

Expansion of Joint Employer Liability Theory on the Horizon: The Ninth Circuit Adopts the Agency Test in *EEOC v. Global Horizons, Inc.*

KELLY KAGAN*

TABLE OF CONTENTS

I.	INTRODUCTION	282
II.	SETTING THE STAGE FOR <i>GLOBAL HORIZONS</i>	284
	A. <i>H-2A Visas</i>	285
	B. <i>Labor Contractors</i>	286
	C. <i>Title VII Discrimination Claim</i>	287
	1. <i>The Allegations</i>	287
	2. <i>The Issue: Determining Who Is an Employer Under Title VII</i>	288
III.	THE RULING: THE NINTH CIRCUIT ADOPTS A TEST FOR JOINT EMPLOYER LIABILITY UNDER TITLE VII	289
	A. <i>The Joint Employer Liability Theory</i>	289
	B. <i>The Agency Test Under Darden</i>	290
	C. <i>The Ninth Circuit Adopts a Blended Darden Test</i>	292
	1. <i>The Court's Reasoning</i>	292
	2. <i>Nullifying Contract Law</i>	295
IV.	THE EXPANSION OF THE JOINT EMPLOYER LIABILITY THEORY	295
	A. <i>The Agricultural Industry's Influence in the Ninth Circuit</i>	296

* © 2020 Kelly Kagan. J.D. Candidate 2020, University of San Diego School of Law; B.A. 2010, University of California San Diego. The author would like to acknowledge Professor Wendy Garewal, casenote editor Noah Gaarder-Feingold, and the entire *San Diego Law Review* team for their attention to detail and inquisitive feedback.

B.	<i>Industries Other than Agriculture Should See a Similar Shift</i>	298
V.	CONCLUSION	299

I. INTRODUCTION

In employment law, not all workplace discrimination leads to employer liability. The relationship between the plaintiff and the defendant is a crucial component in determining employer liability.¹ For instance, courts analyze coworker and customer harassment on a negligence standard.² Title VII of the Civil Rights Act of 1964 even expressly exempts particular employers.³ On the other hand, alter ego and supervisor harassment result in vicarious liability.⁴

However, the use of labor contractors posits a different query: whether the use of a labor contractor renders third-party entities subject to Title VII liability. The Ninth Circuit suggests: yes, under joint employer liability theory.⁵

Courts have not uniformly applied a test to determine whether an entity may be held liable under Title VII as a joint employer.⁶ Some courts have analyzed liability based on varying degrees of control.⁷ Other courts have applied elaborate multifactor tests to determine whether an employer

1. See, e.g., *DeLia v. Verizon Commc'ns Inc.*, 656 F.3d 1, 6 (1st Cir. 2011) (declaring lack of employment relationship “fatal” to plaintiff’s Title VII claim).

2. See SUSAN GROVER, SANDRA F. SPERINO & JAROD S. GONZALEZ, *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* 242 (2d ed. 2014).

3. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b)(1)–(2) (2012) (companies with less than twenty-five employees are exempt from Title VII coverage). Title VII protects against employment practices that “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” *Id.* § 2000e–2(a)(1).

4. “Under the [alter ego] theory, which has traditionally served as a way of justifying vicarious liability, the agent is the ‘alter ego.’” Martin Petrin, *The Curious Case of Directors’ and Officers’ Liability for Supervision and Management: Exploring the Intersection of Corporate and Tort Law*, 59 AM. U. L. REV. 1661, 1694–95 (2010). See Jodi R. Mandell, Comment, *Mack v. Otis Elevator: Creating More Supervisors and More Vicarious Liability for Workplace Harassment*, 79 ST. JOHN’S L. REV. 521, 527, 541–50 (2005), for an examination of the “rationale behind the vicarious liability of employers for harassment by their supervisors.”

5. See generally *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631 (9th Cir. 2019).

6. See *Towns v. Tenn. Dep’t of Agric.*, No. 17-cv-02603-SHM-tmp, 2019 WL 2323636, at *3–5 (W.D. Tenn. Feb. 21, 2019), for a brief summary of the circuit split regarding the proper test for determining an employer under Title VII.

7. See, e.g., *Al-Saffy v. Vilsack*, 827 F.3d 85, 96–97 (D.C. Cir. 2016); see also *Whitaker v. Milwaukee Cty.*, 772 F.3d 802, 810 (7th Cir. 2014) (“[A]n entity other than the actual employer may be considered a ‘joint employer’ ‘only if it exerted *significant* control over’ the employee.” (emphasis added) (quoting *Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1530 (7th Cir. 1989))).

controlled an employee's work and employment.⁸ Still others have examined whether two separate entities "co-determine . . . essential terms and conditions of employment."⁹ In particular, one of the most prevalent tests is the *Darden* test, under which the Supreme Court "adopt[ed] a common-law [agency] test for determining who qualifies as an 'employee'" when determining retirement benefits.¹⁰ After noting that its circuit had "not yet adopted a test for determining when an entity may be held liable as a joint employer under Title VII," the Ninth Circuit opted for a blended *Darden* test.¹¹ In implementing this test, the court held that a third party was also considered an employer under Title VII and, therefore, could be held liable for Title VII violations.¹²

Although the circuit split is not new, the Ninth Circuit's ruling has much deeper ramifications than other circuit decisions. The expansion of joint employer liability drastically undermines the ability to contract labor.¹³ Additionally, although this case stemmed from a Washington state case, this ruling threatens California's economy—and it guts the United States' agricultural system.¹⁴ Moreover, this may be just the beginning of the

8. See, e.g., *Casey v. HHS*, 807 F.3d 395, 404–05 (1st Cir. 2015) (applying fifteen factors); *Torres-Lopez v. May*, 111 F.3d 633, 639–41 (9th Cir. 1997) (applying a multi-factor economic reality test).

9. *Bristol v. Bd. of Cty. Comm'rs of Clear Creek*, 312 F.3d 1213, 1218 (10th Cir. 2002) (quoting *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1360 (11th Cir. 1994)).

10. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992). Although *Darden* dealt with defining an employee under the Employee Retirement Income Security Act, a number of courts have applied tests resembling *Darden*. *Id.* at 323–24; see, e.g., *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213–14 (3d Cir. 2015); *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 612 (6th Cir. 2003). Note that this Casenote only examines tests under Title VII because courts apply different tests for each area of employment law. See, e.g., *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 5 (Cal. 2018). "Here we must decide what standard applies . . . for purposes of California wage orders." *Id.*

11. *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 637–39 (9th Cir. 2019).

12. *Id.* at 637.

13. The agricultural industry has historically relied on various third-party contracting "schemes" to reduce costs. See *infra* note 38 and accompanying text.

14. See *infra* Section IV.A.

expansion,¹⁵ and joint employer liability theory may soon infiltrate other industries, such as the franchise industry.¹⁶

Part II examines the H-2A guest worker visa program, the labor contractor role, and the title case, *EEOC v. Global Horizons, Inc.*¹⁷ Part III explores joint employer liability and the Ninth Circuit's decision to adopt the blended *Darden* test.¹⁸ Finally, Part IV surveys the potential ramifications of the Ninth Circuit's decision in California, as well as its effect on other industries.¹⁹ A limited exception for the agricultural industry may best promote both Title VII protections and the agricultural industry.²⁰ Instead, advocates should focus on exploring nontraditional legal remedies for protecting this vulnerable portion of the American workforce.²¹

II. SETTING THE STAGE FOR *GLOBAL HORIZONS*

Under the H-2A visa program, foreign workers enter the United States to work in the agricultural industry.²² These “guest workers” are commonly recruited by labor contractors.²³ In Washington state, the Equal Employment Opportunity Commission (EEOC) alleged that a labor contractor and two farmers harassed a group of guest workers based on their Thai national origin, a violation of Title VII's equal protection laws.²⁴ The issue was whether the labor contractor was responsible as the sole employer or whether the two farmers could also be held liable, in addition to the labor contractor, as joint employers.²⁵

15. Labor law is witnessing a similar expansion. *See* *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1199–200 (D.C. Cir. 2018) (holding a reserved right to control—not actual control—solidified a third party's status as employer under Title VII). Labor law is a discrete area of law that is separate from employment law. *Compare* KENNETH G. DAU-SCHMIDT ET AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE* (2d ed. 2014), *with* GROVER, SPERINO & GONZALEZ, *supra* note 2.

16. *See infra* Section IV.B.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Section IV.A.

21. *See infra* Part V.

22. *See infra* Section II.A.

23. *See infra* Section II.B.

24. *EEOC v. Glob. Horizons, Inc.*, No. CV-11-3045-EFS, 2012 WL 3095577, at *3 (E.D. Wash. July 27, 2012), *rev'd and remanded* 915 F.3d 631 (9th Cir. 2019); *see infra* Section II.C.1. The EEOC “is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability[,] or genetic information.” *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/index.cfm> [<https://perma.cc/2XVE-J5Q7>].

25. *See infra* Section II.C.2.

A. H-2A Visas

H-2A visas are nonimmigration visas that allow foreign workers to come to the United States to engage in temporary or seasonal work.²⁶ Under the H-2A visa program, an employer must “[d]emonstrate that there are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work.”²⁷ Additionally, the employer must establish that the influx of H-2A workers “will not adversely affect the wages and working conditions of similarly employed U.S. workers.”²⁸

For decades, federal labor law has “recognized the reliance of certain industries on low wage labor” from foreigners.²⁹ Many foreign workers come to the United States to work and send money back to their countries of origin.³⁰ The H-2A program thus balances the employer’s demand for “adequate labor supply” and the domestic employee’s ability to work.³¹ In other words, farm owners maintain an adequate supply of labor without stripping any highly sought-after jobs from domestic workers.

California, in particular, employs a hefty portion of H-2A visa holders.³² Because the H-2A program is not an immigration program, there is “no visa cap.”³³ The number of H-2A jobs available has continued to rise

26. 8 U.S.C. § 1101(a)(15)(H) (2018); *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers> [<https://perma.cc/9LG9-3K35>].

27. *H-2A Temporary Agricultural Workers*, *supra* note 26. *See generally* 8 U.S.C. § 1188(a)(1) (2018).

28. *H-2A Temporary Agricultural Workers*, *supra* note 26. *See generally* 8 U.S.C. § 1188(a)(1).

29. Elizabeth M. Dunne, Comment, *The Embarrassing Secret of Immigration Policy: Understanding Why Congress Should Enact an Enforcement Statute for Undocumented Workers*, 49 EMORY L.J. 623, 635 (2000).

30. *See* Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After Sure-Tan, the IRCA, and Patel*, 63 N.Y.U. L. REV. 1342, 1372 (1988) (“[E]ven subminimum wages earned in the United States and sent home can substantially help household members left behind.”).

31. *United Farmworkers of Am. v. Chao*, 227 F. Supp. 2d 102, 108 (D.D.C. 2002).

32. *See* Philip Martin, *The H-2A Farm Guestworker Program Is Expanding Rapidly*, WORKING ECON. BLOG (Apr. 13, 2017, 5:54 PM), <https://www.epi.org/blog/h-2a-farm-guestworker-program-expanding-rapidly/> [<https://perma.cc/6VYH-LKMU>] (“Approximately half of H-2A jobs . . . were certified in [five] states: Florida, North Carolina, Georgia, Washington, and California.”).

33. Preston Huennekens, *Unlimited Cheap Farm Labor: Evaluating H-2A Disclosure Data*, CTR. IMMIGR. STUD. (Aug. 6, 2018), <https://cis.org/Report/Unlimited-Cheap-Farm-Labor-Evaluating-H2A-Disclosure-Data> [<https://perma.cc/8EJF-RGA4>].

steadily,³⁴ “growing [at] an average of [thirteen] percent a year.”³⁵ Thus, a court decision that alters the relationship between farmers and H-2A holders may have much further-reaching ramifications in California than in the rest of the United States.³⁶

B. Labor Contractors

In the agricultural industry, growers commonly work with farm labor contractors.³⁷ The agricultural industry has maintained a long history of “schemes involving intermediaries,”³⁸ such as farm labor contractors, who recruit and supervise agricultural workers.³⁹ Studies show that some of the key reasons that growers use farm labor contractors are to reduce legal liability⁴⁰ and expenses.⁴¹ In other words, labor contractors generally shift legal obligations away from farmers,⁴² which can leave agricultural workers with “judgment-proof” employers—that is, labor contractors.⁴³

34. See Martin, *supra* note 32.

35. Huennekens, *supra* note 33 (citing U.S. STATE DEP’T, TABLE XVI(B): NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS), FISCAL YEARS 2013–2017, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf> [<https://perma.cc/8GW6-2H4W>]).

36. See *infra* Section IV.A.

37. See, e.g., *Occupational Employment Statistics: Occupational Employment and Wages: 13–1074 Farm Labor Contractors*, BUREAU LAB. STATS. (May 2018) [hereinafter *Occupational Employment Statistics*], <https://www.bls.gov/oes/current/oes131074.htm> [<https://perma.cc/546Z-8P4Z>]; *What Does a Farm Labor Contractor Do?*, YOUR FREE CAREER TEST, <https://www.yourfreecareertest.com/farm-labor-contractor> [<https://perma.cc/U8XV-W2HD>].

38. Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 988 (1999).

39. Allison Ryan, Comment, *You Are the Employer Even If You’re Not: Joint Employment Under the Migrant and Seasonal Agricultural Worker Protection Act*, 25 SAN JOAQUIN AGRIC. L. REV. 91, 94 (2015).

40. See, e.g., Dawn Thilmany & Philip L. Martin, *Farm Labor Contractors Play New Roles in Agriculture*, CAL. AGRIC., Sept.–Oct. 1995, at 37, 38–39.

41. “Once an employer decides to enter the H-2A program, the law creates incentives to prefer guest workers over U.S. workers. For example, the employer must pay Social Security and unemployment taxes on U.S. workers’ wages but is exempt from paying these taxes on guest workers’ wages.” FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 7, <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf> [<https://perma.cc/R42A-G7ZD>].

42. Sean A. Andrade, Comment, *Biting the Hand that Feeds You: How Federal Law Has Permitted Employers To Violate the Basic Rights of Farmworkers and How This Has Begun to Impact Other Industries*, 4 U. PA. J. LAB. & EMP. L. 601, 617 n.74 (2002).

43. Goldstein et al., *supra* note 38, at 988.

C. Title VII Discrimination Claim

In *Global Horizons*, the Thai guest workers suffered repugnant working conditions while employed in Washington state under the H-2A program.⁴⁴ However, the real issue was which business entity—or entities—could be held liable: the labor contractor, or the farmers *and* the labor contractor.⁴⁵

1. The Allegations

Two farmers, Green Acres and Valley Fruits, contracted with labor contractor Global Horizons.⁴⁶ Global Horizons hired “impoverished Thai nationals,” promising they would “make much money” and “work steady hours.”⁴⁷ Despite the “huge fees” Global Horizons charges its workers to be a part of its H-2A guest worker program, hundreds of workers joined the program.⁴⁸

The EEOC alleged that both the farmers and the labor contractor engaged in a pattern or practice of discriminatory treatment and created a hostile work environment because of the workers’ Thai race and national origin.⁴⁹ The EEOC alleged that all three entities—Green Acres, Valley Fruits, and Global Horizons—participated in this discrimination.⁵⁰ Workers stated that the three employers “yelled” at them, assigned “more difficult” tasks to them compared to non-Thai workers, and provided “transportation, housing, and subsistence . . . [that] were unsafe and insufficient.”⁵¹

Although Global Horizons oversaw the workers’ transportation, housing, and boarding, according to the agreements with the farmers, the Thai workers complained to Green Acres about the inadequate transportation and living conditions.⁵² As a result, the labor contractors gave the Thai workers fewer work hours, and the Thai workers “continued to suffer” from harassment.⁵³ At Valley Fruits, the Thai workers expressed their concern

44. EEOC v. Glob. Horizons, Inc., No. CV-11-3045-EFS, 2012 WL 3095577, at *1 (E.D. Wash. July 27, 2012), *rev’d and remanded* 915 F.3d 631 (9th Cir. 2019).

45. *Id.* at *3.

46. *Id.* at *1.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

that their pay was too low “to pay off their substantial debt.”⁵⁴ As a result, Valley Fruits reduced their work hours as well, and Global Horizons “threatened to deport them or transfer them to a different farm.”⁵⁵ Global Horizons also held the Thai workers’ passports and “limited the [workers’] ability to leave the orchards and residences.”⁵⁶ Some of the workers were so fraught that they “were compelled to escape.”⁵⁷

2. *The Issue: Determining Who Is an Employer Under Title VII*

Global Horizons turned on whether or not the two farmers could be held jointly liable, alongside the labor contractor, as employers under Title VII.⁵⁸ An employer held liable under Title VII is subject to both legal and equitable remedies.⁵⁹ Under Title VII, a court may award injunctions, back pay, compensatory damages, and punitive damages,⁶⁰ which means that holding a second employer responsible for a Title VII violation doubles the resources for these remedies.

Although it is not uncommon to hold farmers and labor contractors equally responsible for violations, *Global Horizons* had entered into contracts with Green Acres and Valley Fruits that granted significant “control [to the farmers] over the work to be performed.”⁶¹ Additionally, although the farmers set work product expectations, such as “advis[ing] . . . what work needed to be done and how to do it,” supplying the “necessary equipment, set[ting] the work hours, and inspect[ing] the work done,” *Global Horizons* physically supervised the workers and supplied the housing, transportation, and subsistence.⁶²

Green Acres, Valley Fruits, and *Global Horizons* all agreed that they “were joint employers of the Thai workers as to orchard-related matters.”⁶³ Thus, the farmers would be held jointly liable alongside the labor contractor for any alleged harassment that occurred while working on the orchard; however, under this holding the farmers would not be responsible for any alleged harassment that occurred while the Thai workers were not working at the orchard—such as the poor living conditions. Therefore, the pivotal question in this case was whether the three parties “were also joint employers

54. *Id.*

55. *Id.*

56. *Id.* at *2.

57. *Id.*

58. *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 634 (9th Cir. 2019).

59. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–5(g) (2012).

60. *Id.*

61. *Glob. Horizons*, 2012 WL 3095577, at *1.

62. *Id.*

63. *Glob. Horizons*, 915 F.3d at 633.

with respect to the non-orchard-related matters.”⁶⁴ Under the labor contracts, the labor contractor Global Horizons was solely responsible for non-orchard-related matters.⁶⁵

III. THE RULING: THE NINTH CIRCUIT ADOPTS A TEST FOR JOINT EMPLOYER LIABILITY UNDER TITLE VII

The Ninth Circuit applied joint employer liability theory to find that the EEOC had correctly alleged that the farmers were joint employers, and therefore proper defendants alongside the labor contractor.⁶⁶ This Part briefly summarizes the joint employer theory,⁶⁷ examines a prevalent common law test for establishing joint employer status,⁶⁸ reviews the Ninth Circuit’s analysis,⁶⁹ and questions whether joint employer status should apply to the agricultural industry.⁷⁰

A. *The Joint Employer Liability Theory*

Under joint employer liability theory, two separate entities may be held legally liable as employers for workplace misconduct.⁷¹ A variety of scenarios may give rise to joint employer liability; however, the Supreme Court has primarily entertained joint employer liability theory in the labor law context.⁷² The Court first broached the subject of joint employer

64. *Id.* at 634.

65. *Id.* at 640; *Glob. Horizons*, 2012 WL 3095577, at *1; *see also supra* note 62 and accompanying text.

66. *See infra* Section III.C.

67. *See infra* Section III.A.

68. *See infra* Section III.B.

69. *See infra* Section III.C.

70. *See infra* Sections III.B, III.C.

71. *See, e.g.*, *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 634 (9th Cir. 2019).

72. *See, e.g.*, *Local 24, Int’l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 292 (1959); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (1964); *Humphrey v. Moore*, 375 U.S. 335, 336–37 (1964); *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 14 (1963).

liability under the National Labor Relations Act (NLRA)⁷³ sixty years ago.⁷⁴

More recently, the Supreme Court reaffirmed that joint employer liability exists in some—but not all—contexts.⁷⁵ Circuit courts have followed suit; the District of Columbia Circuit, for example, has reaffirmed that joint employer liability existed under the NLRA.⁷⁶ The Fifth,⁷⁷ Sixth,⁷⁸ and Seventh⁷⁹ Circuits have applied joint employer liability under the Americans with Disabilities Act. Additionally, several circuits have leveraged joint employer theory for the purposes of Title VII liability.⁸⁰ One issue, however, is which test should determine joint employer status.⁸¹

B. *The Agency Test Under Darden*

Under Supreme Court precedent, the agency test is a “well established” common law test for establishing employer status.⁸² To determine agency, a court should consider the entity’s “right to control the manner and means by which the product is accomplished.”⁸³ A court should consider “all of the incidents of the relationship . . . with no one factor being decisive.”⁸⁴

73. See generally 29 U.S.C. §§ 151–69 (2012). The NLRA governs certain relations and activities regarding employees’ rights to unionize. See *National Labor Relations Act*, NAT’L LAB. REL. BOARD, <https://www.nlr.gov/how-we-work/national-labor-relations-act> [<https://perma.cc/W33X-KTUP>] (“Congress enacted the National Labor Relations Act . . . in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”).

74. See *Local 24, Int’l Bhd. of Teamsters*, 358 U.S. at 292; see also *Boire*, 376 U.S. at 475; *Humphrey*, 375 U.S. at 336–37; *McCulloch*, 372 U.S. at 14.

75. *Harris v. Quinn*, 134 S. Ct. 2618, 2638 n.20 (2014) (“More important[ly], the joint-employer standard was developed for use in other contexts.”).

76. *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1199–200 (D.C. Cir. 2018).

77. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 228–29 (5th Cir. 2015).

78. *Swallows v. Barnes & Noble Book Stores, Inc.*, 128 F.3d 990, 993 (6th Cir. 1997).

79. *Whitaker v. Milwaukee Cty.*, 772 F.3d 802, 810 (7th Cir. 2014).

80. See, e.g., *Frey v. Hotel Coleman*, 903 F.3d 671, 676–77 (7th Cir. 2018); *Al-Saffy v. Vilsack*, 827 F.3d 85, 96 (D.C. Cir. 2016); *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015); *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 408–10 (4th Cir. 2015).

81. See *infra* Section III.B.

82. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992) (first citing *Kelley v. S. Pac. Co.*, 419 U.S. 318, 322–23 (1974); then citing *Baker v. Tex. & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959) (per curiam); and then citing *Robinson v. Balt. & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915)).

83. *Id.* at 323 (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)).

84. *Id.* at 324 (citing *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)).

For example, in *Darden*, the Court elaborated that common factors used to determine employer status included the following considerations:

[T]he hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁸⁵

By contrast, the economic reality test “focus[es] on the economic reality of the particular relationship between [the parties].”⁸⁶ However, this test is generally applied under legislation encompassing “broad statutory definitions.”⁸⁷ Occasionally, courts even apply a “hybrid” of the two tests for purposes of Title VII.⁸⁸

Although *Darden*⁸⁹ is a prevalent common law test to determine employer status,⁹⁰ the issue is whether this approach supports a finding of joint employer status in the agricultural industry. In *Darden*, the Supreme Court only questioned the approach to determining one entity's status—not joint employer status.⁹¹ By finding two employers liable, a court does not hold the *right* employer liable; instead, a court applies an overly broad reading of employer status. By applying *Darden* to determine joint employer liability, a court merely expands the defendant list in search of deeper pockets and strikes a vital blow to the agricultural community.⁹²

85. *Id.* at 323–24 (quoting *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52).

86. *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997) (quoting *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996)). Thus, under this test, the farmers would not be “employers” of the Thai workers because the labor contractor recruited the workers and promised them “much money.” See *supra* notes 47–48 and accompanying text.

87. *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 639 (9th Cir. 2019) (first citing *Torres-Lopez*, 111 F.3d at 641; and then citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469–70 (9th Cir. 1983)).

88. See, e.g., *Murray v. Principal Fin. Grp., Inc.*, 613 F.3d 943, 945–46 (9th Cir. 2010); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983).

89. See generally *Darden*, 503 U.S. at 322–23.

90. See, e.g., *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213–14 (3d Cir. 2015); *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 612 (6th Cir. 2003); *Loomis Cabinet Co. v. Occupational Safety & Health Review Comm'n*, 20 F.3d 938, 941 (9th Cir. 1994).

91. *Darden*, 503 U.S. at 320–21.

92. See *infra* Section IV.A.

Instead, legal advocates should focus on other methods to protect agricultural workers that do not undermine the agricultural system.⁹³

C. The Ninth Circuit Adopts a Blended Darden Test

The court conceded that the issue of joint employer liability under Title VII was an issue of first impression in the Ninth Circuit.⁹⁴ The court expressly rejected other tests in favor of the common law agency test to find Green Acres and Valley Fruits were joint employers, along with Global Horizons, for the purposes of Title VII.⁹⁵ This meant that the farmers could be held responsible for harassment for both orchard and non-orchard-related matters.⁹⁶ Additionally, the court reiterated that entities could not contract around H-2A requirements.⁹⁷ However, because this precedent will have detrimental repercussions for California's agricultural industry,⁹⁸ the issue is whether, from a policy standpoint, a proper interpretation of the H-2A program requirements allows for a finding of joint employer liability.

1. The Court's Reasoning

The Ninth Circuit correctly applied Supreme Court precedent to determine what kind of test to apply to determine joint employer status.⁹⁹ The Ninth Circuit concluded that when statutory definitions are circular,¹⁰⁰ courts traditionally apply common law.¹⁰¹ The application of common law "reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning

93. *See infra* Section IV.A.

94. *EEOC v. Glob. Horizons, Inc.*, 915 F.3d 631, 637–38 (9th Cir. 2019).

95. *See infra* Section III.C.1.

96. *Glob. Horizons*, 915 F.3d at 637–38.

97. *See infra* Section III.C.2.

98. *See infra* Section IV.A.

99. *Glob. Horizons*, 915 F.3d at 638 (first citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992); and then citing *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444–45, 447 (2003)).

100. As the Supreme Court has noted, defining an "employer" or an "employee" is often circular; for instance, the Employee Retirement Income Security Act's definition of "employee" is "any individual employed by an employer," and thus lends little clarification when defining the employer-employee relationship. *Darden*, 503 U.S. at 323 (quoting 29 U.S.C. § 1002(6) (2012)).

101. *Glob. Horizons*, 915 F.3d at 638 (citing *Darden*, 503 U.S. at 323).

at common law.”¹⁰² In employment law, the expectation is often to fill that gap with agency law.¹⁰³

By applying the agency test, the Ninth Circuit adopted a blended *Darden* test.¹⁰⁴ To begin its analysis, the Ninth Circuit looked to *Clackamas Gastroenterology Associates v. Wells*’s common law test, under which “‘the principal guidepost’ is the element of control—that is, ‘the extent of control that one may exercise over the details of the work of the other.’”¹⁰⁵ Then, to determine the “extent of control,” the Ninth Circuit looked to *Darden*’s “non-exhaustive list of factors.”¹⁰⁶ The Ninth Circuit further acknowledged that the Supreme Court cautioned that this is a factually intensive inquiry: “[T]here is ‘no shorthand formula’ for determining whether an employment relationship exists.”¹⁰⁷

In embracing the agency test, the Ninth Circuit firmly rejected the alternative economic reality test.¹⁰⁸ The court opined that the economic reality test, which focuses on “whether workers are economically dependent on the alleged joint employer,”¹⁰⁹ had been developed in contexts that differed from Title VII in “material aspects.”¹¹⁰ However, the court did acknowledge that adopting such a test can “produce the same outcome in a joint employment analysis.”¹¹¹

Under the agency test, the court concluded that the EEOC had correctly alleged that Green Acres and Valley Fruits were joint employers of both

102. *Id.* (citing *Clackamas Gastroenterology Assocs.*, 538 U.S. at 447).

103. *Id.* However, nontraditional methods of gap filling may be a better option in the agricultural industry. *See infra* notes 139–49 and accompanying text.

104. *See Glob. Horizons*, 915 F.3d at 637–39.

105. *Id.* at 638 (citing *Clackamas Gastroenterology Assocs.*, 538 U.S. at 448).

106. *Id.* (citing *Darden*, 503 U.S. at 323–24). Factors included required skills, whether the entity furnished “instrumentalities and tools,” work location, length of working relationship, the “right to assign additional projects,” “discretion over when and how long to work,” payment terms, hiring process, “whether the work is part of the regular business of the hiring party,” employee benefits, and “tax treatment of the hired party.” *Id.*

107. *Id.* (citing *Darden*, 503 U.S. at 324).

108. *Id.*

109. *Id.* (citing *Torres-Lopez v. May*, 111 F.3d 633, 641 (9th Cir. 1997)).

110. The Ninth Circuit suggested that the Fair Labor Standards Act (FLSA) and the Migrant Seasonal Agricultural Worker Protection Act (AWPA) were too different from Title VII. *Id.* at 639. “Unlike Title VII, both the FLSA and the AWPA provide broad definitions of ‘employ’ that expand the scope of employment relationships beyond the common-law understanding.” *Id.* (first citing 29 U.S.C. §§ 203(g), 1802(5) (2012); and then citing *Darden*, 503 U.S. at 326).

111. *Id.* Although, this interpretation is doubtful in this case. *See supra* note 86 and accompanying text.

orchard-related and non-orchard-related matters.¹¹² The Ninth Circuit recognized that “typical employment relationship[s]” do not result in an employer’s “control over non-workplace matters[,] such as housing, meals, and transportation.”¹¹³ However, the H–2A program added a unique element to the work relationship; the program required entities to provide “material terms and conditions of employment,”¹¹⁴ which included “housing, transportation, and either low-priced meals or access to cooking facilities.”¹¹⁵ The H–2A program, the court concluded, “thus expand[ed] the employment relationship.”¹¹⁶

Perhaps the Ninth Circuit was concerned about the far-reaching consequences of abusing guest worker programs and the ramifications on the agricultural worker.¹¹⁷ National lobbying efforts strongly support agricultural employers, rather than their employees.¹¹⁸ Additionally, some nonprofits have concluded that employee rights violations are “rampant and systemic” under the H–2A program.¹¹⁹ An influx in foreign workers in the agricultural industry effectively “deprives all [domestic and H–2A] farmworkers of bargaining powers and political influence.”¹²⁰ The use of foreign agricultural workers also deflates the average wages paid in the agricultural sector.¹²¹ Yet, the abolition of the H–2A program would rob the agricultural industry of its workforce.¹²² Thus, this broad application of the *Darden* test to find joint employer liability should not be applied to the agricultural industry.

112. *Glob. Horizons*, 915 F.3d at 639.

113. *Id.*

114. *Id.* at 639–40 (citing 20 C.F.R. § 655.103(b)(1) (2018)).

115. *Id.* at 639 (citing 20 C.F.R. § 655.122(c) (2018)).

116. *Id.* at 640.

117. Farmworker Justice found that “[g]uest worker programs drive down wages and working conditions of U.S. workers and deprive foreign workers of economic bargaining power and the opportunity to gain political representation.” FARMWORKER JUSTICE, *supra* note 41, at 7.

118. “In 2017, the agribusiness sector spent more money lobbying congress (\$131.9 million) than defense contractors (\$127.4 million).” Huennekens, *supra* note 33 (citing *Ranked Sectors: 2017*, CTR. RESPONSIVE POL., <https://www.opensecrets.org/lobby/top.php?showYear=2017&indexType=c> [<https://perma.cc/LQA6-FBGJ>]).

119. FARMWORKER JUSTICE, *supra* note 41, at 7 (“The U.S. Department of Labor (DOL), which has primary responsibility for administering the H–2A program, frequently approves illegal job terms in the H–2A workers’ contracts.”).

120. *Id.* at 7–8.

121. In 2017, “H–2A workers were paid less than the average nationwide wage.” Huennekens, *supra* note 33.

122. Without the H–2A program, farmers would lack “the workforce [they] need[] to produce our fruits, vegetables[,] and livestock.” FARMWORKER JUSTICE, *supra* note 41, at 8.

2. Nullifying Contract Law

In concluding that the farmers were joint employers of the Thai workers, the Ninth Circuit correctly concluded that as a federal law, the H–2A’s mandates preempted Global Horizons’ and the two farmers’ contract terms.¹²³ Federal preemption is not a new concept.¹²⁴ However, the issue is whether applying the joint employer liability theory to override contract terms is the correct conclusion in the agricultural industry.

Under the terms of the labor contract, Global Horizons had agreed to provide housing and non-orchard-related resources to the workers.¹²⁵ This framework enables farmers to keep costs low rather than passing additional expenses through to the consumer,¹²⁶ while maintaining an adequate supply of laborers.¹²⁷ Thus, by applying joint employer liability to the agricultural industry, a court undermines the industry’s carefully planned economic infrastructure. Advocates should instead turn to other methods to deter the harassment of this vulnerable portion of the workforce.¹²⁸

IV. THE EXPANSION OF THE JOINT EMPLOYER LIABILITY THEORY

In *Global Horizons*, the Ninth Circuit reaffirmed the circuit split by finding joint employer status after applying *Darden*’s common law agency test. Yet, it is unclear whether the court considered a public policy exception for the agricultural industry; without better-structured financial liability systems in place, additional expenses may pass through to consumers.¹²⁹ Without a doubt, victims of Title VII violations should be fairly compensated—but that compensation should derive from the party legally and financially responsible.¹³⁰ Perhaps the H–2A program should be revamped to better reflect the nuances of the agricultural industry and ensure that labor contractors are not “judgment-proof.”¹³¹ In the meantime, courts should consider the far-reaching consequences of meddling with labor frameworks in the

123. EEOC v. Glob. Horizons, Inc., 915 F.3d 631, 640 (9th Cir. 2019).

124. See generally U.S. CONST. art. VI, cl. 2.

125. See *supra* Section II.C.1.

126. See *supra* Section II.B.

127. See *supra* Section II.A.

128. See *infra* Section IV.A.

129. See *infra* Section IV.A.

130. Labor contractors should be able to foot the bill because they collect fees from guest workers upfront. See *supra* note 48 and accompanying text.

131. See *supra* note 43 and accompanying text.

agricultural industry because it is an industry that relies heavily on low costs.¹³² More precisely, the issues that remain are twofold: Whether *Darden* really supports a finding of *joint* employer liability,¹³³ and whether *Darden* should yield to a public policy exception for the agricultural industry.¹³⁴

This Part considers whether the Ninth Circuit’s decision to apply the agency test was in the best interest of the agricultural industry, how *Global Horizons* will impact California in particular, and how this reading will expand the list of defendants in other industries, as well.

A. *The Agricultural Industry’s Influence in the Ninth Circuit*

The Ninth Circuit is often touted as “a model of innovation.”¹³⁵ Yet, the Ninth Circuit’s new precedent strikes a vital blow to many California employers. California employs the largest number of labor contractors in the nation.¹³⁶ California is a leading agricultural producer in the United States, contributing more than “a third of the country’s vegetables and two-thirds of the country’s fruits and nuts.”¹³⁷ In recent years, California has exported more than \$20 billion worth of produce.¹³⁸

Expanding the joint employer liability theory is not the only way to deter systemic violations. Perhaps a better method to regulate the agricultural industry is to implement more frequent and thorough Department of Labor (DOL) checks.¹³⁹ Although farmers may be held liable for discrimination

132. See *supra* notes 29–31 and accompanying text.

133. See *supra* note 91 and accompanying text.

134. Courts have made public policy exceptions under Title VII. See, e.g., *Keenan v. Allan*, 889 F. Supp. 1320, 1350, 1357, 1359 (1995) (listing public policy as an exception to Title VII’s default rules), *aff’d*, 91 F.3d 1275 (9th Cir. 1996).

135. See, e.g., CONG. RESEARCH SERV., RL33189, PROPOSALS IN THE 109TH CONGRESS TO SPLIT THE NINTH CIRCUIT COURT OF APPEALS (2006), https://www.everycrsreport.com/files/20061122_RL33189_217684cafbc4fd7556e1d253644dbed9d20f651f.pdf [<https://perma.cc/A3N9-UC6U>]; see also John M. Roll, *Split the Ninth Circuit: It’s Time*, ARIZ. ATT’Y, Sept. 2005, at 34, 34, https://www.myazbar.org/AZAttorney/PDF_Articles/0905procon3.pdf [<https://perma.cc/HUZ8-F259>] (“Whether viewed from the vantage point of population, caseload, number of judges[,], or number of states, the Ninth Circuit dwarfs all other federal circuits.”).

136. *Occupational Employment Statistics*, *supra* note 37.

137. *California Agricultural Productions Statistics: 2018 Crop Year—Top 10 Commodities for California Agriculture*, CAL. DEP’T FOOD & AGRIC., <https://www.cdffa.ca.gov/statistics/> [<https://perma.cc/3EWF-4WJH>].

138. CAL. DEP’T FOOD & AGRIC., CALIFORNIA AGRICULTURAL EXPORTS: 2017–2018, at 105, <https://www.cdffa.ca.gov/statistics/PDFs/2017-18AgExports.pdf> [<https://perma.cc/8Q2M-6K9U>].

139. The DOL is a federal agency that:

[F]osters and promotes the welfare of the job seekers, wage earners, and retirees of the United States by improving working conditions, advancing their opportunities for profitable employment, protecting their retirement and health care benefits,

under Title VII, the labor contractor's role should not be minimized; instead, the labor contractor should be rightfully held accountable for its own violations.¹⁴⁰ The labor contractor maintains a closer connection to the workers: they recruit the workers, furnish housing for the workers, and even provide workers with transportation.¹⁴¹ Thus, they have superior knowledge over the conditions of employment compared to the farmers. Moreover, the DOL has adequate information to implement consistent and frequent check-ins with the labor contractors that it licenses.¹⁴²

Another preferable method may be an agricultural annexation into federal labor law. Currently, agricultural workers are explicitly exempted from the NLRA,¹⁴³ which deprives guest workers from "protection for joining unions and engaging in collective bargaining."¹⁴⁴ Although agricultural workers can still organize,¹⁴⁵ their collective bargaining power¹⁴⁶ may be

helping employers find workers, strengthening free collective bargaining, and tracking changes in employment, prices, and other national economic measurements. *Frequently Asked Questions*, U.S. DEP'T LAB., <https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=478&topicid=9&subtopicid=151> [<https://perma.cc/8ASY-WPG5>]. The DOL may have better oversight ability because it can view labor contracts:

[The] DOL should increase oversight and enforcement in the H-2A program. [The] DOL must address illegal terms and programs violations more effectively, including rejecting terms aimed at discouraging U.S. workers, . . . imposing fines on employers that deter illegal conduct, and barring employers from the program when serious violations occur.

FARMWORKER JUSTICE, *supra* note 41, at 8.

140. FARMWORKER JUSTICE, *supra* note 41, at 8 ("[The] DOL should shine a light on the dark world of labor recruitment [and] examine . . . international recruitment mechanisms . . .").

141. See, e.g., *EEOC v. Glob. Horizons, Inc.*, No. CV-11-3045-EFS, 2012 WL 3095577, at *3 (E.D. Wash. July 27, 2012), *rev'd and remanded* 915 F.3d 631 (9th Cir. 2019).

142. When a farm labor contractor applies for a license from the DOL, it must disclose the "physical address of the location of . . . housing" to the DOL. CAL. CODE REGS. tit. 8, § 13660(a)(3) (2019), https://www.dir.ca.gov/dlse/regulation_detail/Clean_Copy_of_the_Final_Text_of_FLC_Regulations.pdf [<https://perma.cc/GM79-E3MP>].

143. National Labor Relations Act of 1935, 29 U.S.C. § 152 (2012).

144. *Labor Laws*, NAT'L FARM WORKER MINISTRY, <http://nfwm.org/resources/labor-laws/> [<https://perma.cc/6WLD-3FCW>].

145. For a brief summary of organizational efforts made by organizers such as Cesar Chavez, the United Farm Workers (UFW), and the Coalition of Immokalee Workers (CIW), see *id.*

146. Collective bargaining helps alleviate the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers." National Labor Relations Act of 1935, 29 U.S.C. § 151 (2012).

inadequate to ensure better employment terms and working conditions.¹⁴⁷ Even current state protections may be inadequate: in California, additional state legislation has not yet reached employment terms and working conditions,¹⁴⁸ which means that agricultural work environments are not highly regulated. However, new developments in California union rights may be just the solution needed here.¹⁴⁹

B. Industries Other than Agriculture Should See a Similar Shift

The expansion of joint employer liability will not affect merely the agricultural industry. This precedent will also affect franchises.¹⁵⁰ Franchises have previously used the instrumentality test to determine vicarious liability.¹⁵¹

147. The chief legislation protecting farm workers is the Migrant and Seasonal Agricultural Worker Protections Act of 1983. *See generally* 29 U.S.C. ch. 20 (2012). Yet, this legislation may still be inadequate:

The law contains some important protections such as employers must disclose terms of employment at the time of recruitment, farm labor contractors “FLCs” must be licensed by the U.S., provided housing must meet local and federal housing standards and transport vehicles must meet basic federal safety standards Most farm workers lack basic labor protections such as workers’ compensation, health insurance[,] and disability insurance.

US Labor Law for Farm Workers, NAT’L FARM WORKER MINISTRY, <http://nfwm.org/farm-workers/farm-worker-issues/labor-laws/> [<https://perma.cc/5ZQK-64RT>].

148. *See, e.g.*, INDUS. WELFARE COMM’N, ORDER NO. 14–2001, REGULATING WAGES, HOURS, AND WORKING CONDITIONS IN THE AGRICULTURAL OCCUPATIONS (2019), <https://www.dir.ca.gov/IWC/IWCArticle14.pdf> [<https://perma.cc/4AVK-YUH7>]. Harassing conduct is “sufficiently severe or pervasive to alter the working environment.” STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 461 (6th ed. 2017). By addressing meal periods, rest breaks, and minimum wages, the state legislation builds a foundation for workplace expectations—but it does not guarantee workers a job that is free from harassing conduct that alters the working environment.

149. By recognizing a stronger right to organized labor, unions may be the answer to ensuring foreign workers are treated with integrity and respect and not subject to illegal behavior. Recently, the Ninth Circuit upheld a California Agricultural Labor Relations Board regulation that “allow[s] union organizers access to agricultural employees at employer worksites.” *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 526–27 (9th Cir. 2019). Thus, unions may now have better access to agricultural workers and be able to negotiate collective bargaining agreements that are more beneficial to the workers. *See, e.g.*, Yeongsik Kim, Comment, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 WIS. J.L. GENDER & SOC’Y 73, 75 (2015) (“Collective-bargaining agreements represent the most efficient and effective, and sometimes exclusive, means of enforcing the rights guaranteed under the collective-bargaining agreement.”).

150. “The application of the joint-employer standard to the franchising context is imminent.” Thomas J. Walsh III, Comment, *Supersizing the Definition of Employer Under the National Labor Relations Act—Broadening the Joint-Employer Standard to Include Franchisors and Franchisees*, 47 U. TOL. L. REV. 589, 634 (2016).

151. *See, e.g.*, Mary-Christine Sungaila & Martin M. Ellison, *Joint Employer Liability in the Franchise Context: One Year After Patterson v. Domino’s*, 35 FRANCHISE L.J. 339, 340 (2016).

However, the new test will likely be a much broader control requirement because franchises often dictate various employee standards.¹⁵²

V. CONCLUSION

The Ninth Circuit's decision further solidifies the circuit split on joint employer liability. However, the Ninth Circuit's adoption of the agency test further expands this liability because it puts forth a much broader control requirement. The agricultural industry, and California in particular, should see a swift reduction in the use of labor contractors and an increase in crop prices. Finally, the Ninth Circuit's momentous presence in federal law means that this decision will be much further reaching than other commentators have fathomed. Advocates seeking to protect agricultural workers' rights might find the best remedies couched in expanded union rights.

152. Rather than actual control, courts might consider "indirect" or "a reserved right to control," a type of control gaining momentum under the NLRA. *E.g.*, *Browning-Ferris Indus. of Cal. v. NLRB*, 911 F.3d 1195, 1199–200 (D.C. Cir. 2018).

