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I. EXECUTIVE SUMMARY

For the past 3 decades, the National Labor Relations Board (the "NLRB" or "Board") has adhered to the same standard for determining if two separate businesses should be treated as joint employers under the National Labor Relations Act (the "NLRA" or "Act"). The test is clear, it makes sense, and it's worked for over 30 years. The standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can all apply.

Under the current standard, two separate entities are treated as joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment" of the employees. *TLI, Inc.*, 271 NLRB 798, 798 (1984). In making this determination, the Board evaluates whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and looks at whether the putative joint employer's control over these matters is direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the Board's current standard ensures that the joint employer is actually involved in matters material to the scope of the National Labor Relations Act, and that the business is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status to only to those entities that have actual authority to impact the employment relationship.

The Board's General Counsel's proposed rewrite of the joint employment standard ignores the common law agency principles that Congress directed the Board to apply when the Taft-Hartley Act was passed. Instead of focusing on the scope of the relationship between the employees and the putative joint employer and whether the putative joint employer actually has authority to impact the employees' terms and conditions of employment, the proposed standard turns on whether one company exercises financial control over another in a way that "implicate[s] terms and conditions" of the other's employees. Simply because one company has a contractual relationship with another sufficient to "implicate" the terms and conditions of employment of the other company's workers does not demonstrate that either company has been authorized to act as the agent of the other. Yet, the General Counsel would find both companies

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to be a joint employer, equally liable for the unfair labor practices of the other and equally obligated to bargain with the employees who are purportedly jointly employed.

Indeed, the proposed changes would overturn policies which control joint liability for unfair labor practices, but also union organizing and collective bargaining. The proposed changes would overturn Congressional policies similar to those Congress itself refused to overturn, where union efforts failed on a recorded vote to amend the Act by providing for "common situs picketing." That bill would have treated a single primary employer as being engaged in common efforts with secondary employers and, therefore, make each subject to the other's labor disputes. The defeat of the common situs picketing legislation in the mid-1970s reflected the desire of Congress not to enmesh employers in each other's disputes.

In fact, the proposed standard would virtually eviscerate secondary boycott protections enacted by Congress in the Taft-Hartley Act. Secondary boycotts are designed to protect secondary or "neutral" employers from being enmeshed in the labor disputes of the primary employer. The proposed standard would blur the concept of "neutrality", and any economic dependency or relationship between the two entities might trigger a joint employer finding.

Even more fundamentally for the Nation's economy, the proposed changes to the Board's joint employer standard would destroy, or at the least create the massive upheaval of, established, highly successful business models involving franchisors and franchisees throughout the United States. But it is bigger than that. Beyond destroying franchise relationships, which are the basis for fast food chains and other franchise operations in every community in the United States, the Board's proposed standard would disrupt many other established contractual business relationships like staffing operations, for example. The result would be loss of jobs and loss of entrepreneurial business opportunities which fuel the economy (including minority business opportunities which the franchisor - franchisee business model currently provides).

Proponents of the proposed change in the Board's joint employer standard argue that the change is necessary because there cannot be meaningful bargaining when the primary employer's business partners are not at the bargaining table. The proponents offer no evidence, empirical or otherwise, for this thesis.

Congress should understand that these are not small, technical legal changes to labor law. The consequences of the General Counsel's re-interpretation of joint employer status threaten established business relationships which will cause significant economic upheaval.

II. ANALYSIS

A. The Board's Current Joint Employer Standard.

For the past three decades the Board has determined whether two separate entities are joint employers under the Act by assessing whether they exert such direct and significant control over the same employees such that they "share or codetermine those matters governing the essential terms and conditions of employment . . . ." *TLI, Inc.*, 271 NLRB 798, 798 (1984). To make the joint employer determination the Board evaluates whether the putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing,

discipline, supervision, and direction" and whether that entity's control over such matters is direct and immediate. *Id.* (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

By tying joint employer status to direct and immediate control over fundamental aspects of the employment relationship – hiring, firing, discipline, supervision and direction – the Board's current standard ensures that the joint employer is actually involved in matters material to the scope of the Act, and is not merely engaged in a market relationship that may have an indirect impact upon employees. Additionally, by requiring that the control be direct and immediate, the standard assigns joint employer status only to those entities with actual authority to impact the employment relationship – the subject of the Act – and avoids overreaching.

The Board's previous joint employer standards were not at all clear. The Board itself noted that "[p]rior to 1982 when the United States Court of Appeals for the Third Circuit decided *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), the Board's analysis of what constituted a joint employer relationship was somewhat amorphous." *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993). In one case the Board found joint employer status where the joint employer exerted only "indirect control" over the discipline and wages of another entity's employees, *Floyd Epperson*, 202 NLRB 23 (1973), whereas in another the Board agreed with the ALJ that "indirect control over wages and hours" is "insufficient to establish a joint-employer relationship," *Walter B. Cooke, Inc.*, 262 NLRB 626, 641 n.70 (1982). Other cases conflated the joint employer doctrine with the separate "single employer" or "common enterprise" theory, and looked to "industrial realities" even where the entity found to be the joint employer played no role in hiring, firing or directing the employees. *Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968). The Board's varying standards made it impossible for businesses to determine how to approach their relationships in order to comply with governing legal standards.

The standard set forth in *Laerco* and *TLI* was a welcome improvement. *Laerco Transportation & Warehouse* involved a group of drivers that CTL supplied to Laerco under a cost-plus contract. 269 NLRB 324, 325 (1984). CTL made all decisions regarding hiring, discipline and discharge. *Id.* at 324-25. CTL also made all legally-required contributions and deductions from the drivers' paychecks and provided them with benefits. *Id.* at 325. Once a driver was assigned to a Laerco facility, CTL representatives sometimes provided the driver with his or her initial job duty instructions; however, other times Laerco provided those initial instructions alone or with CTL representatives. *Id.*

Beyond occasionally providing CTL's drivers with their initial instructions, Laerco supplied the drivers' vehicles and required them to comply with Laerco's safety regulations. *Id.* at 324. Under Laerco's contract with CTL, Laerco was permitted to establish driver qualifications and refuse to accept any drivers provided by CTL. *Id.* On occasion, Laerco pointed out issues regarding the drivers' performance to CTL, which CTL then resolved. *Id.* at 325. CTL supervisors were seldom at the Laerco facilities to which CTL assigned its drivers, so Laerco provided what little supervision the CTL drivers needed, such as directing them where to go for a pick-up or delivery and setting the drivers' priorities. *Id.* Laerco would attempt to resolve minor problems that arose for the drivers in the workplace, but CTL handled any significant issues. *Id.* at 326.

In reviewing the facts of the case, the Board noted:

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

Id. at 325.

Examining the facts before it in *Laerco*, the Board held that the level of control exercised by Laerco was inadequate to establish that Laerco and CTL functioned as a joint employer. *Id.* Although Laerco provided some supervision of the CTL drivers, it was "of an extremely routine nature" and "the degree and nature of Laerco's supervision" failed to render it a joint employer. *Id.* at 326. Moreover, while Laerco exercised some control in resolving minor issues raised by CTL's drivers, "[a]ll major problems relating to the employment relationship" were handled by CTL. *Id.* Consequently, the Board concluded that Laerco was not a joint employer because its control of the CTL employees' terms and conditions of employment was not meaningful, given "the minimal and routine nature of Laerco's supervision, the limited dispute resolution attempted by Laerco, [and] the routine nature of the work assignments." *Id.*

TLI, Inc. also involved a situation where one company, TLI, provided drivers to another company, Crown. 271 NLRB 798 (1984). Each day, Crown directed the drivers as a group about which deliveries to make, but the drivers selected their specific assignments based on seniority. *Id.* at 799. The drivers reported their accidents to Crown; however, TLI investigated the accidents and determined whether discipline was warranted. *Id.* When a driver engaged in conduct that concerned Crown, Crown would give an incident report to TLI and TLI conducted its own investigation. *Id.* Crown did not hire, fire or discipline TLI's employees. *Id.*

The Board analyzed these facts under the standard set forth *Laerco* and the Third Circuit's decision in *Browning-Ferris* and determined that, "[a]lthough Crown may have exercised some control over the drivers, Crown did not affect their terms and conditions of employment to such a degree that it may be deemed a joint employer." *Id.* The Board found that Crown's daily supervision was not "meaningful": "the supervision and direction exercised by Crown on a day-to-day basis is both limited and routine, and considered with [Crown's] lack of hiring, firing, and disciplinary authority, does not constitute sufficient control to support a joint employer finding." *Id.* (emphasis added). Furthermore, even though a Crown representative actually attended bargaining sessions between TLI and the union and discussed cost savings, the Board found his involvement did not amount to sharing or co-determining terms and conditions of employment because the Crown representative left the actual savings determinations to TLI and the union. *Id.*

The standard articulated by the Board in *Laerco* and *TLI* is clear, rational and has withstood the test of time. Indeed, the Board's direct control standard has been "settled law" since 1984. *See Airborne Express*, 338 NLRB 597, n.1 (2002). Over the past 30 years, the Board has developed a coherent body of law from *Laerco* and *TLI* that elucidates the facts, circumstances and scenarios under which an entity becomes a joint employer.[2] Reviewing courts likewise have adhered to the Board's bright-line test for decades.[3]

The stability and predictability provided by the Board's current standard has allowed thousands of businesses, large and small, to structure their business relationships in a sensible

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[2] *See e.g.*, *Aldworth Co.*, 338 N.L.R.B. 137, 139-40 (2002) (affirming ALJ's finding of joint employer relationship because "[b]ased upon a thorough review of the record, the judge determined that Respondents Aldworth and Dunkin' Donuts together share control over the hiring, firing, wages, benefits, discipline, supervision, direction and oversight of the truck drivers and warehouse employees and thereby meet the standard for joint employer status."); *Mar-Jam Supply Co.*, 337 N.L.R.B. 337, 342 (2001) (affirming finding of joint employment after analyzing all terms and conditions of employment and finding that putative employer directly hired and fired employees, solely supervised and directed the employees with regard to work assignments, time, attendance and leave, and disciplined the employees); *C.T. Taylor Co.*, 342 N.L.R.B. 997, 998 (2004) (affirming finding of no joint employment where none of essential terms and conditions of employment were controlled by putative employer); *Mingo Logan Coal Co.*, 336 N.L.R.B. 83, 95 (2001) (stating that the putative joint employer meaningfully affected all five essential terms and conditions of employment); *Villa Maria Nursing and Rehab. Center, Inc.*, 335 N.L.R.B. 1345, 1350 (2001) (affirming finding of no joint employer relationship where "Villa Maria does not have any authority to hire, fire, suspend or otherwise discipline, transfer, promote or reward, or lay off or recall from layoff ServiceMaster's employees. Villa Maria does not evaluate them or address their grievances."); *Windemuller Elec., Inc.*, 306 N.L.R.B. 664, 666 (1992) (affirming ALJ's finding of joint employment based on facts that putative joint employer shared or co-determined hiring, firing, discipline, supervision and direction); *Quantum Resources Corp.*, 305 N.L.R.B. 759, 761 (1991) (affirming joint employer finding and specifically adding to Regional Director's decision that FP&L's control over hiring, discipline, discharge and direction "[t]ogether with the close supervisory relationship between FP&L and [contract] employees . . . illustrate[s] FP&L's joint employer status"); *D&S Leasing, Inc.*, 299 N.L.R.B. 658, 659 (1990) (finding joint employment based on facts that putative joint employer shared or co-determined the hiring, firing, discipline, supervision and direction of contract employees); *G. Heileman Brewing Co.*, 290 N.L.R.B. 991, 1000 (1988) (affirming joint employer finding based on fact that G. Heileman shared or co-determined all five essential terms and conditions of its contract employees' employment, and in addition negotiated directly with the union); *Island Creek Coal*, 279 NLRB 858, 864 (1986) (no joint employer status because there was "absolutely no evidence in this record to indicate that the normal functions of an employer, the hiring, firing, the processing of grievances, the negotiations of contracts, the administration of contracts, the granting of vacations or leaves of absences, were in any way ever performed by [the putative joint employer]).

[3] *See, e.g.*, *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding that supervision which is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *AT&T v. NLRB*, 67 F.3d 446, 451 (2d Cir. 1995) (finding no joint employment where only one indicium of control (participating in the collective bargaining process) existed and there was no direct and immediate control over hiring and firing, discipline, supervision or records of hours, payroll, or insurance); *Holyoke Visiting Nurses Ass'n v. NLRB*, 11 F.3d 302, 307 (1st Cir. 1993) (finding joint employer status where the putative joint employer had "unfettered" power to refuse to hire certain employees, monitored the performance of referred employees, assumed day-to-day supervisory control over such employees, gave such employees their daily assignments, reports, supplies, and directions, and held itself out as the party whom employees could contact if they encountered a problem during the work day); *Carrier Corp. v. NLRB*, 768 F.2d 778, 781 (6th Cir. 1985) (finding joint employer status where the putative joint employer "exercised substantial day-to-day control over the drivers' working conditions," was consulted "over wages and fringe benefits for the drivers," and "had the authority to reject any driver that did not meet its standards" and to direct the actual employer to "remove any driver whose conduct was not in [the putative joint employer's] best interests.").

and optimal fashion, subcontracting discrete tasks to other companies with specialized expertise to provide services that would otherwise be far more difficult or costly. At the same time, the current joint employer standard has not denied any employee the right to union representation granted by the Act, nor has it prevented any union from bargaining with the employer directly involved in setting the terms and conditions of employment in a workplace.

B. The Proposed Standard.

The Board's General Counsel proposes to abandon the current standard and revert back to the vague and amorphous standards applied prior to 1984. Under the Board's prior standards an entity could be considered a joint employer if it exercised direct *or indirect* control over the significant terms and conditions of employment of another entity's employees, *see Floyd Epperson*, 202 NLRB 23 (1973), OR if it possessed the *unexercised potential* to control such terms and conditions of employment, *see Hoskins Ready-Mix Concrete*, 161 NLRB 1492 (1966), OR if "industrial realities" made the entity an essential party to meaningful collective bargaining, *see Jewell Smokeless Coal Corp.*, 170 NLRB 392 (1968).

1. The Proposed Standard Is No Standard At All.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012). Inherent in the notion of due process is the requirement that the obligation be clear enough that citizens can reasonably ascertain to whom it applies. The proposed standard fails to provide the notice required by due process. It provides no guidance for businesses about how they can structure their operations to provide certainty that they are, or are not, joint employers.

The proposed test contrasts sharply with the Board's three-decade old standard for determining joint-employer status. Under *TLI* and *Laerco*, one company can structure its operations utilizing third parties without the risk of being held responsible for the third parties' actions or having to jointly bargain with those parties' employees, provided it does not exercise direct control over the third parties' employees. *TLI, Inc.*, 271 NLRB at 798; *Laerco Transp.*, 269 NLRB at 325. That standard provides a bright line that everyone – employers, employees, unions, the Board and the courts – can apply. The Board's proposed test, however, provides no line at all, other than what a regional director or administrative law judge might draw well after the parties have established the parameters of their relationship.

The proposed standard is incapable of clear definition because business relationships typically involve an agreement that necessarily but indirectly impacts the terms and conditions of employment for the other's employees. Service contracts, in particular, often involve significant control by the customer over the service provider and, when services are performed on the customer's property, the amount of control is even greater. That control, in turn, can indirectly impact the service provider's employees' terms and conditions of employment. Hours the services are performed, the skills of the individuals who will perform them and conduct requirements to ensure the customer's employees, property and its own customers are reasonably protected – not to mention the amount the customer is willing to pay for the services – all necessarily impact the service provider's employees' terms and conditions of employment.

Under the General Counsel's proposed test, the customers in such cases would be deemed to jointly employ the service providers' employees. Yet, it would be absurd to treat a homeowner as the joint employer of the workers a contractor hires to remodel her home simply because she and the contractor have agreed to a specified amount she will pay for the services and terms that prohibit the services from being performed before or after certain hours or on weekends and require the contractor's employees to leave her home clean and free of hazards at the end of every day.

2. The Proposed Standard Is Inconsistent With The Fundamental Policies Of The Act.

The Supreme Court has made clear that an employment relationship does not exist unless the worker is directly supervised by the putative employer. *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-68 (1971). In *Allied Chemical*, the Court rejected the Board's attempt to expand the definition of the term "employee" beyond its ordinary meaning, observing that:

> It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . . . *"Employees" work for wages or salaries under direct supervision.* . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings, but ordinary meanings.

Id. at 167-68 (quoting H.R. Rep. No. 245, at 18, 80th Cong., 1st Sess. (1947) (emphasis in original)). More recently, in *NLRB v. Town & Country Electric,* the Supreme Court again turned to the dictionary definition of the term, defining employee as a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed." 516 U.S. 85, 90 (1995) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

Just as the Board cannot define the term "employee" in a manner inconsistent with its ordinary meaning, it cannot adopt a "far-fetched" definition of "employer" that dramatically expands it by eliminating the fundamental touchstone of an employer-employee relationship; namely, direct control of the employee. Indeed, if Congress meant "employee" to be defined by the fact that she is directly controlled by her employer, it is axiomatic that Congress meant "employer" to be the person who directly controls the employee.

Apart from the problem that the proposed joint-employer standard is inconsistent with the Act's language and the ordinary meaning of the terms "employee" and "employer," it also is contrary to the mandate Congress gave the Board when it adopted the Taft-Hartley Act in 1947. In particular, Congress intended Taft-Hartley, in part, as a directive to the Board that it apply common law agency principles when interpreting the Act's provisions.

The significance of the dramatic changes Congress made to the Act in 1947 – in the face of massive opposition by organized labor and over the veto of the President – cannot be overlooked, particularly with respect to defining what constitutes an employment relationship. Congress has unequivocally directed the Board to apply common law agency principles in defining the employer-employee relationship. The proposed joint-employer standard would ignore those principles, basing the determination of an employer relationship on the control that one company has over another merely because that control "implicate[s] terms and conditions" of the other's employees. Simply because one company has a contractual relationship with another sufficient to "implicate" the terms and conditions of employment of the other company's workers does not demonstrate that either company has been authorized to act as the agent of the other. Yet, the General Counsel would find both companies to be a joint employer, equally liable for the unfair labor practices of the other and equally obligated to bargain with the employees who are purportedly jointly employed.

Saddling a putative joint employer with all of the duties and responsibilities required of direct employers under the Act could have enormous financial and time-consuming consequences. For example, large-scale franchisors who retain only the control required to protect their brand, trade name and trademark could be drawn into hundreds of collective bargaining relationships where they have little or no involvement with the workplace. Additionally, joint employers with limited involvement in the workplace would be required by Section 8(a)(5) to execute bargaining agreements and subject themselves to contractual and unfair labor practice liabilities without having any control over day to day operations at myriad locations throughout the country. Rather than accept such liabilities with no control over the workplace, or engage in endless bargaining across the country, many companies undoubtedly will opt to cancel subcontracts or franchise arrangements, or subcontract overseas, thus displacing small businesses and the millions of jobs that small businesses create. The impact upon the economy could be enormous.

Where the putative joint employer has only limited involvement in the material terms and conditions of employment of the employees, it is unreasonable and unfair to saddle it with these contractual and legal responsibilities.

3. The Proposed Standard Would Eviscerate The Protections Afforded In Section 8(b)(4) of the Act.

Section 8(b)(4) was added to the NLRA in the 1947 Taft-Hartley amendments. Taft-Hartley Act, Pub. L. No. 80-101, 61 Stat. 136 (1947). The amendments added a list of prohibited actions, or unfair labor practices, on the part of unions to the NLRA, which had previously only prohibited unfair labor practices committed by employers. One of the primary prohibitions added by the amendments was the prohibition against secondary activity. 29 U.S.C. § 158.

Employees and unions engage in various activities - handbilling, picketing and striking - to exert economic pressure upon employers. When the immediate target of that economic pressure is an employer with whom the employees have a direct employment relationship and a labor dispute, the employer is considered the primary employer and the handbilling, picketing and striking is considered primary activity. When, however, the handbilling, picketing and striking is aimed at some other entity with which the primary employer has a business

relationship, a "secondary" or "neutral" employer, the object of such pressure usually is to alter that business relationship to the detriment of the primary employer and thereby to raise the cost to the primary employer of continuing the labor dispute. The prohibitions against secondary activity in Section 8(b)(4) are designed to protect secondary or neutral employers from being enmeshed in the labor disputes of the primary employer.

The General Counsel's proposed standard would blur the concept of "neutrality" by finding the secondary employer to be a joint employer whenever the primary employer is economically dependent on the secondary employer. That would be so even though the secondary employer has no ability or authority to control the employees' terms and conditions of employment or to remedy the union's labor dispute. Under the proposed standard, the secondary employer would become a joint employer with the primary employer and the protections of Section 8(b)(4) would be meaningless.

4. The Proposed Standard Will Unnecessarily Complicate Collective Bargaining.

The proponents of the General Counsel's proposed rewrite of the joint employer standard argue that the test is limited because it will apply only to those businesses necessary for "meaningful bargaining." That criterion, however, is merely a post-hoc assessment without standards, as the proponents fail to provide any guidance as to what constitutes "meaningful bargaining." Moreover, the proponents fail to show how primary employers are incapable of engaging in meaningful bargaining without the presence of their business partners. Contrary to the proponents' argument, the proposed joint employer test would actually undermine the Act's purpose of encouraging effective bargaining.

When Congress adopted the Act, it made clear its primary purpose was to "encourag[e] the practice and procedure of collective bargaining." 29 U.S.C. § 151. As noted above, however, a series of cases that had expanded the Act's reach beyond what Congress intended caused Congress to revisit and substantially revise the Act in ways that directly or practically limited the process of collective bargaining. For example, Congress amended the Act to protect employee rights to *not* engage in collective bargaining or otherwise support unions and it made clear that the Act's reach was not as extensive as the Board and Court seemed to believe. 29 U.S.C. § 157. Another limiting change Congress made through the Taft-Hartley Act was to preclude the Board from certifying a unit based solely on the extent to which a union had been successful in organizing; instead, the unit must be appropriate for bargaining. 29 U.S.C. § 159(c). Clearly, the purpose of the Act today is not merely to encourage collective bargaining for its own sake but, rather, to encourage collective bargaining that can *meaningfully* address the workplace concerns of a group of an employer's employees that shares a community of interest.

No doubt, a business might be reluctant to negotiate employment terms for its workers that would cause it to lose money on its operations, such as a higher wage rate than the user would agree to pay under its cost-plus contract. But an employer might be willing to pay a higher wage than its customer will reimburse if that loss is offset at another of its operations. Moreover, if the financial limitations a customer imposes on an employer are sufficient to demonstrate that "meaningful bargaining" regarding the employer's workers cannot occur

without the customer, then there truly is no limit on what entities can be found to be joint employers.

Absent direct and immediate control over terms and conditions of employment, a putative joint employer is nothing more than a third party business associate whose business relationship may impose some limits on the terms and conditions of employment. The Board and the courts have consistently found that free and fair collective bargaining is not inconsistent with a situation where business relationships impose outside limits on the outcome of bargaining. Indeed, bargaining always takes place within an economic framework, whether that framework is supplied by state law, contractual arrangements or the competitive marketplace.

Surely the Board would not hold, under the rubric of "industrial reality", that the United States government is a necessary party to collective bargaining for every defense contractor throughout the United States, even though the government's reimbursement level for goods or services provides the backdrop for the wages, hours and working conditions for employees throughout the defense industries. In like fashion, a contractor that enters into a fixed fee or cost-plus subcontract for services merely establishes a business relationship that reflects market forces and the competitive business background. Significantly, subcontractors are generally not forbidden from paying wages or benefits in excess of reimbursement levels. Unions can thus bargain for any wages they wish, and subcontractors who choose to pay more than reimbursable levels in the contract can always seek contractual amendments to cover the cost of such increases.

Although the proponents argue that the proposed test is calculated to advance meaningful collective bargaining by having all relevant "employers" at the table, they fail to recognize the obstacles created by forcing two different businesses to bargain over the terms of a group of employees only one of them directly controls. Proposed contract terms that might be crucial to one of the joint employers, and for which it might be willing to make significant concessions, might be irrelevant to, or contrary to the interests of, the other. Moreover, some issues that might be significant to the union, and which might be acceptable to the direct employer if negotiating alone, likely will be barriers to any agreement in a joint-employer situation because the direct employer will not agree to be bound to certain terms when its contract with the other joint employer can be terminated on short notice. It belies logic to assume that, simply because unions want to have both businesses at the bargaining table, more effective bargaining will result.

C. Relationship To Definition Of "Employer" Under Other Federal Laws.

Various union proponents have urged the Board to adopt a joint-employer standard comparable to that provided by federal labor and employment laws other than the Act. The Equal Employment Opportunity Commission (EEOC), for example, has argued that the Board should adopt the EEOC's approach, which treats staffing firms and their clients as joint employers under the laws the EEOC enforces. The assertion is certainly accurate under most federal anti-discrimination statutes – and, for the very reasons identified by the EEOC, it is generally true under the Act – because a joint employer finding is appropriate in such cases because the client usually exercises significant supervisory control over the worker. Concededly, if a customer exercises significant supervisory control over a supplier's employees, the customer

will be a joint employer under current Board law. Courts, likewise, refuse to find joint employer status for purposes of liability under federal employment laws when the user company does not exert significant direct control over the worker. *See, e.g.*, *Jenkins v. Jewell*, 2014 WL 683706, at *4 (D. Idaho Feb. 20, 2014) (customer not a joint employer under Title VII, even though it retained the right to refuse workers assigned under the contract, when provider company retained "primary control" over worker).

Apart from failing to demonstrate that the Board's standard is different from their cited laws, these proponents fail to appreciate two crucial differences between the Act and other labor and employment laws. First, Congress has provided clear directions to the Board and the courts regarding how the employment relationship needed to be defined. Although each statute has its own legislative history, the Board cannot ignore the unique history of the statute it oversees – including the Taft-Hartley amendments that were driven, in part, by the Board's early attempt to expand the definition of the employment relationship beyond the ordinary one that existed when the Act was adopted in 1935 and amended in 1947.

Second, the other laws to which the proponents point – from Title VII of the Civil Rights Act of 1964 to state workers' compensation laws – are all designed to provide and protect *individual* employee rights. The Act, on the other hand, provides and protects employees' rights to act *collectively*. To the extent the Board has discretion to interpret the term "employer" under the Act, appreciating this distinction is of fundamental importance. For example, it furthers Title VII's purpose to deem a prime contractor the joint employer of a sub-contractor's employee when the prime contractor affects that worker's individual rights, such as terminating access to the property because of gender. However, to then treat the prime contractor as the joint employer of all the subcontractor's employees for bargaining purposes as a result of that individual incident would be inimical to the Act if it has no control over the *collective* terms and conditions of the subcontractor's employees. Drawing upon the practice of other agencies is not rational where, as here, there are fundamentally different policies animating particular words in the statutes that Congress has entrusted different agencies to interpret and enforce.

III. CONCLUSION

The rationale that led the Board, three decades ago, to adopt a direct control standard remains fully applicable today. No new facts or industrial developments require that the Board or Congress abandon thirty years of established law and depart from an approach the Board has developed and implemented for the past three decades. The current approach provides ample flexibility to allow the Board to police any improper attempts to evade the requirements of the Act. A return to the "indirect control" standard advocated by the General Counsel and others, by contrast, sweeps too broadly and would enmesh separate businesses in bargaining relationships over which they have no significant control without any materially greater protection of employee rights under the Act. It would create massive uncertainty throughout large segments of American industry and would cause significant economic upheaval. There simply is no reason to fix a standard that is not broken.