STATEMENT
OF
PAUL DECAMP

ON: **ESSENTIAL BUT UNDERVALUED: EXAMINING WORKPLACE PROTECTIONS FOR DOMESTIC WORKERS**

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
SUBCOMMITTEE ON WORKFORCE PROTECTIONS

HEARING

ESSENTIAL BUT UNDERVALUED: EXAMINING WORKPLACE PROTECTIONS FOR DOMESTIC WORKERS

JULY 28, 2022

Good morning, 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 domestic workers under federal employment statutes.[1] My testimony will focus on the Subcommittee's consideration of H.R. 4826, 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 years I have handled numerous matters concerning the treatment of 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 330 attorneys focusing in our core practice areas of employment, labor, and workforce management; health care and life sciences; and litigation. We have roughly 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 2007, 2014, and 2021. 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.

Today I testify in opposition to H.R. 4826. The legislation seeks to advance clearly laudable and important goals of protecting vulnerable workers in domestic service from a wide range of harms that these individuals should never have to face. This particular bill, however, is not the way to accomplish that result. H.R. 4826 would impose extraordinary costs and burdens on the families who employ these workers far out of proportion to any benefit the workers would receive, while at the same time all but ensuring a constitutional challenge that could result in the sharp curtailing of congressional power under the Commerce Clause. Instead, state and local laws, which have already begun to address these concerns, are the best method to ensure that domestic service workers receive the wages and working conditions that they deserve.

I. HISTORY OF THE DOMESTIC WORKER PROVISIONS OF THE FLSA

A. The FLSA as originally enacted: limited coverage

The original version of the FLSA as enacted in 1938 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[,]"[3] 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.[4]

The limited coverage of the 1938 version of the FLSA prevented the law from applying to domestic employees—i.e., those who perform services in or around the residence of another. To the

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[3] 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).

[4] 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." 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).

Congress of 1938, it was all but inconceivable that the Commerce Clause would allow federal regulation of the wages and hours of household employees.[5]

B. The 1961 FLSA amendments: enterprise coverage

In 1961, Congress amended the FLSA in several key respects. 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[,]"[6] 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.[7]

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."[8] By the same token, Congress indicated that the enterprise coverage standard should protect "small local independent business"[9]—"so-called 'mom and pop' stores[.]"[10] These amendments, while expanding the bases for FLSA coverage, did not reach domestic service employment.

C. The 1974 amendments: domestic service employment first covered by the FLSA, with live-in domestic workers exempt from overtime

In 1974, Congress extended the reach of the FLSA even further, this time to an estimated 1,285,000 employees in domestic service.[11] 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."[12] 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

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5 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.

6 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.

7 *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).

8 S. Rep. No. 87-145, at 5 (1961).

9 *Id.* at 41.

10 *Id.* at 45.

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

12 Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7(a), 88 Stat. 55, 63 (1974), codified at FLSA section 2(a), 29 U.S.C. § 202(a).

service in one or more households, and . . . is so employed for more than 8 hours in the aggregate[.]"[13] The amendments also extended overtime protection to these workers.[14] 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."[15]

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[.]"[16] 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[.]"[17]

II. THE KEY PROVISIONS OF THE DOMESTIC WORKERS BILL OF RIGHTS ACT

The main provisions of H.R. 4826 affecting domestic service workers and the families who employ them are the following:

1. Section 3(a)(5)(B) defines "domestic services" to include "services performed by individuals such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides or assistants, and chauffeurs of automobiles for family use."

2. Section 101 repeals the FLSA section 13(b)(21) overtime exemption, codified at 29 U.S.C. § 213(b)(21), for "any employee who is employed in domestic service in a household and who resides in such household[.]"

3. Section 102(a) creates a new FLSA section 8, which among other things would require that employers of live-in domestic service workers provide:

    - Written notice of termination of employment within 48 hours of the termination;

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[13] Pub. L. No. 93-259, § 7(b)(1) (creating new FLSA section 6(f)), 88 Stat. at 63.

[14] *Id.* § 7(b)(2) (creating new FLSA section 7(*l*)), 88 Stat. at 63. Specifically, FLSA section 7(*l*) provides for a right to overtime independent of whether the employer is a covered enterprise or whether the worker engages in commerce: "No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) [referring to the FLSA's general overtime obligation at section 7(a)]." 29 U.S.C. § 207(*l*).

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

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

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

- Subject to certain exceptions, at least 30 days of continued housing, either within the household or at "another premise of a comparable lodging condition" or else two weeks of severance pay; and

- Telephone and internet access if the household has such facilities, along with opportunities for the employee "without interference by the employer . . . to send and receive communications by text message, social media, electronic or regular mail, and telephone calls."

4. Section 103 provides for liquidated (i.e., double) damages for violations of the severance pay or continued housing provision, and fines of up to $2,000 "for each violation" involving use of the telephone, internet, text messaging, social media, or electronic or regular mail.

5. Section 110 requires written agreements for all domestic service employees setting forth, *inter alia*:

    - "All responsibilities to be performed by the covered domestic worker . . . and the regularity in which such responsibilities are to be performed."

    - The "required working hours for any work week[.]"

    - If varied, "a good faith estimate of the days and hours for which the covered domestic worker will be expected to work . . . including, at minimum . . . the average number of hours the covered domestic worker will be expected to work . . . each week during a typical 90-day period" and "the amount of notice that the domestic work hiring entity will provide to the domestic worker in advance of scheduled work hours . . . which shall not be less than 72 hours before such scheduled work hours are to begin[.]"

    - "Information about policies, procedures, and equipment related to safety and emergencies."

    - The agreement "may not . . . contain . . . a mandatory pre-dispute arbitration agreement for claims made by a covered domestic worker against a domestic work hiring entity regarding the legal rights of the worker" or "a non-disclosure agreement . . . or non-disparagement agreement[.]"[18]

[18] The text of the bill creates ambiguity regarding whether the prohibition on non-disclosure agreements and non-disparagement agreements is limited to banning provisions that "limit[] the ability of the covered domestic worker to seek compensation for performing domestic services after the worker ceases to receive compensation from the domestic hiring entity for the performance of domestic services" or whether the prohibition sweeps more broadly.

6. Section 111 requires that domestic service workers receive "not less than 1 hour of earned paid sick time for every 30 hours worked," up to "56 hours of paid sick time a year," which "shall carry over from one year to the next."

7. Section 112 requires employers to "communicate in writing . . . any change to the scheduled work hours of a domestic worker, including any on-call shifts, not less than 72 hours before the domestic worker is scheduled to begin work" and to pay a worker the full rate of pay for any scheduled hours canceled or reduced after a worker arrives for work, or one half of the employee's normal rate of pay for any canceled or reduced scheduled hours if the change comes less than 72 hours in advance of the work.

8. Section 115 requires that domestic workers receive uninterrupted meal breaks of at least 30 minutes for each five hours worked and uninterrupted rest breaks of at least 10 minutes for each four hours worked, subject to an exception for circumstances where "the safety of an individual under the care of the domestic worker prevents the domestic worker from taking such break."

9. Section 117 sets forth a range of prohibited acts, including discharging, retaliating against, or discriminating against a domestic worker for a range of reasons, with a "presumption of retaliation"—rebuttable only by "clear and convincing evidence"—if a discharge or other action occurs "within 90 days of the individual involved asserting any claim or right under this subtitle[.]"

10. Section 118 creates both a private right of action and government enforcement, allowing for various types of recoveries, including:

    - Economic damages and recovery for nonmonetary injury, including to "reputation, character, or feelings";

    - Interest, liquidated damages, attorneys' fees, expert witness fees, and litigation costs;

    - For meal and rest period violations, an hour of pay at the employee's normal rate per violation, capped at two hours of pay per work day;

    - For any violation of any requirement relating to the lengthy and detailed written agreement required by section 110, a penalty of $5,000; and

    - For actions brought by the Secretary of Labor, civil money penalties of up to $15,000 for any violation of any of the requirements of the law, or up to $25,000 for any "subsequent violation."

11. Section 131 reduces the employee coverage threshold in Title VII of the Civil Rights Act of 1964 from 15 employees to just one.[19]

III. H.R. 4826 IMPOSES SUBSTANTIAL COMPLIANCE BURDENS ON FAMILIES WITHOUT PROVIDING A COMMENSURATE BENEFIT TO DOMESTIC WORKERS.

A. Why Congress Typically Excludes Small Employers From The Scope Of Federal Employment Statutes

Many of our most important federal employment laws, including the FLSA and Title VII, have long excluded some or all small employers from their coverage.[20] This is so for several reasons.

First, as one scholar has noted, "the implicit exemption of small employers from the FLSA in 1937-1938 resulted from the trepidations of the legislative drafters in the Roosevelt administration and Congress that the Supreme Court might strike down the statute as an unconstitutionally broad exercise of the legislature's commerce power."[21] In his address to Congress upon the introduction of the FLSA, President Franklin Roosevelt acknowledged that "there are many purely local pursuits and services which no Federal legislation can effectively cover."[22] When Congress added enterprise coverage to the FLSA in 1961, "the use of a dollar-volume exemption level was designed to 'provide more than adequate assurance that the newly covered enterprises will be those plainly engaged to a substantial extent in interstate commerce and should make it abundantly certain that no small local business will be affected.'"[23]

Second, another writer has identified "the most popular explanation" for small business exemptions in employment laws as "that a small firm might be overwhelmed by the burden of compliance"[24] such that there is a need "to relieve small firms of the otherwise disproportionate costs they

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19 The first part of Title VII's definition of "employer" currently reads as follows: "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year[.]" 42 U.S.C. § 2000e(b). Section 131 of H.R. 4826 would change "fifteen" to "one" in that definition.

20 *See* Richard Carlson, *The Small Firm Exception and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1197-98 & nn.5-6 (2006) (citing St. Louis Consol. Coal v. Illinois, 185 U.S. 203, 208 (1902), McLean v. Arkansas, 211 U.S. 539, 551-52 (1909), and Middleton v. Tex. Power & Light Co., 249 U.S. 152, 155-57 (1919), as examples of cases upholding exemptions in employment laws for small employers).

21 Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & POL'Y 403, 416 (1998) (arguing generally against having a dollar threshold for enterprise coverage under the FLSA and suggesting that some members of Congress and the George H.W. Bush Administration did not understand the impact of the 1989 FLSA Amendments and their raising of the enterprise coverage threshold to $500,000).

22 *Id.* at 418 (quoting *The President Recommends Legislation Establishing Minimum Wages and Maximum Hours*, *reprinted in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1937 VOLUME: THE CONSTITUTION PREVAILS 209, 210-11 (1941)).

23 *Id.* at 420 (quoting S. Rep. No. 87-145, at 44 (1961)). The same author referred to the 1974 congressional finding that the employment of domestic service employees in households affects commerce as "verg[ing] on a constitutional provocation[.]" *Id.* at 421.

24 Carlson, *supra* note 20, at 1198.

might bear[.]"[25] Indeed, "Judge Posner . . . began his opinion in *Papa* with the premise that the small firm exemption [to Title VII] was to relieve small firms of the 'crushing expense of mastering the intricacies' of discrimination law."[26] A review of "[t]he record of congressional proceedings leading to Title VII confirms that this was an important justification for the exemption."[27] The idea is that "a firm with very few employees lacks the economies of scale enjoyed by a firm employing a larger workforce. Costs of learning and implementing the law do not vary in direct proportion to the number of employees."[28]

Moreover, "[b]eyond the cost of discrimination law compliance . . . is the potentially catastrophic cost of litigation defense and liability for a single discrimination lawsuit."[29] The owners of many small businesses "operate their businesses as a source of self-employment, and not just as an investment. . . . Frequently, they . . . bear all the risks of business. If competitive pressures prevent a small firm from passing disproportionate costs on to customers, the impact has a direct impact on the owner's livelihood."[30]

And "in a very small firm the owner may be a general manager, front line supervisor, and production worker all in one. He does not specialize in human resources or administrative services, either by training or actual work, and he probably lacks the resources to employ a specialist."[31] Any "additional work and responsibility imposed by any new regulation is not only a financial burden, it is also a burden on his personal time and energy."[32] When "an applicant or employee sues the small firm, the owner/manager will also bear the burden in personal time, energy, and stress in responding to charges, negotiating, and preparing for trial."[33]

With regard to discrimination laws—and this holds true for wage and hour laws as well—these laws "provide a plausible basis for argument in many cases in which the evidence is mainly subjective and circumstantial. Even if the employer had a legitimate reason for an adverse action, the employer could still be liable if prejudice was one of the 'motivating factor[s].'"[34] In that type of proceeding, "[p]roving or disproving all the circumstances and motivations for the employer's decision can involve

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25 *Id.* at 1205.

26 *Id.* at 1247 (quoting Papa v. Katy Indus., Inc., 166 F.3d 937, 940 (7th Cir. 1999)).

27 *Id.* & n.233 (citing 110 Cong. Rec. S7073 (1964) (statement of Sen. Stennis); 110 Cong. Rec. S7074 (1964) (statements of Sens. Stennis and Long); 110 Cong. Rec. S13085, 13092 (1964) (statement of Sen. Cotton), 118 Cong. Rec. S2387, 2410 (1972) (statements of Sens. Stennis and Fannin regarding 1972 amendments); 118 Cong. Rec. 2389-90 (1972) (statement of Sen. Allen regarding 1972 amendments).

28 *Id.* at 1247.

29 *Id.* at 1249.

30 *Id.*

31 *Id.* at 1249-50.

32 *Id.* at 1250.

33 *Id.*

34 *Id.* at 1251 (citing 42 U.S.C. § 2000e-2(m)).

many easily disputed facts. Defending against a discrimination claim is not only expensive, but frequently uncertain, and the ultimate resolution is often in the hands of a jury."[35] And even "[i]f an employee's claim has no merit, the claim might still have enough 'nuisance' value to fortify the employee's demand for some settlement price. These opportunities for private enforcement may be necessary to level the playing field between a very large firm and an individual employee[,]" but for small employers "Title VII's private enforcement procedures might seem to turn the individual employee into a Goliath."[36]

Third, exempting very small employers from federal employment laws serves "to preserve a right of 'personal relationships beyond government intervention[.]'"[37] There are, indeed, "reasons to be more protective of personal relations within a small firm than within a large firm."[38] It should come as no surprise that "the enforcement process and remedies that go along with Title VII and other discrimination laws can be disruptive of personal relations within the firm, and more so in small firms than in large ones."[39] In "a large firm, the effect of difficult relations on productivity can be diluted by the size of the workforce or by transfers. For a small firm, the tension between one employee and the owner/manager could become an overwhelming distraction."[40]

The proposed change to Title VII's employee threshold is not, of course, limited to domestic service employment. That change would affect every industry and thus involves costs and implications far broader than this one category of work. No public policy germane to protecting domestic service workers supports changing the Title VII threshold for any other industry.

All of these considerations regarding why federal employment laws typically exclude various small businesses apply with even greater force when the employer is a family and the worker or workers at issue perform services within the employer's home. Not every employer of a domestic service worker is a Bill Gates or an Elon Musk, with lawyers and human resources personnel at the ready to assist with managing employment law compliance. Instead, the much more common scenario is that the employer is a family, often one where there is either a single parent or two parents who have jobs outside the home, without the resources to obtain legal or other specialized compliance advice, and for whom the cost of defending a single lawsuit or Department of Labor investigation could be financially devastating. This is part of why then-Governor Jerry Brown of California vetoed a similar bill in 2016.[41]

In addition, various businesses that operate in conjunction with domestic service work, such as entities that provide home health aides and personal care aides, would face significant operational

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35 *Id.*

36 *Id.* at 1252.

37 *Id.* at 1205.

38 *Id.* at 1263.

39 *Id.*

40 *Id.* at 1263-64.

41 *See California Gov. Brown Vetoes Domestic Workers Rights Bill*, https://www.foxnews.com/politics/california-gov-brown-vetoes-domestic-workers-rights-bill (Dec. 4, 2016). Gov. Brown later signed into a law a significantly pared-back version of the legislation.

and practical challenges as well as increased operating costs due to the various proposed documentation and scheduling requirements. This is in addition to the increased exposure they would face from private claims and Department of Labor enforcement activity. Those increased burdens on these businesses would make it more difficult for them to employ workers, which in turn could limit employment opportunities for the very people H.R. 4826 tries to help.

B. H.R. 4826 Would Deliver Little Tangible Benefit To Domestic Workers And Could Cause Them Considerable Harm.

Much of the harm that H.R. 4826 seeks to mitigate is already unlawful under a multitude of state laws. Physically assaultive behavior by employers is already unlawful in every state in the Nation. When employers fail to abide by their promise to pay wages, workers in every jurisdiction may sue to recover, often with enhanced remedies such as double or treble damages. And so far, at least ten states and two cities have enacted a version of the Domestic Workers Bill of Rights.[42]

With respect to overtime for live-in domestic service workers, the net result is unlikely to increase worker earnings. So long as employers provide at least the pertinent minimum wage, they would remain free to adjust employees' base hourly rates so that the total weekly earnings end up essentially unchanged. Another possibility is that employers would simply cut employee hours to avoid the overtime premium. Either way, the workers are, by and large, unlikely to receive additional compensation as a result of this type of bill, and they could well end up with less.

IV. H.R. 4826 Invites A Constitutional Challenge That Could Undo 80 Years Of Commerce Clause Jurisprudence.

Lastly, it is important to think carefully before unleashing an extensive statutory and, eventually, regulatory employment law regime on America's households. The 1974 FLSA amendments, which first extended FLSA coverage to domestic service employees, did so with surprisingly little public awareness. In my experience, most practicing employment lawyers, let alone non-lawyers, do not realize that FLSA sections 2(a), 6(f), and 7(*l*) render families who hire household employees potentially subject to the federal minimum wage and overtime requirements. There has been little or no litigation regarding the permissibility of the 1974 amendments with respect to these workers under the Commerce Clause because, by and large, the public has not felt an effect from those statutory changes, and any cases that would arise are typically too small to warrant litigation.

That dynamic would change overnight if H.R. 4826 were to become law. Without belaboring the point, it is apparent that at least some members of the Supreme Court have a strong desire to rewrite the Nation's Commerce Clause jurisprudence. Although under the Commerce Clause case law that prevailed from the time of *Wickard*[43] until 1995 there was a fairly strong sense that Congress could regulate nearly anything it wanted to based on the argument that the aggregated effect of a multitude of purely local events could affect interstate commerce, the Supreme Court's decision in

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[42] *See* Chelsey Sanchez, *Domestic Workers Dese4ve Rights, Too*, https://www.harpersbazaar.com/culture/politics/a39936731/domestic-workers-sexual-harassment-assault-bill-of-rights/ (May 13, 2022) (noting passage of legislation in California, Connecticut, Hawaii, Illinois, Massachusetts, Nevada, New Mexico, New York, Oregon, and Virginia, as well as Philadelphia and Seattle).

[43] *See supra* note 5.

United States v. Lopez[44] and *United States v. Morrison*[45] should give Congress pause. One commentator has referred to *Lopez* as a "stunning reversal of [the Court's] 60-year-old expansive and deferential commerce power jurisprudence[.]"[46]

Of particular interest is the fact that Justice Thomas in both *Lopez* at *Morrison* concurred separately, indeed devoting approximately 20 pages to the issue in *Lopez*, advocating for no less than a complete overhaul of the Court's approach to the Commerce Clause because, in his view, "our case law has drifted far from the original understanding of the Commerce Clause."[47]

If the Court were ultimately to adhere to *Wickard*, there is a decent chance that H.R. 4826 would stand as a proper exercise of Commerce Clause authority. But if Justice Thomas's *Lopez* concurrence were to become the Court's prevailing approach to adjudicating Commerce Clause cases, there is a very significant likelihood that efforts to apply the FLSA and Title VII to households would not succeed. And that would in turn likely lead to invalidating many other federal statutes on similar grounds.

One cannot reliably predict how the Supreme Court might approach a case in the future, but Congress may wish to pause before engaging in further "constitutional provocation."[48]

V. CONCLUSION

For these reasons, I encourage the Subcommittee to reject H.R. 4826. There is an inadequate factual record to support this legislation, the likely results would be far more harm than good, and in key respects the proposal raises 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.

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44 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act on Commerce Clause grounds).

45 529 U.S. 598 (2000) (striking down the Violence Against Women Act on Commerce Clause grounds).

46 Linder, *supra* note 21, at 421 n.56.

47 *Lopez*, 514 U.S. at 584 (Thomas, J., concurring); *see also Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

48 *See* Linder, *supra* note 21, at 421.