The Economic Impact of an Expanded Joint Employer Standard

January 28, 2019

INTERNATIONAL FRANCHISE ASSOCIATION

VIA E-FILING

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Re: 3142-AA13; Proposed Rule Regarding the Standard for Determining Joint Employer Status

Dear Ms. Rothschild:

On behalf of the International Franchise Association ("IFA") and its members, we submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") on the Standard for Determining Joint Employer Status published in the Federal Register on September 14, 2018.

IFA is the world's oldest and largest organization representing franchising worldwide. Celebrating over 50 years of excellence, education and advocacy, IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising. Through its media awareness campaign highlighting the theme, Franchising: Building Local Businesses, One Opportunity at a Time, IFA promotes the economic impact of the more than 733,000 franchise establishments, which support nearly 7.6 million jobs and $674.3 billion of economic output for the U.S. economy. IFA members include franchise companies in over 300 different business format categories, individual franchisees, and companies that support the industry in marketing, law and business development.

For the reasons set forth below, IFA supports the rule proposed by the National Labor Relations Board ("NLRB" or "Board"), which would return the Board to the precise and longstanding joint employer standard that existed prior to the Board's decision in *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). Under that test, an employer is considered a joint employer of a separate company's employees only where that employer possesses and exercises substantial direct and immediate control that is not limited and routine over the essential terms and conditions of employment of those employees.[1]

As predicted by the dissenters in the *Browning-Ferris* decision, the Board's expansion of the joint employer standard has caused significant operational and economic harm to franchising, both for franchisors and franchisees, stifling the creation of business ownership and family equity, two of the essential benefits to franchising. Indeed,

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[1] *See TLI, Inc.*, 271 NLRB 798 (1984), enfd. mem. sub nom. *General Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1984).

according to an economic study, the *Browning-Ferris* decision has cost the franchising sector as much as $33.3 billion annually and has resulted in as many as 376,000 lost job opportunities.[2]

IFA recognizes that on December 28, 2018, the D.C. Circuit Court of Appeals, in a 2-1 decision, partially affirmed the Board's *Browning-Ferris* decision, but denied enforcement of the Board's order in the case.[3] The Court concluded that the Board's joint employer standard could take into consideration both an employer's reserved right to control and its indirect control over employees' terms and conditions of employment.

However, the Court did not require the Board to adopt or maintain such a standard, and the Court denied enforcement of the *Browning-Ferris* decision because the Board did not sufficiently confine its consideration of indirect control. Specifically, the Court concluded that the *Browning-Ferris* decision "obscured the line" between "global oversight" and "[w]ielding direct and indirect control over 'the essential terms and conditions' of employees' work lives."[4] The Court acknowledged that the former constitutes a "routine feature of independent contracts," but the latter does not. Consequently, the Court remanded the case to the Board. In doing so, the Court requested that the Board, among other things, explain which terms and conditions of employment are "essential" to permit "meaningful collective bargaining" and clarify what "meaningful collective bargaining entails" and how it is supposed to work.[5] The Court directed the Board to apply a standard that does not take into consideration "routine components of a company-to-company contract."[6]

For the reasons set forth in Judge Randolph's dissenting opinion, IFA believes the D.C. Circuit erred in finding any aspect of the *Browning-Ferris* standard to be consistent with common law, or by extension the NLRA. At the same time, IFA agrees with the D.C. Circuit's requirement that the Board articulate a new joint employment standard that clearly delineates and limits joint employer status to indicia of control, whether direct or indirect, that are not part of the routine components of company-to-company contracts, particularly within the franchising industry. In order to best assist the Board in articulating a clearer and fairer new standard, therefore, the focus of IFA's comments below is on explaining the basic methods of franchising and the longstanding business model that has been so successful in creating jobs. IFA will then explain how the *Browning-Ferris*

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[2] *See* Ronald Bird., Ph.D., "Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer," attached hereto as Exhibit L, and discussed in detail in section III, *infra.*

[3] *Browning-Ferris Indus. of Cal. v. NLRB*, 2018 U.S. App. LEXIS 36706 (D.C. Cir. 2018).

[4] *Id*. at *51.

[5] *Id*. at *54-55.

[6] *Id*. at *51-53.

standard harms the franchising business model. Finally, IFA shows below why it is vital that any new joint employer standard issued by the Board clearly limit joint employer status to those business relationships that truly co-determine essential conditions of employment, without jeopardizing longstanding franchisor-franchisee relationships.

I. The Franchising Method

"Franchising is a method of marketing goods and services" that depends upon the existence of the franchisor's control over a trademark, other intellectual property or some other commercially desirable interest sufficient to induce franchisees to pay to participate in the franchisor's system by distributing goods or services under the franchisor's trademark or name.[7]

There are two principal explanations given for the popularity of franchising as a method of distribution. One is that it "was developed in response to the massive amounts of capital required to establish and operate a national or international network of uniform product or service vendors, as demanded by an increasingly mobile consuming public."[8] The other is that "franchising is usually undertaken in situations where the franchisee is physically removed from the franchisor, and thus where monitoring of the performance and behavior of the franchisee would be difficult."[9] These two motivations are consistent with a business model in which the licensing and protection of the trademark rests with the franchisor and the capital investment and direct management of day-to-day operations of the retail outlets are the responsibility of the franchisee, which owns, and receives the net profits from, its individually-owned franchise unit.

It is typical in franchising that a franchisor will license, among other things, the use of its name, its products or services, and its reputation to its franchisees. Consequently, it is commonplace for a franchisor to impose standards on its franchisees, necessary under the federal Lanham (Trademark) Act to protect the consumer. Such standards are essential for a franchisor that seeks to ensure socially desirable and economically beneficial oversight of operations throughout its network. These standards allow franchisors to maintain the uniformity and quality of product and service offerings and, in doing so, to protect their trade names, trademarks and service marks (collectively the "Marks"), the goodwill associated with those Marks, and most importantly, the protection of the consumer.

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[7] Joseph H. King, Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 Wash. & Lee L. Rev. 417, 420-21 (2005).

[8] Kevin M. Shelley & Susan H. Morton, *"Control" in Franchising and the Common Law*, 19 Fran. L. J. 119, 121 (1999-2000).

[9] Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 J. Law & Econ. 223, 226 (1978).

Because the essence of franchising is the collective use by franchisees and franchisors of Marks that represent the source and quality of their goods and services to the consuming public, action taken to control the uniformity and quality of product and service offerings under those Marks is not merely an essential element of franchising, it is an explicit requirement of federal trademark law. The Lanham Act, the federal law regulating trademarks, service marks, and unfair completion, mandates that owners of trademarks must "maintain[] sufficient control of the licensee's use of the mark to assure the nature and quality of goods or services that the licensee distributes under the mark."[10] Moreover, because the Lanham Act provides that a trademark can be deemed "abandoned" when "any course of conduct of the owner . . . causes the mark . . . to lose its significance,"[11] franchisors have a strong incentive to control the nature and quality of the good or services sold by their franchisees.[12] As a result, franchisors are compelled to establish and monitor brand standards and provide global oversight with regard to their franchisees.

Likewise, it is imperative that franchisees protect their franchisors' brands, and the trademark value of those brands. A franchisee, functioning as an independent operator under a Brand License, is trusted and relied upon (by the franchisor) to protect the trademark value in implementing brand standards, and exercising day-to-day management over the operation, since the franchisor is not present at every individual franchise location. Because franchising requires the collective use by franchisees and franchisors of Marks, all stakeholders affiliated with a brand collectively share risks and rewards. For example, if a franchisee fails to take adequate steps to protect the brand or otherwise engages in an action that injures the brand's reputation, the damage inflicted on the brand impacts all of the brand's stakeholders, including all other franchisees and the consuming public. With that being the case, it is essential to franchising that all of

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[10] 15 U.S.C. § 1064(5)(A).

[11] 15 U.S.C. § 1127.

[12] As explained further below, the *Browning-Ferris* standard deters franchisors from providing guidance, advice, or recommendations to their franchisees that are essential to the franchisors' protection of their brands. In doing so, the standard conflicts with the Lanham Act's provisions mandating that franchisors maintain control over the use of their Marks. Absent statutory authorization, the Board may not override Congressional mandates contained in other statutes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) ("[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975) (rejecting claim that federal antitrust policy should defer to the NLRA); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984) (Board's remedial authority was limited by equally important Congressional objective adopted in the Immigration Reform and Control Act, even if that led to unavailability of more effective remedies under the NLRA).

the stakeholders agree on brand protection standards and take all necessary action to ensure that those standards are met. Furthermore, these rights and obligations are enunciated in well-drafted franchise agreements and reviewed in advance under a prescribed set of mandated disclosures.

A person need not be a franchise expert to recognize that the ability of a customer to identify a certain level of quality and uniformity in the products or services offered by disparate franchisees within a system has led to the explosive growth of franchising. A patron may enter a chain restaurant in New York, Mexico City, or Hong Kong and expect and receive virtually the same food. The uniformity and quality of products offered under a single brand is a prime factor in the success of the franchising concept. Without uniform standards, franchisees could build and operate units in whatever dissimilar fashions they chose, resulting in different buildings, uniforms, food, consumer service standards, and supply chain issues which could raise health concerns, ultimately causing the destruction of the franchisor's concept.[13]

A franchisor's exercise of controls limited to brand standards is not day-to-day management over the business operations of its franchisees. Further, this exercise of control is not merely reflective of the legal realities imposed by trademark law, the FTC Franchise Rule,[14] and pervasive state and federal regulation. It is also a value-added proposition for franchisees and consumers, which is entirely consistent with the fact that franchisees are independent entrepreneurs who invest substantial capital in their businesses, control their labor relations, and dream to build equity in an independently-owned business for the benefit of themselves, their families, and their communities. For a franchisee, the purchase of a franchise means avoiding those costs of market entry that are ameliorated by the franchisor's extensive guidance and training in many aspects of the operation of the franchised business. It also means enjoying the goodwill generated by the use of the franchisor's Marks, brand and system collectively with other franchisees and company-operated outlets. Dependence by the franchisee on the detailed brand standards and methods of operation honed by franchisor experience is therefore a basic part of what a franchisee bargains for in acquiring a franchise. The use of Marks that project to members of the consuming public that they will enjoy a quality and predictable consumer experience at each outlet operated under those Marks—even though each is independently owned and operated—is the other principal part of the equation, which again benefits both franchisees and consumers.

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[13] *See* Shelley & Morton, *supra* note 8, at 121.

[14] Published by the Federal Trade Commission, the Franchise Rule provides prospective purchasers of franchises information they may use to weigh the risks and benefits of a franchise investment, and requires franchisors to provide potential franchisees with specific items of information about the offered franchise, its officers, and other franchisees.

Put simply, "[t]o comply with trademark standards, a franchisor must achieve uniformity among its company-owned and franchised units; to achieve that goal, elaborate and voluminous standards are developed, imposed, and policed."[15]

As one examination of the franchisor/franchisee model explained:

> Typically, a franchisor imposes systemwide standards by means of the franchise agreement between the parties that establishes uniform specifications with regard to: advertising and promotion; site selection; construction and design; furniture and fixtures; products and services; cash control; bookkeeping and reporting procedures; general operations; personnel; revenue reports; customer lists; accounting; display of signs and notices; authorized or required equipment, appliances, and appurtenances; required uses of trademark; insurance requirements; license requirements; standards for management and personnel; hours of operation; required uniforms; local advertising; required manner of offering or selling products or services; standards of maintenance and appearance; and training requirements. Other procedures, specifications, and standards may also be imposed. This list is not exhaustive, but it touches upon many of the characteristics of the franchise relationship that courts have erroneously cited as examples of the franchisor's "control" over its franchisees in order to justify imposing direct or vicarious liability upon a franchisor.[16]

Indeed, most franchisee agreements will routinely include contractual provisions governing many aspects of business operation, some in great detail, but which have little to no bearing on a franchisor's "control" of its franchisees' employees. In *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*, the authors describe and analyze a series of such provisions commonly found in franchisor/franchisee agreements:

- Language expressly characterizing the relationship of both businesses, and setting forth which responsibilities each party assumes or retains;[17]
- Brand standards manuals and guidance, which give franchisees the benefit of the franchisor's experience and expertise to assist them in running a successful franchise, while giving the franchisor an assurance that its brand standards are

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[15] David J. Kaufman, Felicia N. Soler, Breton H. Permesly, Dale A. Cohen, *A Franchisor is Not the Employer of Its Franchisees or Their Employees*, 34 Franchise L.J. 439, 461 (2015).

[16] Shelley & Morton, *supra* note 8, at 121.

[17] Susan A. Grueneberg, Joshua Schneiderman, Lulu Y. Chiu, *Drafting Franchise Agreements After Patterson v. Domino's: Avoiding the Minefield of Vicarious Liability and Joint Employment*, 36 Franchise L. J. No. 2 189, 195-97 (Fall 2016).

used consistently, and in a manner consonant with its policies and procedures for business operations;[18]

- Training requirements for franchisees and their franchises' executive management on business operation;[19]
- The rights and responsibilities of the parties with respect to ongoing business guidance, recommendations, or advice for franchisees to use at their discretion, and obligations relating to periodic advice and communication;[20]
- Broad contours for the conduct of business administration, including required hours of operation, trade dress provisions ensuring the visual consistency of brand décor, design, color, and signage;[21]
- Staffing guidance, offering suggestions or sample documents for, *e.g.*, HR policies, employee discipline, training, and scheduling, to use (or not use) as the franchisee sees fit;[22]
- The use of proprietary software for business operation or payroll processing;[23]
- Safety and security requirements which franchisees must meet;[24] and
- Language requiring the franchisee to operate the franchise in compliance with all applicable laws and regulations[25]

Some or all of these are likely to be found in common franchisor/franchisee agreements, and on their face can suggest a far greater involvement of the franchisor in day-to-day operations than is actually the case, or which in no way bear on the relationship of the franchisor to the franchisee's employees. While, as one commentator noted, these "[t]ypical franchisor controls can look pervasive to judges, lawyers, and jurors who are not schooled in modern franchising,"[26] they are nevertheless the very types of standards that many courts have found to be: (1) consistent with a franchisor's right to control its trademarks and the quality of products and services distributed under those Marks; and (2) insufficient to justify the imposition of vicarious liability. In this regard, the Board's *Browning-Ferris* standard ignores these fundamental realities of franchising. Establishing and monitoring brand standards performance merely constitutes the global oversight

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[18] *See id.* at 197-199.

[19] *See id.* at 199-201.

[20] *See id.* at 201-202.

[21] *See id.* at 203-207.

[22] *See id.* at 207-210.

[23] *See id.* at 210-211.

[24] *See id.* at 212-213.

[25] *See id.* at 213-214.

[26] William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 Franchise L. J. 162, 165 (2005).

necessitated by the Lanham Act to ensure that franchisors protect and preserve their Marks and brands. As stated by the D.C. Circuit Court of Appeals, there must be "some legal scaffolding" within the joint employment analysis which ensures that global oversight within a company-to-company business relationship does not trigger joint employment.[27] Indeed, global oversight, unlike the exercise of control over the essential terms and conditions of employees' work lives, is a "routine feature of independent contracts."[28] Likewise, it is essential to all Brand Licenses, whether in franchising or not.

The failure of the Board's *Browning-Ferris* standard to recognize that franchisor-established brand standards and necessary controls (such as those discussed above) are integral to the franchise model has dramatic consequences for franchisors.[29] In light of this fact, the Board's final rule must avoid disrupting commonplace but necessary reservations of rights wholly unrelated to the direct control of the terms and conditions of franchisee employees' employment, but which are rather in place to ensure brand consistency and uniformity or protection of Marks, by making clear that such provisions are not indicia of a joint employer relationship. As discussed further below, it is critical that the Board use this rulemaking as an opportunity to clarify that those exercises of "control" which are vital to the franchise model, but may in no way touch directly on the terms and conditions of franchisee employees' employment, are *not* indicia of joint employment. Rather, these are precisely the sorts of "legal scaffolding" and "global oversight" that the D.C. Circuit expressly recognized in *Browning-Ferris* are *not* indicia of joint employment.

Prior to *Browning-Ferris*, the Board concluded that franchisor brand standards and necessary controls did not subject a franchisor or licensor to joint employer liability absent direct and substantial control over labor relations with the franchisee's or licensee's

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[27] *Browning-Ferris*, 2018 U.S. App. LEXIS 36706 at *51.

[28] *Id.*

[29] Indeed, under the Board's current *Browning-Ferris* standard, courts have improperly looked to routine brand standards unrelated to the terms and conditions of franchise employees' employment as indicia of joint employment. *See*, *e.g.*, *Parrott v. Marriott International*, 2017 U.S. Dist. LEXIS 144277, Case No. 17-10359 (E.D. Mich. Sep. 6, 2017) (allegations that franchisor gave franchise employees discounts at other franchise hotels worldwide, "controlled" operations through corporate managers and audits; audited franchisee's financial records and discussed controlling labor costs; and had "workplace rules" by which the business was to be operated sufficient to defeat motion to dismiss in an FLSA exemption/misclassification case); *Harris v. Midas*, 2017 U.S. Dist. LEXIS 184765 (W.D. Pa. 2017) (denying franchisor's motion to dismiss Title VII harassment, discrimination, and retaliation claim because franchisor's franchise agreement was "so nebulously and generally phrased as to suggest that [the franchisor] retained a broad discretionary power to impose upon the franchisee virtually any control, restriction, or regulation it deemed appropriate or warranted").

employees.[30] The Board in this rulemaking should acknowledge and embrace this standard and these cases, which reflected a proper and thoughtful recognition of the realities of the franchise model, while striking a proper balance with the statute's appropriate safeguards of worker rights.

II. The Broader Joint Employer Standard Has Led to a Substantial Proliferation of Joint Employer Charges and Petitions

Since the prior NLRB General Counsel articulated his position on changing the Board's long-established joint-employer standard in his *Browning-Ferris* brief in 2014, joint employer charges and petitions have increased dramatically at the NLRB – fueled by a union-led corporate campaign against nationwide fast food franchises, and various other franchising systems and services. The substantial proliferation of joint employer charges and petitions, and the lack of clarity over the *Browning-Ferris* standard, make it imperative for the Board to adopt a joint employer rule that will provide consistency and clarity for the franchising industry.

On November 29, 2012, the Service Employees International Union ("SEIU") orchestrated an employee walkout in New York City targeting fast food franchises, such as Burger King, Wendy's, McDonalds, Domino's Pizza, Kentucky Fried Chicken, Papa John's, and Pizza Hut.[31] While an entity referred to as the "Fast Food Workers Committee" ("FFWC") publicly took credit for the walkout, it is well known that the FFWC was and is a union front organization for the SEIU. In fact, according to SEIU's LM-2 filings, the SEIU disbursed a total of $16,465,001 to the FFWC between 2012 and 2017.[32]

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[30] *See, e.g.*, *Speedee 7-Eleven*, 170 NLRB 1332, 1333 (1968) (policy manual that described "in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store" is not evidence of joint employer relationship); *S.G. Tilden, Inc.*, 172 NLRB 752, 753 (1968) (finding no joint employer relationship even though the franchise agreement regulated "many elements of the business relationship" because there was no clear indication that the franchisor "intended to, or in fact did, exercise direct control over the labor relations of [the franchisee]").

[31] Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES, Nov. 29, 2012, https://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html?_r=0; Ned Resnikoff, *New York's fast food workers strike. Why now?*, MSNBC, Nov. 29, 2012, http://www.msnbc.com/the-ed-show/new-yorks-fast-food-workers-strike-why-now.

[32] Indeed, the SEIU's LM-2s reflect a disbursement of $35,000 in 2012 to FFWC and annual disbursements to the FFWC in the range of $1.8 million to $4.95 million in each subsequent year. The FFWC did not submit any reports to the Department of Labor until it submitted an LM-2 for its 2017 fiscal year. The FFWC is not a certified bargaining

One day prior to the planned November 29, 2012 New York City walkout, the SEIU filed its first unfair labor practice charge alleging a fast-food franchisor to be a joint employer with one of its franchisees, a franchisee based in New York City. Numerous additional charges against fast food franchisors were filed in the following weeks and months. Given the proximity of the charges and the orchestrated walkout, it appears that the walkout and unfair labor practice charges were related and planned as part of the SEIU's corporate campaign against national fast food franchises.

In the two years that followed, SEIU-related entities and firms filed more than 100 unfair labor practice charges alleging joint employment of a franchisor and its franchisee (Exhibits A, B).[33] The charges were filed by many of the same charging parties – including SEIU, the FFWC, and several "Organizing Committees" in metropolitan areas.[34] Beyond flooding the NLRB with charges, the SEIU continued national one-day walkouts against fast food restaurants promoting its "Fight for $15" campaign to increase the minimum wage to $15/hour.[35]

On June 26, 2014, the NLRB General Counsel, in an amicus brief filed in connection with the Board's consideration of *Browning-Ferris*, expounded the view that the Board's long-standing joint employer standard be revisited. Specifically, the General Counsel argued that the Board's existing standard, established and applied in *Laerco Transportation*, 269 NLRB 324 (1984), and *TLI, Inc.*, 271 NLRB 798 (1984), was inconsistent with the purposes of the National Labor Relations Act, defined "employer" too narrowly, and inhibited "meaningful collective bargaining."[36] The General Counsel urged the Board to restore its prior standard, which would find joint-employer status, *inter alia,* where an employer exercised direct or indirect control or possessed the unexercised potential to

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representative of any bargaining unit, and it has not reported the receipt of any dues from members.

[33] Our researchers' methodology for compiling the information and preparing the charts reflected in Exhibits A through F is set forth in footnote 39, below.

[34] The SEIU's LM-2s demonstrate the significant investment it placed into its corporate campaign against the fast food industry. (Exhibit H.)

[35] Paul Davidson, *Fast-food workers stage protests for higher wages*, USA TODAY, May 14, 2013, https://www.usatoday.com/story/money/business/2013/05/14/food-workers-strikes/2159047/; Steven Greenhouse, *With Day of Protests, Fast-Food Workers Seek More Pay*, N.Y. TIMES, NOV. 29, 2012, https://www.nytimes.com/2012/11/30/nyregion/fast-food-workers-in-new-york-city-rally-for-higher-wages.html?_r=0; Kim Gittleson, *US fast food worker protests expand to 190 cities*, BBC NEWS, Dec. 4, 2014, https://www.bbc.com/news/business-30339438 (last visited Nov. 27, 2018).

[36] Amicus Brief of NLRB General Counsel, *Browning-Ferris Industries of California, Inc., D/B/A BFI Newby Island Recyclery*, Case 32-RC-109684 (June 26, 2014) at 9, 11.

control terms and conditions of employment.[37] In doing so, the General Counsel specifically attacked franchising arrangements, alleging that they "undermine[d] meaningful collective bargaining." [38]

Weeks later, on July 29, 2014 – before any decision issued in *Browning-Ferris* – the General Counsel announced that he had authorized the filing of 43 complaints alleging that franchisor McDonald's USA was a joint employer of its franchisees. Following his attack on the franchising model in its *Browning-Ferris* amicus brief, the General Counsel's announcement represented an inflection point which would lead to an avalanche of charges being filed against franchisors alleging joint employment with their franchisees. In the following four years, more than 200 unfair labor practice charges were filed similarly alleging a joint employment relationship between a franchisor and its franchisee (Exhibits D, E).[39]

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[37] *See id.* at 4-5.

[38] *Id.* at 14.

[39] The information regarding the number of joint employment-related charges and petitions filed between July 29, 2010 and July 29, 2018 was compiled by a team of researchers, who prepared the attached charts (*see* Exhibits A through F). In doing so, the researchers utilized the public NLRB website and searched for relevant search terms included in the titles of the charges. The researchers narrowed the search to the applicable years. The search terms yielded a total of 225,594 responsive cases on the NLRB website, many of which were duplicative. The Board website reveals 10 cases per page; thus, the researchers needed to review 22,600 pages of cases. Each researcher was assigned two years—one pre-dating July 29, 2014, the date the NLRB General Counsel filed a joint employer complaint against McDonald's USA, and a year subsequent to July, 29, 2014. Separate Excel spreadsheets were created for each year, listing the applicable charges that were returned through the NLRB website. In determining whether a case involved a joint employer allegation, where it was unclear whether it was truly a joint employer relationship, the researchers erred on the side of over-inclusion by adding the case to the chart. In compiling the applicable charges in the Excel spreadsheet, the charges (CA cases) and union petitions (RC cases) were separated into three unique charts: (1) a chart including charges filed against both McDonald's franchisees and McDonald's USA; (2) a chart including joint employer charges or petitions filed against franchisors and franchisees as joint employers; and (3) a chart including joint employer charges or petitions filed against employers outside of franchising. When adding a case to a chart, the researchers cross-referenced the other charts to ensure that duplicate cases were not added. For each case, relevant information was compiled including the case name, number, location, charges filed, petitioning party (individual or specific union) as well as details as to whether the case was closed or open and the reason for the case's closure (dismissal, withdrawal, or settlement). After those charts were completed, the researchers merged all of the pre-July 29, 2014 charts into one chart—while maintaining

As expected, the number of joint employment-related unfair labor practice charges and representation petitions escalated significantly following the General Counsel's authorization of the McDonald's complaint. A total of 618 charges or petitions were filed alleging joint employment in the four years predating the complaint, excluding charges filed against franchises (Exhibit C). In the following four years, 924 joint employment-related charges or petitions were filed, excluding charges against franchises (Exhibit F). Consequently, the number of non-franchise joint employment charges and petitions during the four-year period following the authorization of the complaint increased by more than 49.5% over the number of such charges or petitions filed in the four years prior to the authorization of the complaint. The imprecise definition of joint employment articulated by the General Counsel in his *Browning-Ferris* amicus brief was a direct cause of this increase, which would not have been the case under the precise joint employer standard historically used before its ambiguous expansion in *Browning-Ferris.*

It is evident that the expansion of the joint employer standard has led to an increase in charges and petitions alleging joint employment:

Charged Parties or Respondents referenced in charge or petition filed with NLRB	# of charges or petitions filed between 7/29/2010 and 7/29/2014	# of charges or petitions filed between 7/29/2014 and 7/29/2018	Percentage increase
Alleged joint employer (franchisor and franchisee)	122	236	93.44%
All non-franchise alleged joint employers	618	924	49.51%
All alleged joint employers (including all franchisors)	740	1,160	56.75%

There can be no reasonable dispute that the SEIU campaign against fast food franchises triggered an attack on the industry, aided by the prior General Counsel's attack on the franchise industry in the NLRB's *Browning-Ferris* amicus brief, and his authorization of complaints alleging joint employment between franchisors and franchisees. The unwarranted and harmful expansion of the joint employment doctrine in the Board's decision in *Browning-Ferris* has only fueled the attack. The negative effects of this expansion are discussed below.

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three separate tabs for McDonald's charges/petitions, franchise charges/petitions, and all other joint employer charges/petitions. The researchers similarly merged all of the post-July 29, 2014 charts into a single chart with three tabs. The charts were then reviewed to remove any duplicated charges/petitions.

III. *Browning-Ferris*'s Negative Effects on Franchising

As explained by a recent report prepared by the Office of Advocacy for the U.S. Small Business Administration, the broadened joint employment standard set forth in *Browning-Ferris* has created concerns for small businesses across the nation, including franchisees.[40]

The *Browning-Ferris* Board majority's expansion of the joint employer standard to encompass "indirect influence or contractual reservations of authority" as sufficient to establish joint employment has significantly prejudiced the franchising method. Given the breadth of the new joint employment standard, franchisors have justifiably been fearful that providing the same services to franchisees now that they provided prior to *Browning-Ferris*—such as training, store inspections, and operational advice—could result in charges that they are joint employers with their franchisees, and thereby liable for their franchisees' actions. This is an obvious risk to the consuming public, and again contravenes the intent of the Lanham Act's requirements. For example, a franchisor that provides training to its franchisees regarding the prevention of sexual or other unlawful workplace harassment should not have to run the risk that doing so might lead to a charge and litigation over whether it is a joint employer. Nor should a franchisor have to run the risk of undermining its Lanham Act obligations out of a concern over joint employer liability when, for example, the franchisor conducts an in-store visit of a franchisee and provides feedback and recommendations based on the visit, or a franchisor shares operational advice based on its years of industry experience to protect its brand.

These are not merely academic or theoretical concerns. IFA's members, both franchisors and franchisees, have shared their experiences in the wake of the *Browning-Ferris* decision with IFA. Their combined experiences demonstrate that the *Browning-Ferris* decision has directly caused great uncertainty in the franchising world and has had a devastating impact on the manner in which franchisors and franchisees operate.

IFA participated in 77 interviews with its members—including franchisors, franchisees, and law firms or consultants that provide advice and counseling to franchisors—to investigate the practical challenges that *Browning-Ferris* has had on their operations. Professor Ronald Bird, Ph.D. – an economist with extensive experience conducting similar economic fact-finding surveys, including for federal government regulatory agencies—

[40] Office of Advocacy, U.S. Small Business Administration, *What Small Businesses Are Saying and What Advocacy Is Doing About It: Progress Report on the Office of Advocacy's Regional Regulatory Reform Roundtables*, p. 44 (Dec. 2018), *available at* https://advocacy.sba.gov/regulatory-reform/regulatory-reform-follow-up/?utm_medium=email&utm_source=govdelivery (last visited Dec. 20, 2018).

designed and supervised the interviews.[41] The IFA member interviewees' experiences confirm that the *Browning-Ferris* standard is unworkable and dramatically threatens the franchising method.[42]

A. The Crippling Impact of *Browning-Ferris* on Franchisors

As explained above, a critical component of franchising is the ability of franchisors to enhance and protect their brands. Given the breadth of the *Browning-Ferris* decision, franchisors have been forced to distance themselves from their franchisees—at the risk of jeopardizing their brands and creating unnecessary risks to the consuming public.

1. Resolving Crises That Jeopardize Franchisor Brands

Several franchisors conveyed to IFA dismay over the predicament that *Browning-Ferris* imposes on them in circumstances in which the actions of a franchisee's employee could

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[41] Dr. Bird holds a Ph.D. degree in economics (University of North Carolina at Chapel Hill, 1974), and has over 25 years of experience conducting and reviewing economic analyses of the benefits, burdens of government policies, regulations and information-collection mandates. He presently serves as Senior Regulatory Economist with the United States Chamber of Commerce. Previously, he served as Chief Economist of the United States Department of Labor (2005-2009), Chief Economist for The Employment Policy Foundation (1999-2005), Chief Economist for Dyncorp Information Technologies, a regulatory and policy analysis support contractor to Federal agencies (1992-1999), and Senior Economist for Jack Faucett Associates, a regulatory and policy analysis support contractor to Federal agencies (1989-1992). He has held faculty appointments in economics at North Carolina State University (1973-1975 and 1982-1987), The University of Alabama (1975-1982), Meredith College (1986-1987), and Wesleyan University (1987-1989), The George Washington University (2018-present), and Georgetown University (2018-present).

[42] It is appropriate for the Board to rely on employers' experiences for purposes of rulemaking. *See New York v. U.S. EPA*, 413 F.3d 3, 31 (D.C. Cir. 2005) (finding Environmental Protection Agency's reliance on industry anecdotes may be sufficient for issuance of rule in the absence of comprehensive data because "[i]ncomplete data does not necessarily render an agency decision arbitrary and capricious, for '[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion") citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also NextEra Energy Res., LLC v. FERC*, 898 F.3d 14 (D.C. Cir. 2018) (permitting Federal Energy Regulatory Commission to "base its market predictions on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner"). In any event, as demonstrated below, there is overwhelming data to demonstrate that the *Browning-Ferris* standard has imposed a significant economic impact on franchisors and franchisees.

adversely affect the brand. In the franchising world, many customers and members of the general public cannot distinguish between a franchisor and a franchisee. Franchisors and franchisees are commonly confused as being part of the same enterprise in light of the fact that they use common Marks and rely on the same branding. As a result, it is often public perception that the actions of a franchisee are imputed to the franchisor.

This creates a significant problem when a franchisee's employee engages in public misconduct. For example, one IFA franchisor member was alerted to a video in which an employee of a franchisee mistreated a customer's pet. In today's digital age, such video footage of an employee committing misdeeds can be easily disseminated and broadcast to the entire world within a matter of seconds. Consequently, the franchisor was left with the difficult choice of either: (a) doing nothing and hoping that the franchisee would address and resolve the situation in a manner that was satisfactory to the franchisor; or (b) communicating with the franchisee to ensure that the situation would be resolved without damage to the brand.

Under *Browning-Ferris*, if the franchisor recommends any particular disciplinary action against the employee who engaged in the misconduct, the franchisor exposes itself to joint employment liability. However, the option of doing nothing is untenable. A franchisor cannot reasonably be expected to sit idly by when its name becomes associated with scandals or negative publicity. To do so risks the brand. *Browning-Ferris*'s amorphous indirect or potential control test factor runs counter to the business certainty necessary for those in franchising to thrive.

Other franchisors identified this issue as a practical reality they have had to face since *Browning-Ferris* issued. Several franchisors relayed instances where they received reports of franchisee employees using offensive or derogatory language in the presence of customers. Again, in such instances, the franchisor is forced to decide between doing nothing and thereby risking public backlash and damage to the brand, or communicating with the franchisee about a potential strategy moving forward to resolve the situation and thereby risking a joint employer finding. A further risk is created to other franchisees in the system who rely on each other's performance under the brand standards, and trust that the franchisor will exercise the necessary controls over those standards to protect their individual investments in the system.

Browning-Ferris has effectively handcuffed franchisors in situations in which actions have been taken by franchisee employees that can damage the franchisor's brand. Members Miscimarra and Johnson's prediction that *Browning-Ferris* would be "momentous and hugely disruptive" to the franchising method has proven correct. *Browning-Ferris* discourages franchisors from taking actions to protect their brand.

2. Eliminating or Curtailing Training and Support to Franchisees

Seventy-one of the 77 interviewees (92.2%)—including all 28 franchisors interviewed—reported that franchisors have implemented defensive distancing behaviors in the wake of the *Browning-Ferris* decision. This is reflected in the dwindling amount of services franchisors are offering to their franchisees in light of the expansion of the joint employment standard. A loss of franchisor services and guidance has weakened the ability of franchisees to protect and grow the equity they count on to support their families and their communities, and to ensure that consumers are receiving a safe and positive experience.

Prior to *Browning-Ferris*, many franchisors provided a broad array of training and support to their franchisees on a number of subjects—such as Human Resources practices, legal updates, and technology.[43] Several franchisors have ceased or curtailed providing such training and support due to concerns that offering such services will trigger joint employer liability.[44]

Franchisors have drastically altered their training practices for franchisees following the expansion of the joint employer doctrine. Franchisors have elected to leave franchisees to their own devices to seek whatever training the franchisees believe would assist the franchisees' employees. Other franchisors have elected to cease providing training on Human Resources-related subjects.

Those franchisors understand that providing less training places their brand at risk. One franchisor stated the downside of this approach is that it impedes consistency because franchisees receive advice from a number of different sources without any input or advice from the franchisor. The same franchisor stated that some franchisees are receiving insufficient training. The consequence of this cessation of training is that it increases the risk that franchisees or their employees engage in some activity that damages the brand.

Other franchisors have elected to offer training through third parties, which provide such training without any input or direction from the franchisors. However, doing so comes at a cost for the franchisors. One franchisor estimated that its training costs increased 300-400% due to its decision to outsource the training because of joint employer concerns.

Similarly, many franchisors have stopped providing advice or guidance to franchisees that request assistance with regard to personnel matters—such as compensation or disciplinary actions. Prior to *Browning-Ferris*, most franchisors embraced franchisee requests for assistance. However, after *Browning-Ferris*, many franchisors choose not to provide such advice upon request out of concern that doing so will trigger joint employer liability. Instead, some franchisors resort to providing franchisees with options for

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[43] As explained by Third Way, "Both on-the-job learning and formal skills training programs are key to giving workers the tools they need to succeed and increasing businesses' overall efficiency." Third Way, *Workers And Businesses Both Win When Skills Are Put First*, July 26, 2017, https://www.thirdway.org/third-way-take/workers-and-businesses-both-win-when-skills-are-put-first (last visited Dec. 3, 2018).

[44] *Id.*

consideration, but without making any recommendations. Others refrain entirely from responding and instead refer franchisees to other resources, such as an attorney.

Browning-Ferris has also resulted in numerous franchisors' curtailing other forms of support and guidance they used to provide to franchisees. Many franchisors previously provided franchisees with model employee handbook and personnel policies. However, due to concerns that offering such sample materials to franchisees will prompt joint employer liability, this critical brand assistance has stopped.

3. Increased Litigation

Nearly all of the franchisors that provided information to IFA advised that since *Browning-Ferris*, they have experienced a significant increase in joint employer claims across all spectrums of the law—wage and hour claims, tort litigation (*e.g.*, personal injury cases), and harassment or discrimination claims. Very few of the franchisors interviewed were named as parties to joint employer complaints prior to *Browning-Ferris*. Plaintiff's attorneys have since utilized the broadened joint employer doctrine to target franchisors, which are typically viewed as having "deeper pockets" than franchisees.

Certain franchisors advised IFA of the increase in joint employment litigation since *Browning-Ferris*.[45] What follows are a few examples of their experiences.

One franchisor reported that it has received almost double the amount of joint employment complaints or charges in a given year since the decision was issued. Another franchisor had not been alleged to be a joint employer prior to *Browning-Ferris*. Since then, it has received approximately seven demand letters alleging that it is a joint employer with a franchisee. Yet another franchisor estimated that it has been named as an alleged joint employer at least <u>40</u> times since the *Browning-Ferris* decision, which <u>rarely occurred</u> prior to *Browning Ferris*. They are not alone. Several other franchisors advised IFA that they were never alleged to be a joint employer in any context until the *Browning-Ferris* decision was issued.

Franchisors that successfully defended against joint employer allegations prior to *Browning-Ferris* have found that courts and agencies are much less inclined to dismiss joint employer allegations since *Browning-Ferris*. One franchisor was able to successfully remove itself from joint employer litigation by filing motions to dismiss immediately after it was served with a complaint. Since then, it has had two such motions to dismiss denied, which has required the franchisor to engage in discovery in order to demonstrate that it has no employment relationship with the plaintiff. As a result, that franchisor has

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[45] While the reach of *Browning-Ferris* is technically limited to the National Labor Relations Act, the practical impact of the decision has expanded into other areas of law. Again, franchisors have experienced a significant increase in joint employer allegations in multiple areas of law, including personal injury and employment claims.

incurred over $100,000 in litigation expenses for discovery and motion practice that it had not been required to undergo prior to *Browning-Ferris*.

Because complainants are more inclined to pursue the perceived deeper pockets and now have wider latitude to pursue joint employer theories in light of *Browning-Ferris*, many franchisors have chosen to be more selective with regard to selecting franchisees with which it can or will do business. Those franchisors are less inclined to work with newer franchisees or economically disadvantaged franchisees given the heightened risk of joint employer liability.[46] Specifically, if a prospective franchisee does not have a background in the type of service that a franchise system offers, those franchisors who have curtailed their services were less likely to offer the franchise opportunity out of fear that the prospective franchisee will need more guidance and coaching than the franchisor is able to offer under the current joint employer standard. Those franchisors reported strong reluctance to offering franchise opportunities to inexperienced franchisees, who might otherwise be quality and qualified candidates for a specific system, because the inexperienced franchisee would not have adequate access to the franchisor's support necessary for success in the system, nor the business experience to rely upon when those services and guidance are not provided. One franchisor compared this to sending a new franchisee into a boxing match with his hands tied behind his back. Another franchisor, which has over 20% of its franchisees from economically disadvantaged backgrounds, has ceased expanding relationships with such franchisees unless those franchisees demonstrate greater economic long-term stability. One franchisor rejected a potential lower-income franchisee that it would have approved of pre-*Browning-Ferris*, but upon which it would not take a risk given joint employer concerns. Yet another franchisor, because of joint employer concerns, is considering eliminating a program in which it provides an opportunity for successful general managers at franchisor-owned stores to rent the store property and equipment, hire their own staff, and share in the profits of the store. Some franchisors have opted to stop expanding their franchisee base and instead open franchisor-owned stores.

This development is especially harmful to diverse and marginalized franchisees. As explained by the Southern Christian Leadership Conference (SCLC), "franchises are a true symbol of economic opportunity with over 20 percent of franchises being owned by minorities" (Exhibit I). There is a higher minority ownership rate among franchised businesses than in non-franchised businesses. Indeed, IFA's recent study showed that

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[46] As explained by the Progressive Policy Institute, "Faced with the new incentive structure of the expanded joint employer doctrine, franchisors . . . have a clear preference against smaller franchisees in favor of the larger organizations. This [makes] it much harder for new entrepreneurs to enter business through franchising, further raising barriers of entry for business creation." Dane Stangler, *Expansion of the Joint Employer Doctrine Fails to Strike the Right Balance*, PPI RADICALLY PRAGMATIC, Oct. 5, 2017, https://www.progressivepolicy.org/blog/expansion-joint-employer-doctrine-fails-strike-right-balance/ (last visited Dec. 3, 2018).

in 2012, 30.8% of franchises were owned by minorities, compared to 18.8% of non-franchised businesses.[47] Between 2007 and 2012, the minority ownership rate for franchised businesses increased by 50% and female ownership increased by 49%.[48] During that time period, Black ownership of franchises increased by 66% and Hispanic ownership of franchises more than doubled.[49]

The SCLC emphasized, however, that "the expanded policy over what it means to be a joint employer has centralized the franchise systems, providing fewer opportunities for [minorities] to take control of their destiny and build wealth for their families."[50] This view is shared by the National LGBT Chamber of Commerce, which explained that the expanded joint employment standard "impede[s] upon the crucial business opportunities afforded to diverse and marginalized business communities, and in turn, reduce[s] their opportunities to build and sustain generational wealth" (Exhibit K). Historically disadvantaged populations that did not have the same opportunities and resources to gain the necessary business, managerial, or industry experience that franchisors are seeking in prospective franchisees are indirectly impacted when franchisors consider that lack of experience in deciding whether to offer a franchise opportunity. Reasonably so, franchisors must choose prospective franchisees who have compatible experience with the system, or risk mistakes that could damage the brand, consumer safety, and experience, or result in litigation.

4. Compromised Relationships with Franchisees

The manner in which *Browning-Ferris* has increased litigation and caused franchisors to limit their services offered to franchisees has impaired many relationships between franchisors and franchisees. Sixty-nine of the 77 interviewees reported that franchisees have complained to franchisors about the curtailment of services offered to franchisors in recent years because of joint employment considerations. Indeed, most of the franchisee complaints have been focused predominately on franchisees' perceptions that they are receiving reduced value out of the franchising relationship than they did pre-*Browning-Ferris* even though franchisor royalties have either stayed the same or increased.

Many franchisees complain to franchisors that they have had to incur increased costs because they are compelled to seek outside guidance through attorneys or other consultants on matters in which the franchisor used to assist. Some of those franchisees

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[47] IFA Foundation, *Franchise Business Ownership by Minority and Gender Groups – 2018*, *available at* https://www.franchisefoundation.org/franchise-business-ownership-minority-and-gender-groups-2018 (last visited Dec. 3, 2018).

[48] *Id.*

[49] *Id.*, Exhibit J.

[50] *Id.*

have notified the franchisor that they cannot afford counsel to provide guidance and assistance with regard to Human Resources matters.

B. The Devastating Impact of *Browning-Ferris* on Franchisees

IFA's interviews revealed that *Browning-Ferris* has caused unease among franchisees and, more importantly, significant economic losses to them.

1. Loss of Franchisor Benefits

As explained above, 71 out of the 77 interviewees reported that franchisors have curtailed the services and support they provided to their franchisees prior to *Browning-Ferris*. This has had a significant impact on the operations of franchisees.

a. Lack of Advice and Training

The curtailment of franchisor training, in-store observations, and willingness to provide general advice has harmed franchisees. In light of franchisors no longer providing such services, franchisees have been forced to either invest in obtaining or offering such training for themselves or to act without receiving the benefit of any such training. Finding adequate training is not easy for every franchisee. Not all training is available on the internet or other remote resources, and some franchisees based in rural parts of the United States have difficulty obtaining affordable training that can be provided locally.

Given the curtailment of franchisor support, franchisees have been forced to incur new expenses. Several franchisors have retained attorneys to assist them with drafting employee handbook and personnel policies—which typically cost several thousand dollars at a minimum. Such costs are especially burdensome on economically disadvantaged franchisees and rural franchisees that lack access to experienced employment law counsel.

b. Loss of Collaboration

For many franchisees, *Browning-Ferris* has effectively resulted in the elimination of collaboration between franchisees and franchisors. Prior to *Browning-Ferris*, many franchisors provided in-store observations in order to provide advice intended to assist franchisees with their operations. Franchisors often used such observations, as well as store training and sample personnel materials (such as model employee handbooks or personnel policies), to guide franchisees and help strengthen the franchisors' brand. As a result, franchisors offered advice on best practices—obtained through many years of experience working with multiple franchisors—through myriad channels. Beyond that, franchisor training sessions and meetings with franchisees often resulted in franchisees creating a network among themselves through which they could communicate with one another to share operational ideas. Many franchisors also rewarded successful franchisees with recognition awards designed to encourage compliance with the franchisor's branding expectations, but have stopped doing so in light of *Browning-Ferris*.

As franchisors have rolled back on providing such services, franchisees have been left to their own devices to develop successful operational practices. Many of the franchisees, without the benefit of in-store observations, are left wondering whether they are competently performing basic operational tasks, such as scheduling, marketing, or Human Resources tasks. Many franchisees do not know whether they are operating in a manner that is satisfactory with their franchisors' branding expectations.

As a consequence, franchisees are forced to rely on their own experiences. This is especially difficult and challenging for newer franchisees that have had little experience owning or managing a business. They have effectively been tasked with operating their stores, complying with their franchisors' expectations, complying with the law, and trying to run a profitable operation all on their own. Again, *Browning-Ferris* has put the essence of the franchise business model at risk.

2. The Severe Economic Impact of *Browning-Ferris* on Franchisees

Based on the IFA interviews referenced above, Dr. Bird conducted a detailed economic analysis regarding the impact of the *Browning-Ferris* decision on franchising. His analysis is enclosed with these comments as Exhibit L.[51]

According to Dr. Bird, "the 'distancing' behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to yearly lost potential output between [2.55% and 4.93%]." He concluded that the output loss for franchisees in the United States as a result of *Browning-Ferris* is in the range of $17.2 billion to $33.3 billion per year. He further determined that *Browning-Ferris* has resulted in anywhere from 142,000 to 376,000 lost job opportunities.

The losses for franchisees individually have been significant. Dr. Bird concluded that "[f]or the 233,000 small business franchisees nationwide, [assuming a 4.93% loss in output], the average franchisee [has] experience[d] an annual revenue loss of $142,000 per year" since *Browning-Ferris*. Dr. Bird notes that, "These amounts [have] significant

[51] It is imperative that the Board consider the impact of the *Browning-Ferris* standard on small businesses, including franchisees. The Regulatory Flexibility Act, 5 U.S.C. § 604(a)(6), requires an administrative agency, such as the NLRB, to consider the impact of an agency rule on small entities and describe the steps taken by the agency to minimize the economic impacts of the rule. This mandated consideration necessitates that the Board weigh the costs and benefits of the rule and select a rule among available alternatives that is reasonably expected to yield positive net benefits unless explicit statutory requirements dictate otherwise.

impacts on small franchise businesses in which average annual revenue is only $2.9 million and average profit including return on the entrepreneur's own labor is $433,000."

Dr. Bird opined that if the Board maintains the *Browning-Ferris* joint employment standard it "will have a significant adverse impact on the U.S. economy, equivalent to a loss of output of $17.2 billion to $33.3 billion annually for the franchise business sector and likely multiple times that for all sectors affected." These lost revenues do not take into consideration other increased costs that have incurred as a result of the expansion of the joint employer doctrine. Such increased costs include:

- <u>Additional litigation and legal costs incurred by franchisors and franchisees</u>. Dr. Bird's analysis reveals that in the four years following *Browning-Ferris*, "the number of joint employer claims under NLRB jurisdiction involving franchise businesses have increased five-fold" and that there have been other significant increases in non-NLRB matters, such as wage and hour disputes.[52]
- <u>Increased non-litigation attorney costs.</u> Franchisor respondents to IFA's interviews "reported increases in both internal and outside counsel legal costs to help them adapt their operations to the new liability environment associated with the *Browning-Ferris* ruling." Similarly, franchisee respondents "incurred additional legal counsel costs to replace services and guidance that franchisors previously provided to them."
- <u>Training costs.</u> Franchisors and franchisees reported incurring additional costs to revise or outsource training materials.
- <u>Costs associated with reduced or eliminated on-site inspections.</u> As explained above, many franchisors have reduced or eliminated the use of on-site inspections of its franchisees. As noted in Dr. Bird's report, "The subsequent erosion of brand quality may have decreased the market value of the franchise brand."
- <u>Quality of service</u>. In Dr. Bird's words, "In cases where joint employer risk has caused deterioration in quality of service, consumers have likewise suffered an economic loss in comparison to the quality of service received from franchisees prior to the *Browning-Ferris* decision."
- <u>Conflicts with other laws.</u> Dr. Bird notes that the NLRB's joint employer standard has the potential to conflict with other laws and regulations, such as banking regulations that require covered financial institutions to monitor and supervise the selection by their contractors of employees who are assigned to work in their facilities under support services contracts. The Board's *Browning-Ferris* standard

[52] Dr. Bird's analysis specifically does not quantify the increased litigation costs that those in franchising have incurred directly as a result of the expansion of the joint employer doctrine because this complex question requires further data and analysis, which is currently underway; these findings will be published at a later date. *See* Exhibit L at 10.

> exposes such entities to unanticipated costs associated with complying with the banking regulations and potentially incurring joint employer liability.[53]

Furthermore, Dr. Bird concluded that "[t]he adverse impacts that have already been observed since [*Browning-Ferris*] will continue and likely become increasingly severe in future years as the effect of the NLRB definition spreads to other jurisdictions and contexts at the federal, state and local levels through administrative rules and litigation outcomes."

IV. The Need for Clarity

To this day, the *Browning-Ferris* decision provides woefully insufficient guidance regarding what actions taken by a franchisor with regard to its franchisees trigger a joint employment relationship under the Act. It is especially evident that rulemaking for purposes of clarifying the joint employer standard is critical given the current split within the Board regarding the applicable standard.[54] Indeed, the D.C. Circuit confirmed the need for clarity by compelling the Board to "erect some legal scaffolding" to ensure that the Board's joint employment standard recognizes that global oversight or "routine components of a company-to-company contract" cannot trigger joint employment status.[55]

The Board's *Browning-Ferris* standard remains especially amorphous and uncertain in the context of franchising because under that test "all of the incidents of the [alleged joint employer] relationship must be assessed and weighed with no one factor being decisive."[56] Several real life examples illustrate the uncertainty that results because of

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[53] According to Dr. Bird, there is evidence that the *Browning-Ferris* definition of joint employment "has had similar adverse impacts on non-franchise businesses that use supply chain management contracts and support services contracts. Fear of joint employer designation in relation to their suppliers or support services contractors has led businesses to reduce or eliminate their specifications of performance standards, schedules and worker qualifications in these contracts. The result has been a loss of the efficiency, quality and cost savings that were previously obtainable."

[54] *See Orchids Paper Products Company*, 367 NLRB No. 33, slip op. at 4, n. 14 (2018) (noting Members Emanuel's and Kaplan's disagreement with Member McFerran regarding whether the joint employer standard should be returned to prior longstanding precedent, notwithstanding their agreement that there was a joint employment relationship in the case).

[55] *Browning-Ferris*, 2018 U.S. App. LEXIS 36706 at *51-*53.

[56] *See Orchids Paper Products Company*, 367 NLRB No. 33, slip op. at 4, n. 14; *see also Retro Environmental, Inc./Green Jobworks, LLC*, 364 NLRB No. 70, slip op. at 3-4 (2016).

the current standard. Consider the following examples of franchisor-franchisee interaction:

1. The franchisor's franchise agreement sets forth specific requirements for franchisees, such as operating hours, required uniforms, and required pre-employment screenings.
2. The franchisor provides training to franchisees regarding best practices for operations, which include suggestions for staffing, scheduling, hiring, and disciplinary practices.[57]
3. The franchisor provides employee handbooks or other personnel policies to its franchisees that may be used with respect to the franchisee's employees.[58]
4. The franchisor provides its franchisees with sample policies or best practices regarding workplace civil rights issues, such as anti-discrimination policies, anti-harassment policies, statements promoting diversity and inclusion, or guidance regarding affinity groups at the worksite.
5. The franchisor conducts on-site inspections of its franchisees.
6. The franchisor's negative feedback of a franchisee or of a franchisee's employee causes the franchisee to take disciplinary action against the employee(s) responsible for the negative review.
7. The franchisor issues to a franchisee's employee an award recognizing the employee's quality service, which results in the franchisee rewarding the honored employee with a pay raise or promotion.
8. The franchisee requests input from its franchisor regarding desired skillsets of a store general manager, which the franchisee references but is not required to adopt to hire its store manager—or, alternatively, a franchisor recommends an individual to a franchisee as a potential general manager and the franchisee elects to hire the recommended individual for that position.
9. The franchisor provides its franchisees with regular newsletter updates advising the franchisees of recent developments in the law that could impact the franchisees.
10. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisor contacts the franchisee to gather further information on the allegations and the status of any investigation into such allegations.
11. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisee contacts the franchisor and

[57] Obvious questions related to this example are: (1) whether the training is voluntary or mandatory; and (2) whether the voluntary or mandatory nature of the training is dispositive in the joint employer analysis.

[58] Similar questions regarding the degree to which the franchisees are required to incorporate such policies and the consequences of not incorporating such policies also exist in this example.

asks for advice on what to do about the alleged harasser, and the franchisor obliges.

12. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisor contacts the franchisee and recommends that the franchisee investigate the allegations, which the franchisee does.
13. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisor recommends that the franchisee take disciplinary action based on the information the <u>franchisor</u> obtained on its own regarding the incident.
14. In light of negative publicity resulting from an allegation that a franchisee's employee has harassed customers, the franchisor recommends that the franchisee take disciplinary action based on the information the <u>franchisee</u> obtained on its own regarding the incident.
15. The franchisor refers a franchisee to the franchisor's employment counsel for the purpose of providing advice on legal or litigation matters.
16. The franchisor provides its franchisees with point of sale ("POS") software that includes tools that assist franchisees with scheduling.[59]
17. The franchisor requires that its franchisees maintain drug-free workplaces, which causes the franchisee to terminate an employee's employment in light of the employee's violation of a drug-free workplace policy.
18. The franchisor provides recommendations to franchisees regarding best practices involving personnel matters, such as hiring and discipline.
19. The franchisor offers a hotline through which its franchisees can seek advice regarding operational matters.
20. The franchisor provides its franchisees with model staffing and compensation suggestions based on the franchisor's and its other franchisees' experiences—such as typical peak customer hours, the number of supervisors to staff during peak hours versus slower hours, ranges of salaries franchisees have offered to general managers at other stores, etc.

These types of interactions were insufficient to support a joint employer finding under long-standing NLRA joint employer principles, because they presented no direct and immediate control over the terms and conditions of employment of the franchisee's employees. The current joint employer standard provides no answer as to whether any or all of these hypothetical facts are sufficient to trigger joint employer liability. That lack of clarity needs to be rectified by way of a final rule that restores the long-standing requirement of direct and immediate control, and makes clear that the examples set forth above are *not* indicia of joint employer status.

[59] An obvious question relating to this example is whether the franchisor requires franchisees to use the POS software or whether it simply recommends such software.

The Board's request for comments in the NPRM raised several questions the Board asked interested stakeholders to address.[60] IFA raises these questions in its comments because it is critical that the Board address them in the final rule to provide practical clarity as to how the joint employment standard will apply to those involved in franchising.

The Board's *Browning-Ferris* standard leaves no clear answer to any of these questions because it requires that all aspects of the entities' relationship be assessed and weighed with no one factor being decisive. The Board's prior standard provides much-needed clarity as it focuses on whether both entities possess and exercise substantial, direct and immediate control over the essential terms and conditions of employment and whether both entities do so in a manner that is not limited and routine.

For these reasons, IFA believes the Board should return to its longstanding, pre-*Browning-Ferris* joint employment standard, notwithstanding the D.C. Circuit's partial affirmance of the *Browning-Ferris* test. At a minimum, it is vital for the Board to use this rulemaking as an opportunity to address the critical question left unanswered by the D.C. Circuit's opinion: what are the elements of the "legal scaffolding" distinguishing those terms and conditions that are directly related to an employee's employment from those terms and conditions that are routine, business-to-business transactions, commonly contained in franchise or other agreements governing business operations? What are the indicia of "global oversight" that reflect appropriate business management, and which are those that meaningfully impact the day-to-day control of employees' activities as contemplated by the D.C. Circuit in its *Browning-Ferris* opinion?

In fashioning such a rule, we urge the Board to look at common law principles used by those courts that have applied the "instrumentality test" to the question of joint employment. Such a test rejects an overbroad approach that looks at control generally, and rather more closely focuses the vicarious liability analysis on the "specific aspect of the franchisee's business that is alleged to have caused the harm."[61]

The "instrumentality test … focuses the vicarious liability analysis more narrowly on whether a franchiser controls, or has the right to control, 'the daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm.'"[62] Put more simply, and as made clear by way of example, the instrumentality test asks if the putative joint employer had control over the specific behavior or term of employment relevant in a given case. Such an approach ensures that the many common features of franchise contracts—most of which have little if anything

[60] 83 Fed. Reg. 46681, 46687.

[61] *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 332 (Wis. 2004).

[62] Grueneberg, Schneiderman & Chiu, *supra* note 17, at 192 (citing *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 394 (Wis. 2004)).

to do with a specific employee's day-to-day conduct—are not misused as evidence in some "joint employment" tapestry.

Courts have looked to an "instrumentality test" or something akin to it, in focusing the joint employment inquiry on the specific nature of the facts of the case at hand.

In *Wendy Hong Wu v. DunkinDonuts, Inc.*, the District Court for the Eastern District of New York observed that in assessing joint employer liability, "courts determine whether the franchisor controls the day-to-day operations of the franchisee, and more specifically whether the franchisor exercises a considerable degree of control of the instrumentality at issue in a given case."[63] Applying this standard, the court addressed the vicarious liability of a franchisor in a case where the franchisee's employee was brutally assaulted. The court focused its examination on the specific term and condition of employment relevant to the harm suffered, specifically, the extent of the franchisor's control over the store's security, the failure of which was alleged to have caused the attack in question. The court readily concluded that because the franchisor did not require any specific security or equipment, but rather merely suggested that security was important and offered equipment for franchisees, it could not be held vicariously liable. Moreover, the court observed:

> The possibility . . . that the recommended security measures might have helped protect [the plaintiff] highlights a public policy concern that the court believes also counsels against imposing liability under the circumstances of this case. DunkinDonuts' expressed a laudable desire to assist its franchisees in protecting their employees and customers. Imposing liability on the basis of such advice could discourage franchisors such as DD from taking steps to promote an awareness of security issues among franchisees. By contrast, the relatively narrow definition of liability adopted by the *Helmchen*, *Kelley,* and other courts discussed above—which requires a showing of control over a franchisee's security measures beyond merely offering recommendations and advice regarding security and imposing standards relating to appearance, products, and services—fosters a franchisor's efforts to assist in ensuring the safety of its franchisees' employee and customers.[64]

[63] 105 F. Supp. 2d 83, 87 (E.D.N.Y. 2000).

[64] *Id.* at 93. *See also Helmchen v. White Hen Pantry,* 685 N.E.2d 180, 182 (Ind. Ct. App. 1997) (ruling that franchisor did not incur liability for the security of its franchisees' employees even though it required that its franchisees follow the franchisor's plans for fixtures, equipment, signs, and other display-related materials; it required franchisees that chose to adopt video security systems to employ certain kinds of equipment; required that the franchisees comply with the standards included in the franchisor's operating manual, which included a section on robbery; and employed a "director of loss

Similarly, in *Patterson v. Domino's Pizza, LLC,*[65] the California Supreme Court, in determining whether franchisor Domino's could be held vicariously liable for the harassing behavior by a franchisee's employee, declined to find a joint employment or agency relationship relating to the particular fact in issue (*i.e.*, Domino's control over the franchisee's harassment policy and its enforcement). Rather, the court found persuasive the facts that Domino's had no right to establish a sexual harassment policy or training for the franchisee's employees; that there was no means by which franchise employees could report harassment to Domino's; and that the franchisee had implemented its own anti-harassment training and policies.[66] In light of such facts, the court concluded, no public policy would be served by holding liable a party that "could not have prevented the misconduct and corrected its effects."[67]

In adopting this functional approach, courts applying the instrumentality test—or something similar to it—appropriately ensure that the focus of the joint employment inquiry is on control of the specific terms and conditions of employment relevant to the question of vicariously liability in a given case, rather than a broad and overly-generalized "catch-all" of factors whose ostensible "control" bears little on the day-to-day activities of franchisee employees.

Finally, in addition to some form of instrumentality test as described above, IFA seconds the comments of the Coalition for A Democratic Workplace which propose that the Board adopt specific definitional language in the final rule with regard to the terms identified by the D.C. Circuit as being "unclear" under the defective BFI standard. The definitions should address such concepts as "essential terms and conditions of employment," "routine contractual requirements that should not qualify as substantial control," and types of activities that should not constitute "substantial control," and the statement that "reserved control shall not alone be dispositive of joint employer status." Such definitions, in combination with the Board's helpful examples already set forth in the proposed rule, hold out the best hope for guidance to the regulated business community, including franchising.

V. CONCLUSION

For the reasons set forth above, IFA supports a final rule that is clear and implementable in the real world, and which provides that an employer may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as

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prevention" who, in correspondence to franchisees, discussed loss prevention strategies, including video surveillance systems).

[65] 333 P.3d 723 (Cal. 2014).

[66] *See id.* at 739-42.

[67] *Id.*

hiring, firing, discipline, supervision, and direction. Pursuant to this final rule, a putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine. Such a rule is essential to franchising – a model that promotes small business and creates a pathway for individuals who wish to start their own businesses, create jobs, and participate in the American dream.

Respectfully submitted,

Matthew A. Haller
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Statement Regarding the Economic Impact of the Prospective NLRB Public Policy Decision Regarding the Definition of Joint Employer

By Ronald Bird, Ph. D.

Summary:

This report describes the economic impact on employers, employees, and consumers of a contemplated decision by the National Labor Relations Board regarding the definition of circumstances where two or more employers may be found to have joint employer obligations and liabilities with respect to one or more employees. This report examines the costs and benefits of the proposed policy decision on consumers, workers and businesses, and it presents quantitative estimates of the economic impact through the franchise business sector on output and employment.

The decision before the Board is whether to maintain the status quo definition of joint employment enunciated in its 2015 *Browning-Ferris* decision or to adopt a proposed rule (83 Federal Register 179 (September 14, 2018), p. 46681) that would return the definition to its previous form. This report focuses on the economic impact of the status quo, which the Board should consider when it decides either to continue the status quo or to replace it. Relief from cost burdens of the status quo may constitute benefits of adopting the replacement standard that the Board has proposed.

The analysis presented here is based on survey data compiled from 77 in-depth interviews with franchise business entrepreneurs and knowledgeable observers who have direct experience of business conditions in the franchise industry before and after the 2015 decision.[1] This interview data shows that the *Browning-Ferris* expansion of the joint employer definition has had a chilling effect on the assistance and leadership that franchisors previously provided to their franchisees. Fear of joint employer liability under the *Browning-Ferris* doctrine has caused franchisors to "distance" themselves from franchisees by curtailing guidance regarding compliance with labor and employment laws, limiting training programs, withdrawing assistance with marketing and cost control practices and eliminating other services that previously were provided. This economic impact of the decision is NOT the cost of complying with the current joint employer test by assuming joint employer status. Rather, it is the economic impact of franchisors' defensive response to avoid joint employer status under the *Browning-Ferris* standard. It reflects the loss of productivity that has resulted from the fear and uncertainty that has ensued from the *Browning-Ferris* decision. The fact that franchisors are willing to sacrifice the measure of efficiency and output identified here to avoid joint employer designation implies that they perceive the cost of being designated as a joint employer to be even greater than the economic impacts found in this study.

The data presented here indicate that the "distancing" behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to 4.9% average yearly lost potential output for the franchised businesses represented in the sample. Statistical analysis of the sample data indicates with 99.9% confidence the economic

[1] The data collection method applied for this research is commonly described in economic literature as a "contingent valuation" survey. This method has been widely applied in economic cost benefit analyses by government agencies to inform environmental, safety, transportation and land use, regulation decisions. The detailed design and implementation protocols are described in the body of this report, below.

impact on the business model franchise sector's total output is *at least* 2.55% lost yearly potential output.[2] Based on the $674.3 billion national total output of the business model franchise sector reported in 2016 U.S. Economic Census data,[3] the output loss is $33.3 billion per year and 376,000 lost job opportunities at the sample mean of 4.9% lost output.[4] This lost potential output associated with the *Browning-Ferris* joint employment definition could be regained by adoption of the proposed rule to return the definition to its pre-2015 form. Furthermore, if the current *Browning-Ferris* joint employer standard is allowed to remain in place, the annual adverse economic impact may increase.

The robustness of the data reported here is indicated by the statistical lower bound of the sample result. The statistical lower bound of 2.55% lost output implies *at least* $17.2 billion annual lost economic output and 194,000 lost job opportunities for workers. This means that there is less than one chance in one thousand that another survey would find any smaller impact.

For the 233,000 small business franchisees nationwide,[5] at the sample mean the average franchisee experiences an annual revenue loss of $142,000 and $21,000 lost profit per year. These amounts are significant impacts on small franchise businesses in which average annual revenue is only $2.9 million and average profit including return on the entrepreneur's own labor is $433,000. Regulatory decision makers are required to consider these impacts under the terms of the Regulatory Flexibility Act.

The quantified economic impacts on the business model franchise sector are only a part of the total adverse impacts of the *Browning-Ferris* joint employment standard. Other impacts on the franchise sector in qualitative terms are discussed in the body of this report. The adverse economic impacts of the *Browning-Ferris* standard associated with the franchise business sector are only one component of the total economic impact of the *Browning-Ferris* standard across all sectors of the economy. Other adverse impacts are transmitted through the franchised distributor sector, managed manufacturing and service industry supply chains, and

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[2] "Business model" franchise refers to arrangements whereby a company licenses to others the right to operate under its brand name to supply a good or service produced and delivered in a specified manner. Alternatively, "distribution" franchises involve dealer networks for retail sales of a manufactured product such as automobiles or appliances. The analysis presented here is based on experiences of business model franchisors and franchisees.

[3] Quoted in PWC "The Economic Impact of Franchised Businesses, volume IV, 2016 at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf. The PWC report listed employment in the business model franchise sector as 7.6 million in 2016.the lost job opportunities calculation is 4.5% of that number.

[4] Lost job opportunities is an indicator of reduced labor demand. While competitive general economic equilibrium may result in full employment, reduced labor demand results in lower wages and gross domestic product less than the potential that would be achieved if the subject government regulation did not discourage efficient resource allocation.

[5] The 233,000 number of franchisee business firms includes many franchisees who operate multiple establishments. The total number of franchisee establishment units is over 700,000. Data regarding the number of franchisees and franchisors was provided by FRANData (Franchise Information Systems, Inc.). See https://www.frandata.com/

performance-specified support services contract arrangements. These additional channels of impact multiply the quantified impacts presented here.

To justify continuation of the *Browning-Ferris* joint employment standard, the Board must show that there are benefits to the economy and society that outweigh the likely costs and that these net benefits are greater than the net benefits of the alternative standard proposed in the September 14, 2018, *Federal Register* notice.[6] The quantified monetary costs of $17.2 billion to $33.30 billion per year represent a lower bound on the total economic costs that any benefit analysis must surpass. There is no quantitative evidence available to suggest that benefits to workers of expanded joint employer status (supposedly through increased union representation, improved collective bargaining, or increased labor law compliance) would remotely approach the $17.2 billion lowest bound of annual cost shown here and even less likelihood of benefits approaching the mean estimate of $33.3 billion.

Private sector union membership continues its long downward trend despite the *Browning-Ferris* decision: Only 6.5 percent of private sector workers were union members in 2017, compared to 6.7 percent in 2015, before the impact of the Board's decision took effect, and significantly below the 7.5 percent of 2007. This suggests a total lack of the primary expected benefit from the decision.

Because the quantified amount is only a fraction of the comprehensive cost, the full bar that any benefit estimate must surpass is much higher. While quantified impacts are not the exclusive criteria for regulatory decisions, the existence of quantified impacts provides a benchmark against which qualitative impacts must be considered. This report presents overwhelming evidence that the broad *Browning-Ferris* definition of joint employment is a policy that imposes significant net costs on society without commensurate benefits.

A critical factor in the failure of expected benefits from the *Browning-Ferris* decision to materialize is the distancing behavior documented in the interview data presented here: The *Browning-Ferris* decision created an incentive for franchisors and other core businesses to back away from earlier business arrangements and interactions with franchisees, suppliers and support contractors. This reaction may have sacrificed opportunities for better efficiency, quality, brand reputation protection, and output growth that would have benefited themselves, their business partners, workers and consumers, but it avoided the greater perceived risks and costs of embracing joint employer status. The result of this reaction to the *Browning-Ferris* decision is that the benefits that may have been anticipated for workers by the Board and others never materialized. Instead, large economic losses have been imposed on the entire economy, including workers and consumers, because of the fear and uncertainty that the

[6] The Regulatory Flexibility Act (USC 5.604 (a) (6)) mandates that regulatory agencies, which term includes the National Labor Relations Board, demonstrate consideration of impacts of their decisions on small entities by describing the steps that they have taken to minimize these economic impacts. This mandated consideration implies weighing of costs and benefits and selecting a regulatory approach among available alternatives that is reasonably expected to yield positive net benefits unless explicit statutory requirements dictate otherwise.

Browning-Ferris decision created. Instead of improved labor law compliance, which was anticipated as a benefit of the decision, labor law compliance may be reduced because the *Browning-Ferris* decision has encouraged a defensive withdrawal of support and guidance by franchisors, leaving inexperienced franchisees more vulnerable to compliance mistakes and omissions. The result has been a policy that imposes significant losses on society without yielding noticeable commensurate benefits. This mistake can be rectified by a decision to adopt the Board's proposed rule of September 14, 2018.

Background

The joint employment doctrine makes other (usually larger) employers responsible for alleged labor law violation claims filed against their (usually smaller) business partners – suppliers, contractors or franchisees. Prior to 2015, the NLRB had for many years followed a relatively narrow definition that a joint employment relationship existed when two employers "share or codetermine those matters governing the employees' essential terms and conditions of employment."[7] Under this definition a second company's indirect influence over the terms and conditions of employment for employees of another firm was not alone sufficient to establish joint employer status for the secondary company absent a showing that the secondary employer's putative control was actually exercised and was direct and immediate. Findings of joint employer liability in labor law cases were rare prior to 2015. "Even direct and immediate supervision of another's employees was insufficient to establish joint-employer status where such supervision was limited or routine."[8]

In 2015, the NLRB issued an opinion in the case of *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), that significantly broadened its interpretation of circumstances giving rise to joint employment status. The new ruling included circumstances in which the influence of the secondary company over the other's employees was not exercised or was only indirect, limited or routine. Specifically, the Board determined that

1. "Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the join-employment inquiry."
2. A finding of control exercised directly and immediately was not required for a finding of joint employment; and
3. "control exercised indirectly – such as through an intermediary – may establish joint-employer status." [9]

This decision significantly broadened the joint employment liability risk that franchisors, manufacturing supply chain managers, and support services contract managers faced in their relationships with franchisees, suppliers and support services contractors.

[7] 83 Federal Register, 179, p. 46683.
[8] Ibid.
[9] 362 NLRB No. 186, p. 2.

The particular facts of the *Browning-Ferris* decision included, for example, an instance in which an employee of the contractor, Leadpoint, was discharged by Leadpoint following an investigation that determined that the employee was in possession of an alcoholic beverage bottle at her work station in contravention of stated Leadpoint policy. The Board found that BFI was a joint employer of the discharged employee because BFI's contract with Leadpoint included the requirement that Leadpoint would prohibit the importation of alcoholic beverages into BFI facilities and the fact that Leadpoint management had been alerted to the infraction of its policies by a surveillance video supplied by BFI. This incident provided a substantial basis for the Board's ruling that BFI was obligated to participate directly in collective bargaining negotiations with the union representing Leadpoint employees and that BFI was jointly liable for damages arising from unfair labor practices violations by Leadpoint. It is easy to understand how this finding could have a chilling effect on decisions by franchisors, supply chain managers, or managers of support services contractors regarding the specifications in their contracts with franchisees, suppliers or support services contractors. A common-sense requirement in a contract with a security services provider that the provider would ensure that guards would not be intoxicated during their assignments at the company facility puts the company at risk of being named a joint employer in the event of a labor law claim against the security services company.

The perception of increased liability risk may have been enhanced because the new policy was expressed in the form of case law, leaving its future elaboration and application uncertain. The definitively stated regulation approach now being proposed may be less subject of interpretive evolution than a case law decision, although that depends on the clarity with which a regulatory text is written.

In the face of uncertainty, prudent businesses may reasonably plan for the worst outcome and often react by adopting defensive strategies. As it was written and as it was perceived, *Browning-Ferris* marked a departure from the Board's historic policy trend and suggested a risky, costly and uncharted course for the future. Defensive reactions by those subject to the new risk were predictable and reasonable.

The Board's analysis in the *Browning-Ferris* decision conflates under the term "contingent employment" a variety of business arrangements that have been central to innovation and economic growth in recent years:

1. Business model franchising, which has grown to include over 233,000 small business franchisee companies associated with approximately 3,000 franchisor brands, producing $674.3 billion in direct output and directly generating 7.6 million jobs and 269.9 billion per year in direct wages;[10]

[10] FRANdata provided estimates of numbers of franchisees; PWC, op. cit.., is the source for the output, jobs and wages data reported. The PWC report also includes estimates of indirect economic impact through suppliers and through consumption spending multipliers from direct wages.

2. Manufacturers' supply chain management, which has been responsible for increased productivity, timely delivery of critical components, efficiency of inventory cost control, and increased competitiveness of American manufacturers in the globally competitive economy; and
3. Outsourcing of specialized business services, such as information technology, facilities maintenance, housekeeping, logistics, security and administrative services to third party vendors or contractors, which has allowed businesses to focus management effort on improvement of productivity and efficiency in core business areas and to save costs by reliance on specialists who bring specific skills and scale efficiencies.

Critics discount the economic benefits to businesses, workers and consumers that have resulted from these innovations in economic organization. They blame these innovations for declining private sector union membership and slower wage growth among lesser skilled workers, while ignoring the growth in employment opportunities (instead of welfare dependence) that these innovations have helped to bring about.

The NLRB is contemplating a decision to either maintain the current definition of joint employment based on its 2015 *Browning-Ferris* decision or to replace it with the alternative definition proposed at 83 *Federal Register* 179, p. 46681, that an employer "must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine" in order to be considered a joint employer.[11] Central to that decision is the determination of whether or not the practical outcome of the *Browning-Ferris* decision has fulfilled the predictions of its proponents: Has it resulted in an increase in union membership, the improvement in collective bargaining practice, increases in wages for lesser skilled workers, or improved labor law compliance that its proponents' theories predicted, or has it produced contrary results and unanticipated adverse economic consequences?

Data Sources and Findings

To answer these critical questions about the economic impact of the *Browning-Ferris* decision and to inform the Board's decision of whether to maintain the broad definition status quo or to adopt the proposed rule to return the definition to its pre-2015 form, the International Franchise Association, with the assistance of U.S. Chamber of Commerce, undertook an interview survey of franchise business entrepreneurs and knowledgeable observers who had direct experience of business conditions in the franchise sector before and after the 2015 decision. To date, 77 interviews have been conducted. The interview data collection process is on-going, and further updates to this report may be published after the immediate rule-making comment period has ended. In addition, the Chamber is in the process of conducting a separate interview survey of non-franchise businesses involved in the supply chain management and support contract management aspects of the markets affected by the

[11] 83 Federal Register 179, p. 46696.

joint-employer standard. Preliminary findings of this effort are not yet at the stage to provide quantitative economic impact estimation data, but some qualitative initial observations will be discussed later in this report.

The interviews conducted for this research are an example of the data collection method that is known in the economic cost-benefit analysis literature as a contingent valuation survey. Contingent valuation surveys have been widely used for estimation of data to calculate benefits and costs for regulatory decisions in environmental, safety, health, land use, transportation, recreation, and other public policy decision contexts. "Courts have held that surveys of citizens' valuations enjoy 'rebuttable presumption' status in cases involving the assessment of damage to natural resources." [12]

Interviews conducted for this study included a series of both qualitative and quantitative questions. Interviewees were asked questions designed to elicit their assessments of how curtailment of guidance, support services and interactions with franchisees by franchisors had impacted sales, efficiency, costs or other operational parameters of franchisees. Franchisors have direct information regarding franchisees' sales because they typically receive a royalty payment from franchisees based on gross revenue receipts. Some franchisors also operate their own units within the franchise brand network, providing them with a benchmark for comparison of both sales and costs. Franchisees obviously are well acquainted with their own financial performance records, reflecting experience before and after the *Browning-Ferris* decision. The group of attorneys, consultants and others interviewed a have experience with multiple franchisors and franchisees and detailed knowledge of their clients' financial, management, and litigation experiences.

Most interviews were up to an hour in length and covered a variety of both quantitative and qualitative assessments of how joint employer definition concerns have impacted business decisions and operations. For this study an interview guide was developed around a series of questions designed to elicit information from each respondent based on his or her experience. The interview structure asked questions that gradually moved from elicitation of general and qualitative perceptions to more specific and quantified perceptions. To ensure consistency and as a check on bias, key questions were posed in several alternative forms. For example, the key issue of quantitative impact was approached through three different questions posed to franchisees who had qualitatively identified curtailment of franchisor guidance and assistance as a significant concern:

1. "Comparing experience before and since the *Browning-Ferris* decision in 2015, by how much has the curtailment of guidance or assistance from your franchisor caused a perceptible loss of expected revenue or increase in costs for your business?"

[12] Anthony E. Boardman, et al., Cost-Benefit Analysis: Concepts and Practice, 5th edition (Cambridge, UK: Cambridge University Press, 2018) p.422.

2. "How much additional annual royalty percent of gross revenue would you be willing to pay to obtain the valuable services from your franchisor that you say you no longer receive in the post-*Browning-Ferris* environment?"
3. "To mitigate your complaints about receiving less help from your franchisor, how much of a reduction in the current gross revenue royalty payment that you now make to the franchisor would be sufficient?"

Similar questions were adapted for franchisors and other observers who were interviewed.

Questions 2 and 3 go beyond the simple approach used in many contingent valuation surveys and probe for both the "willingness to pay" and the "willingness to accept" values of the respondent, effectively bracketing the estimated damage incurred because of the policy in question and providing a check on the consistency of the respondent's perceptions. In some cases respondents were able to respond to all three questions; in other cases only one or two responses were obtained in an interview. Where more than one response was obtained, the analysis applied the average of the responses given

The 77 completed franchise sector interviews reveal clearly that fear of liability under the broadened *Browning-Ferris* joint employer standard has had a chilling effect on franchisors' support for and interactions with their franchisee partners. Seventy-one respondents (92%) reported that franchisors have implemented defensive distancing behaviors in the wake of the *Browning-Ferris* decision. Fear of joint employer liability under the *Browning-Ferris* doctrine has caused franchisors to "distance" themselves from franchisees by curtailing guidance regarding compliance with labor and employment laws, limiting training programs, withdrawing assistance with marketing and cost control practices and eliminating other services that previously were provided and critically impacted.

This view is shared by both franchisors and franchisees and by other observers interviewed. All 28 franchisor executives interviewed reported that they had constrained guidance, support services and interactions with franchisees that had previously been routine. Thirty (83%) of the 36 franchisee business owners interviewed reported significant curtailment of guidance, support services, and interactions that had been routine before the *Browning-Ferris* decision. Of the six franchisees who reported no notable curtailment (their output loss estimates were recorded as zero percent), three were long-experienced business owners who stated that they had never relied on franchisor assistance either before or since the decision. Two of these, however, stated that less experienced new franchisees would benefit from franchisor guidance that has been curtailed since the *Browning-Ferris* decision. Among the 13 attorneys, consultants and other observers with experience representing franchisors and franchisees, all reported observing franchisors curtailing guidance, support services and interactions with franchisees, ranging qualitatively from moderate to large.[13] Interviewees across the board reported that the impact of defensive distancing and withdrawal of interaction

[13] The inclusion of attorneys and consultants who represent franchise businesses in the interview process improved the reliability of the survey data because many of these respondents reflected the collective experiences of multiple clients.

was most significant for new and struggling franchisees. The adverse impact on women and minority group members in the franchisee ranks was especially noted.

Franchisors reactions to the NLRB decision reflect their concern about liabilities under the National Labor Relations Act, and their reactions also reflect concerns about liabilities under other federal and state laws for which they perceive that judicial and administrative interpretations have been influenced by the NLRB precedent. Their concerns about the risk of joint employer liability reflect both concrete experience from claims filed against themselves or from claims of which they are aware having been filed against others and concerns reflecting uncertainty about the boundaries of the *Browning-Ferris* doctrine and how it may evolve and broaden as further cases are decided in various jurisdictions.

Franchisors, franchisees and attorney/consultant observers reported in 69 of 77 interviews that franchisees (themselves or others from whom they had heard) are complaining about the curtailments of guidance, support services and other interactions from franchisors in the wake of the *Browning-Ferris* decision. Franchisee's complaints focused predominantly on their perception of receiving reduced value for the constant (or even increased) royalty fees that they pay to the franchisor, compared to the value received prior to the *Browning-Ferris* decision.

Altogether, 54 useable quantitative responses for Browning-Ferris related output losses were obtained. These 54 responses ranged from losses of 25% to zero, with a mean value of 4.93% lost output, a sample standard deviation of 0.0539, and standard error of the mean of 0.0073. The median observation was 4.0 per cent lost output. The calculated t-statistic value of 6.729indicates a very high probability that the *Browning-Ferris* decision has had an adverse economic impact that is significantly greater than zero.

The t-value for a one-tail lower bound at p = 0.001 (or 99.9% confidence level) is 3.251, resulting in a lower bound estimate of 2.55% lost potential output associated with *Browning-Ferris*-induced curtailments of franchisors guidance, support services and interactions with franchisees.[14]

The lower bound (99.9 percent confidence) value is shown to reflect potential sensitivity of the sample mean to sample size, sample frame selection, the valuation survey method and non-response biases that may be present. The lower bound estimate of 2.55% output loss, indicates a statistically significant impact even under extreme statistical error assumptions regarding the representativeness of the sample with respect to the subject population. There is less than a one in one thousand chance that another survey or a census of the entire population of franchisors and franchisees would yield a smaller impact estimate than the indicated lower bound amount for this sample.[15]

[14] The lower bound is calculated as 0.093 - 3.251 x 0.0073 = - 0.0255 or 2.55% output loss.

[15] Because of the relatively wide range of sample observations, a trimmed mean calculation was also considered. This approach discards the two greatest (25% each) and two least (0% each) output loss responses and calculates the average of the remaining 50 observations. The trimmed mean approach resulted in a mean estimate of 3.68%

Analysis and implications

The data presented here indicate that the "distancing" behavior by franchisors from franchisees has resulted in franchisees experiencing lost sales or increased costs equivalent to yearly lost potential output between 4.93% and 2.55%.[16] Based on the $678.3 billion national total output of the business model franchise sector reported in 2016 U.S. Economic Census data,[17] the sample mean (4.93% lost output) implies $33.3 billion per year lost output equivalent to the franchise sector and 376,000 lost job opportunities.[18] This lost potential output associated with the *Browning-Ferris* joint employment definition could be regained by adoption of the proposed rule to return the definition to its pre-2015 form. The statistical lower bound (2.55 % lost output) implies that the economic impact of the *Browning-Ferris* joint employment definition is at least $17.2 billion annual lost economic output and 142,000 lost job opportunities for workers.

For the 233,000 small business franchisees nationwide,[19] at the sample mean value of 4.93% lost output, the average franchisee experiences an revenue loss of $142,000 and a profit loss of $21,000 per year. These amounts are significant impacts on small franchise businesses in which average annual revenue is only $2.9 million and average profit (including return on the entrepreneur's own labor) is $433,000. Regulatory decision makers are required to consider these impacts under the terms of the Regulatory Flexibility Act and to choose a regulatory approach that reduces of eliminates these burdens if allowed by controlling statutes.

The quantified economic impacts on the business model franchise sector is only a part of the total adverse impacts of the *Browning-Ferris* joint employment standard on the franchise sector, and the. adverse economic impacts of the *Browning-Ferris* standard on the franchise business sector is only one component of the total economic impact of the *Browning-Ferris* standard on the economy. Other adverse impacts are transmitted through the franchised distributor sector, managed manufacturing and service industry supply chains, and performance-specified support services contract arrangements. These additional channels of

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output loss ($29,2 billion). The smaller resulting mean sample error (.0052), yielded a higher value for the lower bound, 2.63% output loss ($17.3 billion).

[16] These estimates apply to the "business model" franchise market -- arrangements whereby a company licenses to others the right to operate under its brand name to supply a good or service produced and delivered in a specified manner. Alternatively, "distribution" franchise market involves dealer networks for retail sales of a manufactured product such as automobiles or appliances. The analysis presented here is based on experiences of business model franchisors and franchisees.

[17] Quoted in PWC "The Economic Impact of Franchised Businesses, volume IV, 2016 at https://www.franchise.org/sites/default/files/Economic%20Impact%20of%20Franchised%20Businesses_Vol%20IV_20160915.pdf.

[18] Lost job opportunities is an indicator of reduced labor demand. While competitive general economic equilibrium may result in full employment, reduced labor demand results in lower wages and gross domestic product less than the potential that would be achieved if the subject government regulation did not discourage efficient resource allocation.

[19] Data regarding the number of franchisees and franchisors was provided by FRANData (Franchise Information Systems, Inc.). See https://www.frandata.com/

impact likely multiply the quantified impacts presented here. Examples of non-quantified additional economic impacts include

- Additional litigation and legal costs incurred by franchisors and franchisees. In the most recent four years the number of joint employer claims under NLRB jurisdiction involving franchise businesses have increased five-fold.[20] In addition, respondents to the interview survey reported increases in joint employer claims filed in non-NLRB matters alleging joint employer status based on the *Browning-Ferris* precedent. Outside the context of litigation filed, franchisors interviewed reported increases in both internal and outside counsel legal costs to help them adapt their operations to the new liability environment associated with the *Browning-Ferris* ruling. Franchisees have incurred addition legal counsel costs to replace services and guidance that franchisors previously provided to them.
- Franchisees and franchisors have incurred costs to revise or outsource training materials to minimize potential joint employment liability claims.
- Franchisors have reduced inspections and on-site enforcement of brand quality and performance standards to avoid being designated as a joint employer. The subsequent erosion of brand quality may have decreased the market value of the franchise brand.
- In cases where joint employer risk has caused deterioration in quality of service, consumers have likewise suffered an economic loss in comparison to the quality of service received from franchisees prior to the *Browning-Ferris* decision.
- Several franchisors mentioned during interviews that an effect of the *Browning-Ferris* decision has been to discourage them from recruiting and accepting less experienced and less financially secure franchisee applicants. They explained this as the result of the post-*Browning-Ferris* reality that new franchisees must be more self-sustaining because Franchisors cannot risk joint-employment entanglement by providing them the needed guidance that was previously feasible. These respondents noted that this has resulted in reduced opportunities for women, minority race/ethnic group members, disabled veterans, and displaced workers – all groups that found opportunities for entering the economic mainstream through franchises businesses before the *Browning-Ferris* decision changed the dynamics of franchisee recruiting and selection. These initial interview responses were self-prompted. During the last ten franchisor interviews a question about such effects was added and 6 of the ten franchisor executives questioned confirmed that their companies had become more cautious in the selection of new franchisees – favoring candidates with more prior business management experience. These responses raise concern that the *Browning-Ferris* joint employer standard may be having an adverse effect on business opportunities for women and minority group members who typically have relatively less business management experience.

[20] This count excludes cases related to McDonalds, which has been the subject of a concerted campaign by the Service Employees International Union that began before the *Browning-Ferris* decision was rendered.

- Prior to the *Browning-Ferris* decision the franchise sector had enjoyed a notable record of providing business ownership opportunities to minority group members. The 2012 U.S. Census Survey of Business Owners found that 30.8 percent of franchised businesses were owned by members of racial or ethnic minority groups, compared to 18.8 percent of non-franchised businesses. In the five years between the 2007 and 2012 surveys the proportion of franchise businesses owned by minority group members increased by half, from 20.5 percent to 30.8 percent.[21] Results of the 2017 Survey of Business Owners have not yet been published by the Census Bureau, but when the results become available they will be examined to ascertain the possible impact of the joint employer standard change on the growth of minority group members in the franchise sector. The potentially adverse impact of the *Browning-Ferris* decision on minority group members and on women as business owners was noted in a recent study published by the Progressive Policy Institute:

  > "One problem is the likely response from franchisors to the expanded NLRB standard—in particular, we may see reduced business dynamism. Franchising is an engine of entrepreneurship in the United States, with independent operators who, despite the assistance of national brands, assume plenty of financial risk themselves. At the same time, we have seen the rise of large franchising operations that own hundreds of franchises across the country. Not surprisingly, large franchising operations are better able to comply with employment laws than small, single-operator franchisees. Faced with the new incentive structure of the expanded joint employer doctrine, franchisors will have a clear preference against smaller franchisees in favor of the larger organizations. This will make it much harder for new entrepreneurs to enter business through franchising, further raising barriers of entry for business creation."[22]

- Looking beyond the franchise business context, there is evidence that the *Browning-Ferris* definition of joint employment has had similar adverse impacts on non-franchise businesses that use supply chain management contracts and support services contracts. Fear of joint employer designation in relation to their suppliers or support services contractors has led businesses to reduce or eliminate their specifications of performance standards, schedules and worker qualifications in these contracts. The result has been a loss of the efficiency, quality and cost savings that were previously obtainable. The U.S. Chamber of Commerce is in the process of conducting interviews similar to those conducted with the franchise sector to obtain quantified estimates of the economic impacts of risk averting reactions to the

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[21] Quoted in PwC, Franchised Business Ownership by Minority and Gender Groups, p. 1, at https://www.franchisefoundation.org/franchise-business-ownership-minority-and-gender-groups-2018

[22] Dane Stangler, "Experience of the Joint Employer Doctrine Fails to Strike the Right Balance," October 5, 2017, at https://www.progressivepolicy.org/blog/expansion-joint-employer-doctrine-fails-strike-right-balance/

Browning-Ferris decision among companies in the supply chain management and support services contracting markets.

- The *Browning-Ferris* decision has a high potential to create conflict between the joint-employer standard and other federal laws and regulations. For example, banking regulations require covered financial institutions to monitor and supervise the selection by their contractors of employees who are assigned to work in their facilities under support services contracts. These include information technology systems workers, housekeepers, security guards and maintenance workers. Executives in affected companies express concern that the Board's broad joint employer definition exposes them to unanticipated costs for their compliance with federal banking regulations.

To justify continuation of the *Browning-Ferris* joint employment standard, the Board must show that there are benefits to the economy and society that outweigh the likely costs and that these net benefits are greater than the net benefits of the alternative standard proposed in the September 14, 2018, *Federal Register* notice.[23] The quantified monetary costs presented here represent a lower bound on the total economic costs that any benefit analysis must surpass. There is no quantitative evidence available to suggest that benefits to workers (supposedly through increased union representation or improved collective bargaining) would remotely approach the $17.2 billion to $33.3 billion annual cost shown here, and because the quantified amount is only a fraction of the full cost, the full bar that any benefit estimate must surpass is much higher. While quantified impacts are not the exclusive criteria for regulatory decisions, the existence of quantified impacts provides a benchmark against which qualitative impacts must be considered. The interview data shows that the *Browning-Ferris* expansion of the joint employer definition has had a chilling effect on the assistance and leadership that franchisors previously provided to their franchisees and that, in turn, has resulted in lost economic output to society.

There is no evidence that the broadening of joint employer designation actually has had any of the salutary effects predicted by its proponents. These benefits, according to their theory, should be observable in terms of higher wages, observably better collective bargaining outcomes, and increased union representation. No such measures of benefit have been revealed in analysis of post-*Browning-Ferris* data. Private sector union membership continues its long downward trend: Only 6.5 percent of private sector workers were union members in 2017, compared to 6.7 percent in 2015, before the impact of the Board's decision took effect, and significantly below the 7.5 percent of 2007. It seems unlikely that data showing

[23] The Regulatory Flexibility Act (USC 5.604 (a) (6)) mandates that regulatory agencies, which term includes the National Labor Relations Board, demonstrate consideration of impacts of their decisions on small entities by describing the steps that they have taken to minimize these economic impacts. This mandated consideration implies weighing of costs and benefits and selecting a regulatory approach among available alternatives that is reasonably expected to yield positive net benefits unless explicit statutory requirements dictate otherwise.

improvement in union membership or other relevant indicators, if they were found, would rise to the level of offsetting the significant output loss impacts shown herein.

The critical factor in the failure of expected benefits to materialize is the distancing behavior documented in the interview data presented here: The *Browning-Ferris* decision created an incentive for core businesses to back away from earlier business arrangements with franchisees, suppliers and support contractors. This reaction may not have been anticipated by the proponents of broadening the definition of joint employment. By reacting in this way franchisors and other affected businesses may have sacrificed opportunities for increased efficiency, quality, brand reputation protection, and output growth that would have benefited themselves, their business partners, workers and consumers, but they were driven toward this reaction by greater perceived risks associated with a joint employer designation. The result of this reaction to the *Browning-Ferris* decision is that the benefits anticipated for workers never materialized because the strategies adopted by targeted businesses have effectively avoided the joint employer designation. Instead, large economic losses have been imposed on the entire economy, including workers and consumers, because of the fear and uncertainty that the *Browning-Ferris* decision created and the disengagement of franchisors and larger companies at the centers of supply chain and support contractor networks that the decision has motivated. The broader joint employer standard created by the Browning-Ferris decision widened the supposed fissures in the workplace of which some have complained instead of closing them.

Conclusion

If the Board does nothing, the current definition reflecting the *Browning-Ferris* decision will remain in effect by default. Inaction by the board, allowing the current "broad" definition to remain in effect, will have a significant adverse impact on the U.S. economy, equivalent to a loss of output of $17.2 billion to $33.3 billion annually for the franchise business sector and likely multiple times that for all sectors affected. The adverse impacts that have already been observed since the 2015 NLRB decision will continue and likely become increasingly severe in future years as the effect of the NLRB definition spreads to other jurisdictions and contexts at the federal, state and local levels through administrative rules and litigation outcomes.[24]

The current broad joint employer concept based on the *Browning-Ferris* decision is a policy that was motivated by the expectation of salutary effect based on an untested theory. Practical experience has now proven that theory to be in error. In promulgating the 2015 *Browning-Ferris* decision, the Board failed to anticipate the incentives for defensive reaction by affected business that they were creating. The survey findings reported here show that the result has been a policy that imposes significant losses on society without yielding any

[24] In the realm of the joint employer concept, the NLRB provides a pattern and leadership that is followed by other agencies and jurisdictions, giving its decision an economic impact that ranges far beyond the relatively narrow scope of unfair labor standards charges arising under the Board's statutory authority. The "contagion" effect of the 2015 *Browning-Ferris* decision by the NLRB has already been observed in regulations issued by other government agencies and in the growth of single party and class action litigation in which a joint employment relationship is alleged under the "broad" definition.

commensurate benefits. This mistake can be rectified by a decision to adopt the Board's propose rule of September 14, 2018.

Statement of Qualifications and Certification

I, Ronald Bird, hold the Ph.D. degree in economics (University of North Carolina at Chapel Hill, 1974), and I have over 300 years of experience conducting and reviewing economic analyses of the benefits, burdens of government policies, regulations and information collection mandates. I presently serve as Senior Regulatory Economist with the United States Chamber of Commerce. Previously, I served as Chief Economist of the United States Department of Labor (2005-2009), Chief Economist for The Employment Policy Foundation (1999-2005), Chief Economist for Dyncorp Information Technologies, a regulatory and policy analysis support contractor to Federal agencies (1992-1999), and Senior Economist for Jack Faucett Associates, a regulatory and policy analysis support contractor to Federal agencies (1989-1992). I have held faculty appointments in economics at North Carolina State University (1973-1975 and 1982- 1987), The University of Alabama (1975- 1982), Meredith College (1986-1987), and Wesleyan College (1987-1989), The George Washington University (2018 to present), and Georgetown University (2018 to present).
I certify that the opinions expressed in this statement are my true opinions to a reasonable degree of economic certainty.

Ronald E. Bird