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United States House of Representatives
Regarding
H.R. 3441, the Save Local Business Act

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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 de-boners 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.