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H.R. 3459, "PROTECTING LOCAL BUSINESS OPPORTUNITY ACT"

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS

COMMITTEE ON EDUCATION
AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, September 29, 2015

Serial No. 114–28

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web:
www.gpo.gov/fdsys/browse/committee.action?chamber=house&committee=education
or
Committee address: *http://edworkforce.house.gov*

U.S. GOVERNMENT PUBLISHING OFFICE

96–249 PDF WASHINGTON : 2016

For sale by the Superintendent of Documents, U.S. Government Publishing Office
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Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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H.R. 3459, "PROTECTING LOCAL BUSINESS OPPORTUNITY ACT"

Tuesday, September 29, 2015
U.S. 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 10:02 a.m., in room 2261, Rayburn House Office Building, Hon. David P. Roe [chairman of the subcommittee] presiding.

Present: Representatives Roe, Foxx, Salmon, Guthrie, Heck, Messer, Carter, Grothman, Allen, Polis, Courtney, Pocan, Wilson of Florida, Bonamici, Takano, and Jeffries.

Also present: Representatives Kline and Scott.

Staff present: Andrew Banducci, Workforce Policy Counsel; Janelle Belland, Coalitions and Members Services Coordinator; Ed Gilroy, Director of Workforce Policy; Jessica Goodman, Legislative Assistant; Callie Harman, Legislative Assistant; Tyler Hernandez, Press Secretary; Nancy Locke, Chief Clerk; John Martin, Professional Staff Member; Dominique McKay, Deputy Press Secretary; Brian Newell, Communications Director; Krisann Pearce, General Counsel; Alissa Strawcutter, Deputy Clerk; Juliane Sullivan, Staff Director; Olivia Voslow, Staff Assistant; Joseph Wheeler, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Brian Kennedy, Minority General Counsel; John Mantz, Minority Labor Detailee; Richard Miller, Minority Senior Labor Policy Advisor; and Elizabeth Watson, Minority Director of Labor Policy.

Chairman ROE. A quorum being present, the Subcommittee on Health, Employment, Labor, and Pensions will come to order. Good morning, everyone, and welcome to today's hearing on H.R. 3459, the *Protecting Local Business Opportunity Act*.

I would like to thank all of you for being with us today as we review this important piece of legislation.

I am disappointed that yet another misguided move by the partisan National Labor Relations Board has brought us here, but I am not surprised. As chairman of this subcommittee, I have presided over numerous hearings focused on the NLRB's threats to American workers and job creators. From ambush elections and

micro-unions to restricting access to secret ballots and intruding on tribal sovereignty, the unelected bureaucrats at the NLRB have persistently pushed an activist agenda that benefits union bosses at the expense of hardworking men and women, and they are doing it again.

Last month, I traveled to communities in Alabama and Georgia—Mobile and Savannah respectively—to hear about the NLRB's biggest big labor scheme, an effort to change what it means to be an employer by expanding the joint employer standard.

For more than 30 years two or more businesses were considered joint employers, or equally responsible for decisions affecting employees and the daily operation of a business, if they shared, "actual, direct, and immediate" control over those decisions.

That standard had been in place for many decades and it had worked well for consumers, workers, and employers. However, it became apparent that an effort was underway at the NLRB to change the joint employer standard and upend countless small businesses in the process.

So we got out of Washington to get a better idea of what would happen if the board—what happened—what the board did and what many people feared that it might do. At two separate field hearings we heard serious concerns that expanding the joint employer standard would have far-reaching consequences.

We heard words like "disruptive," "devastating," and "detrimental." We heard fears that the board would make a decision that would lead to higher costs, fewer jobs, and less opportunity for individuals, including veterans, women, and first-generation Americans.

Let me just briefly tell you two stories we heard there. There was a man who immigrated to this country at age two from Cuba to escape Castro. They hid out for two years until they could finally get here. He started working at a Burger King and he worked there, just cleaned the floors and basically working an entry-level job.

I will cut through, make a long story short. He now owns 10 Burger King restaurants, 10 Burger Kings, and hires a number of people.

Another young man who was there from India came here at age one and began in his teenage years cleaning up hotel rooms. He now owns 10 Marriotts and Hiltons. No other place in the world could you do that but in America right here, and I think this rule puts a real—puts that at risk.

And they were able to pursue the American dream, and guess what the board did? They did exactly that. They put a roadblock up.

Before we even returned to Washington the NLRB issued a ruling in a case known as Browning-Ferris Industries that significantly expanded the joint employer standard. The decision discarded years of established labor policy to include employers who have indirect or even potential control over virtually any employment decision.

To put it plainly, the board blurred the lines of responsibility for decisions affecting the daily operations of countless small businesses, including the nation's 780,000 franchise businesses and

countless contractors, subcontractors, independent subsidiaries, and more.

Having heard the stories of so many small-business owners across the country and understanding the impact of this decision on countless lives and industries, Chairman Kline and Senator Alexander introduced the *Protecting Local Business Opportunity Act*. This commonsense legislation would simply roll back the NLRB's harmful decisions by reaffirming that two or more employers must have actual, direct, and immediate control over employees to be considered joint employers.

It would prevent the disruption of countless small businesses. It would ensure future entrepreneurs have the opportunity to pursue the American dream. And that is the reason we are here today.

We have spoken many times and heard many stories about the problem related to the board's radical rewrite of the joint employer standard. Now it is time to talk about the solution.

I am eager to hear from our witnesses not only about how the board's decision will affect them, their businesses, and their families, but how this legislation can protect those things that they have worked so hard for and those that they hold so dear.

With that, now I will recognize the ranking member of our subcommittee, Mr. Polis, for his opening remarks.

You are recognized.

[The statement of Chairman Roe follows:]

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

Good morning, everyone, and welcome to today's hearing on H.R. 3459, the Protecting Local Business Opportunity Act. I'd like to thank you all for being with us as we review this important piece of legislation.

I'm disappointed yet another misguided move by the partisan National Labor Relations Board has brought us here, but I'm not surprised. As chairman of this subcommittee, I have presided over numerous hearings focused on the NLRB's threats to American workers and job creators. From ambush elections and micro-unions to restricting access to secret ballots and intruding on tribal sovereignty, the unelected bureaucrats at the NLRB have persistently pushed an activist agenda that benefits union bosses at the expense of hardworking men and women. And they're doing it again.

Last month, I traveled to communities in Alabama and Georgia to hear more about the NLRB's latest Big Labor scheme, an effort to change what it means to be an employer by expanding the joint employer standard. For more than 30 years, two or more businesses were considered "joint employers" – or equally responsible for decisions affecting employees and the daily operations of a business – if they shared "actual," "direct," and "immediate" control over those decisions. That standard had been in place for decades, and it had worked well for consumers, workers, and employers. However, it became apparent that an effort was underway at the NLRB to change the joint employer standard and upend countless small businesses in the process.

So we got out of Washington to get a better idea of what would happen if the board did what many people feared they might do. At two separate field hearings, we heard serious concerns that expanding the joint employer standard would have far-reaching consequences. We heard words like "disruptive," "devastating," and "detrimental." We heard fears that the board would make a decision that would lead to higher costs, fewer jobs, and less opportunity for individuals – including veterans, women, and first generation Americans – to pursue the American Dream. And then, the board did exactly that.

Before we even returned to Washington, the NLRB issued a ruling in a case known as Browning-Ferris Industries that significantly expanded the joint employer standard. The decision discarded years of established labor policy to include employers who have "indirect" or even "potential" control over virtually any employment decision. To put it plainly, the board blurred the lines of responsibility for decisions

affecting the daily operations of countless small businesses, including the nation's 780,000 franchise businesses and countless contractors, subcontractors, independent subsidiaries, and more.

Having heard the stories of so many small business owners across the country and understanding the impact of this decision on countless lives and industries, Chairman Kline and Senator Lamar Alexander introduced the Protecting Local Business Opportunity Act. This commonsense legislation would roll back the NLRB's harmful decision by reaffirming that two or more employers must have "actual, direct, and immediate" control over employees to be considered joint employers. It would prevent the disruption of countless small businesses; it would ensure future entrepreneurs have the opportunity to pursue the American Dream; and it is the reason that we're here today.

We've spoken many times and heard many stories about the problems related to board's radical rewrite of the joint employer standard. Now it's time to talk about the solution. I'm eager to hear from our witnesses – not only about how the board's decision will affect them, their businesses, and their families, but how this legislation can help protect those things that they've worked so hard for and those that they hold so dear.

With that, I will now recognize the Ranking Member of the subcommittee, Congressman Polis, for his opening remarks.

Mr. POLIS. Thank you, Mr. Chairman.

And I also want to recognize that an ex officio member of this subcommittee and the chairman of the full committee is in attendance, Mr. Kline, to whom I want to express appreciation for his service.

And of course there is a lot of work to do in the next year, and we are very grateful for your service as the chair of the full committee.

Our economy is at a crossroads. Part of the frustration that is building is that the link between productivity and wage growth seems to be broken. And this problem will continue to get worse until we get serious about addressing it.

And there are a lot of ideas that people have to do that, including paid sick leave, preventing misclassification of employees, to punishing wage theft.

Study after study shows that workers' diminished bargaining power is one of the key reasons that we have seen a decade of wage stagnation. And that is connected to the background with which we come to this discussion.

Now, this discussion will be about several cases that the NLRB either recently has decided or will decide. We will talk about the Browning-Ferris case, which they recently decided; we will talk about the McDonald's case, which is currently pending; we will talk about the Freshii case, which they also recently decided.

What is at issue here is an attempt to create a shell game loophole to prevent employees from having a negotiating unit to talk to. Rather than use the same definition of employee that served us well in common law that we have for tax and workplace protection reasons, there is a bill to run an end-run around that and essentially create a shell game that threatens to destroy the very entrepreneurial spirit that gives franchisees the opportunity to run their own businesses.

The danger in creating this enormous shell game loophole safe harbor is that franchisors will try to direct even more control over their franchisees, as will employers over their contractors, really diminishing the ability of independent entrepreneurs to run free businesses. That is why this shell game loophole would hurt the

free enterprise system, entrepreneurship, and competition in our economy.

Now, the NLRB's Browning-Ferris Industry decision was important because what we see more and more in the workplace is leasing arrangements, temporary employment, and what we might call "perma-temp" agencies—permanent-temporary agencies—to supply labor.

Now, that is all fine and good. The issue is the degree of control under which an employer places their contractors and ensuring that there is some negotiating unit with which to hold a negotiation.

Again, if you are an employee of the contractor it can simply be a shell game, where you go to your boss, the contractor, and you say, "We haven't had a raise in three years. Can we have one?"

And they say, "Sorry. We are forced in our agreement under contract to pay you a certain wage and we don't have that discretion, but you can talk to the contractor."

Then you go to the contractor and they say, "Sorry. You are not our employee. We don't control—you know, we don't set your wages."

So effectively, there is no one to negotiate with. So that is the problem that we are trying to solve.

Now, of course, something important about the Browning-Ferris Industry decision is it explicitly states it doesn't even touch the franchisor-franchisee relationship, which seems to be the basis for this legislation. So it seems like this legislation might be based on a potential outcome of a different case, the McDonald's case that is pending. But again, we haven't seen the outcome of that case yet, so it would seem like any legislative response would be premature.

The BFI case is around contracting, subcontracting, temporary work relationships. Now, BFI set up what we might call a shell game, so workers who sorted recyclables couldn't talk to or negotiate with those who were actually calling the shots regarding their employment—the terms and conditions of employment.

So BFI, in their contract, set a ceiling pay for workers, but the workers could only negotiate with a subcontractor called Leadpoint, which had no ability to raise wages.

So that is the dilemma that the Browning case I think correctly decided.

Now, BFI is only part of the picture. You will also, I am sure, hear from our witnesses about the pending McDonald's case. Now, we should be cautious about jumping to any conclusions because we are still in the discovery phase of that case, and we look forward to the NLRB's work in that area.

With respect to franchising, however, there is a case that has been decided recently: a company called Freshii, a fast-food company that provides us a window into how the NLRB will examine joint employers where there is a franchisor-franchisee relationship.

And a general counsel's advice memo regarding Freshii found that Freshii was not liable as a joint employer because, as is customary with most franchisee-franchisor relationships, while Freshii controls brand quality, they don't have direct or indirect control

over employee matters like pay, punishment, or collective bargaining.

Without objection, I would like to submit for the record the advice memorandum regarding Freshii.

[The information follows:]

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

S.A.M. DATE: April 28, 2015

TO: Peter Sung Ohr, Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Nutritionality, Inc. d/b/a Freshii 177-1650-0100
Cases 13-CA-134294, 13-CA-138293, and
13-CA-142297

The Region submitted this case for advice as to whether Nutritionality, Inc., as a franchisee, is a joint employer with Freshii Development, LLC and/or Freshii's franchise development agent for the Chicagoland area. We conclude that neither Freshii nor its Chicagoland development agent are joint employers with Nutritionality under current Board law or the General Counsel's proposed standard.

FACTS

Freshii Development, LLC ("Freshii") is a fast-casual restaurant chain that focuses on providing fresh and nutritious meal choices. There are over 100 Freshii stores, which are operated as franchises in over a dozen countries. Freshii contracts with "development agents" in different geographic locations to cultivate new franchises and help ensure mandatory brand standards for existing franchises.

Nutritionality, Inc. ("Nutritionality") operates a single Freshii store in Chicago, Illinois. Nutritionality signed a franchise agreement around November 2010, and the store opened around May 2011. The franchise generally employs between five and nine employees. In the summer of 2014, Nutritionality terminated one employee and disciplined and terminated another employee for attempting to unionize the workforce. The Region found merit to unfair labor practice allegations regarding the terminations and discipline but requested advice as to whether Nutritionality is a joint employer with Freshii and/or with the Chicagoland development agent.

The Freshii Franchise Agreement

The Freshii franchise agreement grants a franchisee the right "to own and operate a Freshii Restaurant using [Freshii's] business system, business formats, methods, procedures, designs, layouts, trade dress, standards, specifications and [trademarks], all of which [Freshii] may improve, further develop and otherwise

modify periodically." Under the agreement, franchisees pay an initial franchisee fee and ongoing royalties (six percent of gross monthly sales) to Freshii.

The agreement also states that Freshii may terminate the franchise agreement for twenty different reasons, including if the franchisee interferes with Freshii's right to inspect the restaurant, if the franchisee fails to pay Freshii, or if the franchisee "fails to comply with any other provision of this Agreement or the Operations Manual, or any mandatory System Standard, and does not correct the failure within thirty (30) days after [Freshii] delivers written notice of the failure" to the franchisee.

Operations Manual, Tools, and Oversight of the Franchisee

Freshii provides its franchisees with an Operations Manual that "contains mandatory and suggested specifications, standards, operating procedures and rules that Freshii periodically prescribes for operating a Freshii Restaurant," i.e., "System Standards." The franchise agreement states that System Standards may regulate any aspect of the operation and maintenance of the restaurant, including, inter alia, sales, marketing, advertising and promotion materials; staffing levels, appearance, service, and job functions for restaurant employees; pricing requirements; ingredients and methods of preparing foods; standards for training managers; use of trademarks; days and hours of operation; payment systems; and any other aspects of operating and maintaining the restaurant that Freshii determines to be useful to preserve or enhance the efficient operation, image, or goodwill of Freshii.[1] On the other hand, the franchise agreement specifies that System Standards do not include "any personnel policies or procedures," which Freshii may make available for franchisees' optional use, and that the franchisee alone will "determine to what extent, if any, these policies and procedures might apply" to its restaurant operations. The franchise agreement also states that Freshii "neither dictates nor controls labor or employment matters for franchisees and their employees...."

The Operations Manual also contains guidance on how to conform to the System Standards. In this regard, sections of the manual address menu item preparation, including which employees are in charge of taking an order, preparing the order, and providing samples to potential customers; food safety regulations; instructions on how to use and clean equipment; and guest service basics.

The Operations Manual also contains guidance on human resources matters, such as hiring and scheduling employees. For example, the manual includes a sample

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[1] There is evidence that Freshii does not actively enforce the non-food-related requirements. For example, after Freshii updated its logo and tagline, it did not require any franchises to update their materials. The Chicagoland development agent states that he has not known Freshii to ever force franchisees to do anything.

hiring advertisement and sample interview questions to ask potential hires. Additionally, the manual explains how to calculate "labor cost percentage" based on the actual labor used and how to project labor calculations to schedule staff in advance. Freshii does not require franchisees to follow its guidance on these topics, which, as mentioned above, are outside the scope of the mandatory System Standards.

Freshii also provides franchisees with a sample employee handbook that contains personnel policies but does not require franchisees to use the handbook and policies. Although Nutritionality used the handbook provided by Freshii, other franchisees, specifically the stores owned by the Chicagoland development agent, used a different handbook that contained different employment policies.

Franchisees also must install and use equipment approved by Freshii, including computer hardware and software. While Freshii requires all franchises to use the same point-of-sale system, new franchises use one system while older franchisees use another without having to upgrade. Additionally, one Chicago franchise uses a completely different system that the franchisee uses in his other franchised Sbarro restaurants. Other than passively monitoring sales and costs, there is no evidence that Freshii is actively involved in the point-of-sale systems or any scheduling software that may or may not be incorporated, and there is no evidence that Freshii has any input into scheduling algorithms or methods used in the software.

Development Agents and Training

Freshii contracts with individuals throughout the country to be development agents. Development agents are responsible for cultivating stores in particular geographic locations, including helping potential and future franchisees find appropriate real estate for potential restaurants, architects for the restaurant design, contractors for building the restaurants, and third-party product lines for snacks.[2] Development agents receive a percentage of the franchise fee and royalties that a franchisee pays to Freshii. There is no contractual relationship between the development agents and the franchisee stores that they oversee. The Chicagoland development agent states that he is not involved in the hiring, firing, or scheduling of employees in any of the franchise stores in his area, other than those he owns and operates.

Additionally, a development agent's store is used to train new franchisees within the geographic area. All franchisee owners and managers are required to undergo a four-week training period before a new franchise can open. The first three weeks cover the menu, recipes, food preparation and ordering, along with showing owners

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[2] Development agents also operate their own Freshii franchises.

how to schedule and use the point-of-sale system. During the last week of training, the franchisee owner is the manager-on-duty for the development agent's store. When a new franchise is set to open, the development agent will train the entire staff for three days prior to the opening, and will stay for the next five days to ensure that the store is organized and running smoothly. During both owner and employee trainings, development agents use digital documents provided by Freshii that outline the duties of various positions and how to make Freshii products. According to the Chicagoland development agent, other than the initial store opening training, franchisees are responsible for training their staffs without the help of development agents.

After a new store is operational, development agents, with the help of their employees, called area directors, perform monthly store evaluations for all franchisees. According to the Chicagoland development agent, the purpose of these evaluations is to ensure that everyone is wearing Freshii uniforms, the food is being made correctly, the store is clean, and proper promotional material is on the wall. To the development agent's knowledge, there are no employment-related standards. The development agent sends evaluation reports to Freshii only if it shows significant deviation from mandatory brand standards. For example, the Chicagoland development agent recommended to Freshii that action be taken against Nutritionality for failing to meet brand standards. However, there is no evidence that Freshii attempted to end Nutritionality's franchise agreement or otherwise take action against Nutritionality, other than send a few letters.

In addition to the monthly evaluations, development agents visit each franchisee store once or twice a month. The Chicagoland development agent states that he recently visited one franchise and noticed that the store was dirty and that there were four employees working during a slow time. The agent later emailed the franchisee about his concerns (no uniforms, store uncleanliness, too many employees working, etc.), and the franchisee replied by thanking him. Franchisees are not required to take any action based on such findings, and to the Chicagoland development agent's knowledge, no franchisee has ever taken action against an employee because of his feedback.

Franchise Labor Relations

Individual franchisees are exclusively responsible for hiring their staffs. Although the Freshii website allows potential applicants to apply to stores online, there is no evidence that Freshii screens or analyzes the applications in any way. Nutritionality's owner testified that he typically either hires employees through word of mouth or through Craigslist advertisements.

Additionally, individual franchisees are exclusively responsible for setting employee wages and benefits. There is no evidence that franchisees need to consult

with Freshii or a development agent in order to grant wage increases, decreases, or changes to benefits. The owner of Nutritionality has both increased and decreased specific employees' wages unilaterally without seeking approval from Freshii.

Individual franchisees are also exclusively responsible for disciplining and discharging their employees, and Nutritionality has disciplined and discharged employees without consulting Freshii. While the Operations Manual includes sections regarding coaching and counseling policies, as well as employee conduct that may warrant discharge, there is no evidence that franchisees must follow these sections. To the contrary, as stated above, the franchise agreement explicitly states that it is up to the franchisee to decide to what extent, if any, it would follow Freshii's personnel policies. Additionally, as mentioned above, during store reviews and visits, a development agent may raise an issue about an employee, but there is no evidence that any employee has ever been disciplined or discharged because of a development agent's comments.

Freshii's involvement with Nutritionality regarding the alleged unfair labor practices

There is no evidence that Freshii or its development agents are involved in Nutritionality's labor relations or provided guidance about how to deal with a possible union organizing campaign. In one instance, Nutritionality's owner told the Chicagoland development agent that if employees were more than five minutes late, he would require them to clock in and work but would not begin paying them until the next half hour. The development agent told him that if employees clock in, the franchisee has to pay them for every minute. Around the same time, Nutritionality's owner told the development agent that employees had presented Nutritionality with a letter asking it to recognize a union as their collective-bargaining representative. The development agent did not instruct him how to respond; instead, he asked Freshii about the incident and Freshii responded that it had not heard anything about unions organizing employees. Neither Freshii nor the development agent followed up with Nutritionality about the organizing effort.

ACTION

We conclude that Nutritionality and Freshii are not joint employers under the Board's current standard or under the traditional joint employer standard being urged by the General Counsel because there is no evidence that Nutritionality shares or codetermines with Freshii matters governing the essential terms and conditions of employment of Nutritionality's employees.[3]

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[3] The instant ULP charges allege that Nutritionality is a joint employer with the Chicagoland development agent, who operates an independent company that is

A. Freshii and Nutritionality are not Joint Employers under the Board's Current Standard.

The Board will find that two separate entities are joint employers of a single workforce if they "share or codetermine those matters governing the essential terms and conditions of employment."[4] To establish such status, a business entity must meaningfully affect matters relating to the employment relationship "such as hiring, firing, discipline, supervision, and direction."[5] As recently noted by the Board in *CNN*, the Board and the courts have also considered other factors in making a joint employer determination, including an employer's involvement in decisions relating to wages and compensation, the number of job vacancies to be filled, work hours, the assignment of work and equipment, employment tenure, and an employer's involvement in the collective bargaining process.[6]

Here, applying the current standard, the evidence does not establish that Freshii meaningfully affects any matters pertaining to the employment relationship between Nutritionality and its employees. Freshii has played no role in Nutritionality's decisions regarding hiring, firing, disciplining or supervising employees. While potential applicants are able to submit resumes through Freshii's website for employment at franchise locations, there is no evidence that Freshii screens the resumes or does anything other than forward them on to individual franchises. Further, there is no evidence that anyone other than Nutritionality is responsible for determining wages, raises, or benefits of its employees. Indeed, Nutritionality's owner regularly increased and decreased employees' wages without Freshii's involvement. And Nutritionality uses a different employee handbook with different

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involved in numerous business enterprises, including several Freshii franchises and other restaurant franchises. In his role as Freshii's Chicagoland development agent, he helps Freshii prepare new franchises to begin operations and monitors brand standards at existing franchises. Aside from these activities, which fall strictly within the development agent's agreement with Freshii, the investigation clearly revealed that the development agent was not a joint employer with Nutritionality. Thus, the following analysis only addresses whether Freshii and Nutritionality are joint employers.

[4] *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 3 (Sept. 15, 2014) (citing *TLI, Inc.*, 271 NLRB 798, 798 (1984), citing *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1123-24 (3d Cir. 1982)).

[5] *Id.* (citing *Laerco Transportation*, 269 NLRB 324, 325 (1984)).

[6] *CNN*, 361 NLRB No. 47, slip op. at 3 n.7 & 7.

personnel policies than the Chicagoland development agent uses for his Freshii franchises. All of this evidence is consistent with the clear language of the franchise agreement, which gives the franchisee the power to determine whether to use Freshii's personnel policies or procedures and states that Freshii "neither dictates nor controls labor or employment matters for franchisees and their employees...."

Additionally, Freshii is not involved in Nutritionality's scheduling and setting work hours of its employees. While Freshii provides guidance on how to calculate labor costs to ensure that restaurants are not over- or understaffed, there is no evidence that Freshii, directly or through scheduling software or the development agent, ever instructed Nutritionality to reduce an employee's hours or send an employee home because labor costs at a particular time were too high.[7] Nor is there evidence that Freshii has any input into scheduling algorithms or methods used in any scheduling software. Further, since Freshii does not enforce its requirement that every franchise use the same system, there are at least three different point-of-sale systems being using by Chicago-area franchises, all of which may contain their own scheduling software.

Also, the required trainings that owners and managers must attend prior to opening a franchise deal primarily with operating a restaurant. While the trainings may also offer recommendations and guidance similar to what is outlined in Freshii's Operations Manual and handbook regarding employee personnel policies, such as hiring, scheduling, and disciplinary practices, Freshii does not require franchisees to follow those recommendations. Additionally, after the initial training, Freshii and its development agents have no involvement in any future trainings, highlighting a lack of impact on franchise employees' terms and conditions of employment.

At most, Freshii's control over Nutritionality's operations are limited to ensuring a standardized product and customer experience, factors that clearly do not evince sharing or codetermining matters governing essential terms and conditions of employment. This case is therefore similar to *Love's Barbeque Restaurant*, where the ALJ, in a decision adopted by the Board, found that materials prescribing the recipes for food preparation and the sizes and portions of the menu items offered ultimately did not tend to establish joint employer status, as they "relate[d] to the image, the historical image of the [franchisor's] chain," as opposed to labor relations.[8] And, as in

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[7] Indeed, the Chicagoland development agent states that he communicated his concerns about staffing levels at a different store to that store's franchisee but that the franchisee's only response was to thank him.

[8] *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 120 (1978), enforced in rel. part, 640 F.2d 1094 (9th Cir. 1981).

Love's Barbeque, Freshii's requirements regarding the "design, decoration and décor" of its franchisees' restaurants is hardly a matter that affects labor relations.[9] Similarly, other than the recipes and décor elements, there is evidence that other parts of the Operations Manual are recommendations rather than mandatory requirements.[10] Lastly, Freshii's requirements regarding uniforms, initial training of employees, and store hours, without more, are not a basis for finding a joint employer relationship.[11] Thus, Freshii's requirements regarding food preparation, recipes, menu, uniforms, décor, store hours, and initial employee training prior to a franchise opening are not evidence of control over Nutritionality's labor relations but rather establish Freshii's legitimate interest in protecting the quality of its product and brand.

Similarly, the monthly reviews by development agents are limited to inspecting franchisees' adherence to Freshii's mandatory brand standards described above, primarily the menu and food products, and are not used to examine any employment-related policies. Thus, franchisees are not reviewed on their hiring, discipline, scheduling, or wage policies. Freshii only obtains a report of the review if a development agent finds a significant deviation from the brand standards. And even after Freshii receives the reports, Freshii is under no obligation to follow a development agent's recommendations. There is no evidence that a review ever affected an employee's terms and conditions of employment either through discipline or discharge. In addition to the reviews, development agents try to visit each franchise once or twice a month and often email notes and suggestions to owners afterwards. But franchisees, including Nutritionality, are not required to make any changes that a development agent suggests after store visits.

Freshii additionally does not meaningfully affect Nutritionality's employees' terms and conditions through its contractual right to terminate the franchise agreement. The record evidence demonstrates that a franchise agreement could be

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[9] *Id.* at 119.

[10] *Id.* at 120 (finding that descriptions of employee duties in operating manual were recommendations and not required to be followed).

[11] *See e.g., S. G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (requirement that franchisees' employees wear prescribed uniforms "amounts to nothing more than an implementation of [the franchisor's] advertising policy"; "offer to train prospective employees" was "not the exercise of any authority over [franchisees'] hiring policies"; and requirement that franchisees' shops be open certain hours and days of the week "in no way prescribes the hours that a particular employee must work" and was designed to "eliminate unfair competition among franchisees").

terminated for failure to maintain brand standards. Indeed, the Chicagoland development agent recommended to Freshii that Nutritionality's franchise agreement be terminated because it continually failed to meet brand standards; the recommendation was not based on labor relations, working conditions, or employee scheduling or compensation. However, Freshii has not followed the development agent's recommendation and has not attempted to terminate Nutritionality's franchise. There is no evidence that any franchise has been terminated for non-brand related reasons.

Lastly, the events that precipitated the instant ULP charges stemming from Nutritionality's employees' organizing efforts further demonstrate Freshii's lack of involvement in Nutritionality's dealings with its employees. Even after Nutritionality's owner asked Freshii, via the development agent, for advice on the situation, Freshii remained silent and did not interfere or instruct Nutritionality's owner as to how to respond to the employees' organizing efforts.[12]

B. Freshii and Nutritionality are not Joint Employers under the General Counsel's Proposed Standard.

Recently, the General Counsel has urged the Board to return to its traditional joint employer standard.[13] Under that standard, the Board finds joint employer status where, under the totality of the circumstances, including the way the separate entities have structured their commercial relationship, the putative joint employer wields sufficient influence over the working conditions of the other entity's employees such that meaningful bargaining could not occur in its absence. This approach makes no distinction between direct, indirect and potential control over working conditions and results in a joint employer finding where "industrial realities" make an entity essential for meaningful bargaining.

Applying the General Counsel's proposed standard, we conclude that Freshii and Nutritionality are not joint employers of Nutritionality's employees. As discussed above, Freshii does not significantly influence the working conditions of Nutritionality's employees. For example, it has no involvement in hiring, firing, discipline, supervision, or setting wages. Thus, because Freshii does not directly or indirectly control or otherwise restrict the employees' core terms and conditions of employment, meaningful collective bargaining between Nutritionality and any

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[12] *See e.g., Love's Barbeque*, 245 NLRB at 120 (ALJ, in decision adopted by the Board, found it significant that franchisor had not become involved in how the franchisee should handle its labor dispute with the union).

[13] *See* Amicus Brief of the General Counsel at 2, 16-17, *Browning-Ferris Industries of California d/b/a BFI Newby Island Recyclery*, Case 32-RC-109684 (June 26, 2014).

potential collective-bargaining representative of the employees could occur in Freshii's absence.

Based on the above, we conclude that Freshii and Nutritionality are not joint employers, under both the Board's current joint employer standard as espoused in *CNN*, and the standard recently proposed by the General Counsel.

/s/
B.J.K.

ROF(s) – NxGen
ADV.13-CA-134294.Response.Nutritionality.jbf

Chairman ROE. Without objection, so ordered.

Mr. POLIS. Thank you.

And what this makes clear is that the NLRB is looking at everything on a case-by-case basis. I personally applaud both the Freshii decision as well as the BFI decision. We will look forward to their thoughtful deliberations in the McDonald's decision.

And I think that we should avoid a kneejerk reaction that legislatively would create a shell game loophole with all sorts of unintended consequences. Instead of calling this bill the Protecting Local Business Opportunity Act, we really should call it the Shell Game Loophole if we want to reflect the bill's content.

Mr. Chairman, I hope we can begin addressing the needs of American workers of ensuring that the productivity and wage gap narrows and that the rising tide can truly lift all boats, because millions of workers are struggling with stagnant wages.

And especially in an economy where more and more people are employed by leasing companies or perm-temps or subcontractors, these issues are very important for Congress to play a deliberative role in to ensure that there is a meaningful negotiating entity with which workers can have discussions around the terms and conditions of their employment.

The National Labor Relations Board should be allowed to follow their process, including in the McDonald's case, without Congress prejudicing its motives and undermining its authority before a decision is made, and we should avoid creating additional loopholes that change decades and centuries of common law with regard to the definition of employment solely for the purpose of creating a different definition of employment for labor organizing purposes.

Thank you again, for everyone, and I look forward to hearing your thoughtful opinions.

And I yield back.

[The statement of Mr. Polis follows:]

Prepared Statement of Hon. Jared Polis, Ranking Member, Subcommittee on Health, Employment, Labor, and Pensions

Our economy is at a crossroads. The link between productivity and wage growth has been broken for 4 decades. The problem will only continue to get worse until Congress finally gets serious about fixing the income disparity in this country. There are countless ways that we could be addressing this, from paid sick leave to preventing misclassification of employees to preventing and punishing wage theft.

Study after study also shows that workers' diminished bargaining power is one of the key reasons that we've seen a decade of wage stagnation. And this is directly connected to the background case that prompted this bill.

The NLRB's recent Browning-Ferris Industries decision was important because more and more workplaces are using employee leasing arrangements, temporary employment and perma temp agencies to supply labor.

This decision was narrowly crafted, however, and returned the law to long-standing common law principles used throughout most of the 20th century, but were abandoned in 1984. As data shows, the 1970s and early 80s were not a bad time to be opening or running a franchise. Between 1971 and 1973 alone there was a 129% increase in franchise sales.

Moreover, the BFI decision explicitly states that it doesn't even touch the franchisor-franchisee relationship, which seems to be the basis for this legislation and the slew of partisan attacks we've seen targeting the NLRB (which, of course, are nothing new).

The BFI case is focused on contracting, subcontracting, temporary worker relationships, and whether BFI had the right to control terms of employment. Essentially BFI set up a shell game, so that the workers who sorted recyclables couldn't talk to and negotiate with those who are actually calling the shots regarding essen-

tial terms and conditions of employment. BFI set a ceiling for pay for workers, but the workers could only negotiate with a subcontractor called Lead Point, whose hands were tied when it came to raising wages. I think, if we set politics aside and consider the facts objectively, we can all agree that BFI should be considered a joint employer under these circumstances.

Now, this BFI case is only part of the picture. You will also hear about the pending McDonald's case from our witnesses today. But we must be cautious about jumping to conclusions based on this pending case, which is still in the discovery phase.

McDonalds has yet to be litigated, much less decided. With respect to franchising, however, there is another case involving a company called Freshii, a fast-food company, that provides us a window into how the NLRB will examine joint employers where there is a franchisor-franchisee relationship. A General Counsel's advice memo regarding Freshii, found that Freshii was not liable as a joint employer, because while Freshii controls brand quality, they do not have direct or indirect control over employee matters such as pay, punishment or collective bargaining.

As the NLRB notes, Freshii provides franchisees with an optional operations manual. Their system standards do not include any personnel and do not dictate or control labor or employment matters for

franchisees such as hiring, pay and scheduling.

I quote from the NLRB Advice Memorandum: "There is no evidence that Freshii or its development agents are involved in the [franchisees'] labor relations or provided guidance about how to deal with a possible union organizing campaign." Without objection I would like to submit for the record the Advice Memorandum regarding Freshii.

What this makes clear is that the NLRB is looking at everything on a case-by-case basis. Some people are jumping to conclusions because of the open McDonald's case, but no one knows how the NLRB will rule. NLRB has not even concluded the discovery phase of the case.

The reaction to these cases is the bill we have before us, which I believe is a kneejerk reaction.

Don't get me wrong, I understand some of the questions and concerns from the business community. We should not be discouraging small businesses from opening, or imposing unwarranted liability on franchisors where they do not exercise control over franchisee's employment practices.

However, this legislation goes far beyond the BFI model, which most businesses don't fall under, and exempts joint employer relationships from common law, which applies to businesses in essentially every other type of law.

Most importantly, this bill runs completely counter to an explicit goal in the National Labor Relations Act, which is to ensure the equality of bargaining power between employers and employees. This bill would prevent employees from bringing all of the employers to the bargaining table who have a say over their terms and conditions of employment.

Instead of calling this bill the Protecting Local Business Opportunity Act, we should probably call it the Futility in Collective Bargaining Act, or even better, The Shell Game Act, if we want the title to actually reflect the bill's context.

There is a middle ground on this issue that provides companies and small businesses the assurances they need to not be liable, if they are not setting up a shell game. But instead of finding that middle ground, this bill takes a radical step by jettisoning the longstanding common law principles—namely, that an "employer" is a person who "controls or has the right to control" the terms and conditions of employment, in an effort to allow joint employers to remain hidden and unaccountable.

Instead of focusing on improving the economy and decreasing income inequality or improving workers' rights, this Committee is taking up yet another bill that chips away at the ability of workers to collectively bargain for a fair share of the fruits of their labor.

Since my colleagues assumed the majority in 2011, there have been 22 hearings and markups attacking the National Labor Relations Board.

Instead of focusing on an agenda to weaken the middle class, we should be discussing the items I hear about from my constituents through the mail and on the phone every day, and at town hall meetings when I am back in my district in Colorado.

We need legislation to raise the minimum wage; we need paid sick leave legislation; we need legislation to ensure that women receive equal pay for equal work; we need legislation to ensure that workers do not face employment discrimination based on whom they love; we need legislation to prevent employees from being misclassified as independent contractors. And the National Labor Relations Act needs to be updated so that it is more effective in protecting the rights of workers, and not simply a cost of doing business.

Mr. Chairman, I would hope we can begin addressing the needs of American workers, instead of taking up another ideological attack on unions and the NLRB.

I look forward to hearing the testimony from the witnesses, and I appreciate that some of you have traveled a good distance to be here.

Chairman ROE. I thank the gentleman for yielding.

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, Ms. Mara Fortin is CEO of Nothing Bundt Cakes, in San Diego, California. In 2007, Ms. Fortin opened the first franchise location, what was then a three-unit bakery concept in Las Vegas, Nevada, called Nothing Bundt Cakes.

She worked with the cofounders to grow their brand and develop a franchise model. Ms. Fortin now owns and operates six bakeries in San Diego.

Welcome.

Mr. Ed Braddy is the owner-operator of a Burger King franchise restaurant in Baltimore, Maryland. Mr. Braddy also serves as a Minority Franchise Association designee to the National Franchisee Association Government Relations Committee. Prior to purchasing the restaurant, Mr. Braddy served in managerial roles for other Burger King franchises.

Welcome, Mr. Braddy.

Michael Harper is the—and I may mispronounce it—

Mr. HARPER. Barreca.

Chairman ROE.—Barreca Labor Relations Scholar—sorry—and professor of law at Boston University School of Law in Boston, Massachusetts. Professor Harper is a leading authority in the areas of labor law, employment law, and employment discrimination, law, has co-authored several major case books both in employment discrimination, employment law, and labor law.

Welcome, Mr. Harper.

Mr. Kevin Cole is the CEO and Secretary of the Board of Directors for Ennis Electrical Company in Manassas, Virginia. Mr. Cole has worked for Ennis Electrical for 23 years. He began with Ennis Electrical as an electrical apprentice and has also served as a project estimator, project manager, chief estimator, vice president, and executive vice president.

Welcome, Mr. Cole.

Dr. Anne Lofaso is a professor of law at West Virginia University College of Law in Morgantown, West Virginia. Dr. Lofaso teaches labor and employment law, jurisprudence, and comparative labor law. Additionally, Dr. Lofaso spent 10 years as an attorney with the National Labor Relations Board appellate and Supreme Court branches.

Welcome.

Mr. Charles Cohen is a senior counsel with Morgan, Lewis, and Bockius here in Washington, DC. A former member of the National Labor Relations Board, Mr. Cohen focuses his practice on rep-

resenting private sector senior management and complex labor and employment law matters, including collective bargaining issues and litigation covering all aspects of labor and employee relations, union representation matters, and corporate campaign activities.

And welcome.

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

[Witnesses sworn.]

Let the record reflect the witnesses answered in the affirmative.

You may take your seats. And before I recognize you for your testimony, let me briefly explain the lighting system.

You will each have five minutes to present your testimony, and when you begin the light in front of you will turn green; one minute left, it will turn yellow; when your time is expired the light will turn red.

At that point I will ask you to wrap up your remarks as best you are able. After all witnesses have testified, members will each have five minutes.

Ms. Fortin, you are recognized for five minutes.

TESTIMONY OF MS. MARA FORTIN, PRESIDENT & CEO, NOTHING BUNDT CAKES, SAN DIEGO, CALIFORNIA

Ms. FORTIN. Thank you and good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. My name is Mara Fortin and, as you said, I am the owner and operator of six Nothing Bundt Cakes locations in San Diego, California.

Thank you very much for the invitation to appear before this subcommittee to tell my small-business story and to discuss the National Labor Relations Board's attempt to redefine what it means for me and countless others to be an employer.

Mr. Chairman, my stores employ 120 wonderful people. I am very pleased that one of my invaluable colleagues is here with us today, my HR director Jennifer, and my mom, who are behind me, who have traveled from San Diego to be here.

I am here today on behalf of the many members of the Coalition to Save Local Businesses, of which I am a co-chair. I joined the Coalition because I believe saving local businesses is what is truly at stake here.

Due to the actions of a handful of unelected bureaucrats at the NLRB, I am now terribly worried about my business, my employees, my family, and our future.

And, Mr. Chairman, I am not asking for much today. I am simply asking this subcommittee and the Congress to reinstate the very successful joint employer legal standard that the NLRB chose to reinvent in its decision in *Browning-Ferris*.

The simple, one-sentence legislation contained in H.R. 3459 is a solution that can protect small businesses like Ed's and Kevin's and mine, and give us certainty that out-of-touch regulators are not going to threaten our businesses again. I urge every member here to co-sponsor H.R. 3459.

For over a year, small businesses have had the threat of an NLRB decision looming over them. Many of us have wondered: What will this case mean, and why would a government agency in Washington decide that another employer may be liable for my em-

ployees, or, alternatively, that I am liable for another company's employees?

On August 27, the NLRB's decision was worse than many even expected. They expanded the definition of "joint employer" and it has the potential to dismantle the contractual relationship between franchisors and franchisees and strip me of my independence as a small-business owner.

This is not an academic issue. Mine is an all-American, successful business story.

I started my career as a lawyer and enjoyed a successful eight-year litigation practice. But I had two daughters and was compelled to spend endless hours in the office, so I reconsidered my life's direction. I kept coming back to the idea of using my undergraduate business degree to run my own company in my hometown of San Diego.

I contacted a then small three-store bakery in Las Vegas that I loved and I proposed to them the idea of franchising. Fortunately, the timing was right for the bakery, called Nothing Bundt Cakes, to grow.

And as you heard, in March 2007, I became the first franchisee in a San Diego suburb. I left my legal career behind cold turkey and transitioned to try to live out my American dream of being a small-business owner.

Thousands of entrepreneurs and small-business owners can relate to what happened next. With pressure mounting to make my first bakery a success, I faced ongoing health problems: panic attacks during the day; I didn't sleep at night. It took a grueling year to even get my business up and running.

Fortunately, we started to grow. Within two years I opened a second bakery, even during the recession, but emerged on the other side with now six successful stores.

And until recently, I could see no reason why I wouldn't continue to expand. But now I do.

The new joint employer standard is harmful to the future of locally owned businesses like mine. To consider my franchisor a joint employer is to completely misunderstand how franchising works.

When I entered into a franchise agreement with Nothing Bundt Cakes I signed up to run my own business and that is what I have done successfully for more than eight years. My franchisor provides the brands and the trademarks, a set of business practices to ensure consistency and quality across all locations.

But everything else—everything else—is left to me.

I hire my own workers, set their wages, benefit packages, et cetera. I manage my inventory and I purchase equipment. I pay taxes as my own small business with my own employer identification numbers. And I help my employees when they are in need of assistance.

My franchisor plays no part in any of these key functions that only a true and sole employer performs. The suggestion that my franchisor is in any way an employer of my workers is, quite frankly, insulting to me, and takes away from all the effort I have put in over the years to build a successful small business.

And remember, my franchisor wasn't even a franchise until I approached them with the idea.

My small-business story is another example of the economic dynamism of the franchising business model that employs 9 million people across America today. Despite the immeasurable time and energy I have poured into my small business, under the new joint employer regulation I may no longer be in charge of the business that I built and invested everything that I had.

In the end, we may be forced out of business altogether. And that would harm not only our business but our community, those that we employ and take care of, and the economy of our nation.

The real-world consequence of the NLRB's decision is that it will lead to consolidation among franchisors and a loss of autonomy for local franchise business owners.

Chairman ROE. Ms. Fortin, could you wrap up?

Ms. FORTIN. Yes.

Mr. Chairman and members of the Subcommittee, when you are faced with the question of whether to support small-business owners or out-of-touch regulators, it should be an easy decision. Please support H.R. 3459.

Thank you.

[The testimony of Ms. Fortin follows:]



COALITION TO SAVE LOCAL BUSINESSES

MARA FORTIN

OWNER, NOTHING BUNDT CAKES
SAN DIEGO, CA

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

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

LEGISLATIVE HEARING ON H.R. 3459, "PROTECTING LOCAL BUSINESS OPPORTUNITY ACT"

SEPTEMBER 29, 2015

Good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. My name is Mara Fortin, the owner and operator of six, soon to be seven, Nothing Bundt Cakes locations in San Diego, California. Thank you very much for the invitation to appear before this Subcommittee to tell my small business story, and discuss the National Labor Relations Board's (NLRB) attempt to redefine what it means for me, and countless others, to be an employer.

As a small business owner and franchisee, I applaud the Subcommittee for its leadership in hosting today's hearing – especially Chairman Roe, as this is the third hearing in the past six weeks you've held to look at the NLRB's attempt to invent a new "joint employer" standard in the National Labor Relations Act and its impact on locally owned businesses like mine.

I am here today on behalf of my business, my team, and the many members of the Coalition to Save Local Businesses, of which I am a co-chair. The Coalition's diverse group of locally owned, independent small businesses, associations and organizations, comprise the face of local businesses that have fueled our nation's economic growth since the founding of our republic and continue to support all of our local communities today.

Mr. Chairman, I'm not asking for much today. I'm simply asking this Subcommittee and the Congress to reinstate the very successful joint employer legal standard that the NLRB chose to invent in its August 27 decision in *Browning-Ferris Industries*. The simple, one-sentence legislation contained in H.R. 3459 is the solution that can protect small businesses like mine and give us certainty that out-of-touch regulators are not going to threaten our business again in the future. I urge every member to support the bill.

I joined the Coalition because I was worried about my business, my employees, my family and our future. The day-to-day challenges we face as small business owners are many, not the least of which is just staying afloat. But for over a year, small businesses have had the threat of an NLRB decision in the Browning-Ferris case looming over them. Many of us have wondered, what will this case mean? And why would a government agency in

Washington decide that another employer may be liable for my employees? On August 27, the NLRB's decision was worse than many even expected. The NLRB's expansion of its definition of "joint employer" has the potential to dismantle the contractual relationship between franchisors and franchisees and strip me of my independence as a small business owner.

We will hear today from a couple members of the academic community; however, the real-world lessons I've learned as a small business owner are not experienced in a classroom. Mine is truly a small business story. To give you a better understanding of why I am so worried about the direction that the NLRB is pursuing, I'd like to tell you about my journey and how my dream of small business ownership became a reality.

I graduated from law school at age 26 and moved to Las Vegas and began a successful litigation practice. I loved what I did during my eight-year practice. My husband, also an attorney, and I had two daughters and built what seemed to be an ideal and financially comfortable life, but I was working around-the-clock at the expense of my family. When my eldest daughter was just two weeks old, I was pulling all-nighters to prepare for an oral argument before the Nevada Supreme Court. As my family grew to two young daughters, I seemed to be working even longer hours. I had little control over my life or career. The experience left me feeling helpless, defeated and constantly wondering if I was doing right by my family...and myself.

It forced me to reconsider my life's direction, my obligations to my family and myself, and I kept coming back to the idea of using my undergraduate business training to build a business in my hometown of San Diego. I contacted a then small, three-store bakery in Las Vegas that I loved and proposed a franchise idea because, let's face it, I'm a lawyer, not a baker, and not qualified to do what they were doing successfully. Fortunately, the timing was right for Nothing Bundt Cakes to grow and we formed a successful alliance.

In March 2007, I successfully negotiated for and opened the first franchise of the now popular brand in Poway, a suburb of San Diego. I left my legal career behind cold turkey

and boldly, but perhaps naively, moved with my two young daughters to San Diego. While ready to work hard, much as I had throughout my practice of law, I quickly came to realize that I was overconfident, under-qualified and had much to learn about running a successful franchise operation. The brand, also being new, had a long way to go, as well.

With pressure mounting to make my first bakery a success, I started having panic attacks during the day, sleepless nights, and lost all appetite for food, and life. I remember vividly a day my sister came to help me with my marketing. She looked shocked at my physical appearance as I stepped out the front door and firmly, but gently, told me that if I didn't unplug, rest and regroup, I was surely going to die. She and my mom, who is here and proudly made the trip from San Diego with me, began to remind me constantly that I was still a human being, and not a robot.

Unfortunately, there were few options for me. My future and my daughters' futures were on the line. My family had already sacrificed greatly to pursue this dream. My husband remained in Las Vegas to work and keep income flowing and only came out on the weekends. I had two young daughters to care for and a business to run, alone. I was working weekdays and all weekends, with no break in sight. I had given this business 100 percent, both financially and emotionally – it represented the future that I so badly wanted for my daughters – and I simply could not fail.

Fortunately, within a year of opening, our traffic increased. I was able to expand my team, hire a manager, step back, sort of, take a breath, reflect on my efforts, and continue to plan for my family's future. Within two years, my husband and I were ready to open a second bakery. I selected the upscale, recession-proof San Diego suburb Del Mar, and the new bakery opened in 2009 to immediate success.

Soon, though, the pressures of being physically separated took their toll, and my husband and I divorced. Facing this personal crisis, my new bakeries began to suffer as well. I was mentally and emotionally numb, but I refused to give up. That summer of 2010, I did the almost unthinkable as a mother; I sent my two babies away for the summer to live

with their father in Las Vegas, while I devoted all of my time to rebuilding both myself, and my business. I had only three months to pull it together, and that is exactly what I did.

I immediately added a key administrative position to my team so I could focus on operations. Her name is Jennifer Malcangio and she is here with me today, and is now, a little over five years later, a director and my right hand. Together with Jennifer and other talented and reliable colleagues, we began to put our enterprise back on track. I hired additional needed staff and implemented systems and procedures that would help us run a more efficient business. I recognized my weaknesses and set out to bring talent on board to fill those gaps.

Within 12 months, my company completely turned around and I rediscovered, but deeper now and stronger, that unfaltering spirit and grit that started me down this road. Since both bakeries were now on a promising path, in late 2011, I took another risk and opened a third successful store in the San Diego suburb of Mission Valley. These efforts allowed me to create additional jobs. I had built something very special in my community. We weren't just a business providing a service; we were a family supporting each other, something I've never forgotten, and we've carried that family atmosphere forward through many charitable partnerships and through the relationships we have with each other. Any smart entrepreneur knows that he/she cannot succeed and grow without great people. Our employees who work hard in the trenches with us matter, and we care about them.

A few weeks ago on my way to speak with Congressman Scott Peters, I decided to stop by two of my bakeries, spontaneously. At one, it was the assistant manager's last day as she was leaving to travel to Florida to be with her husband who had been relocated. She stood in the front of that bakery, promising not to lose it, and cried, and thanked me for a wonderful experience. She told me what it meant to be part of such a great organization and that she would be honored to someday return to us. At the next bakery, I congratulated the staff member, who had just returned from maternity leave, on her beautiful, healthy new baby. And just this September 17th, after leaving us on not the best of terms, I received the following email from an assistant manager: "Hi Mara. I know I may not have left on the

best of terms, but I need help. Not help with work, but with my children. I remember having a conversation with you at my first Leadership Training about my kids and a little of my situation. You told me that when I was ready, to talk to you and you can point me in the right direction. I know you're not a family law attorney, but I also know you know enough. I need advise [sic] and right now you are my only hope." I responded back to her the next day that I would do whatever I could to help her. Why? Because that is what we, small business owners, do – we rally and protect those who have been in the trenches working hard with us, in both good and bad times.

My story doesn't end there. From October 2013 through October 2014, the company continued to grow as my team and I opened four more bakeries in San Diego County. We now operate six bakeries, with one under construction set to open in a month and, until recently, I could see no reason why I wouldn't continue expanding.

Here are a few invaluable lessons I learned through my experiences:

- Being smart and capable is a plus in business, but it's even better when one empowers and trains others who are equally capable.
- The best days of a business leader comes when one actually practices the highly-touted commitment to serve the company and its team members.
- Value does not come from the ability to perform every role in the business, but from one's drive to develop future leaders and to be a resource for them.
- We can be strong on our own, but a better indicator of true success is having a strong team working to achieve a shared dream.

So as you've heard, building and operating a small business comes with many challenges – both personal and professional – and my story is far from unique. In dealing with the highs and lows of building my business, and overcoming so many obstacles along the way that can sink a new small business, the very last thing I thought I would encounter at this stage was having to defend myself to my government.

Mr. Chairman, I thank you for the opportunity to meet with you today on behalf of my business and my team – it has been a life-long dream of mine to appear before Congress – but I regret that we are here to discuss the unnecessary challenges businesses like mine face as a result of the NLRB's decision to redefine "joint employer."

I am wholly invested in every aspect of my business. My team and I thrive on the opportunity to build something that represents the happiest of times in our lives, all while contributing to our community in terms of jobs and economic opportunities. But under the NLRB's ruling in *Browning-Ferris Industries*, my franchisor could be found to be the joint employer of my employees. Nothing could be farther from the truth. I was granted the opportunity to open a franchise location of Nothing Bundt Cakes and use their brand, but my hard work and sacrifice are what built my business into what it is today. My franchisor had nothing to do with hiring my employees or setting their wages and benefits. My franchisor has nothing to do with the day-to-day operations of my small business. But if they are to be considered a joint employer, my franchisor may decide to exert more control over my business, relegating me to a middle manager role for which I did not sign up. I cherish the opportunity to run my small business and help my community prosper, but the NLRB's vastly expanded joint employer definition could force my franchisor to take control of my business away from me. I've worked far too hard and made too many sacrifices to have that happen to me, my family, and my employees.

I am proud to have been part of starting a successful franchise operation, but from a legal, business and cultural perspective, the expanded joint employer standard is harmful to the future of my locally-owned business. The real world consequence of the NLRB's decision is that it will lead to consolidation among our franchisors and a loss of autonomy for local franchise business owners. Franchisors will grant fewer new franchises or stop franchising altogether, opting only to open corporate-owned stores so that they can better manage increasing liabilities. This squeezes out the small business franchise owners like myself who have deep ties to their local communities through the businesses they have built there. Under the new regulation, we would no longer be in charge of the businesses we built and in which we invested all we had. In the end, we may be forced out of business

altogether, and that would harm not only our business but our community and the economy of our nation.

To consider my franchisor a joint employer of my employees is to completely misunderstand how franchising works. When I entered into a franchise agreement with Nothing Bundt Cakes, I signed up to independently operate my business, and that is what I have done for more than eight years. My franchisor provides the recognized brands and trademarks, a set of business practices to ensure consistency and quality across all franchised locations, and support for marketing and advertising. Everything else is up to me – I hire my workers and set their wage and benefit rates. I manage my inventory and purchase equipment. I pay taxes as my own small business, with my own identification number. And I help my employees when they are in need of assistance. My franchisor plays no part in any of these key functions that only a true and sole employer performs. The suggestion that my franchisor is in any way an "employer" of my workers is insulting, and takes away from all the effort I have put in over the years to build a successful small business.

While the NLRB did not consider how their actions would impact thousands of local businesses, I am fortunate that many of our representatives in Washington understand the danger this decision places on my business and other small business owners.

Members of Congress, you love your communities, too. In that way, we are no different in our desire to serve others. In your own districts, you represent communities and businesses like mine, and you know what we have invested in order to contribute to them. I am optimistic that together, we can find a solution that supports all of our local businesses and allows us to continue to live our American dream. We must work together to reverse this ruling.

I ask you to consider these words that were recently spoken here on Capitol Hill:

"I am happy that America continues to be, for many, a land of 'dreams'. Dreams which lead to action, to participation, to commitment. Dreams which awaken what is deepest and truest in the life of a people. ... It is my desire that this spirit continue to develop and grow, so that as many young people as possible can inherit and dwell in a land which has inspired so many people to dream."

These words were spoken by Pope Francis in his address to Congress just last week. In his remarks, he discussed the importance of sacrificing in order to share while building the greatest common good, principles that have driven my business from a simple dream to reality. This is the question The People ask of the Committee: After all that we have invested in our businesses for both our families and our communities, how does transferring our freedom to run our businesses to a major corporation align with the greater good? How will putting me at the bottom help my employees get ahead? How does committing an injustice against small business owners like me to the benefit of big business help *anyone* get ahead?

I am what Pope Francis called a "dreamer." I am the dreamer who has achieved that dream and works hard to pay forward my good fortune to my children, my team and their children, and my community at large. Why not give my business the chance to continue serving my community in a way that only a member of that community cares to do? Why limit my ability to connect with the members of my community and help them achieve their dreams, as well?

The NLRB's *Browning-Ferris* ruling and its negative impact on my business not only affects me, but it will discourage so many others from even starting to chart a course like mine. How can we continue to grow as a society by taking the reins away from so many dreamers and doers like me and returning them to the hands of a few corporations?

Mr. Chairman, as any small business owner or entrepreneur would understand, I have sacrificed a lot for my employees and my business. My hands are sore from all of the personal guarantees I have signed and my children fortunately don't know that I have

pledged them time and time again to banks. I have had countless sleepless nights; I have had panic attacks; and I have worked myself to exhaustion. And I would do it all over again in a heartbeat to truly live out my dream. However, nothing exasperates me more than this manufactured joint employer threat by unelected regulators who have never faced the stress of a small business owner.

Why can't we have a government that supports small businesses? Why are small business owners, who meet countless demands and compete against colossal corporations every day, under attack by Washington bureaucrats? Why are we facing this artificial threat of losing our businesses because of the NLRB? How can anyone support what the NLRB is doing here?

Each and every one of the Committee members here today has an opportunity to stand up for small businesses and the teams like mine. And I am far from alone. Tomorrow, more than 300 franchise business people will visit Capitol Hill to urge their senators and representatives to defend small businesses and support H.R. 3459. We need your help in stopping the NLRB's overreach. Mr. Chairman and members of the Subcommittee, when you are faced with the question of whether to support small business owners or out-of-touch regulators, it should be an easy decision. We plead with you for this simple concession. Please support H.R. 3459, the "Protecting Local Business Opportunity Act," which would clarify the definition of a joint employer and bring necessary clarity to small businesses like mine.

The importance of H.R. 3459 cannot be overstated, not just as a means to help my small business, but also as a means to encourage others with an entrepreneurial spirit to take similar risks and ultimately contribute to their employees' lives and communities.

Thank you, Mr. Chairman, for calling today's hearing. I would be happy to answer any of your questions.

Chairman ROE. Mr. Braddy, you are recognized for five minutes.

TESTIMONY OF MR. ED BRADDY, PRESIDENT, WINLEE FOODS, LLC, TIMONIUM, MARYLAND

Mr. BRADDY. Good morning, Chairman Roe, Ranking Member Polis, and members of the Subcommittee. And thank you for the opportunity to present my testimony to you today.

My name is Ed Braddy. I am a Burger King franchisee, owning one restaurant in Baltimore, Maryland. I would like to note I am a small-business owner speaking on behalf of myself and my association, the National Franchisee Association, and the Minority Franchisee Association within the National Franchisee Association, which represents Burger King restaurants throughout the nation.

NFA is a member of the Council to Save Local Businesses, which works to protect small-business owners from harmful regulations. My statements may not reflect those of Burger King Corporation or other franchisees within the Burger King system.

Growing up in inner-city Baltimore, my life was similar to that of many of my current employees. I was the youngest of three children and struggled to stay off the streets. I dropped out of high school in 11th grade and returned the next year when I saw that my life was heading in the wrong direction.

After graduation I joined the Baltimore City Police Department and worked there for four years before beginning my career in the food service industry.

In 1978, I began working at a local Burger King restaurant. I worked there as a crew leader, an assistant manager, a restaurant manager, a district manager, and eventually I was the director of operations for 15 Burger King locations in the Baltimore City area.

In 1988, I purchased my first Burger King restaurant, but had to close it five years later due to low sales volumes. After managing several Pizza Hut restaurants and starting my own payphone business, I decided to join the Burger King system in 2001 by becoming part-owner of 11 Burger King restaurants throughout the city.

In 2009, we decided to disband that partnership and I used my equity to purchase the most challenging restaurant of the group, yet the one which I thought provided me an ideal opportunity to impact the community. Today I run that Burger King with the help of my 27 employees.

All the men whom I employ have had contact with the criminal justice system—every single one; I intentionally hired them to give them an opportunity to a better life. There are 10 single mothers who work for me; all work part-time and are on some form of government subsidy. I also have four high school students who work at the restaurant after school and on weekends in order to help their families earn money for themselves and receive valuable training and experience.

I am proud to say every one of my five-member management staff started as a regular crew member. As an employer in a lower-income neighborhood, I often lend money to my employees and my customers before payday so they can afford food at home and transportation to get back and forth to work.

As a one-store operator, I receive 25 applications for employment a day. I employ applicants provided by America Works; the Jobs,

Housing, and Recovery Program of Baltimore; Women in Transition; and other recovery and development programs to provide jobs for those in need. I also started a program with three local churches wherein I donate 15 percent of all food purchased at my restaurant by their members to help fund food programs for the needy.

My Burger King restaurant has become a staple in the community. It is located two blocks from the epicenter of the Baltimore unrest that occurred several months ago.

During that terrible time, many local neighbors stood outside of my restaurant throughout the night to protect it from being destroyed. With their help and because of my ties to people in the community, my Burger King was one of the only restaurants open the next day for business in that community.

I am here today to talk to you about how the joint employer standard, as proposed by the NLRB, would harm my restaurant and thousands of communities held together by small-business owners like me. I urge you to support H.R. 3459, the *Protecting Local Business Opportunity Act*, which restores the joint employer standard to its original definition.

Those with experience in the industry or with knowledge of the franchise model understand that most franchisees and franchisors are not joint employers. As a franchisee, I am required to carry certain standards and other identifiers consistent with the Burger King brand. This means I must make my Whopper sandwiches the same as my fellow franchisees, and I must design my restaurant according to certain requirements.

However, I signed my franchise agreement specifically identifying myself as an independent owner and operator of my Burger King restaurant. That means I am my own boss. I am in complete control of hiring, firing, scheduling, and duty assignments of my employees, among many, many other responsibilities.

As I understand it, the NLRB would use a broader, subjective standard in determining whether franchisors and franchisees should be considered joint employers for labor claims. In fact, the recent NLRB ruling in *Browning-Ferris Industries of California* would allow those who indirectly affect my business, such as landscapers and waste disposal companies, to become my joint employer.

In addition to overturning over 30 years of legal precedence, this decision would have disastrous consequences on not only the franchise model but on all businesses across the country. H.R. 3459, the *Protecting Local Business Opportunity Act*, restores the original definition of a joint employer to require actual, direct, and immediate control over the essential terms and conditions of employment.

Among other devastating consequences, the new joint employer standard will destroy smaller restaurant operators like me. By expanding liability, I believe franchisors will be forced to protect themselves in one of three ways. Whichever the result, the NLRB ruling will destroy this franchise model and franchise small-business owners along the way.

The first option franchisors may take is to repurchase the franchise upon—

Chairman ROE. Mr. Braddy, could you wrap up? We are about a minute over.

Mr. BRADDY. All right.

For these reasons, I ask that you support H.R. 3459, the *Protecting Small Business Opportunity Act*. I am concerned that those who created this new standard believe it will help the little guy and put more mandates on large corporations. As a one-store operator in an inner-city neighborhood, I can tell you that is nothing further from the truth.

Thank you for the opportunity.

[The testimony of Mr. Braddy follows:]

Statement on:

To:	**U.S. House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions**
By:	**Ed Braddy, BURGER KING® Franchisee, Baltimore, MD**
Date:	**September 29, 2015**

Chairman Roe, Ranking Member Polis and members of this Subcommittee, thank you for the opportunity to submit my testimony today. My name is Ed Braddy and I am a BURGER KING® franchisee, owning 1 restaurant in Baltimore, Maryland. I would like to note that I am a small business owner; speaking on behalf of myself and my association, the National Franchisee Association, which represents BURGER KING® franchisees. NFA is a member of the Council to Save Local Businesses, which works to protect small business owners from harmful regulations. My statements may not reflect those of Burger King Corporation or other franchisees within the BURGER KING System.

Growing up in inner city Baltimore, my life was similar to that of many of my current employees. I was the youngest of 3 children and struggled to stay off the streets. I dropped out of high school in 11th grade, and then returned the next year when I saw my life heading in the wrong direction. After graduation, I joined the Baltimore City Police Department and worked there for four years before beginning my career in the food service industry.

In 1978, I began working at a local BURGER KING® restaurant; I worked there as a crew leader, assistant manager ,restaurant manager, district manager and eventually the Director of Operations for 15 BURGER KING locations in the Baltimore city area. In 1988, I purchased my first BURGER KING® restaurant, but had to close it 5 years later due to low sales volume. After managing several Pizza Hut restaurants and starting a payphone company, I decided to rejoin the BURGER KING system in 2001 by becoming part-owner of n BURGER KING® restaurants throughout the city. In 2009, the partnership was disbanded and I used my equity to purchase the most challenging restaurant of the group yet also the one which would provide me the ideal opportunity to impact the community.

Today, I run that BURGER KING with the help of my 27 employees. All the men whom I employ have had a run in with the criminal justice system - I intentionally hired them to give them an opportunity at a better life. There are 10 single mothers who work for me. All work part-time and are on some form of government assistance program. I also have 4 high school students who work at the restaurant after school and weekends in order to

help their families, earn money for themselves and receive valuable training and experience. Everyone on my five-member management staff started as a regular crew member. As an employer in a lower-income neighborhood, I often lend money to my employees before payday so that they can afford food at home and transportation to get to and from work.

As a one-store operator, I receive over 25 applications for employment a day. I often employ applicants provided by America Works, the Jobs, Housing and Recovery program of Baltimore, Women in Transition and other recovery and development programs to provide jobs to those in need. I also started a program with 3 local churches wherein I donate to the church 15% of the proceeds for food purchased at my restaurant by their members to help fund food programs for the needy.

My Burger King restaurant has become a staple of the community. It is located 2 blocks from the epicenter of the Baltimore unrest that occurred several months ago. During that terrible time, many local neighbors stood outside of my restaurant throughout the night to protect it from being destroyed. With their help, and because of my ties with the people in the community, my BURGER KING was one of the only restaurants open in that community for business the next day.

I am here today to talk to you about how the joint employer standard, as proposed by the National Labor Relations Board (NLRB), would harm my restaurant and the thousands of communities held together by small business owners like me. I urge you to support H.R. 3459, the Protecting Local Business Opportunity Act, which restores the joint employer standard to its original definition.

The Franchise Model

Those with experience in the industry or with knowledge of the franchise model understand that most franchisees and franchisors are not joint employers. As a franchisee, I am required to carry certain trademarks and other identifiers consistent with the BURGER KING® brand. This means that I must make my WHOPPER® Sandwiches the same way as my fellow franchisees and design my restaurant according to certain requirements. However, I signed my franchise agreement specifically identifying myself as an independent owner and operator of my BURGER KING® restaurant. That means that I am my own boss. I am in complete control of the hiring, firing, scheduling, and duty assignments of my employees among many, many other responsibilities.

As I understand it, the NLRB would like to use a broader, subjective standard in determining whether franchisors and franchisees should be considered "joint employers" for labor claims. In fact, the recent NLRB ruling in *Browning-Ferris Industries of California, Inc.*, would allow those who indirectly affect my business- such as my landscapers and waste disposal company- to become my joint employer. In addition to

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[1] *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015).

overturning over 30 years of legal precedent, this decision will have disastrous consequences on not only the franchise model, but on all businesses across the country. H.R. 3459, the Protecting Local Business Opportunity Act, restores the original definition of a joint employer to require *actual, direct and immediate control* over the *essential* terms and conditions of employment.

Effect on Franchisors and Franchisees

Among other devastating consequences, the new joint employer standard will destroy smaller restaurant operators like me. By expanding liability, I believe franchisors will be forced to protect themselves in one of three ways. Whichever the result, the NLRB ruling will destroy the franchise model and franchisee small business owners along with it.

The first option franchisors may take is to repurchase the franchise upon expiration of the franchisee's agreement. This will allow the corporation to fully consolidate and control all labor practices. As a result, franchisees and the relationships they have with their neighbors and communities will be destroyed. 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.

Franchisors may also choose to consolidate operations by selecting larger operators (with more resources and often internal human resource staff) to buy out other franchisees. As a result, only those who can financially afford to purchase hundreds of restaurants will remain in business. For a one-store operator like me, my contract will not be renewed; I will either close my restaurant or be forced to sell it to a more sophisticated buyer who may not live in the area and be involved in day-to-day business decisions like me.

The third option is to keep the current franchise model in place. Under the new standard, however, franchisors, inundated with lawsuits, will be forced to implement extreme oversight policies in local franchises across the country. In order to protect themselves, franchisors will implement detailed franchisee and employee policies and I will be no more than a glorified manager in my own restaurant.

I became a franchisee so that I could run my own business and help those in my community. The new joint employer standard will not only destroy that dream, but the dreams of other young men and women who hope to create a better future for themselves.

Small Businesses Will Pay

In the franchise model, and despite well-known names and trademarks, it is the local franchisee who is most impacted by government mandates and new legal interpretations like those set forth in the new joint employer standard.

Like most franchisees, I sign an agreement which includes a clause indemnifying Burger King Corporation ("BKC") against most business-related legal claims. Specifically, the clause indemnifies 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.

A new joint employer standard will result in an increase in lawsuits by those seeking "deep pockets." Unknown to most plaintiffs, however, and because of the indemnification clause I signed, all legal and financial obligations related to those claims will fall on my shoulders. Additionally, my costs for employer liability coverage will likely skyrocket. As a one-store operator, the time and cost required to protect myself from and defend claims will take time away from running my business, drain my resources and will very likely cause me to go out of business.

Conclusion

For these reasons, I ask that you support H.R. 3459, the Protecting Local Business Opportunity Act. I am concerned that those who created this new standard believe it will help the "little guy" and put more mandates on large corporations. As a one-store operator in an inner-city neighborhood, I can tell you that nothing is further from the truth. The new joint employer standard will hurt me, my employees and the neighborhood I support. Please restore the definition to require actual, direct, immediate control over the essential terms of employment.

I am often the banker, preacher and even father-figure for my employees. I would hate to tell them that I am being forced out by the rulings handed down by the NLRB. Worse, I'd hate to close my doors and let go of those for whom my employment is their only source of pride, hope and independence.

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 for your testimony.
Mr. Harper, you are recognized.

TESTIMONY OF MR. MICHAEL HARPER, PROFESSOR, BOSTON UNIVERSITY SCHOOL OF LAW, BOSTON, MASSACHUSETTS

Mr. HARPER. Thank you, Chairman Roe.

Chairman Roe, Ranking Member Polis, and members of the subcommittee, I thank you for inviting me to testify at this hearing today. As a professor and scholar of labor law at Boston University since 1978, I care deeply about the integrity of the processes of the *National Labor Relations Act* and the fulfillment of its purposes.

In addition, as a reporter for the recently completed restatement of employment law, I am particularly concerned that the common law of employment not be misrepresented.

I testify as an individual and not as a representative of any institution with which I am now or have been affiliated.

My testimony makes three major points.

First, the significance of this *Browning-Ferris* decision has been greatly exaggerated. In fact, BFI is nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the NLRA.

BFI returns to prior law by overturning a few narrowing limitations placed on the definition of joint employment starting in 1984. These limitations, while providing some employers a loophole to escape potential collective bargaining, did not eliminate joint employment relationships and associated collective bargaining.

Second, despite the BFI dissenters' misreading of case law, the majority's decision in BFI drew logically and appropriately from the common law of agency. I say this as someone who played a central role in the most recent effort of the American Law Institute to formulate a meaningful expression of the common law of employment.

I served as a reporter for the ALI's newly published restatement of employment law and was primarily responsible for the chapter of this restatement that defines the employment relation, including a section on joint employment.

One reason the BFI decision is very narrow is that it makes the common law definition of employer a necessary—not sufficient, but a necessary—precondition of joint employer status. So common law going back to the 19th century defining "employer" limits this decision. It can't be broader than the common law definition going back to the 19th century.

Third, the proposed legislation currently before your committee is unnecessary to ensure the continuation of the kind of franchising and other efficient contractual business models that are represented by our—the admirable witnesses and great stories that I just heard and you just heard. In fact, I think the legislation could be harmful to their business.

The legislation would primarily frustrate the board's renewed effort to ensure that businesses like BFI—where is BFI? Where is BFI in this hearing? It is their case we are talking about.

Where is BFI, that used this loophole and this shell game, as Member Polis stated, to evade its statutory obligations to bargain

over the wages, hours, and conditions of employment? The decision was about BFI. It wasn't about franchising, and it doesn't expressly cover franchising.

The legislation is not necessary to protect franchises and other small business that provide more efficient supplementary services.

The dissenters in BFI, in order to claim there are no new developments in the American economy to warrant the board's re-adoption of the pre-1980s law, actually point out that franchising was—has been around—and other subcontracting—has been around for a long time predating those 1980s decisions that were overruled. This undermines the claim that the BFI decision somehow threatens franchising or other efficient forms of business cooperation.

What they described happened. I have been eating McDonald's fries since the 1960s, way before—served up by franchisees way before these opinions changed the joint employer standard and during a period that the board is going back to.

I don't want to go beyond my time, but I just want to say I was, frankly, shocked and saddened to read the mischaracterizations of the BFI decision that I hear today, that I read about in the press. The decision does not mean that any contractual relationship between businesses may trigger a joint employer status.

There is no way that landscapers or others with a controlling interest—a contractual relationship can be responsible for Mr. Braddy's employees. There is no way that what Ms. Fortin describes as her control over the employment conditions is going to be subject to her franchisors after this decision. The decision is limited by the common law of employment.

My fear is that if this legislation is passed more and more large businesses are going to say, "We have a loophole. We can get the best of both worlds. We can control the employee conditions indirectly through intermediators by telling them what to do, the way BFI did. We can control them and we can insulate ourselves from any collective bargaining at the same time.

And then if one of our subordinates—like Leadpoint or maybe a franchisee, has employees that unionize, we can cut them off," because a labor law allows them to do that without committing an unlawful labor practice.

I fear, ironically and perversely—

Chairman ROE.—wrap up.

Mr. HARPER. Yes. I will end right here.

I fear that, ironically and perversely, this legislation can hurt small business and hurt franchisees because of new technology available to companies like McDonald's.

[The testimony of Mr. Harper follows:]

Testimony of Michael C. Harper

Professor of Law and Barreca Labor Relations Scholar

Boston University School of Law

Regarding the

"Protecting Local Business Opportunity Act" (H.R. 3459).

Before the Committee on Education and the Workforce

Subcommittee on Health, Education, Labor and Pensions (HELP)

United States House of Representatives

September 29, 2015

Introduction

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee, I want to thank you for inviting me to testify at this hearing today. As a Professor and scholar of labor law at Boston University since 1978, I care deeply about the integrity of the processes of the National Labor Relations Act and the fulfillment of its purposes. In addition, as a Reporter for the recently completed Restatement of Employment Law, I am particularly concerned that the common law of employment not be misrepresented.

My testimony makes three major points. First, the significance of the decision of the National Labor Relations Board in *Browning-Ferris Industries of California (BFI), 362 N.L.R.B. No. 186 (2015)* has been greatly exaggerated. This exaggeration derived initially from the *BFI* dissenters, whose opinion reads like a speculative law review article written by a professor with unrealistic hypotheticals and a policy agenda, rather than a responsible attempt to contribute to the articulation of workable legal principles. The exaggeration was then compounded in the press, which of course always wants to tell us that revolutionary changes occurred in the prior day that we must read about today, and then by lobbyists, who claim that the sky is falling and that their fees must be paid to help keep it in place above our heads.

In fact, *BFI* is nothing more than a narrowly crafted opinion that reinstates a prior definition of the joint employment relationship for purposes of collective bargaining under the regulatory umbrella of the National Labor Relations Act (NLRA). *BFI* returns to this prior law by overturning some narrowing limitations placed on the definition of joint employment by a few cases in the 1980s. These limitations, while providing some employers a loophole to escape potential collective bargaining obligations imposed by the NLRA, did not eliminate joint employment relationships and associated collective bargaining. Indeed, given the actual facts of the case, the *BFI* decision itself could have been resolved the same way without changing the 1980s test; and the dissenters could have written a more responsible opinion by concurring through application of this test.

Second, despite the *BFI* dissenters' tendentious and misleading reading of case law, the majority's decision in *BFI* drew logically and appropriately from the common law of agency. I say this as someone who played a central role in the most recent effort of the American Law Institute (ALI) to formulate a meaningful expression of the common law of employment. I served as a Reporter for the ALI's newly published Restatement of Employment Law and was primarily responsible for the Chapter of this Restatement that defines the employment relationship, including a section on joint employment.

Third, the proposed legislation currently before your Committee is unnecessary to ensure the continuation of franchising and other efficient segmented business models that are prevalent in our modern economy. The legislation instead only would frustrate the Board's renewed effort to ensure that businesses like BFI not use such models to evade their statutory obligations to bargain over the wages, hours, and conditions of employment that they at least co-determine.

The legislation is not necessary to protect franchisees and other small businesses that provide more efficient supplementary services rather than simply enable controlling business sponsors to evade labor and employment laws. The controlling business sponsors can reap the legitimate advantages of delegating certain supplementary work without retaining the power to control wages, hours, and other conditions of employment of the employees of independent franchisees and other smaller sponsored businesses. The legitimate business justifications for franchising and delegation of supplementary work are not affected by requiring sponsors to meet their legal obligations. For instance, as economists have long understood, franchising exists because it enables franchisors both to raise capital quickly for the rapid expansion of outlets and also to provide greater performance incentives for the owners of these outlets than can be provided for middle managers in a large corporation. These legitimate business reasons for franchising would not be eliminated even if the franchisor decided to claim or assert

authority to control the wages, hours, or other working conditions of its franchisees' employees, rather than only the branded product its franchisees offer to the market. Furthermore, a franchisor that does not assert or claim such authority over working conditions, as franchisors historically seem not to have, is not even affected by the narrowly framed *BFI* decision.

I. A Narrow Opinion

The remainder of my statement elaborates on each of these three points. First, the *BFI* decision is a narrow and limited decision because it is tethered to judicial and Board precedents that existed for several decades prior to the mid-1980s cases[1] that the *BFI* decision expressly overrules. The controlling precedents include the Supreme Court's 1964 approval of the Board's joint-employer doctrine in *Boire v. Greyhound Corp., 376 U.S. 473 (1964)*, as well as the influential Third Circuit Court of Appeals decision in *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc., 691 F.2d 1117 (3d. Cir. 1982)*. One can debate how to characterize the facts and holdings of all the older controlling precedents, but the Board's acceptance of the precedents and its claim to do no more than over rule the limitations of the 1980s cases, means that the current law of joint-employment is no different than that which existed during a period of great expansion of franchising and other forms of business segmentation, including the traditional subcontracting on construction sites. All legal doctrine is only given full meaning by application to a range of factual contexts, but the existence of old case precedent provides great clarification for the *BFI* decision.

Furthermore, the Board's overruled 1980s qualifications on the prior joint-employer law were marginal in the sense they did not challenge the existence of joint-employment relationships that required joint bargaining obligations. The pre-*BFI* law required employers to be treated as joint-employers when they "share or co-determine" "essential terms and conditions of employment." None of the purported legal issues posed by joint-employer bargaining units, whether fanciful or real, imagined in the *BFI* dissenting opinion were eliminated by the 1980s qualifications. Over the years, the Board has been addressing the real legal issues posed by joint-employer bargaining units in a responsible manner and can be expected to continue to do so.

While the over-turned 1980s qualifications did not eliminate joint-employer bargaining units, they did offer employers like *BFI* a way to avoid bargaining obligations while retaining ultimate authority

[1] See TLI, Inc., 271 N.L.R.B. 798 (1984); Laerco Transportation, 269 N.L.R.B. 324 (1984). The *BFI* decision also overruled two cases elaborating on the 1984 decisions, A&M Property Holding Corp., 350 N.L.R.B. 998 (2007) and Airborne Express, 338 N.L.R.B. 597 (2002).

to control wages, hours, or working conditions, the topics on which § 8(d) of the Act mandates good faith bargaining. They did so by holding that a joint employer's authority over these topics for bargaining must be directly and immediately exercised in more than "limited and routine" instances, rather than only asserted and usually only exercised indirectly through the intermediation of the other employer. In *BFI* the dissenters used these qualifications to assert that BFI was not a joint employer of Leadpoint's employees, even though BFI exerted continuing control over such core mandatory topics of bargaining as the pace of work, productivity standards and overtime requirements, break times, safety standards at its work place, and even maximum pay. As noted above, the dissenters might have concurred in *BFI* without accepting the majority's rejection of the 1980s qualifications. The fact that they did not do so demonstrated how large the loophole created by the qualifications had become for some Board members.

The majority's rejections of the qualifications prevented BFI from avoiding future bargaining obligations while retaining the legal right to control the subordinate's employees of a subordinate employer like Leadpoint and generally only exercising that right by issuing directions through the intermediation of the subordinate employer's supervisors. Indeed, there were instances documented in the record of the *BFI* case, of BFI controlling matters subject to mandatory bargaining, such as termination decisions and processes, indirectly through the Leadpoint supervisors.

All the *BFI* decision does is pronounce doctrine that closes the loophole that was created by the 1980s qualifications. It does so by recognizing that one employer's legal "right–to-control" essential terms and conditions of employment of another employer's employees may be sufficient to determine those terms and conditions, even where control is only exercised indirectly through the second employer's supervisors. Despite the claims of the dissenters and lobbyists, the *BFI* decision does not close this loophole through adoption of some indeterminate and open-ended "economic realities" or "industrial realities" test. The doctrine articulated in *BFI* requires that a joint-employer have at least the "right" to control some essential topics for mandatory bargaining. A"right" to control is a legal, not an economic concept. The *BFI* decision does not impose employer status on one business over another business's employees simply because the first business has an economic relationship with a second business and has more economic resources to satisfy the bargaining demands of the second business's employees. Nor does the *BFI* decision impose on one business employer status over another business's employees simply because the first business has economic leverage over the second business and thus

potentially could require the second business to offer its employees better terms of employment.[2] The *BFI* decision only imposes bargaining obligations where there is an actual, not a potential, employment relationship, as defined by the common law.[3]

II. Common Law Definition of Employment Relationship

My second point about the *BFI* decision is that it appropriately uses the common law as a precondition for finding joint employer status. The Supreme Court has made clear that federal statutes that do not meaningfully define the employment relationship should be presumed to rely on some common law test, such as those presented by ALI Restatements.[4] The legislative history of the Taft-Hartley Act's exclusion of independent contractors from the definition of employee under the Act reflects the same intent that the definition of the employment relationship derive from common law principles.[5] By conditioning joint-employer status on each employer's satisfaction of the common law's definition of employer, the *BFI* decision responds to that intent.

The *BFI* majority based its consideration of a putative employer's legal right to control essential terms and conditions, as well as the employer's exercise of the right, directly on the common law's "right-to-control" test to distinguish employees from independent contractors. This "right-to-control" test was first developed by British and American courts in the nineteenth century to assign responsibility to "masters" for the torts of their "servants." As I discovered during my research for the Restatement of Employment Law, courts have used the "right-to-control" test to cover as employees individuals like chief executives of corporations, highly skilled employees like company computer programmers or pilots or specialized physicians, or mobile employees like ship captains, that the employer has the authority or right to control, but is not practically able to control on a regular basis. Under the various multifactor

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[2] The majority decision also does not embrace any proposals to amend the Act to expand bargaining obligations based on other economic concepts, such as the provision of capital, see Michael C. Harper, Defining the Economic Relationship Appropriate for Collective Bargaining, 39 B.C. L. Rev. 329 (1998). The majority opinion does not endorse or even cite such proposals. Only the dissent does so as part of its mischaracterization of the majority's narrow decision, and its effort to debate broader policy issues not raised by that decision.

[3] The Board does not use the word "potential" in its statement of its holding. It uses the word only once in a footnote, footnote 68 of its opinion, in a statement of agreement with the Board's General Counsel opinion that the "direct, indirect, and potential control over working conditions ... are all relevant to the joint employer inquiry." This same footnote, however, clarifies that "control" must be demonstrated, that "influence" over working conditions is not sufficient. Thus, this single use of the word "potential" does not suggest the Board meant to expand in this footnote the carefully stated holding in the text of its opinion.

[4] See, e.g., Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992); Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[5] See H.R. Report No. 245, 80th Cong., 1st Sess, on H.R. 3020, at 18 (1947).

tests encompassed by the traditional "right-to-control" test, courts consistently treat such workers as employees. In § 1.01 of the Restatement of Employment Law, the American Law Institute recognized that such treatment is appropriate because whether or not the employer regularly exercises control over the manner or means of the employee's service, the employer's authority over the employee prevents the employee from choosing to render that service in a manner that serves the employee's own interests independently from those of the employer.

In § 1.04 the Restatement of Employment recognizes that an employee may be employed by two or more joint employers if each qualifies as an employer under the definition provided by § 1.01. The Illustrations in § 1.04, *Comment c.*, make clear that employer status turns on ultimate legal authority or power, not on whether the power is exercised directly or indirectly. Illustration 4, for instance, is based on the facts of *Greyhound v. Boire*:

> "A and B are janitors who work for P, a cleaning and maintenance service. P has assigned A and B to clean a bus terminal owned by R. P pays A and B and has power to discipline, transfer, or promote them. R's supervisors set A's and B's work schedules and direct the details of their work; R also can reject as unsatisfactory any janitor assigned to it by P."
>
> "Both P and R are employers of A and B. P has primary power to set their compensation, while R has primary power to control the details of their work."

III. Unnecessary and Harmful Legislation

The *BFI* decision is thus both narrowly framed and appropriately based on common law principles. Furthermore, and most importantly for consideration of the proposed legislation, the decision does not threaten the franchising model or any other form of efficient segmentation of franchising. The dissenters in *BFI*, in order to claim that there are no new developments in the American economy to justify the Board's re-adoption of the pre-1980s law, accurately point out that franchising and subcontracting have been around for a long time, predating by decades the 1980s' limitations of the joint-employer doctrine that the *BFI* decision removes. But this observation undermines their claim that the *BFI* decision somehow threatens franchising or other efficient forms of business cooperation. The pre-1980s growth of franchising and other forms of business segmentation demonstrates that the law to which the Board returns was not inhibitory of these business forms.

This should not be surprising. The pre-1980s law and the *BFI* decision do not assume a franchisor or other business must bargain over how it offers its products to consumers, including how it maintains the reputation of its brands through product quality control. Such product market decisions have never been within the scope of mandatory bargaining[6] and there is nothing in the *BFI* decision or other recent Board decisions to suggest the Board does not recognize this bargaining limitation. Thus, franchisors, under the pre-1980s law re-adopted in *BFI*, as well as under the 1980s law, have been able to garner the benefits of the franchisor form – including the alternative mode of raising capital for expansion and the provision of extra profit incentives to franchisees, which I mentioned above – without sacrificing quality control over branded products and the manner in which they are sold or served. There is nothing in *BFI* that threatens this advantage of franchising.

Under the doctrine adopted in *BFI*, a franchisor only may have to bargain with a union that secures the support of a majority of the employees of one of its franchisees if the franchisor, in its agreement with the franchisee, has secured authority to control the wages, hours, or other terms and conditions of employment of the franchisee's employees, even if it exercises that authority only by directing the franchisee and its agents as intermediaries. If a franchisor continues to delegate authority over all employment decisions to its franchisees, and retains no right to control scheduling or work pace or other conditions of employment, it cannot be subject to bargaining obligations. Thus, the *BFI* decision should help protect the decentralized franchise model by encouraging franchisors to continue to rely on independent franchisee control of employment decisions.

The distinction between the traditional franchisor's control over the branded products sold by its franchisees and the traditional franchisor's delegation to its franchisees of control over the wages, hours, and working conditions of the franchisees' employees, was the basis for the Board's General Counsel's Advice Memorandum in the Freshii case last April.[7] That Memorandum concluded that Freshii was not a joint employer of a franchisee's employees because it did not have control over the franchisee's employees' wages, hours, and working conditions, even though it closely controlled the franchisees' food production and service. The Memorandum asserted that it would reach the same conclusion even under a broader "industrial realities" standard that would be broader and less determinative than the pre-1980s standard readopted by the Board in *BFI*.

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[6] See generally Michael C. Harper, Leveling the Road from *Borg-Warner* to *First National Maintenance*: The Scope of Mandatory Bargaining, 68 Va. L. Rev. 1447 (1982).

[7] Advice Memorandum, Nutritionality, Inc.. d/b/a Freshii, (April 28, 2015).

Similarly, the *BFI* decision does not threaten other common forms of independent business cooperation such as subcontracting on construction sites. It was silly for the BFI dissenters to make the "Chicken-Little" type claim that the majority opinion somehow questions the operation of secondary boycott law at construction sites, as confirmed by the Supreme Court in *Denver Building & Construction Trades Council, 341 U.S. 675 (1951)*, a few years after the passage of the Taft-Hartley Act. The Board cannot adopt doctrine inconsistent with the Supreme Court's interpretation of the provisions of the NLRA and the Board majority certainly did not purport to do so in *BFI*. Under the *BFI* joint employer test, a construction contractor does not become a joint employer of the employees of its specialty subcontractors simply because it specifies to the subcontractor the work it wants done and coordinates the necessary timing of this work with the work of others at the work site. Under the *BFI* test, a construction contractor, like any other business with the potential economic leverage to control the terms and conditions of employment of the employees of a second employer, only may be a joint employer if it has secured the "right" to do so in its agreements with the second employer. There is nothing in the *BFI* majority opinion to make the typical construction contractor a joint employer.

While there is thus no reason to pass the proposed legislation to protect important and common flexible business arrangements in the modern economy, there is good reason not to pass the legislation. While the legislation is not necessary, it also would not be harmless. It would send a clear message to the courts, as well as to future Boards, that Congress wants to permit businesses like BFI to continue to enjoy the loophole that BFI attempted to utilize in this case. That would mean that businesses, without any fear of a bargaining obligation, could continue to control, as did BFI in this case, such essential terms of employment as work pace, overtime, break time, and even maximum wages, as long as much of their control of the work place was exerted through intermediary subordinate employers. Then, if the employees somehow organized a union that asked the subordinate employer to bargain, the BFI-type employer simply could terminate its contract with the subordinate intermediary employer and find another non-union subordinate to use as its intermediary means of control.[8] This manipulation of the system to avoid collective bargaining may not seem harmful to those who do not believe in the NLRA or the collective bargaining it is to protect. But it certainly should be recognized as such by those who understand the contributions of collective bargaining -- including to the existence of

[8] See Plumbers Local 447, 172 N.L.R.B. 128, 129 (1968) ("an employer does not discriminate against employees . . . by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees").

a stronger middle class in the middle of the twentieth century and the threat to our democracy that the erosion of this middle class poses today.

I want to make one final argument against the passage of legislation like this in response to a administrative adjudicatory decision. Individual adjudications, especially in relatively easy cases like *BFI*, even when they announce new doctrine, cannot settle the possible reach of the doctrine or any additional possible implications or problems the doctrine poses. It is unfair to criticize decisions like *BFI* for not answering every such related question. The meaning of certain terms, like "substantial control," necessarily only can be illuminated by application to the rich factual contexts of particular cases. The same was true for terms like "limited and routine" in the 1980s qualified test. The administrative adjudicatory process, like the judicial adjudicatory process, requires time to develop. It should be allowed to continue until its legal product can be fully formed and its practical impact can be evaluated. Presumably that form and evaluation will be influenced by how the judiciary reacts in review of new Board doctrine. Congress should not, based on political ideology, the predictions of lobbyists and the exaggerations of pundits, abort the administrative development of Board doctrine without waiting for both a better understanding of how that doctrine will be applied and the judicial reaction to the application.

Chairman ROE. Okay. Thank the gentleman.
Mr. Cole, you are recognized for five minutes.

TESTIMONY OF MR. KEVIN COLE, CEO, ENNIS ELECTRIC COMPANY, INC., MANASSAS, VIRGINIA

Mr. COLE. Chairman Roe, Ranking Member Polis, and members of the subcommittee, I am honored for the opportunity to testify before you today on H.R. 3459, the *Protecting Local Business Opportunity Act*.

My name is Kevin Cole. I am the chief executive officer for Ennis Electric Company, based in Manassas, Virginia.

I am here today on behalf of the Independent Electrical Contractors and their local chapter, IEC Chesapeake. IEC is also a member of the Coalition to Save Local Businesses, a diverse coalition that is challenging the National Labor Relations Board's new interpretation of the joint employer standard and is supporting H.R. 3459, which would codify the previous standard that has stood for over 30 years.

The Independent Electrical Contractors is an association of over 50 affiliates and training centers, representing over 2,100 electrical contractors nationwide. While IEC membership includes many of the top 20 largest firms in the country, most of our members are considered small businesses.

Our purpose is to establish a competitive environment for the merit shop, a philosophy that promotes free enterprise, open competition, and economic opportunity for all. IEC and its training centers conduct apprenticeship training programs under standards approved by the U.S. Department of Labor's Office of Apprenticeship. Collectively, in the 2015 school year IEC will train more than 8,000 electrical apprentices.

Before telling you how this new standard may negatively impact the electrical contracting industry, I first want to tell you about my story and that of Ennis Electric.

I left college before completing my degree and became an apprentice electrician with Ennis Electric. After 24 years of service with the company, I am proud to stand here before you as an example of just how an apprenticeship can lead to not just a well-paying job, but to the American dream.

Founded in 1974, Ennis Electric is an electrical contractor specializing in heavy commercial, institutional, and industrial projects. The majority of our projects are within the public sector, much of which is for the Federal Government.

Ennis Electric currently employs over 160 individuals, with our average non-trainee employee having spent over 10 years with our company. The average compensation package for our electricians is over $40 an hour, which includes paid leave, insurance, and retirement.

Ennis Electric is a fervent believer in the apprenticeship model of its electricians. Ennis fully supports the "earn while you learn" model, whereby our apprentices graduate in four years from the IEC program with no debt.

Both Ennis and IEC are committed to increasing registered apprenticeships, and both are LEADERs—Leaders of Excellence in Apprenticeship Development, Education, and Research, an acro-

nym—in the DOL's ApprenticeshipUSA program, which was initiated to help fulfill President Obama's goal for doubling the number of apprentices by 2020.

Ennis Electric also works hard to be a good corporate citizen within the local community. Over the past two years Ennis Electric has donated over $300,000 to local charities in the form of monetary donations and electrical work.

Some of these charities included those that help at-risk youth and disabled vets, as well as those doing research for cancer. Ennis Electric has helped to build an orphanage in Haiti, a home for unwed mothers in Arkansas, and soon we will build a home for a Marine that lost his legs in Kandahar.

My reason for speaking to you today is our industry is deeply concerned about the NLRB's new joint employer standard and the impact it could have on the electrical contracting industry. The new standard represents a litany of potential problems and complications for doing business by making us potentially liable for individuals we do not even employ.

Moving forward, almost any contractual relationship we enter into may trigger a finding of a joint employer status that would make us liable for the employment and labor actions of our subcontractors, vendors, suppliers, and staffing firms. In addition, as we understand it, the new standard would also expose my company to another company's collective bargaining obligations and economic protest activity, to include strikes, boycotts, and picketing.

It is clear to see just how this broad and ambiguous new standard increases the cost of doing business. It makes it more difficult for companies like mine to continue to do all the great work we do in the community and provide well-paying jobs to more electricians.

It is unclear if we could even put language into any contracts that would insulate us from being considered a joint employer, nor do we know just how much our insurance costs will go up in an attempt to shield ourselves from this increased liability.

This new standard also prevents us from working with certain startups or new businesses that may have a limited track record. For example, my company will take on certain small businesses as subcontractors, which will oftentimes be owned by minorities or women, and will help them mentor—we will mentor them on certain projects. With this new standard, I am now less likely to take on that risk.

I am also less likely to bid on federal contracts over $1.5 million, under which the FAR mandates that I must subcontract with small businesses.

In conclusion, IEC urges Congress to consider the negative consequences this new standard has on businesses and the communities they serve and pass the *Protecting Local Business Opportunity Act* so that companies like mine can continue to provide the kind of quality services and well-paying jobs it has done so for over 40 years.

Thank you, and I look forward to answering any questions the members of the subcommittee may have.

[The testimony of Mr. Cole follows:]

Testimony

of

Kevin R. Cole

Chief Executive Officer, Ennis Electric Company

On behalf of the

Independent Electrical Contractors

Before the

Committee on Education and the Workforce

Subcommittee on

Health, Employment, Labor, and Pensions

United States House of Representatives

Hearing on H.R. 3459, Protecting Local Business Opportunity Act

September 29, 2015



Independent Electrical Contractors

Chairman Roe, Ranking Member Polis and Members of the Subcommittee, I'm honored for the opportunity to testify before you today on H.R. 3459, the Protecting Local Business Opportunity Act. My name is Kevin Cole. I am the Chief Executive Officer for Ennis Electric Company based in Manassas, Virginia. I'm here today on behalf of the Independent Electrical Contractors (IEC) and their local chapter, IEC Chesapeake. IEC is also a member of the Coalition to Save Local Businesses (CSLB), a diverse coalition that's challenging the National Labor Relations Board's (NLRB) new interpretation of the joint employer standard and is supporting H.R. 3459, which would codify the previous standard that has stood for over 30 years.

The Independent Electrical Contractors is an association of over 50 affiliates and training centers, representing over 2,100 electrical contractors nationwide. While IEC membership includes many of the top 20 largest firms in the country, most of our members are considered small businesses. Our purpose is to establish a competitive environment for the merit shop – a philosophy that promotes free enterprise, open competition and economic opportunity for all. IEC and its training centers conduct apprenticeship training programs under standards approved by the U.S. Department of Labor's (DOL) Office of Apprenticeship. Collectively, in the 2015 school year, IEC will train more than 8,000 electrical apprentices.

Before telling you how this new standard may negatively impact the electrical contracting industry, I first want to tell you about my story and that of Ennis Electric. I left college before completing my degree and became an apprentice electrician with Ennis Electric. After 20 years of service with the company, I'm proud to stand here before you as an example of just how an apprenticeship can lead to, not just a well-paying job, but to the American dream.

Founded in 1974, Ennis Electric is an electrical contractor specializing in heavy commercial, institutional and industrial projects. The majority of our projects are within the public sector, much of which is for the federal government. Ennis currently employs over 160 individuals, with our average non-trainee employee having spent over 10 years with the company. The average compensation package for our electricians comes to over $40 per hour, which includes paid leave, insurance and retirement.

Ennis Electric is a fervent believer in the apprenticeship model for its electricians. Ennis fully supports the "earn while you learn" model, whereby our apprentices graduate in 4 years from the IEC program with no debt. Both Ennis and IEC are committed to increasing registered apprenticeships and both are LEADERs (Leaders of Excellence in Apprenticeship Development, Education, and Research) in the DOL's ApprenticeshipUSA program, which was initiated to help fulfill President Obama's goal for doubling the number of apprentices by 2020.

Ennis also works hard to be a good corporate citizen within the local community. Over the past three years, Ennis has donated over $300,000 to local charities in the form of monetary donations and electrical work. Some of these charities have included those that help at-risk youth and disabled vets as well as those doing research to cure cancer. Ennis has also helped to build an orphanage in Haiti, a home for unwed mothers, and soon we will help build a home for a Marine that lost his legs in Kandahar.

My reason for speaking to you today is our industry is deeply concerned about the NLRB's new joint employer standard and the impact it could have on the electrical contracting industry. The new standard presents a litany of potential problems and complications for doing business by making us potentially liable for individuals we do not even employ. Moving forward, almost any contractual relationship we enter into may trigger a finding of joint employer status that would make us liable for the employment and labor actions of our subcontractors, vendors, suppliers and staffing firms. In addition, as we understand it, the new standard would also expose my company to another company's collective bargaining obligations and economic protest activity, to include strikes, boycotts, and picketing.

It's clear to see just how this broad and ambiguous new standard increases the cost of doing business. It makes it more difficult for companies like mine to continue to do all of the great work we do within the community and provide well-paying jobs to more electricians. It's unclear if we could even put language into any contracts that would insulate us from being considered a joint employer, nor do we know just how much our insurance costs will go up in an attempt to shield ourselves from this increased liability. This new standard also prevents us from working with certain start-ups or new small businesses that may have a limited track record. For example, my company will take on certain small businesses as subcontractors, which will often times be owned by minorities or women, and help mentor them on certain projects. With this new standard, I'm now less likely to take on that risk. I am also less likely to bid on federal contracts over $1.5 million, under which the Federal Acquisition Regulation (FAR) system mandates I subcontract with small businesses.

In conclusion, IEC urges Congress to consider the negative consequences this new standard has on businesses and the communities they serve, and pass the Protecting Local Business Opportunity Act, so that companies like mine can continue to provide the kind of quality services and well-paying jobs it has done so for over 40 years. Thank you and I look forward to answering any questions the Members of the Subcommittee may have.

Chairman ROE. Thank you, Mr. Cole.

Dr. Lofaso, you are recognized for five minutes.

TESTIMONY OF DR. ANNE LOFASO, PROFESSOR, WEST VIRGINIA UNIVERSITY COLLEGE OF LAW, MORGANTOWN, WEST VIRGINIA

Dr. LOFASO. Good morning, Chairman Roe, Ranking Member Polis, and distinguished members of the subcommittee.

My name is Anne Marie Lofaso. I am a former senior attorney of the National Labor Relations Board, where I served for 10 years. I am currently a labor law professor at West Virginia University College of Law.

I appear before you today as an expert in labor law and not on behalf of my university or any institution with which I have been affiliated.

Thank you for inviting me to testify regarding H.R. 3459, which would amend the *National Labor Relations Act* to permit joint employer status only when both employers exercise actual, direct, and immediate control over essential terms and conditions of employment. This amendment, prompted by the board's decision in Browning-Ferris, would substantially narrow the definition of "employer." My testimony makes three points.

First, the board's "joint employer" definition after *Browning-Ferris* is consistent with the plain language of the act and the common law. In *Browning-Ferris*, the board concluded that it may find that two or more statutory employers are joint employers if: there is a common-law employment relationship between the putative joint employer and the employees, and the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. In other words, control is central to both inquiries.

Contrary to the belief of some, this definition is not a radical departure from traditional joint employer principles. It is instead grounded in the act's broad definition of employer, which defines employer to include both direct and indirect agents; the common law, which also defines the employment relationship in terms of the right to control rather than actual control; and Supreme Court precedent.

It is misleading to view the board's 1984 joint employer definition, what I call the Laerco standard, as the traditional definition of joint employer. Laerco and its progeny, like the proposed amendment, limits the circumstances under which a putative joint employer would have a duty to bargain with employees by simply reading out of the act traditional joint law—sorry—traditional common law joint employers, unless their control is actual, direct, and immediate.

The difference between the two standards is the same as the difference between possessing and exercising control. Whereas the common law will hold the person to the duties of a joint employer if it possesses control even if that person does not exercise control, the Laerco definition only permits a finding of joint employer status where the putative joint employer actually exercises control. The Laerco definition thereby runs counter to both the plain lan-

guage of the act and the common law, which expressly permit indirect control as an indicia of joint employer status.

Second, *Browning-Ferris* says little about how franchisors will be treated for several reasons, two of which I highlight here. First, Browning-Ferris is not a franchise case. Employees of Leadpoint, the undisputed employer, and BFI, the putative joint employer, worked shoulder-to-shoulder at the same recycling plants.

Second, both standards are highly fact-specific. This means that the nature of the relationship between the franchisor and franchisee is what determines liability.

Accordingly, if Ms. Fortin has accurately described her franchisor as having no control over her labor relations, then that franchisor would be—would not be a joint employer under the Browning-Ferris standard; nor would landscapers, who have no control over Burger King's labor relations, be a joint employer.

Having said that, understanding the difference between the two standards as the difference between possessing and exercising control allows us to make a few projections about how this might affect the franchise business model.

Between 1984 and 2014 a franchisor might, without thinking, retain control over terms or conditions of employment because such right of control, under the then new Laerco standard, would not have given rise to labor liability. That same franchisor today is more likely to refuse to retain the right of control, thereby augmenting the franchisee's autonomy.

Accordingly, one unintended and perverse effect of the proposed legislation is that it can embolden franchisors to take more control over the franchisee's labor relations because it, the franchisor, would have less liability concerns.

Third, the proposed amendment is unnecessary to retain the franchise business model but does harm to employees by rendering bargaining futile. Most of the arguments against Browning-Ferris can be characterized as some form of the following: Small franchisees will lose their businesses if this decision remains unchecked, thereby robbing good citizens of the American dream. Yet, as I just explained, nothing in Browning-Ferris interferes with the franchise business model.

By contrast, the proposed bill renders bargaining futile for those workers who have two masters—the immediate master, and the one who retains control but doesn't exercise it directly.

In closing, the proposed bill is a lose-lose for franchisees and employees but a big win for large franchisors who wish to dominate their smaller franchisees and avoid their labor obligations.

Thank you.

[The testimony of Dr. Lofaso follows:]

Written Testimony of
Anne Marie Lofaso
Professor of Law
West Virginia University College of Law

Before the U.S. House Committee on
Education and the Workforce

Subcommittee on
Health, Education, Labor, and Pensions

Hearing on H.R. 3459
Protecting Local Business Opportunity Act

September 29, 2015

Introduction

Good Morning, Chairman Roe, Ranking Member Polis and distinguished members of the Subcommittee. My name is Anne Marie Lofaso. I am a professor at West Virginia University College of Law, where I teach labor and employment law and serve as the Director of the Labor and Employment Law Certificate Program. I am also a former Senior Attorney of the National Labor Relations Board, where I served for ten years in the Appellate and Supreme Court Branch.

Thank you for inviting me to testify regarding H.R. 3459, the *Protecting Local Business Opportunity Act,* which would amend Section 2(2) of the National Labor Relations Act to add the following:

> Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate.

This amendment would substantially narrow the definition of employer, which broadly includes "any person acting as an agent of an employer, directly or indirectly."

This amendment was prompted the Board's decision in *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 24, 2015) (returning to its pre-1984 construction of Section 2(2) and finding joint-employer status). Proponents of this bill view that decision as substantially revising the Board's definition joint employer in the franchise context. My testimony will address the following questions:

1. What is the Board's definition of joint-employer after *Browning-Ferris*? How does that definition compare with the plain language of the NLRA, the common law, and the Board's previous standards?

2. How does the Board's decision in *Browning-Ferris* impact franchisors?

3. What are the consequences of enacting this legislation in a period where contingent and fissured employment relationships are proliferating?

I. The Board's Joint-Employer Definition, as Articulated in *Browning-Ferris*, Is Consistent with the Plain Language of the NLRA and the Common Law

In *Browning-Ferris*, the Board concluded that it "may find that two or more statutory employers are joint employers of the same statutory employees if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" Slip op. at 2

(quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982), *enf'g*, 259 N.L.R.B. 148 (1981)). The Board divided this into a two-part inquiry (Slip op. at 2):

(1) Is there a common-law employment relationship between the putative joint employer and the employees in question?
(2) If so, does "the putative joint employer possess[] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining"?

To further clarify its test, the Board noted that "control" is central to both inquiries. Relying on Supreme Court jurisprudence, the Board explained: "the question is whether one statutory employer 'possess[es] sufficient control over the work of the employees to qualify as a joint employer with' another employer." Slip op. at 2 (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The Board's definition of joint employer is consistent with the NLRA's plain language, which includes "any person acting as an agent of an employer, directly or indirectly." Given the breadth of this definition, it is significant that the Board's construction of the statute in the joint-employer context tracks the common law, as codified in the Restatement of Agency as early as 1933. *See* RESTATEMENT OF THE LAW OF AGENCY 1933[1]; *see also* RESTATEMENT (SECOND) OF AGENCY 1958.[2] Rather than creating a new definition for a new context, the Board has tethered its construction to a traditional construction of that term that is nearly universal in U.S. law.

It is incorrect to call this definition a radical departure of long-standing law. A more accurate characterization is that *Browning-Ferris* returns Board precedent to traditional common-law principles. To be sure, *Browning-Ferris* does overrule administrative precedent starting in 1984 with *Laerco Transp.*, 269 N.L.R.B. 324 (1984), and *TLI, Inc.*, 271 N.L.R.B. 798 (1984), *enforced mem.* 772 F.2d 894 (3d Cir. 1985), and continuing with its progeny. But those cases are actually the radical departure from, at that point, over half a century of common law. *Browning-Ferris* merely removes the limiting language added by those cases, language which has no connection to the NLRA's plain language or to the common law. As the current Board pointed

[1] Section 1 defines agency as "the relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." Section 2(1) defines master as "a principal who employs another to perform service in his affairs and *who controls or has the right to control* the physical conduct of the other in the performance of the service."

[2] Section 1 similarly defines agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and *subject to his control*, and consent by the other so to act." Section 2(1) similarly defines master as "a principal who employs an agent to perform services in his affairs and *who controls or has the right to control* the physical conduct of the other in the performance of the service."

out, those cases mark "a 30-year period during which the Board – without any explanation or even acknowledgement and without overruling a single prior decision – imposed additional requirements that effectively narrowed the joint-employer standard." Slip op. at 10.

The difference between the two standards is the same as the difference between possessing and exercising power. Whereas the common law will hold a person to the duties of a joint employer if it possesses power, even if that person does not exercise those powers, the *Laerco* definition only permits a finding of joint-employer status where the putative joint employer actually exercises that power. The *Laerco* definition thereby runs counter to both the plain language of the act and the common law. The plain language expressly defines employer as "any person acting as an agent of an employer, *directly or indirectly*," 29 U.S.C. § 152(2), and does not limit the employment relationship to "the employees of a particular employer," 29 U.S.C. § 152(3). The common law reveals that "the control or right to control needed to establish the relation of master and servant may be very attenuated," RESTATEMENT OF AGENCY §220 cmt. d.

As a legal matter, there are no grounds upon which the Board's return to the common law is legally unsound. The definition harkens a return to the common law, which has been tested in all types of economies including the industrial-military complex of the early twentieth century to the service economy of the late twentieth century and the information economy of the early twenty-first century. The definition fulfills the purpose of the NLRA to "encourag[e] the practice and procedure of collective bargaining" by ordering to the bargaining table those who have control of mandatory bargaining subjects.

II. The Board's Decision in *Browning-Ferris* Says Little About How Other Franchisors Will Be Treated Because Under Any Standard the Board Would Have Found Joint-Employer Status

The Board's decision in *Browning-Ferris* does little to help us understand how franchisors will be treated for the following two reasons. First, *Browning-Ferris* is not a franchise case – employees of Leadpoint, the undisputed employer, and BFI, the putative joint employer, worked shoulder-to-shoulder at the same recycling plant. Second, under either the *Browning-Ferris* or the *Laerco* standard, BFI could have been a joint employer. This is so because BPI exercised so much control over the terms and conditions of the employees in

question in that case.[3] Third, both standards are highly fact-specific. This means that the nature of the relationship between the franchisor and franchisee is what determines liability.

Having said that, understanding that the difference between the two standards can be articulated as the difference between possessing and exercising control, we can make a few projections about how this might affect the franchise business model. Between 1984 and 2014, a franchisor might, without thinking, retain control over wages, hours, and other terms or conditions of employment of the franchisee's employees because such right of control, under the new *Laerco* standard, would not give rise to labor liability. It's a little hard to believe that a franchisor would be so unthinking because under the common law, that franchisor would still retain all the liability of a joint employer including tort liability – at least where the franchisor knew or should have known of the hazard resulting in injury. So, assuming that such a franchisor exists, that franchisor is more likely today to refuse to retain the right of control. In these circumstances, the franchisee is likely to become more autonomous. Accordingly, one unintended and perverse effect of the proposed legislation is that it could embolden franchisors to take more control over the franchisee's labor relations because it would have less liability concerns.

III. The Proposed Amendment Is Unnecessary To Retain the Franchise Business Model But Does Grave Harm to Employees By Rendering Bargaining Futile

As stated above, those who disfavor the Board's definition of joint employee have no legal grounds for dismantling that decision. Accordingly, in over-reactive hyperbole, proponents of the proposed amendment have searched for non-legal reasons for preserving the *Laerco* standard.

First, they claim that small franchisees will lose their businesses if the *Browning-Ferris* decision is left unchecked. This speculative argument is supported by no evidence. Indeed, the only evidence available – the U.S. economy during the pre-*Laerco* era, belies this bald assertion. There simply is no evidence that the franchise business model did not flourish prior to 1984.

[3] This, of course, begs the question why the Board simply did not decide this case under the *Laerco* standard. Unlike *Freshii,* Case 13-CA-134294 et al., Advice Memorandum, April 28, 2015, where the General Counsel's Division of Advice concluded that there was no joint-employer relationship, this case inhabits a more gray area. Indeed, in this case, the Board overturned a Regional Director's decision, holding that Leadpoint was the sole employer. See *Browning-Ferris Indus. of Cal., Inc.,* Case 32-RC-109684, Decision and Direction of Election, August 16, 2013. Second, the Board found increased fissuring of workforce, justifying a decision to revisit past precedent and reinstate the common law.

Second, some claim that the *Browning-Ferris* decision robs small businesses of the American dream. As a threshold matter, this argument assumes that only business owners have a right to the American dream. In reality, employees and employers must work together to realize that dream. That collaboration also means, at least in some cases, that employees are entitled to share in decisions affecting their working lives, which in turn sometimes means that small businesses will be brought to the bargaining table to discuss those decisions.

Third, some have argued that the proposed legislation is needed to bring stability to the law. That argument ignores two important facts: (1) the Board's *Browning-Ferris* standard has been the Board's standard for 50 of its 80 years and the common law standard since before 1933; and (2) the proposed legislation does nothing to alter the common law, under which all businesses currently operate.

Fourth, some have argued that the Board's decision interferes with business by upending the franchise business model. Yet, there is no evidence of this for at least two reasons: (1) franchisors concerned about joint-employer liability are more likely to give franchisees more autonomy rather than less autonomy over terms and conditions of their employees; and (2) the franchise business model flourished for many years under the very same standard articulated in *Browning-Ferris* prior to 1984. Simply put, Congress's proposed new standard is unnecessary to preserve the franchise business model.

By contrast, the proposed legislation does grave harm to – dare I say, kills the American dream of – the millions of employees who work for those small businesses by rendering bargaining futile in cases where a joint employer retains control, but which control is not "immediate" or "direct." Eighty years ago, while our country was in the midst of the Great Depression, Congress enacted to the National Labor Relations Act to "encourage[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. Congress found that labor unrest results from inequality of bargaining power between workers and those who control their terms and conditions of employment. As part of a package of laws designed to alleviate economic inequality and to enhance economic opportunity, Congress created the National Labor Relations Board and charged it with administering and applying the NLRA to the complexities of work life. Today, those complexities include an increasingly more fissured workforce, whose members stand witness to extraordinary periods of wage stagnation, proliferation of low-wage jobs through employee leasing, temp agencies and subcontractors, and may include the first

generation of Americans ever to face worse living conditions than their parents. This legislation renders bargaining futile for those workers who have two masters – the immediate master and the one who retains control but doesn't exercise it directly.

The Board's *Browning-Ferris* decision, like the common law of the past century, understands that the law plays a role in ensuring that those who control the plight of others are accountable for that control. The Board's *Laerco* decision, by contrast, allows some of those in control, namely those who retain the right of control, to dodge their duty to bargain in cases where employees, frustrated with working terms and conditions, have voted for union representation. This scenario serves to frustrate rather than encourage the practice and procedure of collective bargaining.

Chairman ROE. Thank you for your testimony.
Mr. Cohen, you are recognized for five minutes.

TESTIMONY OF MR. CHARLES COHEN, SENIOR COUNSEL, MORGAN, LEWIS & BOCKIUS, LLP, WASHINGTON, D.C.

Mr. COHEN. Chairman Roe, Ranking Member Polis, and members of the subcommittee, thank you for your invitation to participate in this hearing.

I am a senior counsel in the law firm of Morgan, Lewis, and Bockius, LLP, where I represent employers in many industries under the *National Labor Relations Act*. From 1994 to 1996 I had the privilege of serving as a member of the National Labor Relations Board and was appointed by President Clinton and confirmed by the U.S. Senate.

The bill which is being considered today would restore the critical role that Congress should play in formulating our national labor and employment policy by simply requiring that two or more employers may be considered joint employers only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate. This legislation is a measured response to the NLRB's usurpation of that role of Congress in defining employer under the NLRA.

The *Browning-Ferris* decision was put out by the NLRB as an opportunity or a case where they were going to consider overturning precedent that had been in effect for 30 years. Seventeen different organizations on both the labor side and the management side and others filed amicus briefs.

This is a groundbreaking decision. It is been much anticipated and much feared by many in the employer community, and much anticipated in the labor community.

During the 45 years that I have worked under the NLRA, I cannot recall a single board decision so rife for potential abuse and mischief, nor one that would intrude the NLRB into the contractual relationships for so many industries and companies. As anyone well-versed in labor relations would know, this decision is all about enhancing union leverage in situations where independent companies are not responsible for the employees of other companies.

Now a joint employer relationship may be found based on the mere potential to control terms and conditions of employment even if that control is indirect and/or unexercised. This new, ambiguous standard has the potential to apply to a wide variety of business relationships, as you see here today on the panel.

And essential terms and conditions of employment will not be limited under this decision to the core subjects of wages, hours, hiring, firing, and discipline. It will also include subjects such as the number of workers to be supplied, scheduling, overtime, productivity, work assignments, and the manner and method of work performance. This is an extremely broad test.

And what is more, as demonstrated by the decision, the NLRB will rely on the thinnest of anecdotal evidence of isolated involvement or oversight in any of these areas to deem the putative joint employer "in control," thereby providing a tripwire for business op-

erations and imposing a virtually impossible standard for policing and managing contractor relationships.

Perhaps the most disingenuous aspect of *Browning-Ferris* is that over the last several years the board has adopted a directly contrary approach to that adopted here where that suited its policy objectives to enhance union leverage.

For instance, with respect to the board's determination of independent contractor or supervisory status, both designations that remove individuals from the NLRA's coverage, the board has expressly held that it considers only actual evidence of control, authority, or rights. These two principles cannot be reconciled.

A fundamental issue under the NLRA and other statutes is, of course, who is your employer. The three-member majority believed that its policy preference justified radically increasing the number of employers for thousands if not millions of employees.

Let me turn now to some of the practical difficulties. They are myriad, but I will address just the main ones.

Companies will now be exposed to greater and potentially automatic liability for unfair labor practices committed by their contractors and suppliers because the general rule is that there is joint liability.

The board is now also, second, putting companies at the bargaining table together without providing any guidance as to how that is supposed to work in practice. If there are two or more putative employers have conflicting financial or commercial interests, as they often do—they are in business—how are they to bargain a single collective bargaining agreement with a union?

Third, in the ordinary course, commercial parties negotiate contracts for a defined length of time. How does that system fit into collective bargaining, and if an employer is going to rebid its contract?

Secondary boycotts are a very important issue here, as well. Since 1947 we have had those restrictions that protect neutral employers—

Chairman ROE. Mr. Cohen, could you wrap up?

Mr. COHEN. I will. Thank you very much, Congressman.

Under the secondary boycott laws, these purported joint employers have lost their ability to have protections because they are deemed to be a primary employer. So that is very important.

And lastly, there are unintended consequences of responsible contractor policies, which will be discouraged very greatly as a result.

Thank you very much.

[The testimony of Mr. Cohen follows:]

Statement of Charles I. Cohen
Senior Counsel, Morgan, Lewis & Bockius LLP

before the

Subcommittee on Health, Employment, Labor, and Pensions
United States House of Representatives

September 29, 2015

Hearing on H.R. 3459, Protecting Local Business Opportunity Act

Chairman Roe, Ranking Member Polis, and Members of the Subcommittee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a Senior Counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a Member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.[1]

The Protecting Local Business Opportunity Act (H.R. 3459) would restore the critical role that Congress should play in formulating our national labor and employment policy.[2] The legislation constitutes a measured response to the NLRB's usurpation of the role of Congress in defining "employer" under the NLRA. During the 45 years I have practiced labor law, I cannot recall a single Board decision so rife for potential abuse and mischief, nor one that would intrude the NLRB into the contractual relationships for so many industries and companies.

As anyone well versed in labor relations would know, this decision is all about enhancing union leverage in situations where independent companies are not responsible for the employees of other companies. In my testimony today, I will describe why Congressional action is needed to reverse the NLRB's overreach on the joint employer doctrine.

A. The *Browning-Ferris* Decision

In its August 27, 2015 decision, the Board overruled its long-standing joint employer jurisprudence, announcing that it will no longer require *direct* and *immediate* control over terms and conditions of employment to establish a joint employer relationship between two or more separate businesses.[3] Instead, a joint employer relationship may be found based on the *mere potential* to control terms and conditions of employment, even if that control is *indirect* and/or

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[1] I am not speaking on behalf of Morgan, Lewis & Bockius, the National Labor Relations Board, or any other specific company or organization, and my testimony should not be attributed to any of these or other organizations. My testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me to prepare this testimony.

[2] H.R. 3459 would make a simple addition to the definition of "employer" under Section 2(2) of the NLRA: "Notwithstanding any other provision of this Act, two or more employers may be considered joint employers for purposes of this Act only if each shares and exercises control over essential terms and conditions of employment and such control over these matters is actual, direct, and immediate."

[3] *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, slip op. 2, 15-16 (Aug. 27, 2015).

unexercised. This new ambiguous standard has the potential to apply to a wide variety of business relationships in which one employer contracts for the work of another business entity's employees, including outside suppliers and on-site contractors. Based on the decision's faulty rationale, a future NLRB decision could extend to the franchise model as well.

Moreover, the Board did not confine itself to potential, indirect, and unexercised control. It went on to expand the terms and conditions of employment that would meet the potential/indirect control standard. Thus, "essential terms and conditions of employment" will not be limited to the core subjects of wages, hours, hiring, firing, and discipline. It also will include subjects such as the number of workers to be supplied, scheduling, overtime, productivity, work assignments, and "the manner and method of work performance."[4] And, what's more, as demonstrated by its decision, the NLRB will rely on the thinnest of anecdotal evidence of isolated involvement or oversight in any of these areas to deem the putative joint employer in "control," thereby deploying a trip wire for business operations and imposing a virtually impossible standard for policing and managing contractor relationships.[5]

The NLRB also held that a joint employer will be required to bargain "only with respect to such terms and conditions which it possesses the authority to control."[6] This could create a bizarre dynamic at the bargaining table and require a joint employer to be involved in bargaining on some subjects but not others. Collective bargaining typically involves many tradeoffs that would be unworkable under this approach. For this and other reasons, the Board is not simply returning to the "traditional" test for joint employer status that existed more than 30 years ago; in fact, the Board has created a whole new scheme for defining joint employer – or partial joint employer – status and collective bargaining obligations under the Act.[7]

Perhaps the most disingenuous aspect of *Browning-Ferris* is that over the last several years, the Board adopted a directly contrary approach to that adopted here where that suited its policy objectives to enhance union leverage. For instance, with respect to the Board's determination of independent contractor or supervisory status, both designations that remove individuals from the NLRA's coverage, the Board has expressly held that it considers only *actual* evidence of control, authority, or rights.[8] The Board majority in *Browning-Ferris* attempts to explain away that disingenuous result in a brief footnote, but without any convincing rationale.[9]

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[4] 362 NLRB No. 186, slip op. 15.

[5] Such anecdotal evidence in *Browning-Ferris* of actual control was limited to two instances where Browning-Ferris requested the removal of two contract employees for misconduct, a single pre-shift meeting to advise the contractor on the day's tasks, and "on occasion" talking with contractor employees about productivity issues. Yet this limited contact or oversight is commonplace and indeed occurs with most contractor-customer relationships. 362 NLRB No. 186, slip op. 36 (dissent).

[6] 362 NLRB No. 186, slip op. 16.

[7] As the dissenting Board members aptly summarized, the Board majority's assertion it has resurrected the Board's pre-1984 standard is based on a misreading of older decisions. While that prior standard may have considered evidence on indirect or potential control, it generally viewed evidence on direct control to be dispositive or critical to the joint employer determination. 362 NLRB No. 186, slip op. 32-33 (dissent).

[8] *See* 362 NLRB No. 186, slip op. 24 (citing cases).

[9] 362 NLRB No. 186, slip op. 14, n.72.

B. The Prior Joint Employer Standard Was a Balanced and Certain Approach to Administering the NLRA

A fundamental issue under the NLRA, and other labor or employment statutes for that matter, is "who is your employer"? Having a balanced and consistent approach on that most basic issue is paramount, and H.R. 3459 would restore what was lost in *Browning-Ferris*.

The three-member majority believed that its policy preference justified radically increasing the number of "employers" for thousands if not millions of employees – and all without any Congressional mandate for change. If left unchecked, *Browning-Ferris* will afford the Board, and its designated regional directors, substantial and unfettered discretion to use potential control and indirect control evidence to achieve results-oriented outcomes in representation and unfair labor practice cases. There can be no consistency in applying or understanding this overbroad and ambiguous standard, other than to say that the regional director or Board will be able to reach whatever outcome deemed desirable, in that case, from a policy perspective.

The importance of consistency and clarity in the law and legal standards cannot be overstated. That is especially true for the basic definition of "employer," from which all of the NLRA's obligations flow. Here, the Board's prior long-standing and consistent application of its joint employer analysis created a workable and predictable standard that many companies applied in structuring their relationships with their many suppliers and contractors. Reversing precedent in such a radical fashion, on the other hand, already has created instability, unpredictably, and uncertainty.

The Board's prior standard struck an appropriate balance between a company's right to manage its relationships with its contractors and suppliers, and the right of employees to organize a union and to have an employer at the bargaining table that is able to engage in meaningful collective bargaining. That standard ensured that a company was at the bargaining table if it exercised *actual control* over the terms and conditions of employment of its contractor's employees, as opposed to potential or indirect control through the terms of the business agreement between the company and its contractor. If, for example, the putative joint employer directed the work of its contractor's employees and engaged in overt measures of control, such as on wages or discipline, a joint employer relationship routinely was found and the joint employer had an obligation to participate in collective bargaining.[10]

An arm's length business agreement between a company and a supplier or contractor should not rise to a joint employer relationship simply because the company has established production, safety or quality standards that the contractor is expected to meet to receive payment. Commercial oversight of contractor efficiency and quality is routine, and should be expected, where one entity contracts with another for services. Companies have legitimate business

[10] *See, e.g., In re Aldworth Co.*, 338 NLRB 137, 140 (2002) (finding joint employer status where, among other things, the contracting employer disciplined the contractor's employees and assigned them work); *Quantum Resources Corp.*, 305 NLRB 759, 760 (1991) (finding joint employer status based on the putative employer's close and routine supervision of unit employees); *see also N.K. Parker Transp., Inc.*, 332 NLRB 547, 549 (2000) (citing evidence of employer's distribution of common work rules and safety procedures, as well as drug testing, and the employer's monitoring of compliance with respect to employee discipline as basis for joint employer finding); *W.W. Grainger, Inc.*, 286 NLRB 94, 96 (1987) (effectively recommending discipline, evaluating work performance, exercising the right to refuse employment of certain drivers, and day-to-day supervision enough for joint employer relationship).

reasons for including these types of terms in their agreements with suppliers and contractors.[11] Agreements such as these should not give rise to a joint employer relationship unless the company exerts *actual, direct control* over the contractor's employees. That is a reasonable and balanced approach to the joint employer test, formerly in place for decades, which the Board jettisoned in *Browning-Ferris*.

C. The New Standard Will Harm the Business Community, Including Small Businesses, and Undermine an Even-Handed Application of the NLRA in Several Key Areas

I now turn to practical issues with the new joint employer test. Those issues are myriad, but in this testimony I address only the most impactful ones.

1. Expanded Unfair Labor Practice Liability

Companies will now be exposed to greater and potentially automatic liability for unfair labor practices committed by their contractors and suppliers. Joint employers are generally liable for unfair labor practices committed by the other employer.[12] This is true even when the company has little or no control over the contractor or its employees, is not in a position to investigate and remedy unlawful actions by the contractor, is not aware of the contractor's actions, and may even affirmatively require that the contractor comply with the law (*e.g.*, through a supplier code of conduct).

There is a serious danger that application of the potential and indirect control standards would expand a company's liability for unfair labor practices committed by a contractor, and based not on any act or omission by the company. Such liability could be imposed solely by virtue of an arm's length contractual relationship with a contractor or supplier.

2. Unworkable Collective Bargaining Negotiations

Now that two or more employers may be swept into union negotiations, either on all mandatory subjects of bargaining or perhaps only some, the Board has provided no guidance for how such bargaining is to work in practice. For instance, if the two or more putative employers have conflicting financial or commercial interests – as they often do – how are they to bargain a *single* collective bargaining agreement with a union?[13]

In addition, if the two or more employers are parties to a commercial contract for a specific duration, does that durational limit also define the obligation for the putative joint employer to participate in collective bargaining negotiations? And should the ultimate collective bargaining agreement be negotiated to mirror the contractual duration between the commercial parties? Again, such critical questions for the business community are not answered by the

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[11] As the dissent stated in *Browning-Ferris*, "[s]uch global oversight, as opposed to control over the manner and means of performance (and especially the details of that performance), is fully compatible with the relationship between a company and an independent contractor." 362 NLRB No. 186, slip op. 36 (dissent).

[12] *Whitewood Maintenance Co.*, 292 NLRB 1159, 1162-63 (1989).

[13] Indeed, the Board also is in the process of considering a reversal of precedent on the issue of whether the NLRB *can force* two or more employers to create a multi-employer bargaining relationship to negotiate with a union representing the principal's employees and the principal/contractor's jointly-employed employees in a single bargaining unit. *Miller & Anderson*, Case No. 05-RC-079249.

Board majority, and sufficient answers cannot be found in any historical Board precedent given the sweeping nature of the new, unworkable standards.

3. Impediments to Cancellation or Renegotiation of Commercial Contracts

In the ordinary course, commercial parties negotiate contracts for a defined length of time, subject to potential cancellation or renewal. That widely-held practice is now subject to considerable uncertainty and confusion if a joint employer relationship can be found. A putative joint employer's decision not to renew, or to cancel, the commercial agreement could give rise to virtually automatic Section 8(a)(3) discrimination liability, Section 8(a)(5) failure to bargain liability, and imposition of a collective bargaining agreement – with another third party – under *frozen* terms and conditions.[14] Commercial bargaining will thus merge with, and be hostage to, collective bargaining under the NLRA. That massive intrusion into ordinary commercial negotiations and freedom of contract goes to the heart of the Board majority's fallacy in adopting the new *Browning-Ferris* test.

4. Limits on Secondary Boycott and Picketing Protections

In 1947, Congress expressly amended the NLRA to prohibit "secondary" boycotts and picketing directed at neutral employers.[15] Congress intended for secondary or neutral employers not to be drawn into labor disputes between an employer and its own employees. Now, in a single decision wholly unrelated to those secondary boycott provisions, the Board has undercut those very provisions by expanding the universe of "employers" that automatically lose neutral status based on their commercial relationship with a third party. This combined with the Board's prior "bannering" decisions,[16] has the effect of erasing secondary boycott restrictions from the law. And once deemed an "employer," a formerly neutral company can be subject to union pressures at *all* of that company's operations throughout the United States and not just the single site or area where the joint employer liability originated.

5. Decrease in Responsible Contractor or Hiring Programs

Finally, the new joint employer standard will have the likely unintended consequence of discouraging companies from adopting responsible contracting policies or supplier codes of conduct, or promoting special hiring programs for certain groups, such as veterans. The new standard exposes companies to joint employer liability if they require or even encourage their contractors and suppliers to meet certain safety and/or minimum labor standards, or otherwise promote special programs on hiring and employment issues. Companies, under this new standard, are now discouraged from asking their contractors and suppliers to meet these legitimate standards, which are intended not to establish *control* over the contractor's employees but, instead, to promote safety, compliance with the law, and larger societal goals.

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[14] 362 NLRB No. 186, slip op. 40-41, 44 (dissent); *see also CNN America, Inc.*, 361 NLRB No. 47 (Sept. 15, 2014).

[15] 29 U.S.C. § 158(b)(4).

[16] *See, e.g., Carpenters & Joiners of Am. Local 1827 (United Parcel Serv. Inc.)*, 357 NLRB No. 44 (2011); *Sheet Metal Workers Local 15 (Galencare Inc. d/b/a Brandon Reg'l Med. Ctr.)*, 356 NLRB No. 162 (2011); *Southwest Reg'l Council of Carpenters (New Star Gen. Contractors Inc.)*, 356 NLRB No. 88 (2011); *Carpenters & Joiners of Am. (Eliason & Knuth of Ariz. Inc.)*, 355 NLRB No. 159 (2010).

Labor unions, human rights groups and the international labor community all have urged companies to adopt responsible contracting policies or supplier codes of conduct in order to ensure that the company's suppliers and contractors, both domestically and internationally, adhere to minimum labor standards, provide safe working conditions for their employees, and adopt environmentally friendly practices.[17] The policies may require that suppliers and contractors pay a living wage, accurately pay and report employees' overtime, provide health insurance or other welfare benefits, prohibit certain materials that are deemed to be harmful to the environment, require updates to facilities, and mandate the use of certain types of safety equipment. The Board should not be in the business of creating disincentives for companies to adopt these policies. Yet *Browning-Ferris* does precisely that.

I urge passage of H.R. 3459 for all of the reasons discussed herein.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Subcommittee may have.

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[17] *See generally* Eduardo Porter, *Dividends Emerge In Pressing Apple Over Working Conditions in China*, N.Y. Times, Mar. 6, 2012.

Chairman ROE. Thank you for yielding.

I will now like to yield five minutes to the chairman of the full committee and lead author of the legislation, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman.

Thank you to the panel. All excellent witnesses. Great deal of expertise; great deal of passion today. Wonderful stories about bakeries and Burger Kings.

And well done, to both of you.

Wow. This is so often the case in a hearing like this. We have got this account from Professor Harper and this account from Mr. Cohen, a former NLRB member, and they are not exactly the same.

And in fact, when the board ruled in *Browning-Ferris* it was a 3 to 2 decision. So there were members of that board who were concerned. In fact, in their dissent—a scathing dissent, I might add—they argue—the minority, the dissenters—argue that, "the majority abandons a longstanding test that provided certainty and predictability and replaces it with an ambiguous standard that will impose unprecedented bargaining obligations on multiple entities."

Doesn't line up very well with Professor Harper's description of how narrow *Browning-Ferris* was and how it is not possible to look at it any other way as being very narrow and would not apply to the concerns of first two witnesses.

So, Mr. Cohen, do you agree with the dissenters in this case?

Mr. COHEN. I believe that the dissenters have done a thorough and very good job in pointing out the difficulties that the *Browning-Ferris* decision poses. It was a, as I said, a much anticipated case, and obviously from the length and the number of arguments it was very, very well-considered by the dissenters.

Mr. KLINE. Well, in his testimony Professor Harper states that Browning-Ferris was a "narrowly crafted opinion that reinstates a prior definition of the joint employer relationship." And both professors, Harper and Lofaso, also describe the board's decision as a return to the joint employer standard as it was prior to the 1980s.

And yet, I think your words, Mr. Cohen, were "this is groundbreaking." Very different. So could you expand on that for me a little bit?

Mr. COHEN. Sure. With all due respect to the professors, I do not read the pre-1980s decisions the same way. In almost all of the instances there was evidence of actual control before there was actually a finding of joint employer status.

We have had the 1980s standard for the past 30-plus years. What has changed in this period of time is that we are in a period of specialization.

Companies have tended to move to providing their core competencies. This has dramatically changed the workplace, and it makes it more difficult, I understand, for some unions to try to organize some employees when there are many specialized providers. There is no license given to these NLRB members to address that perceived issue by virtue of changing these doctrines.

Mr. KLINE. Yes. Thank you.

When we crafted this short piece of legislation, I have got to say, we were very, very concerned about losing the certainty and predictability that the dissenters talked about and moving into unprecedented bargaining obligations and ambiguous standard. And

clearly we have heard from the testimony here—and I have heard from people all over the country, and certainly my constituents in Minnesota—there is a great deal of uncertainty right now and a great deal of fear.

And I think it is incumbent upon us and this body to return some of that certainty so that entrepreneurs young or old can step out there and start bakeries and Burger Kings and contract for electrical work and all of those things with some certainty and without the fear that is clearly reigning out there right now.

I yield back.

Chairman ROE. Thank the gentleman for yielding.

Mr. Scott, our ranking member, is recognized for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Professor Harper, you raised a book before you. Could you explain what that is and what its—just very briefly for the record, what its standing is in the legal community?

Mr. HARPER. Well, this is a book put out by the American Law Institute, and the American Law Institute is a group of highly distinguished judges, lawyers around the country in every state, and law professors. It is a selected group that has done these restatements for a century.

This is the first restatement of employment law. It builds on the restatement of agency. It went through a decade-long process and debate and heavily researched in all its aspects, including the definition of the employment relationship, for which I was the primary reporter.

And I can tell you that we based this on—

Mr. SCOTT. Just briefly, the restatement of the law is a fairly well-accepted statement of the—of what the status of the law is—

Mr. HARPER. Right. Right. What—

Mr. SCOTT.—generally recognized in the legal community.

Mr. HARPER.—what is the definition in the first chapter, what is the definition of in—the employment relationship? And we have a section on the joint employment relationship.

Mr. SCOTT. Thank you. And could you explain how the new interpretation differs from the traditional interpretation that was found?

Mr. HARPER. Do you mean the—what the board does in BFI?

Mr. SCOTT. Right, how that differs from the traditional interpretation of the law starting in 1947.

Mr. HARPER. It doesn't differ. It is tied to that; it is tethered by that.

In other words—

Mr. SCOTT. But how—

Mr. HARPER.—one reason I think this decision is narrow is that it says, in order for someone to be a joint employer that as a necessary condition they have to be an employer under the common law—a common law which goes back to the 19th century. In order to be a joint employer you first have to be an employer under the common law.

They don't try to change that. They say, "We are going to borrow from that because that is what Congress wanted us to do."

Mr. SCOTT. So when we talk about the original intent, the BFI decision is, in fact, the original intent of the law. Is that true?

Mr. HARPER. Well, Congress, in the *Taft-Hartley Act*, told the board basically that you are not supposed to be departing from the common law; you are supposed to be using the common law when you define such terms as "employer" or "employee."

And so, I mean, that is the reason legislative history shows for the exclusion of independent contractors from the definition of employee that the Taft-Hartley Congress placed in 1947.

Mr. SCOTT. Who changed that in 1984?

Mr. HARPER. Well, the board, by adopting the direct and immediate and limited routines standards, which I see Chairman Kline has passed, but those are pretty ambiguous standards. You talk about uncertainty, but—

Mr. SCOTT. Well—

Mr. HARPER.—those are placed there by the board, and the current board in BFI says we need to go back to the common law.

Mr. SCOTT. Okay. Well, I would just make the point that the change of the traditional law was made by the board, which I think were described as out-of-touch unelected bureaucrats. That is who made the change?

Mr. HARPER. In 1984, right.

Mr. SCOTT. Okay. Now, the new—the words at issue are "actual, direct, and immediate." What happens if you have the control but don't actually exercise it? Under the bill, does that mean you are not an employer?

Mr. HARPER. I think the—under the proposed legislation?

Mr. SCOTT. Right.

Mr. HARPER. Yes. That is my understanding.

Mr. SCOTT. Now, is it possible to have kind of sporadic application—you are covered sometimes, covered with some franchisees when you decide to exercise control, others you don't?

Mr. HARPER. It is possible. I think that this legislation, if passed, would send a message that you can—to the franchisors or larger businesses—that you can control the employees of the franchisees if you use the franchisee owners, like Ms. Fortin, as a middle manager. That is what Browning-Ferris did with the Leadpoint. They used these—

Mr. SCOTT. Well, I am trying to get in one more question before my time expires.

Mr. HARPER. Okay.

Mr. SCOTT. What happened in the Freshii case?

Mr. HARPER. Well, in the Freshii case we had an assistant general counsel issuing an advice memorandum that Freshii was not a joint employer of one of its franchisee's employees because what Freshii did was protect its brand, what Mr. Braddy says that Burger King does—protect its brand by specifying what the product must be, that they have to have their sandwiches and their salads be this consistent, and maybe have the same uniform on the servers—

Chairman ROE. Gentleman's time is expired.

Mr. HARPER.—but not control the wages, and the advice memorandum said the franchisee was the only employer; the franchisor was not—

Chairman ROE. Like to ask you to wrap up. Thank you.

Mr. HARPER. Yes.

Chairman ROE. I will direct myself five minutes.

And I want to label this hearing as "if it ain't broke, don't fix it." We have had both Republican and Democrat administrations since 1984. We have developed millions of jobs,—excuse me, almost 8.9 million workers in the franchise business, billions of dollars in revenue, a system that you heard is working very, very well, and we have now decided to throw a wrench into that system.

And by the way, Ms. Fortin, I am not going to ask you any tough questions with your mother being here, okay? Just to let that out.

I haven't heard a—this is the third hearing that I have chaired, and I haven't heard one franchisee or one franchisor think this is a great idea. And Mr. Braddy up there, with 27 employees and one business, doesn't have a legal firm, he—at $400, $500, $600 an hour has to hire a lawyer to figure all this out.

It is working just fine right now. That would bankrupt him if he had to go into the legal system at hundreds of dollars an hour to argue this out. He doesn't have that resource.

And by the way, Mr. Braddy, thank you for what you do for your community, and thank you what you do to make Baltimore a better place to live and America a better place to live. And you hire people that are disadvantaged, that have trouble finding work anywhere else, and I want to personally right here on TV thank you for doing that.

I want to ask the two—three business owners here how they think this will affect them. Because if it is such a great idea and it doesn't affect you at all, why have we had these hearings? Why is there such angst out there?

And I will start, Ms. Fortin, with you.

Ms. FORTIN. Thank you, Chairman Roe.

And I assure everyone in this room that I am not a middle manager. I am a proud business owner.

And while we can get into the academic debate about whether it will impact, whether it won't, I can tell you from the real-world, from a small-business perspective that it has already made a change. There is fear out there. My franchisor doesn't know how to react.

And what is going to happen is that franchisors are going to pull back completely and we will be left to try to figure this out on our own, which we are fine to do. Also, insurance costs, EPLI, administrative costs, it is already happening, and it is happening to all small businesses, including franchises.

Chairman ROE. I have, look, worked for myself for 30-something years in a practice of medicine, and I always thought my employer was who wrote my check.

Does Burger King write your check, Mr. Braddy, or do you write the checks to your employees?

Mr. BRADDY. I sign the front of the check.

Chairman ROE. You sign the front of the check.

Mr. BRADDY. Yes. Yes. And that is one of the things I always tell my employees when you are talking about who you work for and who you don't work for. The person who signs the front of your check is your employer.

Chairman ROE. And you determine the working conditions, the hours, who you hire, and who you fire. That would seem to me like

you are the employer. Am I correct in that or did I state that wrong?

Mr. BRADDY. No, you are absolutely correct. I pride myself in being able to hire people who I believe, other than people like me, would be unemployable, and I give them an opportunity to prove to me, and I say that to them going in: "If you prove to me that you can come here and work and be a part of this team, you gain credibility and you can stay here."

Chairman ROE. And you can work your way up—

Mr. BRADDY. Yes.

Chairman ROE.—and perhaps even be a restaurant manager, even with a background that may be less than stellar.

Mr. BRADDY. Yes.

Chairman ROE. I think I want to ask Mr. Cole some questions.

We had some issues and questions down in Savannah when we were there about the legal—the liability you might have if someone—if you subcontract with someone and then there is a work stoppage with the subcontractor somewhere else. How would that affect your business?

Mr. COLE. Negatively, I am sure, but I am not sure how. That is very troubling about this whole thing. We regularly subcontract and are subcontracted to, so we are in both roles all the time. Even when we are a first-year subcontractor, we still subcontract to others.

To Mr. Cohen's point, it is the age of specialization and we regularly subcontract certain things out. For example, more often than not we hire union contractors to do high-voltage terminations and splices.

I am about to bid a job at Dulles Airport and I have already identified a small, woman-owned business to do a portion of the work for us in advance of the bid. So that small, woman-owned business is a union employer. She signed a CBA. I have to completely reevaluate whether I can safely bid the job without being drawn into her CBA. We are a merit shop.

More than anything, what business owners and operators want is clarity from a regulatory agency. And this ruling is vague.

It even uses the language "case by case." They are going to examine on a case-by-case basis. How do I run a company on a case-by-case basis?

To me, this puts a wall up between merit shops and union shops, where we regularly cross the line between each other all the time.

Chairman ROE. I thank you.

My time is expired.

Mr. Pocan, you are recognized for five minutes.

Mr. POCAN. Thank you, Mr. Chairman.

And thank you to the witnesses.

You know, I myself am a small-business owner, last 28 years. Started at 22 years old. So very much like a franchise sort of model. In fact, the business was at one time a failed franchise.

It was called Budget One Hour Signs, and then we took over and it was Budget Signs, made it Budget Signs and Specialties. My dad had the shop in Kenosha and I started one in Madison about 15 months out of college, so understand the area.

But I also understand, you know, the fear that is out there. You know, the chairman mentioned the great deal of fear that is out there.

And, Ms. Fortin, you just mentioned, you know, that people are concerned.

And so I am going to do it in small-business owner plain-speak rather than lawyer-speak, but I am going to ask a lawyer if they can try to do the same speaking style.

As I understand it, BFI essentially went through what they saw as a loophole by what they were doing, and so therefore, they were slapped on the hands because they were trying to get around the law. They are one of the 800-pound gorillas involved in this.

The other 800-pound gorilla is really an 800-pound clown. It is McDonald's, who, I notice, isn't on the panel, who doesn't have Jones Day here at $450 an hour dealing with their case because they would rather not talk about this case. But that is the other big one that is out there.

People who want to go around the law are the problem. But the chairman just—helped by the two business owners talking about their situation—say that someone who has a legitimate franchise and you are a legitimate small owner aren't affected by this new rule.

So, Mr. Harper, as a plain-speaking person rather than, if we can, a law professor, am I paraphrasing things well, or am I—what am I saying wrong?

Mr. HARPER. First I just want to say that I am not going to make any comment on the McDonald's case because I don't know the facts of that case. I don't know whether McDonald's is doing anything to, you know, to use a loophole. I don't know how that case should come out.

But in the BFI case, I read the BFI case, and the facts of that case is that Browning-Ferris owns this facility. Their essential business is doing this—sorting this recycling. They hire Leadpoint to come in to do that as a staffing agency.

They set the pace of the assembly line or the streaming process; they set the hours, the overtime; they set maximum pay. They do things that the franchisors of these two folks don't do, and I assume Mr. Cole does not do when he subcontracts.

So the fact that BFI is found here to be an employer has nothing to do, it seems to me, with the typical franchise case. That is why I say that they are using a loophole here.

There are good reasons for—good business reasons—

Mr. POCAN. If I can, just want to reclaim my time, just to keep going. So the Freshii case is really a much stronger parallel to what—

Mr. HARPER. Yes.

Mr. POCAN.—the two small-business owners have—

Mr. HARPER. Yes.

Mr. POCAN.—than the BFI case.

Mr. HARPER. Yes, yes. And we have the advice memorandum, and that should provide some certainty.

Mr. POCAN. Okay. So then let me take it a step farther.

One of the things you briefly mentioned is you are afraid this bill would actually make it worse for the two small-business owners. Could you just expand on that a little bit?

Mr. HARPER. I understand that certain companies—Domino's Pizza, McDonald's—they have the technology now that they can track employees, and it is possible they could use that technology—I am not saying they do it now; I don't know—but they could use that to control working conditions and make—Ms. Fortin now is not a middle manager. What she described, she is definitely not that. She doesn't want to come that.

But some franchisors may have technology to make their franchisees middle managers, and this bill could send a signal to the board and to the courts that they can do that.

Mr. POCAN. And then if you could, Mr. Cole brought up—because I am a big believer in apprenticeship programs. I think we should do a whole lot more. In fact, we have got a PACE Act I would like to talk to the chairman about, I would like to see happen and I think it should be a strong bipartisan bill.

Could you just address Mr. Cole's concerns with his business? And the light is yellow, so you are going to have to be very brief.

Mr. HARPER. Well, my understanding is that Mr. Cole, when he does the subcontracting, even to a union contractor, specifies what product he wants, what results he wants, what work he needs, but he does not specify how that work—specifically how that work is going to be done.

He asks for a particular product, but he does not specify the processes and the—you know, the hours, the wages of the people, and the specific work products, that he is not an employer under the common law of those subcontractors' employees and therefore he would not be a joint employer under this opinion.

Mr. POCAN. Thank you.

Chairman ROE. Gentleman's time is expired.

Mr. Guthrie, you are recognized.

Mr. GUTHRIE. Thank you, Mr. Chairman. Thanks for having this meeting.

Thank all of you for being here.

I was in business, as well, before I arrived. Still have the family business. My brothers get the privilege of running it every day, so appreciate them for doing that.

Before I get started—and I have heard it several times here—I have 21 counties at home, was home in August, went to a lot of businesses. And no matter what industry I went to, the words you guys have used—your concern, your angst, you don't know, I mean, through financial services, through banks, insurance, even lunchroom workers that I will point out, are just really concerned about the federal agencies moving all of this—these rules down and just the unknowns of how to invest and move forward. So it is consistent what I have heard from each of you.

And so I want to start with Ms. Fortin, if—so what authority, just to kind of get us some facts, what authority do franchisors have over your employees and how much involvement do your franchisors have with your employees?

Ms. FORTIN. Thank you. In my system, my franchisor has no involvement and no authority.

And I would say, if I were to poll my employees, they would probably have no idea who the franchisor even was. They know me and my directors.

Mr. GUTHRIE. How do you think they would respond to having more involvement from a—having two employers, essentially, having more involvement from your franchisor, more—as well as you?

Ms. FORTIN. I don't think they would understand it. What they would know is that everything just slowed down because now we have to figure it all out.

Mr. GUTHRIE. Okay. So—

Ms. FORTIN. And they just want to work.

Mr. GUTHRIE. Just want to work. And—

Ms. FORTIN. They just want to work, yes.

Mr. GUTHRIE.—you want to run your business.

Ms. FORTIN. We want to bake cakes. I don't want to worry about legislation and regulations and policies. I want to bake cake.

Mr. GUTHRIE. Nothing Bundt Cakes, right?

Ms. FORTIN. Exactly.

Mr. GUTHRIE. Yes.

Can you explain some of the benefits that arise from the current franchisor relationship, where the franchisor maintains the brand while the individual focuses on the business?

Ms. FORTIN. Well, for someone like myself, I have a business degree and a law degree. I don't know how to bake cakes—or I didn't. I do now.

I wanted to join forces with someone who did something really well, and that is what I did. And then I was able to use my business expertise and my knowledge in my local market and build a successful business. It is a wonderful model and it has been truly successful for many of businesses across the country, including mine.

Mr. GUTHRIE. How do you think making a franchisor a joint employer disrupts this relationship?

Ms. FORTIN. I don't even understand in any capacity how it would work. How would they even begin? I am in California. We are already regulated, and we have worked very hard to understand those regulations. And so for my parent company to come from another state and even try to understand it, much less help me and guide me—I can do that better than anyone.

Mr. GUTHRIE. Well, thank you.

Mr. Braddy, I appreciate what you do and your story. I was—ran into someone I think everybody on Capitol Hill just really enjoys being around; everybody would call him his best friend, so I will call him a really good friend of mine, Tim Scott—Senator Scott. And he has a great story how a franchisor—franchisee took him in when he was a young man, and now he is a—sitting in the U.S. Senate. So a lot of great opportunities that are provided. I love his story.

So Burger King—does anyone from Burger King Corporation monitor the day-to-day operations of your restaurant to ensure compliance with the *National Labor Relations Act*?

Mr. BRADDY. No one physically comes in to monitor my restaurant.

Burger King does have the potential to monitor my restaurant remotely because they require all their franchisees to use a point-of-sale system that they can monitor, where they can understand and know what my prices are, understand whether or not my people are making drive-thru times. So they have access to my registers. They do have the potential to have access to all of my information.

Mr. GUTHRIE. Well, do you think it would be a good use of their time to come in and monitor you in that way?

Mr. BRADDY. Not at all.

Mr. GUTHRIE. Do you need their supervision, I guess is my question.

Mr. BRADDY. No. The reason I became a franchisee is I like the partnership between having someone who would—who has already baked a cake, and now I can go in and finish the mold and put icing on.

Mr. GUTHRIE. That sounds good.

Since 1984, to determine whether two separate entities should be considered joint employers the NLRB analyzes whether alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. Essential terms and conditions of employment include hiring, firing, disciplining, supervision, and direction of employees.

Do you or do the franchisor hire and fire and determine the work of your employees?

Mr. BRADDY. I schedule interviews every other Wednesday. I sit down with eight people every other Wednesday. Even though I am not hiring, I do the interviews because I always like to have a waiting list of people who want to work.

So I do all the hiring. I don't allow my managers or my assistants to terminate anyone because I want to make sure that once I let someone go it is for a good reason.

Mr. GUTHRIE. But it is you as the business owner, not the—what role does the franchisor play in any of your—those issues?

Mr. BRADDY. None at all.

Mr. GUTHRIE. None at all. Thank you. My time expired. Perfect timing. Thank you.

I yield back, Mr. Chairman.

Chairman ROE. Thank you.

Mr. Polis, you are recognized.

Mr. POLIS. Thank you.

First I want to go to Mr. Braddy and Ms. Fortin.

Both of your testimonies suggest that you are afraid that the BFI decision could make your companies joint employers.

Mr. Braddy, you indicated that your franchise agreement with Burger King provides you with complete control over hiring, firing, scheduling, duty assignments for your employees. Under the NLRB's ruling and common law, that means Burger King would not be considered a joint employer. And I want to ask, on what basis do you believe the BFI decision has any impact at all on your business?

Mr. BRADDY. I have a fear that we are—the NLRB's ruling—

Mr. POLIS. Is there any basis—factual basis for your fear?

Mr. BRADDY. Sure, because I have people that I subcontract out to which I—and I consider myself a customer of theirs. If I am considered to be a joint employer—

Mr. POLIS. And what do some of those subcontractors do for you?

Mr. BRADDY. I have a landscaper. I have a refuse removal company. I have a window washer—

Mr. POLIS. And in those contracts with your subcontractors, do you set the wages or the work hours of those subcontractors and who they choose to employ?

Mr. BRADDY. No, I do not.

Mr. POLIS. Okay. Then I think a simple reading of the BFI case would show that you have nothing to worry about with regard to that.

I also want to go to Ms. Fortin.

Now, in your case, from your testimony, you said the real-world consequences of the NLRB's decision is it would lead to consolidation among our franchisors and loss of autonomy for local franchise business operations.

My question is, how do you get that out of the BFI case if it has to do with contractors? Or are you just talking about a hypothetical outcome for other cases that might be pending?

Ms. FORTIN. I mean, I don't think anyone here can truly answer what is going to happen. I look at words like "indirect," "reserved," "potential." Any contractual relationship at that point is on the table.

Mr. POLIS. But when you are saying the real-world consequences of the NLRB's decision is that it will lead to consolidation among our franchisors and loss of autonomy, which decision are you referring to when you say the real-world consequences of the NLRB's decision?

Ms. FORTIN. I am talking about the potential from this decision.

Mr. POLIS. Okay. Well, I think it is an important change, because here we are talking about a case that is pending. We are talking about a case that doesn't even affect the franchisee-franchisor relationship. It is a case that affects contracting, the BFI case. As Mr. Braddy said, certainly the best practices in contracting anyway, and the ones that he uses, would not be pulled in under the BFI case.

And I want to go to Dr. Lofaso, as well, and I wanted to ask her what she sees as the impact that the BFI decision has, if any, on franchisors and franchisees across the country.

Ms. LOFASO. The BFI case is not a franchise case, so there is no effect at this time.

Mr. POLIS. And so it sounds to me like there is—in some of the testimony there is a conflation of cases. You know, and there are pending cases that could affect the franchisee-franchisor relationship, and I think it would be interesting to reassemble and talk about that after they are decided and whether they—whether that impacts that at all. At this point, the case that has been decided for franchisees and franchisors is the "Freshii" case, which was found in a favorable way to franchisees.

And, of course, the case that was decided with regard to contractee and contractors was the BFI case, which to me seems like common sense. We have a common-law definition of "employer."

If, in fact, somebody who is doing the contracting is setting wage levels and working hours then they are, in fact, their employer. There is no meaningful negotiating unit that the contractor can provide because if their employees go to them they would simply say, "Sorry. We are required to pay you a cap of $10 or $12 an hour," or whatever it is.

I also want to ask about the crux of the BFI case, which is the inability of workers to have anybody to negotiate with. And I wanted to go to Mr. Harper and say, can you explain how the workers at BFI's subcontractor, Leadpoint, how could they collectively bargain for higher wages if this case wasn't decided the way they were—was?

In fact, if they were prevented from speaking about pay with BFI, who actually determines pay, and they couldn't talk to their contractor because they were bound under contract, what other mechanism would there possibly be if this case wasn't decided the way it was?

Mr. HARPER. Well, from reading this decision, my understanding is there was a lot of contention about the pace of those lines, and the break time, and the—being able to stop. And that was—that pace of work is a very essential thing for a worker, how fast they are pressed. And BFI set that pace of work; Leadpoint didn't.

So if they are negotiating—the reason I think, reading between the lines here—

Mr. POLIS.—because of our limited time. So if they—if this case wasn't decided the way it was—

Mr. HARPER. They wouldn't be able to negotiate about that.

Mr. POLIS. There was no one to talk to. Is that—

Mr. HARPER. Right. On that question, which is an essential question.

I think this case could have been decided under the direct, immediate, and limited routine. I think it is an easy case.

Mr. POLIS. Thank you, and I yield back.

Chairman ROE. Gentleman's time is expired. Thank you for yielding.

Dr. Foxx, you are recognized for five minutes.

Dr. FOXX. Thank you very much, Mr. Chairman.

And I want to thank our witnesses for being here today.

One of the comments that was made makes me think of a promise we heard a few years ago, "If you like your health care plan, you can keep your health care plan," that nothing in this is going to have any impact on anybody else, and that is what we were told, you know, in terms of what the health care plan was going to do.

Mr. Cole, Dr. Lofaso said that this BFI ruling would have absolutely no effect on franchisees. How do you feel about that?

Mr. COLE. Well, I am not a franchisee, but what is troubling for me about the BFI case is that it could have been—there could have been a finding of joint employer status under the old definition of the rule. The NLRB interjected uncertainty for all of us by changing the definition of the rule unnecessarily.

In my case, the perfect example is the Dulles Airport job that we are bidding in two weeks. The small, woman-owned business is technically qualified to execute the work on the site, but too small to bond it, too small to manage a $5 million project. So I will be

the project manager; I will be the bonding agent on the job; I will be at risk on the entire job.

And I will direct her forces. I will have to tell them where to go. Now, since she has a CBA I am not going to obviously tell her how much she pays; she has already decided how much she is going to pay those people.

But I am at risk because she has a CBA. If we finish the project early then I am sending her employees home, but her contract with the union might not be up. So now I am—in a joint employer situation I am in deep trouble.

Dr. FOXX. Okay.

Mr. Cohen, what is your response to what Dr. Lofaso said?

Mr. COHEN. Thank you. I believe that the fear and uncertainty across the business community, whether it be franchise situations, contract situations, up and down the line, is real and something that business people are justifiably concerned about.

There has been a lot of emphasis on what the general counsel did in the *Freshii* case—the associate general counsel—and that everybody ought to take a deep breath and realize that the law is not going to be bad on franchise situations.

I don't know what the law is going to be on franchise situations. But the Freshii case was a memorandum issued by the associate general counsel and the general counsel, a prosecutor for the NLRB. He decided not to prosecute that case through his division of advice and finding and alleging joint employer status.

That is in no way binding on the board. It is not board precedent at all.

Dr. FOXX. Well, thank you very much.

It seems to me that if our colleagues think that this has no impact then I don't understand why you would be so opposed to this legislation. Because if the legislation simply is there to clarify, then I don't quite understand why there is any real strong opposition to it.

Ms. Fortin, I want to—I know you worked for a year with the Nothing Bundt Cakes cofounders to develop a franchise model for them and to become their first franchise bakery. Now there are 150; you own six of them.

Why has franchising been successful for Nothing Bundt Cakes? And if the broad *Browning-Ferris* joint employer standard had been in place eight years ago, do you think you would have gone to all the effort to become a franchisee?

Ms. FORTIN. Nothing Bundt Cakes has been successful in part because they partnered with business owners like myself who had expertise, knowledge in other areas. We wanted to own our own businesses; we wanted to live our American dream, but we didn't know how to bake, so we needed their brand.

And that is really—I loved the product. I had it at both of my baby showers. That is why I got involved. And I lived in Las Vegas at the time, and I moved to San Diego to start the company.

If this had been in place back then and we were in this discussion about oversight, I don't know that I would have wanted to jump into the arena and do this.

Dr. FOXX. Mr. Braddy, I just want to say thank you so much for the great example that your business is providing for other busi-

nesses in terms of what you are doing in the community, in terms of what you are doing for rehabilitation. I think you are a wonderful role model, and I thank you so much for all the efforts you put into helping your community.

Mr. BRADDY. Thank you.

Chairman ROE. The gentlelady's time is expired.

Ms. Bonamici, you are recognized for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman.

And thank you, to all the witnesses. It has been an interesting discussion.

And I strongly support the right of workers to collectively bargain for fair wages, and reasonable hours, and a safe workplace, health care. These are really hallmarks of a fair labor market.

And unfortunately, my concern about the bill that we are talking about today could limit the ability of workers to engage with all of the employers who control the essential terms and conditions of employment at the bargaining table. And in fact, that is what the Browning-Ferris case is about: acting like an employer without the responsibilities of an employer.

I hope that this committee considers policies that help workers, like paid sick leave, increasing the minimum wage, increasing access to retirement security. Those are policies that lift up families and help the economy—for example, Mr. Scott's WAGE Act, to strengthen protections for workers so they can exercise their right.

But I wanted to follow up on questions that Mr. Pocan and Mr. Polis asked. I am a little bit like Ms. Fortin in that I used to practice law before I had children, and then I changed careers.

When I practiced law, in fact, a lot of what I did was represent franchisees, so I know a lot about what you do and appreciate all of that.

And Ms. Fortin testified she was terribly worried because of Browning-Ferris.

And I think your testimony says, "My franchisor has nothing to do with hiring my employees or setting their wages and benefits. My franchisor has nothing to do with the day-to-day operations of my small business."

And, Mr. Braddy, thank you for all you do, as well. You talked about the potential harm and devastating consequences, but then you said, "I am in complete control of the hiring, firing, scheduling, and duty assignments of my employees."

So it sounds like those are much more like the Freshii situation than they are like Browning-Ferris.

So you may have things to worry about. I would worry about earthquakes, I think—I am on the west coast too—fires. I mean, there is lots to worry about. But it seems like when you look at the situation that you are in your testimony, the Browning-Ferris case is definitely not something that should cause you concern.

I wanted to ask the—Professor Harper and Dr. Lofaso, could you talk a little bit about the significance of the—and I know Mr. Cohen said it is just an opinion, but can you talk about the significance of the Freshii case? And I want time to ask another question.

Mr. HARPER. You want to start? Go ahead.

Ms. LOFASO. Sure. Well, Mr. Cohen is right that it doesn't have precedential—it doesn't have—it is not mandatory authority. That is absolutely correct.

However, the general counsel did not put it forward to the board, and it—and under those facts, is a—you have a franchisee situation—franchisor, which is in control of the brand but not in the labor relations. So under BFI, applying that law, you would have—you would not have a joint employer situation.

I would like to correct the record on something that Mr. Cohen did say, however, which is that he stated that supervisory status is—the board only does it when you are exercising the authority, and that is not correct. The plain language of the act actually contemplates mere possession, and then it says if exercised with—if it were to be exercised, it is exercised with independent judgment.

So first of all, the language is different, and it is also not true.

Ms. BONAMICI. Thank you. And I am going to ask Mr. Harper to briefly weigh in on that.

But I also want to ask you, Mr. Harper—it has been a while since I was in law school—so it appears that there were two different periods. There was a comment made in the testimony that the bill that is being contemplated today would restore the original intent of the law. I don't get that impression at all.

So could you go through—

Mr. HARPER. It is hard—

Ms. BONAMICI.—for those non-lawyers, what was the law—

Mr. HARPER. It is hard for me to understand that, that it would go back to the original intent, because the BFI decision says they are based—they want to go back to those precedents.

Now, Mr. Cohen said he reads those precedents one way, that there has to be actual involvement, and he thinks that the board majority is reading another way. That is sort of beside the point because they are saying those precedents are binding; they are saying the common law tethers us. And that is what Congress says.

So it is not uncertain any more than the common law is uncertain because we have all these precedents limiting who can be a joint employer.

I think the Laerco decision in 1984 and the developments after that is what is ambiguous and uncertain and what is not based on anything in the statute. I don't know where they came up with direct, immediate, and limited routine. We don't have any explanation from those old boards where they came up with those things.

Ms. BONAMICI. And one more quick question before my time expires: There was some testimony about how almost any contractual relationship could trigger a finding of joint employer status—for example, making someone liable for subcontractors, vendors, suppliers, and staffing firms. Is that correct or is it a misreading of the—

Mr. HARPER. That is a total misreading—

Chairman ROE. Mr. Harper, hold that thought—

Mr. HARPER. Okay.

Chairman ROE.—and we will get your answer—

Ms. BONAMICI. My time is expired.

Thank you, Mr. Chairman. I yield—

Chairman ROE.—expired.

Mr. Allen, you are recognized for five minutes.

Mr. ALLEN. Thank you, Mr. Chairman.

And thank you, panel, for this discussion.

And, of course, I—under full disclosure, I want to confess to you that I am a former small-business owner in the construction industry, Mr. Cole. And yes, I have subcontracted work to both merit and union companies—labor-only contracts because, like I said, some of these smaller companies that deserve every opportunity in the world to work in our industry don't have the capital to bond or fully subcontract a project, so we have to enter into these agreements for labor only. And that seems to be the debate here today, in listening to all sides.

The thing that is disturbing to me is that the NLRB said that they are going to deal with this on a case-by-case basis. I think that is the problem out there, meaning that your project at Dulles, if, you know, the unions made a complaint against the way you were subcontracting that project, could come in and file a lawsuit against you.

I guess the first question: Do you put money in your bid to defend yourself, as far as lawsuits are concerned?

Mr. COLE. Certainly not. I would never get the job if I did that.

Mr. ALLEN. Okay. So that just comes right off the bottom line.

Mr. COLE. Absolutely.

Mr. ALLEN. So you have got this—you have got to defend yourself.

As far as the case-by-case basis, is that a fear we are talking about here? I mean, you are trying to bid a job, put people to work, and now, okay, how do I confidently bid this project, and is it going to also run the cost of the project up in contemplating all this that might happen?

Mr. COLE. Absolutely. I mean, contracting is all about risk management. You mitigate everything you can and manage what you can't mitigate.

And I don't know how to handle case-by-case basis. I need something firm to—in order to understand how I subcontract with other companies, particularly union companies.

The NLRB had something firm and took it away. It was crystal clear before this case with BFI, which, I would repeat, didn't need a change in the rule in order to have a finding of joint employer status.

Mr. ALLEN. Mr. Cohen, I am from Georgia, a right-to-work state. And, of course, Mr. Cole and myself, in the construction business we work multistate.

How will this rule apply, for example, across—you know, where you go from states that don't have right-to-work laws to states that do have right-to-work laws, and how complicate dis that going to be?

Mr. COHEN. Talk about case-by-case. It would be state-by-state.

There are—could be very, very different rules. The dissent in the Browning-Ferris case showed the multitude of relationships that could flow from the decision which the board majority decided to issue. So it is a deep problem.

Mr. ALLEN. So, and this rule would then be subject to—constantly by the courts. It would increase the cost of doing business.

So are there other examples of federal intrusion on your business that you would like to talk about—any of our business folks—that you are dealing with right now that—

Mr. COLE. How much time do I—

Mr. ALLEN. Well, you don't—I don't have much time left, but, I mean, is it—it is fair to say that there is reasonable angst here about what the Federal Government is doing.

Mr. COLE. Yes. Absolutely. I mean—

Mr. ALLEN. You know, you have got to walk in your shoes to understand that, as well—

Mr. COLE. Absolutely.

Mr. ALLEN.—and you have got to understand that, you know, when it comes to legal issues, particularly with the Federal Government, you are going to get out-lawyered every time.

Mr. COLE. We need to understand the rules to comply with them.

Mr. ALLEN. Yes.

Mr. COLE. Okay, so if I am trying to mentor a small business—

Mr. ALLEN. Yes.

Mr. COLE.—they are—the young business owner is the first one to make a mistake, not to be the evil guy trying to mess with somebody.

Mr. ALLEN. Yes.

Mr. COLE. The small business is the one that is going to make a mistake and get me in trouble.

Mr. ALLEN. Right.

Mr. COLE. So I—it is not on my best interest to mentor small businesses under the new definition of the rule.

Mr. ALLEN. Yes.

Mr. COLE. It is in my best interest to just hog everything for myself.

Mr. ALLEN. Well, let me make a point here. You know, this economy is growing some say at 2 percent. Folks, you know, that is not getting the job done out there.

We need to put people back to work in this country. And this is just another example of overreach by this administration to cause fear and uncertainty in the economy.

You know, in the business world they say, "Just tell us what the rules are and we will figure out how to do business."

Mr. COLE. Absolutely.

Mr. ALLEN. Mr. Braddy, my final comment: Your story is—

Chairman ROE. Gentleman's time is expired.

Mr. ALLEN.—needs to be told. Thank you for what you are doing.

Chairman ROE. Mr. Takano, you are recognized for five minutes.

Mr. TAKANO. Thank you, Mr. Chairman.

Ms. Fortin, as you mention in your written testimony, I too was inspired by the words of his holiness, the pope, Pope Francis, that America is the land of dreams. And it is my hope that we can continue to be the land of dreams for small businesses and employees alike.

And it seems to me that the rights and protections granted by the *National Labor Relations Act* are part of that dream for millions of workers. Instead of focusing on ways to support working

families, such as raising the minimum wage, strengthening overtime protections, or providing paid sick leave, this committee is again attacking the NLRA and the promise it offers workers to speak up for better working conditions and to better themselves.

And moreover, I am concerned that H.R. 3459 is possibly going to strengthen the hand of franchisors vis-a-vis franchisees.

Now, Mr. Harper, I saw you sort of reacting to this case-by-case questioning. Can you respond to some of what my colleague, Mr. Allen, was trying to get at?

Mr. HARPER. Well, I don't understand why folks are saying it is real—was real certain before BFI. I don't understand that because—and Mr. Cole said, well, it didn't need—we didn't need any change in the law to plug the loophole for BFI, but we had two dissenters here applying the 1984 standard, and they are dissenting; they are not concurring under the BFI.

And what it was happening with the law is that it was just a—before the BFI decision, it seems to me, it was just eroding further and the loophole was getting larger. And so what is limited and routine? What is direct and immediate? Those are standards which are not in the statute for which we have no common-law basis for limiting.

It seems to me that the BFI standard is more clear; it is potentially broader. But this angst and fear that is out there, I wonder who creates that angst and fear. Is it the franchisors? Is it the large businesses who are whipping up these people and saying, "You have got a problem"?

They don't have a problem. But the franchisors or the BFIs who want to abuse the system have a problem, and they are whipping this up. They are whipping this up. I think they are responsible, their lobbyists and, frankly, I have to say it, some lawyers who say, "You know, you have got a problem here with this opinion; you better hire us so we can do something for you."

I think that it is the lobbyists and perhaps the lawyers who are whipping up this problem and creating fear in these small-business people around the country. And—

Ms. LOFASO. And may I add—

Mr. HARPER.—that is sad.

Ms. LOFASO. May I add that the case-by-case basis is no matter which standard. It is by law that they have to do case-by-case basis of any kind of collective bargaining representation case.

Mr. TAKANO. So all this talk about case-by-case is really part of the hyperbole that is—

Ms. LOFASO. Yes. I believe the witnesses believe that, but they are being misled.

Mr. TAKANO. So can you, just with the time I have left, explain further how H.R. 3459 actually sends a signal or can strengthen the hand of franchisors over franchisees? I am interested in making sure that franchisees get a fair break vis-a-vis the franchisors, and so to—that there is, in fact, control, autonomy, and not a fictional autonomy.

Mr. HARPER. Well, I think when Congress acts it sends a signal and courts respond to that, as they should, and the board responds. If Congress acts in response to the BFI decision, the—it looks—the signal is that the BFI decision was wrong.

Mr. TAKANO. So, in fact, Ms. Fortin and Mr. Braddy, under this law, could be weakened in their position vis-a-vis the franchisor.

Mr. HARPER. Well, I—as I said earlier, I—

Mr. TAKANO. As far as their autonomy goes.

Mr. HARPER. Yes. It is possible that franchisors—I am not saying their franchisors, but it is possible some franchisors would step in and say, "Look, we have—we can get the best of both worlds. We have the technology. Now we can control employment relationships without being responsible for that."

Mr. TAKANO. So reduced liability, more control, and less autonomy for the franchisees could be the result of this law?

Mr. HARPER. Yes. Yes.

Mr. TAKANO. All right. Thank you.

Chairman ROE. Thank the gentleman for yielding.

Mr. Messer, you are recognized for five minutes.

Mr. MESSER. Thank the chairman.

You know, it is an important maxim of life that we are not only accountable for our intentions, we are accountable for our results. And we all want to see workers in America treated fairly in the workplace, but if the decisions of the NLRB destroy the franchise model, you won't just hurt the people who own those franchises; you will hurt all the workers who would lose their jobs because those franchises go away.

We all want to see answers to stagnant wages in this country. We understand that over the last 10 years for many workers in the middle of this economy their wages have flat-lined.

But if you put regulatory burdens on these franchises in a way where they don't have the additional revenue to increase wages, you are going to hurt the very people that you are trying to help. Not to mention the consumers who go to these places and as the cost of this regulatory burden drives up cost for the individual business owner, then they are going to have to raise the price of their product.

So we can all agree that we want to make sure that workers who work in these franchises are treated fairly. I think we have to look today in this hearing not just at the broad promises but, like so many of the policies of this administration, the outcome of the policies actually ended up hurting the very people that they are trying to help.

Now, I want to talk to both Ms. Fortin and Mr. Braddy about a—something to get on the record about the relationship that you have with your franchisor.

At first glance, it might appear that sharing liability with your franchisor would be a good thing for small-business owners, that you could be a part of this much larger conglomerate. But could you talk a little bit about how that relationship really works and why that probably wouldn't be true for you?

Ms. FORTIN. Well, my franchisor, like I said previously, doesn't have any involvement in my day-to-day. They guide and they direct on the brand and marketing, and they allow us, capable small-business owners, to succeed in our markets and to establish our own relationships with our employees. And we take care of employees very well.

Mr. MESSER. And if you end up in the middle of a legal battle here on this, who is going to pay for that legal battle?

Ms. FORTIN. Everyone. And it is going to be—take my time and, of course, attorney's fees at $700 an hour while we battle this out.

We are small-business owners. We just want to run our businesses. It takes us away from that, focuses on other things that we shouldn't be focusing on.

Mr. MESSER. Mr. Braddy?

Mr. BRADDY. Thank you.

Specifically in my franchise agreement, my franchisor has chosen to indemnify themselves of any claims that may come against my business when I have anything—any lawsuits against me. So therefore, I would be in those situations alone, and I understand that. I understand it would be on my shoulders.

When I entered into the franchise agreement, I realized that I was going into business for myself and by myself, and I am a small-business owner. So, I need to understand that I need to follow the laws, and I need my franchisor to trust me to do that.

Thank you.

Mr. MESSER. No further questions. I yield back.

Chairman ROE. Thank the gentleman for yielding.

Ms. Wilson, you are recognized for five minutes.

Ms. WILSON of Florida. Thank you, Mr. Chair.

First of all, I would like to give a shout-out to Mr. Braddy for what he does to help African-American men who have been involved in the criminal justice system disproportionately—we all know that. They comprise too many spaces in our criminal justice system, and we have a revolving door.

When they are released from prison there is no work, and you are providing that. And I want to commend you, because that is my life's work. So I feel a connection to you.

And as Pope Francis took the opportunity to visit a prison to give the inmates hope that then when they are released they will be able to come back to society and find a way to help their families and become better citizens. So I want to thank you for that.

I have a question for Dr. Lofaso. And as you mentioned in your testimony, what we are discussing here today comes down to the distinction between possessing power and exercising power to control the terms and conditions of employment. Could you walk us through why this distinction is so important and why the court was correct in finding the possession of power is enough to create an employee-employer relationship?

Ms. LOFASO. Yes. Thank you for that question.

When you are at the bargaining table and, say you are an entity and you are in a dual-employer situation, so there are two potential employers, and only one employer is at the bargaining table, say the one that you see day to day, but the other employer has the power to dictate terms and conditions of employment typically doesn't exercise it, bargaining becomes futile.

This is about employees who are exercising what the Supreme Court has termed a fundamental right and that is the policy of this Congress to encourage the practice and procedures of collective bargaining. That is still the law.

And to uphold the law in an appropriate way, then you must have—bargaining must be not futile. And bargaining is futile if there aren't the people at the bargaining table who are authorized and have the authority to bargain.

If there is someone who is missing from the bargaining table that does—that has authority to stop agreement, that renders the act null, and that is not the policy of this Congress. The policy of this Congress is still the *National Labor Relations Act*.

Ms. WILSON of Florida. Okay. Thank you.

What are the consequences of—if entities are held to be joint employers only if they exercise this power?

Ms. LOFASO. If only if they exercise and they haven't actually, but they do possess it, is exactly that, that they can thwart bargaining. And remember, this is in the situation where you have already a bargaining—you already have a bargaining relationship.

And this is what the real problem is. This is what Professor Harper keeps on talking about, the big loophole. And this is what the board saw as this larger and larger loophole and said, "Look, enough is enough. We have already an increased fractured workforce, and this is getting worse." And so the board acted—with—by the way, I should add, within its authority and actually quite conservatively.

The definition in the act of "employer" is—the common law is actually indirect or direct control, and there is a two-part test, as Professor Harper has repeatedly said today, which is first that it is a common law. There has to be the common law.

But the second law—secondly, not only do you have to have the common-law definition, which would tether everything, but then you have to actually have sufficient control over the terms and conditions of employment. The subcontext being there is to make bargaining meaningful.

Ms. WILSON of Florida. So in other words, are you saying that the legislation before us today would provide a loophole for employers who have the right to control their subcontractors' labor relations—it would help them avoid collective bargaining obligations?

Ms. LOFASO. Yes. And I don't really understand the way it is drafted. If everyone here is saying what I think they are saying, which is they want the common law, why don't they just say—I don't think there is even a need for this, but why don't you just say, "Okay, we want the common-law definition"? It seems to me that would resolve everything.

Ms. WILSON of Florida. Okay. Thank you.

That is fine. I yield back.

Chairman ROE. Thank the gentlelady for yielding.

Mr. Grothman, you are recognized for five minutes.

Mr. GROTHMAN. Thank you very much.

I guess there are two things I would like to go over again with those of you who are in business, and maybe Mr. Cohen could comment as well.

The first thing, Ms. Fortin mentioned legal fees, and there is no question this decision is going to result in uncertainty, which will lead to more legal fees.

I think a lot of times people in the law schools—and we have a couple law professors testifying today—they don't appreciate how

difficult it is and how quickly the legal fees go up, up, up, and they just kind of figure that is part of the system and blah, blah, blah.

But there is no question in my mind this uncertainty is going to result in, you know, more potential lawsuits and somebody on the hook.

I would like to ask one of the three small businessmen here today, and then Mr. Cohen, because I was a lawyer myself so I can't—not being critical of you, but, you know, their experience with legal fees, and is it, you know, just no big deal, and it is everything is going to be fair the more we have to go to court. You want to give us any stories about the enjoyment of having to go over to the local law firm and deal with these decisions?

Ms. FORTIN. I would like to. Thank—

Mr. GROTHMAN. Oh, thank you.

Ms. FORTIN. We have one right now, and what small-business owners don't know is that they need to have EPLI insurance. And before it was if you had 35 employees or more you need it. If you have one employee you need to have EPLI insurance because normal liability policies don't cover that.

So we are paying, out of pocket, those big attorney fees. And trust me—and Jennifer knows this—every time the bill comes in she waits until I am in a good mood to give it to me. It is brutal and it hurts.

Mr. GROTHMAN. You want to give me just a number of the one time you had to—you know, just a little shock in the story?

Ms. FORTIN. Right now we are at $15,000 for 3 months, and it is a nuisance. The plaintiff's attorneys are counting on breaking us down.

Mr. GROTHMAN. Okay.

Mr. Cohen, I always hated billing out when I was a lawyer, so you can tell me.

Mr. COHEN. Yes. Thank you, Congressman, I think.

What I have already encountered with clients is rebid situations—situations where they employ another entity to perform a discrete task. The matter gets rebid from time to time.

Some of their contractors are unionized; some of them are not; some of them are in the process of unionizing. So they have come to us, as many other companies have, and said, "How do we cope with this new standard that the board is having?"

And I can tell you, the situation is quite varied. Of course, every decision is case-by-case at the NLRB; they have to decide every case. But the question is whether there are discrete rules which are going to let us analyze those cases.

There has been so much changing of position that what I find myself doing is not answering what the law is today, but trying to divine what the law is going to be a year or two from now because that is what is of value to the client. And we have had to counsel on the basis of expecting a bad Browning-Ferris decision. And I can assure you, we got it, and companies are paying for it.

Mr. GROTHMAN. So you are, in other words, going to have to bill out more because of that decision, right?

Mr. COHEN. Absolutely. We have to provide this service.

Mr. GROTHMAN. This is something we want the law professors to pay attention to, what happens in the real world.

Now, one other question for you guys—and I apologize for being part of the government even though I am not in favor of that decision that, you know, I know is so frustrating. People say, "How in the world are those people running Washington when these stupid decisions come out?"

But just a general comment from you guys—or maybe Mr. Cohen, because you deal with businesses of all sorts of sizes, and one of the sad things that happened in my life is again and again the small businesses close up and the big multinationals come in, and I think it is because we have more and more regulation that only a big, massive company with maybe in-house counsel or everything can deal with it.

But could you just one more time give me your impression on how this decision, unless we pass this bill, how it affects the mix in this country between small businesses, and instead small businesses drying up and only the larger businesses running the show?

Mr. COHEN. I think it has a direct impact on small business. As I said before, businesses are going to their core competencies, so there are—and I think this is the hope for small business, is to be particularly good at a particular function.

At the same time as the NLRB has changed a multitude of rules in the last several years, they have made it so that there almost needs to be a labor and employment lawyer on speed dial for them.

Mr. GROTHMAN. Right. So if you have got a little business with five or 10 or 30 employees, much more difficult to handle this than if you are a—

Chairman ROE. The gentleman's time is expired.

Mr. GROTHMAN. Thanks so much for giving me the time.

Chairman ROE. Like to thank, again, the witnesses. Each of you have taken your time to be here. It was a great panel, was a great discussion this morning, a lot of good remarks on both sides.

And I will now ask my ranking member, Mr. Polis, if he has any closing comments?

Mr. POLIS. Want to thank our witnesses.

And I think it—you know, we all understand the consequences of the decisions that are being made and will be made by the NLRB. Obviously the paramount issue here is that millions of Americans are struggling with stagnant wages, and in an economy where more workers are employed by leasing companies and perm-temp agencies and subcontractors, the workplace environment is becoming more complex from a legal perspective and on the ground.

This bill, which would limit the definition of a joint employer to only those who have an actual, direct, and immediate control over the terms and conditions of employment, would effectively set up a broad loophole for companies to hide behind in order to avoid negotiating with their workers.

I understand that some of the questions here are about recent NLRB activities, especially from franchisees, and I think it has been made clear in the questioning that their recent decisions have not affected franchisees or franchisors one way or the other.

The BFI case affected contracting; the "Freshii" case was found in favor of the position that is advocated by the franchisees. So any

concerns about that, I think we have established clearly, are premature.

I think none of us up here want to make it more difficult for small businesses to succeed. Really one of my priorities in Congress is removing barriers for small business success, and I think there is a strong middle ground here as long as we encourage caution and patience as we analyze NLRB rulings that are upcoming.

I think it is important the National Labor Relations Board follow their process, including in the pending McDonald's case, without Congress prejudging their motives or undermining their authority before a decision is made.

Once there is a ruling, I look forward to convening again and seeing whether there is any legitimacy to the fear that some of you have expressed with regard to the practices of your franchisees or franchises. If there is, I think you will find great sympathy on both sides of the aisle; if not, then those fears will—are largely unwarranted and will not have any impact at all on your business.

Thank you again, for everyone, for your time and opinion, and I yield back.

Chairman ROE. Thank the gentleman for yielding.

And again, I too thank the panel for being here today.

And having worked in small business, the only employer I ever had in my life was me. And so I understand about that, and I also understand about three people that I see here today who have literally lived the American dream.

Many different backgrounds, but literally, starting as an apprentice, working your way all the way up to the vice president of a company. A high school dropout then decided, hey, that is not the road I want to be on, graduated, worked for the police department, and then began his own business through a series of other ventures before that, and now serves not only as a business leader but as a model for the community, and the franchise business allowed him to do that. And because of family circumstances, Ms. Fortin decided to take the risk.

And I heard your stomach—when you are the one that signs the note at the bank, they are coming after you. And when you look back and your CFO and ask how much—$15,000 might not sound like too much money, but to a small-business person, that is money that will either go in your hip pocket or you could reinvest back into your business through higher wages, or new equipment, or whatever. That is a lot of cakes, I think—$15,000.

And I hear right now Mr. Harper said, "Oh, there is nothing to worry about. It is all a bunch of lobbyists and lawyers that have created this situation." I might agree with that, but there is fear and uncertainty.

We have got three very expensive labor attorneys sitting up here telling us two different things. That is the uncertainty, folks.

You have got experienced people on both sides of this saying: yes, there is a problem; no, there is not a problem. That is very expensive if you are the small-business owner and you are having to pay for those opinions. And that is exactly what we have got right now is this uncertainty.

And Mr. Allen asked before he left about regulations. Let me give you just one little number: In medical administration now—that is

complying with all the regulations—we spend more money on that in America than we do cancer treatment and heart disease. That is how ridiculous this has gotten.

At Vanderbilt University right now, Dr. Nick Zeppos is the chancellor there, just came out with a report that complying with government regulations for his shop at Vanderbilt adds $11,000 to the tuition of each student that goes there per year. What do they get out of that? Nothing but a check that their parents or somebody has got to write or a donor has got to give to help those kids get an education.

So we have the—and we talk about the NLRB. Look, the NLRB is supposed to be, the way I understand it, is a fair arbiter of—look, you have a right to collectively bargain.

I was raised in a union household. That is a right in this country. If you vote to do it, it is your right to do that in America. You can. That is a decision a business makes.

But the NLRB is not a fair arbiter. This one is not. Others have been; this one is not.

And just look at what I have listed to the last six and change years I have been in Congress. Card check: want to take away somebody's right to a ballot, secret ballot. Well, my wife claims she voted for me in the election, but I don't know that for a fact because she has a secret ballot. That is paramount in America right now to be able to have that right.

Ambush elections, persuader rule, the Boeing case, micro-unions, specialty health care, joint employer—all this stuff costs money when you are out there and adds no value. And that cost for the cake or whatever has got to be passed on to me as a consumer. I pay for that, whether it is health care or buying a product.

And that is one of the reasons we have had this hearing today is that small-business people, the last person to get paid is a small-business owner. They are the last one.

Everybody else gets paid. Taxes get paid, employees get paid, the insurance gets paid, the rent gets paid. You are the last person to get paid.

You are the last guy to pick up on the front of that check when you write your name on it, Mr. Braddy.

I want to thank you all. It has been a great hearing. We have got a lot of work to do, and I appreciate your spending your time coming all the way from California, Baltimore, and so forth, to be here with us today. Thank you.

Thank you again to everyone for their time and opinion.

With nothing further, the hearing is adjourned.

[Additional submissions by Dr. Roe follows:]

September 9, 2015

NATIONAL RESTAURANT ASSOCIATION

John Kline, Chairman
Education & the Workforce Committee
U.S. House of Representatives
Washington D.C. 20515

Phil Roe, Chairman
Health, Employment, Labor & Pensions Subcommittee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Kline and Chairman Roe:

On behalf of the National Restaurant Association, I want to thank you for your introduction today of the "Protecting Local Business Opportunity Act."

The National Restaurant Association is the leading business association for the restaurant and foodservice industry. Nationally, the industry is made up of one million restaurant and foodservice outlets employing 14 million people. Despite being an industry of mostly small businesses, the restaurant industry is the nation's second-largest private-sector employer.

As recently as a few weeks ago, some of our members highlighted for your Committee the threat the changes to the joint-employer relationship envisioned by the National Labor Relations Board (NLRB) pose to franchisees and franchisors alike. The ongoing attempts by the NLRB to change the joint-employer standard are bad for workers, employers, franchises, and the economy.

At a hearing on June 24, 2014, on "What Should Workers and Employers Expect Next From the National Labor Relations Board?" witnesses were told that there was nothing to fear and that the NLRB would be impartial. In fact, Ranking Member John Tierney stated, "I'm a little baffled…I don't think this will be a problem for [Restaurants]…I haven't heard any evidence that indicates to me that there is any reason to believe that this board won't be fair minded."

However, the concerns raised by the witnesses were both real and well founded. Less than two weeks ago, in a split 3-2 decision, the NLRB issued a controversial decision in the *Browning-Ferris Industries* (BFI) case. In it, the majority disregarded the decades old joint-employer standard in favor of a new unclear "indirect control" theory, making employers potentially liable for employees they do not employ—jeopardizing business partnerships in all industries.

Once again, I thank you for your leadership on this issue and would like to offer our industry's help to bring clarity back to the treatment of two or more employers as joint employers under the NLRA.

Sincerely,

Angelo I. Amador
Regulatory Counsel &
Senior Vice President for Labor & Workforce Policy

NFIB
The Voice of Small Business.

September 10, 2015

The Honorable John Kline
Chairman, U.S. House Committee on Education and the Workforce
2181 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Kline:

On behalf of the National Federation of Independent Business (NFIB), the nation's leading small business advocacy organization, I am writing in support of H.R. 3459, *the Protecting Local Business Opportunity Act*. This legislation would restore a reasonable legal standard for determining joint employer status.

On August 27, 2015, the National Labor Relations Board (NLRB) overturned more than 30-years of precedent by declaring *Browning-Ferris Industries* to be a joint employer with *Leadpoint*, a staffing services company. This highly controversial decision adopted a dramatically expanded definition of a joint employer, and has the potential to inflict serious harm to the small business community.

Under the previous standard, a small business would be deemed a joint employer only if it exercised direct and immediate control over another company's employees, including the opportunity to hire, fire, discipline, supervise, or direct an individual. Previously, most franchisors, franchisees, and subcontractors were treated as separate independent businesses. In the *Browning-Ferris* case, the NLRB implemented an expanded definition of joint employer, which now includes indirect and even potential, unexercised control over employees. This expansion is greatly concerning to the small business community as it will make it more difficult for small businesses to enter into service agreements with other companies. Further, this new standard could lead to fewer jobs as entrepreneurs reduce their investment in local businesses.

Small businesses are the backbone of Main Street and it is critically important that lawmakers and regulators understand the severe consequences of the NLRB's actions. *The Protecting Local Business Opportunity Act* would restore a reasonable definition for determining who is a joint employer and NFIB looks forward to working with you to enact this commonsense legislation in the 114th Congress.

Sincerely,

Amanda Austin
Vice President, Public Policy

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Government Affairs

James W. Tobin III
Executive Vice President & Chief Lobbyist
Government Affairs and Communications Group

September 14, 2015

The Honorable Lamar Alexander
Chairman
Health, Education, Labor, and Pensions Committee
U.S. Senate
428 Dirksen Office Building
Washington, DC 20510

The Honorable John Kline
Chairman
Education and Workforce Committee
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Alexander and Kline:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB), I write in strong support of the *Protecting Local Business Opportunity Act* (H.R.3459/S.2015), which would restore the traditional definition of joint employment at the National Labor Relations Board (NLRB). We appreciate your leadership on this issue of great importance to many small businesses and working families in America.

The NLRB's contentious decision in *Browning Ferris* expanded the test for finding joint employer status. Under the decision, a company is a joint employer if it has the *potential* right to control or co-determine the essential terms of an employee's employment, including hiring and firing, discipline, supervision, scheduling, seniority and overtime, and assigning work and determining the means and methods of performance. This is a radical departure from the traditional standard of "direct control." *Browning Ferris'* biggest impact on home builders and their contractors will be in three areas: the use of staffing agencies, secondary boycotts, and union organizing.

The determination of joint employment is especially important for home builders. The dominance of small business entities in the residential construction sector illustrates the necessity of the independent contractor business model in the industry. Eighty percent of NAHB's builder members have less than ten employees and build less than ten homes annually. For most builders, there is simply not sufficient internal demand to justify hiring an employee for the numerous specialized tasks required to complete a home project. Consequently, builders rely on an average of twenty-two subcontracting firms to build a home, including framers, roofers, electricians and other types of specialty trades. Without these independent contractors, many family-owned small businesses would simply cease to be viable operations.

NAHB believes the *Browning Ferris* decision will be damaging to the marketplace and housing affordability. The "potential" control standard adopted by the NLRB will lead to centralization of the industry and contribute to higher housing prices.

NAHB strongly supports the *Protecting Local Business Opportunity Act, which* will restore the traditional definition of joint employment and ensure a level playing field for all small businesses. NAHB encourages Congress to consider this legislation without delay. Thank you again for your leadership.

Sincerely,

James W. Tobin III

NCCR
NATIONAL COUNCIL OF CHAIN RESTAURANTS

September 14, 2015

The Honorable John Kline
Chairman
House Education and the Workforce Committee
Washington, DC 20515

Dear Chairman Kline:

On behalf of the membership of the National Council of Chain Restaurants, thank you for introducing H.R. 3459, the *Protecting Local Business Opportunity Act* which responds appropriately to the National Labor Relations Board's (NLRB) misguided decision in the *Browning Ferris Industries* case.

The NLRB's expansive and unbalanced ruling imposes a restrictive definition of an employer that upends the business model for tens of thousands of business owners around the country. This is not the appropriate function of any government agency, especially one in which the president chooses the majority of its members.

The effect of this decision will be sweeping. The NLRB has ruled that the existence of a contractual relationship between employers, through the use of franchise agreements, subcontractors, vendors, temporary workers, etc., will result in a legal "joint employer" relationship which will have dramatic and damaging implications for businesses both small and large.

Chain restaurants are, in the large majority of instances, small business franchisees that operate independent restaurants in local communities around the country. The NLRB is effectively telling these small business owners that their personal business investments and the details of how they run their restaurants in local communities around the country now do not matter. This unilateral decision by the NLRB is contrary to the realities of the 21st century economy and American free enterprise.

Again, thank you for introducing H.R. 3459 and we look forward to working with you to ensure prompt passage of this important legislation by the U.S. House of Representatives.

Sincerely,

Robert J. Green
Executive Director

NATIONAL **RETAIL** FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com/nccr



September 15, 2015

Dear Chairmen Alexander, Kline, Isakson, and Roe:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I write to thank you for introducing the Protecting Local Business Opportunity Act (S. 2015/H.R. 3549), which will help restore the "joint employer" standard that has been in place for over 30 years and bring stability back into the economy for contractors and subcontractors across the country.

On August 27, 2015, the National Labor Relations Board (Board or NLRB) issued its decision in Browning-Ferris Industries altering the "joint employer" standard under the National Labor Relations Act. The standard is used to determine when two separate companies are considered one employer with respect to a group of employees for purposes of liability and bargaining obligations under the National Labor Relations Act. Prior to this decision, companies were only deemed joint employers when they both exercised "direct and immediate" control over the "essential terms and conditions of employment." In Browning-Ferris, however, the Board overturned 30 years of precedent to impose a new standard expanding the definition to include those employers who have "indirect" control and "unexercised potential" control. The two Republican members who dissented in the case explained the potential consequences of such a change, stating that the rule will "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."

The Board's decision will disrupt hundreds of thousands of business operations throughout the country and threaten the ability of hardworking Americans to achieve the American dream of owning their own business. Thank you again for introducing this much-needed legislation, and we urge Congress to quickly pass it.

Sincerely,

Geoffrey Burr
Vice President, Government Affairs

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CHAMBER OF COMMERCE
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RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION, &
EMPLOYEE BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

October 13, 2015

Hon. David P. Roe, Chairman
Subcommittee on Health, Employment, Labor & Pensions
Committee on Education and the Workforce
United States House of Representatives
Washington, DC 20515

Dear Chairman Roe:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, appreciates this opportunity to provide a statement for the record as part of the Committee's September 29, 2015 hearing on H.R. 3459, "Protecting Local Business Opportunity Act" (H.R. 3459 or PLBOA). The Chamber supports H.R. 3459 as a commonsense solution to restore the longstanding and unambiguous "joint employer" standard under the National Labor Relations Act, which has allowed employers to develop business models that have led to increased flexibility, competitiveness, and growth. We look forward to working with you and your colleagues to pass this critical legislation.

I. The Browning-Ferris Decision

A. *The Joint Employer Standard Existing Prior to BFI Provided Clarity and Certainty*

PLBOA is, of course, necessary because of the National Labor Relations Board's (NLRB or Board) controversial 3-2 ruling in *Browning-Ferris Industries* (*BFI*) on August 27, 2015. In *BFI*, the National Labor Relations Board upended decades of precedent to change its standard for determining whether two businesses are "joint-employers" of certain workers. For over 30 years prior to *BFI*, the Board maintained a clear test for determining whether two separate companies were joint employers: does the alleged joint employer exercise direct and immediate control over the workers at issue? This direct control was generally understood to include the ability to hire, fire, discipline, supervise and direct. *TLI, Inc.* 271 NLRB 798 (1984), enforced 772 F.2d 894 (3d Cir. 1985).

This test made perfect sense. It ensured that the putative joint employer was actually involved in matters that fall within the Board's purview, to wit, the employment relationship. It also ensured that such companies would not be embroiled in labor negotiations or disputes involving employees and workplaces over which they had little or no control. This was particularly important because a large company may have contractual relationships with hundreds or thousands of franchisees, vendors and subcontractors. Indeed, it made sense to impute liability – as the now-previous standard did – only in those cases in which an employer was in a position to investigate and remedy unlawful actions. It is no surprise that prior to the decision in *BFI* this standard had been in existence for over 30 years and had been endorsed by reviewing federal courts of appeal. [1]

B. BFI's Joint Employer Standard is Ambiguous, Uncertain and Provides no Guidance for Employers

In *BFI*, the Board overturned this clear bright-line test in favor of an amorphous, ill-defined test which will find joint employment even where one company only has the right to exert indirect or potential control over the terms and conditions of another company's employees. This confusing, multi-factor test provides absolutely no guidance to employers on how to structure their relationships so as to avoid joint employer liability. Quite clearly, this new test is both uncertain and seemingly easy to meet, and will therefore "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have." *Browning-Ferris Industries of California*, 362 NLRB No. 186, slip op. at 21 (2015).

The new *BFI* standard is unmoored from the realities of the modern workplace, as the very nature of a contractual relationship presupposes at least *some* type of control over the services, results or product agreed to. Surely a company (or perhaps the U.S. House of Representatives[2]) that contracts with a food service business to provide cafeteria services will retain a modicum of indirect control to ensure that food quality, prices and speed of delivery are what it bargained for in the contract for services. Under *BFI*, this type of reserved and indirect control may be sufficient to establish a joint employer relationship between the two parties to the contract. *See id.*, at 25-26. As one can easily imagine, these types of contractual relationships are myriad and commonplace. According to the dissent, "the number of contractual relationships now potentially encompassed within the majority's new standard appears to be virtually unlimited." *Id.*, at 37.

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[1] *TLI* and *AM Prop. Holding Corp.*, 350 NLRB 998 (2007) were affirmed by the Third Circuit and Second Circuit, respectively.

[2] WASHINGTON POST, June 9, 2015 "Capitol Hill to Run on Dunkin...at Least on the House Side" available at http://www.washingtonpost.com/blogs/in-the-loop/wp/2015/06/09/capitol-hill-to-run-on-dunkin-at-least-on-the-house-side/

The NLRB claims that the application of *BFI* is limited in scope – that it is to be applied on a case-by-case basis and "does not govern joint-employer determinations" under other labor and employment statutes. But this is mere lip service to an employer community which finds itself at the mercy of one of the most controversial and politically-motivated Boards in history. For example:

- This is an NLRB which lacked a constitutional quorum, yet continued to issue decisions until being stopped by the Supreme Court in a 9-0 decision. *National Labor Relations Board v. Noel Canning*, 573 U.S. ___ (2014).[3]

- This is an NLRB that has promulgated regulations to speed up the union election process, unfairly limiting employers' abilities to communicate with employees about the pros and cons of unionization. The Board issued this regulation despite the fact that prior to issuance, 94% of all elections were conducted in 56 days and unions won about two-thirds of all elections.[4]

- This is an NLRB which blatantly attempted to force employers to post biased workplace notices about unionization, despite having no statutory authority to do so. *See Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152 (4th Cir. 2013).

- This is an NLRB which is willing to overturn decades of precedent in significant cases in order to, among other things: limit employees' abilities to decertify an unwanted union; require employers to remit employees' union dues to unions even upon expiration of a collective bargaining agreement, thereby providing unions with greater leverage at the bargaining table; permit union organizing on employer-owned email systems; award itself a second bite at the apple when it does not like the decision of an arbitrator; and require employers to disclose to union officials confidential witness statements made during the course of workplace investigations.[5]

- This is a Board whose *Specialty Healthcare* decision – another case overturning Board precedent – purportedly only made "modest" changes to the law, but has been applied to, among other workplaces, dog training facilities and department stores. [6]

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[3] The U.S. Chamber Litigation Center represented Noel Canning, a member of the Chamber, in the Supreme Court, and served as co-counsel to Noel Canning alongside the law firm Jones Day.

[4] *See* U.S. Chamber comments, April 7, 2014, available at https://www.uschamber.com/sites/default/files/documents/files/NLRB%202011%200002%20US%20Chamber%20of%20Commerce.pdf

[5] *See*, respectively, *Lamons Gasket Co.*, 357 NLRB No. 72 (2011); *WKYC-TV, Inc.*, 359 NLRB No. 30 (2012); *Purple Communications*, Inc., 361 NLRB No. 126 (2014); *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014); *American Baptist Homes of the West d/b/a Piedmont Gardens ("Piedmont Gardens")*, 362 NLRB 139 (2015).

[6] *Guide Dogs for the Blind*, 359 NLRB No. 151 (2013); *Macy's, Inc.*, 361 NLRB No. 4 (2014).

Time and time again, the Board has stretched its legal authority in order to advance policy goals that are simply driven by the agenda of organized labor. Why should this time be any different? Clearly, the time has come to enact legislation that will reign in an out-of-control Board, and PLBOA is a vital first step.

II. *BFI*'s Impact on Employers

By changing its joint employer standard in *BFI*, the Board has opened up a Pandora's Box of problems that may now potentially befall almost any employer who enters into a contract for services with another business. Indeed, this new standard is really about expanding the universe of potential employers who can be targeted by the NLRB, unions, and plaintiffs' bar. Many of these problems were set forth in our letter to you dated September 23, 2014, as well as in the Chamber's Workforce Freedom Initiative's report "Opportunity at Risk."[7] However, it is worth reiterating that some negative results of this new decision include the following:

1. Corporate Campaigns. Being able to characterize large, well-known businesses as the "employer" of a targeted group of workers who are employed by smaller, lesser known businesses, will encourage unions to launch very public organizing campaigns in hopes that the larger employer will bend to public pressure and recognize the union.

2. Liability under the National Labor Relations Act. Because joint-employers are liable for each other's acts and omissions, expanding the pool of joint-employers will result in increased labor law liability for employers, even in cases in which they exert little or no control over the workers involved.

3. Collective Bargaining. If the direct employer is organized, the "indirect employer" would have to participate in collective bargaining. Depending on the circumstances, the "indirect employer" could be dragged into bargaining relationships with hundreds of entities over whose day-to-day operations they have no control.

4. Secondary boycotts. The NLRA's prohibition on secondary boycotts means that if a union has a dispute with one employer (e.g., a janitorial services company), it cannot entangle other employers in the dispute (e.g., the factory

[7] The WFI report is available here: http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final_0.pdf. In conjunction with this report, on March 20, 2015, the Chamber hosted a conference entitled, "The NLRB and the Joint-Employer Standard." The conference featured commentary from two former NLRB members, Andy Puzder (CEO of CKE Restaurants, Inc.), and several small business owners. Additionally, after *BFI* was issued the Chamber hosted a briefing call on September 9, 2015. Approximately 150 Chamber members dialed-in, which is indicative of the significance of this issue.

owner that contracts with the janitorial services company). This distinction will likely be eviscerated under *BFI*'s new standard, allowing unions to picket and demonstrate against both entities.

Worse, the plaintiffs' bar and other enforcement agencies may attempt to import the new *BFI* standard into other areas of employment law[8] such as:

1. Threshold employer coverage. Many statutes, such as the Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act have small business exceptions and only apply if an employer has a certain number of employees. By loosening the joint-employer standard, employer coverage under such statutes will explode. This would essentially eliminate carefully-negotiated small business exceptions in these federal statutes.

2. Discrimination law. *BFI*'s new joint-employer standard will encourage both the EEOC and the plaintiffs' bar to stretch the bounds of the law in an effort to entangle more employers in discrimination lawsuits.[9] Importantly, compensatory damages are capped under Title VII, and the caps generally increase as the number of employees increases. Thus, the plaintiff's bar will be encouraged to establish joint employer status because doing so could increase the number of employees, thereby increasing the amount of available damages.

3. Wage and Hour issues. Employers who use subcontractors may be liable for the subcontractor's wage-and-hour violations if it is determined they are a joint-employer of the employee. The Wage & Hour Division and the plaintiffs' bar will likely look to see how they may take advantage of *BFI*. It is no secret that the current Wage and Hour Administrator, David Weil, has a strong distaste for alternative workplace arrangements.

4. Occupational Safety and Health Administration (OSHA) issues. *BFI* may also provide an opportunity for OSHA to ratchet up fines against a parent company for repeated violations. For example, the same safety violation occurring at several different franchisees could be considered repeat violations if the franchisor is considered to be a joint-employer with each of the franchisees. Moreover, a recently released internal OSHA memorandum reveals that the agency is looking at the potential for a joint-employment relationship between franchisors and franchisees when investigating workplace safety.

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[8] Note that most employment laws have damages, enforced through both agency action and private court action, which exceed those under the National Labor Relations Act, some including punitive and compensatory damages with jury trials. Hence, there is a built-in incentive for the plaintiffs bar to push the envelope in this area of the law, relying on the reasoning in *BFI*.

[9] *See, e.g., Little v. TMI Hospitality, Inc.*, et al. 2:15-cv-02204 (C.D. Ill., September 18, 2015)(in a complaint claiming sexual harassment and race discrimination, the plaintiff cites to *BFI* and has alleged that the hotel owner and the corporate brand are joint employers).

5. Affordable Care Act Issues. Under *BFI*, individual companies falling well below the employer mandate threshold and small businesses that depend on independent contractors or temporary workers could soon have to comply with the employer mandate's requirements. The franchise and temporary worker/subcontractor communities will be particularly hit hard since they use high numbers of part-time workers that might now be considered "full-time" under the new definition of full-time work in the ACA as 30 hours per week.

III. Correcting the Record of the September 29th Hearing

A. BFI Does Not Return to Any Pre-Existing Standard Because Prior to 1984, There Was No Standard At All

There was some discussion at the hearing that *BFI* is simply a return to the NLRB's joint employer standard that existed prior to the decisions in *TLI* and *Laerco Transportation,* 269 NLRB 324 (1984). In reality though, there was no consistent NLRB joint employer standard prior to these two decisions. It is notable that in their written testimonies, neither Professor Lafosso nor Professor Harper cite to a Board case which established this alleged prior standard.[10] They cannot because there is no such case. In fact, a brief examination of NLRB decisions prior to *TLI* and *Laerco* reveals that the Board had no joint employer standard at all.

One need look no further than the Teamsters Local 350's (the union) initial Request for Review in *BFI* for evidence that the Board did not maintain a consistent joint employer standard prior to 1984. In its brief, the union argued to the Board that it could find *BFI* to be a joint employer under the then-existing standard, and also under multiple "broader formations" of the standard. Tellingly, the Union did not encourage the Board to return to an allegedly consistent, rock-steady formulation of the joint employer test announced in some prominent Board decision. Instead, the union's brief reads like a smorgasbord of various NLRB joint employer standards espoused over the years from which the Board could choose. Thus, the union urged the Board to adopt any of these joint employer tests with supporting cases:

- "Indirect control." *Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966).
- "Unexercised" or potential control. *Jewel Tea Co.*, 162 NLRB 508 (1966).

[10] Professor Harper cites to *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964) and *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d. Cir. 1982), as the "controlling precedents" that existed prior to *TLI* and *Laerco*, but neither of these cases sets forth a two-part multifactor test – which relies on indirect or potential control – to which *BFI* supposedly returns. Moreover, Professor Harper writes that "one can debate how to characterize the facts and holdings of all the older controlling precedents," which indicates that the law at the time was unsettled. Indeed, if there was some previous controlling standard prior to 1984, one would not need to engage in "debate."

- "Industrial realities." *Jewell Smokeless Coal,* 170 NLRB 392 (1968), enfd. 435 F.2d 1270 (4th Cir. 1970).

In addition to these formulations, the Board also employed the "direct control" test in some cases. *See O'Sullivan, Muckle, Kron Mortuary*, 246 NLRB 164, 165 (1979) (funeral home was not joint employer with company who provided it with driving services, because service provider was "solely responsible for hiring, disciplining, and discharging its drivers"). Moreover, other pre-1984 cases expressly denounced the "indirect control" standard. *See Walter B. Cooke*, 262 NLRB 626, 641 (1982)(finding "such indirect control over wages and hours to be insufficient to establish a joint employer relationship."). Adding to the confusion, prior to 1984, the Board sometimes conflated its "joint employer" test with its test for "single employer." *See Parklane Hosiery Co.*, 203 NLRB 597, amended 207 NLRB 991 (1973).[11]

In sum, prior to 1984, the Board did not have a consistently applied joint employer test. It examined cases under the direct control test, the indirect control test, the unexercised control test, the industrial realties test and other tests. Sometimes, the Board applied the wrong test altogether. It was not until *TLI* and *Laerco* that a consistent and cogent joint employer test emerged. Enactment of PLBOA is necessary to return to this consistent and coherent standard.

B. The Freshii Memorandum Carries No Legal Weight

On April 28, 2015, the NLRB's Division of Advice issued a memorandum to Region 13 regarding whether Freshii (a franchisor) should be responsible as a joint employer for the alleged unfair labor practice committed by Nutritionality (its franchisee). The memorandum concluded that Freshii and Nutritionality were not joint employers. While this was likely welcomed news for both Freshii and Nutritionality, the memorandum has no broad application to the employer community in general. This is because the Board makes policy through its jurisprudence, not through internal advice memoranda. Simply put, "advice memoranda do not constitute Board law." *Kysor/Cadillac*, 307 NLRB 598, 603 (1992). Thus, attempts during the hearing to elevate the significance of the Freshii memorandum and downplay the significance of *BFI* were misplaced.

[11] "Single employer" is a similar but different labor law term of art which addresses the question of whether two supposedly separate employers are actually one employer. The test for determining whether two entities are actually the same, "single employer" involves an analysis of the following factors: (1) inter-relation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. *See, e.g., NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982).

C. BFI Provides No Guidance to Employers

There was some patronizing comments made during the hearing that employers should not be so concerned about *BFI* because: (1) the ruling will only be applied on a case-by-case basis; and (2) it only involved "contracting", so franchisors and franchisees should have nothing to worry about. First, "case-by-case" applications of rules are inherently unpredictable. This very uncertainty of how the new criteria *could* be applied will raise serious concerns in the business community about how future workplace contractual relationships between two or more employers should be structured. And no employer is going to risk energy, time and capitol to volunteer as the Board's next guinea pig.[12]

Second, at the close of the hearing, Ranking Member Polis stated, "Their [NLRB's] recent decisions haven't affected franchisees or franchisors one way or the other. The *BFI* case affected contracting." One would think that it should go without saying, but evidently it must be said: the franchise relationship is a contractual relationship. Therefore, franchisors and franchisees – just like any employer entities that enter into service agreements – have a great deal to be concerned about the uncertainty raised in *BFI*. *See BFI* slip op., at 45 ("Of the thousands of business entities with different contracting arrangements that may suddenly find themselves to be joint employers, franchisors stand out.").

IV. The *BFI* Decision is the Latest Attack on Alternative Workplace Arrangements

The need for PLBOA becomes even more apparent when one considers other simultaneous efforts by the Board, Department of Labor (DOL) and state and local regulators to attack employers whose workforce structures do not fit into their ideal world view. Some of these efforts include:

- The NLRB has ignored instructions from federal courts of appeals in an attempt to expand its jurisdiction over independent contractors.[13]

- DOL's proposed changes to regulations regarding eligibility for overtime (RIN 1235-AA11).

- DOL's Administrator's Interpretation (No. 2015-1, July 15, 2015) regarding Independent Contractor classification, which downplays the "control" factor.

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[12] The Board does not issue advisory opinions or letters, so there is no way for an employer to inquire in good-faith as to whether a certain contract or relationship makes it a joint employer.
[13] 361 NLRB No. 55 (September 30, 2014); 362 NLRB No. 29 (March 16, 2015).

- Proposed legislation in Seattle that would permit labor unions to organize independent contractors in certain transportation industries. [14]

Rather than adapting the law to keep pace with modern competitive workplaces, these regulators are trying to force companies to change their business models and strategies in order to make workplaces look the way they did in the 1930s: every worker is an employee who punches in at 9 AM and punches out at 5 PM and never checks their email outside of work. This model – which ultimately increases employer costs – will undoubtedly stifle competitiveness and result in stagnant economic growth. It also ignores the benefits of such structures for the parties involved. In particular, the independent contractor model can result in workers who "have more control over their economic destiny."[15] While PLBOA obviously does not address these other efforts, it would be a positive step forward for employers whose successful business models are under constant regulatory threat.

V. Conclusion

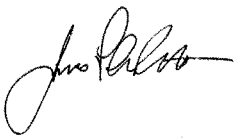
For the foregoing reasons, the U.S. Chamber supports PLBOA as a modest and reasonable solution to the problems created by the NLRB's *BFI* decision. As noted above, plaintiffs' attorneys and other enforcement agencies, such as OSHA, are already looking to take advantage of the new, broader joint employer standard. And there is no doubt that the Board's General Counsel will attempt to apply this new standard to the franchising industry in pending litigation.

We wish to thank you for taking the time to hold this important hearing on PLBOA. Please do not hesitate to contact us if we may be of assistance in this matter.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits



James Plunkett
Director
Labor Law Policy

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[14] http://seattle.legistar.com/ViewReport.ashx?M=R&N=Text&GID=393&ID=2296991&GUID=A1841B13-CF4F-4E5A-9409-A613DC6B2B15&Title=Legislation+Text

[15] Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013).

COALITION FOR A
DEMOCRATIC WORKPLACE

October 1, 2015

Dear Chairmen Alexander, Kline, Isakson and Roe:

On behalf of the millions of American businesses concerned with the rights of their employees, the fragile economy, and the need for balance in federal regulation, the Coalition for a Democratic Workplace (CDW) writes to thank you for introducing the Protecting Local Business Opportunity Act (S. 2015/H.R. 3549). The bill will restore the longstanding "joint employer" standard under the National Labor Relations Act—a standard that has paved the way for franchisors, franchisees, contractors, subcontractors and other businesses to create millions of jobs and has allowed hundreds of thousands to achieve the American dream of small business ownership.

CDW is a broad-based coalition of over 600 organizations representing millions of businesses, which employ tens of millions of employees nationwide in nearly every industry. CDW members are joined by their mutual concern over recent actions by the National Labor Relations Board (NLRB or Board), which threaten entrepreneurs, other employers, employees and economic growth.

On August 27, 2015, the NLRB issued its decision in *Browning-Ferris Industries* overturning the 30 year-old "joint employer" standard for determining, with respect to a certain group of employees, when one company is liable for the labor practices of another separate company under the NLRA. Until the Board's recent ruling, two separate entities were only considered "joint-employers" when they both exercised "direct and immediate" control over "essential terms and conditions of employment." In *Browning-Ferris Industries,* the Board announced it will now also impose joint employer liability where an entity has "indirect" control and "unexercised potential" of control over another entity's employees. As noted by the Board's two dissenting members, this new rule will "subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential liability for unfair labor practices and breaches of collective bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts and picketing."

The decision threatens to disrupt hundreds of thousands of business relationships to the detriment of entrepreneurs, other small businesses and their employees. We thank you for introducing this much-needed legislation and urge Congress to pass it quickly.

Sincerely,

The Coalition for a Democratic Workplace
and the following organizations:

ACCA- The Indoor Environment & Energy Efficiency Association
Aeronautical Repair Station Association
American Bakers Association
American Fuel & Petrochemical Manufacturers
American Fire Sprinkler Association
American Foundry Society
American Home Furnishings Alliance
American Hospital Association
American Hotel & Lodging Association
American Moving & Storage Association
American Pipeline Contractors Association
American Staffing Association
American Supply Association
American Trucking Associations
AmericanHort
Arizona Builders Alliance
Asian American Hotel Owners Association
Assisted Living Federation of America
Associated Builders & Contractors
Associated Builders & Contractors, Central Florida Chapter
Associated Builders & Contractors, Delaware Chapter
Associated Builders & Contractors, Eastern Pennsylvania Chapter
Associated Builders & Contractors, Florida East Coast Chapter
Associated Builders & Contractors, Hawaii Chapter
Associated Builders & Contractors, Indiana & Kentucky Chapter
Associated Builders & Contractors, Mississippi Chapter
Associated Builders & Contractors of Greater Houston
Associated Builders & Contractors of Oklahoma
Associated Builders & Contractors, Pelican Chapter
Associated Builders & Contractors, Rhode Island Chapter
Associated Builders & Contractors, Rocky Mountain Chapter
Associated Builders & Contractors, South Texas Chapter
Associated Builders & Contractors, Virginia Chapter
Associated Equipment Distributors
Associated General Contractors
California Delivery Association
Cardinal Health
CAWA- Representing the Automotive Parts Industry
Center for Individual Freedom
Center for the Defense of Free Enterprise
Coalition of Franchisee Associations
Food Marketing Institute
Forging Industry Association
Foundry Association of Michigan
Franchise Business Services
Global Cold Chain Alliance
Heating, Air-Conditioning & Refrigeration Distributors International
HR Policy Association
Independent Electrical Contractors, Inc.

Independent Office Products & Furniture Dealers Alliance
Indiana Cast Metals Association
Industrial Fasteners Institute
Industrial Supply Association
Industrial Supply Chain Association
Interlocking Concrete Pavement Institute
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Sign Association
International Warehouse Logistics Association
Metals Service Center Institute
Minnesota Grocers Association
Montana Chamber of Commerce
Motor & Equipment Manufacturers Association
NASTO, Representing America's Travel Plazas and Truckstops
National Apartment Association
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Club Association
National Concrete Masonry Industry
National Council of Chain Restaurants
National Federation of Independent Business
National Franchisee Association
National Grocers Association
National Lumber & Building Material Dealers Association
National Multifamily Housing Council
National Office Products Alliance
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
National Small Business Association
National Stone, Sand and Gravel Association
National Tooling and Machining Association
Nebraska Chamber of Commerce & Industry
Nebraska Grocery Industry Association
North American Die Casting Association
Northeastern Retail Lumber Association
Ohio Cast Metals Association
Office Furniture Dealers Alliance
Pennsylvania Foundry Association
Precision Machined Products Association
Precision Metalforming Association
Retail Industry Leaders Association
Society for Human Resource Management
Society of American Florists
Texas Cast Metals Association
Textile Rental Services Association

Truck Renting and Leasing Association
U.S. Chamber of Commerce
Wood Floor Covering Association
Wisconsin Cast Metals Association
World Millwork Alliance
Zimolong LLC

[Questions submitted for the record and their responses follow:]

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December 3, 2015

Mr. Michael C. Harper
Barreca Labor Relations Scholar and Professor of Law
Boston University School of Law
765 Commonwealth Ave.
Boston, MA 02215

Dear Mr. Harper:

Thank you for testifying at the September 29, 2015, Subcommittee on Health, Employment, Labor, and Pensions legislative hearing on H.R. 3459, the *Protecting Local Business Opportunity Act*. I appreciate your participation.

Enclosed are follow-up questions for you submitted by Ranking Member Robert C. Scott after the subcommittee's hearing. Please provide your written responses no later than December 17, 2015, for inclusion in the official hearing record. Responses should be sent to Callie Harman of the Committee staff, who can be contacted at (202) 225-7101, should you have any questions or need additional information.

Thank you again for your contribution to the work of the committee.

Sincerely,

Phil Roe
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Questions from Congressman Scott (VA)

1) Professor Harper, proponents of H.R. 3459, the *Protecting Local Business Opportunity Act,* and will ward off franchisors from seeking to manage their potential liability as a joint-employer under the National Labor Relations Act by asserting greater control over their franchisees, and ensure that franchisees will have greater control over their businesses. Your testimony indicated that this bill could have an unintended consequence, and actually give franchisors even greater control over franchisees than the current law. Could you explain how franchisees could be worse off under this legislation than the current law?

2) Professor Harper could you explain where the "direct and immediate" control test comes from? Did this first arise from a footnote to a 2002 case, *Airborne Express* 338 NLRB 597 (2002), or was it earlier? Is it fair to say this test has been in place for 30 years and is therefore longstanding Board law? Or is this a fairly recent development?

3) Professor Harper, a witness at the hearing testified that "what business owners and operators want is clarity from a regulatory agency." In your testimony you state that the *BFI* decision "tethers" Board law on joint-employer to the common law. In your opinion, does the common law provide more clarity in the joint-employer analysis than the law that has been in place since 1984?

4) Franchisees testified they have real "fears" about the BFI decision undermining control over their businesses, and that virtually any business relationship, such a contract between a restaurant franchisee and a service provider who does garbage collection or lawn care, could result in a finding of joint-employer status under the NLRA. The word fear was used 23 times during the hearing regarding the BFI decision. Is there anything that could be found in the BFI decision that could substantiate such fears?

Questions from Congressman Scott (VA)

1) **Professor Harper, proponents of H.R. 3459, the *Protecting Local Business Opportunity Act,* suggest that it will ensure that franchisees have greater control over their businesses, and will ward off franchisors from seeking to manage their potential liability as a joint-employer under the National Labor Relations Act by asserting greater control over their franchisees. Your testimony indicated that this bill could have an unintended consequence, and actually give franchisors even greater control over franchisees than the current law. Could you explain how franchisees could be worse off under this legislation than the current law?**

Enactment of H.R. 3459 indeed would result in franchisors ultimately exerting greater control over their franchisees than they will under the law set forth by the Board's decision in *Browning-Ferris Industries* (*BFI*). This is because H.R. 3459 would direct the Board and the courts to allow franchisors indirectly to control the identity, work assignments, hours, wages, and working conditions of the employees of their franchisees. Modern computer technology allows franchisors to monitor workers at franchisee sites more and more closely. Under H.R. 3459, with the use of this technology, franchisors could claim they were not exerting direct and immediate control of franchisees' employees by directing the franchisees to serve effectively as intermediary supervisors who implement the employment policies of their franchisor. These policies even could include a ceiling on wages such as that imposed by BFI. Franchisors also can reduce royalty payment levels and thus have an incentive to require the lowering of labor costs in their own economic interest, not to increase the profit margins of the franchisees.

2) **Professor Harper could you explain where the "direct and immediate" control test comes from? Did this first arise from a footnote to a 2002 case, *Airborne Express* 338 NLRB 597 (2002), or was it earlier? Is it fair to say this test has been in place for 30 years and is therefore longstanding Board law? Or is this a fairly recent development?**

The "direct and immediate" control test, adopted in H.R. 3459, derives from a footnote in a 2002 decision of the Board, *Airborne Express*. The footnote's use of this particular language had no support in prior Board law. Thus, this articulation of the standard for joint employment has not been the law for three decades. Rather, it would be more accurate to state that the standard for joint employment has become increasingly and unpredictably strict since the Board started eroding its original standard in 1984. This change has resulted in an enlarging loophole in the NRLA's protection of collective bargaining and has occurred concomitant with the increased use by many employers, like BFI, of contracts with supplier sub-employers who act effectively as intermediary supervisors of the user employers' employees.

3) Professor Harper, a witness at the hearing testified that "what business owners and operators want is clarity from a regulatory agency." In your testimony you state that the *BFI* decision "tethers" Board law on joint-employer to the common law. In your opinion, does the common law provide more clarity in the joint-employer analysis than the law that has been in place since 1984?

The common law right-to-control standard for defining the employment relationship dates from the nineteenth century and has been embraced by the modern Supreme Court as the default rule for employment statutes. I commend the Board's BFI decision for adopting this standard as a minimum floor for a joint employment relationship. This common law standard, which has been applied in thousands of modern judicial decisions, should provide much more clarity for employers and their lawyers than would the vague, newly articulated "actual, direct, and immediate" control test set forth in H.R. 3459. Importantly, the common law right-to-control test does not confer employment status on an entity that has the economic "potential" to control another business; it confers such status only when there is an actual legal (generally contractual) right to exert such control.

4) Franchisees testified they have real "fears" about the BFI decision undermining control over their businesses, and that virtually any business relationship, such a contract between a restaurant franchisee and a service provider who does garbage collection or lawn care, could result in a finding of joint-employer status under the NLRA. The word fear was used 23 times during the hearing regarding the BFI decision. Is there anything that could be found in the BFI decision that could substantiate such fears?

Franchisees have nothing to fear from the *BFI* decision. The decision has no relevance for the traditional franchisor-franchisee relationship where the franchisor determines the nature of the product sold under its brand, but allows the franchisee to determine the identity, compensation, hours, and working conditions of its employees. The *BFI* decision does not in any way encourage franchisors who want to maintain control over their brands to exert control over their franchisees' employees as well. On the contrary, as stated in my answer to the first question, the *BFI* decision discourages franchisors from using new technology to control their franchisees' employment relationships.

Furthermore, the *BFI* decision does not subject franchisees to any increased risk of being a joint employer of the employees of their service providers. Since the beginning of franchising, franchisees, like other businesses, have been subject to a right-to-control test. Franchisees, like other businesses, however, generally do not retain the right to control the employees of the companies with whom they contract to maintain their grounds or collect their garbage or shovel snow from their drive ways. When franchisees contract to purchase services, they may specify a deadline by which the service must be completed as part of the product they purchase; but they do not contract to determine the wages, working hours, or identity of the employees of the service provider. Because they do not contract to have a right to control such matters, franchisees are not joint employers under the common law right-to-control test and thus are not joint employers under *BFI*. The fears generated by franchisor lobbyists have no basis.

[Whereupon, at 12:09 p.m., the Subcommittee was adjourned.]

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