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December 6, 2022

Via Federal eRulemaking Portal

Roxanne Rothschild, Executive Secretary
National Labor Relations Board
1015 Half Street S.E.
Washington, D.C. 20570

Re: *Comments Submitted on Behalf of the National Association of Convenience Stores Regarding Standard for Determining Joint-Employer Status; RIN 3142- AA21*

Dear Ms. Rothschild:

Our client, the National Association of Convenience Stores ("NACS"), writes to provide comments on the proposed rule concerning the NLRB's Standard for Determining Joint-Employer Status ("Proposed Rule").[1] The Board claims the purpose of the Proposed Rule is to "explicitly ground the joint-employer standard in common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities under the Act," but it accomplishes neither of these goals. Instead, the Proposed Rule is an overly broad, vague, arbitrary, and capricious expansion of the current joint employer rule. Specifically, NACS takes issue with the Proposed Rule's determinative "indirect and reserved forms of control" standard and an open-ended and non-exhaustive definition of employees' "essential terms and conditions of employment." 87 Fed. Reg. 54641, 54645.

Application of the proposed rule would have direct, substantial, and far-reaching negative impacts on the convenience and fuel retailing industry, including exposing innocent businesses to unwarranted joint employer liability for actions over which they have no direct or actual control and forcing them into another party's labor dispute. This would have the practical impact of exposing franchisors to liability for actions of their franchisees and businesses to liability for the actions of their suppliers and vendors and would essentially create a joint employer relationship out of nearly all contractual relationships in the industry. As a result, NACS does not support the Proposed Rule, and submits the below additional comments for the Board's consideration.

[1] Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54641 (proposed Sept. 7, 2022) (t0 be codified at 29 CFR 103).

I. BACKGROUND

NACS has a significant interest in the Proposed Rule. NACS is an international trade association representing the convenience store industry with over 1,300 retail and 1,600 supplier companies as members, the majority of whom are small businesses based in the United States.

A. NACS Members are Significant Entry Level Employers.

The convenience and fuel retailing industry is a significant entry-level employer. Currently, there are 148,026 convenience stores operating in the United States, employing more than 2.38 million employees. As a result, the industry represents a significant percentage of the U.S. economy, generating $705.7 billion in total sales, representing approximately 3.1 percent of U.S. Gross Domestic Product.[2]

Employee turnover is a significant cost that retailers are constantly seeking to minimize through pay, benefits, and/or advancement opportunities. In fact, approximately fifteen percent (15%) of adult Americans have worked at a retail fuel outlet or convenience store at some point in their working lives. It is important to note that because the industry tends to promote from within, the fuel wholesaling and convenience industry is a significant entry-level employer for management jobs.

B. The Majority of Convenience Stores are Small Businesses and Operate on Narrow Margins.

The convenience and fuel retailing industry is an industry of small businesses. The vast majority of branded outlets are locally owned by an individual or family, approximately sixty percent (60%) of convenience store owners operate a single store. As the convenience and fuel retailing industry is one of the most competitive in the United States, NACS members are unable to absorb even incremental cost increases resulting from regulatory burdens without passing them on to consumers.

C. Franchising is a Common Business Model in the Industry.

Although, there are many distinct business models in the industry, one of the most common types is the traditional franchise model. Under this model, a franchisee operates one or more locations pursuant to a contract that allows it to use the name of a larger franchisor. In some of those instances, the franchisor has established parameters on food offerings, business plans, or other aspects of the functioning of the location, but in other situations, it has not. Indeed, convenience stores and fuel retailers vary greatly, even those that are part of the same chain, based largely on their location. For example, stores within a chain may sell different items, and the way the stores offer those items frequently differs. Catering to individual preferences is a defining trait of the industry and largely responsible for these variations.

D. Fuel Retailing and Convenience Stores Also Operate Under a Branded Fuel or Retail Outlet Model.

Despite common misconceptions, oil companies own less than five percent of fuel retailers nationally. This misconception likely arises from another type of business arrangement utilized in the fuel retailing and convenience industry, the “branded” fuel or retail outlet model. This model

[2] All of the data points about the convenience store industry come from the NACS, State of the Industry Report (2021).

is little known or understood outside the retail fuels space and is governed by its own legal regime, The Petroleum Marketing Practices Act.[3] Under this model, fuel retailers may be branded with the name of a major oil company or a private brand (e.g., ExxonMobil, Shell, Tesoro, Chevron, etc.). In some instances, under such a branding contract, a store contractually agrees to purchase fuels from the private brand and sell motor fuels under the brand name, but the private brand may have little to do with in-store service offerings and other sales. For example, a gas station and convenience store operated by an individual owner may sell Shell gas and the gas pumps and gas station element may be branded as Shell. However, Shell may have no practical relation to the convenience store element of the business.

Alternatively, there are also arrangements in which the convenience store is also branded with the name of the major oil company and is subject to its brand standards. Those brand standards vary, depending on the terms of the particular contract, and may cover aspects of the business such as property cleanliness, marketing, and hours of operation to ensure consistency among branded locations. However, these agreements typically do not include specific terms related to other elements of the business, such as in-store product offerings; delivery of products sold in stores; stocking; hiring of third parties to perform cleaning, maintenance, and other services; and employment of those who work in the retail stores. Thus, the typical branded retailer model is substantially different from the traditional franchise model because the branded fuel retailer may operate his convenience store as an independent business without direction by the private brand as to that element of the business, even though the private brand may have some control over some aspects of the fuel retailing element.

II. COMMENTS TO THE PROPOSED RULE

A. By Establishing that Reserved or Indirect Control is Determinative of Joint Employer Status, the Proposed Rule Exceeds the Bounds of Common Law and the Board's Decision in BFI and Fails to Comply with the D.C. Circuit's Ruling.

The proposed amendment to Section 103.40(c) defines "share or codetermine those matters governing employees' essential terms and conditions of employment" to mean "for an employer to possess the authority to control (whether directly, indirectly, or both), or to exercise the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment." 87 Fed. Reg. 54641, 54663. The Proposed Rule further clarifies in section 103.40(e) that simply "[p]ossessing the authority to control... regardless of whether control is exercised" and "[e]xercising the power to control indirectly... regardless of whether the power is exercised directly" are "sufficient" in and of themselves "to establish status as a joint employer." *Id.* Contrary to the Board's claim that this standard amounts to a return to the *BFI*[4] standard and is consistent with the common law of agency and the D.C. Circuit's 2018 *BFI* decision,[5] the Proposed Rule goes far beyond the confines established therein in critical and potentially harmful aspects.

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[3] 15 U.S.C. § 2801 *et seq.*

[4] *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015), hereinafter referred to as "*BFI I*."

[5] *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), hereinafter referred to as "*BFI II*."

First, the Proposed Rule's creation of a dispositive reserved and indirect control standard, without requiring any direct or exercised control, is overly broad and exceeds the bounds of the common law. The Board opined that it "believes that the policies of the Act, together with the expansive common-law employer-employee relationship defined by the judiciary, make it appropriate for the Board to give determinative weight" to authorized but unexercised and indirect control. *Id.* at 54648. However, the Board fails to provide any basis or support for this belief or explain how the policies of the Act or common law agency principles authorize such an expansion. There is no such basis or support to justify the Proposed Rule's expansion beyond the limits of the common law or judicial precedent.

As noted by Members Kaplan's and Ring's dissent to the Proposed Rule and the D.C. Circuit's decision in *BFI II*, the common law supports the position that both reserved and indirect forms of control are relevant to the joint-employment inquiry. *See BFI II*, 911 F.3d at 1200; 87 Fed. Reg. 54641, 54652. However, the common law imposes a second step for determining joint employer status: once control is found the inquiry must consider "*who* is exercising that control, *when*, and *how*." *BFI II*, 911 F.3d at 1215 (emphasis in original). Contrary to this established precedent, and the D.C. Circuit's instruction, the Proposed Rule completely ignores this second step, requiring no *exercise* of control at all, much less considering when and how the control is exercised.[6] The Board's failure to incorporate this second step of the inquiry goes beyond the permissible limits of the common law and the instructions of the D.C. Circuit in *BFI II*.

Additionally, the *BFI I* standard stopped short of declaring that a never-exercised reservation of right to control, indirect control, or influence over a single "essential" term or condition of employment, standing alone, is determinative of joint employer status. Instead, *BFI I* instructs that the right to control and indirect exercise of control are "*probative of* joint-employer status" and "*relevant to* the joint-employment inquiry," not determinative in and of themselves. *See BFI I*, 362 NLRB at 1600, 1607 (emphasis added). As a result, *BFI I* requires a second step in the inquiry: determination of whether *"the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." Id.* at 1600. The D.C. Circuit specifically criticized the Board's failure to "meaningfully apply the second step" and did not affirm the Board's holding that indirect or a contractually reserved right to control can establish joint employer status on its own, absent any direct and immediate control. *See BFI II*, 911 F.3d at 1222.

Rather, the D.C. Circuit made clear that the Board "is bounded by the common-law's definition of joint employer," and must "color within the common-law lines identified by the judiciary." *Id.* at 1208. In that regard, the D.C. Circuit found that in failing to distinguish indirect control over essential terms and conditions of employment from "evidence that simply documents the routine parameters of company-to-company contracting, the Board overshot the common-law mark." Despite this caution, the Proposed Rule contravenes this second step of the inquiry and ignores the D.C. Circuit's criticism, and the Board conclusorily claims that "any required bargaining under the new standard will necessarily be meaningful." However, the Board does not provide any explanation or support in the common law for this conclusion, or any authority for

[6] The 2020 Rule accounted for this second step of the inquiry by providing that the putative joint employer must exercise "[s]ubstantial direct and immediate control" and to be substantial, the control cannot be "exercised on a sporadic, isolated, or de minimis basis." 85 Fed. Reg. 11184, 11210; 29 C.F.R. 103.40(D). The Proposed Rule makes no such effort to apply the second step of the inquiry.

broadening the *BFI I* standard beyond the confines or common law principles and ignoring the D.C. Circuit's explicit direction to "erect some legal scaffolding that keeps its inquiry within traditional common-law bounds." *Id.* at 1220. Instead, the Board notes that it is "not aware of any common-law judicial decision or other common-law authority directly supporting the proposition that . . . further evidence of direct and immediate exercise of that control is necessary to establish a common-law employer-employee relationship." 87 Fed. Reg. at 54650.[7] However, the Board's lack of awareness of authority requiring direct and immediate exercise of control does not give the Board carte blanche to expand the rule beyond the limits of established common law, *BFI I,* and additional judicial precedent. In that respect, NACS is not aware of any instance in which the Board or a court has found that evidence of a reserved, unexercised right of control, standing alone, *was sufficient* to create a joint employer relationship. By the Board's logic, the lack of any case law or Board decision supporting the determinative reserved or indirect control standard renders it off limits.

In contrast, the 2020 Rule colored within the lines of common law agency principles and abided by the guidance of the D.C. Circuit in providing that a reserved right to control and indirect control are *probative* of joint employer status and *relevant to* the analysis.[8] Specifically, the 2020 Rule considers indirect control, reserved but unexercised authority to control, and control over mandatory subjects of bargaining that aren't essential terms and conditions of employment to supplement and reinforce evidence of established direct and immediate control. *See* 85 Fed. Reg 11184, 11186. This standard serves to limit a finding of joint employment to entities whose exercise of control "meaningfully affects matters relating to the employment relationship with" the employees at issue. *Id.* at 11204. As a result, the 2020 Rule gives proper weight to the relevance of reserved and indirect control without contravening the common law by making either form of control dispositive, absent any evidence of direct and immediate control over one or more essential terms and conditions of employment. This is the proper standard.

B. The Proposed Rule's Open-Ended and Non-Exhaustive Definition of Employees' Essential Terms and Conditions of Employment is Impermissibly Vague and Overly Broad.

The Proposed Rule suggests replacing the 2020 Rule's definitive and closed list with an "inclusive approach" to defining the essential terms and conditions of employment. 87 Fed. Reg. 54641 at 54646-47. To effect this purpose, the Proposed Rule's proposed amendment to Section 103.4(d) provides an open-ended and non-exhaustive definition of "essential terms and conditions

[7] While the Board may not have found authority "directly supporting the proposition that . . . further evidence of direct and immediate exercise of that control is necessary to establish a common-law employer-employee relationship," circuit courts, in applying the common law, have ruled that a joint employer relationship *did not exist* where the putative joint employer did not exercise direct and immediate control over its putative employees. *See, e.g., Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 682–683 (9th Cir. 2009) (finding joint employer status did not exist where putative joint employer did not exercise an "immediate level of day-to-day control over employment decisions" (quotations omitted)); *Gulino v. N.Y. State Education Dep't.*, 460 F.3d 361, 379 (2d Cir. 2006) (finding no joint employer status in the absence of direct, immediate control and stating that the common-law "focuses largely on the extent to which the alleged master has 'control' over the day-to-day activities of the alleged 'servant'" and supports a joint employer "relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract.").

[8] Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg 11184 (codified at 29 CFR 103), hereinafter referred to as the "2020 Rule."

of employment" to "generally include...: wages, benefits, and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; and work rules and directions governing the manner, means, or methods of work performance." *Id.* at 54663. This non-exclusive list allegedly serves to "leave some flexibility for the Board in future adjudication under a final rule." *Id.* at 54647. However, this suggested "flexibility" actually results in lack of any meaningful limitations on the standard to establishing joint employment or guidance to employers, as the determination of whether a particular term or condition of employment is "essential" would require adjudication on a case-by-case basis. As a result, the proposed definition renders the Proposed Rule impermissibly vague.

The D.C. Circuit specifically admonished the Board for failing to "delineate[] what terms and conditions of employment are 'essential' to make collective bargaining 'meaningful'" and choosing to, instead, "adhere to an 'inclusive' and 'non-exhaustive' approach to the meaning of 'essential terms and conditions of employment.'" *BFI II*, 911 F.3d at 1222 (quoting *BFI I*, 362 N.L.R.B. at 2, 15). Despite this rebuke, the Proposed Rule again fails to conclusively define the meaning of "essential terms and conditions of employment," choosing instead to further double-down on its self-created confusion by indicating that the definition of "essential terms and conditions of employment" may change over time and with "the particularities of certain industries or companies." 87 Fed. Reg. 54641 at 54647. This lack of clarity leaves employers in the dark and unable to determine how they, or the Board in potential future adjudication, should determine whether an unspecified term and condition is "essential." In contrast, the 2020 Rule not only provides a definitive and closed list of what qualifies as essential terms and conditions of employment but also supplies clear, practical examples of what sufficient control would look like under each term and condition considered essential. As a result, the 2020 Rule provides employers with greater certainty and predictability and should remain in effect.

Additionally, the Proposed Rule's inclusion of workplace health and safety as an essential term and condition of employment is unnecessary and renders the definition overly broad and impermissibly vague. Companies are already subject to rules and regulations governing workplace health and safety on the federal and state level. For example, all companies are obligated to exercise indirect control over safety and health conditions under OSHA's General Duty Clause, even with respect to non-employees over whom it lacks authority to control any other term or condition of employment. It is unclear how inclusion of health and safety within the definition of essential terms and conditions of employment would go beyond the already existing, and ever-increasing, workplace safety regulations to make the workplace safer, as opposed to simply creating increased liability for companies solely as a result of their compliance with these regulations.

The Board proposes inclusion of workplace health and safety in the definition due to "shortcomings [of the 2020 rule] revealed during the COVID-19 pandemic." 87 Fed. Reg. 54641 at 54647. Assuming for the sake of argument these alleged shortcomings exist, the Board has failed to articulate how they negatively impacted workplace health and safety or how the Proposed Rule would remedy these supposed impacts. Put simply, it is unclear how potentially depriving a union of the ability to bargain over workplace health and safety conditions *with a putative joint employer* would negatively impact workplace health and safety when the union can sufficiently address these issues with its bargaining unit's direct employer.

The Board further undermines its own argument that inclusion of health and safety in the

definition of "essential terms and conditions of employment" is necessary by its own observation that workplace health and safety *may* constitute an essential condition of employment *in some industries*, *but not in others*. If health and safety is not automatically an essential term and condition of employment for *all employers covered by the Act*, the determination of whether a particular putative joint employers' control over health and safety issues amounts to an essential term and condition of employment would require case-by-case adjudication considering various aspects of its particular industry. As a result, this feature of the Proposed Rule again fails to provide any meaningful guidance to employers and serves no purpose other than increasing potential liability due to simple compliance with existing health and safety regulations. In contrast, the 2020 Rule adequately addresses and gives proper weight to workplace health and safety issues through its probative consideration of the mandatory subjects of bargaining, which typically include workplace health and safety conditions, as probative supporting evidence of joint employer status.

In the Proposed Rule, the Board expressed concern over ensuring its "approach to defining essential terms and conditions of employment is not needlessly overinclusive." *Id.* Adoption of an open-ended and non-exhaustive definition of "essential terms and conditions of employment" and inclusion of health and safety, however, would create the very "needlessly overinclusive" definition the Board seeks to avoid and renders the Proposed Rule impermissibly vague.

C. Implementation of the Proposed Rule Would Have Direct, Substantial, and Far-Reaching Negative Impacts on the Convenience and Retail Fuel Industry.

As discussed above, application of the Proposed Rule would have direct, substantial, and far-reaching negative impacts on the convenience and fuel retailing industry. The Proposed Rule's application of a determinative reserved or indirect control standard and overly-broad and non-exclusive definition of employees' terms and conditions of employment would expose businesses to unwarranted liability for actions of other entities, over which they have no direct or actual control, and force them into another party's labor dispute. In this regard, the Proposed Rule fails to "distinguish between arm's-length contracting parties and genuine joint employers." *Id.* at 54655. As a result, implementation of the proposed rule would essentially create a joint employer relationship out of nearly all contractual franchise, vendor, and supplier agreements in the industry. Examples of the practical impact of the Proposed Rule, as it currently stands, are discussed below.

Operators in the convenience and fuel retail industry frequently utilize third parties that deliver motor fuel, food, and other goods and provide cleaning, fuel storage tank maintenance, and other services. The provision of these services necessitates some level of direction by the store. For example, with respect to deliveries, the store may need to specify certain times during the day in which fuel, food, and other product deliveries can be made. Additionally, due to the dynamic between operators and their contractors, suppliers, and vendors, and the small format of convenience stores, operators often utilize direct store delivery. Because there is generally not a loading dock, backroom, or warehouse for delivery and storage of goods, the employees of these contractors, suppliers, and vendors typically must enter the store and deliver the products directly on store shelves, in coolers, etc. as opposed to simply dropping them off. As a result, the stores must provide some level of direction to these individuals as to how they bring items into the store and where items are placed. Additionally, because these deliveries frequently must be

made while customers are fueling their vehicles and shopping in the store, operators must be able to establish some level of rules, guidelines, and expectations with respect to the employees of the contractors, suppliers, and vendors interacting with customers and avoiding business disruptions. Under the Proposed Rule's position that any *ability* to control potentially *any unspecified term or condition of employment* is sufficient to establish joint employment, operators exerting this limited and routine control over deliveries and service would render them a joint employer of the contractors', suppliers', and vendors' employees, which reflects the Boards lack of understanding as to how small businesses leverage subcontractors. As a result, larger companies that provide these services would be more likely to subsume local small businesses rather than work with individually owned enterprises, resulting in stifling entrepreneurship, business innovation, and flexibility.

By way of further example, with respect to the Proposed Rule's inclusion of health and safety as an essential term and condition of employment, fuel retailers and convenience stores are required by federal, state, and local laws and regulations to implement certain health and safety standards that apply to every subcontractor, supplier, and vendor that enters the worksite. Additionally, every fuel retailer and convenience store is required to exercise some level of *indirect* control over these individuals under OSHA's General Duty Clause. Under the Proposed Rule, control, even indirect, over these mandatory workplace health and safety standards would render fuel retailers and convenience stores joint employers with every contractor, vendor, and supplier whose employees perform services their premises. This should not be the case.

The Proposed Rule would have a similar detrimental effect on franchise relationships in the fuel retail and convenience store industry, compelling franchisors to "contract around an otherwise forced choice between protecting their brand and incurring joint employer status, or avoiding joint employer status by abandoning their legal duty to protect their brand." 85 Fed. Reg 11184, 11221. The franchise model is rooted in the traditional common law joint employer standard. The franchisor provides a business model, logo and brand name, and varying levels or assurances and support, while the franchisee remains responsible for the operation and success of the business and subject to liability for actions with respect to its employees. This model allows individuals, who would otherwise not have the resources to do so, to open their own small businesses with support provided by the franchisor, who is experienced in the business. The Proposed Rule would impose significant liability on franchisors' and other similar entities through exercising indirect control by means of providing resources, training, policies, procedures, and guidance, they are more likely to withdraw or limit this critical support. This would further hamper these businesses' efforts to encourage corporate responsibility among franchisees, contractors, and vendors to the detriment of workers, consumers, and their communities alike.

For example, within the convenience and fuel retailing industry, many franchisors set established brand standards related to food offerings, business plans, or other aspects of the functioning of the location, including cleanliness and presentation of the business, requiring franchisee employees exhibit basic professional conduct, ensuring franchisees comply with all applicable laws and regulations, including federal and state wage laws, and hours of operation. However, the individual fuel retailer and convenience store has discretion as to how to implement these standards. For example, an agreement may require the convenience store be open from 6:00 am to 10:00 pm, but the franchise has the ability to set work shifts of the employees within these hours of operation, or a contract may call for a particular wage floor, but the franchisee has discretion to set the actual wages paid to employees. Additionally, many franchisors provide

training, rules, and guidelines related to a number of workplace topics, including health and safety, wage and hour compliance, and even Diversity, Equity, and Inclusion assistance programs. This assistance is beneficial for small businesses, employees, and consumers alike, in that they ensure that franchises operate consistently and maintain brand standards. However, under the Proposed Rule, the franchisor's indirect control in setting minimum basic standards and providing essential resources would result in the franchisor being deemed a joint employer and, therefore, liable for the actions of its potentially thousands of franchisees. This should not be the case, as these limited and routine elements of a franchise relationship, a number of which are required to remain under the control of the franchisor to maintain their status as a franchisor under federal and state trademark law, should not amount a sufficient exercise over the franchisee's employees' terms and conditions of employment to create joint employer status. As opined by the D.C. Circuit, "global oversight is a routine feature of independent contracts," not a factor that should in and of itself be sufficient to create a joint-employment relationship. *BFI II*, 911 F.3d 1195, 1220 (citations omitted). However, under the Proposed Rule fails this type of indirect and required contractual control through setting minimum basic standards and providing essential resources is not distinguished in any way from other indicia of joint employment. In fact, the Proposed Rule fails to even acknowledge the unique federal regulatory scheme under which franchises operate.

To account for this overreach, franchisors may become hesitant to supply this critical support, training, resources, and benefits requiring franchisees to purchase training and resources from third parties. In some cases, small business franchisees will be unable to absorb these costs, leaving them without the ability to provide training and resources to their employees. In the alternative, since franchisors will face increased liability for the actions of their franchisees under the Proposed Rule, they may take a different approach and exert *increased* control over franchisees. This would all but eliminate small business owners' control over their businesses and essentially convert those small business owners to employees of the franchisor, further stifling entrepreneurship, business innovation, and flexibility.

As a result, the application of the Proposed Rule's determinative reserved or indirect control standard and overly-broad and non-exclusive definition of employees' terms and conditions of employment, without any accounting for routine and commonplace elements within arm's length business-to-business contractual agreements, could have dire consequences for the fuel retailing and convenience store industry, leading to a loss of independence for small business owners, a loss of critical resources, and stifled entrepreneurship and flexibility necessary to the industry. Indeed, in *BFI II*, the D.C. Circuit directed the Board to apply the second prong of the *BFI I* analysis discussed above, and distinguish whether and to what extent indirect control was exercised over the essential terms and conditions of employment, in comparison to control that is an incidental and common feature of business-to-business contracts. *See BFI II*, 911 F.3d at 1216. However, the Proposed Rule provides no explanation what qualifies as routine and commonplace elements within arm's length business-to-business contractual agreements or how the Board will treat these elements in assessing joint employer status.

D. The Proposed Rule's Prematurity and Lack of Reasoned Explanation and Meaningful Guidance Renders It Arbitrary and Capricious in Violation of the Administrative Procedure Act.

In the Proposed Rule, the Board opined that it "believes that establishing a definite, readily available standard will assist employers and labor organizations in complying with the Act." NACS

agrees. However, the rulemaking is unnecessary to accomplish this goal, as the 2020 Rule already provides a "definite, readily available standard." Additionally, replacing the 2020 Rule with the Proposed Rule would undermine the Board's own goal because, unlike the 2020 Rule, the Proposed rule is not definite and provides no meaningful guidance. The "fuzzier standard" set forth in the Proposed Rule not only fails to "assist employers and labor organizations," but runs afoul of the Administrative Procedures Act ("APA").

The APA prohibits administrative agencies from acting arbitrarily or capriciously in rulemaking and, therefore, the action taken must "be reasonable and reasonably explained." 5 U.S.C. Section 551 *et seq.*; *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Put simply, the Board must "show there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Here, the Board's justification for rescinding the 2020 Joint Employer Rule and replacing it with the Proposed Rule fails to meet these requirements.

First, the Proposed Rule is premature, as the 2020 Rule has yet to be tested in practice. The Board has not applied the 2020 Rule in any reported case and no court precedent or decision has "materially changed the landscape" since the 2020 Rule was issued. As such, there is no evidence the 2020 Rule has failed to meet the Board's proffered goal, and the Board cannot rely on any experience under the 2020 Rule in revising or rescinding the 2020 Rule, since there is none. In contrast, the 2020 Rule was developed based on informed, reasoned experience gleaned from thirty (30) years of Board and court precedent.

Since the need for Proposed Rule is not supported by any evidence through Board or court decisions, the Board must show some other reasoned and reasonable explanation of the need for rulemaking. The Board's pronounced purpose for promulgating the Proposed Rule is to "explicitly ground the joint-employer standard in established common-law agency principles and provide relevant guidance to parties covered by the Act regarding their rights and responsibilities" under the Act and remedy their belief that "the 2020 Rule's approach to defining joint-employer status wrongly departs from common-law agency principles." 87 Fed. Reg. 54641, 54645. However, this explanation falls flat since, as discussed above, the Proposed Rule exceeds the outermost limits of common law agency principles, rebounding sharply from the 2020 Rule and going further than *BFI* contemplated or the common law allows, and fails to provide any meaningful guidance to employers. The Proposed Rule sets out a general, fuzzy standard without any bright line rules or a single instructive example. Instead, the Proposed Rule simply refers employers and labor organizations to look to common law agency principals for guidance. By instructing employers and labor organizations that the determination of joint employer status is to be made on an individualized, fact-specific, and case-by-case bases and a search of common law agency principals, the Board undermines its own explanation that the Proposed Rule is necessary to meet the need for establishing "a definite, readily available standard" that "will assist employers and labor organizations in complying with the Act" and created a Proposed Rule that is the antithesis of this goal.

By comparison, the 2020 Rule provides a clear, unambiguous, and well-reasoned set of rules for employers to look to. The 2020 Rule enumerated the specific factors that would be considered in the joint employer analysis, defined key terms, provided a definite and meaningfully limited set of essential terms and condition, and provided examples to illustrate how the factors would be applied to each essential term and condition of employment. As a result, the 2020 Rule provides a "definite, readily available standard" that allows employers to look to the rule itself to

determine whether a joint employer relationship would be found by the Board, instead of having to review decades of common law precedent.

Because the Board has failed to provide any reasonable or reasonably explained justification for the promulgation of the Proposed Rule that is not entirely undercut by its own lack of meaningful guidance or is not already attained by the 2020 Rule, it does not meet the standards of the APA and is, therefore, unlawfully arbitrary and capricious.

E. The Proposed Rule's Economic Analysis is Flawed and Violates the APA.

The Proposed Rule's small business economic analysis considers only the one-time, initial familiarization costs under the Regulatory Flexibility Act, which requires the Board to "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations" associated with implementation of the Proposed Rule.[9] In doing so, the Board took an improperly narrow focus on the cost burden that would be imposed on the typical affected small business by failing to account for the aggregate economic impact on small businesses, which is required under the Congressional Review Act, and grossly underestimating the one-time familiarization costs.[10]

Specifically, the Board erroneously concluded implementation of the Proposed Rule would impose no compliance cost beyond initial familiarization cost, alleging employers will not be required to take any additional action to avoid joint employer status. By any reasonable reading, the Proposed Rule reveals that the actual, and intended, effect is to increase the likelihood of finding joint employer status as compared to the 2020 Rule. As a result, if employers who have been operating under the 2020 Rule wish to continue to avoid joint employer status, they must not only exert familiarization costs, but also costs related to compliance with the Proposed Rule, including one-time costs related to revising existing policies, procedures, and contracts and obtaining internal and external advice and analysis on applying the rule to the workforce. Additional, ongoing costs related to, compliance, new disputes, and litigation would be unavoidable.

Further, in estimating a one-time cost of "between $147.24 and $151.51," the Board's assumption that familiarization would require one (1) hour of time by a human resources specialist and an in-house attorney is unsupported and incorrectly estimates both the time and number of individuals who would be required to not only *read and understand* the rule, but also analyze its application to its workforce. 87 Fed. Reg. 54641, 54661. In many instances, this would also require seeking assistance from outside attorneys and management consultants at substantially higher costs. Additionally, the Board's calculation failed to consider the full opportunity cost of lost overhead and profit caused by diversion of labor to familiarize with the rule. This disparity is further heightened when considering the potential cost associated with *affected employees'* familiarization time, which was not addressed at all by the Board. As such, there is no empirical basis for the Board's conclusion the Proposed Rule will not "have a significant economic impact on a substantial number of small entities." *Id.* at 54662. In fact, when the costs omitted from the Board's economic analysis are considered, it becomes clear that there is a high likelihood the implementation of the Proposed Rule would have a major economic impact, as defined by the

[9] 5 U.S.C § 601 *et seq.*

[10] 5 U.S.C. § 801 *et seq.*

Congressional Review Act, and that such costs are in excess of any potential economic benefits to workers.

Due to the Board's understatement of the familiarization costs and neglect to consider additional one-time and ongoing costs, there are likely substantial impacts on the economy that are absent from the Board's assessment. For these reasons, among the others discussed above, the Proposed Rule violates the APA.

III. CONCLUSION

As succinctly stated by Members Ring and Kaplan in their dissent to the Proposed Rule, the Proposed rule "neither articulates the common-law agency principles that appropriately bear on determining joint-employer status under the NLRA nor provides any real guidance to the regulated community." *Id.* at 54652. Instead, the Proposed Rule oversteps "the outermost limits of the common law." *Id.* For these reasons, the Proposed Rule is an overly broad, vague, arbitrary, and capricious expansion of the current joint employer rule.

The Board asked the public for comments on whether it should replace the 2020 Rule, solely rescind the 2020 Rule and not replace it with a new rule or amend the 2020 Rule. NACS proposes none of the above. Instead, the 2020 Rule should not be rescinded or amended, and should remain in force, as is. Unlike the Proposed Rule, the current 2020 Rule is both "consistent with common-law agency principals and provides clear guidance to regulated parties," such as those in the fuel retailing and convenience store industry represented by NACS.

Sincerely,

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For FISHER & PHILLIPS LLP

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