Statement on "Save Local Business Act"
House Education and Workforce Committee
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Farmworker Justice appreciates the opportunity to submit this statement to the House Committee on Education and the Workforce. Farmworker Justice, a national advocacy, education and litigation organization for farmworkers founded in 1981 and based in Washington, D.C. Farmworker Justice has played a leading role in advocacy, education and litigation regarding the joint employer concept to remedy and prevent labor abuses. I am President of Farmworker Justice and have 37 years of experience as an attorney, including at the National Labor Relations Board, Legal Services, in private practice and at this organization.

Farmworker Justice opposes the "Save Local Business Act," HR 3441 because it would remove an important mechanism to protect farmworkers and other low-wage workers from suffering violations of the minimum wage and child labor requirements. The bill would make it extremely difficult to hold two businesses jointly liable as "joint employers" of the same worker or group of workers. This bill, if enacted, would result in massive violations of the minimum wage and other labor abuses that would harm farmworkers and harm the reputation of the entire agricultural sector.

This bill, if enacted, would reverse more than 130 years of knowledge developed in the quest to eradicate sweatshops. The Fair Labor Standards Act of 1938, which sets minimum wage, overtime, and child labor standards, adopted a definition of employment relationships based on 50 years of experience under state laws that evolved to address employers' efforts to evade child labor and other labor laws.

During the mid- to late-1800's states adopted laws to regulate and limit the hours of employment of children and quickly confronted employers' efforts to evade the laws. Business owners that operated a manufacturing plant would claim that the children in the plant were employed solely by a subcontractor within the plant or had been brought to the plant by a parent or sibling and therefore should not be considered to have "employed" the child. Even if the subcontractor or parent were punished, in the absence of liability on the part of the plant operator it would suffer no adverse impact and would be free to find another subcontractor or parent to bring children to do the work. In addition, often a labor contractor lack sufficient assets to pay a court judgement, leaving workers remedy-less.

One of the responses of state legislatures was to adopt a broad definition of employment relationships that imposed employer status on the larger business owner even where there existed a labor intermediary. Numerous states adopted language defining employment relationships that later became the model for the Fair Labor Standards Act of 1938.

The state laws and the FLSA defined employers as entities that directly or indirectly employed a worker and defined the word "employ" as including not just the restrictive common law definition's "right to control test" but also as "to suffer or permit to work." 29 USC §203(g). To "suffer" in this context means to acquiesce in, passively allow or to fail to prevent the worker's work.[1]

This broad definition imposed liability on a company that had the power to prevent the work of the worker from happening and denied the business the ability to hide its head in the sand about what

[1] This use of the word is similar to its use in a well-known Bible verse: "But Jesus said, Suffer little children, and forbid them not, to come unto me: for of such is the kingdom of heaven." Matthew 19:14.

was happening in its business, including where it utilized labor contractors or other intermediaries which were considered employers of those workers. See Goldstein et al., "Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment," 46 UCLA Law Review 983 (1999). The purpose of establishing joint responsibility is also reflected in FLSA's definition of "employer," 29 USC §203(d), "'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee."

The facts in the U.S. Supreme Court's decision in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) illustrate the concept. A slaughterhouse company retained a contractor to assemble a crew of workers to de-bone meat in a special room within the slaughterhouse. The Department of Labor sued the defendant company for recordkeeping and overtime violations. The company denied that it employed the meat de-boners, arguing that the contractor was their sole employer. The Court found that the definition of employment relationships in the FLSA imposed liability on the slaughterhouse.

The Save Local Business Act would alter the longstanding meaning of employment relationships under the FLSA and the National Labor Relations Act. The NLRA excludes agricultural workers from its protections, so I will focus on the FLSA. The FLSA's minimum wage applies to farmworkers on most (but not all) larger farms; small farms generally are excluded from the minimum wage. 29 USC §213(a)(6). Agricultural workers are excluded from overtime pay. 29 USC §213(b)(13)-(16). FLSA prohibits certain types of child labor although it allows large agricultural employers, as well as small family farms, to employ children at younger ages than is allowed in other occupations. Id. at (c)(1)-(2).

The bill would set criteria so onerous that it would be rare for two businesses that shared responsibilities regarding workers to be held to be joint employers; just one business would be held to be an employer. Because the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) refers to the definition of "employ" in the Fair Labor Standards Act, the proposed law may also apply to AWPA. 29 USC §1802(5). AWPA is the principal federal employment law for farmworkers, regulating employment contracts and the use of farm labor contractors.

Many agricultural workers suffer violations of the Fair Labor Standards Act's minimum wage and other basic labor protections. Often, when such workers try to remedy illegal employment practices, they run into a problem: the farm operator that really determines their job terms and has the capacity to prevent abuses, denies that it is their "employer" for purposes of the minimum wage and other labor protections. Instead, the farm operator claims that a "farm labor contractor" or other intermediary is the sole "employer" of the farmworkers on its farm. Often a labor contractor competes for business by promising low labor costs and when sued by victimized workers cannot afford to pay a court judgment.

In most such cases, the definition of employment relationships in the FLSA enables courts and the Department of Labor to ensure compliance with the law by considering the farm operator and the farm labor contractor to be "joint employers" and jointly responsible for meeting FLSA's obligations. This issue has been the subject of numerous lawsuits in which farm operators have been held to be joint employers with their farm labor contractors.

This Committee played a historic role in addressing abuses of migrant workers at the hands of farm operators and their labor contractors and recognized the importance of the joint employer concept in ensuring a law-abiding, prosperous agricultural sector. The Farm Labor Contractor Registration Act of 1964 was passed in part in response to the powerful documentary by Edward R. Murrow, "Harvest of Shame" that aired during Thanksgiving weekend in 1960. Congress revised its provisions and replaced

it with the Migrant and Seasonal Agricultural Worker Protection Act of 1983, 29 U.S.C. §1801 et seq. At the heart of this Committee's motivation was ensuring joint employer responsibility.

"This broad scope of joint employment—and joint employer liability—is one of the AWPA's most important features. The AWPA's legislative history indicates that Congress considered the joint employer doctrine "a central foundation" of this new law. 29 C.F.R. § 500.20(h)(5)(ii); citing House Report, n.2 at 4552. It is the "indivisible hinge" that allows workers to hold accountable all those responsible for violating the AWPA's protections. Id, citing H.R. Rep. 97-885, 97th Cong., 2d Sess.1, reprinted in 1982 U.S.C.C.A.N. 4547, 4552 (1982) ("House Report").

The economic reality is that few farm operators will risk their profitability and the survival of their business by delegating all responsibility to a labor contractor. Most farm operators who engage labor intermediaries exercise substantial decision-making regarding the impact of subcontracted workers on their business. If strawberries or grapes are harvested when they are over-ripe or under-ripe, are subjected to pathogens transmitted on the footwear or hands of farmworkers, or are not handled carefully to prevent bruising, huge financial losses could result. A farm operator generally makes these and other major decisions to ensure its profitability, even if it uses a farm labor contractor, instead of its own supervisor, to ensure that its decisions are carried out. Such farm operators should not be able to avoid complying with the minimum wage or child labor requirements by blaming a labor contractor as the sole employer. In most cases, there is shared responsibility among the farm operator and the labor contractor so that the workers on the farm ensure the profitability of that business. That shared responsibility means shared liability is appropriate.

The joint employer concept does not deprive farms or other businesses of the ability or right to engage labor contractors or other intermediaries such as staffing agencies. Nor does it prevent businesses from entering into agreements that require labor contractors to comply with all employment-law obligations, purchase liability insurance against employment-law claims and hold the larger business harmless for any litigation and liability that may result.

Joint employer liability creates an incentive to ensure that a business selects its labor contractors, as well as its directly-hired supervisors, wisely and ensures compliance with employment laws. In addition to ensuring protections for workers, joint employer liability helps protect law-abiding businesses from unfair competition by unscrupulous employers that keep their labor costs low by using labor contractors that violate employment-related obligations. The joint employer concept is an important, longstanding approach to minimizing sweatshops and its elimination would result in a return to an era in which sweatshops are more prevalent.

The joint employer concept also helps create consumer confidence regarding their purchases. People want to feel good about the food they eat. Agriculture has a reputation for poor treatment of farmworkers that would be exacerbated by the increases in abuses that would flow from this legislation.

Congress should reject the Save Local Business Act because it contradicts 130 years of experience in preventing sweatshops in factories and at least 50 years of consensus regarding policies needed to remedy and prevent abuses of the people who labor on our farms and ranches to produce our food.

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