Before the Health, Education, Labor & Pensions Committee
United States Senate

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Let me begin by thanking the Committee Chair, Senator Alexander, ranking member Senator Murray, and the other Committee members for giving me this opportunity to testify about the Board's recent *Browning-Ferris* decision and its practical impacts in the modern workplace. Based on my more than 30 years of experience representing low-wage workers in industries where the use of staffing agencies and labor services contractors has become pervasive, I will principally address why the Board's joint employer test under *Browning-Ferris* is critical to protecting the rights of workers and to achieving the stated purposes of the National Labor Relations Act, and why the Board reached the only proper result given the facts of that case.

I am a lawyer in private practice in San Francisco who frequently represents low-wage workers in wage-and-hour, discrimination, and other labor and employment cases. My clients have included warehouse workers, janitors, security guards, restaurant employees, and concession stand hawkers, among others. In my experience, especially in recent years, it has become far easier to

prove that low-wage workers' fundamental statutory rights have been violated than to obtain a meaningful remedy that will make those workers whole and prevent future violations. Often this is because the company that ultimately controls their wages, hours, and working conditions has contracted away (or tried to contract away) its legal duty to comply with state and federal employment law.

In the low-wage economy in which many of my clients are employed, wage-and-hour violations, discrimination, and other unlawful conduct is rampant, yet the workers whose rights are violated rarely complain or join together to enforce their rights. There are several reasons why that is so. Often, the workers' direct employer is an undercapitalized temp agency or labor services subcontractor. Even when that direct employer has plainly violated the NLRA or other workplace statute, it may be judgment-proof or unable to pay a significant backpay award or other money judgment. An injunction or reinstatement order against such a company – whether it supplies garment workers in Los Angeles, janitors in Texas, or warehouse workers in California or Illinois – may be worthless, because the "user" company can simply terminate its contract, leaving the supplier company *and* its workers without any work at all. Labor services contracts are almost always at will, terminable upon short notice; and user companies can and do terminate their suppliers' contracts at the first sign of legal claims filing or labor organizing efforts. The user company then simply re-bids the job to the next supplier company that promises to keep its labor costs low enough to win the bid.

If the only company that can be held responsible for back pay or reinstatement in this increasingly common scenario is a staffing company whose labor services contract can be terminated at will, the workers' statutory right to overtime pay, a fair wage, and protection from

discrimination, retaliation, and other unfair labor practices becomes little more than an empty promise.

The statistics cited in *Browning-Ferris* and elsewhere dramatically illustrate how rapidly the composition of the American workplace has changed. Between 1990 and 2008, the number of workers employed through temp agencies doubled from 1.1 million to 2.3 million. A year ago, the number was close to three million workers, or roughly 2% of the American workforce. That number is expected to rise to almost four million by 2022. It should come as no surprise that in industries in which such outsourcing is common, studies have shown significantly higher levels of employment law violations, lower wages, and job insecurity.

This increasingly fissured nature of the America workplace was the source of the problem facing the Board in *Browning-Ferris*. Fifty years ago, there would have been no question that the workers who perform conveyor belt or assembly line work were "employees" of the plant owner. But 50 years ago, it was unusual for any company even to consider contracting out the core job functions required to operate its business. Just as the Board now has to consider the workplace impacts of social media and other technology that no one dreamed possible in the 1930's, so was it required in *Browning-Ferris* to evaluate the parties' bargaining obligations in light of their actual workplace relationships, consistent with its statutory duty to "adapt the Act to changing patterns of industrial life," as the Supreme Court required in *NLRB v. Weingarten*.

Browning-Ferris arose in the context of an election petition filed by a Teamsters local seeking to represent approximately 240 workers. The union alleged that those employees were jointly employed by Browning-Ferris and Leadpoint Business Services, its labor services contractor. The Board began by tracing the history of the joint-employer doctrine under Board law. It concluded that although the standards governing joint employment under the NLRA had been

fairly consistent between at least the *Greyhound* case in 1964 (which the 5th Circuit had enforced) and an earlier *Browning-Ferris* case in 1984 (which the 3rd Circuit had enforced), that standard had been significantly narrowed by a series of Board decisions starting in the mid-1980's that – without explanation or apparent justification – made it much harder to prove joint employer status by adding requirements that were never part of the original common law test. Under those cases, which the Board overruled in *Browning-Ferris*, the General Counsel had been required to prove not only that the user company had the right to control the affected workers' terms and conditions of employment, but that it *actually* exercised that control, and did so in a manner that was both "direct" and "immediate." [1]

The Board in *Browning-Ferris* found no basis for those additional requirements "in the common law, or in the text or policies of the Act," and it supported that conclusion with citations to more than two dozen prior cases as well as the First and Second Restatements of Agency, which set forth the basic common law test that has been in effect since well before the NLRA was enacted.

Turning to the evidentiary record (as is required in these fact-specific cases), the Board conducted a detailed review and concluded that Browning-Ferris and Leadpoint were joint employers of the recycling plant workers for purposes of collective bargaining. Many facts supported this conclusion. Although the companies' contract stated that Leadpoint was the workers' sole employer, Browning-Ferris in fact dictated many of the terms and conditions of those workers' employment. Browning-Ferris had the absolute right under its contract to terminate the

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[1] *See, e.g., TLI, Inc.*, 271 NLRB 798 (1984), *enf'd mem.* 772 F.2d 894 (3d Cir. 1985); *Laerco Transportation*, 269 NLRB 324 (1984); *Airborne Express*, 338 NLRB 597 (2002); *AM Property Holding Co.,* 350 NLRB 998 (2007), *enf'd in relevant part sub nom. SEIU Local 32BJ v. NLRB*, 647 F.3d 435 (2d Cir. 2011).

entire Leadpoint workforce, without cause. Browning-Ferris provided training to the workers, required them to undergo rigorous pre-employment screening, and prohibited Leadpoint from sending it any worker whom Browning-Ferris declared ineligible for re-hire. Browning-Ferris also retained the contractual right to reject any worker sent by Leadpoint "for any or no reason," and twice it told Leadpoint to remove workers from its plant for violating workplace rules.

Browning-Ferris also co-determined workplace conditions by controlling the speed of the conveyer belts, setting productivity standards for the workers, deciding when to stop the conveyer belts to permit breaks, and establishing safety standards that the workers had to satisfy. It was solely responsible for determining when and how many shift workers would be required to work overtime. It conducted pre-shift meetings with Leadpoint supervisors every day to tell them what work was required on each shift, and its managers gave direct instructions to those workers concerning job tasks and quality control. Browning Ferris also placed a cap on what those workers could be paid and required Leadpoint to obtain its express approval before increasing any worker's wages.

Based on these facts viewed as a whole, the Board concluded that Browning-Ferris and Leadpoint were both statutory "employers" of those workers for purposes of collective bargaining. Those two companies "share[d] or codetermine[d] . . . . matters governing the essential terms and conditions of employment" and "possess[d] sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining."

That outcome of *Browning-Ferris* should have come as no surprise. Under the Board's former joint-employer test, which required proof that a company exercised actual control that was both direct and immediate, Browning-Ferris might have been able to continue dictating the most crucial terms and conditions of the workers' employment, while avoiding any obligation to bargain

over those terms and conditions by using Leadpoint as an intermediary. That would not have been the proper result, given the Board's statutory mandate to protect the right of employees to engage in concerted activity and to bargain collectively with their employers – the entities that can meaningfully determine, or co-determine, terms and conditions of employment. The Board's ruling in *Browning-Ferris* ruling was entirely consistent with prior Board law and considerable federal appellate authority, and it was completely in line with the Restatements of Agency – which state the common law standard and which the Board quoted at length in its ruling – and with prior rulings of the U.S. Supreme Court under other common law statutes.

A "joint" employer, whether under the NLRA or any other state and federal workplace statute, is simply an "employer" – as defined by applicable statute or common law doctrine – in circumstances where more than one entity (or individual) satisfies the legal definition of "employer." No person or entity can be a "joint employer" without first being an "employer."

The standards for determining who is an employer differ from statute to statute and from jurisdiction to jurisdiction. For example, the NLRA, ERISA, and the Internal Revenue Code adopt different variants of the common law "right to control" test, adapted to suit the purposes of those statutes,[2] while the FLSA, Family and Medical Leave Act, and the Agricultural Workers Protection Act adopt the more protective "suffer or permit" standard that was derived from the state child-labor statutes of the early part of the 20th century.[3] Because the definition of "employer" can vary, it is possible for a particular labor services contractor to be in a joint-employer relationship for purposes of providing FMLA leave, but not with respect to a claim for NLRA retaliation; just as a

[2] *See* 29 U.S.C. §152(2) (NLRA); 29 U.S.C. §1002(5) (ERISA).

[3] *See* 29 U.S.C. §203(g) (FLSA); 29 U.S.C. §2611(3) (FMLA); 29 U.S.C. §1802(5) (AWPA).

worker may be an "employee" for purposes of minimum wage and overtime protections, but not for purposes of the right to collectively bargain; or under California, but not Texas employment law.

If the recycling plant workers in *Browning-Ferris* had been denied minimum wage payments or overtime under the FLSA, or had been deprived of rights under the California Labor Code (which incorporates, in part, the same suffer-or-permit standard as the FLSA), they would surely have been able to establish that Browning-Ferris was their "employer" within the meaning of those laws. FLSA cases going back to at least *United States v. Rutherford* in 1947 make that clear.

Even though the common law standard under the NLRA is not as protective of worker rights as the suffer-and-permit standard under the FLSA and other federal labor statutes, the proposed Republican bill would make the NLRA standard far *less* protective still, allowing companies to avoid bargaining over workplace conditions they have the authority to control, simply by funneling that control indirectly through an at-will supplier. To limit the definition of "employer" under the NLRA to a company whose control over essential terms and conditions is "actual, direct, and immediate" would be to create a standard that is far less protective than the common law itself, and that would undermine the right to bargain collectively by imposing restrictions that are entirely inconsistent with Congress' broad delegation of authority to the Board to construe the NLRA in light of evolving workplace conditions.

Enacting the proposed narrow definition of "employer" would have seriously negative impacts not only on workers, but on small business owners as well. First, of course, it would leave without remedy the workers most in need of statutory protection, those who are most susceptible to exploitation because they are temporary at-will employees without union representation or collective voice. But it would also leave small business owners in the untenable position of being solely responsible for labor law compliance and collective bargaining even when they lack the

authority or means to fulfill that legal responsibility. And such a change is not necessary, because any user company that does not want to be responsible for bargaining over the workplace conditions it controls can simply restructure its relationships to give its suppliers greater independence and leeway in controlling wages, hours, and working conditions.

The pressure to cut labor costs while meeting productivity quotas inevitably results in a race to the bottom, where the supplier company often can only make a decent profit by violating its workers' right to legally mandated wages and other workplace protections. We have seen this scenario repeated in low-wage workplaces throughout the country, and in a broad range of industries – with the resulting heavy burden on social services and state and federal tax receipts.

In a recently completed case involving warehouse lumpers in Southern California, for example, where I was one of the attorneys for the plaintiffs, hundreds of workers were employed in four Walmart warehouses, unloading and re-loading trucks for deliveries to Walmart distribution centers throughout the country. Walmart owned the warehouses and all of the contents of the trucks. A subsidiary of Schneider Logistics, Inc. operated the warehouses. The workers were hired by two labor services contractors. By contract, all responsibility for legal compliance rested solely with the labor services contractors. Yet the facts set forth in the district court's joint employer rulings showed that Walmart and Schneider had retained for themselves the contractual the right to control almost every aspect of those warehouse workers' employment, both directly and indirectly.

The violations we found in those warehouses were extensive. But the only reason the workers were eventually able to obtain relief – through a $22.7 million settlement that resulted in many class members receiving tens of thousands of dollars each as compensation – was because of a series of court rulings that found the warehouse workers had established a likelihood of success in proving that Walmart, Schneider, and the staffing agencies were the workers' joint employers. The

two staffing agencies were undercapitalized (which is why they could only afford to pay a combined 7.5% of the total settlement amount). They were pressed past the point of lawfulness by the economic and operational pressures imposed by Walmart and Schneider. They had no ability to make the workers whole or to provide any meaningful injunctive relief. Nor could they push back by forcing Walmart or Schneider to pay them more money or ease productivity or operational standards. Only because the federal courts focused on the actual working relationships in those warehouses, as the Board did under the NLRA in *Browning-Ferris*, were the workers able to be compensated for past violations, to obtain higher wages and significant benefits, and hopefully, to have deterred future violations.

We have seen the practical impacts of the modern fissured workplace in industry after industry: garment workers performing piece rate work for fly-by-night contractors who compete almost solely based on low labor costs; restaurant workers whose immediate employer declares bankruptcy after the workers seek back pay for federal and state overtime violations; and sports arena hawkers who nominally work for a staffing agency but are told by the sports arena's managers what to sell, where to sell it, what they can and cannot say, what they must wear, and how they can appear. Without a meaningful opportunity to pursue remedies against *all* joint employers having a right to control essential working conditions, many of these workers would be left remediless, despite their statutory "right" to minimum labor standards protection. And despite the NLRA's central promise of promoting collective bargaining as an alternative to labor strife those workers would have no opportunity to bargain for improved conditions with the company that in fact co-determines the terms and conditions of their employment.

Judge Frank Easterbrook famously noted in the Seventh Circuit case of *Reyes v. Remington* that if the joint employer standards are properly enforced, the inevitable result (assuming

economically rational actors) will be a significant decrease in workplace violations and a corresponding increase in worker protection, because companies with the *ability* to control workplace conditions will also have the *incentive* to ensure legal compliance. Similarly, under the NLRA, the inevitable result of *Browning-Ferris* is that the purposes of the NLRA will be furthered, not undermined, because the companies having the ability to control workplace conditions will be required to bargain over those conditions, allowing their employees to act collectively for the purposes of mutual aid and protection in furtherance of the ultimate goal of labor peace.