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## The Joint-Employer Standard After Browning-Ferris II & The 21st Century American Dream

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# THE JOINT-EMPLOYER STANDARD AFTER *BROWNING-FERRIS II* & THE 21ST CENTURY AMERICAN DREAM

JAY FORESTER\*

Introduction.....	37
I. The Economic Reality .....	38
II. The Decision .....	40
III. Employers Now Face a Fact Question.....	42
IV. Members of The NLRB Need to See Merit in Collective Bargaining.....	43
V. Other Contexts .....	45
VI. The 21st Century American Dream.....	46
Conclusion .....	47

## INTRODUCTION

On August 27, 2015, the National Labor Relations Board (“NLRB” or the “Board”) issued its long-awaited *Browning-Ferris* decision<sup>1</sup> (the “decision” or “*Browning-Ferris IP*”) clarifying the “joint-employer standard”<sup>2</sup> under the National Labor Relations Act (“NLRA” or “Act”). The decision’s majority purports to reaffirm the traditional joint-employer standard enunciated by the Third Circuit in 1982 in *NLRB v. Browning-Ferris Indus. of Pa.* (“*Browning-Ferris I*”).<sup>3</sup> *Browning-Ferris II*’s dissenters, instead, view the decision as an unprecedented move by the Board, announcing an entirely new standard. This division is not limited to

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1. *Browning-Ferris Indus., Inc.*, 362 N.L.R.B. No. 186, 1 (Aug. 27, 2015) [hereinafter *Browning-Ferris II*].

2. The joint-employer standard determines when a company may be held liable as an employee’s “employer,” though the company is not the employee’s contractual employer.

3. *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1981).

the decision's authors and has already begun to play out in state legislatures.<sup>4</sup>

Although the decision, and its significance, is far from final, it is already worthy of review. At a minimum, *Browning-Ferris II* explicitly overturns decades of NLRB precedent.<sup>5</sup> This Article praises the decision's majority and responds to its dissent. This Article also responds to remarks that were made at *American University Business Law Review's* Spring 2015 Symposium ("AU Symposium"),<sup>6</sup> where panelists suggested that this decision would not only be bad for management but that it would also damage the "American Dream."

*Browning-Ferris II* will undoubtedly result in changes for affected employers, perhaps most immediately through increased legal fees. It will likely result in several parent companies sitting down at the collective bargaining table with third-party employees for the first time in decades. And, it may attract bad press for companies who still resist the notion that they, too, have a role to play at this expanded table.

In exchange, millions of NLRA-covered workers will have a better chance of receiving the full benefits of this eighty year-old law. Millions more workers will benefit from a spillover effect, whereby parent companies' expanded policies will also function to improve work conditions for the non-union workers. And, compliant employers will have a greater chance to compete on a level playing field. These changes are not only beneficial. They are essential to the American Dream in the 21st century.

## I. THE ECONOMIC REALITY

The economic reality requires a functional joint-employer standard. Tellingly, in *Browning-Ferris II*, a fact at issue—whether an email from a Browning-Ferris agent directing the intermediary human resources company, Leadpoint, Inc. ("Leadpoint"), to fire an employee—was found to be sufficient evidence of control. The NLRB Regional Director ("Regional Director") argued that this email was insufficient evidence of

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4. For example, a Texas law designed to defeat the decision went into effect on September 1, 2015. S.B. 652, 84th Leg., (Tex. 2015) (amending § 7 in Chapter 1156). Note also that the decision had the benefit of an array of amici briefs. *Browning-Ferris II*, 362 N.L.R.B. No. 186 at 7–8.

5. *Browning-Ferris II*, 362 N.L.R.B. at 16 ("Accordingly, we overrule *Laerco*, *TLL*, *A&M Property*, and *Airborne Express* [ . . . ] and other Board decisions, to the extent that they are inconsistent with our decision today.")

6. Hospitality for the Employee: Where Business, Employment, and the Hospitality Industry Intersect, American University Business Law Review Spring Symposium (Mar. 27, 2015).

“direct control.”<sup>7</sup> Because the firing order was executed by someone other than the one communicating the instructions, the Regional Director argued that Browning-Ferris was not legally in control of the situation.

In 2015, workplaces are not only monitored remotely via e-mail and cameras; they can also be controlled directly through software that dictate a worker’s schedule and tasks, hours of work performed or recorded, and pay.<sup>8</sup> Beyond this new technological reality, the traditional two-tiered employer-employee dynamic is now multi-layered. In 2014, a Bureau of Labor Statistics survey indicated that roughly 2.87 million workers<sup>9</sup> worked for a temporary agency like Leadpoint. Many millions more worked for franchised businesses. For nearly a decade, the United States Department of Labor (“DOL”), Wage and Hour Division Administrator David Weil, has focused on this “fissuring of the employment relationship.”<sup>10</sup> Prior to his position with the DOL, Weil studied these issues as an academic and found that “[r]egardless of motivation, fissuring in employment relations dramatically complicates the regulation of workplace conditions.”<sup>11</sup> Applied in the joint-employer context, he noted

[s]uch clear lines of accountability have become murky and establishing the employer of record in order to assess responsibility has become more complicated. This creates significant problems for a workplace agency where foundational statutes like the FLSA assume that most employer-employee relationships are between easily identified parties. Consequently, the task of bringing regulatory pressure on the “employer” has become elusive.<sup>12</sup>

Recognizing these “changing patterns of industrial life” and that “the primary function and responsibility of the Board . . . is that ‘of applying the

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7. *Browning-Ferris II*, 362 N.L.R.B. at 16.

8. See, e.g., *McDonald’s USA, LLC, a joint employer, et al.*, NLRB Case No. 02-CA-093893 (authorizing complaints to proceed against McDonald’s under joint-employer theory because of these practices).

9. See *Browning-Ferris II*, 362 N.L.R.B. at 11 (“The most recent Bureau of Labor Statistics survey from 2005 indicated that contingent workers accounted for as much as 4.1 percent of all employment, or 5.7 million workers. Employment in the temporary help services industry, a subset of contingent work, grew from 1.1 million to 2.3 million workers from 1990 to 2008. As of August 2014, the number of workers employed through temporary agencies had climbed to a new high of 2.87 million, a 2 percent share of the nation’s work force. Over the same period, temporary employment also expanded into a much wider range of occupations.”)

10. See generally David Weil, Rep. to Dep’t of Labor: Wage & Hour Div., *Improving Workplace Conditions Through Strategic Enforcement* (May 2010), <http://www.dol.gov/whd/resources/strategicenforcement.pdf>.

11. *Id.* at 10 (identifying the “desire to shift labor costs and liabilities to smaller business entities or to third-party labor intermediaries, such as temporary employment agencies or labor brokers”).

12. *Id.*

general provisions of the Act to the complexities of industrial life,”<sup>13</sup> the NLRB found “reason enough to revisit the Board’s current joint-employer standard.”<sup>14</sup> The Board did not set out to “reshape”<sup>15</sup> the economic reality; the dissent itself acknowledged that we have had this complex reality for some time. Rather, the decision recognized that the NLRB has lagged behind federal courts, which have interpreted “employment” for many years under other federal labor and employment laws through a remedial, realistic, or, minimally, 21st century lens.

## II. THE DECISION

*Browning-Ferris II* stems from a 2013 election petition by the Teamsters Union seeking to represent workers at a Browning-Ferris recycling facility in Milpitas, California. Reaffirming the “traditional” joint-employer standard from the Third Circuit in *Browning-Ferris I*<sup>16</sup> and relying heavily on the Supreme Court’s precedent that joint-employer status under the NLRA is an issue of fact for the Board to determine,<sup>17</sup> the NLRB overturned the Regional Director’s decision that Browning-Ferris was not a joint employer of the workers. The NLRB directed the Regional Director to permit the ballots of the approximately sixty workers in question to count. In doing so, the Board announced “[r]eserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry.”<sup>18</sup> Thus, for the first time in decades, the Board said that factors exhibiting mere “indirect control,” and not just factors exhibiting “direct and immediate control,”<sup>19</sup> could be sufficient to support a factual finding of joint employment.

Applying this “traditional” or “indirect control” standard,<sup>20</sup> the Board

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13. *Browning-Ferris II*, 362 N.L.R.B. at 11 (citing *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)).

14. *Id.*

15. *Contra id.* at 23.

16. *See generally id.* (“Today, we restate the Board’s joint-employer standard to reaffirm the standard articulated by the Third Circuit in *Browning-Ferris* decision. Under this standard, the Board may find that two or more statutory employers are joint employers of the same statutory employees if they ‘share or codetermine those matters governing the essential terms and conditions of employment.’ In determining whether a putative joint employer meets this standard, the initial inquiry is whether there is a common-law employment relationship with the employees in question. If this common-law employment relationship exists, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.”).

17. *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

18. *Browning-Ferris II*, 362 N.L.R.B. at 2.

19. *See, e.g.*, *Airborne Express Co.*, 338 N.L.R.B. 597, 597 n.1 (2002).

20. This distinction is immaterial for this discussion but the label depends on

found that the NLRA applied to the company who, among other factors, “indirectly”

- Required workers to be drug tested prior to hire and enforced other eligibility criteria;
- Retained the right to reject workers for “any reason”;
- Ordered that specific workers be terminated;
- Determined what tasks workers completed;
- Controlled how quickly workers could perform these tasks;
- Chose where the workers would be stationed;
- Decided workers’ schedules and when they were eligible for overtime; and/or
- Set the ceiling on workers’ pay.<sup>21</sup>

The Board did not rely on any one factor in particular, but it found that “all of these forms of control—both direct and indirect—are indicative of an employer-employee relationship.”<sup>22</sup> That is, the human resource company who merely hired, fired, and paid the workers was not the sole employer.

By contrast, the dissent would continue to require direct and immediate control.<sup>23</sup> Justifying its opposition, the dissent enumerated a number of specific concerns. The first three of these concerns are particularly suspect and are likely what prompted the majority to characterize the dissent as “long and hyperbolic.”<sup>24</sup> The dissent first quipped that the majority’s decision will force companies to find larger bargaining tables.<sup>25</sup> Second, the dissent suggested that, because employment relationships have been layered for over 200 years and since the law has not always adapted to this reality, the standard should remain unchanged and outdated.<sup>26</sup> Still stretching for logic, the dissent’s third contention was that the Board did not have the authority to modify agency standards. Instead, it argued that

whether one views the decision as an extension of *Browning-Ferris I*’s “traditional standard” or a novel, “indirect” standard.

21. See *Browning-Ferris II*, 362 N.L.R.B. at 18–19.

22. *Id.* at 19.

23. *Id.* at 22; see, e.g., *Airborne Express*, 338 N.L.R.B. at 597 n.1.

24. *Browning-Ferris II*, 362 N.L.R.B. at 20.

25. *Id.* at 21 (Members Miscimarra and Johnson, dissenting) (“First, no bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority’s new standards.”). Here, the dissent also makes the point that the majority does not have authority for the decision, which is addressed with the dissent’s “third contention.”

26. *Id.* at 22, 35 (noting the decisions the Board overturns were not challenged by courts of appeal). While this observation is noteworthy, the majority’s decision was not without justification. See *supra* Part II. Furthermore, the dissent fails to explain why this lack of a challenge would warrant staying with a dormant standard.

the common law standard should apply; however, the dissent conceded that the majority purported to apply the common law as well<sup>27</sup> as standards set forth in the NLRA. Therefore, the concern is really that the majority applied improper interpretation, not acted without authority.

### III. EMPLOYERS NOW FACE A FACT QUESTION

The dissent next criticized the decision for taking the predictability out of the law by reviving a uniquely<sup>28</sup> dormant legal theory. If this “kind of, sort of, maybe someday” standard—<sup>29</sup> as it has been called—is upheld, parent companies will need to consider the possibility that the NLRB could find that the NLRA applies to the union workers they actually control. For three decades, these companies have operated at a liability discount. Now, they may face a question of fact.

The dissent’s moment of worker empathy comes in the section where the dissenters expressed the need to spare employees’ confusion.<sup>30</sup> Even if it were true that all workers understand which entity actually “employs” them, which many likely do not, the more pressing issue is to decide what kind of *predictability* is desirable: a standard that is predictable because (a) it is so narrow that it will only apply to a parent company once every 30 years; or (b) it forces companies to consider that their intermediaries may not always, under every circumstance, be a fail proof liability shield. Choice (a) is the obvious choice of the business community, certain state legislatures, and, as explained below, the decision’s dissenters. Choice (b)

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27. *Browning-Ferris II*, 362 N.L.R.B. at 14, 20 (“Today’s decision is grounded firmly in the common law, while advancing the policies of the National Labor Relations Act. [. . . ] The common-law definition of an employment relationship establishes the outer limits of a permissible joint-employer standard under the Act. But the Board’s current joint-employer standard is significantly narrower than the common law would permit. The result is that employees covered by the Act may be deprived of their statutory right to bargain effectively over wages, hours, and working conditions, solely because they work pursuant to an arrangement involving two or more employing firms, rather than one. Such an outcome seems clearly at odds with the policies of the Act.”).

28. *Browning-Ferris II*, 362 N.L.R.B. at 22–23 (explaining that other federal acts, like Title VII and the FLSA have not been applied so narrowly to require “direct” or “immediate” control).

29. Erin Horton, *NLRB Adopts New Joint Employer Test: Companies That Kind of, Sort of, Maybe Someday Could Exercise Control over Employees Can Be Joint Employers*, EMP. MATTERS BLOG (Aug. 28, 2015), <http://www.employmentmattersblog.com/2015/08/nlr-adopts-new-joint-employer-test-companies-that-kind-of-sort-of-maybe-someday-could-exercise-control-over-employees-can-be-joint-employers/>.

30. *See e.g., Browning-Ferris II*, 362 N.L.R.B. at 23 (“This confusion and disarray threatens to cause substantial instability in bargaining relationships, and will result in substantial burdens, expense, and liability for innumerable parties, including employee.”).

is the choice required by courts and by law.

The Supreme Court has spoken clearly that “employment” is a case-by-case basis determination.<sup>31</sup> Accordingly, courts apply a broad interpretation of the employer-employee relationship “to identify responsible parties without obfuscation by legal fictions applicable in other contexts.”<sup>32</sup> Thus, the Third Circuit found, in *Browning-Ferris I*, that “the question of ‘joint employer’ status is a factual one and requires an examination into whether an employer who is claimed to be a ‘joint employer’ possessed *sufficient control* over the work of the employees to qualify as a ‘joint employer’ with [the actual employer].”<sup>33</sup> In determining that a judge’s role is to assess “sufficient”—and not “direct” or “immediate”—control, the Third Circuit relied on four decades of NLRB precedent that interpreted and applied the joint-employer standard under the NLRA.

Given this established precedent, the majority’s claim, that “the criticisms that our colleagues level at our joint-employer standard could be made about the concept of joint employment generally – which has been recognized under the Act for many decades and which has long been a familiar feature of labor and employment law[,]” has merit.<sup>34</sup> This claim is true not only for the predictability argument, but it applies to the dissent’s fifth argument with equal force.

#### IV. MEMBERS OF THE NLRB NEED TO SEE MERIT IN COLLECTIVE BARGAINING

Fifth, to the extent the majority seeks to correct a perceived inequality of bargaining leverage resulting from complex business relationships where some entities are currently nonparticipants in bargaining, the “inequality” addressed by the majority is the wrong target, and collective bargaining is the wrong remedy.<sup>35</sup> The dissent continues to say that

the inequality targeted by the new “joint- employer” test is a fixture of our economy—business entities have diverse relationships with different interests and leverage that varies in their dealings with one another. There are contractually “more powerful” business entities and “less powerful” business entities, and all pursue their own interests.<sup>36</sup>

Here, the two sides have a fundamental disagreement over their role on

31. See e.g., *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964).

32. *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991).

33. *NLRB v. Browning-Ferris Indus., Inc.*, 691 F.2d 1117, 1121 (3d Cir. 1982) (citing *Boire*, 376 U.S. at 481).

34. *Browning-Ferris II*, 362 N.L.R.B. at 23.

35. *Id.*

36. *Id.*

the NLRB. The majority stated that “the primary function and responsibility of the Board . . . is that ‘of applying the general provisions of the Act to the complexities of industrial life.’”<sup>37</sup> While the dissenters might persuasively disagree with this function, their role as members of the NLRB should require that they, at a minimum, seek to advance the purposes of the NLRA, whatever they might be. “It is not the goal of joint-employer law to guarantee the freedom of employers to insulate themselves from their legal responsibility to workers, while maintaining control of the workplace.”<sup>38</sup>

As the dissent continues, however, it becomes clear that the dissenters were not concerned that the decision espouses a policy, exceeding the bounds of the NLRA; instead, they were concerned that the majority’s decision advances the *wrong policy*. The majority explained clearly and consistently that the Board’s role was to determine what interpretation best upheld the NLRA’s purpose,<sup>39</sup> which the Board recognized as “*encourag[ing]* the practice and procedure of collective bargaining[.]”<sup>40</sup> and it also cited the Supreme Court’s reasoning that “[o]ne of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.”<sup>41</sup> In stark contrast, the dissent did not seem to have space for peaceful negotiation or settlement. The dissent did not encourage collective bargaining but found peace through silence; it found that “[r]equiring collective bargaining wherever there is some interdependence between or among employers is much more likely to thwart labor peace than advance it.”<sup>42</sup> Although there is an inherent tension between the additional protections that employment laws afford workers and the costs these protections impose on management, both workers and management must have a voice in America.

The majority in *Browning-Ferris II* seeks to amplify workers’ voice. The dissent seemed distracted from the present issues, spending several pages attempting to re-litigate other cases,<sup>43</sup> and it ultimately provided a better defense for the franchise industry than it does for any party present—*Browning-Ferris II* did not present a franchise relationship—or under the NLRA.

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37. *Id.* at 11.

38. *Id.* at 21.

39. *See e.g., id.* at 12.

40. *Id.* at 13.

41. *Id.* at 12–13 (citing *Fireboard Corp. v. NLRB*, 379 U.S. 203, 211 (1964)).

42. *Id.* at 23.

43. *Id.* at 26–32.

## V. OTHER CONTEXTS

What is most clear from the decision's dissent is that there is widespread concern and disagreement about the possible implications this decision could have. While states are considering—or have passed—laws designed to countermand the decision, the Occupational Safety and Health Administration (“OSHA”) is considering the possibility of a joint-employer relationship between franchisors and franchisees in regard to workplace safety matters that would follow the NLRB and its General Counsel's lead. And, there is precedent for courts to draw on the NLRA's joint-employer standard when considering the joint-employer standard under a different labor and employment law.

For example, the Third Circuit relied on *Browning-Ferris I* when considering the proper joint-employer standard to apply under the FLSA in its *Enterprise* decision.<sup>44</sup> At the 2015 AU Symposium, several of my co-panelists expressed concern that the potential of future cases brought, alleging joint employment under the FLSA, and not the NLRA, is the true threat. *Browning-Ferris II*, however, recognizes that the joint-employment standard, which now applies under the NLRA, is *narrower* than under the FLSA.<sup>45</sup> While the decision catches up to the FLSA, both laws will once again have space for questions of joint-employment status to be factually determined; however, it is unlikely that the decision will affect joint-employment interpretation under the FLSA.<sup>46</sup> This prediction is particularly grounded given that, outside of the Third Circuit, federal courts have been interpreting the FLSA joint-employer standard in isolation from the NLRA for decades.

Also, while the FLSA has been cited as having the broadest scope of “employment,”<sup>47</sup> courts rarely find that the facts are sufficient to hold a parent company liable. This notion is especially apparent in the franchise context where parent companies routinely are kept in a case through the motion to dismiss phase, *i.e.*, they have to join the initial round of talks but are then released at the summary judgment phase because the facts do not

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44. *In re Enter. Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F. 3d 462, 468 (3d Cir. 2012).

45. *See Browning-Ferris II*, 362 N.L.R.B. at 17 (explaining that the revised standard is limited to considerations of control and not broader notions of “economic realities,” which are factors applied in joint-employer doctrine under both the FLSA and the Agricultural Workers Protection Act).

46. *See generally* *Barfield v. N.Y.C. Health & Hosp. Corp.*, 537 F.3d 132, 143 (2d Cir. 2008) (describing joint employment under the FLSA as a fact intensive inquiry); *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964) (describing whether company exercised sufficient control under the NLRA to be found a joint employer as a factual issue).

47. *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945).

warrant a liability determination.<sup>48</sup> Despite this reality that it is very unlikely that a parent company will remain liable, the joint employment determination is still a viable legal approach under the FLSA. The same congressionally recognized rationale that justifies the joint-employer theory for the FLSA also applies to the NLRA:

This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure from interstate commerce the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not.<sup>49</sup>

The decision's dissenters and challengers should take note that labor and employment laws, including the NLRA, exist for the employers' benefit too.

## VI. THE 21ST CENTURY AMERICAN DREAM

At the AU Symposium, the panel considered briefly what impact the decision could have on the American Dream. After listening to the argument that the decision threatened the American Dream because it would inhibit two young brothers' ability to start a small business early in life, I made the case for a more dynamic view of the American Dream. My version of the American Dream exists not only for my twenty-something-year-old brother to become a small-business owner early in life, but it also applies to my service-industry-employed sister who makes a living wage, which she still strives to achieve one hour at a time. It again applies to my other sister, a soon-to-be college graduate, who is repeatedly offered unpaid internships as a means to get her "foot in the door" to what *might* become a paying job and who also desires to one day earn a living wage.

In a 1987 congressional hearing considering adjustments to the federal minimum wage, the American Dream was defined as "independence and self-reliance achieved through the fruits of one's own labor."<sup>50</sup> For many,

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48. See, e.g., *Cordova v. SCCF, Inc.*, No. 13CIV5665-LTS-HP, 2014 WL 3512838, at \*4 (S.D.N.Y. July 16, 2014) (noting other circuits have generally held that franchisors are not employers under the FLSA). However, similar to the decision in *Olvera v. Bareburger Grp. LLC*, the court distinguished those prior cases by noting that they were all decided after the completion of discovery pursuant to summary judgment motions and the court here was deciding in the context of a motion to dismiss prior to the completion of any discovery. Because discovery was not complete and the pleadings were sufficient, it was inappropriate to dismiss the franchisor at the motions to dismiss phase). See *Olvera v. Bareburger Grp. LLC*, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014).

49. *Roland Elec. Co. v. Walling*, 326 U.S. 657, 670 (1946).

50. H.R. REP. NO. 101-260, pt. 1, at 14 (1989).

this independence and self-reliance is achieved at an hourly wage. While the decision will undoubtedly increase certain costs for management, its net effect will be positive. Beyond the union workers who can apply greater financial pressure to their demands,<sup>51</sup> the decision will benefit non-union workers who are also jointly-employed by parent companies, whose policy changes will benefit workers without regard to union status. The decision will help this responsive employer because “the joint employer doctrine denies a competitive advantage to those who use substandard labor.”<sup>52</sup> And, companies will begin to be more widely distinguished based on their labor records, as has occurred with companies’ environmental records in recent years. To the extent that companies choose to be a resistant employer, the NLRA will now be more capable of forcing employers to be reputable in their own interest. After *Browning-Ferris II*, companies have a clear choice: respond or resist. While the initial inclination might be to resist, everyone is still better off with viable and enforceable labor and employment laws.

The 21st century American Dream recognizes that we have arrived at this economic and technological reality because of the laws that were put into place eighty years ago and the workers, as well as the innovators, that got us here. The idea that certain things have improved is not justification to reduce the legal standards and protections for any American. *Browning-Ferris II* is an important decision because it acknowledges that everyone has a voice and that we can still add more chairs to the table, essential components of the 21st century American Dream.

#### CONCLUSION

*Browning-Ferris II* is not a perfect decision. As pointed out in the dissent, it is difficult to imagine how parent companies’ NLRA obligations will be limited only to those terms and conditions they are deemed to control.<sup>53</sup> Regardless, the decision is, on the whole, a step in the right direction.

If the decision is upheld, the NLRA has a greater likelihood of achieving its purpose, and millions of Americans stand to benefit. While there will be a financial burden imposed on certain employers, the initial costs will be absorbed, and the incentives to layer employment relationships will persist and evolve. Parent companies will still control virtually every aspect of their employment or contractual relationships. If these companies are

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51. See *Browning-Ferris II*, 362 N.L.R.B. No. 186, 28 (2015) (reaching into the parent company’s “deeper pockets” and increasing costs).

52. Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L. J. 393, 405 (2002).

53. *Browning-Ferris II*, 362 N.L.R.B. at 42

concerned with these relationships that put them at risk under the NLRA, they can terminate the relationships, can further indemnify themselves, and can even choose to be better for their workers and their brand.