

H.R. 3441, SAVE LOCAL BUSINESS ACT

JOINT HEARING
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
AND THE
SUBCOMMITTEE ON HEALTH,
EMPLOYMENT, LABOR, AND PENSIONS
OF THE
COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
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FIRST SESSION

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H.R. 3441, SAVE LOCAL BUSINESS ACT

**Wednesday, September 13, 2017
House of Representatives,
Subcommittee on Workforce Protections,
joint with the
Subcommittee on Health, Employment, Labor, and Pensions,
Committee on Education and the Workforce,
Washington, D.C.**

The subcommittees met, pursuant to call, at 10:03 a.m., in Room 2175, Rayburn House Office Building, Hon. Bradley Byrne [chairman of the subcommittee on Workforce Protections] presiding.

Present: Representatives Byrne, Walberg, Wilson, Roe, Brat, Grothman, Stefanik, Allen, Lewis, Mitchell, Smucker, Estes, Handel, Foxx, Takano, Courtney, Fudge, Bonamici, Adams, DeSaulnier, Norcross, Blunt Rochester, Krishnamoorthi, Shea-Porter, and Scott.

Staff Present: Bethany Aronhalt, Press Secretary; Andrew Banducci, Workforce Policy Counsel; Courtney Butcher, Director of Member Services and Coalitions; Michael Comer, Press Secretary; Rob Green, Director of Workforce Policy; Callie Harman, Professional Staff Member; Nancy Locke, Chief Clerk; Geoffrey Macleay, Professional Staff Member; Kelley McNabb, Communications Director; Rachel Mondl, Professional Staff Member; James Mullen, Director of Information Technology; Krisann Pearce, General Counsel; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Olivia Voslow, Legislative Assistant; Joseph Wheeler, Professional Staff Member; Lauren Williams, Professional Staff Member; Tylease Alli, Minority Clerk/Intern and Fellow Coordinator; Kyle deCant, Minority Labor Policy Counsel; Denise Forte, Minority Staff Director; Christine Godinez, Minority Staff Assistant; Eunice Ikene, Minority Labor Policy Advisor; Stephanie Lalle, Minority Press Assistant; Kevin McDermott, Minority Senior Labor Policy Advisor; Richard Miller, Minority Senior Labor Policy Advisor; Udochi Onwubiko, Minority Labor Policy Counsel; Veronique Pluviose, Minority General Counsel; Erin Robinson, Minority Policy Fellow; and Kimberly Toots, Minority Labor Policy Fellow.

Chairman BYRNE. Good morning. A quorum being present, the subcommittees will come to order.

Let me welcome everybody to a joint subcommittee hearing on H.R. 3441, the *Save Local Business Act*. We look forward to hearing from an excellent panel of witnesses who travel led from different parts of our country to be here today. We want all of you to know,

who have come to be here with us, that we appreciate the time you have taken away from your jobs and businesses to testify.

To most Americans, the question over who their employer is seems to be an obvious answer. It is the person who hired them, the one who signs their paycheck. As a former labor attorney, I can tell you it used to be very clear in legal terms how you become someone's employer. But that is no longer the case since the National Labor Relations Board stepped in. Many people would be shocked to find out that some company they have had zero contact with is also considered their employer in addition to the employer that actually hired them and signs a paycheck.

Now, we all agree there are times when two or more employers should be deemed joint employers. Before the NLRB stepped in and overstepped, there was a commonsense understanding of the circumstances establishing that joint employer relationship. Both employers had to have, quote, "actual, direct, and immediate," close quote, control, over the central terms and conditions of employment.

That standard made sense. But today, business owners and their employees face a standard vastly different and far more confusing. They face a situation where a group of unelected bureaucrats in Washington are interfering with their relationship in a way that has created a lot of problems. The NLRB's decision, the Obama administration's actions that followed it, in addition to a litany of rulings by activist judges, have inserted a great deal of uncertainty and confusion into the traditional employer/employee relationship. Two completely separate employers can be considered joint employers if they made a business agreement that, quote, "indirectly," close quote, or, quote, "potentially," close quote, impacts their employees.

Indirectly or potentially. What does that even mean? It's vague, and it's confusing. Think of it from the employee's standpoint. There shouldn't be any room for question on who their employer is. As for employers, they should have the clarity they need to look out for their employees in the way the law requires. Because in order for employees to have strong protections in the workplace, it needs to be crystal clear who was responsible for providing those protections. If everyone is, no one is.

We are here today because we are determined to provide that clarity once and for all and protect jobs and small businesses in our communities. I'm proud to say that three of our Democratic colleagues, Representatives Chorea, Cellar, and Peterson are cosponsors of the *Save Local Business Act*, and we hope to continue to build bipartisan support so we can restore commonsense to the joint employer issue.

This is an issue of great importance to both of our workforce subcommittees, which is why this critical legislation has been a joint effort with my colleague Mr. Walberg. Chairman Foxx has made the *Save Local Business Act* a top priority for the full committee, and this hearing will bring us one step closer to moving it through the legislative process.

I'm going to give Mr. Walberg an opportunity to provide his own opening remarks, but before I do, I will yield to, Workforce Protec-

tions Subcommittee Ranking Member Takano for his brief opening remarks.

Mr. Takano.

[The statement of Chairman Byrne follows:]

Prepared Statement of Hon. Bradley Byrne, Chairman, Subcommittee on Workforce Protections

To most Americans, the question over who their employer is seems to be an obvious answer. It's the person who hired them, the one who signs their paycheck.

As a former labor attorney, I can tell you it used to be very clear in legal terms how you become someone's employer. But that's no longer the case since the National Labor Relations Board stepped in.

Many people would be shocked to find out that some company they've had zero contact with is also considered their employer, in addition to the employer that actually hired them.

Now, we all agree there are times when two or more employers should be deemed "joint employers." Before the NLRB overstepped, there was a commonsense understanding of the circumstances establishing that joint employer relationship. Both employers had to have "actual, direct, and immediate" control over essential terms and conditions of employment.

This standard made sense. But today, business owners and their employees face a standard vastly different, and far more confusing. They face a situation where a group of unelected bureaucrats in Washington are interfering with their relationship in a way that has created a lot of problems.

The NLRB's decision and the Obama administration's actions that followed, in addition to a litany of rulings by activist judges, have inserted a great deal of uncertainty and confusion into the traditional employer-employee relationship. Two completely separate employers can be considered joint employers if they made a business agreement that "indirectly" or "potentially" impacts their employees.

What does that even mean? It's vague and confusing. Think of it from the employee's standpoint. There shouldn't be any room for question on who their employer is.

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I'd like to give Mr. Walberg an opportunity to provide his own opening remarks, but before I do, I will yield to Ranking Member Takano.

Mr. TAKANO. Thank you, Chairman Byrne.

We are here today to discuss H.R. 3441, the *Save Local Business Act*. But I believe this bill is more accurately described as a gift to large corporations that will further rig the economy against workers. More and more employees are working for a company whose name is not on the front of their office building. Instead of hiring employees directly, companies are renting employees from staffing agencies and then evading responsibility for upholding the rights of those workers, even though they profit from their work.

For decades, joint employment standards have ensured workers can hold employers accountable for violating wage and hour laws or refusing to collectively bargain. This bill represents a significant and dangerous break from that precedent. It denies millions of workers the right to hold their employers accountable for wage

theft and undermines their ability to have the responsible parties at the table in order to collectively bargain for better wages.

This bill amends the FLSA and the NLRA to set a very narrow standard for who can be considered a joint employer. By setting a standard that is far more restrictive than the existing economic realities test used under the FLSA, this bill would seriously undermine worker protections.

We'll hear today about a case involving workers at a Walmart warehouse that underscores the importance of the FLSA's joint employment standards. In this case Walmart contracted out the operations of the warehouse to one company, and that company, in turn, contracted out the staffing of the warehouse. The contractors violated wage and hour laws. And because of the joint employment standard under the FLSA, 1700 workers were able to bring Walmart and both contractors to the table to collect the pay that they had earned. The joint employer standard plays an important role in protecting the rights of American workers and combating the extreme and crippling inequality in our economy, which should be the central focus and top priority of this committee. Unfortunately, our focus and our priorities have been elsewhere.

Studies have shown that for every dollar invested in high-quality early learning programs, there are \$7 in economic returns. As a teacher, I know that improving early learning -- early learning provides more children the opportunity to reach their full potential and puts more communities on the path to a better future. Yet, this committee has only held four hearings or markups on early childhood education since the 112th Congress.

In comparison, as the chart shows, during that same time we have had 35 hearings and markups attacking labor unions and workers' rights to collectively bargain for better wages and working conditions.

Now, there's a fine line between streamlining the economy and targeting workers' rights, and I believe this committee has moved well past that line several hearings ago. Even when we debate federal wage and hour standards, we're debating policies that would put financial stability even further out of reach for many workers.

At no point since 2011, including in the 19 hearings and markups we've held on the subject, has this committee considered a single policy to raise workers' pay or create a fair playing field for millions of hard-working people who are struggling to make ends meet. Workers do not have the leverage in the workforce. The joint employment standard offers them the basic ability to hold both their employer and the joint employer liable for wage theft claims.

This bill would strip workers of one of the few areas of leverage they have left. Victims of our two-tiered economy need this committee to realign its priorities. As this chart shows, a recent study found that wages for the bottom half of earners were stagnant from 1980 to 2014. In this same time, income for the top 1 percent grew by 205 percent. I'm going to say that again, 205 percent.

So I challenge my colleagues, what are we going to do for the bottom half of income earners? I have great respect for small businesses, and I know the business owners here today will say that joint employer standards cause them uncertainty. And I'm not indifferent to your concerns. But I, too, am worried about uncer-

tainty. And it's the uncertainty felt by millions of American workers who do not know if they'll be able to meet their basic expenses and provide for their children. This is the type of uncertainty that no one should have to live with, and it's the uncertainty that this committee is obligated to address.

Thank you all for being here today, and I look forward to your testimony.

[The statement of Mr. Takano follows:]

Prepared Statement of Hon. Mark Takano, Ranking Member, Subcommittee on Workforce Protections

We are here today to discuss H.R. 3441, the Save Local Business Act. But I believe this bill is more accurately described as a gift to large corporations that will further rig the economy against workers.

More and more employees are working for a company whose name is not on the front of their office building. Instead of hiring employees directly, companies are renting employees from staffing agencies...and then evading responsibility for upholding the rights of those workers, even though they profit from their work.

For decades, joint employment standards have ensured workers can hold employers accountable for violating wage and hour laws or refusing to collectively bargain.

This bill represents a significant and dangerous break from that precedent.

It denies millions of workers the right to hold their employers accountable for wage theft and undermines their ability to have the responsible parties at the table in order to collectively bargain for better wages.

This bill amends the F-L-S-A and N-L-R-A to set a very narrow standard for who can be considered a joint employer. By setting a standard that is far more restrictive than the existing economic realities test used under the F-L-S-A, this bill would seriously undermine worker protections.

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And because of the joint employment standard under the FLSA, 17 hundred workers were able to bring Walmart and both contractors to the table to collect the pay they had earned.

The joint employer standard plays an important role in protecting the rights of American workers and combating the extreme and crippling inequality in our economy, which should be the central focus and top priority of this committee.

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Victims of our two-tiered economy need this Committee to realign its priorities.

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But I, too, am worried about uncertainty. It's the uncertainty felt by millions of American workers who do not know if they will be able to meet their basic expenses or provide for their children.

That is the type of uncertainty that no one should have to live with. And it's the uncertainty that this committee is obligated to address. Thank you all for being here today, and I look forward to your testimony.

Chairman BYRNE. Thank you, Mr. Takano.

I will now yield to my distinguished colleague from Michigan, Health, Employment, Labor, and Pensions Subcommittee Chairman Walberg for his brief opening remarks.

Mr. Walberg.

Chairman WALBERG. Thank you, Mr. Chairman. And good morning to everyone. I, too, would like to extend a warm welcome to our witnesses who have traveled from out of state to join us today. We appreciate you being here, and have had hearings on this issue in the past, and I am excited for this again.

I listen to my friends and colleagues on the other side talk about the things that we should be doing that weren't done when they were fully in control with the White House and both houses as well. So it is our time now to deal with things that I think make a difference in the real world of the American dream. This committee has been fighting to roll back the extreme joint employer scheme since it first took effect and for good reason. It's a threat to jobs, entrepreneurship, and local employers across the country.

We know this new joint employer standard has led to a whole host of real world consequences. Because that's exactly what we've heard from business owners and their employees in each of our districts before this committee. We've all heard the voices of local job traders who fear they could lose control of their business to larger companies. One small business owner who described himself as, and I quote, "the living definition of the American dream," warned the committee that he would -- and, again, quote, "virtually overnight become a manager of a large company."

We've also heard how this new standard has made it harder for small businesses to grow and create jobs in their communities. Kristie Arslan, the owner of a small gourmet popcorn shop, said she was considering opening five new locations through franchising but the joint employer threat made her expansion plans too risky. She decided she could only open one new store instead of five. This is just one concerning example of lost jobs and opportunity.

So many hard-working entrepreneurs who took a risk to start their own business now find themselves in the sea of uncertainty. And it's not just those in the franchising industry. Many small businesses and local vendors rely on contracts with larger companies, and they are concerned those contracts could soon be harder to come by.

According to the American Action Forum, the joint employer scheme threatens 1.7 million jobs. To protect those jobs, we have to restore a commonsense definition of what it means to be an employer.

I'd like to remind some of our critics that the *Save Local Business Act* reflects the same straightforward joint employer test that workers and job creators relied on for decades. To be someone's employer it makes perfect sense that you need to have actual, direct, and immediate control over terms and conditions of employment. This clear test does nothing to let employers off the hook for their obligations to their employees. What it does ensure -- what it does is ensure the actual employer is the one held responsible. And that's the way it should be.

It's time to settle, once and for all, what constitutes a joint employer, not through arbitrary and misguided NLRB decisions and rulings by activist judges, but through legislation. This is obviously an area of labor law that is in desperate need of clarity as recognized by at least three of our colleagues on the other side of the aisle. This isn't a Democrat verse Republican issue.

The *Save Local Business Act* is about providing certainty for job creators in each and every one of our districts. It's about keeping the American dream within reach. I look forward to today's discussion.

And, Mr. Chairman, I yield back.

[The statement of Mr. Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Health, Employment, Labor and Pensions

This committee has been fighting to roll back the extreme joint employer scheme since it first took effect, and for good reason. It's a threat to jobs, entrepreneurship, and local employers across the country.

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This is just one concerning example of lost jobs and opportunity. So many hard-working entrepreneurs, who took a risk to start their own business, now find themselves in a sea of uncertainty. And it's not just those in the franchising industry. Many small businesses and local vendors rely on contracts with larger companies, and they are concerned those contracts could soon be harder to come by.

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As recognized by at least three of our colleagues on the other side of the aisle, this isn't a Democrat versus Republican issue. The *Save Local Business Act* is about

providing certainty for job creators in each and every one of our districts. It's about keeping the American Dream within reach.

Chairman BYRNE. Thank you, Chairman Walberg.

I now yield to my distinguished colleague from New Jersey, Congressman Norcross, the ranking member *pro tempore* on the Health, Employment, Labor, and Pensions Subcommittee for his brief opening remarks.

Mr. NORCROSS. Thank you, Chairmen Byrne and Walberg for holding this meeting today. And I would like to thank my, Ranking Member Mark Takano for what you do each and every day for working families, and certainly to the witnesses who you will be bringing your experiences to this issue.

I'd like to start by offering my thoughts and prayers to the people of Texas and Florida and all those who have been impacted by the devastating storms over the last two weeks. There are 60,000 what they call storm break workers in those two states restoring power, one of the most dangerous jobs that you can imagine.

But today we're here to consider a bill that attacks workers' rights to fight for better wages and conditions. Employers have increasingly moved away from direct hiring, relying on leased employees, subcontractors, permatemps. There's approximately 3 million Americans that are now employed by temporary staffing agencies, and one-fifth of all new jobs since 2009 have been through those temp agencies.

Labor and employment laws have long held that there are multiple joint employers, when more than one entity controls the terms and conditions of employment. This bill would rig the *National Labor Relations Act* and the *Fair Labor Standards Act* to make it nearly impossible for workers to hold joint employers responsible for unfair labor practices, wage theft or others.

Research shows that the fissuring of the workforce to increase outsourcing is already contributing to wage stagnation, and this bill would make that problem even worse.

The joint employer standard that exists today started out in the common law standard as existed for hundreds of years. In America, that standard has existed through most of the 20th Century and exactly intended to do what it is doing. But when the NLRB narrowed that joint employer standard back in 1984, it made it easier for companies to evade this joint employer. So from 1935 to 1984 it was the same standard. Hundreds of decisions were made based on that. And it wasn't until 1984 that changed.

In 2015, the NLRB considered a case where workers at Browning-Ferris, BFI, Recycling Plant wanted to organize a union. These workers were hired by the staffing agency Leadpoint to sort recycling materials at the BFI facility. But BFI capped their wages and assigned their workers' shifts. BFI claimed it wasn't the employer. But here's the problem. If a worker had joined the union with Leadpoint as the only employer, then Leadpoint wouldn't be able to bargain over anything without BFI's permission. Workers wouldn't even be able to bargain for better wages because the amount Leadpoint could pay was capped by BFI. The NLRB finding: that BFI was a joint employer. And this is critical to help raise wages.

So let's look what happened at the table behind you and on the walls showing the disparity in those wages since the Leadpoint came into this equation. The wages of workers in nearly all the plants that have unions were from \$19 to \$30 an hour, plus healthcare, retirement savings. Leadpoint only made \$12.50 an hour total package. Without being able to bargain with both of their employers, Leadpoint BFI workers and hundreds of thousands like them will never see their wages rise again. And this isn't the only example. And we've seen these trends continue.

Mr. Chairman, I'd ask for unanimous consent to introduce this document which lists three primary cases that the carpenters' union has dealt with into the record.

Chairman BYRNE. Without objection, so ordered.
[The information follows:]

USDOL v. Diversified Builders, Inc. (D. Colo. 2016)

Civil Action No. 1:17-cv-00053LTB

Consent Judgment and Injunction

Diversified Builders, Inc. (DBI) is a metal stud and drywall installation contractor. On job sites in Colorado DBI used its own employees as well as workers provided by labor brokers O&J Labor, Unlimited Drywall and Prowall, LLC. DBI paid its employees time-and-a-half for overtime but the labor brokers did not. The Court found the DBI was a joint employer with the labor brokers and ordered DBI to pay over 170 workers more than \$43,000 in overtime compensation. DBI was further ordered to insert into all written agreements with subcontractors that they would comply with the FLSA, not misclassify employees as independent contractors and issue paystubs to their workers. (See attached consent judgment).

USDOL v. Force Corp. and AB Construction Group, Inc. (D. Mass. 2016)

Civil Action No. 16-cv-40103-TSH

Consent Judgment and Order

An investigation by the USDOL found that Force Corp., a residential contractor, created AB Construction to provide it with most of its labor. They further determined that Force Corp and AB were joint employers and that they had misclassified workers as independent contractors to evade overtime pay and other FLSA requirements for 478 construction workers. The Court ordered Force Corp and AB to pay employees overtime, keep wage and hour records and not evade their FLSA obligations by misclassifying employees as independent contractors. Force Corp and AB were ordered to pay \$2,359,685 in back wages and liquidated damages and \$262,900 in civil monetary penalties. (See attached consent judgment and USDOL press release).

Wiljo Interiors, Inc. (2015)

Site: Riverside Indian School, Anadarko, Oklahoma

Cherokee CRC LLC hired Wiljo Interiors to perform metal stud and drywall installation on the \$2.9 million federally funded Riverside Indian School project in Oklahoma. USDOL investigators found that Wiljo used Strong Rock Drywall LLC on the project, that they had misclassified employees as independent contractors and failed to pay workers overtime despite working 50 to 70 hours a week. Investigators further determined that Wiljo set the wages of the Strong Rock workers and that they were joint employers under the FLSA. Wiljo paid \$208,756 in overtime back pay, prevailing wages and fringe benefits to 178 construction workers. (See attached USDOL press release).

Mr. NORCROSS. Thank you.

The right to join a union and collectively bargain helps workers raise wages. I've lived this. I've fought on behalf of workers to raise wages for almost two decades. This bill enables corporations to keep wages low by subcontracting out the work. They're subcontracting their conscience to put profits over people.

This bill even goes further. It amends the FLSA, the *Fair Labor Standards Act*, to prevent workers from holding employers accountable for wage theft, overtime violations or others. It immunizes the employers from child labor violations. Under this bill, all a company has to do is outsource control of just one essential term of employment, just one essential term of employment to its subcontracting. You could be -- scheduling. This bill relieves that company from any liability of wage theft for which it would be responsible.

This is where I think the crux of what we're discussing today comes down to. This bill is pushing for a solution in search of a problem when it claims this bill would help franchisees. The current joint employer standards do not hurt, do not hurt, franchisees in any way. There are approximately 800,000 franchisees in this country. The NLRB has never found one of them was a joint employer, 800,000, and not one decision to create a joint employer. It's a remarkable fact. But it's an important fact when we're talking about what we're trying to do here today.

That's because the board carefully draws a line between what a franchisor maintains its brand, like requiring training on how to prepare hamburgers, hot dogs or whatever else that the company produces. But they also do something now, the terms and conditions, wages, benefits, and hold that subcontractor to their exact standards.

Mr. Chairman, I'm happy to work on legislation that would help small businesses and raise wages. This bill does neither. It empowers massive corporations and stagnant wages at a time when working families need relief.

I'll remind everybody it's been a decade since a vote was taken on the minimum wage. It's been eight years since they have received a raise. We should be lifting people up, not pushing wages down.

While we disagree on the merits of the bill, I want to thank the chairman for following regular order, and I want to thank each of witnesses for traveling to Washington and look forward to your testimony.

Thank you.

[The statement of Mr. Norcross follows:]

Prepared Statement of Hon. Donald Norcross, a Representative in Congress from the state of New Jersey

Thank you Chairmen Byrne and Walberg for holding this hearing today. And I would like to thank my colleague, Ranking Member Mark Takano for all you do on behalf of working families.

I would like to start by offering my thoughts and prayers to the people of Texas, Florida, and all the states impacted, particularly those who lost loved ones as well as those who remain displaced. I know I speak for my Democratic colleagues in stating that we stand ready to work with you to ensure that the affected states have the resources they need to recover and rebuild.

Today we consider a bill that attacks workers' rights to fight for better wages and conditions. Employers have increasingly moved away from direct hiring, relying on

leased employees, subcontractors, and perma-temps. Approximately 3 million Americans are now employed by temporary staffing agencies, and one fifth of all new jobs since 2009 have been through temp agencies.

Labor and employment laws have long held workers have multiple, “joint employers” when more than one entity controls the terms and conditions of employment. This bill would rig the National Labor Relations Act and the Fair Labor Standards Act to make it nearly impossible for workers to hold joint employers responsible for unfair labor practices or wage theft. Research shows that the fissuring of the workforce through increased outsourcing is already contributing to wage stagnation, and this bill would make the problem even worse.

The joint employer standard that exists today is based on a common law standard that has existed for hundreds of years. In America, the standard that existed through most of the twentieth century did exactly what it was intended to. But when the NLRB narrowed the joint employer standard under the NLRA in 1984 it made it easier for companies to evade joint employer status.

In 2015, the National Labor Relations Board considered a case where workers at the Browning Ferris (BFI) recycling plant wanted to organize a union. These workers were hired by the staffing agency Leadpoint to sort recyclable materials at BFI’s facility, but BFI capped their wages and assigned the workers’ shifts. BFI claimed it wasn’t an employer, but here’s the problem: if the workers joined a union with Leadpoint as the only employer, then Leadpoint wouldn’t be able to bargain over anything without BFI’s permission. The workers wouldn’t even be able to bargain for better wages, because the amount Leadpoint could pay was capped by BFI. The NLRB’s finding that BFI was a joint employer is critical for these workers to raise their wages.

[Referencing the chart:] Let’s look at what actually happened. This table compares what the subcontracted Leadpoint workers were making with the wages of workers at nearby plants that have unions. The union workers nearby make anywhere from \$19 to \$30 an hour, plus healthcare and retirement savings. The Leadpoint workers only make \$12.50 an hour with no wages and benefits. Without being able to bargain with both of their employers, the Leadpoint/BFI workers, and hundreds of thousands like them, will never see their wages rise. And this isn’t the only example - we have seen similar trends in the telecom and construction industries.

Mr. Chairman, I ask unanimous consent to introduce this document into the record.

The right to join a union and collectively bargain helps workers raise wages. I’ve lived this—I fought on behalf of workers to raise wages for over two decades. This bill enables corporations to keep wages low by subcontracting out their work. They are subcontracting their consciences to put profits over people.

This bill goes even further. It amends the Fair Labor Standards Act to prevent workers from holding employers accountable for wage theft or overtime violations. It even immunizes employers from child labor violations. Under this bill, all a company has to do is outsource control over just one essential term of employment to its subcontractors—say scheduling. The bill then relieves the company of any liability for any wage theft for which it may be responsible. Workers and businesses want stability and predictability. Instead we are giving them chaos.

The Majority [alternative: This bill] is pushing a solution in search of a problem when it claims that this bill would help franchises. The current joint employment standards do not hurt franchises in any way. There are around 800,000 franchisees in America and the NLRB has never found that one of them was a joint employer.¹ That’s because the Board carefully draws a line between when a franchisor maintains its brand—like requiring training on how to prepare burgers—and when a franchisor governs terms of employment, like wages. This bill would leave countless hardworking Americans without a voice in their workplace at a time when Congress should be helping to lift up workers by raising wages and improving workplace conditions.

Mr. Chairman, I’m happy to work on legislation that would help small businesses and raise wages. This bill does neither: it empowers massive corporations and stagnates wages at a time when working families need relief. We should be lifting people up, not pushing wages down.

While we disagree about the merits of this bill, I want to thank the Chairman for following regular order. I also want to thank each of the witnesses for traveling to Washington, DC, and taking the time to appear here today.

I yield back.

<https://www.cnn.com/2016/01/20/us-franchises-set-to-grow-in-2016-report.html>

Chairman BYRNE. Thank you, Mr. Norcross.

Pursuant to committee Rule 7(c), all subcommittee members will be permitted to submit written statements to be included in the permanent hearing record. Without objection, the hearing record will remain open for 14 days to allow statements, questions for the record, and other extraneous material referenced during the hearing to be submitted in the official hearing record.

Now, it's my pleasure to introduce our distinguished panel of witnesses.

Our first witness is Mr. Granger MacDonald. He is the CEO of MacDonald Companies, a group of companies specializing in developing, building, and managing multi-family neighborhoods in Texas, and is testifying on behalf of the National Association of Home Builders.

And, Mr. MacDonald, let me just say on behalf of all of us, we're all praying for the state of Texas. We appreciate you being here.

Now I recognize Representative Lewis to introduce our next witness.

Mr. LEWIS. Thank you, Mr. Chairman, for holding this hearing and for introducing this very important piece of legislation to provide clarity and relief to local businesses and job creators across this country who are threatened by this joint employer scheme.

It is my pleasure to introduce a local business owner from my state of Minnesota, Ms. Tamara Kennedy who will be testifying on behalf of the International Franchise Association. She began her career as a secretary and worked her way up to owner by working nights in the restaurants while studying accounting and managing the books for a previous owner.

Ms. Kennedy now owns and operates nine Taco John's franchises, eight of them in the Twin Cities area. She epitomizes the American dream of work, investment, and risk. But America's economy's tolerance for risk is not unlimited. You know, her favorite part of the job is getting to teach young people how to be good employees and good teammates, an important role franchises play across this nation.

Ms. Kennedy is serving her second year as a member of the International Franchise Association's convention committee and will be soon be taking a seat on the IFA board of directors. I look forward to hearing about her experiences, and I thank her for joining us today.

Chairman BYRNE. Thank you, Mr. Lewis. I will now continue with this mornings' introductions.

Mr. Michael Rubin is a partner at Altshuler Berzon LLP, in San Francisco, California. Welcome sir.

Mr. Zachary Fasman is a partner in the labor and employment law department at Proskauer Rose LLP, in New York City. Distinguished panel.

I now ask our witnesses to raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Let the record reflect the witnesses answered in the affirmative.

Before I recognize each of you to provide your testimony, let me briefly explain our lighting testimony. You will each have five min-

utes to present your testimony. When you begin, the light in front of you will turn green.

When one minute is left, the light will turn yellow. When your time has expired, the light will turn red.

At that point, I will ask to you wrap up your remarks as best as you are able.

After everyone has testified, members will each have five minutes to ask questions of the panel.

Now, I am not, like, really harsh about the lights. But sometimes people go a little bit over. We have a lot of members here that want to ask questions. And only so much time for you and for them. So if I push you a little bit, please don't take it personally. It's because we're trying to keep everything moving.

So when that light turns yellow please start getting to the point where you're winding up. Okay. Are we all clear on that? Good.

Also, before you testify, just as Mr. MacDonald is doing, press the button for your microphone or we won't hear you good Mr. MacDonald thank you look forward to your testimony.

STATEMENT OF GRANGER MACDONALD, CEO, MACDONALD COMPANIES, KERRVILLE, TEXAS, TESTIFYING ON BEHALF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

Mr. MACDONALD. Thank you, Mr. Chairman appreciate being here today.

My business, MacDonald Companies, specializes in developing affordable multi-family housing across Texas. We currently own and manage 4571 units in 41 different apartment communities in 25 cities. We directly employ 131 workers from construction supervisors, to property managers, to maintenance and repair staff, many of whom are full-time, salaried individuals.

Beyond our regular staff, MacDonald Companies contracts with 80 other companies and specialty trades to perform a range of services across all of our properties including HVAC work, piling, drywall, *et cetera*. This type of arrangement is not unique to the entire construction industry. It's made up of a system of building contractors and subcontractors who have been this together. For the most builders they don't have enough work to hire someone full time to just do tile work for example. I might only need a drywaller for a few weeks each year.

These numerous specialized task require a complete project we contract with other small companies out of necessity. This is why I'm very concerned about the ongoing ambiguity over what constitutes a joint employer. A builder can now be considered a joint employer if he has indirect or potentially ability to exercise control over the workers' subcontractors the question of what can deemed indirect control and when it legally constitutes joint employment has been left to an open ended situation by the NLRB. This threatens to upend the foundation of the entire industry.

For example, we'll schedule a painter or an electrician to come to a jobsite at a certain time. Does that trigger a finding of joint employment? Do I have indirect control if I ask a contractor to bring on extra staff to make up for delays? One might think that an indirect or potential control over just one factor like scheduling would not justify a finding of joint employment. But because of the

indirect test, it's so vague, the NLRB has not ruled on that possibility. And there is nothing stopping the courts from ruling on the basis of just one factor.

Over the last three weeks, I've been overseeing cleanup and reconstruction efforts at some of our buildings in the wake of Hurricane Harvey's historic devastation. The process of rebuilding from a natural disaster is chaotic and time lines are anything about predictable.

I have contractors and subcontractors coming in and out of our properties round the clock right now. I may ask a contractor to bring on more staff to finish up drywalling that has fallen behind so that the next stage of workers can get started or tell the cabinet installer that he can't come as planned because the replacement floor tiles have not been set because of lingering humidity because of the storm damage. Can these acts meet the test for indirect control? The expanded joint employer test provides no clarity.

My focus is on getting families back to their homes. We have endured and rebuilt from bad storms before, and we're doing it again. But this time is with the added worry of whether my company will be held liable for the practices of contractors, third-party vendors, and suppliers that we've hired to help with this important job over whom we have no direct control.

The reality is that the line that once clearly separated two employers is so blurry that neither I nor others in the industry can see where it lies. The scope of the liability will only grow for builders as courts explore and expand the limits of the new standard. Exposed to unlimited and unpredictable joint employment liability, small businesses will find it increasingly challenging to comply and, therefore, compete. This is true for residential building firms, the majority of which have less than ten employees, as well as specialty trades.

With less competition among small firms, construction costs, and subsequently home prices, will rise, particularly troubling for those of us who are in the business of providing affordable housing.

The bipartisan *Save Local Business Act* offers a commonsense solution to the ambiguity created by the Browning-Ferris decision by affirming that a company may be considered a joint employer of a worker only if it directly, actually, and immediately exercises significant control over the primary elements of employment.

This is reasonable. I should be held accountable for my employees but not for those of another company. Codifying the definition will provide the legal certainty every business owner needs. I urge the Committee to take swift action to advance the *Save Local Business Act*.

Thank you.

[The statement of Mr. MacDonald follows:]

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Testimony of
Granger MacDonald

On Behalf of the
National Association of Home Builders

Before the
United States House of Representatives
Subcommittee on Workforce Protections
and
Subcommittee on Health, Employment, Labor, and Pensions

H.R. 3441, the “*Save Local Business Act*”

September 13, 2017

Introduction

On behalf of the approximately 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today on the National Labor Relations Board's (NLRB) expanded joint employer standard.

My name is Granger MacDonald, and I am CEO of the MacDonald Companies based in Kerrville, Texas. I am a proud second-generation builder with 40 years of experience in real estate development. I run the business my parents founded in the mid-1950s to meet post-war demand for affordable housing. My son Justin serves as president of our business, continuing our family legacy.

I also serve as the 2017 Chairman of the Board of NAHB, a Washington, D.C.-based trade association focused on enhancing the climate for housing, homeownership and the residential building industry. We represent builders and developers who construct many types of housing — including single-family for-sale homes, affordable and market-rate rental apartments, and remodelers. About one-third of our members are builders and remodelers; the other two-thirds work in closely related specialties, such as sales and marketing, insurance, and financial services.

NAHB is also a member of the Coalition to Save Local Businesses, a diverse group of locally owned, independent small businesses, associations and organizations seeking fairness and clarity on the new rules of the unlimited joint employer doctrine.

My company specializes in developing, building, and managing affordable multifamily housing across Texas, and we currently own and manage 4,700 units in 41 communities in 25 cities. We directly employ 146 workers, from construction supervisors and property managers to maintenance and repair staff, many of whom are full-time salaried individuals.

The building industry is made up of a vast system of general contractors and subcontracted businesses. Beyond our regular staff, MacDonald Companies contracts with 80 companies and specialty trades to perform a range of services across all of our properties, including HVAC work, tiling, and drywalling, amongst other specialties.

The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process as well as the builder's ability to pass those corresponding savings through to homeowners.

The current definition of "joint employment" adopted by the NLRB in *Browning-Ferris* for purposes of the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) is the antithesis of "certainty and predictability," and is alarming.

The dangerously vague paradigm of "direct, indirect or potential" control established by the

NLRB calls into question the very basic idea of what it means to be a business. Employers in the residential construction sector have been forced to re-examine their entire business model since it affects their responsibilities not only at the NLRB, but with other federal agencies such as the Wage and Hour Division at the Department of Labor. Builders of all sizes are now potentially exposed to unlimited and unpredictable joint employment liability.

That is why a legislative solution to provide employers certainty and clarity in their employment obligations under the law is necessary, and why NAHB urges the Committee to favorably report out H.R. 3441 without delay.

Joint Employer is an Indefinite, Evolving Area of the Law

Under the expanded standard, MacDonald Companies could be considered a joint employer if it has “indirect or potential” ability to exercise control or co-determine the essential terms of a subcontractor’s employee’s employment, including hiring and firing, discipline, supervision, scheduling, seniority and overtime, and assigning work and determining the means and methods of performance. Simply by applying responsible, everyday business practices, we could still be held accountable for the labor and employment practices of third-party vendors, suppliers, and contractors over whom we have no direct control. Whether a builder has exercised too much influence or control over the subcontractor’s work is a moving target.

One of the most significant factors of concern for the construction industry, discussed at length in both the majority and dissenting opinions in *Browning-Ferris*, is scheduling. Timely delivery of homes is inextricably tied to our ability to promptly schedule a myriad of trades and manage issues that could lead to production delays, such as weather-related incidents or labor shortages.

Let me provide a few examples.

If MacDonald Companies contracted with a painting company for a multifamily building in San Antonio, by telling the subcontractors when to paint the walls or even when the walls would be constructed, we could be found a joint employer. To avoid a joint employer finding, would we be prevented from scheduling installation of the fire sprinklers or cabinets? Would the roof be completed in time for the codes inspector to visit? This would be akin to ordering a pizza, but allowing the delivery service to show up at the driver’s discretion.

It is also common for general contractors to request additional labor or time on the job site when severe weather delays work and jeopardizes deadlines. Would the act of requesting two additional workers to get a deck installed trigger a finding of joint employment? If the completion of a project is behind due to heavy rainfall, would I not be able to tell the contractor to double his labor and meet the construction deadline?

While *Browning-Ferris*’s new approach to joint employment under the NLRA has been described as a radical departure from existing precedent, the 4th Circuit’s decision in *Salinas v. Commercial Interiors Inc.*, (848 F.3d 125 (4th Cir. 2017)), has been described by some as far more unprecedented. In *Salinas*, the 4th Circuit discarded the settled approach of focusing on

the relationship between the worker in question and the putative joint employer, shifting the focus instead to the relationship between the alleged joint employers. These inconsistent tests contribute to the uncertainty and undermine traditionally recognized business relationships.

My project managers are responsible for overseeing the work done at MacDonald Companies worksites throughout the build process. Would they not be able to check in on a subcontractor's progress? If they find work to be deficient, would they not be able to request a contractor correct it to ensure the safety and stability of the overall project? If I know one of the trades' employees is a diligent and efficient worker, would I not be able to request the specific worker on my job site? By the 4th Circuit's interpretation, any number of these seemingly commonplace interactions in contractor-to-subcontractor relationships could be viewed as establishing joint employment between the two separate businesses.

Under such a broad joint employer standard, it could be argued that indirect or potential control over just one of the essential terms of employment would not be sufficient to justify a finding of joint employment. In reality, however, businesses can be found to be joint employers of another company's workers by merely doing or having the authority to do (even if not exercised) one of the aforementioned actions – scheduling or requesting additional labor or even a specific worker. The scope of liability will only grow as the courts explore and expand the limits of the new standard. The resulting consequence of the NLRB's decision in *Browning-Ferris* is that there is no certainty or predictability regarding the identity of the employer.

The Expanded Joint Employer Standard Hurts Housing Affordability

The determination of joint employment is particularly significant for residential construction, an industry that is large and decentralized with a workforce that is spread out nationwide. Like most of the construction sector, home building is dominated by small firms. The median gross receipts for NAHB builder members is just under \$2.5 million. Seventy-two percent of NAHB's builder members have fewer than ten employees and 66 percent construct fewer than ten homes annually.¹ For most builders, there is simply insufficient internal demand to justify hiring an employee for the numerous specialized tasks required to complete a home project. Consequently, builders rely on an average of 22 subcontracting firms to build a home, including framers, roofers, electricians and other types of specialty trades. MacDonald Companies itself relies on an average of 40 contractors on a typical build. Without them, my company and many other family-owned home building firms like it would simply cease to be viable operations.

Collectively, however, home builders represent a massive industry, employing millions of people and directly generating 3.5 percent of our nation's gross domestic product (via residential fixed investment). Housing contributes to the national economy in two basic ways: through residential fixed investment and consumption spending on housing services. Historically, residential

¹ <http://eyeonhousing.org/2017/05/who-are-nahbs-builder-members-3/>

investment has averaged roughly 5 percent of GDP, while housing services have averaged between 12 and 13 percent, for a combined 17 to 18 percent of GDP.

Residential investment includes construction of new single-family and multifamily structures, residential remodeling, production of manufactured homes, and brokers' fees. Consumption spending on housing services includes gross rents (which include utilities) paid by renters, and owners' imputed rent (an estimate of how much it would cost to rent owner-occupied units), and utility payments.

Home builders are major job creators. Currently, the industry employs 766,000 individuals in the builder category and 1.94 million as residential specialty contractors, for an industry total of 2.7 million. These workers and entrepreneurs are spread out across the nation. Over the last 12 months, 11,700 jobs have been added by home builders and remodelers. More are expected with continued gains in construction activity.

In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry should be constructing about 1.3 million new single-family homes each year and approximately 1.5 to 1.6 million total housing units. In comparison, home builders in 2017 are forecasted by NAHB to start construction on only 842,000 single family homes and 362,000 multifamily units.

According to NAHB estimates, construction of 1,000 single family homes creates 2,970 full-time equivalent (FTE) jobs. Similarly, 1,000 new multifamily units results in 1,130 FTE jobs and \$100 million in remodeling expenditures creates 890 jobs. As we return to normal levels, home builders will have millions of jobs to fill. As the recovery continues, there will be millions of more jobs in home building and related trades, but shortages for most specialty construction occupations are more widespread now than at any time since 2000, according to NAHB's most recent Housing Market Index survey.² For subcontractors, shortages of painters, framing crews and electricians are at their all-time worst.

Congress should consider policies that support a continued housing recovery, starting with undoing the harmful precedent set by the NLRB's expanded joint employer doctrine and other policies that reduce labor market flexibility. Limiting or deterring the use of independent contractors and subcontractors will reduce the number of local home building firms.

Small, Local Businesses Suffer the Most Under the Expanded Standard

Where this standard hits the hardest is on small businesses. As I previously mentioned, MacDonald Companies is a family business spanning decades and generations. We pride ourselves on the relationships we have built with our local communities and the businesses that grow in and around them. This includes longstanding relationships with many small contractors and subcontractors – trusted partners that we enlist again and again for projects across the state of Texas.

² <http://eyeonhousing.org/2017/08/share-of-builders-reporting-labor-shortages-rises-again/>

The home building industry is highly decentralized, supporting a large number of competitive firms. Each of the specialty trades we contract with has an average of 15 employees, varying from 5 to 150 employees. Besides being a sector that supports local small businesses, having a significant number of such small firms operating in the same industry promotes competition, providing a benefit for prospective home buyers. However, the ever-evolving liability that the expanded joint employer standard has created for longstanding contractor-subcontractor relationships may lead to a point where utilizing these local businesses may not be worth the risk for us. The line that once clearly separated two employers is so blurry in the post-*Browning-Ferris* legal landscape that neither I nor many others in our industry can see where it lies.

If the joint employer standard poses this much of a challenge to my company, you can imagine its impact on even smaller companies operating in the home building industry. Without the in-house human resources capabilities typical of large firms, small firms will find it increasingly challenging to compete. This will lead to a centralization of the industry, with less competition among small firms and higher home prices. Decentralization of the market is better for the housing recovery because more competition among small firms will yield more affordable housing options for consumers. As NAHB has cautioned before, if the goal of the NLRB is to put small home builders out of business, then the Pandora's Box opened by *Browning-Ferris* may very well lead to such an outcome.

Conclusion

NAHB welcomed Labor Secretary Alexander Acosta's decision earlier this year to rescind a 2016 Department of Labor administrative interpretation on joint employment that had further expanded the test for what constitutes a joint employer for purposes of agency enforcement actions. This was a necessary and important first step in undoing the damage of the runaway joint employer standard. However, so long as the NLRB's underlying decision in *Browning-Ferris* remains in place, it will continue to threaten the marketplace and housing affordability.

The bipartisan *Save Local Business Act* offers a common sense solution to the uncertainty generated since the NLRB's ruling by affirming that a company may be considered a joint employer of a worker only if it "directly, actually, and immediately" exercises significant control over the primary elements of employment. Codifying this definition would provide my company and the contractors with whom I work with more certainty for determining the identity of the employer, and allow us to operate with certainty in our labor and employment obligations under the law. We urge the Committee to act on this bill expeditiously.

Thank you again for the opportunity to testify today.

Chairman BYRNE. Thank you, Mr. MacDonald.
Ms. Kennedy, you are recognized for five minutes.

**STATEMENT OF TAMRA KENNEDY, PRESIDENT, TWIN CITY
T.J.'S, INC. ROSEVILLE, MN, TESTIFYING ON BEHALF OF THE
INTERNATIONAL FRANCHISE ASSOCIATION**

Ms. KENNEDY. Chairman Byrne, Chairman Walberg, Ranking Member Takano, Ranking Member Norcross, and distinguished members of the subcommittees, good morning. My name is Tamara Kennedy, and I'm the president of Twin Cities' Taco John's, multi-unit franchisee based in Minnesota. I'm honored here today to speak here on behalf of small businesses throughout the nation, and I thank you for your invitation.

I want to start by recognizing that all of our prayers and thoughts are with the people of Florida, Alabama, Georgia, South Carolina, Texas, Louisiana, all of whom have been affected by the hurricanes of Irma and Harvey.

Today I'm representing the Coalition to Save Local Businesses and its thousands of members who are supportive of the *Save Local Business Act*. I'm appearing before you today with over 400 franchise brand leaders coming around Capitol Hill urging their Representatives and Senators to take close look at this legislation. We consider H.R. 3441 the most important federal legislation in franchising in over a generation.

Mr. Chairman, I got my start working as a secretary for a Taco John's franchisee. It took me 17 years to realize my dream of owning my own business, and in 1999, when my employer retired, I bought the restaurants. Today my organization operates nine locations, eight in Minnesota and one in central Iowa. My business has overcome many challenges, including the recession, but we have stayed the course because I believe our company has the potential for growth, should the regulatory environment allow us the certainty and the flexibility to do so.

Countless people in the franchisee industry start out in entry-level positions like mine, as busboys, line cooks or cashiers, or as secretaries, working towards their dream of someday owning their own business and being their own boss. The franchise structure has created that path.

As a local business owner, I am very fortunate to have the privilege of providing jobs in our neighborhoods. My company's values really are about giving people a place to earning a living and learn skills at the same time. It's the greatest honor a local business can have to pay forward the opportunity to learn how to be good employees, good teammates, and eventually great leaders in their own right. I'm here today to encourage this committee and this Congress to act on the legislative solution to address the joint employer problem pending before the subcommittees.

It is important that you know how much I love my brand and that partnership that I have with Taco John's. If you've ever heard the phrase or used the phrase taco Tuesday, I'm proud to say you're using a Taco John's trademark. But now, after two years operated under the expanded joint employer standard, the impact of my business is clear.

Joint employee means I must pay more to run my business and earn less in return. Franchisors, including mine, have been compelled to consider the potential liability risk of the new joint employer standard that the National Labor Relations Board has imposed. Changing the rules' language with less clear, more widely interpreted definitions of joint employer by adding words like indirect and even reserved or unexercised control, opens up very real concerns.

Some examples: My franchisor used to provide employee management products as options for franchisees. Basic but essential tools like job descriptions, performance reviews, and employee handbooks, and recruiting tools like banners, fliers, and ad copy, used to be available. But due to expanded joint employment liability, the company no longer provides most of these tools.

Now I must hire an outside attorney to write an employee handbook. That employee handbook cost me \$9,000. Just this year we no longer have access to a branded job application form from the franchisor. I must create my own application or use an off-the-shelf, non-branded form.

The reality is that joint employer is impacting my ability to recruit employees. Quite simply, we want and need employees to consider our business when they're searching for a job. It could not be more important today to have a powerful, creative, systemwide set of employment tools. I don't blame our brand for some of these changes, because I know they're watching what's at stake for everyone.

Our brands are coming under attack for involvement in the hiring process which some believe indicates a direct relationship with my employees. Those of us running our businesses know that's simply not the case. My view and my brand's view is that my employees are my employees alone. My brand's role is to provide me with tools and never to exert control over my employees.

In its August 2015 decision to expand the joint employer, the NLRB removed the clear understanding from a business relationship and the now the industry is justifiably struggling with this new legal landscape.

Chairman Byrne, Chairman Walberg, on behalf of the Coalition to Save Local Businesses, thank you so much for introducing the *Save Local Business Act*. The expanded joint employer standard is simply not working. It's time we provide some security to local business owners. Thank you.

[The statement of Ms. Kennedy follows:]



**COALITION TO SAVE
LOCAL BUSINESSES**

TAMRA KENNEDY

PRESIDENT

**TWIN CITY T.J.'s, INC.
ROSEVILLE, MINNESOTA**

**TESTIMONY BEFORE THE SUBCOMMITTEES ON
WORKFORCE PROTECTIONS AND HEALTH, EMPLOYMENT,
LABOR, AND PENSIONS**

**HEARING ON
H.R. 3441, THE "SAVE LOCAL BUSINESS ACT"**

SEPTEMBER 13, 2017

Good morning Chairman Byrne, Chairman Walberg, Ranking Member Takano, Ranking Member Sablan, and distinguished members of the subcommittees, my name is Tamra Kennedy. I am the President of Twin City Taco John's, a multi-unit franchise business based in Minnesota. I am honored to be here today to speak on behalf of small businesses throughout the nation, and I want to thank you for your invitation. I am grateful to the Committee members for their action on the "joint employer" issue and look forward to an important discussion today on the merits of the "Save Local Business Act."

Today I am representing the Coalition to Save Local Businesses and its diverse group of thousands of locally-owned, independent small businesses, including manufacturers, retailers, restaurants, hotels, construction companies, and homebuilders like Mr. MacDonald.

Mr. Chairman, I am the 25th local business owner and 15th franchisee to testify before the U.S. Senate or House asking for clarity on joint employer liability over the past two years. Whatever the ideological goals were for the regulators who originally pushed to create a new standard two years ago, my business has become collateral damage in the confusing quagmire of unlimited joint employment liability. And so are the thousands of other small business owners who are members of our diverse coalition. I am here on their behalf to encourage this Congress to support and commit to swift passage of the Save Local Business Act.

My road to business ownership is similar to that of so many American entrepreneurs before me. I got my start as an employee of a local Taco John's franchise, working as a secretary for the franchisee. From there, I worked my way up doing administrative work, and I began exploring the operations side on my own time so I would have experience and first-hand knowledge of that part of the business. You could say that I started plotting out my strategy early on to someday become a franchise owner. All of my hard work as an employee paid off, and in 1999, when my employer retired, I bought the business.

Today, my organization operates nine locations, with eight in a seven-county area surrounding the Twin Cities and one in central Iowa. Because of strategic decisions made early on, our business has achieved tremendous success and has the potential for continued growth, should the regulatory environment allow us the certainty and flexibility to do so.

I am wholly invested in the success story that is franchising. As a Board member of the International Franchise Association, I am very involved in protecting our life's work and ensuring that this industry, that has provided so much to me, can continue to do the same for every rising entrepreneur. For example, as I am doing here this week, every September, I am honored to join other leaders in our industry here in Washington, D.C., to meet with our elected representatives and highlight for them the various issues that impact small business owners in Minnesota, Iowa and throughout the nation.

Working closely within the collective industry, I have learned that I am not alone in my success. Countless people in the franchise industry start out in administrative roles like mine – or as busboys, line cooks or cashiers – and move up to become multi-unit owners. Stories like ours are celebrated as some of the greatest American success stories there are, and the franchise structure is, in large part, responsible. It has provided each of us with so many opportunities to succeed, and I am hopeful that it will remain intact so that it can continue to afford other hard-working employees similar paths to success.

As a local business owner, I am very fortunate to have the platform to provide job opportunities for my neighbors seeking employment. My company's values really are about giving people an opportunity to earn a living, to contribute to their families, and be proud of how they are earning and learning at the same time. Our team works side-by-side to feed our neighbors – we get to know their families while they get to know our Taco John's family. Our team is fortunate to be able to contribute to our community, volunteering with the Twin Cities Women's Business Network, Muscular Dystrophy Association, Second Harvest Heartland, and Toys for Tots. We're part of that fabric that makes this country great, and it is an honor to do what we do.

I am here today to encourage this Committee and this Congress to act on the legislative solution to address the joint employer problem that is pending before the subcommittees today. It is not only the business owners and operators who are struggling with the repercussions of this puzzling new regulation, but our employees and potential employees, as well. I know because I was one of them and I can see, firsthand, how the burdensome regulations have made it harder for individuals to succeed.

After two years operating under the expanded joint employer standard, the impact on my business is clear: joint employer means I must pay more to run my business, and earn less in return, all while worrying if the unclear joint employment liability rules will continue to erode my autonomy to run my business. Let me explain.

It is relevant for me to note at the outset how much I love my brand company. I chose to own and operate Taco John's restaurants because of its products and its people, and I am pleased everyday with that decision. But franchisors and other primary contractors have been compelled to respond to the liability risk of a new joint employer standard that the National Labor Relations Board (NLRB) based on "direct," "indirect," and even "reserved and unexercised" control.

Joint employer has negatively affected my business in several ways. First, my franchisor used to provide standard employee handbooks to its franchisees. But due to expanded joint employment liability, the company no longer provides me employee handbooks – even though my brand has the expertise and best practices that would be most helpful for me and my employees. Now, I must hire an outside attorney to write an employee handbook for me. It cost my business \$9,000 to have outside counsel prepare my employee handbook. Not to mention, I need my attorneys to update my handbook each time the law changes. All told, I need to sell hundreds of extra tacos every day to cover this needless expense.

Second, I no longer receive a job application form from my franchisor. I must create my own application now, and keep it updated as events warrant. We are currently determining how much that will cost, but that's another recurring cost for which the new joint employer doctrine is responsible.

A third example is that joint employment liability means I must recruit employees on my own. For years, our brand company has produced and provided its franchise owners employee recruiting kits that included banners, brochures, fliers and even an employment application form for use in our restaurants. All of the materials were created by the brand and presented a unified, consistent quality to our potential employees. Today, because of the fear of joint employment liability, these essential recruitment tools are no longer available to

franchisees. While we are welcome to produce our own materials – both incurring the cost of design and printing – we can no longer expect this support from our brand company. It also creates another barrier to hiring great people, so unfortunately, I'm creating jobs in my community slower than I otherwise would.

Finally, and most importantly, joint employer is impacting our ability to recruit and retain quality entry-level employees. Due in part to how I grew professionally within the fast-food restaurant industry, this is the area that causes me the most distress. Any quality business owner will tell you that our businesses are only as good as our employees; quite simply, we want and need employees to consider our business when they are searching for a job. Statistics continue to show that we have fewer people joining the workforce, increased competition for those entry-level positions, and critically high marketing and advertising costs to recruit. As I mentioned earlier in my testimony, it could not be more important today to have the recruiting tools and support once provided by our brand company.

All of these costs quickly add up. I signed up to run my restaurants with the expectation that I would enjoy the myriad benefits of the franchise business format. Now I'm paying more to run by business and getting a whole lot less, because unelected regulators created a vague, harmful joint employer standard that has discouraged many primary companies and franchisors from providing resources or passing along any expertise related to employment.

I am one business owner, but these are examples of how the expanded joint employer standard has harmed the franchisee-franchisor relationship for thousands of other entrepreneurs. As a franchisee, I purchased and continue to pay for a "brand system" that agreed to provide support and used to include these important recruiting tools. Because of the expanded joint employer standard, we can no longer trust that our brand will support us as we build our local business. While we continue to pay the same franchise fees, we no longer have access to all the benefits that were once an important part of the business model. Franchisees are understandably feeling under serviced, or frankly, cheated, which can and will erode the partnership that was formed through the franchise agreement.

To reiterate, I am very happy with the Taco John's brand. While it is upsetting to have to undertake more duties like these on top of our existing responsibilities to our business and employees, I cannot blame our corporate team when I know what is at stake for everyone. Our brand company is watching other brands come under attack for "involvement in the hiring process," which critics believe indicates a "direct relationship with the employee." Those of us running our businesses know that this is simply not the case. My view and my brand's view of joint employer has always been mutually understood: my employees are my employees alone, and the role of the brand is to support my business with tools such as recruitment materials. But in its August 2015 decision to expand joint employer, the NLRB removed that clear understanding from our business relationship, and now our industry is justifiably struggling with the new legal landscape.

But my biggest fear of this issue is that I may be lose what I have worked for – my autonomy – and ultimately find myself, once again, an employee of my franchisor. If broad joint employment liability means franchisors can be potentially liable for franchise employees they do not even employ, then they may be compelled to exercise more control over their franchisees. Consequently, I may lose my freedom to make decisions for my own business, and eventually, my

entire business. While I am paying more and getting less today, I also worry for my livelihood in the future – as do thousands of other business owners.

Subcommittee members – like me, you are all small employers. You have the right to hire and fire whom you choose in your congressional offices. And none of you would want your parent company – in your case, the Federal government – telling you who to hire and fire. But unlimited joint employment liability means my right to run my own business could be taken away from me. I hope this Committee will protect my business, and the livelihoods of thousands of other local business owners.

You see, local businesses are not afraid of complying with the law. We are simply concerned about the needless costs and the threat to our livelihoods that joint employer has caused.

Mr. Chairman, when you've worked your way up from the bottom like I have, you don't like to see anyone knock you back down. It's time we clear up the confusion of joint employer for local business owners and all of those depending on us, and I am confident that the Save Local Business Act does just that. I urge you and your colleagues to support this bill.

Thank you.

Chairman BYRNE. Thank you, Ms. Kennedy.
Mr. Rubin, you're recognized for five minutes.

**STATEMENT OF MICHAEL RUBIN, PARTNER, ALTSHULER
BERZON LLP, SAN FRANCISCO, CA**

Mr. RUBIN. Thank you. Let me begin by thanking Chairmen Byrne and Walberg, and Ranking Members Norcross and Takano for this opportunity to testify about the impacts of the *Save Local Business Act*.

I've been representing low-wage workers for more than 35 years. My clients include janitors; security guards; warehouse, garment, fast food workers; and others. For these workers, and for many small businesses operating in a low-wage economy, H.R. 3441 will have disastrous consequences.

The bill purports to redefine the term joint employer under the NLRA and FLSA. But its practical effect would be to completely eliminate joint employer responsibility under those statutes. The proposed definition narrows the NLRA's common law standard and the FLSA's direct or indirect suffer or permit standard so dramatically that no company could meet the definition of joint employer once it contracts out any direct control over its workers' employment.

The bill exempts from joint employer responsibility any company that does not exercise direct and significant control over all essential terms and conditions of its workers' employment. That means once an employer has delegated any significant control over any terms and conditions of its workers' employment, it has ceased exercising direct control over those terms and conditions and is no longer a potential joint employer.

Why does that matter? In a low-wage economy, wage and hour violations, discrimination, and other unlawful conduct are rampant. All too often, though, the injured workers have no real ability to enforce their rights, even in the face of flagrant violations, especially when their direct employer is an under-capitalized labor services subcontractor.

Mr. RUBIN. In case after case, we have seen law-violating subcontractors, whether they supply garment workers in Los Angeles, janitors in Texas, or warehouse workers in California or Illinois, simply declare bankruptcy in the face of a court judgment for back-pay or other relief, while their owners or their owners' relatives or business partners later incorporate under another name to carry on the company's same business, leaving the judgments unsatisfied.

The proposed definition of joint employer would leave without remedy the workers most in need of statutory protection, the at-will, nonunion employees who are most susceptible to exploitation.

It would also leave small business owners in the difficult position of being solely responsible for labor law compliance and collective bargaining even when they lack sufficient authority and control to meet that responsibility. The problem faced by small businesses is not that a court might impose joint employer liability on the company that shares their control over the workforce.

The problem is the small businesses' economic dependence on that larger company may leave it no choice but to accept that shared control without correspondingly shared responsibility.

The proposed bill radically redefines joint employment under the FLSA and NLRA, abandoning the statutory directly or indirectly suffer-or-permit standard that has been key to effective FLSA enforcement since 1935, and rejecting the common law of agency-based NLRA standard. Under the proposed bill, it would be easier to prove a company's responsibility for wrongful acts committed by an employee against a stranger under the traditional common law master-servant standard than to prove that company's own responsibility for wage and hour violations committed against its own employees. This turns the purposes of the FLSA and the common law standard on its head.

There's no need for these changes. Any lead company that does not want to be responsible for bargaining over workplace conditions it controls can simply restructure its relationships to give its suppliers greater independence in controlling wages, hours, and working conditions.

In my law practice, I've seen the destructive impacts of the fissured economy and the critical need for meaningful labor enforcement in many industries. Let me briefly share one example as mentioned by Representative Takano.

In a case we settled a few years ago in southern California, hundreds of warehouse workers were employed in four warehouses, loading and unloading trucks for deliveries to Walmart distribution centers. Walmart owned the warehouses and their contents. It contracted with a subsidiary of Snyder Logistics to operate the warehouses, and Snyder, in turn, retained two labor services contractors to hire the workers. By contract, all responsibility for legal compliance rested with the contractors, yet Walmart and Snyder retained and exercised control over almost every aspect of those workers' employment.

We ended up settling that case for \$22.7 million. Class members got tens of thousands of dollars in recovery and significant injunctive relief that stopped those violations, that increased the wages and allowed health benefits for the first time for those workers only because the courts made preliminary findings of --

Chairman BYRNE. Mr. Rubin, you're beginning to run over. Can you wind up, please?

Mr. RUBIN. Absolutely.

The proposed bill would have required a completely different result in that case. None of those defendants would have been a joint employer under H.R. 3441. The new narrow definition would have left those workers and millions like them almost completely without recourse.

I'd be pleased to answer your questions.

[The statement of Mr. Rubin follows:]

Testimony of Michael Rubin
Partner, Altshuler Berzon LLP
San Francisco, California

Before the Subcommittee on Health, Employment, Labor and Pensions
(HELP) and the Subcommittee on Workforce Protections of
the Committee on Education and the Workforce
United States House of Representatives
Regarding
H.R. 3441, the Save Local Business Act

Wednesday, September 13, 2017

2175 Rayburn Office Building

Let me begin by thanking Chairmen Walberg and Guthrie and Ranking Members Norcross and Takano for this opportunity to testify about the Save Local Business Act (H.R. 3441) and its practical impacts in the modern workplace.

I have been a lawyer in private practice in California for more than 35 years. I frequently represent low-wage workers in wage-and-hour, discrimination, and other labor and employment cases. My clients have included warehouse workers, janitors, security guards, concession stand hawkers, and fast-food workers, among others. Based on my experience representing low-wage workers in industries where the rate of workplace violations *and* the use of staffing agencies and labor services contractors have become increasingly pervasive, I am convinced that H.R. 3441 will neither benefit local businesses nor further any of the well-established, longstanding national labor policies that Congress codified more than eight decades ago in the National Labor Relations Act of 1935 and the Fair Labor Standards Act of 1938.

The practical impact of this bill, if enacted, is easy to predict. It will eliminate joint-employer responsibility under the NLRA and FLSA altogether. The proposed definition of “joint employer” so dramatically narrows the common law standard under the NLRA and the “suffer or permit” standard under the FLSA that it will prevent any entity, other than the direct employer itself, from being a “joint employer.” As a result, H.R. 3441 would effectively overrule hundreds of court decisions, going back to well before the Supreme Court’s first major joint-employer decision 1947, which held that a slaughterhouse owner was the statutory employer of the meat deboners it hired through an independent staffing contractor. *See Rutherford v. McComb, Wage and Hour Administrator*, 331 U.S. 722 (1947).

Why Preserving Joint Employer Responsibility is Critically Important

Wage-and-hour violations, discrimination, and other unlawful conduct is rampant in the low-wage economy. Yet in my experience, shared by colleagues throughout the country, it is far easier for an attorney representing low-wage workers to prove a violation of those workers’ fundamental statutory rights than to obtain a meaningful remedy that will make those workers whole and prevent future workplace violations.

Why are low-wage workers so often unable to enforce their statutory rights? All too often, it is because the workers’ direct employer is an undercapitalized temp agency or labor services subcontractor that can be terminated on short notice, or no notice at all. With increasing frequency in many industries, the company that has the actual economic control over a worker’s wages, hours, and working conditions and for whose primary benefit the work is performed, contracts away – or tries to contract away – its legal duty to comply with state and federal employment law by hiring a subcontractor, or some other middleman, to be “responsible” for various terms and conditions of the workers’ employment.

If the subcontractors in these cases could truly exercise independent control over the workers' terms and conditions of employment, and if they were sufficiently well-funded to bear full responsibility if caught cheating their workers, the problems facing low-wage workers would not be as severe. The reality, though, is that even when labor services contractors and other middleman companies have been caught committing flagrant violations of federal workplace statutes – and statistics compiled by the Department of Labor and state labor agencies demonstrate a stunningly high frequency of those violations – they are often judgment-proof or unable to pay a significant backpay award or other money judgment. In those circumstances, the law-violating subcontractor – whether it supplies garment workers in Los Angeles, janitors in Texas, or warehouse workers in California or Illinois – can simply declare bankruptcy in the face of a judgment, and its owners (or their relatives or business partners) can then incorporate under another name to carry on the company's business, leaving the judgment unsatisfied. There is no point in seeking a court injunction or reinstatement order against that subcontractor either, because the company that contracted for its services can too easily respond by simply terminating the underlying contract, leaving the subcontractor *and* its workers without any work at all.

Much has been written about the fissuring, or fragmentation, of the modern American workplace, where different companies oversee different aspects of a company's business. While contracting-out can lead to economic savings, in practice it often results in a race to the bottom, where potential subcontractors compete for work by lowering their projected labor costs to below the statutory breaking point. Labor services contracts are almost always at will, and can be terminated by the lead company on short notice. Lead companies routinely cancel their labor services contracts at the first sign of labor organizing or legal claims filing activity. The lead

company then simply re-bids the job to the next supplier company that will reduce its projected labor costs to a low-enough level to win the bid.

How the Save Local Business Act Exacerbates these Problems and Creates New Ones

The Save Local Business Act would magnify these existing problems tremendously. Turning back the clock on 80 years of court decisions under the NLRA and FLSA, the Act would create a new and completely counter-productive definition of “joint employer” that exempts from statutory coverage any company that, despite fitting the current definition of “employer” under the NLRA and FLSA, does not exercise direct and significant control over the essential terms and conditions of its workers’ employment. In practical effect, this means there will be no more “joint employment” under the FLSA or NLRA – or arguably, under any statute that borrows its statutory definitions from the FLSA, like the Migrant and Seasonal Agricultural Worker Protection Act – because once an FLSA or NLRA employer (as defined under current law) delegates *any* significant control over *any* terms or conditions of its workers’ employment, it ceases to exercise “direct” control over those terms and conditions and is no longer a potential “joint employer” under the bill’s definition.

Since 1938, the FLSA has covered any person or entity that “suffers or permits” work to be performed under unlawful conditions – a standard that had its origins in state child labor laws that imposed liability on any entity in a position to know about, and be able to prevent, work being performed for its benefit by underage workers. See *Rutherford*, 331 U.S. at 728; *National Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-24 (1994); *People ex rel. Price v. Sheffield Farms*, 167 N.Y.S. 958, 960 (App. Div. 1917), *aff’d*, 121 N.E. 474 (N.Y. 1918). Congress adopted this “suffer or permit” definition in 1938 with the intent of making the FLSA’s definition of “employ” the “broadest definition that has ever been included in any one act.” *United States v. Rosenwasser*,

323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7,657 (1938) (remarks of Sen. Hugo Black). The bill completely abandons that longstanding definition and the decades of case law applying it to circumstances where two companies co-determine and share responsibility for their workers' terms and conditions of employment.

The bill also radically redefines the common law definition of the term "employer," which was the basis for the NLRA's current definition, by overruling the "right to control" standard that has been crucial to identifying common law "employers" for more than a century and instead requiring proof of direct, actual, immediate, and significant control over all essential terms and conditions of employment before a joint employment relationship is recognized. The common law has never required anything close to that level of direct and comprehensive control, as Supreme Court decisions and the Restatement of the Law of Agency – the uniformly accepted, objective historical statement of the common law standard – make clear. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124-32 (1944); Restatement (Second) of Agency (1958) §§2(1), 220(1), 220(2), and comment d to §220(1) ("the control or right to control needed to establish the relation of master and servant [at common law] may be very attenuated"); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–324 (1992) (citing Second Restatement); *see also* House Conf. Rep. No. 510 on H.R. 3020, at 36 (1947), reprinted in 1 Legis. History of Labor Management Relations Act, 1947, at 540 (1948) (incorporating common law agency principles); Cong. Record, Senate, at 1575-1576 (1947), reprinted in 2 Legis. History of Labor Management Relations Act, 1947, at 51 (1948) (same).

Under the proposed bill, it would be easier prove that a company is responsible for an employee's wrongful acts against a stranger under the traditional common law "master-servant"

standard, than to prove that company's responsibility for the wage-and-hour violations it commits against its own employees. This turns the purposes of the common law standard on its head.

The bill provides that "[a] person may be considered a joint employer in relation to an employee only if such person directly, actually, and not in a limited and routine manner, exercises significant control *over the essential terms and conditions* of employment (*including hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, and administering employee discipline*)."

(Emphasis added). That language excuses the lead company from joint-employer responsibility once it has delegated direct control over any of these terms and conditions to a subcontractor or other business partner, no matter how much other control, direct or indirect, it retains. Under the bill's language and logic, once a company gives up its right of direct control over any of the designated terms and conditions, it no longer bears any potential "joint employer" responsibility, even if it retains the right to control those same terms and conditions indirectly, through requirements imposed on its business partner.

The bill does not say that a joint employer is one that "exercises significant control over *one or more* essential terms and conditions of employment." It does not say that a company is a joint employer if it maintains control over "hiring, . . . discharging, . . . assigning, . . . *or* administering." Instead, the bill states that any person or entity that would otherwise be a joint employer" under the NLRA or FLSA will no longer have any statutory responsibilities unless it continues to directly and substantially control each of "the" designated "essential terms and conditions of employment" – which include each of the more than half-dozen terms and conditions listed in the bill's parenthetical, which are set forth in the conjunctive (" . . . hiring . . . discharging . . . *and* administering . . .").

Not a single court case in which the Supreme Court or other state or federal court has found a joint-employment relationship, going back to *Rutherford* in 1947, would come out the same way under this new definition. In *Rutherford* itself, the owner of the slaughterhouse that delegated the task of hiring de-boners was held to be those workers' joint employer, even though it contracted out all employee hiring. In *Browning-Ferris*, a recycling plant that contracted out assembly line work to a staffing company, but screened those workers, trained them, retained the right to reject any worker "for any or no reason," controlled the speed of the conveyer belts, set productivity standards, decided when to require overtime, and placed a cap on what the workers could be paid, was found to be a joint employer because the 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."

Countless other examples of such joint-employer relationships can be found in the case law, both vertical relationships (one company retaining another to act as an intermediary with its workers) and horizontal relationships (two companies sharing different oversight responsibilities). See, e.g., *Chao v. A-One Medical*, 346 F.3d 908, 913 (9th Cir. 2003) (joint control over patient-services employees); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007) (corporate owner's shared responsibility for hotel's day-to-day operations); *Reyes v. Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 409 (7th Cir. 2007) (food producer and insolvent labor services contractor); *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 67 (2d Cir. 2003) (garment manufacturer and contractor); *Rivcom Corp. v. ALRB*, 34 Cal.3d 743, 767-73 (1983) (growers and contractors that controlled agricultural workers' employment). In each of those cases, the court's joint-employment finding was critical to ensuring that the responsible companies would be held liable for their wrongdoing

and the injured workers made whole. Yet none of those courts could have found joint employment under the H.R. 3441 standard.¹

The composition of the American workplace has changed dramatically in the past two decades. Almost four million workers, or nearly 3% of the workforce, are currently employed through temp agencies. Those numbers are growing steadily upward, particularly in lower-paying blue-collar jobs like manufacturing and warehousing. Study after study demonstrates significantly higher levels of employment law violations, lower wages, and job insecurity in industries where this contracting out is common.

Forty years ago, when I went to law school, there would have been no question that the workers who perform conveyor belt or assembly line work in a plant, like the temp workers in the NLRB's *Browning-Ferris* case, were "employees" of the plant owner. Back then, and for decades before, it was unusual for any company even to consider contracting out the core job functions required to operate its business. But that has changed; and courts throughout the country, at every level of the state and federal judicial systems, recognize that in our modern economy, companies routinely share control over different terms and conditions of their workers' employment. The proposed bill would propel us decades backwards in time to an era of workplace relationships that no longer exist, imposing a rigid and unjust definition of "joint employer" that completely ignores how modern workplaces actually operate. The Save Local Business Act will dramatically increase

¹ *Compare Nutritionality, Inc., d/ba Freshii*, Case 13-CA-134294, Advice Memorandum (April 28, 2015), in which the Board's General Counsel and Division of Advice concluded that a franchisor was not a "joint employer" where it did not dictate any of its franchisee's personnel policies or procedures, imposed no pressure on its franchisee to comply with general personnel guidance memos, had no involvement in the franchisees' hiring, firing, or scheduling or ongoing training of the franchisee's staff, and did not interfere or give any instructions regarding the employees' organizing efforts.

the practice of abusive contracting-out, not curtail it. The consequence will be widespread violations of federal workplace laws and increased competitive pressures on law-abiding companies – including the small businesses that the bill purports to protect.

By limiting the definition of “joint employer” under the NLRA and FLSA to companies that directly exercise significant control over all terms and conditions of employment, the bill would allow companies to avoid bargaining over workplace conditions they have the authority to control and to avoid responsibility for FLSA violations they create, simply by funneling a handful of direct control responsibilities through an at-will supplier or business partner. Limiting the definition of “joint employer” in this manner would establish a legal standard that is far less protective than the common law itself, which has always focused on the “right to control” the means and method of production, not the extent to which that right is “directly” or “actually” or “significantly” exercised; and it would eviscerate the FLSA’s broad, worker-protective coverage under the longstanding “suffer or permit” standard.

The Act’s Negative Impacts on Workers and Small Businesses

The proposed narrow definition of “joint employer” would have seriously negative impacts on workers *and* on small business owners. First, 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 facing the risk of being held solely responsible for labor law compliance and collective bargaining even when they lack the authority or means to fulfill that legal responsibility.

The problem faced by small businesses is not that a court might impose joint-employer liability on their economically more powerful business partner when that partner shares control

over terms and conditions of their workers' employment. The problem is that the smaller company's economic dependence on its business partner may leave it no choice but to accept shared control without correspondingly shared responsibility.

There is also no need to change the existing legal standard. Any lead 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.

Joint employment cases do not arise often. They are more complicated and more expensive to litigate than single employer cases, and they are only brought where the middleman company cannot pay for its violations or when it lacks authority to provide adequate injunctive relief. In those circumstances, though, establishing joint-employer status is essential to furthering the goals of our nation's labor and employment laws.

Real-Life Examples Illustrate the Potential Consequences of the Bill

In my practice, I've 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; tipped employees whose immediate employer declares bankruptcy after the workers seek back pay for federal and state overtime violations; and sports arena concession workers who are told by the arena's managers what to wear, what to sell, and where and how to sell it, but are then informed that their resulting sub-minimum wage is the sole responsibility of their labor services subcontractor.

In a case we settled a few years ago in Southern California, hundreds of hard-working warehouse workers were employed in four warehouses, loading and unloading trucks for deliveries to Walmart distribution centers throughout the country. Walmart owned the warehouses and all of

their contents. It contracted with a subsidiary of Schneider Logistics, Inc. to operate the warehouses. Schneider, in turn, retained two labor services subcontractors who hired the warehouse workers. By contract, all responsibility for legal compliance rested solely with those two labor services subcontractors. Yet Walmart and Schneider had kept for themselves the contractual right to control almost every aspect of those warehouse workers' employment, directly and indirectly.

The violations we found in those warehouses were egregious. 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 the warehouse workers had demonstrated a likelihood of success in proving that Walmart and Schneider, as well as 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 the two up-the-ladder companies. 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 other courts have done in other joint-employer cases under the NLRA and FLSA, were the workers able to obtain compensation for past violations, to obtain higher wages and significant benefits, and to have deterred future violations.

The proposed bill would have required a completely different result, at least with respect to the workers' FLSA claims. On the facts of that case, none of the defendants would be a "joint employer" under H.R. 3441. The new, narrow definition would leave those workers – and millions

like them – remediless. They could not even demonstrate the enormity of the workplace violations committed against them, because they would be unable to overcome the threshold burden of proving that *any* of the responsible actors were their “joint employers” within the meaning of H.R. 3441.

Congress got it right 80 years ago when it enacted the FLSA and NLRA. The statutory definitions of “employer” under those statutes have withstood the test of time. Those definitions ain’t broke. But even if they were, the language of H.R. 3441 is not the way to fix them.

Chairman BYRNE. Thank you, Mr. Rubin.
Mr. Fasman, you're recognized for five minutes.

**STATEMENT OF ZACHARY D. FASMAN, PARTNER, PROSKAUER
ROSE LLP, NEW YORK, NY**

Mr. FASMAN. Chairman Byrne, Chairman Walberg, Ranking Member Takano, Ranking Member Norcross, and members of the committee, thank you for inviting me to testify today. I'd like to address my remarks to the legal issues that are before this committee.

As this committee knows, beginning in 1984, the National Labor Relations Board and the courts instituted a standard in which the courts determined whether two separate entities were joint employers by applying exactly the standard set forth in this bill. The accepted test was, and should be, whether the alleged joint employers' control over employment issues was direct and immediate. The NLRB and the courts properly distinguished direct and immediate control from situations where the alleged joint employers' supervision was limited and routine.

And I want to emphasize for the committee this is not a new standard. This is the traditional standard that was followed by the NLRB and the courts in hundreds of cases for more than 30 years. This bill will simply restore the law to where it was before the NLRB's decision in *Browning-Ferris*. Now, why is this important? The key for me is that the traditional standard is based upon facts, the actual conduct of the parties, as opposed to hypothetical, after-the-fact legal conclusions about indirect or potential but unused authority. The traditional standard affords stability and predictability by asking a factual question: Who actually makes employment decisions?

I want to emphasize that this standard does not prevent collective bargaining. It allows collective bargaining between unions and the employer that actually hires, fires, disciplines, supervises, and directs the employees. In *Browning-Ferris*, the NLRB abandoned the facts and actual conduct and created a new test based upon whether the alleged joint employer has the potential to control aspects of the workplace either directly or indirectly, whatever that means, even though it's never exercised that authority.

In other words, the *Browning-Ferris* test is not based upon the parties' actual conduct but turns on after-the-fact legal conclusions about who has what potential authority. That test is not based upon the common law. Indeed, in my view, it is no test at all.

As the dissent in *Browning-Ferris* observed, virtually every business that subcontracts part of its operations falls into this category. Contracting parties will always have the potential economic control over the relationship, even though they've never exercised it. And that's the key problem with *Browning-Ferris*. It makes virtually every business that subcontracts any of its operations into a joint employer.

This standards negates freedom of contract and allows imposition of joint employer liability after the fact through administrative determinations about the level of potential or indirect control retained but never exercised by the joint employer. It destroys any

level of predictability on thousands of vital commercial relationships.

For me, as someone who's negotiated many contracts, the justification of this standard, because it is allegedly necessary for meaningful collective bargaining, makes no sense. In fact, to me, it's just the opposite. Adding in an employer that has potentially conflicting interests that is a third employer or second employer into the bargaining sessions will make it much more difficult to reach agreements, not easier. And I can tell you from experience it's difficult to reach agreements between one union and one employer, let alone multiple employers who have conflicting interests.

Applying such a broad definition of joint employer also undermines the *Taft-Hartley Act* where Congress confined labor disputes to a dispute between the primary employer and outlawed secondary boycotts, outlawed secondary picketing and involvement of a broader series of employers. A joint employer could easily be -- under this standard, under the Browning-Ferris standard, might easily be considered sufficiently related to the primary employer to allow picketing at the joint employer's facilities. And that's contrary to Taft-Hartley.

A slightly different question is raised under the *Fair Labor Standards Act* which does have different definitions. But under that act there's a crying need for a definition of joint employer. As I've said in my written comments, there were 9,000 *Fair Labor Standards Act* lawsuits filed in 2016 alone. That's not 9,000 total in the courts. That's 9,000 new lawsuits. And there has never been a clear definition of joint employment under that act.

There is a crying need for a clear definition. And my colleague on the panel has cited a case called *Salinas v. Commercial Interiors* where the Fourth Circuit, in 2017, goes through all the different standards, itemizes them, comes up with a clearly unworkable new test. That goes on all the time. And it's time for Congress to --

Chairman BYRNE. Mr. Fasman, you're going to have to wind up too.

Mr. FASMAN. Let's get a definition that works. And, in my view, this one would work under that act.

[The statement of Mr. Fasman follows:]

TESTIMONY OF ZACHARY D. FASMAN
BEFORE THE HOUSE EDUCATION AND LABOR COMMITTEE
SUBCOMMITTEES ON WORKFORCE PROTECTION AND
HEALTH, EMPLOYMENT, LABOR AND PENSIONS

September 13, 2017

**Chairwoman Foxx, Ranking Member Scott, Subcommittee Chairman Byrne,
Ranking Member Takano, Subcommittee Chairman Walberg, Ranking Member Sablan
and Distinguished Members of the Committee and Subcommittees:**

My name is Zachary D. Fasman and I am a partner in the law firm of Proskauer Rose, LLP, practicing in the Firm's New York office. I graduated with honors from the University of Michigan Law School in 1972 and have been practicing labor and employment law for the past 45 years, during which time I have had extensive experience under the National Labor Relations Act, the Fair Labor Standards Act and other federal labor laws. I also have had extensive experience with the collective bargaining process, having negotiated hundreds of bargaining agreements during my career. I am a member of the Advisory Board of the Center for Labor and Employment Law at NYU Law School, a member of the Labor Relations Committee of the U.S. Chamber of Commerce, a Fellow of the College of Labor and Employment Lawyers, and have held various leadership positions in the Labor Law Section of the American Bar Association.

I have written several books and numerous articles on labor and employment law during my career. I delivered a lengthy paper entitled "Joint Employers under Employment Law" at the 68th Annual NYU Labor Conference in 2015. I submitted an amicus brief to the NLRB in the Browning-Ferris case, urging the NLRB not to alter its joint employment test, on behalf of the Coalition for a Democratic Workplace and 15 national trade organizations. And I have been

counsel to CNN America in one of the most significant recent joint employer cases under the National Labor Relations Act, *CNN America, Inc.*, 361 NLRB No. 47 (2014), a case that consumed 82 trial days which until the recent McDonald's litigation was the second-longest hearing in the NLRB's history. I am pleased to advise the Committee that on August 4, the District of Columbia Circuit Court of Appeals held that the NLRB had erred in departing from the "direct and immediate" control test to find that my client and a contractor who performed services for it were joint employers under the NLRA.

I am appearing here as an individual, and the views I express are my own and not the views of any clients I represent or organizations on which I serve.

LEGAL ISSUES

I strongly support H.R. 3441, which would restore the traditional "direct and immediate control" test for joint employment under the NLRA and the FLSA, overturn the NLRB's ill-advised 2015 ruling in *Browning-Ferris, Inc.*, 362 NLRB No. 185 (2015), and codify this important standard to prevent future NLRB panels from embarking on this unwise course. In my view as a practicing labor lawyer, *Browning-Ferris* is nothing short of a disaster. My co-panelists and many others have addressed the economic impact of that ruling upon business, which is highly significant.¹ I would like to concentrate on some of the troubling legal questions that the ruling raises.

1. The Dangers of a Hypothetical Test. I am sure the Committee members know the history of the joint employer controversy, but let me restate briefly what is in my opinion the critical legal issue.

¹ See, e.g., Testimony of G. Roger King before the House Education and Workforce Committee, July 12, 2017.

Beginning in 1984 and continuing until the NLRB's 2015 *Browning-Ferris* decision, the NLRB and the courts determined whether two separate entities were joint employers by assessing whether each exerted such direct and significant control over the same employees that they "share or codetermine those matters governing the essential terms and conditions of employment. . . ." ² The Board applied this analysis by evaluating whether a putative joint employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction" and whether that entity's control over such matters was direct and immediate. ³ And it deliberately – and wisely – distinguished direct and immediate control from situations where the alleged joint employer's supervision was limited and routine. ⁴

This standard, which was based upon the **actual conduct** of the parties as opposed to hypothetical after the fact legal conclusions about retained but unexercised authority, afforded stability and predictability in business relationships while allowing collective bargaining between unions and the "direct" employer that actually set the terms and conditions of employment. For more than 30 years, the NLRB and the courts applied this standard by determining the **actual relationship** between the two businesses in question; who hired, fired, disciplined, supervised or directed the employees. See generally *AT&T v NLRB*, 67 F.3d 446 (2d Cir. 1995) (joint employer finding cannot be based upon only one indicia of control; putative joint employer must be involved in hiring, firing and discipline of employees); *NLRB v Clinton's Ditch Coop. Co.*,

² *TLI Inc.*, 271 NLRB 798 (1984), enforced without op. sub nom., *Gen. Teamsters Local Union No. 326 v. NLRB*, 772 F.2d 894 (3d Cir. 1985); *Laerco Transp. & Warehouse*, 269 NLRB 324 (1984).

³ *Airborne Freight Co.*, 338 NLRB 597 (2002); see *TLI Inc.*, 271 NLRB at 798 (citing *Laerco Transp.*, 269 NLRB 324 (1984)).

⁴ See, e.g., *SEIU Local 32BJ v. NLRB*, 647 F.3d 435, 443 (2d Cir. 2011) (finding supervision that is "limited and routine" in nature does not support a joint employer finding, and that supervision is generally considered "limited and routine" where a "supervisor's instructions consist primarily of telling employees what work to perform, or where and when to perform the work, but not how to perform the work.") (citation omitted); *A.M. Property Holding Corp.*, 350 NLRB 998, 1001(2007); *G.Wes Ltd. Co.*, 309 NLRB 225, 226 (1992).

778 F. 2d 132 (2d Cir. 1985) (limited supervision of employees not sufficient for joint employer finding).

In *Browning-Ferris*, however, the NLRB decided to abandon **actual conduct** and base its future decisions not on what actually happened in the workplace but on hypothetical concepts; whether the alleged joint employer had the “potential” to control aspects of the workplace, either “directly or indirectly”, even though it never had exercised that authority. According to the Board’s three member majority, joint employer status now will be found where one entity either (1) actually directly controls another employer’s employees’ terms and conditions of employment; (2) where that entity has “indirect” control of terms and conditions of employment, whatever that might mean; or (3) where the alleged joint employer simply has the “potential” right to exert such control. As the *Browning-Ferris* dissent pointed out, virtually every business that subcontracts part of its operation falls into this category, as contracting parties will always will have some form of economic control over the relationship, even if they have never exercised it. As the dissent stated: “anyone contracting for services, master or not, inevitably will exert or and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain.” 362 NLRB No. 186 (2015) slip op. at 29 (and cases there cited).

That is the key problem of the *Browning-Ferris* decision; it sweeps virtually every contracting relationship within its boundaries. In practice, it is no standard at all. As the *Browning-Ferris* dissent stated, “[n]o bargaining table is big enough to seat all of the entities that will be potential joint employers under the majority’s new standards.” 362 NLRB No. 186 (2015), slip op. at 21. A business that merely contracts for a specific number of personnel at designated times – clearly controlling only the result of the relationship, and not the terms of

employment for the employees – is liable to be considered a joint employer under *Browning-Ferris*.

The dissenters in *Browning-Ferris* claimed that the new standard promotes “no certainty or predictability regarding the identity of the employer.” 362 NLRB No. 186 (2015), slip op. at 22. I disagree; in fact, it does just the opposite. It assures every contracting business throughout the entire United States that it is likely to be considered a joint employer with every one of its subcontractors, because – and here I agree with the dissent – “anyone contracting for services, master or not, inevitably will exert or and/or reserve some measure of indirect control by defining the parameters of the result desired to ensure he or she gets the benefit of his or her bargain.” 362 NLRB No. 186 (2015) slip op. at 29. A prudent business seeking to comply with the law will have to assume that the NLRB or a reviewing court, applying this standard, will find it liable to the subcontractor’s employees under the NLRA or the FLSA, even if it retains no control over them. This will ensure an unprecedented level of business disruption, and cannot be what Congress ever intended.

To make this clear, recall that the Board majority in *Browning-Ferris* emphasized that “the total factual context” must be “assessed in light of the pertinent common law principles” and that the Board would consider the various ways in which joint employers may “share” or “codetermine” terms and conditions of employment, including specifying the number of workers to be supplied; the times the workers will be expected to work; and the assignment of work and the method of performance. The majority referenced a number of factors as evidence of indirect control that might arise in any given case, including:

- owning and controlling the place of work;

- “dictating the essential nature of the job, and impos[ing] the broad, operational contours of the work,” including the number of workers to be provided, defining the work and how quickly the work should be completed⁵;
- setting the hours when the work will have to be performed, seniority and overtime;
- prescribing minimum qualifications necessary for completion of the work, including requiring the contractor to ensure that the personnel have the appropriate qualifications including certification and training;
- reserving the right to reject an individual;
- inspecting the contractor’s employees’ work;
- providing work directions to the contractor that the contractor’s supervisors use in their directives to the contractor’s employees;
- agreeing to a price for the services in the form of a cost-plus formula.⁶

How these factors will be applied in any given case remains to be seen, but it certainly requires no stretch of the imagination to foresee that an NLRB comprised of members with the views of the *Browning-Ferris* majority would conclude that every contractor with a cost-plus contract retains “potential” control sufficient to make it a joint employer.

The problem with this formulation – or indeed any formulation that is not based upon the parties’ **actual conduct** – is that it negates freedom of contract and allows imposition of joint employer liability **after the fact**, based upon administrative decisions about the level of “potential” or “indirect” control retained but unused by the alleged joint employer. To illustrate the reach of this concept, consider a business that contracts with a security company, a common practice given the level of training and licensing requirements for security guards who may carry weapons. The two contracting businesses agree that the security company will hire, fire, pay, discipline and supervise its own employees, and in fact that is how the relationship is conducted. The contracting company in fact makes no decisions about the employment of the security guards, but does specify in the contract how many guards it needs and the locations and hours when it needs them. Under an **actual control** standard, the security company properly is

⁵ 362 NLRB No. 185 (2015) at 14.

⁶ See 362 NLRB No. 185 (2015) at 14-15; at 36 (dissenting opinion).

considered the employer of the guards, and the contracting company is not a joint employer. Yet under the NLRB's "indirect" and "potential" control standard, as explained in *Browning-Ferris*, the contracting company might well be considered a joint employer with the security company because it specifies how many guards it needs and the hours when they are needed. It then could be required to bargain with the union representing the security guards, solely because it has specified how many guards it needs and when it needs them. If the standard is applied by the courts under the FLSA, it would render the contracting company liable for wage-hour violations in which it had no hand and over which it exerted no control.

Basing a decision on "indirect" or "potential" control, as opposed to how the parties **actually conduct** business in the workplace, thus would allow administrative agencies or courts to ignore the parties' actual practices and impose unanticipated retroactive liability on businesses that require stability and predictability in their contractual relationships. Companies that in fact have little or no say in how workers are paid or treated should not be held liable for workplace practices that are expressly contracted away to another party, and over which they have retained no control. This is not only improper, but has a number of serious consequences in the bargaining context.

2. Collective bargaining will become confused and unpredictable. Ironically, the justification for the revised standard is to allow employees and their union representatives to bargain with companies that exercise "control" over some aspect of the workplace. Yet the *Browning-Ferris* majority stated that "[a]s a rule, a joint employer will be required to bargain only with respect to such terms and conditions which it possesses the authority to control" and that duty will not extend to terms that are limited in scope so as to negate "meaningful collective

bargaining.”⁷ Does this mean that an alleged joint employer may refuse to bargain about some subset of the many mandatory subjects of bargaining that employers confront at the bargaining table? It is by no means fanciful to imagine a bargaining session in which the “joint employers” disagree about who has the responsibility for a given practice, with their disagreement making it impossible to reach agreement on a given issue. The presence of multiple parties with conflicting interests at the bargaining table – where a joint employer must bargain about the terms and conditions which it “directly, indirectly or potentially” controls – is certain to complicate bargaining almost beyond recognition. It is difficult enough to bargain a detailed labor contract between one employer and a union on subjects ranging from wages, seniority, leaves of absence, health care and the like. Injecting another partially-related business into the mix, and fomenting legal arguments about which business is responsible for what aspects of the employment relationship, is certainly not a recipe for prompt and efficient resolution of bargaining agreements. Complicating the bargaining process in this way makes little sense under a statute which is designed to foster the practice of collective bargaining.

None of this is justified by trying to ensure that all parties that can influence the terms and conditions of employment must be required to participate in bargaining. Collective bargaining always takes place against an economic background. Terms and conditions of employment may be set by local or federal law or by provisions of a procurement contract. In the defense industry, for example, wages of contractor personnel are directly impacted – if not established – by defense procurement contracts. Yet we do not require the Department of Defense to sit at the bargaining table of first tier government contractors like Boeing or

⁷ 362 NLRB No. 185 (2015) slip op. at 16.

Northrop, even though the terms of the defense contract are a major determinant of wages. In like fashion, state and municipal governments are not required for effective bargaining between a state or local contractor and its personnel, even though state or municipal contracts may directly limit the amount of money that a contractor can pay to its unionized workers.

Problems arising from subcontracting and the “contingent workforce” are not solved by adding multiple employers with conflicting interests at the bargaining table, particularly where this addition raises possible internecine conflicts and numerous practical questions about the scope of bargaining that will take years to elucidate. The party with “direct and immediate” control over the terms and conditions of employment – and not companies that have tangential, indirect or “potential” control over some issues that may affect employees – is the employer and only it should be required to bargain.⁸

3. Workplace disputes will spread across businesses without practical limitations. In the 1947 Taft-Hartley Act, Congress sought to confine labor disputes to the “primary” employer of the employees in question, and outlawed strikes and picketing against related businesses, deemed “secondary” employers. It is not clear at this point that a joint employer finding under the *Browning-Ferris* standards will necessarily allow picketing that otherwise would violate the law’s ban on secondary boycotts. But certainly this is a possibility, and if a joint employer was found to be sufficiently related to the “primary”, picketing could take at the joint employer’s facilities. Picketing that otherwise would be unlawful secondary activity could be used to place pressure on the joint employer in connection with the labor dispute with the primary employer,

⁸ See also *Browning-Ferris*, 362 NLRB No. 186 (2015) at 37-43 (expanding upon how the new test will disrupt bargaining relationships under the NLRA.) Although the *Browning-Ferris* ruling does not by its own terms apply to franchisors and franchisees, for large franchisors with thousands of separate franchise establishments, the Board’s expansive standard potentially could require having to manage labor practices and engage in collective bargaining in thousands of separate units across the country. The NLRB’s prosecution of McDonald’s based upon such a theory illustrates the potential reach as well as the adverse consequences of applying such a standard.

including by persuading employees of the joint employer to join striking primary employees. The dispute also could extend to workers of other firms who could refuse to enter the premises and perhaps to customers to refrain from doing business with the primary employer. Expanding joint employer status, to the extent it could authorize such secondary activity, is plainly inconsistent with the intent of Congress under the NLRA.

4. Imposing liability upon “joint employers” under the Fair Labor Standards Act based upon “indirect” or “potential” control does not serve the goals of the statute. I am sure the Committee is well aware that the profusion of FLSA lawsuits has reached epic proportions. During the 12-month period ending on March 31, 2016, plaintiffs filed 9,063 FLSA cases in federal district courts, compared with 4,699 trademark suits, 1,070 anti-trust cases, and 1,053 securities cases.⁹ At the same time, while there have been numerous decisions on joint employer status under the FLSA, there is no commonly accepted test for joint employer liability under the statute. Some courts rely upon a four factor “economic reality” test; others add as many as six or eight factors to that test, others consider whether the putative joint employer can discipline or discharge an employee, while new and novel – and different – tests continue to arise in federal courts across the country. Employers with multi-state operations have no idea what standards will apply to their operations, or when they may be held responsible – after the fact, if the NLRB’s *Browning-Ferris* standards are applied – for another employer’s wage and payroll practices.

There is no justification for such confusion. Indeed, just the opposite is true; as the Supreme Court has aptly observed, “[p]redictability is valuable to corporations making business and investment decisions.” *Hertz Corp. v Friend*, 557 U.S. 77, 94 (2010) (citing *First Nat. City*

⁹ Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017).

Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) (recognizing the “need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation”)). Congress can and should resolve this quagmire by enacting H.R. 3441, and establishing once and for all that a joint employer relationship will be found under the FLSA only where the putative joint employer in fact “directly and immediately” controls the essential terms and conditions of employment in the workplace. An evidentiary test based upon facts and the parties’ actual practices is the only way to ensure consistent application of the statute throughout the United States.

* * * *

In my judgment, H.R. 3441 solves these problems by defining the term “joint employer” under the NLRA and the FLSA based upon the standards applied by the NLRB for 30 years prior to *Browning-Ferris*. The bill would properly limit joint employment to situations where the putative joint employer “actually” exercises “significant direct and immediate control” over the “essential terms and conditions of employment”, which the bill defines to include hiring, firing, discipline, setting rates of pay and benefits, day to day supervision, assigning individual work schedules, positions and tasks. These are the very tasks that courts of appeals have identified as the essential terms and conditions of employment. Significantly, this bill would not deny any employee the right to join and form a union or to bargain with his or her employer. It would merely establish that the proper employer for bargaining is the employer that actually sets the terms and conditions of employment in the workplace, and not some affiliated entity which has a commercial relationship with the employer.

H.R. 3441 reestablishes a reality-based test based upon actual and provable conduct, and does not base joint employer liability on hypothetical constructs such as potential but

unexercised reserved control. It sets forth a clear and well-accepted standard that can readily be employed by the NLRB, the Department of Labor and the courts to identify when joint employer liability should be imposed. It also codifies these standards so that the NLRB – which has a history of reversing itself on significant questions like this when the political winds and the Board’s membership changes – cannot undertake the *Browning-Ferris* experiment again in the future.

This is appropriate and necessary legislation. I would urge the Committee to report favorably on this bill and recommend its passage to the House of Representatives.

Chairman BYRNE. Thank you, Mr. Fasman. I'm a lawyer. We just can't help ourselves. We can't stick to the timeframe. I understand it. But I do appreciate all your testimony. That was excellent for all of us.

Now we get to the time period where it's question-and-answer time from the members of the committee. Let me remind the members of the subcommittees and the witnesses, each member gets five minutes. So however many people he asks, it's just five minutes for that one member. And we're going to try to stick to that as close as we can, because we have a lot of members here today.

We'll start off our questioning from the distinguished chairwoman of the committee, Dr. Foxx from the great state of North Carolina.

Dr. Foxx, five minutes.

Mrs. Foxx. Thank you, very much, Mr. Chairman. I want to thank all of our members for being here and certainly thank our panelists for being here today. Their testimony has been great.

Mr. Fasman, I want to start with you, because I think you gave such a wonderful statement at the beginning about the traditional standard being based on facts. You know, I think that's so important that we continue to talk about that, and that the Browning-Ferris decision based on potential authority and on intent, not action. I think too many times in our culture these days there is this decision to judge people on intent and not action. And I thank you so much for making this so succinct.

It's been suggested that the BFI standard is not as broad as some claim and that business owners should not worry about it. Do you agree?

Mr. FASMAN. Chairwoman Foxx, thank you for your comments. I don't agree. I think that the potential in this standard, to use the standard's own terms, is amazingly broad. The potential to control a relationship, I think basing a decision upon that, sweeps everything into the standard. So I would not agree with that.

Mrs. FOXX. So your concern is that the potential application of this expanded standard is far reaching. Is there anything in BFI that serves to limit its application so business owners we have here today should not be concerned? And, on the other hand, would the joint employer standard in *Save Local Business Act* be limited in such a way as to assuage business owners' concerns?

Mr. FASMAN. Well, I think there is nothing in BFI that suggests a limitation. And that, indeed, is the problem, as the dissent observed in BFI. And the standard in this bill restores the law to what it was and the law that we've lived under for 30-plus years. So I think that people should take some comfort in that. There are many, many decisions applying the standard that's in this bill.

Mrs. FOXX. Thank you very much.

Mr. MacDonald, my husband and I were in the construction business for many years several times in our lives. And we did a lot of subcontracting with people. So I understand a little bit about your business.

Does your company have any way to control all the actions of your vendors or subcontractors that you could be held liable for under expanding joint employer definitions?

Mr. MACDONALD. Well, thank you very much. And I'm glad that you got out of the business and found good work. It was a good move.

You know, under Browning-Ferris, it's so overly broad, and it doesn't provide employers with clarity so we know where we're headed. We all agree that there needs to be some common sense guidelines. And that's what we're not seeing currently. Essentially, we're working under a scenario where you'll know it when you see it if it's bad. I mean, which doesn't give anyone any certainty as to what's going forward or where we're headed with all this.

And we don't have the opportunity to direct every single task with our subcontractors. We don't set the price. We don't do anything like that. And we certainly don't do any more than just scheduling our folks when we need a task done, which is -- you know, this morning at breakfast I got a menu. I selected something. The gentleman brought it to me. I asked him to hurry. You know, was I scheduling him? He didn't bring me what he wanted to bring me for breakfast. You know, it seems facetious, but it's really the same thing.

Mrs. FOXX. Right.

Well, Ms. Kennedy, I would like to know if you would have been able to have gained the same level of experience as an employer without the franchise help? And would you have been as eager to have become a franchise owner yourself if you knew the franchiser would have had such a level of control over your business?

Ms. KENNEDY. Thank you. No. There's no way that I could have gained that experience without following the path that I did through the course of franchising. It is one of the true quintessential American products, franchising is. It gives us the opportunity to learn all of the many important parts of running a business but gives us the security of knowing that we're working with a proven process. So it limits the risk that we take when we go into business for yourself.

It's important to remember that same path that I followed, I hope more people can. And that's what we're risking here if we don't get this fixed.

Mrs. FOXX. Thank you, Mr. Chairman.

Thank you, lady and gentlemen.

Chairman BYRNE. Thank you, Madam Chairwoman. The chair now recognizes the ranking member of the full committee, the gentleman from Virginia, Mr. Scott, for five minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Rubin, you have a copy of the bill in front of you?

Mr. RUBIN. Yes.

Mr. SCOTT. On page 2, line 8, it says a person may be considered a joint employer "only if such person directly," then goes down to exercises essential control over the central terms of employment, including hiring/firing, determining rates of pay and benefits, day-to-day supervision, assigning work schedules, positions and tasks and administering discipline. To be called a joint employer, you would have to do all of those.

Mr. RUBIN. Under the language of the bill, you have to do all of those, which is why --

Mr. SCOTT. So if you do everything, if you hire, fire, determine rates of pay, but you don't assign individual work schedules, you would not be a joint employer under this definition. Is that right?

Mr. RUBIN. That is right.

Mr. SCOTT. Now, exactly how would your right to negotiate wages as a union work if the person who hires, fires, and determines rates of pay and benefits is not at the table?

Mr. RUBIN. You can't. And contrary to Mr. Fasman's testimony, and as the Board made clear in Browning-Ferris, and later in Miller and Anderson, it's only if the companies that can actually control the essential terms and conditions are at the table that you can have meaningful bargaining.

Mr. SCOTT. Now, in Ms. Kennedy's testimony, she said that the franchisor used to have employee handbooks, a job application form, and helping recruiting employees. Would anybody doing that ever be considered a joint employer?

Mr. RUBIN. Well, in the Freshii case, the advice memorandum by the Boards' general counsel made clear that a franchisor would not be liable for making available handbooks and other materials as long as they're optional. The circumstances that Ms. Kennedy described would not, under the Board's current view, trigger joint employer liability, which is why, of the 800,000 franchisees, none have ever been found in a joint employer relationship.

Mr. SCOTT. Ms. Kennedy, in light of the fact that of 800,000 franchisees, none of the franchisors have ever been held joint employment. And I'm trying to find out what the problem is that you are articulating. Did lawyers help prepare your testimony and interpret the laws, give you advice on that?

Ms. KENNEDY. No.

Mr. SCOTT. Who prepared your testimony?

Ms. KENNEDY. I did.

Mr. SCOTT. Now, why did you think that -- where did you get the idea that a franchisor might become a joint employer?

Ms. KENNEDY. We are taking a look at all of the many written articles that are out there in not only the franchise space but in all the business magazines, and trying to understand how our relationship is changing right now with our franchisor, and trying to determine where we're going to head as a partnership.

Mr. SCOTT. But are lawyers helping you get through that?

Ms. KENNEDY. No.

Mr. SCOTT. Okay. Well, I think that most of the lawyers are suggesting, as Mr. Rubin said, that there's 800,000 franchisees, and not a single franchisor has ever been declared a joint employer. And so we're trying to find out what the fear is. If they are joint employers, they will be responsible for what they did. If they are controlling the wages, then they would have to be subject to the NLRB.

Mr. Rubin, if there is an OSHA violation created by the franchisor, would the franchisor be a joint employer under present law or under the bill?

Mr. RUBIN. Under the present law governing OSHA, yes. Under the bill, absolutely not. Because under the bill there is no joint employer anymore.

Mr. SCOTT. And if there is a wage -- if there's a failure to pay overtime directed by the franchisor, under present law would they be a joint employer for that purpose?

Mr. RUBIN. Yes. And there are many examples of that. But under the current bill, they would not be a joint employer because there are no more joint employers who control every single term and condition directly and actually.

Mr. SCOTT. And how does the bill return us to the traditional definition of employer?

Mr. RUBIN. It doesn't at all. The traditional definition of employer, under the FLSA, is directly or indirectly suffers or permit. It's a completely different standard, the most worker-protective standard ever enacted by this Congress.

And under the *National Labor Relations Act*, the Supreme Court said you return to the common law standard. So if you actually read the Browning-Ferris opinion, you see them extensively quote from the Restatement of Agency, 1933, 1958, which states the legal standard, which the Board adhered to.

And the test in Browning-Ferris, despite what I'm hearing about perspective, and indirect, is very clearly stated in the context of collective bargaining. If they are -- they have to be employers within the meaning of the common law, which includes direct and indirect and if they share or codetermine those matters governing the essential terms and conditions of employment.

That is the standard that has always been applied. That goes back to the beginning of the *National Labor Relations Act*. That is the standard that should continue. And, of course, these are fact-based inquiries.

Chairman BYRNE. Mr. Rubin, we're going to have to wind up.

Mr. RUBIN. I'll end it there.

Chairman BYRNE. Thank you, Mr. Scott.

Mr. BYRNE. Thank you, Mr. Scott. The chair now recognizes the chair of the Subcommittee on Health, Employment, Labor, and Pensions, Mr. Walberg, for five minutes.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks again to the witnesses.

Ms. Kennedy, thanks for grabbing the whiplash by the tail of franchisee and going for the American dream, as you have. And we applaud you and congratulate you.

You spoke about receiving less assistance and help from your franchisor due the expanding joint employer standards and the fear that these programs will create unintended joint employer liability.

Could you further explain why this type of assistance is so critical to the franchisee and to all business owners, and especially, first time business owners who are in the franchise system?

Ms. KENNEDY. Thank you. I'll be glad to.

What's important to remember is that at the heart of franchising is someone's idea, I make really good tacos. But that doesn't make me an expert in legal matters. It doesn't make me an expert in construction. It doesn't make me an expert in all of the things that it takes to run a business.

When you join a franchise, when you choose to partner with a franchise, you get some of the support in those areas that you're looking to learn more about. It lessens the risks and it creates the

opportunity to grow faster, become more profitable, and put more people to work.

It is, for me, probably one of the most important parts of this is to try to understand that my employees are my employees. And I get to pick them. I get to watch them grow and move on and, through our company, on to better things. And my employer doesn't have any role in that employment process other than to supply me with what I desperately need right now, which is really good recruiting tools and training tools to keep people growing into what they're going to become.

And where we're at now is, does that make them potentially indirectly responsible for part of the employment process.

Mr. WALBERG. We'll go on with that. What problems may develop and be created in an expanding joint employer standard that isn't reined in? What additional problems would you see?

Ms. KENNEDY. Goodness. Trying to wait to see whether or not we want to use the court system to decide whether or not there was indirect control, whether or not there is reserved and unexercised control, means that I'm not going to be able to open restaurants as often as I'd like to and at a speed that I think that I could, because I'm not sure whether or not I'm eventually not really going to be an owner.

If I'm in some way just a middle manager because my franchisor is somehow indirectly responsible for my employees. And that's, that's concerning.

Mr. WALBERG. Thank you. Mr. Fasman, your written testimony noted that bringing two or more alleged joint employers to the bargaining table in a union contract negotiation may result in conflicts of interest between the two employers.

Do you think this would result in better deals for employees, and would it promote labor peace?

Mr. FASMAN. Chairman Walberg, I don't think it would promote labor peace at all, and I don't think it would promote better deals for employees. I don't think it would promote deals. Because you would have two employers with differing view points pointing fingers at each other saying, "It's your responsibility. No, it's your responsibility." And nothing is likely to get done in those circumstances.

So, no, I don't think it's a better deal at all.

Mr. WALBERG. Okay. Mr. MacDonald, you spoke about shortages of workers in especially construction trades. And we hear about that all over our districts, all across the country.

It seems to me that one of the driving forces to get workers into specialty trades would be the potential to own their own business some day after they learn the process.

Do you think the expanding joint employment standard could take away that incentive and how might this impact the construction industry?

Mr. MACDONALD. Well, it would be an extreme negative impact. You know, most of our smaller subcontractors now are the ones that do the majority of the work. They are people that have under 15 employees total in their shop. They are the great American dream. They are the guys who started off as a journeyman and

made their way to a master status and then started their own companies. And with their own sweat and blood, have gotten it done.

And they're not out trying to do anything but a good job. Most of the people in the construction industry, the homeowners that I represent are just like myself. I started off in a pickup truck with a toolbox. And we've built a very good company. We've been blessed and we've gotten a lot done. And we've made a lot of good, safe affordable housing for Americans because of it.

With the storm that we've had in Texas and it's occurred in Florida, we're going to be short in Texas alone, somewhere between 10 and 20,000 construction workers just to put people back in the home where they were, not to accelerate to a new level, just to bring us back to where we were.

And anything that we do that stymies the effort to keep people in business, to keep people going is just going to make it more and more impossible to put people back at home and back at work.

Mr. WALBERG. Thank you. My time has expired. I yield back.

Mr. BYRNE. Thank you, Chairman Walberg. The chair now recognizes the ranking member of the subcommittee on Workforce Protections, Mr. Takano, for five minutes.

Mr. TAKANO. Thank you, Mr. Chairman. Mr. Rubin, in your testimony you mentioned a case you litigated involving warehouse workers in a Walmart-Schneider facility.

That case hits close to home. In fact, the facilities in question are in my congressional district.

The case of these workers takes what, to many, seems like a technical, legal debate, and puts a face to the workers who are protected by our joint employer laws. I want to give you a chance to share a little more about the facts of the case.

Mr. RUBIN. Sure, 1700 workers, many earn far less than the minimum wage, they earned money based on a bogus piece rate, where because the company up the ladder paid the labor services contractor on a piece rate for truck loaded or unloaded, the contractor in turn paid the workers, depending on how many trucks were loaded or unloaded, on a shift among the four warehouses at the same time.

So no worker had any idea what any other worker was doing in terms of loading or unloading, whether those numbers were accurate.

Many of the workers had to sign their pay stubs when they went to work in the morning and the supervisors filled those in later with whatever hours the supervisors claimed should be in there. The workers had to show up hours before the work began. They weren't paid for those hours. The workers were often sent home early when there weren't enough trucks to unload. They weren't paid for those hours. There was a whole series of egregious labor violations that went on for decades in those warehouses and that was the basis of the lawsuit.

And the control was exercised by Walmart and by its operator by dictating the terms and conditions of employment, acting indirectly through the next level down. Indirect simply means you're using someone else as your agent. You're telling that next company down what to do, how to do it. Your instructions are carrying through to

the workers. So the ultimate responsibility was held to be shared by all of the companies.

Mr. TAKANO. So that's a horrible situation for those workers, terrible working conditions, being cheated out of their pay.

What remedy would they have had if this bill were to pass?

Mr. RUBIN. They would have no remedy at all. Their only recourse would be against the labor services contractor, who as we found out when we finally entered into settlement negotiations, had only enough money to pay, I think, it was about seven percent of the total settlement combined over a period of years.

What happens in real life, when you're talking about the facts, is that as soon as there's a threat of labor organizing, as soon as there's a threat of a wage-and-hour lawsuit, the company up the ladder terminates its contract with the small business. If small businesses are concerned, the concern should be based on the fact that they have no job security.

What happens is they lose their contracts and the workers lose their jobs as soon as one worker complains. So if a worker complains, not only is that worker out of a job, but all of his or her coworkers are out of jobs, too, because the labor services contract is terminated.

Mr. TAKANO. So let me get this right. So right now, I mean the law gives some protection to these workers, but if we pass this new bill, remedies go away for those workers, and you're telling me that even the small business, that the contractor, the contractor with the big business becomes even more vulnerable under this law?

Mr. RUBIN. That's why I don't understand why this is called the *Save the Small Business Act*. The small businesses are the ones who are caught in the squeeze. They're the ones who are hurt by this language because they will bear full responsibility even if they don't have full responsibility.

Mr. TAKANO. So this really should be called the Screw Workers and Screw Small Businesses Act.

Mr. RUBIN. Not for me to say.

Mr. TAKANO. I'm sorry for using such a word.

Mr. RUBIN. That's the effective impact.

Mr. TAKANO. So I'm curious about as to whether this bill creates perverse incentives that could harm franchisees or smaller businesses that operate as subcontractors for larger firms. Under this bill could franchisors or warehouse owners exercise exceptionally broad control over the labor relations of its franchisees or subcontractors but enjoy immunity from liability for employment law violations associated with that control?

Mr. RUBIN. Yes, that's exactly what can and would happen.

Mr. TAKANO. Ms. Kennedy, did any of your, did you -- you didn't ever recall consulting any lawyers, but did you ever read any articles about this possibility that your franchisor could exercise far more control over your operations but yet put all the liability for violations onto you?

Ms. KENNEDY. I have read information about that. But I would, I'm always --

Mr. TAKANO. Did you ever talk to your own attorney, not the franchisor's attorneys?

Ms. KENNEDY. I do have counsel --

Mr. BYRNE. Let me just interrupt for a second.

Mr. TAKANO. Wait, wait, Mr. Chairman, this is my time.

Mr. BYRNE. Well, I'm going to just -- I'm going to give you your time. The communication between an attorney and client is privileged and, I don't think you mean to insert yourself into that privilege and get her to divulge --

Mr. TAKANO. No, Mr. Chairman, I'm not. I just want to know if she's --

Mr. BYRNE. I don't think she should be asked --

Mr. TAKANO. -- consulted her own attorney or the company's attorney --

Mr. BYRNE. We should not be asking her about what her attorney told her. That's inappropriate.

Mr. TAKANO. But, Mr. Chairman, this is my time.

Mr. BYRNE. I'm going to let you have your time, I'm just saying --

Mr. TAKANO. But it is my time, Mr. Chairman.

Mr. BYRNE. -- she has a recognized privilege and we cannot invade that privilege here.

Mr. TAKANO. Okay. Well, Ms. Kennedy, have you consulted your own attorney about this -- not, not -- the franchisor's attorney?

Ms. KENNEDY. Yes.

Mr. TAKANO. Okay. Well, I'd be interested to know just whether or not, whether you have any advice on whether the company's control, the franchisor's control would leave you in a more vulnerable situation, more liable?

Ms. KENNEDY. I don't know that I have any information or advice that I want to share about that today. I don't think that that's really what I'm here to talk about. It hasn't happened. I can't speak to what has happened.

What I am most concerned about is, is that it could happen. If we don't find a way to bring this language back into what is my reality, which is defining what is direct, immediate control over employees. It's the language that we've always worked under. Those employees that I have, I'm proud of, and they work for me. And when we open -- when we use these words like indirect or reserved, unexercised control, that's where the danger is.

Mr. TAKANO. Thank you for your response, Ms. Kennedy. Thank you.

Mr. MACDONALD. Mr. Chairman, if I might --

Mr. BYRNE. We got to follow the protocol here.

Let me make sure I say this for everybody here who is not an attorney. It is not appropriate to ask somebody to tell us what an attorney has -- their attorney has told them. They have an attorney-client privilege, and it's not appropriate for the House of Representatives to try to invade that privilege.

Ms. FUDGE. Then they can say no.

Mr. BYRNE. Well, they are not lawyers and they don't have their lawyers here with them to give them that advice. And I think it would not be responsible for those --

Ms. FUDGE. And you cannot be their lawyer.

Mr. BYRNE. I'm not trying to be their lawyer.

Mr. TAKANO. Mr. Chairman --

Mr. BYRNE. But I --

Mr. TAKANO. Mr. Chairman --

Mr. BYRNE. Let me finish, let me finish what I'm saying.

Now, those of us that are lawyers understand this is a very serious thing. And some of us are officers of the court, whether we're these folks lawyers or not. And we've got to be careful -- and I don't think it's the intention of anybody on this panel to try to invade the attorney-client privilege. But it is a privilege. It is recognized by the courts. And we should not be invading that privilege.

If they want to consult their attorneys to come back to us and give us an answer, that's a different thing. But to ask them without their attorneys being present to give us information about what their attorneys have told them, I don't think is appropriate.

Mr. TAKANO. Well, Mr. Chairman, I was merely trying to clarify whether such communication had taken place, whether she had her own attorney, whether she had consulted her own attorney or whether she was being guided by the franchisor's attorney.

I wanted to make sure that her interest as a small business owner was being represented, as opposed to receiving guidance from the franchisor's interest. And because the law, the way this law is written is so perversely against both workers and small business people.

Mr. BYRNE. Mr. Takano, you are welcome to ask the questions that you want to ask, and they can give you the answers. But when we're wandering into a situation where we might be asking a non-lawyer to make a decision about whether or not they're going to give up a privilege that is recognized by the courts, I think it is appropriate for us to--

Mr. TAKANO. Well, I have no intention of asking for any privilege to be waived, merely whether or not the communication, whether she had consulted her own attorney versus the franchisor's attorney.

Mr. BYRNE. Thank you.

The Chair now recognizes the gentleman from South Carolina, Mr. Wilson, for five minutes.

Mr. WILSON. Thank you, Chairman Byrne. And thank you all for being here today, particularly Ms. Kennedy. I appreciate the opportunities you provide.

The International Franchise Association gives such opportunities, and then from that, you help develop -- and the members help develop -- small businesses that provide entry-level jobs for people to have first time employment and prove themselves and succeed. In fact, in South Carolina we particularly recognize this. U.S. Senator Tim Scott had his first job at a Chick-fil-a franchise in North Charleston. And so how wonderful it was that he had that opportunity. And so I want to thank you for what you do.

In regard to that, in your testimony you provided several examples how the joint employer standard has increased the cost for you to run your business.

You mentioned that you now provide job application forms, employee handbooks and recruitment materials that were previously provided by the franchisor.

Could you elaborate as to how the cost of the joint employer standard is reducing job creation and growth?

Ms. KENNEDY. Thank you very much. I'd be glad to.

The one thing that I can tell you for sure is we keep track in the restaurant business, my restaurant business, of every penny and how it is spent, and we find that the most valuable way to spend our resources on something that I'm passionate about, which is education and helping our young people get started in their work life.

In order to do that we need good tools. We need to provide them with training documents, standard structures that help them learn different parts and different skills of the restaurant business. It's not as simple as just becoming a cashier and running a cash register. It's about understanding how to direct employees and manage money and manage inventory. And those skills, given the opportunity to learn them, can help them run any business in the world.

The costs for me to do that have gone up substantially. I have to source, find, pay for, and produce many of the items that I used to get from my franchisor. Simple things like "Now Hiring" banners, flyers that go on bags and on trays, all of those pieces and products that I use to let people know that I am looking for really great people, cost me more money to go produce.

My handbook, the \$9,000 was just a start. Every time there's a change in the work environment, I have to update that handbook. That's expensive, and it's definitely not something that I'm an expert at. And so I have to pay to get the legal representation that I feel I need to make sure that I'm complying with all of the many pieces of legislation and work rules that I'm responsible for.

Mr. WILSON. Well, again, thank you so much. I know personally the opportunities you provided -- my third son Julian began at Ruby Tuesday, and did great work. And then my youngest son started at Atlanta Bread Company serving. So, what great opportunities you provide.

Equally, Mr. MacDonald, I appreciate the National Association of Home Builders.

In fact, I, in my real estate practice, was a member of the Columbia Area of Home Builders Association, and I still pay my dues.

Mr. MACDONALD. Thank you.

Mr. WILSON. I know -- well, they are very persistent.

But I appreciate the jobs created. And it's family-run businesses that span generations such as yours.

You discussed in your testimony how small local businesses are negatively impacted by the expanded joint employer rule, and that without having the resources of larger companies resulting in higher home prices for consumers.

Can you explain how the housing market would be negatively impacted by the expanded joint employer mandate?

Mr. MACDONALD. Absolutely. And thank you for the question. It is exactly where you were headed there, that we have small companies, small companies don't have the access to in-house lawyers, to in-house H.R. personnel, and all that it takes to be in business. So we have to rely upon what we can glean from the street or what we have to do in the way of hiring outside counsel on our own.

And frankly, and all due respect to Mr. Rubin, he's the first attorney that I've heard that's willing to opine as to what's going to

happen in labor law after Browning-Ferris. I can't find an attorney who says, "you need to do this, this and this."

The attorneys that I have consulted have said, "I can't answer the question yet until there's more case law." We all know that case law means much more legal expense, many more problems for small business owners.

So who's going to succeed here? It's only going to be the big builders, the larger people who have larger volume and can afford to have staffs of attorneys to deal with these issues.

The smaller subcontractors, the smaller contractors are just not prepared. And can't be.

Mr. WILSON. And final, again, home builders are great citizens and corporate citizens and business leaders of our America. We appreciate the home builders association. Thank you.

Mr. MACDONALD. Thank you, sir.

Mr. BYRNE. Thank you, Mr. Wilson.

The Chair now recognizes the gentleman from New Jersey, Mr. Norcross, for five minutes.

Mr. NORCROSS. Thank you, Chairman.

Common law to 1935 when the NLRA was passed. From 1935 to 1984, 46 years working off the same decision, getting decisions from the Board, clarifying where it was. Then we had 1984 to 2015, only 31 years. And here we are from 2015 to 2017, or as I call it, "back to the future." Because what has happened is we went back to where we were for 46 years of decisions, 46 years. 800,000 franchisees, not one has been considered a joint employer.

So I listened to the testimony and I'm trying to make sense how is it that we can work together to address the issues that we're here hearing from you.

And the first thing that comes to mind is, Mr. MacDonald, you mentioned that the franchisees or -- excuse me -- the joint employer decision is hurting the construction industry.

How would you reflect on that in the last two years, companies have grown, those who are starting? There's an increase of construction companies. Isn't that the exact opposite of what you suggested?

Mr. MACDONALD. Well, it's the indecision that's going to put an end to it. We're only seeing an --

Mr. NORCROSS. Well, you mentioned that this would keep people from going into business.

Mr. MACDONALD. Yes, sir. And it will keep people --

Mr. NORCROSS. But it increased.

Mr. MACDONALD. Would you like for me to answer the question?

Mr. NORCROSS. No, but you --

Mr. MACDONALD. The answer to the question is that we went through an extreme period of negative growth in the construction industry in 2008, 2009, and 2010 and we've seen a rebirth of housing starts. Housing starts have almost doubled in that period of time, and that's what -- it is a simple supply and demand issue.

I will also say that the protection of workers and labor in our industry is really based on supply and demand. I will tell you right now --

Mr. NORCROSS. Well, thank you. I don't --

Mr. MACDONALD. -- because of the shortage of labor that we're having --

Mr. NORCROSS. I want to keep --

Mr. MACDONALD. -- nobody wants to treat an employee poorly.

Mr. NORCROSS. Excuse me. My time. I would like to keep a narrow focus of what I was asking you, because the employee is not going to be impacted by the joint decision whether or not he is going to go to work for somebody, and that's the problem that we're having.

The fact of the matter is, particularly in construction, the job site safety, it's everybody working together. You're not going to throw that on another employee. That's where all the liability comes in. And that's, quite frankly, the reason why the deaths on the job has been decreasing, because everybody works together.

I just want to make sure that when we looked at what's going on here, instead of going back to the decisions of 46 years, we're going all the way back beyond what it used to be. So the idea of having precedents and predictability, you're going beyond that.

And I just want to follow-up with my last question. When I looked at AT&T now, the retail stores, almost 60 percent of their stores are operated by one of two very, very large subcontractors. Completely contradicting what you're telling us today.

Mr. RUBIN, I was wondering if you could talk about, in a broad sense, the different tactics that are used to erode the employer's obligations to employees and how they might vary depending on the industry.

Mr. RUBIN. Varies depending on the industry and the creativity of the dominant company. There are lots of ways to do it. The AT&T example is one. We know through the Communication Workers how they're able to structure the relationships so that they maintain their control.

Mr. NORCROSS. Because in the construction industry, the fact of the matter is joint employers is not happening all that often.

Mr. RUBIN. Very rarely. Of the 9,036 cases identified by Mr. Fasman that were filed under the FLSA in that one year, I bet no more than two or three included a joint employer allegation. It is a rarely advanced theory but a critically important theory, which is why we need to preserve it.

It's not just that the law went through a 46-year period. Under the *Fair Labor Standards Act* this would change law going back 81 years since the FLSA was enacted. Even with the NLRA, this notion of direct and immediate didn't come into play until 2002 in the Airborne Express footnote. So in fact, it's not even 1984.

The standard that was rejected in Browning-Ferris was, in fact, the 2002 standard, it's a period of only 13 years.

Mr. NORCROSS. Thank you.

We need to sit down and work together because these facts are completely opposite of each other. We don't need to go all the way back. We need to sit down and have a reasonable discussion and work this out. I yield back.

Mr. BYRNE. Thank you, Mr. Norcross.

The Chair now recognizes the gentleman from Tennessee, Dr. Roe, for five minutes.

Mr. ROE. Thank you, Mr. Chairman. And I want to thank the minority staff for their well wishes and flowers you sent me during my recent surgery and continued recovery. So thank you for that. I appreciate that very much.

You know, uncertainty, when you have an uncertainty, that creates a situation where people react. And Ms. Kennedy pointed out clearly that the uncertainty of this particular definition of the NLRB, what is the joint employer status, created a chain of effect where she then had to go and create her own book, which cost \$9,000 and a continuing recurring cost. That cost could go in -- that money could go into expanding your franchise, increasing wages, growing your business where it is, de novo where it is. So the uncertainty is done. And the fact that something hadn't happened doesn't mean it won't.

And so I know exactly -- in my business -- I'm a small business person. And I know I've reacted when ERISA law changed. We would do certain things. The fact that it hadn't happened didn't mean that it wouldn't happen.

So I'd like to ask you, Ms. Kennedy -- and thank you all, all of you, for being here -- how much involvement does your franchisor have in your daily affairs of your business and employees? For example, does your franchisor sign the paychecks or hire employees or decide what hourly -- what hours someone would work?

Ms. KENNEDY. They do not have any involvement in any of the day-to-day interactions with my employees.

Mr. ROE. And yet this uncertainty has caused them to change the relationship they had with you. Am I correct on that?

Ms. KENNEDY. I believe you are correct.

Mr. ROE. And that change created, what, an added expense for both you and the franchisor?

Ms. KENNEDY. Absolutely.

Mr. ROE. Am I correct on that?

Ms. KENNEDY. You are.

Mr. ROE. I think the uncertainty is important. And, look, this is great for employment of attorneys who have differences of opinion. And everything is arguable, I've found out. Not matter how it's said.

So, Mr. Fasman, we've seen an age of e-commerce and the importance of an expedited delivery. What limitations does the new joint employer standard put on companies who may be exploring innovative delivery services or new partnerships with other businesses to satisfy growing consumer demand for rapid product delivery?

Mr. FASMAN. Well, that's a very good question. And I think it goes back to exactly what you were, what you were saying, Congressman, and that is, that it's very difficult to understand exactly what a contractor can do and cannot do under this standard because it's not based upon the facts of the relationship. It's based upon potential or indirect control that's a question that's only answered in retrospect. That is, I don't know what potential control could be. And as you said, Mr. Rubin and I can argue about potential control in any relationship. And that's properly how we made our living for a long period of time.

But I mean, those things are not, they're just not clear. And structuring a relationship, a commercial relationship is vital in the

areas that you've spoken about. And that's why basically saying, "let's go by the facts, let's not go by potential and unreserved or unexercised control" is so important.

Mr. ROE. I want to thank Mr. Byrne for this, to try to put some clarity to this.

I had -- not a franchise business, but I was in my business myself the entire time before I came to Congress, over 30 years. And we contracted -- a medical practice. And we contracted cleaning services. And we didn't do that ourselves. We contracted that. I expected certain standards to be met in cleaning the office so it would be presentable the next day. I didn't exercise direct control over that. If we had been a franchise I would have been caught in that uncertainty. What do I do.

And I think that uncertainty is clear and it's costing millions, if not billions of dollars to comply with this uncertainty. And if you've got that many people, 700 and something thousand franchises, 9 million employees, it is a gigantic number.

Mr. Rubin, just a question. Yes or no. Was that \$22.7 million dollar settlement a class action lawsuit or just not?

Mr. RUBIN. It was a class and collective action under state and Federal law.

Mr. ROE. So what was your fee out of that \$22.7 million? How much of that did the workers not get?

Mr. RUBIN. The workers got up to \$80 thousand --

Mr. ROE. No, I didn't ask that.

Mr. RUBIN. -- based on the amount of --

Mr. ROE. I said what percent of that \$22.7 million went to you and your firm, not to the affected workers.

Mr. RUBIN. In order to litigate that -- I don't know exactly how much our firm made but there were 5 different --

Mr. ROE. Twenty-five percent?

Mr. RUBIN. -- there were five different firms who had to work on it, who put in more time than we were paid, if you do it on an hourly basis.

Mr. ROE. Twenty to thirty percent? Forty percent? How much?

Mr. RUBIN. No, no, no, no, no. I think it was probably in the low 20's. But we were paid less than our hourly -- had we been billing on an hourly rate, our fee would have been more than twice the amount we ultimately received.

Mr. ROE. I yield back.

Mr. BYRNE. Thank you, Dr. Roe.

The Chair now calls on the gentlewoman from Ohio, Ms. Fudge, for questioning for five minutes.

Ms. FUDGE. Thank you very much, Mr. Chairman.

Thank you all for being here today.

Mr. Rubin, before I give you the balance of my time to respond to Mr. MacDonald, who just shared with us a communication between he and his lawyers that has now said that you're an outlier in your thought process, and to address the question that was just asked by my colleague: Of course, we know lawyers get paid. I mean, this is ridiculous. But let me just make a couple of comments and then I'm going to turn over my time to you, sir.

First, we have heard *ad nauseam* about the decision in Brown-ing-Ferris. As my colleague said, we've had 35 hearings about this.

It is interesting that every time my colleagues across the aisle don't like a law, they call it uncertain, ambiguous, unsustainable. Just because you don't like it doesn't mean you don't understand it. And they clearly understand it.

And I just want to remind our Chairwoman Foxx that intent is a standard that has been accepted in American jurisprudence for generations. It did not start here.

And lastly, I just have to say this: I am trying to figure out for the life of me what Tim Scott has to do with what we are talking about today. So he worked at Chick-fil-a. So what? I mean, did he bring it up because he's black? Did he bring it up because he thinks Tim Scott might support his position?

I take great offense to using a U.S. Senator, who happens to be my friend, in something so ridiculous.

My time is now yours, Mr. Rubin.

Mr. RUBIN. Thank you. In response to the questions about uncertainty, first a bit of background.

I try to be well versed in the law. Before I started practicing I was a clerk for a Supreme Court justice. I try to be well versed in the facts because my job as a litigator is to discover and know the facts and apply the facts. And I try to understand cases like the *Browning-Ferris* decision and the *Freshii* advice memorandum by actually looking to see what's written in those opinions, what standards are applied.

You start with the *Browning-Ferris* decision. It actually simply reiterates the standard that I quoted before about sharing the essential terms and control over the terms and conditions. The standard itself is not objectionable.

What people seem to be complaining about, Mr. MacDonald and others, Ms. Kennedy, is that they have been advised that there's some uncertainty. But in each of the instances they've described to me there's no way a litigator would pursue their case on a joint employer basis, which is why of the 9,000 FLSA cases only a handful were ever pursued under joint employer basis.

What were the facts in BFI? We have to focus on them. BFI owned the plant. It set the shifts. It told the employees where to work. It capped their wages. It decided when they would have to work overtime. It decided how many workers would be working overtime. It decided when to stop the assembly line for breaks. It controlled the line speed. It had the right to veto any wage hike or wage change the lead point offered. It trained the workers. It had the power to fire and, in fact, it did terminate two workers that it didn't want, and it had the power to fire the entire work force.

Those are the facts of *Browning-Ferris*. And any lawyer looking objectively at those facts under the standard that has been part of the *National Labor Relations Act* would conclude that party should participate in collective bargaining, *Browning-Ferris* that is, because it had the right to affect terms and conditions of employment.

And certainly we haven't talked a whole lot about the *Fair Labor Standards Act*, but the *Fair Labor Standards Act* --

Ms. FUDGE. Mr. Rubin, if I could just interrupt you one moment. I really would like to yield the last of my time to our ranking member, if you would allow me to do that, sir.

Mr. SCOTT. Thank you. Mr. Rubin, I think you can finish up that statement, but include in that, if you have a *Fair Labor Standards Acts* violation and somebody comes in and says, "I'm not an employer under this definition," and then the other guy comes in and says, "I'm not an employer under this definition either," is it possible that nobody is responsible?

Mr. RUBIN. Wow. In fact, as I look at the language of the Act, that is possible.

Imagine this circumstance: Company A is in charge of hiring. Company A and B share responsibility for firing. And company B also sets wages. The worker says, who is my employer under this definition? Well, does either company, A or B, control the essential terms, which are then listed? There are nine of them in the conjunctive? No.

So in that case there may be no employer.

Mr. SCOTT. So if there's a finding that I wasn't paid overtime, nobody owes it?

Mr. RUBIN. Neither company is a joint employer and arguably neither is an employer at all. The uncertainty, this language explodes uncertainty to the point where every single case, where any element, any term or condition of employment is shared, there's going to be litigation over whether either company could be --

Mr. BYRNE. Mr. Rubin, you're going to have to wrap up again.

Mr. RUBIN. I think I've answered the question.

Mr. BYRNE. Okay good. Thank you. Thank you.

All right. The Chair now recognizes for questions, for five minutes, the gentlewoman from New York, Ms. Stefanik.

Ms. STEFANIK. Thank you, Mr. Chairman.

Mr. Fasman, in the amicus brief submitted by Microsoft in the Browning-Ferris case, Microsoft argued that the NLRB's new standard will discourage companies from implementing policies and initiatives that go above and beyond their legal requirements.

For example, market leaders with complex supply chains will be penalized simply for implementing policies on responsible product sourcing or human rights, as well as labor and environmental standards.

In this Congress, I've worked on the Millennial Task Force, which I chair with my colleague, Mr. Messer, who also sits on this committee, and we have explored how today's companies are changing business models to attract and retain the largest segment of our work force, millennials. What companies such as PriceWaterhouseCoopers, Uber, and Google are telling us is that millennials are looking for companies that have a purpose larger than the business. Corporate citizenship is now more than ever a key factor in millennials interest in a job.

So how does this new joint employer standard actually chill positive corporate policies by American companies, specifically large companies with complex supply chains?

Mr. FASMAN. I think that that's a very good point. And the answer is that large companies with supply chains and with innovative programs, under the standard that the labor board has cre-

ated, have to be extremely careful about the control that they exercise. It is implementing policies from the top down. That seems to me to be a very doubtful enterprise if in fact this is the standard, because the more control you retain, the more you say you should do this, this is how we want to do this, the more likely it is that you're going to be considered a joint employer.

Ms. STEFANIK. Is there any more specific example you can provide?

Mr. FASMAN. I can't think of any sitting here right now.

Ms. STEFANIK. Okay. Thank you very much.

I yield back.

Mr. BYRNE. The gentlewoman yields back.

The Chair now recognizes the gentlewoman from Oregon, Ms. Bonamici, for five minutes.

Ms. BONAMICI. Thank you very much, Mr. Chairman. And thanks to each of the witnesses for being here today.

We've had this conversation many times. I am one of the people here on the committee who used to practice law as well. I represented franchisees in disputes with franchisors, and I certainly know and appreciate the franchise model and the opportunities that it creates.

Before that, though, before law school, I worked at my mom's small business. And I look at the title of this Save Local Business Act and, you know, we all want local businesses to thrive and succeed. This bill is not the way to do it.

You know, and as we've heard multiple times, this BFI case that we've talked about so much does not upend the franchise model. And as we've heard again this morning, that was made clear in the Freshii case, a franchisor is not a joint employer if they act like a franchisor by protecting brand standards. And yes, a franchisor can provide guidance. And there was an advice memo from the NLRB on that. Employee handbooks, payroll services. Those things, as long as they're optional, do not make a franchisor a joint employer.

And you know, that, if they're going to act like a joint employer, they should be treated as a joint employer.

And Mr. Rubin, you've talked a little bit about why a fact-specific standard is important. And I really appreciated also your response to ranking member Scott's question, because as I read this language with the "and," all of those have to be met to be a joint employer.

Why is it important that there be a fact-specific standard when assessing joint employment?

Mr. RUBIN. Under any standard, the current standard under the FLSA, the NLRA, state law, other federal statutes, it all depends on the actual relationship between the parties. There's so many ways franchisors, franchisees, lead companies, supplier companies can structure their relationship. That's a good thing. We welcome flexibility in how companies operate and how they interact with each other --

Ms. BONAMICI. And those are typically spelled out in the franchise agreement, correct?

Mr. RUBIN. Yes. And it's set forth in as clear language as they can set it forth. And the courts must look at the specific factors and see what happens, both as a matter of contract, and then on the

ground in terms of the actual exercise of control. That's why it's fact-specific.

You can't just say, because you have a relationship of user/supplier or franchisor/franchisee, you are or are not a joint employer. You have to look at the facts on the ground and the legal relationship by contract under the law in the jurisdiction under the particular statute. That's how you analyze cases.

Ms. BONAMICI. Well, I certainly agree that the language in this bill would make it much more confusing and create much more uncertainty about who is a joint employer, what entity is a joint employer.

Mr. RUBIN, we're sitting here in 2017 and there's still a pay gap between women and men. It's difficult for individuals to prevail in Equal Pay Act claims. Congress did pass the *Lilly Ledbetter Fair Pay Act in 2009*. There's also the *Paycheck Fairness Act*, which I support that would further strengthen the right of pay equity.

If this bill, the *Save Local Business Act*, were to pass, would it make it more difficult for a worker to succeed in an *Equal Pay Act* claim? If so, how?

Mr. RUBIN. It probably would. That's another great uncertainty with the way this bill is written. *The Equal Pay Act* is incorporated into the FLSA.

Ms. BONAMICI. Right.

Mr. RUBIN. As a result it adopts the standards set forth in the FLSA. It depends on Congress' intent at the time, and that's why there's going to be litigation over it. But certainly if this bill changes the definition from what it's been going back to the early 1930's to what is proposed here, it will affect the *Equal Pay Act*, make it far more difficult, in fact, I think impossible, to prove joint employer relationships.

Same thing will happen under the *Family Medical Leave Act* and certainly under the *Migrant and Seasonal Agricultural Worker Protection Act*, which also borrows the FLSA definitions. So we are going to have an explosion of litigation, more uncertainty, more expense for franchisors, franchisees, contractors and the like, if this bill were enacted.

Ms. BONAMICI. And I know it's been asked before, but just to clarify, how many cases are you aware of where a franchisor has been found to be a joint employer with its franchisees under the *Fair Labor Standards Act*?

Mr. RUBIN. Zero.

Ms. BONAMICI. Thank you.

I yield back the balance of my time.

Mr. BYRNE. The gentlewoman yields back.

The Chair now recognizes the gentleman from Georgia, Mr. Allen, for five minutes.

Mr. ALLEN. Thank you, Mr. Chairman, and thank you witnesses for enduring this.

As you can, see there's a very, varied difference of opinion. I will tell you, Mr. MacDonald and Ms. Kennedy, I'm not going to warn you of the risk of running your business. I'm a small business person and I, for years, and it's a construction business, and I pretty well understood the risk. And I'm not going to try to tell you how to run your business. I think that's the great thing about this coun-

try. Is you decide what's best for you and your employees. And we need to keep it that way, in my opinion.

As far as this law is concerned, obviously we've had two lawyers who can't agree here today. Ain't America, a great place to live, we're all trying to figure out what is best for, you know, the people and the citizens, the great citizens of this country.

But it is pretty dynamic right now, this economy, and the innovation is very dynamic. And frankly, you know, the five-year business plans are a thing of the past. You know, one-year business plan, maybe six months, I don't know, maybe 30 days is what we have to deal with in the business world because your competition is getting, you know, it's just difficult out there. And but that's good. That's good for the customers. And we haven't talked much about customers here today but that's who we, that's who we work for.

But going back to these models and what we're trying to clean up here, as far as trying to make at least the lawyers understand, you know, again we've got the lawyers disagreeing on, "well, there's going to be more litigation after this law," versus, you know, "well, we've got to have this to decrease litigation."

You know, Mr. MacDonald, as far as your relationship with your subcontractors -- and also Texas is a right-to-work state.

Mr. MACDONALD. That's true, actually.

Mr. ALLEN. Yeah. Yeah. In fact, going back, Mr. Fasman, as far as, you know, you've got states in this country that are right-to-work states, and you've got states that are not right-to-work.

This Browning-Ferris case, obviously this was in California. Georgia is a right-to-work state. Texas is a right-to-work state. How is that, I mean, how do you deal with that?

Mr. FASMAN. Well, I think it's a different -- so is Michigan, by the way.

Mr. ALLEN. Yeah.

Mr. FASMAN. And I think the real question in any of these situations is who the employer is. And I don't think that that's necessarily directly related to the right-to-work issue at all. But I would like to, Congressman, I would like to utter some words that haven't been said during this hearing. Because everybody has talked about, there's never been a franchisor who has been found to be a joint employer.

There's been 145 days of hearing in the McDonalds' litigation on just that point. General counsel Griffin is using the Browning-Ferris decision to prosecute McDonalds and all of its franchisees across the country.

There's an air of unreality here in the questions that have been asked. I mean, to say there hasn't been a franchisor who has ever been found to be a joint employer, I mean, tell that to McDonalds who's spent the last 145 days, and continuing, in hearings on this point.

And I find it unbelievable that nobody has mentioned that. I just did.

Mr. ALLEN. Yeah, and I am glad you brought that up. I was going to get to that as well.

As far as the right to work situation, Mr. MacDonald, I know, you know, one of the questions is whether you work in union or open shop. And at least in a right-to-work state you can have two

gates and you can work, work both union and open shop subcontractors.

Do you have any subcontractors who work under those, under that scenario?

Mr. MACDONALD. Yes, sir, we certainly do.

Mr. ALLEN. You do?

Mr. MACDONALD. The people that provide our elevator services Thyssen Krupp are union, and even their maintenance personnel are as well. And we work hand in hand with them.

Mr. ALLEN. Right. So we don't have any issues there that -- these were some concerns that were brought up about, and I know -- and I'm not sure in a state that's a not right-to-work state, you don't have that option. Is that correct?

Mr. FASMAN. I think that that's correct. I think that you don't have that option.

Mr. MACDONALD. And it's a state-by-state situation. And you bring up a wonderful point that a lot of state law is going to be trampled as we try and unravel all the litigation around this, that is pending and it's working quite well, and it's working well in Texas.

Mr. ALLEN. Well, obviously, you know, we're here to try to dismantle regulatory involvement in the process. We think that's the most innovative, productive way for this country to grow and to get people to work.

Thank you for your testimony.

Mr. BYRNE. The gentleman yields back.

The Chair now recognizes the gentlewoman from North Carolina, Ms. Adams, for five minutes.

Ms. ADAMS. Thank you, Mr. Chairman.

Ranking member, thank you as well. And thank you to the witnesses today.

You know, what's interesting to me is that the very people that my colleagues claim to be advocating for with the support of H.R. 3441 are those who will suffer the most if this bill is enacted.

The focus on the harm the joint employer standard does to franchisees is a red herring because the National Labor Relations Board has really never found the franchisor to be a joint employer.

So it seems that all this bill does is create a scheme that would give franchisors the power to scourge labor and employment laws while leaving franchisees increasingly exposed to lawsuits.

So I have a couple of questions. Mr. Rubin, my colleagues claim that H.R. 3441 creates certainty for franchisees and the joint employment context, so could you explain why this may not necessarily be the case and what uncertainty might arise from narrowing the standard in this way?

Mr. RUBIN. The only certainty created by the bill is, as Representative Scott was pointing out, it is certain that no franchisor or other large company could be held liable as a joint employer. It creates uncertainty because there are still lots of other federal statutes and lots of state statutes that have a range of different standards.

The standards proposed here still have to be applied on a fact-by-fact basis.

There is no way, no court, at any time, since the Supreme Court in the Rutherford in 1947, has ever tried to analyze a joint employer case without looking at the facts.

There is always uncertainty until the facts are developed, a well-counselled franchisee, small business, large business, franchisor will know how to avoid responsibility by delegating all control to the other business or to take on responsibility, as it should, if in fact it does control the workers.

Ms. ADAMS. Okay. So, Mr. Rubin, Ms. Kennedy is concerned about the impacts that the common law joint employee standard may have on her business, and believes that common law standard limits her autonomy as a franchisee and increases cost. Well, what's your view?

Mr. RUBIN. The common law standard has been in effect for well over a hundred years.

As the board in Browning-Ferris emphasized -- looking at the re-statement of the law of agency which sets out the common law principle, it is a fair and appropriate way to determine when one company is acting on behalf of another. That's what agency is all about.

Where the franchisor directs the franchisee to do certain things, and that's indirect control, it is responsible for what it has directed the franchisee to do. It's as simple as that. Common law was developed, initially, the principle, for when a company is responsible for its employees wrongful acts against someone else. There was strict liability imposed on the master for the acts of a servant.

The statutes have been adopted in order to protect the employees of the master so the master doesn't deprive those workers of their rights. And that's all the joint employer doctrine is about, ensuring that the responsible parties are held liable and responsible for bargaining for, and making whole, employees who are deprived of fundamental statutory rights because of a larger company's own actions.

Ms. ADAMS. All right. Thank you very much.

And, Mr. Chair, I yield back.

Mr. BYRNE. The gentlewoman yields back.

The Chair now recognizes the gentlewoman from Georgia, Mrs. Handle, for five minutes.

Mrs. HANDLE. Thank you, Mr. Chairman.

Thank you to all the witnesses here today. I appreciate the insightful testimony.

For Mr. MacDonald, with the aftermath of Hurricane Harvey and now with Hurricane Irma through Florida and into Georgia and South Carolina, how important will it be for builders to be able to find subcontractors to work with the rebuilding effort? And does the expansion of the joint employer standard impact that in any negative way?

Mr. MACDONALD. It will impact it in a negative way because we can't do anything that impedes our ability to get more folks to come to work. We were having problems getting people to come to work before the storms in these areas because we have an economic rebirth since the 2008 crash. And so now it's just being exacerbated by the fact that we're not only trying to produce new housing but

we're trying to repair the damaged housing and get people back in their homes.

Mrs. HANDLE. Okay. Great. Thank you very much.

Ms. Kennedy, like you, I also am not an attorney. In fact, we actually share a common history in that I, too, started out as a secretary and worked my way up. One may have an opinion about the direction of my career since then. But I want to say that I have tremendous respect for lawyers both on this panel and across the country. At the same time having the view points of people who are actually on the ground, having to implement these types of regulations that come through and giving us a very practical real-world impact of what you're trying to deal with, as well as Mr. MacDonald, is incredibly important. And so I appreciate that you're here.

One question for you: You spoke about owning stores in Iowa and Minnesota. If you were thinking to expand into Wisconsin or Illinois, as you know there will be different definitions there, as a result is it possible that a different test for joint employer liability under FLSA would apply?

As a business owner, would it be helpful, more helpful or less helpful to ensure that we have a uniform national standard such as the one created in this -- bipartisan, I would like to add -- the *Save Local Business Act*, and how important is that consistency and uniformity to you.

Ms. KENNEDY. Thank you very much. It would be very helpful to have one clear definition of what joint employer means across any state line. Working in two states right now, it's difficult, challenging. I learn fast and often. When things change from one -- I mean, we share a border, that's about it, from Iowa to Minnesota. If I do want to expand -- and I hope to -- in other states besides the two that I'm in, it would be very helpful to have one specifically clear set of languages that help guide us in how we look at joint employer and, in fact, any other type of regulation as we run our businesses.

Mrs. HANDLE. Right. Thank you very much.

Mr. Chairman, I yield back.

Mr. BYRNE. The gentlewoman yields back.

The Chair now recognizes the gentleman from California, Mr. DeSaulnier, for five minutes.

Mr. DESAULNIER. Thank you, Mr. Chairman. I would like to maybe make just some macro comments. I'm not an attorney. And this is, maybe, in the context, Mr. Chairman, I hope you don't take any offense, it might have been easier on everyone, but not as good for attorneys, if we just went back to the more traditional employer/employee relationship.

I know that the Obama administration and the Department of Labor had been working on a study that showed that up to 70 million Americans no longer have a traditional employer/employee relationship. So in that context we have this debate.

Having worked at fast food restaurants -- and I'm going to date myself -- when I was in college in the 1970's, it was a traditional employer/employee relationship. Having owned restaurants for 35 years -- Ms. Kennedy, I understand the pressure you're under -- but they were independent restaurants, and I wonder about this

rule and the impact it might have in the real world, as some of my colleagues like to say, having worked in what their definition of the real world is, on independent restaurants.

Because with all due respect to McDonalds, I never felt like, even though I was in fine dining, they wanted me to stay in the business any longer if they could get my business aside.

So, Mr. Rubin, in the context, the larger context, I'm just worried about this erosion of worker protection. I wish it could be clearer. I share that with the majority party.

I know that former Secretary of Labor, Secretary Reich, likes to argue that we should make it simpler just by saying employee/employer relationship is if you've received 80 percent of your compensation, you are employed by that employer. It strikes me that for everybody that would be easier, knowing that we have to have something for these unique franchise relationships. But maybe you could just expand on sort of more, in your world, what happens with other employers as they try to compete in the world where you've got this disadvantage, in my mind's eye, when I'm trying to compete with somebody who pays less in terms of wages and benefits because they're contracting out.

Mr. RUBIN. Right. That's an interesting perspective and one we haven't addressed.

I, too, started my career as a secretary, my first job out of college, and spent a lot of time in a small business, Rubin Hardware and Son, in Dorchester, Massachusetts, founded by my grandfather in 1922. I understand the impacts on small businesses, and I particularly understand the impacts on small businesses that try to follow the law.

And that's the problem we have here. The - we'll call them high-road businesses. That's a nomenclature, they shouldn't be called that. They're simple law-abiding business, as every business should strive to be and the overwhelming majority do. The problem they face is competition from companies that don't follow the law --

Mr. DESAULNIER. Right.

Mr. RUBIN. -- who are able to save labor costs, by what has been called wage theft. By taking money, sometimes in small amounts, but in the aggregate large amounts, from workers not in compliance with the FLSA and other statutes.

And what the joint employer doctrine does, and actually, we see it more often in the agricultural context, more than half of the cases that have actually been litigated and found joint employer, have involved farm workers who have been ripped off by farm labor contractors. But we see it in a range of industries where labor is a significant element of the employer's cost, and where the reason the company is cheating its workers is because the squeeze is on from the higher-up-the-ladder company.

So the contract doesn't provide the small business enough profits. Yet demands that it acts in a certain way, certain productivity quotas that can't be done legally. That's when that company caught in the middle, that small business has to, find sometimes violating the law, and that adversely affects every other small business.

So it's not just the small businesses that themselves are in a joint employer relationship that would be affected by this bill. Every small business that faces the competitive squeeze from other

small businesses that aren't legally compliant because of their relationships with other companies are going to be harmed by this bill.

Mr. DESAULNIER. And I just -- one other aspect to that, Ms. Kennedy, one of the pressures I felt as I went longer in my restaurant career was disposable income. So this dynamic, and this race to the bottom, gives workers, consumers, less disposable income. So I always looked at the trade magazines to look at that in terms of housing costs, transportation, healthcare costs, because there's less money for them to spend in the marketplace.

And, Mr. Chairman, just in conclusion, maybe Mr. Rubin can add some comments to this. I did want to note that McDonald's is still pending and was brought under the 1984 joint employee standard which was pre-BFI, if I'm correct. Mr. Rubin, you have any comments about that?

Mr. RUBIN. Yes. And the facts of the case are very McDonald's specific, as are the facts of other cases against McDonald's. But, yes, it's based on the old tried-and-true standard.

Mr. DESAULNIER. Thank you.

Thank you, Mr. Chairman.

Chairman BYRNE. Thank you, Mr. DeSaulnier.

The chair now recognizes the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. Yes I'll start with, Mr. Fasman. It's kind of a difficult topic because you normally think small business is the backbone of America. And, of course, government, for a long time, has been waging a war on small business, trying to drive them out of business, just punish them. They hate them. But could you just -- in general, a lot of small businesses today are franchisees.

Could you give me, in general, your opinion of what will happen to small businesses as this goes into effect? Will more of them be driven into becoming carpet stores and more employees be forced to work for large corporations? Will that be something that will happen in the long run?

Mr. FASMAN. That is, of course, where this ultimately goes. If you are a large franchisor, and you're found to be a joint employer with franchisees across the country, you may have thousands of collective bargaining agreements that you have to negotiate. And that's untenable. So what do you do under those circumstances? Well, there are certain things you could do. But one of them is you could say, well, we won't have franchise -- we won't --

Mr. GROTHMAN. Become all carpet stores.

Mr. FASMAN. Yeah.

Mr. GROTHMAN. Just like we do in so many other industries --

Mr. FASMAN. Correct.

Mr. GROTHMAN. -- the government will -- their hatred for the small businessman will be such they want everybody to have to work for a large corporation. That's what's going to happen. Right?

Mr. FASMAN. Yes. I mean, that's the logical thing to do is to say, look, we can't do this, we can't negotiate, you know, 3,000 franchise labor contracts. It's just an impossibility.

Mr. GROTHMAN. Not to mention you don't want to be personally on the hook for what's going on with somebody who you're not supervising yourself.

Mr. FASMAN. Well, that is absolutely right. And that really is. That really goes back to what we're talking about here. It's hard for a business that has a contractual relationship with another business and says, look, you run all of these things, we don't want -- as is the case with Ms. Kennedy -- you hire, you fire, you pay, and you're responsible for this, to be told after the fact by a Federal agency, oh, but, by the way, you're a joint employer because you have the potential to control that relationship. I mean, that just is -- that just makes no sense.

The parties do this. And, you know, with all due respect to what I've heard today, companies do this not to evade the law. They do this because this is a legitimate and important business model in generating jobs throughout the United States. It's not a nefarious way to get around paying employees what they're entitled to under the law.

Mr. GROTHMAN. Well, Ms. Kennedy, I'll ask you. I guess you now own several Taco John's. But you just probably started out with one?

Ms. KENNEDY. Actually, I bought the company in 1999, and we started out with more restaurants than I have today. I started with 14. I'm down to nine.

Mr. GROTHMAN. Oh, okay.

Ms. KENNEDY. Yeah.

Mr. GROTHMAN. I'll ask you, though, as somebody who is a franchisee. Would you feel you were a small business woman if, I guess, you lost control of the employer/employee relationship in which more and more of the employer/employee relationship -- assuming Taco John's would allow you to continue to exist, would be directed from the corporate level?

Ms. KENNEDY. In effect, it would make me a manager for them. If they are going to be responsible for employees that are technically my employees and my business, why would they want to carry all of that risk if they couldn't direct every single action of those employees? And that's really what is at odds here today, is that uncertainty over whether or not -- could they? Is it possible that they could take over control of my employees? Because they might be held responsible in the end for what they do.

Mr. GROTHMAN. Now we're looking at joint employer role today, Ms. Kennedy. But we sit on other committees. We deal with other sort of businesses. And this idea of hating small business, and forcing them into a position in which they ultimately have to get bought out by the big corporation, is something that we see in other areas, not just in the restaurant business. Do you know why the government hates small business? Could you take -- tries to drive them out of business? Could you maybe speculate as to why that is, why there are politicians who would be in favor of this rule?

Ms. KENNEDY. I guess I can't. I won't speak for or to that. I can tell you from my perspective, though, that it's easier to control the larger.

Mr. GROTHMAN. Easier to control. Yeah.

Ms. KENNEDY. Yeah. Yeah.

Mr. GROTHMAN. Control the big business. Control the little guy.

Ms. KENNEDY. Yeah.

Mr. GROTHMAN. You know, you lose touch, of course, with the local community. I'm sure you give money to the local charities and participate in those events. And, you know, once big Mr. -- nothing against Taco John's, but big Mr. Taco John's gets out there they're not going to be helping out with the local float at the local parade or whatever. It's a shame that so many people are trying to drive people like you out of business. It's kind of a shame that the government is doing that. I guess my time is up.

Chairman BYRNE. The time is up. Gentleman yields back.

I now recognize myself for five minutes for questions.

Mr. Fasman, we've heard today that there have been virtually no findings of joint liability for franchisors. And yet, there are press stories of investigations and cases regarding a number of brand name franchisors. And you mention the McDonald's case. Is it accurate to say that franchisors and franchisees have no reason to worry under this BFI standard?

Mr. FASMAN. Absolutely not. It is inaccurate to say that. And the reason to worry, of course, are the things that we've been talking about today when we've actually talked about the bill. The Browning-Ferris decision is, as I said, completely allows the labor board to come in and say, after the fact, you're a joint employer based upon evidence that was not there, not on the way that you've run your business. So I would be remiss in not saying that this is a standard that all businesses, not only franchisors, but all businesses, should care about.

And, Mr. Chairman, you've made it very clear, and said, that, you know, all you have to do is look at the McDonald's prosecution on this, on this theory. And I don't agree that the McDonald's -- the McDonald's prosecution was brought before Browning-Ferris. But I can virtually guarantee that the general counsel will argue that Browning-Ferris should apply under that ruling or in that case. So I don't agree with the proposition that this has nothing to do with it.

Chairman BYRNE. It seems to me that the game here is to get a favorable decision in the McDonald's case and then use that as precedent to go after franchisor/franchisee relationships throughout the country, large, medium, and small. Would you agree?

Mr. FASMAN. I agree with that. I think that that's why it's being brought.

Chairman BYRNE. So would you agree with this assertion, that prior to Browning-Ferris that there was certainty under the *National Labor Relations Act* about who is and who is not a joint employer?

Mr. FASMAN. Well, I think that there -- yes. I think that there was certainty in the sense that there was 30 years of history. All of these cases, as Mr. Rubin rightly points out, are fact-specific. But we at least knew what the standard was. I do not agree, by the way, that there was a common law standard for 46 years before that period of time that was applied under the *National Labor Relations Act*. I think -- I've read all those cases.

And if one can figure out what the standard was, you're better than I am, and a better lawyer than I am. Those cases were all over the place. And even the board said about its prior decisions that it was somewhat amorphous what test we used.

So this standard in 1984 brought clarity, brought certainty, balanced the rights of employees, employers, and labor unions, in an appropriate fashion.

Chairman BYRNE. And what did the Browning-Ferris standard do to that clarity and that certainty?

Mr. FASMAN. Well, it destroyed it. It destroyed it by introducing this after-the-fact, nonfactual, contrafactual possibilities about potential control and indirect control. It just threw everything into uncertainty. And it will literally take -- if this standard continues, it will literally take another 30 years to figure out what it means.

Chairman BYRNE. As opposed to going back to the old standard under the bill that we're talking about today and having that clarity and certainty that we had before.

Mr. FASMAN. Yes. I agree, Mr. Chairman.

Chairman BYRNE. Ms. Kennedy, the American Action Forum, Washington think tank, just released a study citing a downtrend in growth in the hotel industry, which is heavily reliant on franchises. This could be attributed to expanding the joint employer standards. Do you think a similar downturn could occur in the franchise restaurant industry based on expansion of the joint employer standards?

Ms. KENNEDY. I do. I sit here today with that exact position. I am waiting before I start construction on another site. I just finished building one, got it open successfully in January, and now I'm on hold.

I want to make sure that what I build is mine under all of the laws. And all of the history that I have, 33 years as a franchisee, or an employee of a franchisee, everything seemed like we were together in this idea of franchising. And now, with this, the question is out there: Will they be able to take over, in essence, my business, because they might be responsible for my employees?

I'd like to point out, too -- and I'm reminded -- that there are hundreds of charges against franchises pending at the NLRB waiting on the McDonald's decision. So it might be fair to say that there aren't any today. That probably isn't going to be the case once that decision is made.

Chairman BYRNE. Thank you.

And that comes to the conclusion of our question and answer. I would like to thank our witnesses for taking the time to testify before our subcommittee today. It was excellent testimony, got great information out there.

I would ask unanimous consent to submit for the record a statement from the House Committee on Small Business, Chairman Chabot in support of H.R. 3441. Without objection, it will be entered in the record.

[The information follows:]

STEVE CHABOT, OHIO
CHAIRMAN

NYDIA M. VELAZQUEZ, NEW YORK
RANKING MEMBER

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2561 Rayburn House Office Building
Washington, DC 20515-6515

September 12, 2017

The Honorable Bradley Byrne
Chairman, Subcommittee on Workforce Protections
House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Tim Walberg
Chairman, Subcommittee on Health, Employment, Labor and Pensions
House Committee on Education and the Workforce
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Byrne and Chairman Walberg:

As Chairman of the House Committee on Small Business and as an original co-sponsor of H.R. 3441, "Save Local Businesses Act," I commend you on holding a hearing on this vital legislation. The Obama-era joint employer scheme threatens small businesses—the engines of American economic growth. They create the majority of our nation's jobs and spur innovation. Enacting this legislation would help ensure continued freedom for America's job creators.

For over 30 years, the National Labor Relations Board (NLRB) used one standard to determine whether two separate businesses were joint employers. A joint employer relationship existed if two separate businesses "share[d] or co-determine[d] those matters governing the essential terms and conditions of employment." Crucially, whether the potential joint employer had "direct and immediate" control over employment matters "such as hiring, firing, discipline, supervision, and direction," determined a joint employer relationship. In 2015, the NLRB abandoned this standard when it issued a decision finding that merely possessing the potential for control, even if unexercised, was sufficient to find that two businesses are joint employers. This interpretation unfairly makes employers responsible for actions by employees they do not employ.

Other federal agencies and activist judges quickly promulgated this new standard. An appeal of the NLRB's 2015 decision is still pending before the courts, but it is unlikely that the decision will resolve this issue in a manner that provides any certainty to small businesses. While Secretary of Labor Alexander Acosta withdrew the Department of Labor's 2016 informal guidance

in June, NLRB will continue to use the new standard going forward. The expanded definition of the joint employer standard has become so entrenched into both federal and state statutes that only Congressional action rolling back this scheme and restoring a common sense definition of an employer can restore certainty to America's job creators.

Small businesses and entrepreneurs are threatened by this new definition of the joint employer standard. The ambiguity of the new standard makes it difficult to determine whether a current or prospective relationship would be classified as a joint employer, thus increasing the risk of continuing or entering into the relationship.

In particular, potential small business owners may avoid buying a franchise because of the risk of being punished for actions of a franchiser. Franchisers would likely take more active roles in day to day operations which could lead them to stop franchising altogether and to consider ending current franchise agreements. Locally owned franchises would then be owned and operated by corporate employees located outside of the community. At the very least, companies must spend additional time and money seeking legal advice. Like so many other one-size-fits-all policies, again small businesses, with fewer resources and access to expertise needed to navigate these complicated matters, will be disproportionately affected.

Franchises generally have lower start-up costs than other small businesses and thus are an attractive business model for nascent entrepreneurs. Reduced franchise expansion would limit the number of avenues available to Americans desiring to become small business owners and job creators. The American Action Forum projects that a reduction in franchise activity due to concerns about the new joint employer standard could result in 1.7 million fewer private sector jobs.

Additionally, this new joint employer standard threatens small businesses seeking work as subcontractors. In order to more actively oversee employment matters to mitigate risk, companies may choose to keep work in house and thus deny small businesses subcontracting opportunities. Consolidation of operations will have a chilling effect on small businesses of all sorts including suppliers, subcontractors, and franchisees.

As Chairman of the Small Business Committee, I have heard firsthand how the NLRB's new joint employer standard threatens the ability of small business owners to remain independent and responsible for their own employees. At a 2015 roundtable, the Committee heard from eight small business owners from different industries about the devastating impact uncertainty about the standard was already having on their bottom lines.¹ At a 2016 Small Business Committee hearing, one small business owner testified that if the new standard continues and businesses consolidate operations, "local business owners may effectively be demoted from entrepreneur to middle manager, as they are gradually forced to forfeit operational control of the stores, clubs, inns or restaurants they built."² At the same hearing, another small business owner testified that because of

¹ Roundtable on Potential Joint Employer Standard, H.Comm. on Small Business, 114th Cong. (2015), available at <https://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=398109>.

² *Risky Business: Effects of New Joint Employer Standards for Small Firms: Hearing before the Subcomm. on Investigations, Oversight and Regulations of the H. Comm. on Small Business*, 114th Cong. (2016) (statement of Danny Farrar, CEO and Founder, SoldierFit), available at <https://smallbusiness.house.gov/calendar/eventsingle.aspx?EventID=398913>.

the increased control franchisers would likely exert over franchisees, that “I would cease to be an independent small business owner ... ultimately, I would become a de facto employee of the corporate brand.”³ These are merely a few examples of the consequences real American small business owners face because of the decisions of Washington regulators and activist judges.

I commend the House Committee on Education and the Workforce in taking the first steps to advance this legislation that is necessary to restore certainty to America’s small business owners and their employees so that they can continue to operate their businesses locally and independently.

Sincerely,

A handwritten signature in black ink that reads "Steve Chabot". The signature is written in a cursive, slightly slanted style.

Steve Chabot
Chairman
Committee on Small Business

³ *Risky Business: Effects of New Joint Employer Standards for Small Firms: Hearing before the Subcomm. on Investigations, Oversight and Regulations of the H.Comm. on Small Business*, 114th Cong. (2016) (statement of Vinay Patel, President and CEO, Fairbrook Hotels).

Chairman BYRNE. Mr. Takano, do you have any closing remarks?

Mr. TAKANO. I do, Mr. Chairman.

I would like to thank the witnesses for their testimony today. And particularly I want to thank Mr. Rubin from my home State of California for clarifying some things for us.

And I just want to say that too many Americans can't afford to buy a house, send their children to college, or save for retirement. It really should not be this way. American workers' productivity has led to tremendous economic growth.

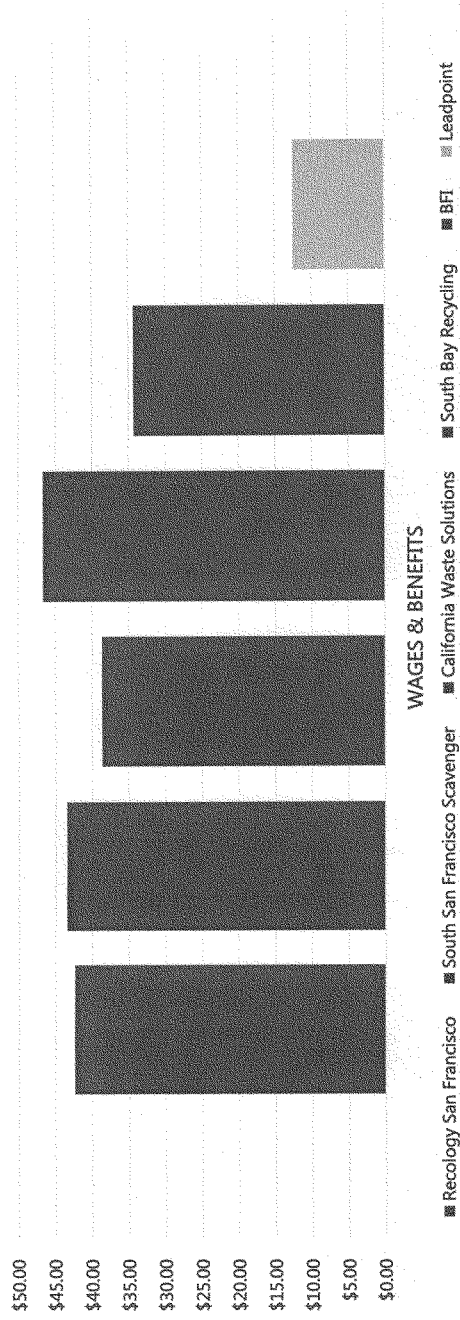
But, unfortunately, the rules are written so that the economy delivers only for those at the very top. Here in Congress, we have the power to fix that. Unfortunately, we seem to have our priorities mixed up. We have held numerous hearings on how to undermine our nation's unions and fundamental labor protections. If we spent the same amount of time, in this committee, working towards building up our nation's workforce as we have spent on destroying unions, I believe we could have come together on a bill to dramatically scale up investments in our nation's workforce through registered apprenticeship programs.

H.R. 3441 is not a good deal for small business owners or small franchises. And it's an even worse bill for workers. I hope we can work together to refocus our priorities, to support and strengthen the rights of our working people in our modern economy.

Mr. Chairman, at this time I would like to ask unanimous consent to insert into the record the slides that Mr. Norcross and I referenced in our opening statements.

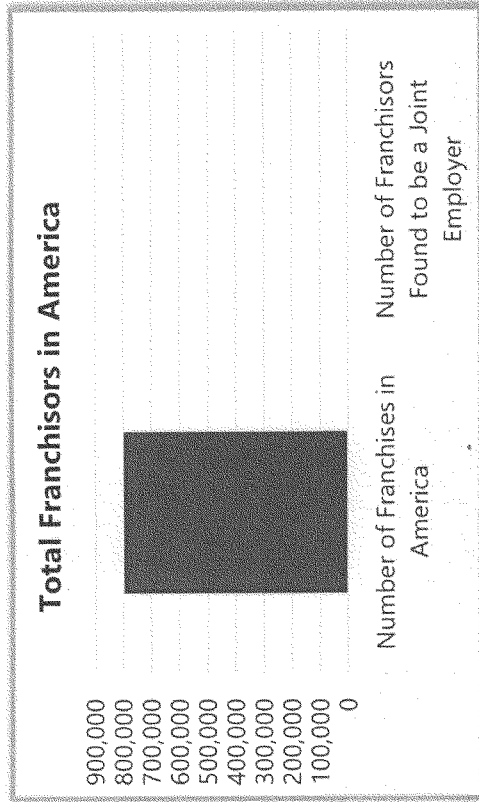
Chairman BYRNE. Without objection, so ordered.

[The information follows:]



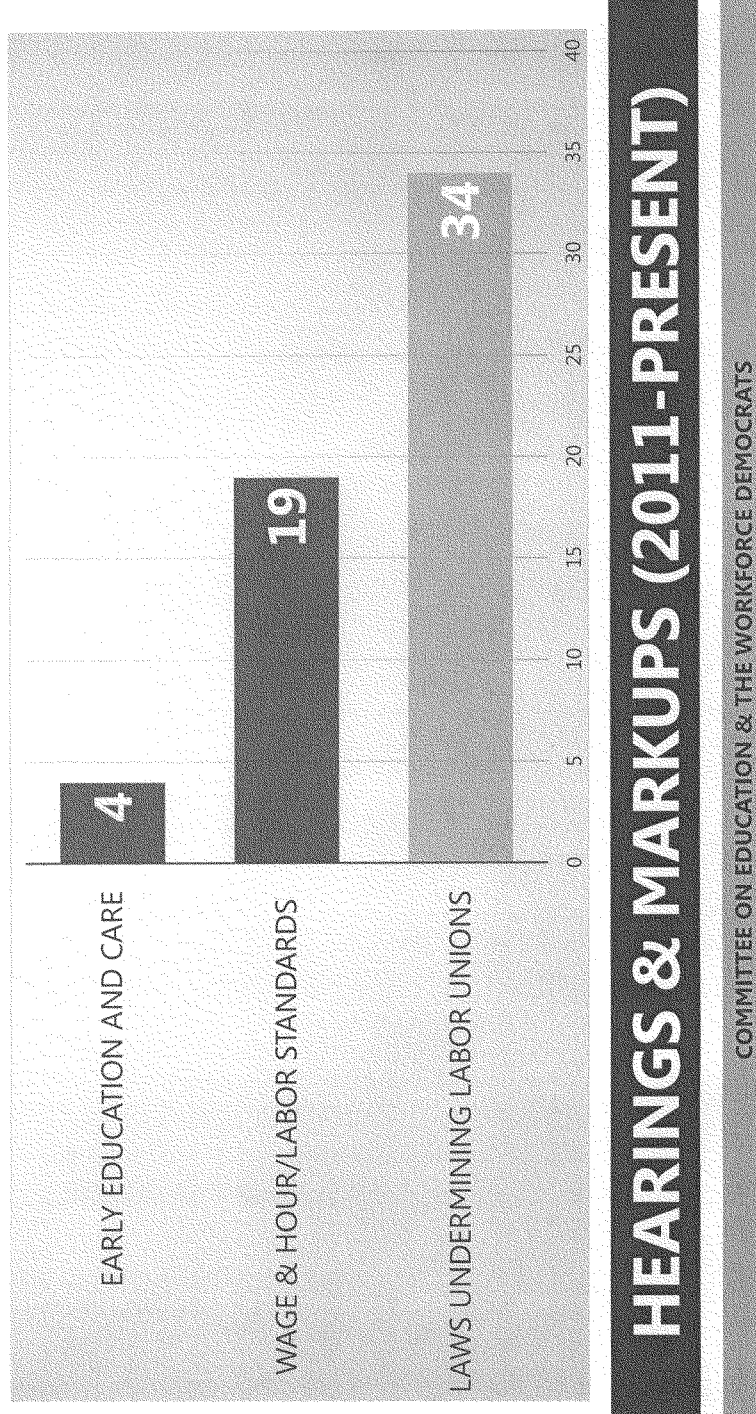
WAGES AND BENEFITS OF SORTERS REPRESENTED BY A UNION COMPARED TO SUBCONTRACTED LEADPOINT WORKERS

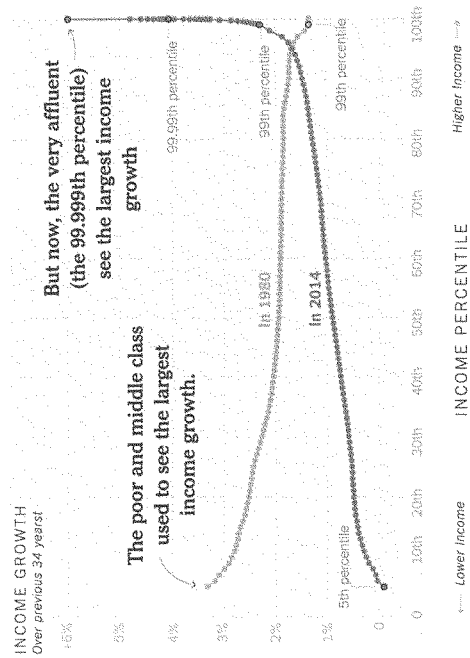
COMMITTEE ON EDUCATION & THE WORKFORCE DEMOCRATS



**NUMBER OF FRANCHISORS FOUND TO BE JOINT
EMPLOYERS SINCE 1935:
ZERO**

COMMITTEE ON EDUCATION & THE WORKFORCE DEMOCRATS





Note: Inflation-adjusted annual average growth using income after taxes, transfers and non-cash benefits.

Over the past four decades, the bottom half of American earners have been denied their fair share of economic growth.

AMERICA'S EXPLODING INEQUALITY

COMMITTEE ON EDUCATION & THE WORKFORCE DEMOCRATS

Mr. TAKANO. And I'd also like to ask unanimous consent to insert two letters opposing H.R. 3441 from the AFL-CIO, and the other, collectively, from the Teamsters, SEIU, UAW, UFW, UFCW, and the USW.

Chairman BYRNE. Without objection, so ordered.
[The information follows:]

AFL-CIO

LEGISLATIVE ALERT

September 7, 2017

Dear Representative:

On behalf of the 12 million working women and men represented by the unions of the AFL-CIO, I am writing to urge you to oppose H.R. 3441, the “Save Local Business Act.”

Proponents of the legislation claim that it is designed to repeal the National Labor Relations Board’s (NLRB’s) 2015 decision in *Browning-Ferris Industries*, in which the NLRB clarified its legal test for determining whether two employers are joint employers of certain employees. In fact, H.R. 3441 rolls back worker protections so they are weaker than when Congress adopted the National Labor Relations Act in 1935 and the Fair Labor Standards Act in 1938. It is harmful legislation that will undermine workers’ pay and protections on the job.

Browning-Ferris concerned a group of workers on a recycling line at a facility owned and operated by Browning-Ferris. The workers were supplied by a staffing agency – Leadpoint. Browning-Ferris controlled the facility, set the hours of operation, dictated the speed of the recycling line, indirectly supervised the line workers, and had authority over numerous other conditions of employment. In order to ensure that the employees’ right to form a union and bargain over workplace issues was protected, the NLRB held that Browning-Ferris was a joint employer of the line workers along with Leadpoint. This fact-intensive decision reflected the realities of the arrangement at Browning-Ferris and was rightly decided in order for the line workers to have a meaningful right to bargain over their terms and conditions of employment.

Before the ink was dry on the *Browning-Ferris* decision, business groups and Republicans in Congress began attacking the decision, claiming it dramatically changed the law and undermined the franchise business model. (Browning-Ferris is not a franchise case, a fact specifically noted by the NLRB in its decision). In fact, the decision did no such thing; it merely clarified and updated the NLRB’s longstanding legal test to better reflect the realities of today’s workplaces.

In our view, the attacks on the *Browning Ferris* decision are overblown and misguided. In today’s fragmented workplaces, with perma-temps, contracted workers, agency employees, and subcontracting becoming ever more prevalent, it is more important than ever to make sure our laws protect workers and ensure they receive the wages they are due and that their right to join with their co-workers to bargain for improvements on the job is protected.

H.R. 3441 takes the law in the opposite direction, instituting a new test for finding employers to be joint employers that is more restrictive than any agency or court has ever adopted. It weakens worker protections and allows corporations to evade their responsibilities to workers.

We urge you to reject this harmful and misguided proposal.

Sincerely,



William Samuel, Director
Government Affairs Department

WS/lkr

American Federation of Labor and Congress of Industrial Organizations

815 16th St., N.W. • Washington, D.C. 20006 • 202-637-5000 • www.aflcio.org

RICHARD L. YRUMKA
PRESIDENT

ELIZABETH H. SHULER
SECRETARY-TREASURER

TEFERE GEBRE
EXECUTIVE VICE PRESIDENT

July 28, 2017

Dear Representative:

We, the undersigned unions representing millions of American workers, are writing to urge you to not support H.R. 3441, the joint employer bill introduced by Representatives Bradley Byrne and Chairwoman Virginia Foxx of the House Committee on Education and the Workforce, which would eliminate the National Labor Relation Board's (NLRB) decision in *Browning-Ferris*, and greatly restrict the definition of employer under the Fair Labor Standards Act. Congress should be working to strengthen the rights of working people and raise wages. The legislation would accomplish the opposite.

Over the past few decades, the middle class has been struggling to stay afloat. As wages have often been stagnant or declining, more and more companies have used middlemen from staffing agencies, labor contractors and to subcontractors to maintain low wages, avoid accountability and prevent a large percentage of workers from organizing. It is important that when workers try to remedy illegal employment practices or organize to join a union that the party calling the shots is at the table and part of the remedy. And indeed, the current state of the law under both under the National Labor Relations Act and the FLSA balances the interests of workers and employers by requiring a fact specific inquiry to determine whether or not there is a joint employer relationship.

This bill seeks to legislate around a century of consistent case law and established joint employer standards in labor and employment law. It redefines the term 'employer' so narrowly that many workers will have no remedy when their employers violate their union rights or wage laws.

The legislation would overturn the Browning Ferris NLRB decision, a case which found a joint employer relationship between Browning Ferris and Leadpoint their subcontractor. In this case, Browning-Ferris, Inc. (BFI), the employer, controlled the speed of the conveyor belt where employees of contractor Leadpoint sorted materials, prohibited Leadpoint from raising wages above a specified cap without BFI's permission, and determined the shift times and the number of people on shifts. Since Leadpoint was unable to negotiate these employment terms among others without BFI approval, the NLRB found BFI must be at the bargaining table along with its subcontractor in order for the union to negotiate a meaningful collective bargaining agreement. The decision was fact specific and in keeping with the realities of today's workplace.

Further, the bill would drastically change the definition of employment relationships under the FLSA which recognizes that more than one business can be an employer. Currently, under the FLSA employers cannot hide behind labor contractors or franchisees, when they set critical conditions of employment. Because the Migrant and Seasonal Agricultural

Worker Protection Act refers to the definition of “employ” in the FLSA, this bill will also impact farm workers seeking to redress wage theft and other employment abuses. It is the FLSA definition of employ that has allowed workers to effectively enforce child labor and other laws and to effectively address sweatshops for decades. Today, it is this definition that offers workers hope that when they organize for a union and better wages that the party that can actually effectuate change is at the table.

We urge you to weigh the interests of workers and stand with them in opposing legislation that would rollback the NLRB’s decision and restrict workers’ rights under the law.

Sincerely,

International Brotherhood of Teamsters (IBT)
 Service Employees International Union (SEIU)
 United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
 United Farm Workers of America (UFW)
 United Food & Commercial Workers International Union (UFCW)
 United Steelworkers (USW)

Mr. TAKANO. Thank you, Mr. Chairman. And that concludes my closing statement.

Chairman BYRNE. Thank you, Mr. Takano.

Well, this has been very useful and helpful, I think, both to the committee and to the House as we consider this particular piece of legislation.

What's really going on here is this is a game. I think we all understand what the game is here. You just heard the two letters that were entered into the record from the largest labor unions in America. It's an effort by the labor unions to try to organize where they haven't been able to organize before. And it's a very calculated game. It started with the Browning-Ferris decision, but certainly the Browning-Ferris decision is going to be used, is being used today in the McDonalld's case to try to get precedent to use to come in and interfere with the employment relationship of small businesses.

Let me make this very clear. This is going to hurt small businesses. I don't hear from big businesses about this. Big businesses have lawyers, and accountants, and all those people to take care of them.

I hear from people like Mr. MacDonald and Ms. Kennedy from my district and all over America. And they know that this is going to hurt them. More importantly, they know what's going to hurt their employees. This is not about the employees of small businesses or the small businesses in America. This is about the big labor unions in America trying to find a way to try to claw themselves back into the position they were in years ago.

Labor unions have continued to lose their percentage of American workers that they represent even after 8 years of a very favorable administration. And this is one more effort that's their attempt to try to get back into some sort of position of strength in America.

I would assert the only way they can get back in strength is by changing their model, not by interrupting or interfering with a model that's worked for small businesses and the employees of small businesses throughout America.

So I think, if anything, the testimony we've heard today has underscored the need for this piece of legislation. I will say to my colleagues that I have open ears and open minds. If they have some suggestions they want to make to me about changes they think that would improve it, I'm happy to listen.

But based upon what I've heard today, it simply has underscored what I've been hearing for months now, which is that we desperately need to pass this law, get certainty and clarity back into that employment relationship, and help small businesses throughout America.

There being no further business, the subcommittees stand adjourned.

[Additional submission by Mr. Takano follows:]



UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Douglas J. McCarron

General President

September 19, 2017

The Honorable Virginia Foxx
Chair
Committee on Education and the Workforce
2262 Rayburn House Office Building
Washington, DC 20515-3305

The Honorable Robert C. Scott
Ranking Member
Committee on Education and the Workforce
1201 Longworth House Office Building
Washington, DC 20515-4603

Re: Opposition to HR 3441, the Save Local Business Act

Dear Chair Foxx and Ranking Member Scott,

I write to respectfully express our opposition to HR 3441, the Save Local Business Act, because it will provide a safe haven for unscrupulous contractors in the construction industry who use a system of subcontractors to deliberately shield themselves from liability for abusing workers and stealing jobs away from law-abiding businesses, even as they knowingly profit from it.

Regrettably, while most companies in the construction industry are legitimate, responsible employers, we are also home to many who excel in illegal employment practices. This fact is well known and widely acknowledged. The trend is for contractors to use subcontractors or labor brokers who either intentionally misclassify employees as independent contractors or, more often, pay employees off the books. They find two benefits in their schemes. First, through violating wage, tax, immigration, workers' compensation and other employment laws, they can shave up to 30 percent off of their labor costs and underbid law-abiding businesses. Second, if laws are enforced, contractors use the subcontract relationship as a shield against liability and replace offending subcontractors or labor brokers with others that will do the same.

There is one vulnerability to their schemes. Under the Fair Labor Standards Act (FLSA) and National Labor Relations Act (NLRA) these contractors are frequently joint employers with their subcontractors or labor brokers. The contractors keep time, supply building materials, discharge workers, provide training and daily supervision.



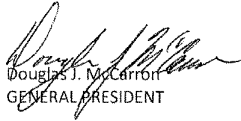
HR 3441 closes that door by making it exceedingly difficult to find joint-employer liability. Under the bill, businesses cannot be joint employers unless they have direct, actual and immediate control over the essential terms and conditions of employment—a remarkable reversal of decades of law. Moreover, a contractor and labor broker need only split up responsibility over essential terms, and joint employment is defeated. Indeed, it is arguable that under such an arrangement there may be no employer at all.

It cannot be forgotten that construction contractors that scheme to cheat workers out of overtime, wages and the right to collective action also fail to comply with federal and state employment tax laws. In Texas alone federal tax losses from cheating contractors has been estimated to cost the federal government over \$1 billion.

This is not to suggest that legitimate, law-abiding contractors should not use subcontractors, or that there are not thousands of legitimate, law-abiding contractors and independent contractors across this country. But it must be recognized that abusive subcontracting schemes as described above are also prevalent in our industry and that this bill would make it even harder to crack down on these illegal practices.

Despite its name, HR 3441 is a blue print to violate the law and drive law-abiding employers out of business and make it more difficult for working men and women to reach the middle class. The law needs to protect workers and responsible businesses --not put them in jeopardy.

Very truly yours,


Douglas J. McCarron
GENERAL PRESIDENT

DJM/km/jb

[Whereupon, at 12:20 p.m., the subcommittees were adjourned.]

