STATEMENT
OF
PAUL DECAMP

ON: **FARMWORKERS, DOMESTIC WORKERS, AND TIPPED WORKERS UNDER THE FAIR LABOR STANDARDS ACT**

TO: **THE UNITED STATES HOUSE OF REPRESENTATIVES,**
COMMITTEE ON EDUCATION AND LABOR,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
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HEARING

FARMWORKERS, DOMESTIC WORKERS, AND TIPPED WORKERS UNDER THE FAIR LABOR STANDARDS ACT

MAY 3, 2021

Good afternoon, Chair Adams, Ranking Member Keller, and distinguished members of the Subcommittee.

Thank you for inviting me to testify at this hearing to address the treatment of farmworkers, domestic workers, and tipped workers under the Fair Labor Standards Act.[1] My testimony will focus on the Subcommittee's consideration of three bills: (1) H.R. 603, the "Raise the Wage Act of 2021"; (2) H.R. 1080 (116th Congress), the "Fairness for Farmworkers Act"; and (3) H.R. 3760 (116th Congress), the "Domestic Workers Bill of Rights Act."

I am a member of the law firm Epstein, Becker & Green, P.C., where I co-chair the national Wage and Hour Practice.[2] I have devoted most of my professional efforts over the past quarter-century to wage and hour issues. In 2006 and 2007, I served as Administrator of the U.S. Department of Labor's Wage and Hour Division, the chief federal officer appointed by the President of the United States responsible for enforcing and interpreting the Nation's wage and hour laws, including the Fair Labor Standards Act (the "FLSA").

My practice focuses on helping businesses pay their people correctly. I have advised clients across the country in a broad range of industries regarding virtually every significant area of wage and hour compliance, including employee versus independent contractor status, classifying workers as exempt or non-exempt for purposes of overtime and minimum wage requirements, identifying compensable work, calculating overtime, providing meal and rest breaks, and more. I also regularly represent businesses in state and federal administrative agency proceedings, as well as class action and other complex litigation matters throughout the United States. Over the past decade, much of my practice has related to issues involving tipped workers, and I have handled numerous matters concerning the treatment of farmworkers and domestic workers under federal and state law.

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[1] I am testifying today in my individual capacity. The opinions expressed in my written and oral testimony are my own and do not necessarily reflect the views of my firm, its attorneys, its clients, or anyone else.

[2] Epstein, Becker & Green, P.C. is a national law firm with approximately 300 attorneys focusing in our core practice areas of employment, labor, and workforce management; health care and life sciences; and litigation. We have close to 150 attorneys in offices across the country advising, counseling, and litigating on behalf of employers large and small, including with respect to the full range of wage and hour issues arising under federal, state, and local laws.

I have testified before Congress on several prior occasions—both during and after my time with the Department of Labor—concerning wage and hour policy and enforcement issues, including before this Subcommittee in 2014. I speak and write on these topics frequently, and I am a member of the *Law360* Employment Editorial Advisory Board and the American Employment Law Council.

In light of the title of this hearing[3], I will begin with a review of the history surrounding the development of the FLSA's provisions involving farmworkers, domestic workers, and tipped workers. Then I will discuss the specific proposals in the Raise the Wage Act of 2021, the Fairness for Farmworkers Act, and the Domestic Workers Bill of Rights Act.

I. HISTORY OF THE FARMWORKER, DOMESTIC WORKER, AND TIPPED WORKER PROVISIONS OF THE FLSA

A. The FLSA as originally enacted: limited coverage, with agricultural employees exempt from minimum wage and overtime

The original version of the FLSA as enacted in 1938[4] applied to only a small portion of the Nation's workforce. This is because the statute required employers to provide minimum wage and overtime only to those employees "engaged in commerce or in the production of goods for commerce[,]"[5] a concept known as "individual coverage." This early version of the law extended these protections only to workers personally engaged in interstate commerce, regardless of the extent to which the employer happened to engage in interstate commerce. Congress enacted the FLSA against the backdrop of significant then-recent skepticism from the Supreme Court regarding the exercise of Commerce Clause power in New Deal legislation, and tying federal authority to impose wage standards to a requirement that an individual employee engage in interstate commerce was an effort to provide a clear basis for Congress to regulate.[6]

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[3] The official title of the hearing is "From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act." I claim no special expertise in determining what is and is not racist, and I defer to the Subcommittee on that matter. My testimony is not meant to accept, and should not be construed as accepting, the premise reflected in the hearing title that the FLSA's treatment of some or all of these groups of workers is, in fact, racist. More specifically, my testimony in no way questions the motives or good faith of any current or former member of Congress, or of Congress collectively. My working assumption, in the absence of compelling evidence to the contrary, is that Congress acts in good faith and with non-discriminatory motives. Instead, my remarks today address the history of the FLSA, followed by a discussion of the policy implications of H.R. 603, H.R. 1080 (116th Congress), and H.R. 3760 (116th Congress). It is, of course, entirely appropriate for the Subcommittee to consider the effects of the FLSA on the Nation's workers, including exploring areas where the laws may have disproportionately adverse consequences, whether intended or unintended, for particular groups.

[4] The 75th Congress, which enacted the FLSA in 1938, was overwhelmingly Democratic, with the House consisting of 334 Democrats and 88 Republicans, plus an additional 13 members of other parties. The Senate consisted of 74 Democrats and 17 Republicans, plus three members of other parties.

[5] Fair Labor Standards Act of 1938, Pub. L. ch. 676, § 6(a), 52 Stat. 1060, 1062 (June 25, 1938) (minimum wage requirement); *see also id.* § 7(a), 52 Stat. at 1063 (identical verbiage for overtime requirement).

[6] The drafters repeatedly voiced concerns about federal power in this area. A House committee report on an early draft of the bill stated that "[t]he bill has been drafted in accordance with the principles of constitutional law, particularly those enunciated in the recent minimum wage and Labor Relations Board decisions of the Supreme Court of the United States[,]" and noted that the legislation "applies only to industries engaged in the production of goods for interstate commerce and directly affecting interstate commerce. It does not affect the purely local intrastate business."

The 1938 text of the FLSA set forth ten exemptions from both the minimum wage and overtime requirements, and one of those exemptions applied to "any employee employed in agriculture."[7] Although the committee reports do not discuss the rationale for this exemption, there seem to be at least a few explanations for the decision to exempt these workers from minimum wage and overtime in the original FLSA. Farm work has, historically, required long hours, often during compressed harvesting seasons. In addition, farm laborers in the 1930s often received food and housing, unlike in many other industries then or now. Moreover, piece-rate compensation has long been common in farming, providing workers an incentive to work quickly and ensuring additional pay for each hour of work. In addition, much of the farm work happening in the 1930s involved small farms that brought their products to local markets, thereby potentially keeping employees of those farms beyond the reach of the law's individual coverage standard in the first place.[8]

The limited coverage of the 1938 version of the FLSA also prevented the law from applying to employees of restaurants and hotels, the kinds of establishments where tipping has been most common. By the same token, domestic employees—i.e., those who perform services in or around the residence of another—were outside the scope of the law's original coverage provisions. To the Congress of 1938, it was all but inconceivable that the Commerce Clause would allow federal regulation of the wages and hours of household employees.[9]

H. Rep. No. 75-1452, at 9 (1937). Eight months later, the same committee described the bill as "provid[ing] for the establishment of fair labor standards in employments in and affecting interstate commerce" and cautioned that "[t]he Federal Government cannot and should not attempt to regulate the wages of all wage earners throughout the United States." H. Rep. No. 75-2182, at 1, 6 (1938). Echoing these concerns, the Senate noted that "[t]he bill carefully excludes from its scope business in the several States that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce." S. Rep. No. 75-884, at 5 (1937).

[7] Pub. L. ch. 676, § 13(a)(6), 52 Stat. at 1067. The very next exemption addressed "any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14[,]" *id.* § 13(a)(7), 52 Stat. at 1067, which in turn authorized the newly-created Wage and Hour Administrator "to the extent necessary in order to prevent curtailment of opportunities for employment" to issue "regulations or . . orders provid[ing] for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages . . . , and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates." *Id.* § 14, 52 Stat. at 1068. The original FLSA also set forth two exemptions from just the overtime requirement but not the minimum wage requirement. *See id.* § 13(b). 52 Stat. at 1068.

[8] Over the years, the agriculture exemption has changed in various ways. The minimum wage and overtime exemption in section 13(a)(6) now applies to a more limited set of workers, including employees of small farms, family members of farmers, hand harvest laborers paid on a piece rate, and workers engaged in range production of livestock. *See* 29 U.S.C. § 213(a)(6). There are also overtime-only exemptions for various other categories of agricultural workers, including at FLSA section 13(b)(12)-(16) and 13(h)-(j). *See* 29 U.S.C. § 213(b)(12)-(16), (h)-(j).

[9] It was not until *Wickard v. Filburn*, 317 U.S. 111 (1942), that the Supreme Court adopted a much more expansive conception of Congress's authority under the Commerce Clause, allowing federal legislative authority to attach based on the effect that aggregations of a multitude of small local actions can have on interstate commerce, rather than looking at each local action in isolation.

B. The 1961 FLSA amendments: enterprise coverage, with employees of hotels, motels, and restaurants exempt from minimum wage and overtime

In 1961, Congress amended the FLSA in several key respects.[10] First, Congress expanded the law's coverage by creating a second basis for the law to apply to a worker: employment "in an enterprise engaged in commerce or in the production of goods for commerce[,]"[11] a concept referred to as "enterprise coverage." The 1961 amendments limited enterprise coverage to businesses that, depending on their industry, had minimum annual sales or revenues at levels ranging from $250,000 to $1,000,000.[12]

The stated legislative purpose behind the enterprise coverage dollar thresholds was "a way of saying that anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under this law."[13] By the same token, Congress indicated that the enterprise coverage standard should protect "small local independent business"[14]—"so-called 'mom and pop' stores[.]"[15]

Given the new significantly enlarged scope of the FLSA, Congress created several new exemptions, including a minimum wage and overtime exemption for employees of "a hotel, motel, restaurant, or motion picture theater"[16] and another for "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs[.]"[17] Together, these two new exemptions had the effect of continuing to keep many, likely the vast majority, of tipped employees outside the scope of the FLSA's minimum wage and overtime protections. As to those workers, the 1961 amendments did not change their substantive rights under federal law, but rather maintained their status as beyond the reach of the FLSA.

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[10] Like the 75th Congress in 1938, the 87th Congress, which enacted the 1961 FLSA amendments, was overwhelmingly Democratic. The House had 262 Democrats and 175 Republicans, while the Senate had 64 Democrats and 36 Republicans.

[11] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 5(b) (minimum wage requirement), 75 Stat. 65, 67 (May 5, 1961); *see also id.* § 6(a) (same verbiage added for overtime requirement), 75 Stat. at 69.

[12] *See id.* § 2(c) (adding, *inter alia*, new FLSA sections 3(r) and 3(s), which define the terms "enterprise" and "enterprise engaged in commerce or in the production of goods for commerce"), 75 Stat. at 65-66. Congress has modified the annual dollar volume threshold for enterprise coverage over the years. The current standard is $500,000. *See* 29 U.S.C. § 203(s)(1)(A)(ii).

[13] S. Rep. No. 87-145, at 5 (1961).

[14] *Id.* at 41.

[15] *Id.* at 45.

[16] Pub. L. No. 87-30, § 9 (adding new FLSA section 13(a)(2)(ii)), 75 Stat. at 71.

[17] *Id.* (adding new FLSA section 13(a)(20)), 75 Stat. at 73.

C. The 1966 FLSA amendments: employees of hotels, motels, and restaurants now subject to minimum wage, with introduction of the tip credit

In 1966, Congress once again expanded the reach of the FLSA[18], this time by applying the law's protections to an estimated 7.2 million workers previously not subject to minimum wage or overtime.[19] This time, Congress eliminated the complete exemption for hotel, motel, and restaurant employees and in its place created an overtime-only exemption for workers at those establishments, rendering those employees subject to the FLSA's minimum wage for the first time.[20]

With a large number of tipped employees newly subject to the FLSA's minimum wage provisions as a result of these amendments, Congress also created the tip credit, whereby under certain circumstances employers could receive credit for up to 50% of the minimum wage based on tips their employees receive.[21] Congress indicated its intent not to disrupt existing pay practices in the industries where tipping is common: "The committee believes that the tip provisions are sufficiently flexible to permit the continuance of existing practices with respect to tips."[22]

D. The 1974 amendments: domestic service employment first covered by the FLSA, with live-in domestic workers exempt from overtime, and phase-out of overtime exemption for employees of hotels, motels, and restaurants

In 1974, Congress extended the reach of the FLSA even further[23], this time to an estimated 1,285,000 employees in domestic service.[24] Congress added the following statement to the FLSA in order to make the case for federal authority to legislate as to these workers: "Congress further finds that the employment of persons in domestic service in households affects commerce."[25] The amendments extended the FLSA's minimum wage protection to "[a]ny employee . . . who in any workweek is employed in domestic service in a household" or "who in any workweek . . . is employed in domestic service in one or more households, and . . . is so employed for more than 8

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18 The 89th Congress, which enacted the 1966 FLSA amendments, saw a more than two-to-one ratio by party. The House had 295 Democrats and 140 Republicans, and the Senate had 68 Democrats to 32 Republicans.

19 S. Rep. No. 89-1487 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3005.

20 Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 201(a) (modifying section 13(a)(2)), (b)(1) (creating new section 13(b)(8) exemption), 80 Stat. 830, 833 (1966). The amendments also repealed the former section 13(a)(20) exemption and replaced it with a new overtime-only exemption covering the same employees as the former section 13(a)(20) exemption. *See id.* § 210(a)-(b) (creating new section 13(b)(18) exemption), 80 Stat. at 837

21 *See id.* § 101(a) (amending the definition of "wage" under FLSA section 3(m) to include tips under certain circumstances), (b) (adding new FLSA section 3(t) defining "Tipped employee"), 80 Stat. at 830. Amendments to the FLSA in 1996 fixed the minimum cash wage for tipped employees at 50% of the minimum wage then in effect—meaning $2.13 per hour in light of the then-current $4.25 minimum hourly wage—and that minimum cash wage for tipped employees remains in effect to this day. *See* 29 U.S.C. § 203(m)(2)(A)(i).

22 S. Rep. No. 89-1487, *as reprinted in* 1966 U.S.C.C.A.N. 3002, 3014.

23 The 93d Congress, which enacted the 1974 FLSA amendments, consisted of a House with 242 Democrats, 192 Republicans, and one member from a third party, while the Senate had 56 Democrats, 42 Republicans, and one member from a third party.

24 H. Rep. No. 93-913 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 2811, 2842.

25 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(a), 88 Stat. 55, 63 (1974).

hours in the aggregate[.]"[26] The amendments also extended overtime protection to these workers.[27] The legislative history cited Department of Labor statistics indicating that more than half of all domestic workers work less than 15 hours per week, that only about one in ten works more than 40 hours a week, that "the great preponderance of the household workforce is comprised of female employees," and that "the median age of the household worker has climbed to 50, or 10 years older than the average for female workers."[28]

Congress chose, however, to provide exemptions for two groups of household workers. First, the 1974 amendments created a minimum wage and overtime exemption for "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves[.]"[29] Second, these amendments created an overtime-only exemption for "any employee who is employed in domestic service in a household and who resides in such household[.]"[30]

With respect to tipped workers, the 1974 amendments accomplished two significant changes. One change involved revising the conditions on taking the tip credit, shoring up protections for tipped workers relative to the 1966 version of the provision.[31] The other change involved phasing out over a three-year period the overtime exemptions for hotel, motel, and restaurant employees[32], as well as phasing out the overtime exemption for food service and catering employees over a two-year period.[33]

II. THE RAISE THE WAGE ACT OF 2021 WOULD INCREASE THE MINIMUM WAGE TOO HIGH, TOO QUICKLY, THEREBY INCREASING UNEMPLOYMENT, AND WOULD HARM TIPPED EMPLOYEES AS WELL AS LEARNERS AND INDIVIDUALS WITH DISABILITIES.

A. The proposed increase to the general federal minimum wage would harm the very workers the bill is supposed to help, without offering significant benefit to families in need.

Section 2 of H.R. 603 proposes an immediate increase in the federal minimum wage from $7.25 to $9.50 per hour, with annual increases thereafter to $11.00, $12.50, $14.00, and $15.00, followed by annual updates determined by the Secretary of Labor beginning in five years. This proposal is both unnecessary and harmful to the country's workers.

Economists have long debated whether and to what extent increases in the minimum wage adversely affect employment. The public policy dilemma is how to weigh wage increases for some

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26 *Id.* § 7(b)(1) (creating new FLSA section 6(f)), 88 Stat. at 63.

27 *Id.* § 7(b)(2) (creating new FLSA section 7(*l*)), 88 Stat. at 63.

28 H. Rep. No. 93-913, *as reprinted in* U.S.C.C.A.N. at 2842.

29 Pub. L. No. 93-259, § 7(b)(3) (creating new FLSA section 13(a)(15)), 88 Stat. at 63.

30 *Id.* § 7(b)(4) (creating new FLSA section 13(b)(21)), 88 Stat. at 63.

31 *Id.* § 13(e)) (amending the tip credit provision in FLSA section 3(m)), 88 Stat. at 66.

32 *See id.* § 13(a)-(d) (phasing out the FLSA section 13(b)(8) exemption), 88 Stat. at 66.

33 *See id.* § 15 (phasing out the FLSA section 13(b)(18) exemption), 88 Stat. at 67.

workers against job loss and reduced employment opportunities for others. I am not an economist, and I certainly do not claim to have a clear answer to these questions.

One proposition that seems to be relatively uncontroversial, however, is that the magnitude of a minimum wage increase bears on the extent to which individuals will lose jobs as a result. In July 2019, the non-partisan Congressional Budget Office ("CBO") published a study examining various scenarios in which the federal minimum wage increases in increments over a six-year period.[34] In the scenario where the minimum wage increases to $10 per hour, CBO's median estimate is that there would be "no effect on employment in an average week in 2025."[35] Where the increase is to $12, CBO projected approximately 300,000 job losses.[36] But where the increase is to $15, CBO anticipated that *1.3 million* people would lose their job or drop out of the workforce as a result.[37]

More recently, the CBO studied the economic impact of the Raise the Wage Act of 2021.[38] The CBO projects that if this bill were to become law, the number of individuals in poverty would decline by roughly 900,000, but that approximately *1.4 million* people would lose their jobs or drop out of the workforce.[39] According to the CBO, "[y]oung, less educated people would account for a disproportionate share of those reductions in employment."[40] And "[f[or families that lose employment because of the increase in the minimum wage, real income would fall[,]" with the effect "concentrated in the lowest quintile, or fifth, of the distribution of family income."[41]

Moreover, the CBO also projected a resulting increase in the federal budget deficit of $54 billion, coupled with "[h]igher prices for goods and services—stemming from the higher wages of workers paid at or near the minimum wage, such as those providing long-term health care[.]"[42] According to the CBO, "[h]igher wages would increase the cost to employers of producing goods and services[,]" causing those businesses to "pass some of those increased costs on to consumers in the form of higher prices, and those higher prices, in turn, would lead consumers to purchase fewer goods and services[,]" putting pressure on employers "to reduce their employment of workers at all wage levels."[43] In addition, the CBO observed, "[w]hen the cost of employing low-wage workers goes up, the relative cost of employing higher-wage workers or investing in machines and

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34 Congressional Budget Office, *The Effects on Employment and Family Income of Increasing the Federal Minimum Wage* (July 2019).

35 *Id.* at 4.

36 *Id.*

37 *Id.* at 1.

38 Congressional Budget Office, *The Budgetary Effects of the Raise the Wage Act of 2021* (Feb. 2021).

39 *Id.* at 2. More specifically, 1.4 million is the average projection, and the CBO estimates a one-third chance that employment losses would be as high as 2.7 million. *See id.* at 9.

40 *Id.* at 8.

41 *Id.* at 9.

42 *Id.* at 1.

43 *Id.* at 8.

technology goes down[,]" which will cause employers to "respond to a higher minimum wage by shifting toward those substitutes and reducing their employment of low-wage workers."[44]

It is also important to consider which workers earn the minimum wage. In the public debate over minimum wage, a common assertion is that the minimum wage should be at a level where a full-time worker, perhaps as the sole wage earner for a family, will not fall below the poverty level. Yet the data do not support this picture of families struggling in poverty because of the minimum wage. According to the Bureau of Labor Statistics ("BLS"), of the 73.3 million workers in the United States in 2020 age 16 and older who earn hourly wages, only about 1.1 million individuals earn at or below the federal minimum wage, or just 1.5 percent of all hourly-paid workers.[45] Fully 48 percent of minimum wage workers are under age 25.[46] Seven out of ten of these workers are in "service occupations, mostly in food preparation and serving related jobs."[47] The fact that most of those workers are in food service indicates that a significant number of these workers are tipped employees, whose "wages" according to BLS would equal the minimum wage[48], but whose *total earnings* routinely—and substantially—exceed the minimum wage, as discussed in the next section.

Although the precise effect on employment, the federal deficit, and inflation associated with the proposed increase to the minimum wage is probably unknowable ex ante, what does seem clear is that the proposed steep increase in the minimum wage, which would more than double the current level in just four years, will cost a great many people their jobs, or drive them from the workforce altogether. The people who will bear the brunt of these reduced job opportunities will be younger workers and individuals in the lowest income group. Meanwhile, the main beneficiaries of these minimum wage increases would not be working single parents struggling to help their families escape poverty, but rather high school and college kids, younger workers without families, and restaurant workers who have total earnings, including tips, well above minimum wage.

In addition, the Subcommittee should consider how the burden of these minimum wage increases would affect different localities in different ways. There may be high-wage cities and regions where a minimum wage of $15 per hour might have little or no effect on employment. In some markets, the local economy can probably support that kind of wage structure without costing people their jobs. But in many parts of the country, particularly in rural areas and the South, the economic conditions simply cannot sustain these kinds of wage levels. A minimum wage level that may already be in line with the market norms in New York City, San Francisco, or Boston would in all likelihood be devastating in Alabama, Mississippi, Arkansas, and many other parts of the country.

A further consideration is the nature of the industries where these minimum wage workers find their employment. Businesses such as restaurants, hotels, and movie theaters, which employ a high proportion of minimum wage workers, have been especially hard hit by the COVID-19

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44 *Id.*

45 U.S. Bureau of Labor Statistics, *Characteristics of Minimum Wage Workers, 2020*, Report 1091, at 1 (Feb. 2021).

46 *Id.*

47 *Id.* at 2.

48 *Id.* at 25 ("Hourly earnings for hourly paid workers do not include overtime pay, commissions, or tips received.").

pandemic.[49] Many of those businesses have closed permanently, while many others struggle to remain solvent. A sharp wage increase now would, for a large number of businesses, represent the death knell. Now is just not the time to make things even more difficult for these businesses as they try to keep their doors open. If those businesses fail, workers lose even more jobs.

B. The proposed elimination of the tip credit would harm tipped workers, not help them.

Section 3 of the bill proposes an immediate increase in the minimum cash wage for tipped employees from $2.13 to $4.95 per hour, followed by annual increases in increments of $2.00 per hour or such lesser amount as is necessary to bring the tipped wage up to the full minimum wage, at which point the tip credit provisions of the FLSA would be repealed. This proposal would not make tipped employees better off; to the contrary, they would earn less as a result. Restaurant workers have repeatedly demonstrated that they prefer the tip credit.

Two recent studies examine the data regarding tipped employees, taking into consideration not only the hourly wages and tip credit, which together constitute the employees' "wages" under the FLSA, but also their tips, thereby painting a much more complete picture of their economic circumstances.[50] These reports make several key findings:

First, tipped workers have *total* earnings (i.e., including tips) that average $14.32 per hour, nearly twice the current federal minimum wage.[51]

Second, eliminating the tip credit while raising the minimum wage to $15 per hour will cost *one in three* tipped workers, or more than 693,000 individuals, their jobs.[52]

Third, as tipped minimum wages increase, customer tipping decreases. States with lower tipped minimum wages see higher average tip percentages than states with higher tipped minimum wages.[53]

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[49] For example, the hotel industry reports that it lost "more than 670,000 direct hotel industry operations jobs and nearly 4 million jobs in the broader hospitality industry . . . due to the pandemic." American Hotel & Lodging Association, *AHLA's State of the Hotel Industry 2021*, at 4 (Jan. 2021). And "in the first 12 months of the pandemic, restaurant and foodservice sales are down $270 billion from expected levels" as "[r]estaurants are still down two million jobs (or 16 percent)" relative to pre-COVID levels, while "[a]pproximately 17 percent of restaurants (which is about 110,000 restaurants) have closed permanently or long-term." Comments from the Restaurant Law Center and the National Restaurant Association, submitted through www.regulations.gov, regarding the Department of Labor's Tip Regulations Under the Fair Labor Standards Act, at 12 (RIN 1235-AA21) (April 13, 2021).

[50] *See* Rebekah Paxton, *The Case for the Tip Credit: From Workers, Employers, and Research* (Employment Policies Institute Feb. 2021); David Neumark & Maysen Yen, *Tipped Workers, Minimum Wage Workers, and Poverty: Analyzing the Redistributive Impact of Eliminating Tip Credits* (Employment Policies Institute Feb. 2021).

[51] Paxton at 1.

[52] *Id.*

[53] *Id.* at 6.

Fourth, when the tipped minimum wage increases, restaurants shift their hiring preferences and elect to hire "higher-educated or higher-skilled workers, pricing out lower-skilled workers[,]" thereby harming "young, lower-educated workers[.]"[54]

Fifth, when faced with the alternatives of tipped employment subject to the tip credit or all-in menu pricing with no tipping, *97 percent* of tipped employees prefer the tipping option.[55]

Sixth, 81% of restaurant customers prefer traditional tipping to "no-tip alternatives."[56]

Seventh, numerous restaurants that have shifted to a no-tip approach have found themselves forced to return to a tipping model due to high numbers of employees leaving to pursue other employment opportunities that allow for tips.[57]

Eighth, tipped workers are approximately 40% less likely than other nominally minimum wage workers to fall below the poverty line.[58]

Taken together, these findings confirm that the tip credit does not harm worker; it helps them. When given the choice, tipped employees prefer tipped employment to non-tipped employment. The tip credit provisions of the FLSA ensure that tipped employees are no worse off than other minimum wage employees, and the reality of tipping practices leads to tipped employees receiving total earnings nearly double those of the typical minimum wage employee. Ending the tip credit will help no worker or consumer. Moreover, no worker who wants an hourly wage at or above minimum wage needs to choose a tipped position. Workers seek out tipped jobs precisely because these positions offer the opportunity to achieve significant total earnings.

And, as noted in the previous section, now is not the time for imposing major changes on how restaurants must pay their workers, including substantially increasing the restaurants' out-of-pocket labor costs. The public would be better served by finding solutions to ensure that restaurants remain open so that they can continue to serve their customers and employ their workforce.

C. The proposed elimination of the special minimum wage for learners would make it more difficult for younger workers to obtain jobs.

Section 4 proposes an immediate increase in the minimum wage for newly hired employees who are less than 20 years old from $4.25 to $6.00 per hour, followed thereafter by annual increases in increments of $1.75 or such lesser amount as is necessary to bring the training wage up to the full minimum wage, at which point the separate wage provisions for these workers would be repealed. As a public policy matter, this proposal is rather difficult to understand.

The whole purpose behind allowing these special minimum wages in the first place was to create opportunities for younger workers, to make it easier for them to find that first job. The

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54 *Id.* at 7.

55 *Id.* at 1.

56 *Id.*

57 *Id.* at 11-12.

58 Neumark & Yen at 1, 9-11.

proposal would put these new workers on an equal footing with more seasoned and experienced workers. In short, why would an employer choose to hire a new, inexperienced worker when for the same money the employer could select a more experienced worker? Federal wage and hour policy has for more than 80 years recognized the importance of creating opportunities for new workers to enter the workforce.[59] Eliminating this learner wage option will simply make it that much more difficult for young workers to succeed in the workplace.

D. The proposed elimination of the special minimum wage for workers with disabilities would make it prohibitively expensive to hire individuals with significant physical or mental impairments that limit their productive capacity.

Section 6 proposes an immediate increase in the minimum wage for employees "whose productive capacity is impaired by age, physical or mental deficiency, or injury" under section 14(c) of the FLSA to $5.00 per hour, followed thereafter by annual increases of $2.50 per hour, until this rate converges with the federal minimum wage in five years, at which point the section 14(c) program sunsets. This proposal is even more difficult to square with sound policy than was the proposal in the preceding section.

The purpose behind the FLSA section 14(c) program is to provide an economic incentive for employers to hire individuals who, for a variety of reasons, suffer from a diminished capacity to engage in productive work. The section 14(c) program has created countless opportunities for individuals with a broad range of disabilities to obtain gainful employment and to experience the dignity of work, rather than being priced out of the labor market due to their lesser productive capacity. Requiring employers to pay full minimum wage to workers who may be able to produce at only a fraction of the capacity of other workers all but ensures that work opportunities for these individuals will disappear. If a business has the choice of paying $15 an hour to someone with a typical productive capacity or paying that same wage to someone limited to producing 30%, 50%, or even 80% less work, what rational economic actor would hire the less productive worker? One certainly hopes that altruism and generosity would cause some employers to select the worker with disabilities nevertheless, but experience strongly suggests that the net result of this proposal would be to drive large numbers of individuals with disabilities from the workforce.

III. THE FAIRNESS FOR FARM WORKERS ACT WOULD INCREASE THE COST OF AGRICULTURAL PRODUCTION, THEREBY RAISING THE PRICE OF FOOD AND PUTTING AMERICAN FARMS AT A COMPETITIVE DISADVANTAGE RELATIVE TO NON-U.S. AGRICULTURAL PRODUCERS.

H.R. 1080 (116th Congress) would, over a period of years, completely eliminate nearly every aspect of the FLSA's various minimum wage and overtime exemptions for agricultural employees, except for a farmer's immediate family members. Even though the nature of agricultural work, especially harvesting, requires long hours during relatively short seasons, defies the work-spreading public policy underlying the FLSA's 40-hour workweek standard,[60] thus rendering these jobs

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[59] *See supra* note 7.

[60] When Congress enacted the FLSA, the national unemployment rate stood at around 20%. The 50% overtime wage premium encourages employers to shift hours away from employees who would otherwise work more than 40 hours in a week and instead to assign that work to other workers, which may involve hiring more employees. As the

generally inappropriate for overtime, the proposal would force farmers to choose between incurring dramatically higher labor costs or else trying—likely in vain—to find sufficient additional laborers in order to avoid incurring the requirement of paying premium wages for overtime hours.

Extending an overtime requirement to most of this work will have two virtually inevitable results. First, the increased labor costs that farmers incur will force them to raise their prices, which will in turn result in higher food prices to consumers at the grocery store and in restaurants. Second, these increased costs and prices will put American farms at a competitive disadvantage relative to non-U.S. agricultural producers who are not subject to similar overtime requirements. By making foreign-grown food products relatively less costly compared to American produce, the proposal would lead to a loss of sales and revenue for American farmers, making it even more difficult to pay the higher wages mandated by H.R. 1080. Indeed, smaller independent farming operations and family farms would likely suffer the most, as they are less able to absorb higher costs or lower profits than larger, more robustly financed corporate farming conglomerates.

This proposal is harmful to American consumers, American farmers, and ultimately the workers who need jobs from farmers who find themselves driven out of business.

IV. THE DOMESTIC WORKERS BILL OF RIGHTS ACT IMPOSES INAPPROPRIATELY HEAVY COMPLIANCE BURDENS ON FAMILIES AND INVITES A CONSTITUTIONAL CHALLENGE.

H.R. 3760 (116th Congress) proposes many changes to a variety of laws, and I will focus my testimony on a few key provisions. First, section 101 would repeal the FLSA's section 13(b)(21) exemption for live-in domestic employees. Second, Subtitle B would impose on the families employing domestic workers a host of compliance obligations, including written agreements, sick days, scheduling restrictions, meal and rest breaks, and more. Third, section 131 would reduce the coverage threshold for Title VII of the Civil Rights Act of 1964 from a minimum of 15 employees to just one employee.

Setting aside the question whether these proposals represent sound public policy—while obviously acknowledging that harassment and discrimination based on protected status are wrong regardless of the size of the employer—perhaps the most important question for the Subcommittee is whether imposing such a detailed and demanding set of obligations on families who locally hire individuals to provide services in their home truly implicates a legitimate *federal* interest within the scope of Congress's enumerated powers. It seems fairly clear that at least some members of the Supreme Court would likely view this legislation as an overreach inconsistent with the framers' original intent and beyond the Commerce Clause power. Indeed it is difficult to imagine a better test case for seeking to overturn *Wickard v. Filburn*—the 1942 decision that accepted the view that the federal government can regulate purely local activities so long as the sum of those local activities in the aggregate across the entire country has an effect on interstate commerce[61]—than a federal statute that extensively regulates conduct occurring primarily or even exclusively within private residences. I respectfully suggest to the Subcommittee that it is better to avoid this potentially

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Supreme Court explained in *Bay Ridge Operating Co. v. Aron*, 334 U.S. 446 (1948), one of the key purposes of the FLSA's "maximum number of hours" is "to spread employment through inducing employers to shorten hours because of the pressure of extra cost." *Id.* at 460.

[61] *See supra* note 9.

thorny and far-reaching constitutional complication by keeping the federal government out of people's homes.

V. CONCLUSION

For these reasons, I encourage the Subcommittee to reject these three bills. There is an inadequate factual record to support any of this legislation, the likely results would be far more harm than good, and in key respects the proposals raise significant constitutional concerns. Chair Adams, Ranking Member Keller, and members of the Subcommittee, thank you for the opportunity to share these views with you today. Please let me know what else I can do to help you in this matter.