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By Electronic Filing (http://www.regulations.gov)
John F. Ring, Chairman
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570–0001

Re: Notice of Proposed Rulemaking (RIN:3142-AA13)
The Standard for Determining Joint-Employer Status

Dear Chairman Ring and Executive Secretary Rothschild:

We write on behalf of the states of New York, Pennsylvania, California, Illinois, Maryland, Massachusetts, Oregon, New Jersey, Virginia, and Washington and the District of Columbia to oppose the proposed rulemaking by the National Labor Relations Board (the "Board") to change the joint-employer standard, which governs the status and liability of an employer that shares control over the terms and conditions of workers' employment with another employer. *Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018) (the "NPRM").

The experiences of the undersigned state Attorneys General ("State AGs") in enforcing labor laws and protecting workers argue strongly against adopting the Proposed Rule. As further explained in this Comment, the State AGs believe that the Proposed Rule contravenes the statutory purposes of the National Labor Relations Act ("NLRA"), the Proposed Rule will make enforcement of the NLRA increasingly difficult, and the NPRM raises serious concerns under the Administrative Procedure Act ("APA"). We are especially concerned about the rule's impact in a context of other recent developments limiting legal protections for low- and middle-income

workers, such as the Department of Labor's proposed rollbacks of overtime and tip rules and Supreme Court decisions like *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *Janus v. State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

Specifically, the undersigned oppose rescission of the joint-employer standard adopted in *BFI Newby Island Recyclery*, 362 N.LRB No. 186 (2015) ("*BFI*"), and recently affirmed in relevant part by the U.S. Court of Appeals for the District of Columbia. *Browning-Ferris Indus. v. NLRB*, No. 16-1028, 2018 WL 6816542, at *1 (D.C. Cir. Dec. 28, 2018) (hereinafter, "*Browning-Ferris*"). In *BFI*, the Board correctly concluded that "the right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect." *Id.* at *19. Thus, *BFI* corrected the previous standard in order to classify two or more employers as joint employers if they fall "within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Id.* at *19. By contrast, the Proposed Rule proposes to add requirements that are wholly inconsistent with common law definitions and even more restrictive than the pre-*BFI* joint-employer standard.

In addition to being rooted in the common law, the *BFI* standard is appropriate for employment relationships in today's economy and necessary to effectuate the purposes of the NLRA. The *BFI* standard ensures accountability for companies that share responsibility and oversight for employment matters or that attempt to evade responsibility under employment laws by using an intermediary. The *BFI* standard also comports with the statutory purpose of the NLRA to facilitate collective bargaining when chosen by workers, promotes enforcement, and provides clear standards for employees, employers, and labor organizations – while the Proposed Rule fails on each of these counts.

I. The Undersigned States Are Interested Parties with Expertise in Labor and Employment Issues.

The State AGs enforce federal, state, and local labor and employment laws in various ways, including by representing state labor regulators and by investigating and prosecuting violators of minimum wage, overtime, and anti-discrimination laws. We have worked to hold joint employers accountable to protect workers in our states. Thus, our expertise meaningfully informs the Board's proposed rulemaking.

Because the NLRA precludes state enforcement activities and private lawsuits, the State AGs rely on the NLRB to protect the rights of private-sector workers in our states to unionize and to engage in collective activity. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) ("[W]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the NLRB"). With this Comment, the signatories voice our concerns on behalf of workers in our states and nationwide to ensure that their rights under the NLRA remain vigorously protected.

The legal definition of a joint employer directly impacts the NLRB's ability to protect employees. As most comprehensively explained by Heller School for Social Policy Dean David

Weil, in today's economy, companies commonly structure their businesses and employment relationships to shift parts of their operations to other entities, in an attempt to limit legal and monetary liabilities, while still creating and enforcing standards for those operations, thus "fissuring" the workplace. *See* David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (2014). Increasingly, firms that provide goods and services distance themselves from employment decisions, including matters like wages and hours that have always been at the core of collective bargaining, through subcontracting, franchising, third-party management, or other contractual relationships that obscure who the real employer is. *Id.* As other prominent economists have observed, this practice "creates an environment that is ripe for the violation of labor standards as the lines of responsibility for complying with standards become murkier." Heidi Shierholz, *Strengthening Labor Standards and Institutions to Promote Wage Growth*, Policy Proposal, p.13 (Feb. 2018), available at http://www.hamiltonproject.org/assets/files/strengthening_labor_standards_shierholz_pp.pdf.

As law enforcement agencies, we have seen that "fissuring" leads to less compliance with labor standards and makes it more difficult for law enforcement agencies to hold responsible parties accountable. Whereas enforcement could previously focus on the workplaces where violations occur, today effective law enforcement requires examining both the worksite and "higher-level, seemingly more removed business entities that affect the compliance behavior 'on the ground.'" Weil, *The Fissured Workplace*, p. 222. If a joint-employer legal standard under a given law fails to encompass the company that pays for subcontracted employees and dictates standards of employment, then gaps in legal compliance inevitably increase. We have seen that this result can leave injured employees vulnerable and without a remedy.

Our states have encountered and tried to address these gaps in enforcement in our work. Thus, our states not only have an interest in this Proposed Rule based on concerns about the rights of workers in our states under the NLRA, but also based on our expertise in enforcing joint employer standards under other labor and employment laws.[1]

[1] For example, the New York State Attorney General filed suit against Domino's Pizza LLC ("Domino's"), the largest pizza delivery chain in the country, for wage-and-hour labor violations at its franchise stores. Though Domino's claimed that it played no role in employment of employees at franchise stores, evidence revealed that Domino's exercised significant control including by requiring franchisees to purchase and use a software system that the company knew under-calculated wages. In this case, New York is arguing that Domino's must be a joint employer in order to identify the responsible party and get relief for injured workers. The Massachusetts Attorney General has also applied common law principles to hold companies jointly liable for wage and hour violations ostensibly committed by third parties. In one case, Massachusetts concluded that a company called Shield Packaging, Inc. was a joint employer to nearly 500 employees based on its routine supervision and scheduling of "temporary workers." Shield agreed to pay nearly a million dollars in restitution and penalties for its failure to pay minimum wage and overtime to workers who were employed and paid through various staffing agencies. *See also Potelco, Inc. v. Dep't of Labor & Indus*., 191 Wash. App. 9, 33, 361 P.3d 767 (Wash. Ct. App. 2015) (recognizing that both a temporary employment agency and the site employer may be responsible for workplace violations under the economic realities test).

II. The *BFI* Definition of a Joint Employer Should Remain in Effect Because It Better Reflects the Statutory Policies of the NLRA and Common Law Agency Principles.

The State AGs believe that the joint-employer standard established by the Board in *BFI* was consistent with the statutory purposes of the NLRA and common law principles of agency, which the Supreme Court requires the Board to follow when defining employment relationships. In contrast, the Proposed Rule will not advance the NLRA's statutory purposes and is inconsistent with the common law.

a. *The BFI Standard Better Effectuates the Purposes of the NLRA.*

In passing the NLRA during the depths of the Great Depression, Congress declared that the "policy of the United States" is to "encourag[e] the practice and procedure of collective bargaining," and to protect workers' rights to associate "for the purpose of negotiating the terms and conditions of their employment . . . ." 29 U.S.C. § 151. In order to accomplish these purposes, the NLRA created a set of rights for employees under Section 7 of the NLRA, which includes the right to join or support labor organizations as well as the right "to engage in other concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. And, while Congress has amended the NLRA since its original passage, the NLRA's fundamental policy of protecting workers' right to bargain collectively has never changed.[2]

Congress delegated responsibility for administering the NLRA to the Board, intending the Board's expertise to guide it in a constantly changing economy. "[T]he primary function and responsibility of the Board . . . is that of applying the general provisions of the [NLRA] to the complexities of industrial life." *BFI*, 362 NLRB No. 186, at 15 (quoting *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979)) (internal quotations omitted).

As described above, the labor market and structure of employment relationships is rapidly changing. As the Board majority in *BFI* observed, "[i]f the current joint-employer standard is narrower than statutorily necessary, and if joint-employment arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's 'responsibility to adapt the [NLRA] to the changing patterns of industrial life.'" *BFI*, 362 NLRB No. 186 at 15 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

The Proposed Rule will fail to advance the statutory purpose of promoting collective bargaining by creating an overly narrow definition that will keep necessary parties away from the bargaining table. *Cf. BFI*, 362 NLRB No. 186 at 19 (applying *BFI* rule to find BFI to be a joint employer and noting with regard to direction of work, "given BFI's 'ultimate control' over these matters, it is difficult to see how Leadpoint alone could bargain meaningfully about such

[2] Congress amended the NLRA in 1947 to make clear that "some labor organizations" as well as "some employers" engage in unfair practices and employees "also have the right to refrain from" collective bargaining (29 U.S.C. §§ 151 and 157), but maintained the NLRA's statutory purpose to protect the right to collectively bargain for workers who choose to do so.

fundamental working conditions as break times, safety, the speed of work, and the need for overtime imposed by BFI's productivity standards").

Relatedly, the Proposed Rule could easily dissuade some workers from exercising their statutorily protected choice to form unions, by leading them to believe that even if they unionize, they will not be able to bargain with the party that most fundamentally controls their working conditions. There are good reasons why workers might choose to join unions. Unorganized workers experience wage theft at nearly twice the rate of employees that belong to unions. Josh Bivens et al., Economic Policy Institute, *How today's unions help working people*, at 9 n.22 (2017), available at https://www.epi.org/files/pdf/133275.pdf. Further, according to Department of Labor studies, workers who are members of a union earn higher wages and better benefits than those that are not organized. George I. Long, *Differences between union and nonunion compensation, 2001-2011*, Monthly Labor Review 16 (April 2013).

Finally, the Proposed Rule is inconsistent with statutory purposes to protect workers' fundamental rights as enunciated in Section 7 of the NLRA. When workers cannot obtain a remedy for violations of their rights because the overly narrow joint-employer definition fails to encompass a party responsible for and capable of remedying labor law violations, the statutory purposes will be undermined. *See*, *e.g.*, *AM Property Holding Corp.*, 350 NLRB 998, 1012 (2007) (Liebman, M, concurring) (observing that under the pre-*BFI* standard to which the Proposed Rule would return, "the dominant economic actor" was able to escape liability even though it "refused to hire the unionized former employees of [subcontractor] Clean-Right, unlawfully discriminating against them, . . . [and] selected nonunion [subsequent subcontractor] PBS, discarded [PBS] after PBS employees struck, and replaced PBS with nonunion [second subsequent subcontractor] Servco").

b. *The BFI Standard Is More Solidly Grounded in Common Law and Longstanding Board Precedent.*

The existing *BFI* standard is more consistent with the Board's long-standing precedent, which properly reflected common law principles of agency. The Supreme Court has applied common law principles to determine when an employment relationship exists under the NLRA. *NLRB v. United Ins. Co. of Am*., 390 U.S. 254, 256 (1968) (applying common law agency test to distinguish between employee and independent contractor). *See also NLRB v. Town & Country Elec., Inc*., 516 U.S. 85, 93-94 (1995) ("when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute . . . have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine").

Thus, the NPRM correctly observes that "it is clear that the Board's joint-employer standard, which necessarily implicates the same focus on employer control, must be consistent with the common law agency doctrine." 83 Fed. Reg. at 46683. However, the Proposed Rule runs afoul of this doctrine. Under common law principles, an employee is a worker who is "subject to the [employer's] control or *right to control*." Restatement (Second) of Agency (1958) § 220(1) (emphasis added). Thus, under the common law, an employer is defined as one who has the right of control, rather than one who actually exercises it. Further, the common law

recognizes that a joint employer's control may be indirect, as illustrated by the "subservant" doctrine, which provides that even the regulation of more removed helpers raises the inference of an employment relationship. *Id.* at § 220.

The Board's joint-employer standard for much of its history, to which it returned in *BFI*, was widely approved of by federal courts and properly incorporated common law concepts. In *Boire v. Greyhound Corp.*, the Supreme Court upheld the Board's approach to the joint-employer inquiry. 376 U.S. 473, 476 (1964). The Court noted that the relevant question was "[w]hether Greyhound . . . possessed sufficient control over the work of the employees to qualify as a joint employer" and that this determination "is essentially a factual issue" for the Board to decide. *Id.*

Later, the United States Court of Appeals for the Third Circuit agreed that "the Board chose the correct standard" to determine whether two employers were joint employers: "[W]here two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment – they constitute 'joint employers' within the meaning of the NLRA." *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1124 (3d Cir. 1982) ("*Browning-Ferris* (1982)"). The court cited cases from six sister circuits and a long string of NLRB cases which had approved and applied this joint-employer standard. *Id.*

Just two years later in 1984, the Board stated a new and different joint-employer standard without announcing a reversal of precedent, holding that the putative joint employer must not only share or co-determine essential terms and conditions of employment but also "meaningfully affect" hiring, firing, discipline, and supervision in a way that is not "minimal [or] routine." In *Laerco Transportation*, the Board cited *Greyhound* and *Browning-Ferris*, but then added this additional requirement: "To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." 269 NLRB 324, 325 (1984). The Board referenced the "minimal and routine nature of Laerco supervision" and "the routine nature of the work assignments," and concluded that Laerco was not a joint employer. *Id*. at 326. In *TLI, Inc.*, the Board cited *Laerco* to find that "supervision and direction exercised by Crown on a day-to-day basis is both limited and routine," supporting a finding that Crown was not a joint employer. 271 NLRB 798, 799 (1984).

The Board's test became even more confused – and further afield from the common law – when the Board in 2002 added a requirement that the "putative joint employer's control over employment matters is *direct and immediate*," noting that this was "[t]he essential element in this analysis." *Airborne Freight Co*., 338 NLRB 597, 597 n.1 (2002) (emphasis added). As the Board correctly observed in *BFI*, *Airborne Freight* cited only *TLI* for this proposition, "[b]ut the *TLI* Board did not use the phrase 'direct and immediate control,' let alone identify that concept as the 'essential element' in the Board's test." *BFI*, 362 NLRB No. 186, at 10 n.43. In fact, the Restatement explains that "the control or right to control needed to establish the relation of master and servant may be very attenuated." *Id*. at cmt. d. That is, the Restatement specifically rejects the "direct and immediate" requirement manufactured by the Board in *Airborne Express*.

The D.C. Circuit's recent decision affirming *BFI* in relevant part provides further support for this position. *Browning-Ferris Indus.*, No. 16-1028, 2018 WL 6816542. There, the court held that "the right-to-control element of the Board's joint-employer standard has deep roots in the common law." *Id.* at *1. The court also endorsed "indirect control" as being consistent with the common law. *Id*. While it remanded due to the Board's application of the indirect control analysis,[3] the court found that "the Board's right-to-control standard is an established aspect of the common law of agency" and that the Board had "also correctly determined that the common-law inquiry is not woodenly confined to indicia of direct and immediate control; an employer's indirect control over employees can be a relevant consideration." *Id*. at *9. It carefully examined the state of the common law concept of agency and turned to the Restatement for guidance, concluding that "the 'right to control' runs like a leitmotif through the Restatement (Second) of Agency." *Id.* at *11. The court explicitly rejected Browning-Ferris's argument that independent-contractor inquiry and the joint-employer inquiry are "essentially the same" such that the extent of actual supervision exercised should be a focus of inquiry. *Id*. Finally, the court concluded, "we uphold as fully consistent with the common law the Board's determination that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis." *Id*. at *20.

The Board now purports to return to the standard of *Laerco* and its progeny, but has added requirements, without explanation, that would make it run even further afield of the common law. The Proposed Rule would now require that the direct and immediate control be "substantial." 83 Fed. Reg. at 46696-97. Abandoning precedent, and without citing any support, the Board wrote that its "preliminary belief is that, absent a requirement of proof of some 'direct and immediate' control to find a joint-employment relationship, it will be extremely difficult for the Board to accurately police the line between independent commercial contractors and genuine joint employers." NPRM, 83 Fed. Reg. at 46686.

Thus, the Proposed Rule would resurrect a standard that departed from Board and court precedent, and that lacked basis in the common law. Instead, the Board should reaffirm the *BFI* rule that returned to a test used for much of the Board's history, which properly gave effect to common law agency principles and was widely approved of by federal courts, most recently by the D.C. Circuit as discussed above.

III. The Proposed Rule Is Both Substantively and Procedurally Deficient Under the Administrative Procedure Act.

Because the Board's Proposed Rule lacks indicia of reasoned decision-making, the rulemaking raises serious questions about its legality under the APA. Rulemaking under the APA is unlawful where it is "arbitrary, capricious . . . or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Board has failed to satisfy the fundamental legal requirement to "examine the relevant data and articulate a satisfactory explanation for its action including a

[3] In particular, the court reversed "to the extent that [the Board] failed to distinguish between indirect control that the common law of agency considers intrinsic to ordinary third-party contracting relationships, and indirect control over the essential terms and conditions of employment." *Id.* at *20.

rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation omitted).

The Board's stated rationale for the Proposed Rule suggests that the Board has "failed to consider an important aspect" of the joint-employer standard and has only "offered an explanation for its decision that runs counter to the evidence." *Id.* The Proposed Rule also runs counter to the APA's presumption against changes in current policy. *Id.* at 42. An agency must provide a more substantial explanation for a policy that departs from its former views where "its new policy rests upon factual findings that contradict those which underlay its prior policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Thus, this rule requires the Board to justify its departure from the *BFI* standard and demonstrate that its justification does not "run[] counter to the evidence before [it]." *State Farm*, 463 U.S. at 42.

The Board does not meet this standard for the Proposed Rule for at least four reasons. First, there is no evidence supporting the premise that the current joint-employer standard leads to uncertainty for employers. Second, the purported bases for the Board's Proposed Rule are inconsistent with the current state of common law and policy. Third, even if the Proposed Rule could withstand review in light of the evidence in the record and the Board's inconsistent rationale, the procedural irregularities surrounding this rulemaking cast doubt on its integrity. Finally, the Proposed Rule fundamentally conflicts with the statutory purposes of the NLRA. Thus, the Board should withdraw the Proposed Rule and reaffirm the *BFI* standard.

a. *The Proposed Rule Lacks Evidence Necessary to Support the Board's Reversal of the Prior Agency Standard Set in* BFI.

The Board does not provide empirical evidence or economic analysis to support its proposed change, which makes the integrity of its proposal suspect. Under *State Farm*, an agency "must examine the relevant data and articulate a satisfactory explanation for its action." 463 U.S. at 43. The *State Farm* Court also rejected an agency's explanation as arbitrary where "there [was] no direct evidence in support of the agency's finding." *Id.* at 52. Here, the Board cites no independent evidence in its proposal to justify changing the joint-employer standard.

Further, if an agency fails to reflect upon contrary evidence or treats it in a conclusory fashion, then the rule will not survive judicial scrutiny. Courts have found that "a complete failure to . . . grapple with contrary evidence . . . disregard[s] entirely the need for reasoned decisionmaking." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638 (D.C. Cir. 2017); *see also Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008) (finding conclusory dismissal of empirical data on a critical factor in the decision lacking a reasoned explanation). In this case, the Board acknowledged but did not respond to counter-evidence underlying the importance of and need for the *BFI* standard, such as trends in employment structures.

The Board's NPRM demonstrates both of these evidentiary deficiencies. First, the Board justifies its proposed joint-employer standard based on the agency's "recent oscillation" and the "wide variety of business relationships that it may affect," with no reference to evidence. 83

Fed. Reg. at 46686. However, other than positing a vague "uncertainty in the labor-management community created by these adjudicatory variations," *id.* at 46682, the Board cites no data or qualitative research to support its assumption. It is particularly concerning that the Board is in possession of the necessary data to analyze the effect of the *BFI* standard, but has failed to consider or reference it. *See* Letter from Representative Scott and Senator Murray to Chairman Ring 1 (Oct. 10, 2018) (setting forth list of seventeen relevant categories of information the Board possesses but failed to consider in the NPRM).

By contrast, in *BFI*, the Board explained that the standard was based on trying to adapt the NLRA to changing industrial practices in light of data showing that "the number of employment relationships has grown significantly in recent years, and that a sizeable proportion of the labor force now works for staffing agencies." *BFI*, 362 NLRB No. 186 at *8. The Board also based its decision on data showing that more than 2.87 million of the country's workers were employed by temporary agencies in 2014. *Id.* at *11 (citing Steven Greenhouse, *The Changing Face of Temporary Employment*, N.Y. Times (Aug. 31, 2014)). The Board cited BLS data showing that this number was projected to increase to nearly 4 million by 2022, making it "one of the largest and fastest growing" employment trends. *Id*. (citing Richard Henderson, *Industry Employment and Output Projections to 2022*, Monthly Labor Review, Bureau of Labor Statistics (Dec. 2013)). The NPRM fails to address the empirical evidence demonstrating the need for the NLRA to adapt in order to effectuate its purposes in the face of changing employment structures.

Though the NPRM acknowledged that *BFI* relied upon changing economic circumstances, 83 Fed. Reg. at 46684-85, it cited no independent evidence to justify changing this standard and offered no explanation for how the new Proposed Rule accounts for the evolving landscape of employment. Under these evidentiary standards, the Board's Proposed Rule raises serious concerns because its anecdotal conjecture lacks credible data, ignores empirical economic trends, and fails to engage with readily available contrary evidence.

b. *The Board's Asserted Bases for This Policy Change Are Not Supported.*

The Board's purported rationale for changing the joint-employer standard, which is premised on common law and policy-based considerations, fails to justify the Proposed Rule and in fact supports maintaining the *BFI* standard. *Cf. Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (holding agency action to be arbitrary because its analysis was "internally inconsistent and inadequately explained"); *see also Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 58-59 (D.C. Cir. 2015) (collecting cases).

The Board first claims that the Proposed Rule is justified based on its "consisten[cy] with the common law agency doctrine." 83 Fed. Reg. at 46683. However, as explained above, the common law doctrine of agency strongly favors the current joint-employer standard. The Board's joint-employer test from 1984 to 2015 was neither consistent with, nor justified by, the common law agency doctrine. Specifically, the cases that created the joint-employer standard that the Board is attempting to reinstate did not invoke the common law; rather, they narrowed the joint-employer standard without explanation. *See Laerco Transportation*, 269 NLRB 324

(1984); *TLI, Inc.*, 271 NLRB 798 (1984). Indeed, in affirming the *BFI* standard, the D.C. Circuit recently emphasized that the common law permits reserved and indirect control, in stark contrast to the view set forth in the Proposed Rule. *Browning-Ferris*, 2018 WL 6816542.

As the D.C. Circuit held, *BFI* adopted a standard that appropriately encompassed common law considerations. *Id.* *BFI* acknowledged that the "right to control is probative of an employment relationship–whether or not that right is exercised." 362 NLRB No. 186 at *13. Additionally, the Board in *BFI* recognized that control can be either direct or indirect. *Id*. at *16. Thus, the claim that the common law supports the Proposed Rule is without basis.

The Board also claimed that the Proposed Rule is justified based on its predictability, as it will purportedly allow employers, unions, and employees "to plan their affairs free of the uncertainty that the legal regime may change on a moment's notice." 83 Fed. Reg. at 46686. However, even setting aside that overruling a decision issued just three years ago, and which returned to a standard previously in effect for decades, hardly removes "uncertainty that the legal regime may change on a moment's notice." The Proposed Rule is less predictable than the current joint-employer standard. First, the Proposed Rule's codification will lead to the concurrent application of two different standards. Second, previous failed attempts to reverse *BFI* cast doubt on the lawfulness of the Proposed Rule. Finally, the standard the Board proposes to adopt is more difficult to apply consistently.

Because rulemaking has presumptively prospective application, *see De Niz Robles v. Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015) (Gorsuch, J.), the *BFI* joint-employer standard will continue to control in cases that arise before a final rule is announced. In fact, because the current standard was just affirmed by the D.C. Circuit, promulgating a contrary rule will only raise more uncertainty.[4] *Browning-Ferris Indus.*, 2018 WL 6816542.

The Board's previous improper attempt to change the joint-employer standard also calls into question the Proposed Rule's legality, leading to uncertain reliance if the rule is adopted. The Board already attempted to reverse *BFI*'s properly promulgated joint-employer standard in *Hy-Brand I*, which the NLRB's Inspector General found reflected a "serious and flagrant problem and/or deficiency" based on Member Emanuel's participation. *See* Mem. from Inspector General (Feb. 9, 2018) (concluding that *Hy-Brand* was a "continuation of the *Browning-Ferris* deliberative proceedings and . . . Member Emanuel should have been recused from participation"). As further discussed below, the effect of the Proposed Rule is to reverse *BFI*, identical to the effect of *Hy-Brand I*, rendering the Proposed Rule possibly vulnerable to challenge as an attempt to restore a vacated result. Questions about the lawfulness of an adopted rule cast doubt on whether the subjects of regulation should invest resources to comply. *See generally* David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of*

[4] In particular, the D.C. Circuit held that the Board is not entitled to *Chevron* deference in its interpretation of the common law, which suggests that the Proposed Rule would be struck down as contrary to the common law principles enunciated in *Browning-Ferris*. *See Browning-Ferris*, 2018 WL 6816542 at *8-9. In explaining why it issued the decision during the NLRB's rulemaking process, the court noted that "[t]he policy expertise that the Board brings to bear on applying the National Labor Relations Act to joint employers is bounded by the common-law's definition of a joint employer," and thus, "we see no point to waiting for the Board to take the first bite of an apple that is outside of its orchard." *Id*. at *9.

Administrative Policy, 78 Harv. L. Rev. 921, 934 (1965) (examining the "substantial reliance interests" that prospective regulation affects). Even if the Board were somehow able to provide evidence that *BFI* created uncertainty, the context in which it intends to adopt this standard suggests that the Proposed Rule will create even more uncertainty.

Additionally, a standard dependent on proof of "substantial direct and immediate control" that is "not limited and routine" still requires case-by-case adjudication to clarify its meaning. By limiting the reach of common law rather than reaffirming a broad formulation of joint-employer status, the Board's proposal will raise more fact-intensive questions about which employers are shielded from obligations under labor laws. And, to the extent that the majority grounds the rule's predictability in prior NLRB precedent, the proposed standard is textually more restrictive than *TLI* and *Laerco*. Thus, this rule will leave future adjudications without a principled and developed body of law to direct and guide its application.

For the Board to articulate a satisfactory and reasoned decision, it must consistently apply the stated basis for its proposed rulemaking. The only rational result is to maintain the current joint-employer standard because common law favors an approach consistent with *BFI* and because a dramatic legal change that rests on a dearth of reasoning will generate more uncertainty about legal obligations, not less.

c. *Conflict of Interest and Procedural Irregularities Undermine the Proposed Rule.*

Because the Proposed Rule effectively arises out of *Hy-Brand*, which was vacated and set aside due to the improper participation of a potentially conflicted Member, *see Hy-Brand II*, 366 NLRB No. 26 (2018), the undersigned States are concerned about the appearance of bias if the Board adopts the joint-employer standard proposed in this rulemaking, in which the same potentially-conflicted Member participated. The APA protects the integrity of the rulemaking process. *Cf. United Steelworkers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) (requiring disqualification from rulemaking under the APA "when there has been a clear and convincing showing [of] an unalterably closed mind on matters critical to the disposition of the proceeding"); *see also Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1467 (9th Cir. 1987) (same).

The Board vacated and set aside *Hy-Brand I* following two independent determinations that Member Emanuel should have been recused from the proceeding. In the first, the Inspector General found Member Emanuel to be conflicted impermissibly because his former law firm represented a party in *BFI.* The Inspector General further concluded that "the Board was in fact not deciding *Hy-Brand* on the merits of the case, but was continuing the deliberative proceedings of the *Browning-Ferris* decision." IG Report at 3. Although the Inspector General did not find that Member Emanuel engaged in misconduct, he observed that this conflict was a "serious and flagrant problem . . . with respect to the deliberation of a particular matter." *Id*. at 5.

The Board's Designated Agency Ethics Official came to the same conclusion. *Hy-Brand II*, 336 NLRB No. 26. Based on the authority to determine "whether a reasonable person . . . would be likely to question the employee's impartiality in the matter," 5 C.F.R. 2635.502(c), this

official concluded that Member Emanuel should have been disqualified from participating. *Id.* Now, given the similarities between the *Hy-Brand I* rule and the Proposed Rule, the undersigned are concerned that the conflict of interest may still be a live issue in this rulemaking.

To allow the Board to recreate the same *Hy-Brand* outcome – found to be improper – in a separate forum is an artificial exercise in circumventing conflict of interest issues. Member Emanuel provided a crucial third vote for the majority in proposing this standard. (NPRM, 83 Fed. Reg. 46687, n.9). Promulgating through rulemaking the same standard that previously failed in adjudication in no way cures that conflict. Instead, the circumstances of this rulemaking raise serious questions about the integrity of this agency action.

d. *The Proposed Rule Is Unfaithful to the Statutory Purpose of the NLRA*

Finally, the Proposed Rule is arbitrary and capricious because it contravenes the statutory purpose of the NLRA, which authorizes the Board to create rules within its scope. The *State Farm* Court indicated that agencies should bear in mind the "preeminent factor" that Congress intended to characterize their statutory authority. *State Farm*, 463 U.S. at 55; *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 556 (9th Cir. 2016) ("The standard FWS followed . . . was in accordance with statutory purpose and hence could not have been arbitrary, capricious, or contrary to law.").

In this case, the Board's Proposed Rule is inconsistent with the statutory purpose of the NLRA. The NLRA declares its policy as "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151. The Proposed Rule will actually inhibit workers from bargaining collectively by making it more difficult to bring to the bargaining table employers that have control over the terms and conditions of their employment and hold them accountable for unfair labor practices.

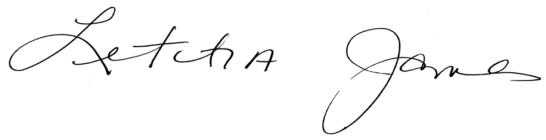
For the foregoing procedural and substantive reasons under the APA, the Proposed Rule fails. The Board's new proposed joint-employer standard lacks evidentiary support, is not consistent with its stated rationale, raises ethical questions, and is contrary to the NLRA's statutory purposes.

IV. Conclusion

The current joint-employer standard not only accords with well-established common law principles, but also better protects employees and provides clear expectations to employers. This standard is superior to the Proposed Rule based on both the policy considerations codified in the NLRA and the overwhelming evidence of changing models of employment in the modern economy. For the foregoing reasons, the signatory State AGs urge the Board to preserve the

joint-employer standard adopted in *BFI*, rather than adopting a wholly new standard even narrower than in *Laerco* or *TLI*.

Respectfully submitted,



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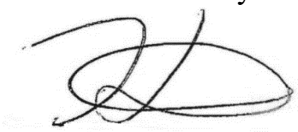

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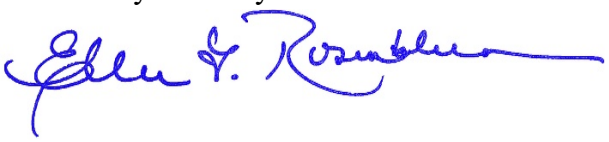

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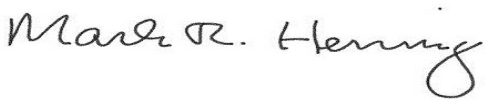

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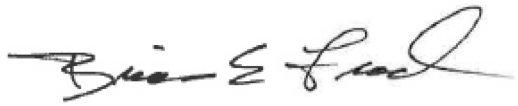

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