

**FROM EXCLUDED TO ESSENTIAL: TRACING
THE RACIST EXCLUSION OF FARMWORKERS,
DOMESTIC WORKERS, AND TIPPED WORKERS
FROM THE FAIR LABOR STANDARDS ACT**

HEARING

BEFORE THE

**SUBCOMMITTEE ON
WORKFORCE PROTECTIONS**

OF THE

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTEENTH CONGRESS

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**FROM EXCLUDED TO ESSENTIAL: TRACING
THE RACIST EXCLUSION OF FARMWORKERS,
DOMESTIC WORKERS, AND TIPPED WORKERS
FROM THE FAIR LABOR STANDARDS ACT**

Monday, May 3, 2021

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WORKFORCE PROTECTIONS,
COMMITTEE ON EDUCATION AND LABOR,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12 p.m., via Zoom, Hon. Alma Adams (Chairwoman of the Subcommittee) presiding.

Present: Representatives Adams, Takano, Norcross, Jayapal, Omar, Stevens, Jones, Yarmuth, Keller, Stefanik, Owens, Good, Cawthorn, and Steel.

Staff present: Rashage Green, Director of Education Policy; Christian Haines, General Counsel; Sheila Havenner, Director of Information Technology; Eli Hovland, Policy Associate; Eunice Ikene, Labor Policy Associate; Ariel Jona, Policy Associate; Richard Miller, Director of Labor Policy; Max Moore, Staff Assistant; Mariah Mowbray, Clerk/Special Assistant to the Staff Director; Udochi Onwubiko, Labor Policy Counsel; Kayla Pennebecker, Staff Assistant; Veronique Pluviose, Staff Director; Banyon Vassar, Deputy Director of Information Technology; Cyrus Artz, Minority Staff Director; Courtney Butcher, Minority Director of Member Services and Coalitions; Rob Green, Minority Director of Workforce Policy; Georgie Littlefair, Minority Legislative Assistant; John Martin, Minority, Minority Workplace Policy Counsel; Hannah Matesic, Minority Director of Operations; Audra McGeorge, Minority Communications Director; and John Witherspoon, Minority Professional Staff Member.

Chairwoman ADAMS. Good afternoon. I'd like to call the Subcommittee on Workforce Protections to order. Today we are gathered to examine the racist origins of denying farm workers, domestic workers and tipped workers full protection under the Fair Labor Standards Act and to chart a path forward, a path toward finally addressing these inequities.

The Fair Labor Standards Act or FLSA is one of our Nation's most significant labor laws, first passed in 1978 it created the Federal minimum wage, set limits on work hours and banned oppressive child labor. Yet after more than 80 years the FLSA still includes aspects of our Nation's history of slavery and racial discrimination by expressly denying farm workers, domestic workers and

tipped workers the full protections of basic wage and hour protections.

Following the abolition of slavery, black Americans, the majority of whom lived in the south were concentrated in agricultural and domestic jobs with little to no pay in order to preserve the profitable return that had been built on the backs of slaves.

By the time President Franklin D. Roosevelt opposed what would become the FLSA he knew that certain lawmakers who held the levers of power in Congress were committed to denying black workers the wage protections that could lead to their economic and social freedom.

Roosevelt acquiesced to the demands of these lawmakers by excluding specific occupations that were over-represented by black workers from the labor protection. Thus, to ensure its passage and to allow employers to underpay black Americans, the FLSA excluded agricultural and domestic workers. In other words, by excluding jobs held by black and brown workers from basic worker protections, the FLSA inserted institutional racism into a Federal wage and hour law.

And these exclusions robbed workers of color of economic security over the next three decades. I know this because I've lived it. In fact, my mother and grandmother were domestic workers. They cleaned other people's houses, so I would not have to, so that I could focus on going to school, getting a good education and security a future I desired.

Unfortunately, I saw first-hand how impossible it was for them to make ends meet and how impossible it was for them to cover basic necessities, let alone live comfortably. Throughout the 1960s and 70s Congress took limited steps to expand FLSA protection, responding to the demands of the 1963 march on Washington for jobs and freedom.

The attention brought to the issue by the 1965 California Great Strike and the advocacy work from Civil Rights groups, women's organization and labor unions, expanding coverage to industries with high concentrations of black workers, including agriculture, hotels and restaurants, helped narrow the racial gap, wage gap and significantly boost the wages for millions of workers.

Similarly, the tipped minimum wage is also wounded in denying black workers economic security. Post-Civil War formerly enslaved black workers were denied wages and hospitality jobs and instead worked for tips. And while tipped workers were originally excluded entirely from the FLSA, later amended extending coverage to these workers codified the practice of allowing employees to rely on consumer's tips to subsidize wages.

And while there's been important progress, some racist FLSA exclusions are still on the books and continue to prevent people of color who remain over-represented in these jobs from getting the pay they deserve.

Today farm workers will do not have overtime protection, live-in domestic workers still don't have overtime protections, and tipped workers are still not guaranteed the Federal minimum wage, but today's hearing is not just about reviewing the history of the American labor laws, it's about recognizing the multi-generation's struggle of black workers and workers of color, and confronting our

country's legacy of racism so that we can forge a more equitable future.

And many of my Committee colleagues have spearheaded efforts to correct these decades-old inequities, including Representative Grijalva's Fairness for Farmworkers Act, which would phaseout overtime exemptions for agriculture workers. Representative Jayapal's Domestic Workers Bills of Rights, which among other things would eliminate the overtime exemption for live-in domestic workers.

And Chairman Scott raised the Wage Act, which would gradually phaseout the tipped minimum wage. We know that several states have extended these key protections to workers and their economies have continued to thrive.

And of course no one could speak more authoritatively on institutional racism than the people who experience it each day, so I'm grateful that we're joined by three women of color to help guide our discussion, and I want to thank them for being with us.

[The statement of Chairwoman Adams follows:]

STATEMENT OF HON. ALMA S. ADAMS, CHAIRWOMAN, SUBCOMMITTEE ON
WORKFORCE PROTECTIONS

Today, we are gathered to examine the racist origins of denying farmworkers, domestic workers, and tipped workers full protections under the Fair Labor Standards Act and to chart a path toward finally addressing these inequities.

The Fair Labor Standards Act, or FLSA, is one of our Nation's most significant labor laws. First passed in 1938, it created the Federal minimum wage, set limits on work hours, and banned oppressive child labor. Yet, after more than 80 years, the FLSA still includes aspects of our Nation's history of slavery and racial discrimination by expressly denying farmworkers, domestic workers, and tipped workers the full protections of basic wage and hour protections.

Following the abolition of slavery, Black Americans, a majority of whom lived in the South, were concentrated in agricultural and domestic jobs—with little to no pay—in order to preserve the profitable economy that had been built on the backs of slaves.

By the time President Franklin D. Roosevelt proposed what would become the FLSA, he knew that certain lawmakers who held the levers of power in Congress were committed to denying Black workers the wage protections that could lead to their economic and social freedom. Roosevelt acquiesced to the demands of these lawmakers by excluding specific occupations that were overrepresented by Black workers from labor protections.

Thus, to ensure its passage and allow employers to underpay Black Americans, the FLSA excluded agricultural and domestic workers.

In other words, by excluding jobs held by Black and Brown workers from basic worker protections, the FLSA, inserted institutional racism into Federal wage and hour law.

And these exclusions robbed workers of color of economic security over the next three decades. I know this because I have lived it. In fact, my mother and grandmother were domestic workers. They cleaned other peoples' houses so I would not have to—so I could focus on going to school, getting a good education and securing a future I desired. Unfortunately, I saw first-hand how impossible it was for them to make ends meet and how impossible it was for them to cover basic necessities, let alone live comfortably.

Throughout the 1960s and 70s, Congress took limited steps to expand FLSA protections, responding to the demands of the 1963 March on Washington for Jobs and Freedom, the attention brought to the issue by the 1965 California grape strike, and the advocacy work from civil rights groups, women's organizations, and labor unions.

Expanding coverage to industries with high concentrations of Black workers, including agriculture, hotels, and restaurants, helped narrow the racial wage gap and significantly boosted wages for millions of workers.

Similarly, the tipped minimum wage is also rooted in denying Black workers economic security. Post-Civil War, formerly enslaved Black workers were denied wages in hospitality jobs and, instead, worked for tips. And while tipped workers were ini-

tially excluded entirely from the FLSA, later amendments extending coverage to these workers codified the practice of allowing employers to rely on consumers' tips to subsidize wages.

While there has been important progress, some racist FLSA exclusions are still on the books and continue to prevent people of color, who remain overrepresented in these jobs, from getting the pay they deserve.

Today, farmworkers still do not have overtime protections. Live-in domestic workers still do not have overtime protections. And tipped workers are still not guaranteed the full Federal minimum wage.

But today's hearing is not just about reviewing the history of American labor law. It's about recognizing the multi-generational struggle of Black workers and workers of color and confronting our country's legacy of racism so that we can forge a more equitable future.

Many of my Committee colleagues have spearheaded efforts to correct these decades-old inequities, including:

- Representative Grijalva's Fairness for Farm Workers Act, which would phase-out overtime exemptions for agricultural workers;
- Representative Jayapal's Domestic Workers Bill of Rights Act, which, among other things, would eliminate the overtime exemption for live-in domestic workers; and
- Chairman Scott's Raise the Wage Act, which would gradually phaseout the tipped minimum wage.

We know that several states have extended these key protections to workers and their economies have continued to thrive.

Of course, no one can speak more authoritatively on institutional racism than the people who experience it each day. I am grateful we are joined by three women of color to help guide our discussion. And I want to thank them for being with us.

Chairwoman ADAMS. I'd like right now to recognize the Ranking Member Keller for the purpose of making an opening statement. Mr. Keller?

Mr. KELLER. Thank you, Madam Chair. I appreciate the opportunity to be with everyone this morning. As the foundation of our Nation's wage and hour protections, the Fair Labor Standards Act, FLSA, affects nearly every workplace across the country. However, our world looks very different now than it did 83 years ago when the FLSA became law.

The nature of work in the United States and by extension, the American workforce has also changed. These changes matter and have very real implications for today's workforce. This fundamental transformation in the workplace has brought about technological advances that are enabling a diverse population to balance professional and personal needs in ways that were unheard of in the 1930's.

While these developments are encouraging, unfortunately there is a rapidly growing disconnect between Federal standards and the needs of a vast majority of working Americans in the 21st Century. Committee Republicans have long championed necessary updates to labor and employment policies that help American workers and business owners compete in a global economy.

We stand ready to work in a bipartisan manner to modernize the FLSA to meet the—ever-evolving needs of a workforce that increasingly desires flexibility, choice, and mobility. Unfortunately, the misguided proposals before us today fail to address the needs of the modern workforce and will ultimately harm the very individuals my colleagues on the other side of the aisle claim to help.

A radical mandated wage policy, and one size fits all regulations will lead to fewer employment opportunities, less economic free-

dom, restricted hours for workers, and more aggressive use of automation. All while threatening our economic recovery from COVID-19.

Congress can either consider policies which incentivize job creators to continue employing American workers and create new pathways for innovation and entrepreneurship where we can double down on out of date policies resulting in unemployment.

As states continue to relax COVID-19 restrictions, and businesses continue to reopen safely, now is the time to consider pro-growth policies that reflect the needs of our modern economy and workforce, and create more economic freedom and independence.

Unfortunately, today's hearing will not help further productive discussion about how we can foster an environment to create better, higher paying jobs without costly one-size-fits-all government mandates that ignore industry-specific needs, and the resources available to small business owners.

I would like to thank all of our witnesses for joining us today, and Madam Chair I yield back.

[The statement of Ranking Member Keller follows:]

STATEMENT OF HON. FRED KELLER, RANKING MEMBER, SUBCOMMITTEE ON
WORKFORCE PROTECTIONS

As the foundation of our Nation's wage and hour protections, the Fair Labor Standards Act (FLSA) affects nearly every workplace across the country.

However, our world looks very different now than it did 83 years ago when the FLSA became law.

The nature of work in the United States and by extension, the American workforce, has also changed.

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A radical, mandated wage policy and one-size-fits-all regulations will lead to fewer employment opportunities, less economic freedom, restricted hours for workers, and more aggressive use of automation, all while threatening our economic recovery from COVID-19.

Congress can either consider policies which incentivize job creators to continue employing American workers and create new pathways for innovation and entrepreneurship, or we can double-down on out-of-date policies resulting in unemployment.

As states continue to relax COVID-19 restrictions and businesses continue to reopen safely, now is the time to consider pro-growth policies that reflect the needs of our modern economy and workforce and create more economic freedom and independence.

Unfortunately, today's hearing will not help further productive discussion about how we can foster an environment to create better, higher-paying jobs without costly, one-size-fits-all government mandates that ignore industry-specific needs and the resources available to small business owners.

Chairwoman ADAMS. Thank you very much and let me just go back to something that I should have done from the beginning. I do want to note that we do have a quorum, and I do want to note for the Subcommittee that Mr. Grijalva of Arizona is permitted to participate in the hearing today with the understanding that his questions will come only after Members of the Subcommittee on Workforce Protections on both sides.

This is a remote hearing. Microphones will be kept muted as a general rule to avoid unnecessary background noise, and witnesses will be responsible for unmuting themselves when they're recognized to speak, or when they wish to seek recognition and I ask the Members also to identify themselves before they speak.

Members please keep your cameras on while in the proceedings and you will be considered present in the proceeding when you're visible on the camera. The only exception to this is that if you're experiencing difficulty you need to inform the Committee Staff of the difficulty.

And if any Member experiences technical difficulties during the hearing you should stay connected on the platform, and let us know. Should the Chair experience technical difficulty or need to step away Mr. Takano or another Majority Member is hereby authorized to assume the gavel in the Chair's absence.

This is an entirely remote hearing. Members should also expect to adhere to social distancing and safe health guidelines, including the use of masks and hand sanitizers. While the roll call is not necessary to establish a quorum and official proceedings conducted remotely, the Committee has made it a practice whenever there's an official proceeding with remote participation for the Clerk to call the roll to make it clear who's present.

Members should say their names before announcing that they are present. At this time, I would like for the Clerk to call the roll.

The CLERK. Chairwoman Adams?

Chairwoman ADAMS. Present.

The CLERK. Mr. Takano?

Mr. TAKANO. Mr. Takano is present.

The CLERK. Mr. Norcross?

Mr. NORCROSS. Present.

The CLERK. Ms. Jayapal?

Ms. JAYAPAL. Jayapal is present.

The CLERK. Ms. Omar?

[No response]

The CLERK. Ms. Stevens?

[No response]

The CLERK. Mr. Jones?

[No response]

The CLERK. Mr. Yarmuth?

Mr. YARMUTH. Yarmuth is present.

The CLERK. Chairman Scott?

[No response]

The CLERK. Ranking Member Keller?

Mr. KELLER. Present.

The CLERK. Ms. Stefanik?

Ms. STEFANIK. Stefanik present.

The CLERK. Mrs. Miller-Meeks?

[No response]

The CLERK. Mr. Owens?

Mr. OWENS. Owens present.

The CLERK. Mr. Good.

Mr. GOOD. Good present.

The CLERK. Mr. Cawthorn?

[No response]

The CLERK. Mrs. Steel?

[No response]

The CLERK. Mrs. Foxx?

[No response]

The CLERK. Chairwoman Adams that concludes the roll call.

Chairwoman ADAMS. Thank you very much and let me also say any Members who wish to insert written statements into the record may do so by submitting them to the Clerk electronically in Microsoft Word by 5 p.m. on the 17th of May.

I want to now introduce the witnesses. First of all, Ms. Rebecca Dixon is Executive Director of the National Employment Law Project. As Executive Director Ms. Dixon leads NELP's work to build and contribute to a strong worker's rights movement that dismantles structural racism, eliminates economic inequality, and builds worker power.

Mr. Paul DeCamp is a Member of the first Epstein Becker and Green. In 2006 and 2007 Mr. DeCamp served as the Administrator of the U.S. Department of Labor's Wage and Hour Division, and now frequently represents employers in complex wage and hour class and mass actions and mass actions in government investigations.

Ms. Teresa Romero, President of United Farmworkers, the Nation's largest farm workers union. USW's mission is to help protect the rights and interests of farm workers by creating a safe and just food supply.

Ms. Romero is the first Latino and first immigrant woman to become President of a national union in the United States.

Ms. Haeyoung Yoon is Senior Policy Director at the National Domestic Workers Alliance, the NDWA works to raise and strengthen industry standards to ensure that domestic workers achieve economic security and opportunity, and have protections, respect and dignity in the workplace.

We appreciate the witnesses for being here today and participating, look forward to your testimony. But I want to remind the witnesses that we've read your written statements, and they will appear in full in the hearing record. Pursuant to Committee Rule 8(d) and the Committee's practice, each of you is asked to limit your oral presentation to a five-minute summary of your written statement.

But before you begin your testimony please remember unmute your microphone. And during your testimony, staff will be keeping track of the time and a timer will sound when time is up. So please be attentive to the time and wrap up when your time is over and remute your microphone.

If you experience technical difficulties during your testimony or later in the hearing, you should stay connected on the platform, make sure you are muted and use your phone to immediately call

the Committee's IT director, whose number was provided to you in advance.

So we are going to let all the witnesses make their presentations before we move to Member questions, and when answering a question, please remember to unmute your mic.

The witnesses are aware of their responsibility to provide accurate information to the Subcommittee, and therefore we will proceed with their testimony.

I'd like to first recognize Ms. Dixon. Ms. Dixon you have five minutes.

**STATEMENT OF MS. REBECCA DIXON, JD, MA, EXECUTIVE
DIRECTOR, NATIONAL EMPLOYMENT LAW CENTER**

Ms. DIXON. Good afternoon Chair Adams, Ranking Member Keller and Members of the Committee. I am deeply appreciative of the opportunity to testify today. I am here today to talk to you about how slavery and the continued racism, exploitation and subjugation left in the wake of slavery has directed the passage of the original Fair Labor Standards Act and lives on in exclusions that are still in place today.

Congress can act to address this historic wrong and make a material difference in the lives of millions of working families immediately. At the time of this passage in 1938 the agrarian southern political economy depended on the exploitation and subordination of black labor.

The southern states held the balance of power in Congress, and were unified in their opposition to including black people in new laws that guaranteed wages, rights, benefits, or protections. As a result, Congress used sectors of work dominated by black workers and other workers of color, including farm labor, tipped and domestic work as a proxy for race, in order to exclude black workers in particular from the FLSA's protections.

This exclusion depressed black workers' wages, effects still present today in persistent generational wage and wealth caps. The color line of who worked in which jobs, known as occupational segregation, continues today with nearly 9 in 10 current occupations being classified as racially segregated, even after accounting for education.

After years of pressure from civil rights and farmworker advocates, in 1966 Congress rectified some of the FLSA's racist exclusions, extending some protections to industries heavily populated by black workers such as agriculture. But these amendments continue to exclude most agriculture workers from vital overtime protections.

In 1974, Congress extended FLSA coverage to many domestic workers in private household service, but not live-in domestic workers, casual care workers, or others that were providing companionship services.

The remainder of my remarks will focus on the FLSA's subminimum wage for tipped workers. The tipped minimum wage is a legacy of slavery. It was a practice that was proliferated in the U.S. after emancipation among restaurants and hospitality industries which hired "newly freed black people" and used tipping instead of paying them.

Years later when the FLSA was adopted, it excluded workers in most tipped applications from its protections. For tipped workers, the 1966 FLSA amendment expanded minimum wage protections, but allowed employers to pay a lower wage to tipped workers with tips making up the difference.

This is a rare improvement in the FLSA that has lost ground over the years as a subminimum wage has been frozen at \$2.13 since 1991, even as the minimum wage has increased. As a result, approximately 3.1 million workers in a wide array of occupations are subjected to lower base wages for the work they perform leading to higher property rates and precarity for those who work for tips.

One of the reasons for this is the high rates of labor law violations such as not tipping workers up. Nationwide tipped workers rates of labor law violations are extremely high. Nationwide tipped workers have a high poverty rate that is nearly twice that of non-tipped workers, eliminating the subminimum wage advances equity, promotes economic security as evidenced by analysis from one fair wage states where tipped workers receive the full minimum wage on top of tips.

In those states the property rate for tipped workers was 42 percent lower than national averages, and the gender wage gap shrank by one-third. As a final matter, let's talk about businesses and the impact of the one fair wage.

Evidence from the seven one fair wage states points to businesses not just surviving but thriving. An analysis covering 2011 to 2019 finds that the restaurant industry was stronger and grew faster in one fair wage states, than in states with a lower tipped wage.

Congress has the obligation and opportunity to right the wrongs that we are discussing today. Joining together with workers who are organizing and demanding better wages in the laws that have exclusion and inequity at their core. Congress should pass the Raise the Wage Act of 2021, the Domestic Worker's Bill of Rights, and the Fairness for Farmworkers Act.

Each of these will put us on the path toward more equitable and just treatment of millions of workers who have been excluded from these protections of the FLSA for far too long. Thank you.

[The prepared statement of Ms. Dixon follows:]



TESTIMONY | MAY 2021

Testimony of Rebecca Dixon

National Employment Law Project

**From Excluded to Essential:
Tracing the Racist Exclusion
of Farmworkers, Domestic
Workers, and Tipped
Workers from the Fair Labor
Standards Act**

**Hearing before the U.S. House of
Representatives Education and Labor
Committee, Workforce Protections
Subcommittee**

May 3, 2021

Rebecca Dixon
NELP Executive Director

National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act

I. Introduction

Good afternoon Chair Adams, Ranking Member Keller, and members of the Committee. I am deeply appreciative of the opportunity to testify today. I am Rebecca Dixon, Executive Director of the National Employment Law Project (NELP).

NELP is a nonprofit research, policy, and capacity building organization that for more than 50 years has sought to strengthen protections and build power for workers in the U.S., including people who are unemployed. For decades, NELP has researched and advocated for policies that create good jobs, expand access to work, and strengthen protections and support for underpaid and jobless workers, both in the workplace and when they are displaced from work. Our primary goals are to build worker power, dismantle structural and institutional racism, and to ensure economic security for all.

As President Joe Biden and Vice President Kamala Harris have repeatedly acknowledged, the United States has a long history of systemic racism which is a stain on our nation's soul.¹ The president and vice president have called on all of us to do the hard work of undoing the racism baked into our country's laws and policies. That work demands, as Majority Whip Jim Clyburn has stressed, scrutinizing the legacy of New Deal policies that unfairly excluded Black people from their benefits and protections.²

I am here today to talk to you about how systemic racism stained the original passage of the Fair Labor Standards Act, how it lives on in exclusions still in place today, and how Congress can act to address this historic wrong and make a material difference in the lives of millions of working people and their families.

When we speak about undoing the stain of systemic racism in this country, we are speaking not just about dismantling something, but about building a better future, one that appeals to our highest principles and aspirations: Where we all have what we need, where we are all truly treated equally under the law, and where our fundamental human rights, like that of a fair wage for our work, are sacred and honored. This Congress has the tremendous opportunity to center these shared values as it responds both to this current moment of an

¹ See, e.g., "Remarks by President Biden on the Verdict in the Derek Chauvin Trial for the Death of George Floyd", April 29, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-on-the-verdict-in-the-derek-chauvin-trial-for-the-death-of-george-floyd/>.

² Laura Barron-Lopez, Alex Thomson, and Theodoric Meyer, "Clyburn doesn't want Biden to be like FDR," Politico, April 13, 2021, <https://www.politico.com/newsletters/transition-playbook/2021/04/13/clyburn-doesnt-want-biden-to-be-like-fdr-492463>.

unprecedented health and economic crisis and our ongoing and intertwined national reckoning with structural racism.

To ensure that our economy and larger society is truly fair and just, we must center racial equity in policy choices and directly confront how racism shaped the economy we have now. The fact that a disproportionate share of those in underpaid, insecure, and unsafe jobs are Black people and other people of color is neither inevitable, nor accidental. Occupational segregation—the preservation of glass and concrete ceilings and the way racist and sexist policy choices pushed people of color and women into underpaid occupations—accounts for a large portion of the racial and gender wage gap.³ In fact, the Blacker an occupation is, the less employers tend to pay workers, and the more female-dominated an occupation is, the more underpaid that work is, especially care work. This is our country's default policy, a continuing legacy of chattel slavery and Jim Crow—but it does not have to be this way.

The history of the New Deal, including the passage of the Fair Labor Standards Act (FLSA) and its exclusions of domestic, agricultural, and tipped workers, is a foundational part of this legacy. These exclusions did not accidentally deny Black people and other workers of color the rights and protections given to white workers. Congress intentionally excluded whole categories of workers from vital protections in order to deny Black people the opportunity for economic and social freedom and to preserve a system where employers could profit off of racist exploitation. Nearly half of all Black men, Mexican-American men, and Native American men and women, plus significant numbers of Asian American workers were excluded from Social Security, unemployment insurance, and the right to organize in the NLRB. The effects of this exclusion fell most heavily on Black women because of their concentration as agricultural and domestic workers.

This history has continued and impacts economic realities for millions of people every day. Not only are vital resources such as housing, schools, and neighborhoods largely separate and unequal, but the labor market remains highly segregated. This stratification perpetuates two-tiered workplaces and a Jim Crow economy—contributing to generational wage and wealth gaps and the exclusion of millions of people from the benefits, rights, and protections we all deserve.

In practice, the FLSA exclusions might look like a Black restaurant worker in Louisville who experiences significantly more precarity, stress, and fluctuation in her earnings than her white coworkers—because racism affects how customers tip and she can't rely on a decent set wage with tips on top. It may look like a Latino farmworker in Arizona who is forced to work inhumane hours because he does not have overtime protections to prevent his employer from exploiting his labor. It could look like an Asian American domestic worker in Pittsburgh who is struggling to pay her bills because she could not access overtime for her live-in hours.

³ See Olga Alonso-Villar and Coral del Río, "The Occupational Segregation of African American Women: Its Evolution from 1940 to 2010," *Feminist Economics* 2 (1) (2017): 100–134; Coral del Río and Olga Alonso-Villar, "The Evolution of Occupational Segregation in the United States, 1940–2010: Gains and Losses of Gender–Race/Ethnicity Groups," *Demography* 52 (3) (2015): 967–988; see also Will McGrew, "How workplace segregation fosters wage discrimination for African American women," Washington Center for Equitable Growth, Aug. 28, 2018, <https://equitablegrowth.org/how-workplace-segregation-fosters-wage-discrimination-for-african-american-women/>.

The COVID-19 pandemic, as both a health and an economic crisis, has further exposed these deep societal fissures. The problem of labor market inequities is deeply embedded, multi-faceted, compounding, and interlocking, so our country's solutions must in turn be systemic and focused on root causes. That is why we must understand and reckon with the historical reasons behind the FLSA's racist exclusions.

We should all be equally protected by human rights like a fair wage for our work, regardless of our skin color, gender, who signs our paycheck, or any other factor. This Congress has the power and the incredible opportunity to begin to rectify this particular legacy of slavery and Jim Crow and to honor our higher values not just in principle, but in practice. Addressing the racist exclusions in the FLSA is a clear structural step that Congress can take right now to move toward racial equity, to build a better future for our nation, and to make a difference in the lives of millions of workers and community members immediately.

In this testimony, I will first discuss the historical conditions that led to the exclusions in the FLSA; then I will discuss how those exclusions compounded racial wealth gaps, exploitation, and other inequities in the years since their passage; and then finally, I will discuss how the FLSA exclusions continue to perpetuate wealth gaps, poverty, and other forms of racial and gender inequality for workers and communities today, and how this Congress can begin to correct this historical wrong.

II. A Legacy of Slavery and Jim Crow: The Racist Politics and History of FLSA's Passage

The Fair Labor Standards Act, passed in 1938, established a minimum wage, outlawed the use of child labor, and established a regular work week by mandating the payment of overtime wage rates.⁴ The preamble of the FLSA stated that its purpose was to eliminate the conditions that substantially curtailed workers' employment and earning power, seeking to protect workers.⁵ However, instead of lifting up all workers, the FLSA adopted racist exclusions of farmworkers and domestic workers as a proxy to deny broad swaths of workers of color its core protections. Although the legislative history is sparse, it is widely understood that these exclusions were a facially race-neutral way to deny Black workers coverage under the FLSA.

A. The National Industrial Recovery Act as a Precursor to the FLSA

The use of occupational designations as a proxy for the racist and intentional exclusion of Black workers from wage protections was not new to the FLSA. Five years earlier, Congress passed the National Industrial Recovery Act (NIRA), which called for industries to establish codes of fair competition to regulate the wages and hours of workers in those industries.⁶ The National Recovery Administration (NRA) was tasked with gathering evidence to determine the codes for each industry.⁷ Employers who testified at these hearings called for explicit wage differentials based on race. One employer stated that "a negro makes a much

⁴ Act of June 25, 1938 (Fair Labor Standards Act), Pub. L. 75-718, 52 Stat 1060, June 25, 1938, p. 1060

⁵ Act of June 25, 1938 (Fair Labor Standards Act), Pub. L. 75-718, 52 Stat 1060, June 25, 1938, p. 1060

⁶ Juan F. Pera, *The Echoes of Slavery: Recognising the Racist Origins of the Agricultural and Domestic Worker Exclusion From the National Labor Relations Act*, 72 OHIO ST. L. J 95, 104-05 (2011).

⁷ Id. at 104.

better workman and a much better citizen, insofar as the South is concerned, when he is not paid the highest wage."⁸ An employer of a manufacturing company in Selma, Alabama testified:

"If all the past years have failed to make any real impression in the status of their intelligence, can any legislative act take them and immediately advance their capabilities to be equal to those of the white man with whom they must compete in the race for employment? We think not and because of this inherent irradicable element of incapability, any idea is futile that fails to recognize a difference does exist and will always exist and that a proper difference in wage rates must be applied to meet the inequality."⁹

President Roosevelt also commented, with regard to the National Industrial Recovery Act, that "[i]t is not the purpose of this Administration to impair Southern industry by refusing to recognize traditional differentials"¹⁰ (referring to the differentials in the wages and wealth between Black Southerners and white Southerners). Although the explicit race differentials were not adopted, the National Recovery Administration conducted hearings to gather evidence to formulate maximum hours and minimum wages for each industry.¹¹ In debates for these codes, various industries argued that the NRA should adopt explicit racial differentials.¹² Although the NRA did not use explicit racial distinctions, it did use occupational and geographic classifications in the industry codes that achieved nearly the same purpose.¹³ For example, when domestic workers petitioned the NRA for a board to regulate domestic service, the NRA responded that household employment or domestic service would not ordinarily be a trade or industry subject to its jurisdiction, meaning that domestic workers were excluded altogether.¹⁴ Thus, "[t]he compromise position was race-neutral language that both accommodated the southern desire to exclude blacks but did not alienate northern liberals nor [B]lacks in the way that an explicit racial exclusion would."¹⁵

B. Appeasing Southern Democrats and Codifying the Labor Exploitation of Black Workers

The construction of the FLSA was part of a concerted effort to exclude Black workers from the fruits of their labor and resist any threats to the economic and social status quo of the Jim Crow South. In particular, the Southern political economy, dominated by agriculture, depended on the exploitation and subordination of Black labor¹⁶, and an equalized wage floor was a threat to that racially segregated system. Southern Democrats in Congress held the balance of power during the New Deal era. The Southern states controlled 35 percent of

⁸ *Id.* at 105.

⁹ *Id.*

¹⁰ *Id.* at 103.

¹¹ *Id.* at 104.

¹² *Id.* at 104.

¹³ *Id.* at 106.

¹⁴ Peggie R. Smith, *Regulating Paid Household Work*, 48 AM. U. L. REV. 851, 885 (1999).

¹⁵ See *supra* note 6 at 106.

¹⁶ See *supra* note 6 at 101.

the seats in the Senate and a large number of seats in the House.¹⁷ They also held a number of the committee chairperson seats.¹⁸ They were unified in their opposition to any initiatives that would endanger the ability to exploit and subjugate Black people or that would improve their welfare relative to whites.¹⁹ Meanwhile, President Roosevelt refused to push for measures that could imperil the coalition he needed to pass the FLSA and other New Deal measures. As he stated: "First things come first and I can't alienate certain votes I need for measures that are more important at the moment by pushing any measures that would entail a fight."²⁰ Similarly, during the Joint Committee hearings on the FLSA, Gardner Jackson, the chairman of the National Committee on Rural and Social Planning, said the New Deal legislation excluded all agricultural laborers because "it has been deemed politically certain that their inclusion would have spelled the death of the legislation in Congress."²¹

C. How the Plantation System Extended the Legacy of Slavery for Black Workers in the South

Domestic and agricultural labor were the cornerstone of the plantation system and continued to be integral post-Emancipation to the functioning of Southern society. Post-Emancipation, many Black workers were forced to continue providing this labor by working as domestic workers in the community, and also by working as tenant farmers and sharecroppers. According to some estimates, at Emancipation, 3 million enslaved people over 10 years of age were emancipated, and nearly 2 million of those worked on farms and many of the others labored as domestic servants.²² Black farmworkers in the South accounted for 87.4 percent of all Black farmworkers nationwide.

Sharecroppers and tenant farmers were often subject to terrible conditions, conditions that Black lawyers and workers with the NAACP at the time described as "peonage" or a form of involuntary servitude.²³ William Henry Huff, a Black lawyer, asked President Roosevelt to abolish "that new form of slavery known as peonage, which entered the back door as the Proclamation of immortal Lincoln drove chattel slavery out of the front door."²⁴

As one scholar has explained:

"The North's victory in the Civil War formally ended the institution of slavery. It did not end the southern plantation owners' need for a cheap supply of labor or the regime of white supremacy in the South...the expectation in the South was that the newly freed [B]lack would

¹⁷ Sean Farhang and Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, *Studies in Amer. Political Dev.* 19 at 1 (Spring 2005).

¹⁸ *Id.* at 1, 15.

¹⁹ See *supra* note 6 at 102.

²⁰ See *supra* note 6 at 103.

²¹ Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *HAMLIN L. REV.* 649, 655 (1988-1989), citing "Bills to Provide for the Establishment of Fair Labor Standards in Employments In and Affecting Interstate Commerce and Other Purposes", Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. at 1196 (1937).

²² R. R. Wright, "The Negro in Unskilled Labor," *The Annals of the American Academy of Political and Social Science*, vol. 49 at 19 (1913).

²³ Risa Goluboff, *The Lost Promise of Civil Rights*, at p. 56. (Cambridge: Harvard University Press 2007)

²⁴ *Id.*

continue to supply the needed cheap labor. In fact, most of the southern [B]lack population remained as farm laborers, either wage laborers, sharecroppers or tenant farmers. Blacks were slaves no longer, but neither were they the equals of whites.”²⁵

D. Southern Lawmakers’ Commitment to Preserving the Plantation System

The legislative history is clear that Southern lawmakers were adamant that setting a floor on wages, as the FLSA proposed, would attack this lingering plantation system.

From 1930-1940, 57 percent of the U.S. farm labor lived in the South and 51 percent of those workers were Black.²⁶ By cutting across wage disparities between Black and white workers in underpaid sectors, Georgia Democratic Representative Edward Cox argued that the FLSA would allow for the “elimination and disappearance of racial and social distinctions, and... throw into question the determination of the standards and customs which shall determine the relationship of our various groups of people in the South.”²⁷ As Florida Representative James Mark Wilcox explained:

[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, the delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between races. We may rest assured, therefore, that when we turn over to a federal bureau or board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.”²⁸

FLSA’s wage floor was condemned by Southern legislators as an attack on the South that was specifically designed to win Black votes.²⁹ Lawmakers compared the FLSA to anti-lynching legislation they said was designed to increase Black political power. According to Representative Cox, “[this bill, like the antilynching bill, is another political gold brick for the

²⁵ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEXAS L. REV. 1335, 1348 (1986-1987).

²⁶ See *supra* note 17 at 14-15 (for this analysis, the South included 17 states: the 11 ex Confederate states, plus Delaware, Kentucky, Maryland, Missouri, Oklahoma and West Virginia).

²⁷ See *supra* note 17 at 14. 2

²⁸ *Id.*

²⁹ *Id.*

Negro, but this time the white laborer is also included in the scheme.”³⁰ South Carolina Senator “Cotton Ed” Smith complained that:

“Every Senator present knows that the anti-lynching bill is introduced for no reason in the world than a desire to get the votes of a certain race in this country. . . .”Anti-lynching, two-thirds rule, and last of all, this unconscionable -- I shall not attempt to use the proper adjective to designate, in my opinion, this bill [the FLSA]! Any man on this floor who has sense enough to read the English language knows that the main object of this bill is, by human legislation, to overcome the splendid gifts of God to the South.”³¹

E. How FLSA Exclusions Were Made Possible Through Racist Violence and the Disenfranchisement of Black People in the South

The successful adoption and maintenance of FLSA’s racist exclusions cannot be divorced from Black political disenfranchisement, often achieved through violence. The Southern states that controlled Congress at the time of the FLSA’s passage had legally mandated racial segregation in their states and excluded the majority of their Black populations from voting by law and by force. Black residents did not have access to the full rights of citizenship. Because of this broad disenfranchisement, even though the Southern states controlled 35 percent of the seats in the Senate and a large number of seats in the House, they were unaccountable to the vast majority of the Black residents in those states.³² Lynchings were used not only to instill terror, but as studies show, were more likely to take place prior to elections in order to suppress the Black vote.³³

Black organizations, such as the NAACP-LDF and the Urban League, aware of the exclusions that were being used as a proxy for excluding Black workers in the Social Security Act, NLRA, and the NIRA, testified during the FLSA hearings about the disparate impact on Black workers, who would be excluded from the minimum wage. The NAACP-LDF argued that the combination of employment discrimination and the lack of a minimum wage would serve as a “double penalty” for Black workers³⁴

Thus, it was against this backdrop of political disenfranchisement; the segregation of Black workers in the South into specific occupations based on the legacy of slavery; and the extraordinarily powerful Southern Democrats’ commitment to preserving the exploitation of Black workers in the South that the FLSA was constructed and passed.

³⁰ See *supra* note 6 at 115.

³¹ *Id.*

³² See *supra* note 17.

³³ Mara Suttman-Lea, “The history of lynching and African American Voting Rights, A House Divided,” October, 28, 2019, <https://johnsodysseydesd.com/2019/10/28/the-history-of-lynching-and-african-american-voting-rights/>; Brad Epperly, Christopher Witko, Ryan Strickler and Paul White, *Rule by Violence, Rule by Law: The Evolution of Voter Suppression and Lynching in the U.S. South* (March 1, 2016).

³⁴ See *supra* note 6 at 112-113.

III. How We Ended Up Here: The Direct Historical Line From the FLSA Exclusions to Modern Racial Wealth Gaps

A. Racist Policies Are Self-Reinforcing: How the Exclusions Reverberated Through Generations

As Richard Rothstein has written, “we cannot understand the income and wealth gap that persists between African Americans and whites without examining governmental policies that purposely kept [B]lack incomes low throughout most of the twentieth century.”³⁵ Rothstein argues that “federal and state labor market policies, with undisguised racial intent, depressed African American wages.”³⁶ That is because once these policies are implemented, their effects are self-reinforcing, given how limited income mobility is for subsequent generations, regardless of race. As Rothstein observes, while “standard of living may grow from generation to generation,” “an individual’s relative income—how it compares to the incomes of others in the present generation—is remarkably similar to how his or her parents’ incomes compared to others in their generation.”³⁷

By excluding so many Black workers and other workers of color from its coverage, the FLSA was one of the federal labor market policies that effectively depressed Black workers’ wages from its passage through 1966. The effects of this wage depression were further compounded, as Rothstein argues, by the ways in which “neighborhood segregation imposed higher expenses on African American than on white families, even if their wages and tax rates had been identical.”³⁸ The result, Rothstein says, was that Black families had “smaller disposable incomes and fewer savings,” and were denied the opportunity to accumulate wealth.³⁹

The 1940s, 1950s, and 1960s were thus critical decades in which white workers, heavily concentrated in sectors covered by the FLSA and other federal labor standards and protections,⁴⁰ were able to build family wealth, both through jobs as well as through other federal programs, like the Federal Housing Administration, whose benefits were only available to white workers.⁴¹ Thus Black workers and other workers of color were unable to build wealth during these decades.⁴² The effects of these decades on wealth inequality have persisted to the present day.

³⁵ Richard Rothstein, *The Color of Law* 153 (2017).

³⁶ *Id.* at 154.

³⁷ *Id.* at 153.

³⁸ *Id.* at 154.

³⁹ *Id.* at 154.

⁴⁰ *E.g.*, the National Labor Relations Act.

⁴¹ See *supra* note 35 at 63-75.

⁴² See Janelle Jones, ‘The racial wealth gap: How African-Americans have been shortchanged out of the materials to build wealth’, Economic Policy Institute Blog (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/>

B. Eliminating FLSA Exclusions as a Major Demand of the Civil Rights Movement

As discussed above, while Civil Rights movement activists fought in the 1930s to prevent the exclusion of Black workers in the domestic and agricultural sectors from the FLSA,⁴³ they were vastly overmatched by the Southern Democrats who controlled Congress and were fiercely committed to white supremacy and to ensuring the FLSA reinforced the racial hierarchy in the South.

In the years that followed, civil rights activists continued to press for expansion of the FLSA. In 1955, the NAACP's national convention adopted a resolution calling for the expansion of minimum wage coverage to agricultural workers.⁴⁴

At a 1957 Congressional hearing on proposals to expand FLSA coverage, representatives from a broad array of civil rights organizations testified, including the NAACP, the National Council of Negro Women, and the National Sharecroppers Fund. Patricia Roberts Harris from the National Council of Negro Women called for the "widest possible coverage" of the FLSA, and particularly emphasized that the large numbers of Black workers concentrated in these industries was "due largely to the fact that their weak bargaining position forces them to accept lower wages than their more fortunate white neighbors."⁴⁵ Clarence Mitchell from the NAACP emphasized that the exclusions were part of a larger system designed to keep Black workers as a vast supply of cheap labor for the excluded industries.⁴⁶ The National Sharecroppers Fund called out the FLSA's exclusion of farmworkers as government-backed discrimination.⁴⁷

The leaders of the 1963 March on Washington highlighted, as one of their ten core demands, "A broadened *Fair Labor Standards Act* to include all areas of employment which are presently excluded." This can be seen in the program from the march:⁴⁸

⁴³ See *infra* at Part I.

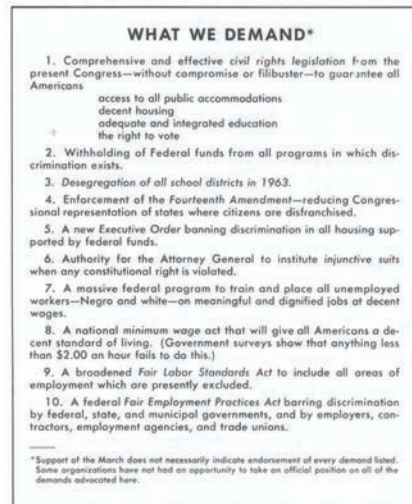
⁴⁴ Phyllis Palmer, *Outside the Law: Agricultural & Domestic Workers Under the Fair Labor Standards Act*, 7 J. Pol. Hist. 416, 423 & n.34 (1995).

⁴⁵ Statement of Patricia Roberts Harris, National Council of Negro Women, U.S. Senate, *Proposals to Extend Coverage of Minimum Wage Protection: Hearings Before a Subcommittee on Labor of the Committee on Labor and Public Welfare*, U.S. Senate, 85th Cong., 1st sess., March 1957, at 860-61.

⁴⁶ Remarks of Clarence Mitchell, NAACP, *id.* at 856.

⁴⁷ Statement of Mrs. Paul Blanshard, National Sharecroppers Fund, *id.* at 858-60.

⁴⁸ March on Washington for Jobs and Freedom August 28, 1963 Lincoln Memorial Program, <https://www.crmvet.org/docs/mowprog.pdf>



In early 1965, Black farm laborers in the Mississippi Delta formed the Mississippi Freedom Labor Union (MFLU) to advocate for higher wages from the planters who owned the farms.⁴⁹ The workers' organizing efforts were aided by organizers from the Student Nonviolent Coordinating Committee (SNCC). In the spring of 1965, about 350 MFLU members went on strike, seeking minimum wages of \$1.25 for cotton farming. The planters were intransigent, and many of the workers who were sharecroppers were evicted in retaliation for striking. But their labor struggle attracted national attention to the plight of Black farmworkers in Mississippi and across the United States.

Later that year, MFLU leaders testified before Congress on the need to ensure the FLSA covered as many farmworkers as possible, including Black sharecroppers.⁵⁰ Their testimony exposed the stark conditions that Black sharecroppers faced, working for as little as 30 cents an hour and subject to abusive debt laws that kept them trapped in a cycle of debt and

⁴⁹ See generally Michael Siström, *The Freedom Labor Union: Economic Justice and the Civil Rights Movement in Mississippi*, in Matthew Hild & Keri Leigh Merritt, eds., *Reconsidering Southern Labor History: Race, Class, and Power* (2019).

⁵⁰ *Minimum-Wage Hour Amendments, H.R. 8259*, Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives, 89th Cong., 1st Sess. - Part 4, at 1898-1926 (1965).

deprivation. As MFLU leader Aaron German stressed, “All of the plantation owners don’t want to pay \$1.25 an hour... So there needs to be some law that will force them to pay a decent wage.”⁵¹ After MFLU leaders Andrew Hawkins and Aaron German finished their testimony, Committee Chair Dominick V. Daniels declared the conditions the farmworkers faced were “nothing short of slavery,” and that “we haven’t progressed very far from slave days.”⁵²

Civil rights advocates continued to advocate for expansion of FLSA protections to domestic workers in subsequent legislative sessions. In 1971 and 1973 Congressional hearings, Clarence Mitchell testified on behalf of the Leadership Conference on Civil Rights as well as the NAACP in support of the expansion of the FLSA to non-covered domestic workers, emphasizing that 340,000 women employed as private household workers earned \$1,296 a year, well below what welfare recipients received annually at the time.⁵³

And within the halls of Congress, it was New York Congressional Representative and civil rights leader Shirley Chisholm who led the charge to pass amendments to the FLSA that expanded coverage to include domestic workers.⁵⁴ The daughter of a domestic worker, Congresswoman Chisholm emphasized the importance of the amendments for lifting Black families out of poverty, stressing the reality that 50 percent of poor Black families were headed by women, and that over half of these women worked as maids in 1970 but were living in poverty.⁵⁵

C. Reform Efforts: Subsequent Reforms Failed to Dismantle the Structural Racism in the FLSA and in Some Ways Reinforced It

1. The 1966 Amendments Continued to Exclude Farmworkers From Critical Overtime Protections

After years of pressure from civil rights and farmworker advocates, Congress finally took steps to rectify some of the FLSA’s racist exclusions in 1966. Many of the sectors that were covered by at least some of the Act’s protections for the first time—including agriculture, hotels, restaurants, schools, hospitals, nursing homes, and entertainment—were ones in which Black workers were disproportionately represented.⁵⁶ Moreover, the 1966 amendments extended FLSA protections to nearly a third of all Black workers in the United States.⁵⁷

The impact of the 1966 amendments was significant for the workers newly covered. Economists have concluded that more than 20 percent of the reduction of the racial earnings and income gaps between 1965 and 1980 is due to the 1966 FLSA amendments extending basic (though still incomplete) FLSA protections to agriculture, restaurants, nursing homes,

⁵¹ *Id.* at 1906.

⁵² *Id.* at 1907.

⁵³ *Fair Labor Standards Amendments of 1971, S. 1861 and S. 2259, Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92nd Cong., 1st Sess., Part 1, at 223-28 (1971).*

⁵⁴ See Martin Tolchin, “Mrs. Chisholm Led Fight for Domestic’s Base Pay”, *N.Y. Times* (June 21, 1973), <https://www.nytimes.com/1973/06/21/archives/mrs-chisholm-led-fight-for-domestics-base-pay-grasp-of-problem.html>.

⁵⁵ See *supra* note 44 at 430.

⁵⁶ See discussion of tipped workers in Part V below.

⁵⁷ Ellora Derenoncourt & Claire Montaloux, *Minimum Wages and Racial Inequality*, Q. J. OF ECON. 169, 171 (2021), http://www.clairemontaloux.com/files/QJE_QJE_2021.pdf.

and more.⁵⁸ Extending these protections was particularly important in reducing the Black-white wage gap in the newly covered industries, accounting for more than 80 percent of the impact the FLSA had in reducing the economy-wide racial earnings gap.⁵⁹ And the 1966 amendments are also correlated with a significant reduction in the poverty rate for Black children in families—that rate fell from 65.6 percent in 1965 (pre-amendments) to 39.6 percent in 1969 (post-amendments).⁶⁰

But the 1966 amendments still preserved the systemic racism of the original Act, including by continuing to exclude most agricultural workers from overtime protections. While the 1966 amendments extended minimum wage protections to most farmworkers,⁶¹ they did not extend overtime/maximum hours protections to them—which has serious implications from a racial equity perspective.

First, farmworkers were, as a class, denied the monetary benefits that come with overtime pay—time and a half. The availability of overtime pay has a significant impact on workers' annual earnings.⁶² Second, farmworkers were denied the quality-of-life benefits that can come with maximum hours protection. Historically, the overtime premium pay requirement was intended to be a disincentive in many sectors for employers to require workers to labor for more than 40 hours per week, allowing workers the opportunity to have basic work-life balance, to pursue other activities, and to invest in their children's care and education outside work hours.⁶³

Overtime also can prevent workers from being subjected to unsafe conditions for overly long periods of time. Farmworkers in particular labor in dangerous conditions that expose them to extreme temperatures, require them to work with heavy machinery and carry burdensome loads, and expose them to dangerous chemicals and pesticides.⁶⁴ But the FLSA's continued exclusion of farmworkers from overtime pay enables and incentivizes farms to require farmworkers to labor from sunrise to sunset, regardless of the hours required or the toll that places on farmworkers' bodies and family lives.⁶⁵

⁵⁸ *Id.*

⁵⁹ *Id.* at 174.

⁶⁰ Statement of William E. Spriggs, "The Recurring Struggle of the Minimum Wage, House Education and Labor Committee Hearing, *Gradually Raising the Minimum Wage to \$15: Good for Workers, Good for Businesses, and Good for the Economy*, at 16 (2019), https://edlabor.house.gov/imo/media/doc/Testimony_Spriggs020719.pdf.

⁶¹ See 29 U.S.C. § 213(a)(6). The bulk of farmworkers were protected, but several exclusions from coverage remain. In particular, employees who work on farms using less than 500 man-days of agricultural labor, immediate family members of the farm employer, and employees employed as hand harvest laborers paid on a piece rate basis who commute from their permanent residence to the farm and were employed in agriculture less than 13 weeks during the previous calendar year, remain excluded from coverage.

⁶² For example, the Economic Policy Institute in 2017 estimated that a Congressional proposal to expand eligibility for overtime protection would have boosted affected workers' paychecks by \$1.2 billion annually. Heidi Shierholz, "Federal overtime pay bill would boost paychecks by \$1.2 billion annually", Economic Policy Institute (Dec. 1, 2017), <https://www.epi.org/publication/federal-overtime-pay-bill-would-boost-paychecks-by-1-2-billion-dollars-annually/>.

⁶³ See generally Shirley Lung, *Overwork and Overtime*, 39 IND. L. REV. 51, 53-59 (2005) (discussing how the movement for an 8 hour day resulted, in part, in the FLSA's maximum hours protections).

⁶⁴ See Eric Hansen & Martin Donohoe, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. Health Care for the Poor & Underserved 153, 155-60 (2003).

⁶⁵ <http://phs.org/files/Migrant%20and%20Seasonal%20Farm%20Worker%20Health/Migrant%20and%20Seasonal%20Farm%20Workers%20-%205%20HCPU.pdf>.

⁶⁶ The health and safety implications of denying farmworkers maximum hours protection were recently recognized by the Washington Supreme Court, which held that Washington State's exclusion of farmworkers from overtime denied the workers the fundamental right to workplace health and safety protection, as guaranteed by the Washington State constitution. See *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wn.2d 506, ¶¶ 22, 27-35 (2020). Studies have shown that being required to work overtime hours is associated with significantly higher injury hazard rates. See A.E. Dembe et al., *The impact of overtime and long work hours on occupational injuries and illness: new*

Finally, by denying farmworkers maximum hours protection, farm employers were incentivized to maintain smaller workforces and work them for longer hours, rather than being encouraged to hire more workers—meaning fewer opportunities for other farmworkers to earn a living. In sum, the earnings benefits, the quality-of-life benefits, and the job-creation benefits afforded by overtime/maximum hours protection have been denied to millions of farmworkers of color for the past 55 years.

2. The 1974 Amendments Contained Huge Exceptions That Allowed Continued Mistreatment of Black Domestic Workers and Other Domestic Workers of Color

A powerful alliance of women's rights, civil rights, and labor finally convinced Congress to extend FLSA coverage to domestic workers in private household service in 1974. This was a significant victory, extending FLSA protections to approximately 1.5 million domestic service employees.⁶⁶

But the 1974 amendments still preserved the systemic racism of the original Act, including by continuing to exclude significant categories of domestic workers from minimum wage and overtime protections.

Two categories of workers were completely excluded from both the Act's minimum wage and overtime protections: (1) "Casual" care workers providing babysitting services; and (2) Workers providing "companionship services for individuals who (because of age or infirmity) are unable to care for themselves."⁶⁷ Congress empowered the Department of Labor to define these terms. Over time, corporations exploited the "companionship" exemption to deny millions of domestic workers fair wages, particularly as the use of in-home elderly care services exploded in recent decades.⁶⁸ While the Department of Labor narrowed the scope of this exemption through regulations that took effect in 2015, so that third-party employers such as home care and staffing agencies can no longer take advantage of it, it is still available to individual household employers.⁶⁹

In addition, live-in domestic workers were completely excluded from the Act's overtime/maximum protections.⁷⁰ This had serious racial equity implications, as hundreds of thousands of live-in domestic workers have been denied the earnings benefits, the quality-of-life benefits, and the job-creation benefits afforded by overtime/maximum hours protection, as discussed above with respect to farmworkers. But denying these protections to live-in domestic workers has especially pernicious implications because there is simply no boundary between home and work for these workers.

evidence from the United States, 62 J. Occupational & Environmental Medicine 588 (2005).

<https://oem.bmi.com/content/content/opened/62/5/588.full.pdf>

⁶⁶ Congressional Research Service Memo, *Exemptions in the Fair Labor Standards Act: Agricultural, Domestic Service, and Tipped Workers* (Apr. 7, 2021), at 7 & n.13 (citing 1974 Bureau of Labor Statistics analysis).

⁶⁷ 29 U.S.C. § 213(a)(15).

⁶⁸ See National Employment Law Project, "Federal minimum wage & overtime protections for home care workers", at 1, <https://se27147.pcdn.co/wp-content/uploads/NELP-Fact-Sheet-Companionship-Rules-Reform.pdf> (updated Sept. 2015).

⁶⁹ *Id.* at 1.3.

⁷⁰ 29 U.S.C. § 213(b)(21).

Even more troublingly, the FLSA has allowed employers to deduct the cost of food and housing from live-in domestic workers' wages.⁷¹ In sum, the employer's ability to compel round-the-clock labor, without any economic deterrent or the earning benefits of overtime protections, and to deduct food and housing expenses from workers' wages, makes live-in domestic workers particularly vulnerable to continued employer abuses.

IV. The Effects of Racist FLSA Exclusions on Workers and Our Communities Today: Workers of Color Are Still Disproportionately Represented in Agricultural and Domestic Service, and Employers Continue to Pay Very Low Wages In These Sectors

The proof of how the FLSA has reinforced structural racism in our economy is in the numbers. Black and Latinx workers and other workers of color continue to be very disproportionately represented in these sectors, and employers still pay very low wages for these jobs.

There are currently an estimated 2.5 to 3 million agricultural workers in the United States.⁷² Recent demographic data from the National Agricultural Workers Survey (prepared for the U.S. Department of Labor) shows that only 24-25 percent of farmworkers interviewed were born in the United States, while the rest were foreign born.⁷³ 83% of all farmworkers were identified as Hispanic, and 6% were identified as Indigenous.⁷⁴ The vast majority (69%) were born in Mexico, and just over half (51%) had work authorization.⁷⁵ Incomes among farmworkers remain extremely low, with mean and median personal incomes ranging from \$17,400-\$19,999.⁷⁶ Mean and median total family incomes ranged from \$20,000 to \$24,999, and 33% of farmworkers had family incomes below the poverty level.⁷⁷

There are currently an estimated 2.2 million domestic workers in the United States working in private homes, including as house cleaners, nannies, child care workers, and home health aides.⁷⁸ The majority, 57.1%, are workers of color, with 21.7% Black workers, 29.1% Hispanic workers, and 6.3% Asian American/Pacific Islander workers.⁷⁹ Over one-third of domestic workers are foreign-born, and 20.3% are noncitizens.⁸⁰ And domestic work is still disproportionately done by women of color; 52.4% of domestic workers are Black, Hispanic, or AAPI women.⁸¹ Moreover, domestic worker pay has been stagnant for decades and has

⁷¹ 29 U.S.C. § 203(m)(1); see also U.S. Dep't of Labor, Wage & Hour Division, *Credit towards Wages under Section 3(m) Questions and Answers*, <https://www.dol.gov/agencies/whd/direct-care/credit-wages/faq>

⁷² National Center for Farmworker Health, *Facts About Agricultural Workers* (2018),

https://www.ncfh.org/uploads/3/8/6/8/38685495/facts_about_ag_workers_2018.pdf

⁷³ Trish Hernandez & Susan Gabbard, JBS International, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers*, at i (Jan. 2018) https://wdlr.doleta.gov/research/FullText_Documents/ETAOP_2019-01_NAWS_Research_Report_13.pdf

⁷⁴ *Id.* at i.

⁷⁵ *Id.* at i.

⁷⁶ *Id.* at iii.

⁷⁷ *Id.* at iii.

⁷⁸ Julia Wolfe et al., Economic Policy Institute, "Domestic workers chartbook: A comprehensive look at the demographics, wages, benefits, and poverty rates of the professionals who care for our family members and clean our homes", at 4, Chart 1, <https://files.epi.org/pdf/194214.pdf>.

⁷⁹ *Id.* at 7-8 & Chart 3.

⁸⁰ *Id.* at 11-12 & Chart 5.

⁸¹ *Id.* at 9-10 & Chart 4 Table 3 (Black, non-Hispanic women are 19.7%; Hispanic women are 27.2%, and Asian women are 5.5%).

lagged far behind the pay of all other workers; the median real hourly wage for domestic workers is currently \$12.01, compared with \$19.97 for all other workers.⁸² The median annual earnings of domestic workers is \$15,980 per year.⁸³ 16.8 percent of domestic workers had family incomes below the poverty level, and 44.3% had incomes below the twice-poverty level.⁸⁴

V. The Effects of Racist FLSA Exclusions on Workers and Our Communities Today: Precarity and Pay Discrimination for Tipped Workers

A. Tipping as a Legacy of Slavery

The tipped minimum wage is a legacy of slavery—a practice that proliferated in the U.S. after Emancipation as a way to exploit recently freed Black people.

Tipping originated in Europe as early as the Tudor era. By the 17th century, the custom of tipping had spread throughout Europe.⁸⁵ It was imported to the U.S. in the 1880's by Americans who had traveled to Europe and were eager to show off their familiarity with European customs.⁸⁶ The practice of tipping proliferated among the restaurant and hospitality industries, which "hired" newly freed Black people and used tipping as a way to subsidize the costs of employer payrolls.⁸⁷

Initially, it was met with opposition from those who saw it as a relic of an Old World, feudal master-servant relationship. In a 1916 polemic against tipping, William R. Scott described tipping as the price "one American is willing to pay to induce another American to acknowledge inferiority".⁸⁸ This sense that those who took tips were inferior was compounded by racism in the way Black tipped workers were seen: As one Southern journalist reflected on his travels North in 1902: "I had never known any but Negro servants. Negroes take tips, of course; one expects that of them—it is a token of their inferiority. But to give money to a white man was embarrassing to me."⁸⁹

This idea that Blackness was linked with inferiority and servitude, particularly in tipped work, was especially clear with the Pullman Company, which employed 6,500 porters—all Black—in 1915, making it the largest private sector employer of Black workers.⁹⁰ Founder

⁸² *Id.* at 17 & Chart 8.

⁸³ *Id.* at 25-26 & Chart 13.

⁸⁴ *Id.* at 29-30 & Chart 15. As EPI explains, the twice-poverty level is considered by poverty researchers to be a better measure of poverty given that poverty thresholds set in the 1960s have not evolved to reflect changing spares of spending on various necessities. *Id.*

⁸⁵ Kerry Segrave, *Tipping: An American Social History of Gratuities* (McFarland & Company 1998).

⁸⁶ Ofer H. Azar, *The history of tipping—from sixteenth-century England to United States in the 1910s*, *The Journal of Socio-Economics*, Vol. 33, Issue 6, Figs. 745-764 (December 2004).

⁸⁷ "Pullman Porters Fight on Tipping," *New York Times* (July 23, 1928) p. 8. See also *supra* note 22 at 24 (noting that "[i]n the hotel business, the Negro is in demand in large cities as waiter, bellman, etc.")

⁸⁸ William R. Scott, *The Itching Palm: A Study of the Habit of Tipping in America* 38 (1916) ("Every tip given in the United States is a blow at our experiment in democracy.")

⁸⁹ Nina Martyris, "When Tipping Was Considered Deeply Un-American," *National Public Radio* (November 30, 2015), <https://www.npr.org/sections/thesalt/2015/11/30/457125740/when-tipping-was-considered-deeply-un-american>

⁹⁰ See *supra* note 85 at pp.17-18.

George Pullman believed Black people were servants “by nature.”⁹¹ “[Pullman] recruited porters who would be courteous to his passengers while tending to their every need and desire... [a]ll were ordered to answer to the name ‘George,’ a custom from slavery days when slaves were called by their master’s name.”⁹² This form of servitude, in the recollections of many porters, “resembled slavery.”⁹³ Porters were dependent on their white patrons’ tips for the majority of their income, meaning that they had to cater to every whim and demand for their survival:

“The Pullman rule book allowed porters only three hours of sleep the first night out and none for the remaining days. Stationed in the men’s smoker where they could be reached by sounding a buzzer, porters were expected to be at the beck and call of their wards at all hours of the night, standing by for any emergency and ensuring that their charges got off at the proper destination. Trying to sleep on the leather seats of the smoker, they were often awakened when passengers went to the bathroom or when those who had trouble sleeping merely wanted to talk. Their dependence on tips guaranteed continued obsequiousness.”⁹⁴

Thus, tipping kept Black people in an economically and socially subordinate position. And not surprisingly, the Pullman Company was one of the main lobbyists for using tips, recognizing the significant payroll cost savings it enjoyed from customers subsidizing workers’ wages. One 1915 estimate found that if not for tips, Pullman would have had to pay workers \$60 per month instead of \$27.50, which would have cost the company an additional \$2.5 million annually.⁹⁵

In 1900, a third of all Black workers were in domestic or personal service, including nearly half a million “servants and waiters”—the second largest category after laborers, and a much greater percentage than Black workers’ percentage of the population.⁹⁶ As I have demonstrated, this labor stratification was a direct legacy of slavery that functioned to continue the exploitation of Black workers after Emancipation—with effects compounding into the present.

⁹¹ See Bruce Nelson, *Review of Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945*, *Journal of Interdisciplinary History*, vol. 34 no. 1 (2003), p. 110-112, at p.111, citing Beth Tompkins Bates, *Pullman Porters and the Rise of Protest Politics in Black America, 1925-1945* (Chapel Hill: University of North Carolina Press, 2001).

⁹² Arthur C. McWatt “A Greater Victory: The Brotherhood of Sleeping Car Porters in St. Paul,” *Minnesota History*, vol. 55, no. 5, 1997, pp. 202-216, www.istor.org/stable/20188023.

⁹³ See *supra* note 91.

⁹⁴ See *supra* note 92.

⁹⁵ See *supra* note 95 at 17.

⁹⁶ See *supra* note 22 at 20-21. Specifically, in the 1900 census, “[t]here were 11,356 janitors and sextons; 545,980 laborers, 220,105 laundresses and laundresses; 465,787 waiters and servers; 9,681 soldiers, sailors and marines; 2,994 watchmen, policemen and firemen; and 6,070 in other branches of domestic and personal service.” *Id.*

B. How the FLSA Excluded Tipped Workers

When FLSA was first adopted, workers in most tipped occupations were excluded entirely from its protections, as the statute's initial scope of coverage excluded industries with significant numbers of tipped workers.⁹⁷

The FLSA also did not include provisions for the treatment of tips where workers would be covered under its minimum wage provisions. Shortly after Congress adopted the FLSA, the Supreme Court decided *Williams v. Jacksonville Terminal Co.*⁹⁸ At issue was whether a railroad employer had to pay "red cap" employees a fixed minimum hourly wage irrespective of tips received. The Court held that while employees must "receive a compensation at least as great as that fixed by the Act," it "left [the employer] free, in so far as the Act [is] concerned, to work out the compensation problem his own way."⁹⁹ Under this reasoning then, an employee could receive 100% of the required minimum wage from tips alone, without an employer obligation to directly pay any wage.

The 1966 FLSA amendment expanded minimum wage protections to many previously excluded sectors of the economy, including hotels and restaurants,¹⁰⁰ where the majority of tipped workers are employed. Congress also created the FLSA's tip credit in 1966 by amending the definition of "wage" in section 3(m) of the FLSA to provide employers with a tip credit (initially set at 50 percent of the full minimum wage).¹⁰¹ The "tip credit" is the amount from employee tips that an employer may count against his requirement to pay the full minimum wage. While an improvement to the original 1938 statute, the 1966 expansion nonetheless fell short of equal treatment for tipped workers, as the cash wage was set at just 50 percent of the full minimum wage, with tips still expected to make up the difference between the cash wage and the full minimum wage.

Thirty years later, under another round of amendments, the tipped wage was frozen at \$2.13 an hour, where it remains today. These 1996 amendments set the cash wage at \$2.13 an hour (rather than defining the tip credit as a percentage of the full minimum wage).¹⁰² This move delinked the tipped wage from the full minimum wage, leaving tipped workers behind as the full minimum wage has been incrementally increased over the years. Today, the tipped cash wage is the equivalent of less than 30 percent of the full federal minimum wage of \$7.25.

⁹⁷ See *supra* note 57 at 13. (explaining the expansion of coverage under the 1966 amendments to the FLSA: "[t]he 1938 Fair Labor Standards Act introduced the federal minimum wage in manufacturing, transportation, communication, wholesale trade, finance, insurance and real estate, mining, forestry, and fishing. In 1950, the federal minimum wage was expanded to the air transport industry. In 1961, the minimum wage coverage was extended to all employees of retail trade enterprises with sales over \$1 million and to construction enterprises with sales over \$350,000. In 1967, the minimum wage was extended to agriculture, restaurants, hotels, schools, hospitals, nursing homes, and other services.")

⁹⁸ *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942).

⁹⁹ *Id.* at 408.

¹⁰⁰ See *supra* note 57 at 13.

¹⁰¹ Public Law 89-601, §101(a), 80 Stat. 830 (1966).

¹⁰² Public Law 104-188, § 1112, 110 Stat. 1759 (1996). \$2.13 is the equivalent of 50 percent of the full \$4.25 minimum wage from 1991, which was the effective rate prior to increases in the full minimum wage in 1996 and 1997, to \$4.75 and \$5.15, respectively.

C. Tipped Workers Today

Under the FLSA, a tipped worker is one who “customarily and regularly” receives more than \$30 per month in tips (an amount that has been unchanged since 1977).¹⁰³ Although the law does not classify any specific occupation as a tipped occupation, certain jobs rely heavily on tips and are therefore considered “customarily” or “predominantly” tipped occupations.

Table 1 below lists these occupations, along with their median wages inclusive of cash wage and tips. Tipped occupations are most heavily concentrated in the food services and drinking places subsector, where most restaurant servers and bartenders are employed.

TABLE 1: Customarily or Predominantly Tipped Occupations in the U.S.

Occupation	Employment	10th Percentile Wage	Median Wage
Baggage porters, bellhops, and concierges	28,440	\$9.15	\$13.00
Barbers	14,880	\$10.48	\$15.61
Bartenders	486,720	\$8.63	\$12.00
Cleaners of vehicles and equipment	341,660	\$9.52	\$13.29
Dining room and cafeteria attendants and bartender helpers	374,940	\$8.78	\$12.03
Food servers, non-restaurant	254,650	\$9.30	\$12.46
Hairdressers, stylists, and cosmetologists	302,410	\$9.06	\$13.16
Hosts and hostesses, restaurant, lounge, and coffee shop	316,700	\$8.55	\$11.48
Manicurists and pedicurists	73,010	\$9.79	\$13.40
Massage therapists	85,040	\$10.86	\$20.97
Parking attendants	123,790	\$9.48	\$13.02
Shampooers	8,310	\$8.92	\$11.63
Skin care specialists	46,640	\$10.99	\$17.55
Passenger vehicle drivers, except bus drivers, transit and intercity	599,980	\$9.53	\$15.54
Waiters and waitresses	1,944,240	\$8.42	\$11.42

Source: List of occupations from Table A2, Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>; and endnote 1, Restaurant Opportunities Center United, *Better Wages. Better Tips: Restaurants Flourish with One Fair Wage*, https://chapters.rocunited.org/wp-content/uploads/2018/02/OneFairWage_W.pdf.
Employment and wage data from U.S. Bureau of Labor Statistics, *May 2020 National Occupational Employment and Wage Estimates*, https://www.bls.gov/oes/current/oes_nat.htm

According to recent analysis by the Economic Policy Institute (EPI), there are 3.1 million tipped workers throughout the country who earn a cash wage below the full minimum wage.

¹⁰³ 29 U.S.C. §203(t). In 1977, the FLSA was amended to increase the monthly tip amount from \$20 to \$30. See Pub. Law 95-151 §3a.

Of these, 1.3 million earn a cash wage of \$2.13 per hour, and the rest earn a cash wage higher than \$2.13 but lower than the full state minimum wage.¹⁰⁴

Women make up 68 percent of tipped workers¹⁰⁵ in key tipped industries—far above their share of the overall workforce. The average age of tipped workers is 35, and many of them (1 in 3) are parents to one or more dependent children.¹⁰⁶

D. The Tipped Wage Puts Workers at Greater Risk for Poverty and Exploitation

Tipped work is precarious work. Tipped workers' take-home pay fluctuates widely depending on the seasons, the weather, the shift they are given, and the generosity of customers.¹⁰⁷ Tipped work is also underpaid work. As Table 1 shows, the median wage for most tipped occupations falls below \$15 per hour, with some workers on the lower end of the wage distribution earning as little as \$8.42. In fact, prior to the pandemic, eight out of the 15 lowest paid occupations were restaurant jobs. Of these, seven were tipped.¹⁰⁸

Low pay puts workers and their families at risk of poverty.¹⁰⁹ It should come as no surprise, then, that tipped workers are more likely to live in poverty than non-tipped workers, since in all but seven states in the country, employers are allowed to pay tipped workers a cash wage below the full state minimum wage, with the expectation that customer tips will bring these workers up to or above the full minimum wage. As Table 1 shows, most tipped workers are typically paid a total hourly wage (cash wage plus tips) of less than \$15.

According to a 2014 analysis by the University of California and the Economic Policy Institute (EPI), nationwide tipped workers have a poverty rate that is nearly twice that of non-tipped workers. While the poverty rate for non-tipped workers was 6.5% during the period analyzed (2010–2012), the poverty rate of tipped workers was 12.8%—6.3 percentage points higher. Restaurant servers and bartenders, who comprise the largest share of all tipped workers, had an even higher poverty rate of 14.9 percent.¹¹⁰ But there is a significant difference in tipped worker poverty rates in states with a lower tipped wage and “one fair wage” states where tipped workers are guaranteed the full minimum wage as their cash wage. According to a 2021 analysis by EPI, between 2017 and 2019, servers and bartenders had a poverty rate of 13.3 percent in states with a \$2.13 tipped

¹⁰⁴ Economic Policy Institute and National Employment Law Project, “Why the U.S. Needs a \$15 Minimum Wage”, January 26, 2021, <https://www.epi.org/publication/why-america-needs-a-15-minimum-wage/>.

¹⁰⁵ Justin Schweitzer, “Ending the Tipped Minimum Wage Will Reduce Poverty and Inequality”, Center for American Progress, March 30, 2021, <https://cdpn.americanprogress.org/content/uploads/2021/03/29133657/Ending-Tipped-Minimum-Wage1.pdf>.

¹⁰⁶ Id.

¹⁰⁷ Restaurant Opportunities Center United, *Behind the Kitchen Door: Promise and Denial in Boston's Growing Restaurant Industry*, October 2016, https://chapters.rocunited.org/wp-content/uploads/2016/11/ROU_Boston_Report_W.pdf.

¹⁰⁸ One Fair Wage and the UC Berkeley Food Labor Research Center, *Locked Out by Low Wages: Service Workers' Challenges with Accessing Unemployment Insurance During COVID-19*, May 2020, https://onefairwage.site/wp-content/uploads/2020/11/DFW_LockedOut_UI_COVID-19_FINALUPDATE.pdf.

¹⁰⁹ Ken Jacobs et al., *The High Public Cost of Low Wages*, UC Berkeley Center for Labor Research and Education, April 2015, <https://laborcenr.berkeley.edu/the-high-public-cost-of-low-wages/>.

¹¹⁰ Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>.

wage. But in one fair wage states, their poverty rate was substantially lower: 7.7 percent,¹¹¹ or 42 percent lower.¹¹²

The tipped wage also contributes to the gender and racial wage gaps. Researchers attribute at least some of the pay gaps to occupational segregation, such as the overrepresentation of women and workers of color in underpaid occupations, including tipped jobs.¹¹³ Women in the overall workforce earn just 82 cents for every dollar men make, a gap that reduces women's annual median earnings by over \$10,000.¹¹⁴ This gap and its impact on women's incomes is much greater for women of color: Black, Native Hawaiian, and Pacific Islander women earn 63 cents for every dollar that white non-Hispanic men earn; Native American women earn 60 cents; and Latinas just 55 cents.¹¹⁵

However, the gender wage gap is significantly smaller in one fair wage states, where tipped workers are guaranteed the full minimum wage as their cash wage. Per analysis by the National Women's Law Center, in these states, the wage gap shrinks by one-third: Women's earnings increase from 82 cents for every dollar a man makes to 85 cents. Conversely, the wage gap widens significantly in states with a \$2.13 tipped wage, where women earn on average just 78 cents for every dollar their male counterparts earn.¹¹⁶ These figures illustrate the impact of the tipped wage on the gender wage gap.

Tipped work also reproduces the structural racism of our society and reinforces racist practices. Recent analysis by the Center for American progress finds that workers of color make up 48 percent of workers in key tipped industries, far above their share of the overall workforce.¹¹⁷ A 2020 report by the University of California finds that restaurant workers of color in tipped occupations are concentrated in casual full-service restaurants, such as Denny's, Olive Garden, and Applebee's, and significantly underrepresented in fine dining restaurants where tips and earnings are significantly higher.¹¹⁸ Within fine dining establishments, workers of color, especially women, are further segregated into positions that underpay them and come with lower tips, such as host and hostesses, baristas, barbacks, runners, and bussers.¹¹⁹

The University of California report also finds that the barriers that workers of color face to entry into fine dining restaurants start early in the process: White applicants are more likely to receive favorable treatment during the interview process and are 27 percent more likely

¹¹¹ See *supra* note 104.

¹¹² These findings are in line with the earlier 2014 University of California and EPI analysis, which had found that in states with a \$2.13 tipped wage, the poverty rate for non-tipped workers was 7.0 percent between 2010 and 2012, while for tipped workers the poverty rate jumped to more than twice that rate: 14.5 percent. See *supra* note 110.

¹¹³ See AAUW, The Simple Truth About the Gender Wage Gap: 2020 Update, https://www.aauw.org/apps/uploads/2020/12/SimpleTruth_2.1.pdf; National Women's Law Center, "One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers", February 2021, <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v2.pdf>; Lily Roberts and Galen Hendricks, "Short-Changed: How Tipped Work Exacerbates the Pay Gap for Latinas", Center for American Progress, November 20, 2019, <https://www.americanprogress.org/issues/economy/news/2019/11/20/477637/short-changed-tipped-work-exacerbates-pay-gap-latinas/>.

¹¹⁴ National Women's Law Center, "The Wage Gap: The Who, How, Why, and What to Do", October 2020, <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *supra* note 105.

¹¹⁸ One Fair Wage and the UC Berkeley Food Labor Research Center, *A Persistent Legacy of Slavery*, August 2020, https://onefairwage.org/wp-content/uploads/2020/11/OFW_LegacyOfSlavery_USA-1.pdf.

¹¹⁹ *Id.*

to be offered a job.¹²⁰ Further, the report finds that white customers are significantly more likely to show an unconscious preference for white people.¹²¹

These findings are consistent with other analyses on the pervasiveness of racial discrimination in tipped occupations: Research from Cornell University shows that Black restaurant waitstaff receive less in tips than white staff, and that the *perception* of the quality of service also negatively affects Black tipped workers.¹²² Separate research published in the Yale Law Journal made similar observations of tipping discrimination affecting Black taxi drivers.¹²³

E. The Tipped Wage is Difficult to Monitor and Enforce, and Often Leads to FLSA Violations

Where a lower tipped cash wage exists, as is the case at the federal level and in 43 states in the country, minimum wage laws require that employers make up the difference between the cash wage and the full minimum wage by (“topping up”) if tipped workers’ total hourly earnings (cash wage plus tips) do not bring them to the full minimum wage. However, for various reasons, ranging from the complexity of the law, to the manner of tipping (cash vs. credit card), compliance is difficult to monitor and enforce, oftentimes resulting in FLSA violations.

Tipped workers are at significant risk for wage theft. Unscrupulous employers have an opportunity to misappropriate a portion of their workers’ income—and in fact, many do. A 2009 detailed report by the National Employment Law Project and researchers at academic institutions found that a significant share of tipped workers (12 percent) had experienced wage theft related to stolen tips.¹²⁴ A 2017 study by the Economic Policy Institute found that wage theft is more likely to occur in bars and restaurants,¹²⁵ where the majority of tipped workers are employed.

The complexity of the tipped wage also poses significant problems for enforcement. While employers are required to top up tipped workers whose tips are not enough to bring them up to the full minimum wage, many employers do not maintain accurate and complete records of tips earned by their tipped employees, as required by law.¹²⁶ A 2014 report by the Department of Labor found that the lower tipped wage also facilitates other related violations, such as “failing to pay the full minimum wage when tipped employees are asked

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, Cornell University and Mississippi College, 2008, https://ecommons.cornell.edu/bitstream/handle/1813/71558/Lynn18_Consumer_Racial_Discrimination_in_Tipping.pdf.

¹²³ Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 Yale L. J. 1613 (2003).

¹²⁴ Annette Bernhardt et al., *Broken Laws, Unprotected Workers*, Center for Urban Economic Development, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009, <https://s27147.pdcn.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

¹²⁵ David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers’ Paychecks Each Year*, May 10, 2017, <https://www.epl.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>. See also David

Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, Boston University, May 2010, <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

¹²⁶ U.S. White House, *The Impact of Raising the Minimum Wage on Women and the Importance of Ensuring a Robust Tipped Minimum Wage*, March 2014, <https://obamawhitehouse.archives.gov/sites/default/files/docs/20140325minimumwageandwomenseportfinal.pdf>.

to perform non-tipped work such as cooking, cleaning, and stocking in excess of 20 percent of their time.”¹²⁷

Many instances of tipped wage violations have been documented over the years.¹²⁸ From 2010-2012, the Department of Labor conducted a compliance sweep of 9,000 restaurants and found that an overwhelming number of them (84 percent) had committed some type of violation, including 1,170 tipped wage violations.¹²⁹ An egregious case from 2014 illustrates how the difficulty in enforcing tipped wage rules—especially those related to record keeping—can allow employers to knowingly violate the law with little fear of punishment. In Pennsylvania, a chain restaurant was found in violation of the law when it failed to pay over 1,000 of its workers even the low tipped wage of \$2.13 per hour,¹³⁰ among other violations.

That employer was ultimately required to pay over \$6.8 million in back wages and damages. But for every employer who is found in violation of the tipped wage law and forced to make amends, there are many more who continue to take advantage of the complexity of the tipped wage to steal desperately needed earnings from workers who too often live in economic insecurity.

F. The COVID-19 Pandemic Has Exacerbated the Economic Insecurity of Tipped Workers, Especially Tipped Workers of Color. However, as the Economic Outlook Improves, Some Employers are Adopting Fair Pay Models

For decades prior to the pandemic, job growth had been skewed towards low-paying occupations, including those in the food service industry where tipped workers are concentrated.¹³¹ With the COVID-19 pandemic and recession, the harm of low pay was compounded, as job losses¹³²—and even rates of infection¹³³—have disproportionately impacted workers in low-paying occupations. Women and workers of color, who make up significant shares of workers in frontline occupations and most affected industries, have especially been harmed.¹³⁴

¹²⁷ *Id.*

¹²⁸ Brady Meisell and Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, September 11, 2014, <https://www.epl.org/publication/epidemic-wage-theft-costing-workers-hundreds-a-year>.

¹²⁹ See *supra* note 110.

¹³⁰ Press Release, U.S. Dep’t of Labor, “More Than \$6.8 Million in Back Wages, Liquidated Damages to be Paid to Current & Former Chickie’s & Pete’s Employees for Serious Wage Violations” (Feb. 20, 2014), <https://www.dol.gov/newsroom/releases/schd/schd20140944>.

¹³¹ Bureau of Labor Statistics, “Employment Projections, 2010-20” [Press Release], February 1, 2012, https://www.bls.gov/news.release/archives/ecopro_02012012.pdf.

¹³² Elise Gould and Jori Kandra, *Wages Grew in 2020 Because the Bottom Fell Out of the Low-wage Labor Market: The State of Working America 2020 Wages Report*, Economic Policy Institute, February 24, 2021, <https://www.epi.org/publication/state-of-working-america-wages-in-2020/>.

¹³³ Centers for Disease Control and Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups*, April 19, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html>.

¹³⁴ See Tori Bedford, “Women, People of Color Disproportionately Affected by Economic Impacts of Pandemic,” WGBH News, November 10, 2020, <https://www.wgbh.org/news/national-news/2020/11/10/women-people-of-color-disproportionately-affected-by-economic-impacts-of-pandemic>; and Eric S. Rosengren, Perspectives on the Eventual Economic Recovery, Federal Reserve Bank of Boston, February 19, 2021, <https://www.bostonfed.org/news-and-events/speeches/2021/perspectives-on-the-eventual-economic-recovery.aspx>.

There are signs that the economy is improving. From a record high of 14.7 percent in April 2020,¹³⁵ the unemployment rate was 6.0 percent in March of 2021¹³⁶—the latest available data. But the data also shows an uneven and racialized recovery. Currently, the unemployment rate of white workers is 5.4 percent,¹³⁷ a rate below the average for all workers. For workers of color, however, the unemployment rate remains significantly above that average: 9.6% for Black workers¹³⁸ and 7.9% for Latinx workers.¹³⁹ This points to structural forces at play that existed prior to the pandemic, which harm all workers in underpaid occupations, including tipped occupations, and especially hurt workers of color.

In the hospitality sector, recent data also suggest improving conditions. According to March estimates by the U.S. Commerce Department, sales in retail and food service industries increased by 9.8 percent from the previous month, and by 27.7 percent from a year ago.¹⁴⁰ Sales in food services and drinking places, specifically, increased by 13.4 percent in February compared to a month prior, and 36 percent higher than March 2020.¹⁴¹ Estimates by the National Restaurant Association similarly point to an improving jobs outlook in the restaurant industry, with employment rising each month in 2021.¹⁴²

But as employment figures and sales rebound in the hospitality sector, a worker shortage has emerged as a new challenge.¹⁴³ News reports suggest that this shortage is in part driven by the easing of COVID-19 restrictions, leading to an increase in customers and the need for more workers to staff restaurants and other eating and drinking establishments.¹⁴⁴ Importantly, the shortage may also be influenced by workers leaving the hospitality sector for jobs in industries with better pay and better working conditions.¹⁴⁵

The worker shortage has led some employers to reconsider their pay models and to adopt business practices that incorporate significantly higher wages and better working conditions, including a rethinking of the lower tipped wage.¹⁴⁶

¹³⁵ U.S. Bureau of Labor Statistics, “Unemployment Rate Rises to Record High 14.7 Percent in April 2020,” *TED: The Economics Daily*, May 13, 2020, <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm>.

¹³⁶ U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-1. Employment Status of the Civilian Population by Sex and Age, <https://www.bls.gov/news.release/empstat.t01.htm>, Accessed April 28, 2021.

¹³⁷ U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-2. Employment Status of the Civilian Population by Race, Sex, and Age, <https://www.bls.gov/news.release/empstat.t02.htm>, Accessed April 28, 2021.

¹³⁸ *Id.*

¹³⁹ U.S. Bureau of Labor Statistics, *Economic News Release*, Table A-3. Employment Status of the Hispanic or Latino Population by Sex and Age, <https://www.bls.gov/news.release/empstat.t03.htm>, Accessed April 28, 2021.

¹⁴⁰ U.S. Census Bureau, U.S. Department of Commerce, “Advance Monthly Sales for Retail and Food Services, March 2021” [Press Release], April 15, 2021, https://www.census.gov/retail/marts/www/marts_current.pdf.

¹⁴¹ *Id.* at Table 2.

¹⁴² National Restaurant Association, *Restaurant Employment Rose for the Third Consecutive Month*, April 2, 2021, <https://restaurant.org/articles/news/restaurant-employment-rise-in-march>.

¹⁴³ Brett Anderson, “As Diners Return, Restaurants Face a New Hurdle: Finding Workers,” *New York Times*, April 8, 2021, <https://www.nytimes.com/2021/04/08/dining/restaurant-worker-shortage.html>.

¹⁴⁴ Heather Haddon, “Restaurants Serve Up Signing Bonuses, Higher Pay to Win Back Workers,” *Wall Street Journal*, April 25, 2021, <https://www.wsj.com/articles/restaurants-serve-up-signing-bonuses-higher-pay-to-win-back-workers-11619359201>.

¹⁴⁵ See *supra* note 143.

¹⁴⁶ *Id.*; see also Tejal Rao, “What Is Hospitality? The Current Answer Doesn’t Work,” *New York Times*, April 13, 2021, <https://www.nytimes.com/2021/04/13/dining/restaurant-hospitality.html>; *supra* note 144.

G. Tipped Workers and Businesses Do Better in One Fair Wage States.

In seven states (Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington), employers are required to pay tipped workers the full state minimum wage as their cash wage and cannot claim any portion of tips as a credit towards their obligation to pay all workers the full minimum wage.¹⁴⁷

The experience of the seven “one fair wage” states makes it clear that businesses can survive and thrive without a lower tipped wage. There is no indication that tipped industries have suffered from the absence of a lower tipped wage. In fact, the opposite is true. Analysis by the Economic Policy Institute finds that from 2011 to 2019, the restaurant industry was stronger in one fair wage states than in states with a lower tipped wage: Among full-service restaurants, the number of establishments grew by 17.5% in one fair wage states, compared with 11.1% in states with a lower tipped wage. Similarly, the growth in employment in full-service restaurants was 23.8% in one fair wage states, compared with 18.7% in states with a lower tipped wage.¹⁴⁸ These findings are in line with two separate earlier analyses: A 2014 University of California and EPI study, which found that from 1995 to 2014, leisure and hospitality industries grew significantly faster (43.2%) in one fair wage states than in states with a lower tipped wage (39.2%);¹⁴⁹ and a 2018 analysis published by the Federal Reserve Bank of Atlanta, which found that restaurant industries in one fair wage states experienced similar or higher sales and employment growth as states with a lower tipped wage, and that wages also grew at a faster rate.¹⁵⁰

Research shows that tipped workers also benefit from earning the full minimum wage as their cash wage. The 2014 analysis by the University of California and EPI found that “tipped workers in equal treatment states earn 14.2 percent more than tipped workers in low tipped minimum states,” and that earnings for servers and bartenders were 20.6 percent higher in one fair wage states compared with states with a \$2.13 tipped wage.¹⁵¹ A more recent analysis by EPI confirms this fact: In one fair wage states, restaurant servers and bartenders earn 21 percent more on average, than their counterparts in states with a \$2.13 tipped wage.¹⁵² In fact, Alaska—one of the seven states where tipped workers are paid the full state minimum wage as their cash wage—has the highest average tip rate among all fifty states, according to a 2014 analysis of debit and credit card transactions.¹⁵³

¹⁴⁷ U.S. Department of Labor, *Minimum Wages for Tipped Employees*, <https://www.dol.gov/agencies/wbdl/state/minimum-wage/tipped>. Accessed April 28, 2021.

¹⁴⁸ See *supra* note 104.

¹⁴⁹ See *supra* note 110.

¹⁵⁰ Teofilo Reyes, “One Fair Wage: Supporting Restaurant Workers and Industry Growth,” in T. Andreasson, S. Greene & C. E. Prince, H., and Van Horn (Eds.), *Investing in Work* (Volume 2, pp 27–41). Atlanta, GA: Federal Reserve Bank of Atlanta, <https://www.investinwork.org/-/media/Files/volume-two/One%20Fair%20Wage%20Supporting%20Restaurant%20Workers%20and%20Industry%20Growth.pdf>.

¹⁵¹ See *supra* note 110.

¹⁵² See *supra* note 104.

¹⁵³ See Roberto A. Ferdman, “Which US States Tip the Most (and Least), as Shown by Millions of Square Transactions,” Quartz, March 21, 2014, <http://qz.com/189458/the-united-states-of-tipping/>. (compares One Fair Wage states to other states in table assessing “Which US states are nicest to their servers?”)

H. Extending Full FLSA Protections to Tipped Workers Would Have a Minimal Impact on Prices and Would Eliminate an Unfair Subsidy to Employers in Tipped Industries

Research of the effect of minimum wage increases on restaurant menus suggest that raising the tipped wage—or eliminating it altogether—would have minimal impact on menu prices. In a 2018 peer-reviewed study, University of California economists analyzed changes in menu prices for restaurants in the San Jose California area, after the city implemented a 25 percent increase in its minimum wage in 2013. (In San Jose, as throughout California, employers of tipped workers are required to pay their employees the full state minimum wage as a cash wage). The researchers found that the minimum wage increase raised menu prices in full-service restaurants (restaurants with table service and tipped wait staff) by \$0.44 for every 10 percent increase in the minimum wage.¹⁵⁴ That is, the *full 25 percent minimum wage increase* raised menu prices at full-service restaurants by only \$1.10 on average.¹⁵⁵ A separate analysis, projecting the impact of eliminating the tipped wage in New York, suggested that a tipped wage elimination and an increase in the minimum wage to \$15 in the state would increase operating costs for full-service restaurants by 1.2 percent—meaning that a \$10 menu item would increase by \$0.83 cents if restaurants passed the full operating cost increase onto customers.¹⁵⁶

Polling shows that the public supports fair treatment for tipped workers. A 2018 public opinion poll commissioned by the National Restaurant Association found overwhelming support (71 percent) for raising the federal minimum wage to at least \$10 per hour, even if doing so increased the cost of food and service at restaurants.¹⁵⁷ And a 2019 poll commissioned by the National Women's Law Center found that 81 percent of voters support extending full minimum wage protections to tipped workers.¹⁵⁸

Extending full FLSA protections to tipped workers would not only lead to greater fairness for tipped workers, but for employers in non-tipped industries as well. The lower tipped wage serves as an unfair subsidy to employers in restaurants and other hospitality sector industries where the lower tipped wage is most widely used. The tipped wage essentially transfers responsibility for paying a significant portion of tipped workers' wages from employers onto the customers. No other industries are subsidized this way.

VI. Conclusion

Congress has the obligation and opportunity to right the wrongs we are discussing today, to advance equity, and increase the economic security and wellbeing of millions of workers.

¹⁵⁴ Sylvia Allegretto and Michael Reich, "Are Local Minimum Wages Absorbed by Price Increases? Estimates from Internet-Based Restaurant Menus," *ILR Review*, 71(1), January 2018, pp. 35–63, <https://ilr.berkeley.edu/files/2018/01/are-local-minimum-wages-absorbed.pdf>.

¹⁵⁵ The \$1.10 average increase in menu prices is a NELP calculation based on the findings in the study: $\$0.44 \times 2.5 = \1.10 .

¹⁵⁶ Sylvia Allegretto, *Should New York State Eliminate Its Subminimum Wage?*, Center on Wage and Employment Dynamics, University of California at Berkeley, April 20, 2018, <https://ilr.berkeley.edu/files/2018/04/Should-New-York-State-Eliminate-its-Subminimum-Wage.pdf>.

¹⁵⁷ Lisa Graves and Zaid Jilani, "The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them," *The Intercept*, April 17, 2018, <https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>.

¹⁵⁸ National Women's Law Center, "NWLC Survey Finds Overwhelming Support for Gender Justice Policies", May 3, 2019, <https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies/>.

Across the country, workers are organizing and demanding better wages and the end to laws that have exclusion and inequity at their core. It is time for representatives in Congress to join together with them and fight for justice and equality in our jobs and beyond.

The seven states that already ensure tipped workers have the protection of the full minimum wage—along with the states and cities that are providing agricultural workers and domestic workers with the full protections of their laws—offer a glimpse into both the possibilities of rectifying the racist exclusions in the FLSA and the wide-ranging positive effects doing so will have on communities across the country.

That progress, of course, was only possible because of workers' and community movements, and policymakers should look to the work of groups like the National Domestic Workers Alliance, the Fight for \$15, and the United Farmworkers that are already charting a path forward towards equity and prosperity for all. It is my hope that this Congress will listen to their demands and begin taking steps right away to rectify the lingering racist exclusions of domestic workers, farmworkers, and tipped workers from the bedrock labor protections all workers need.

When harms are rooted in racism and other forms of oppression built into the very core of our laws, it is crucial that the federal government address the problem at that root and explore structural, rather than cosmetic, solutions. The policy proposals presented by workers' groups like the ones present in this hearing today are clear examples of structural action that this Congress can take immediately. Congress should consider and pass the Raise the Wage Act of 2021, the Domestic Workers Bill of Rights, and the Fairness to Farmworkers Act. Each of these will put us on the path toward more equitable and just treatment of the millions of workers who have been excluded from the protections of the FLSA for far too long.

If this pandemic has shown us anything, it is that we are all interconnected. When structural oppression harms some of us, it harms all of us, and likewise, we can only thrive when all of us have what we need and when everyone's human rights are protected.

I hope that this Congress will recognize the profound opportunity it has to start undoing the stain of systemic racism and building a better, healthier, and more equal nation by addressing exclusions in the Fair Labor Standards Act right away—and that those changes will act as a beacon of more and lasting structural change to follow.

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Mr. VASSAR. Apologies. I believe Chair Adams is currently off the platform. Hold on one second please. We're working to get this together.

Mr. TAKANO. Mr. DeCamp we'll now hear from you for five minutes.

**STATEMENT OF MR. PAUL DeCAMP, MEMBER, EPSTEIN
BECKER & GREEN, PC**

Mr. DeCAMP. Thank you. 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 farm workers, domestic workers and tipped workers under the Fair Labor Standards Act.

My testimony today will focus on the Subcommittee's consideration of three bills: H.R. 603, H.R. 1080, and H.R. 3760. I'm here today to express my opposition to these bills.

Given the Subcommittee's stated interest in examining the origins of those portions of the FLSA relating to agriculture, domestic service and tipped employment, as set forth in my written testimony, a detailed discussion of the pertinent statutory language, followed by an analysis of these bills.

I will focus my remarks today on the policy and legal reasons why I encouraged the Subcommittee to reject each bill. First, the proposal in H.R. 603 to more than double the Federal minimum wage from \$7.25 to \$15.00 an hour will cost people their jobs.

The nonpartisan Congressional Budget Office has repeatedly determined this kind of sharp increase would hurt more people than it would lift out of poverty. Earlier this year the CBO considered H.R. 603, it concluded that while the number of individuals in poverty would decline by roughly 900,000, employment would drop by 1.4 million if the Federal minimum wage increased to \$15.00 as people either lose their jobs or drop out of the workforce entirely.

CBO has noted that the hardships caused by these steep minimum wage increases fall most heavily on young, less educated workers with the resulting loss of earnings concentrated among families within the lowest income quintile.

CBO has also pointed out that as the cost of employing low-wage workers rises, employers shift their hiring preferences, opting for employees with more skill or experience, or investing in machines to replace workers.

While much of the public debate about \$15.00 an hour, posits a sole breadwinner struggling to lift the family out of poverty. The reality is that most individuals who earn minimum wage are young and are not supporting families. According to the Bureau of Labor Statistics, only about 1.5 percent of all hourly workers in the United States earn at or below minimum wage, and fully 48 percent of those individuals are under age 25.

7 out of 10 of them are in service industries, mostly in food service, often earning significant tip income. In addition, it is important to keep in mind that although a minimum wage of \$15.00 might not have much effect on employment in certain high wage cities.

In many parts of the country, particularly in rural areas and in the south, the economic conditions simply cannot sustain these kinds of wage levels, and it is important to remember that minimum wage workers cluster in industries such as restaurants, hotels and movie theaters, which have been especially hard hit by COVID-19.

The hospitality industry has lost nearly 4 million jobs, and more than 100,000 restaurants have closed. Now is not the time to make things even more difficult for these businesses to keep their doors open. If they fail, workers lose jobs.

With regard to the proposal to eliminate the tip credit, the key thing to keep in mind is that 97 percent of tipped workers prefer the current structure of tipping over no tip options. They earn on average \$14.32 an hour in total compensation.

Indeed, several restaurants that shifted to a no tip approach ended up switching back to tipping after their wait staff quit. Tipped workers are simply better off with the tip credit than without it.

Turning to H.R. 1080 it is important to understand the economic consequences of eliminating nearly all of the FLSA's agricultural exemptions. The nature of agricultural work, especially harvesting, requires long hours during a relatively short season, thus rendering the jobs generally unsuited for overtime.

Some farmers may try to cut worker's hours leading to lower earnings per worker, but finding extra farm workers is no easy task, and most farmers would end up seeing a dramatic increase in labor costs leading to higher food prices for consumers.

At the same time American farmers would be at a distinct competitive disadvantage with respect to non-U.S. agricultural producers. In addition, smaller, independent farming operations and family farms would likely suffer the most, as they are less able to absorb higher costs than larger, more robustly financed corporate farms.

Finally, my opposition to H.R. 3760 today centers mainly on its likely unconstitutionality. The bill intrudes into people's homes and imposes on individuals sweeping legal obligations untethered to legitimate Federal interests.

It is far from clear that Congress has authority under the commerce clause to regulate purely local employment within a private residence, particularly given the current configuration of the Supreme Court.

This concludes my prepared remarks. I welcome any questions the Members of the Subcommittee may have. Thank you.

[The prepared statement of Mr. DeCamp follows:]

PREPARED STATEMENT OF PAUL DeCAMP

**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

BY: PAUL DeCAMP
MEMBER
EPSTEIN, BECKER & GREEN, P.C.

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STATEMENT OF
PAUL DECAMP
EPSTEIN, BECKER & GREEN, P.C.
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
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.

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 hearing³, 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 1938⁴ 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

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[f]” *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.

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 FLSA¹⁸, 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 further²³, 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

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(f) 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)②.

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 employees³², 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

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(j)), 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(c) (amending the tip credit provision in FLSA section 3(m)), 88 Stat. at 66.

³² *See id.* § 13(i)-(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

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[j]” 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 wage⁴⁸, 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

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

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 Rebeckah 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[.]”⁵⁴ 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

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

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 commerce⁶¹—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

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.

Chairwoman ADAMS. Thank you, sir. Next, we'll hear from Ms. Romero and again I want to apologize for my internet issue that I had a moment ago. Ms. Romero?

**STATEMENT OF MS. TERESA ROMERO, PRESIDENT, UNITED
FARM WORKERS**

Ms. ROMERO. Thank you. Chair Adams, Ranking Member Keller, and distinguished Members of this Subcommittee. Thank you for the opportunity to testify today. My name is Teresa Romero, and I am the President of the United Farm Workers. Today I'm testifying on behalf of the United Farm Workers and the UFW Foundation.

Farm workers workday in and day out to plant and harvest the crops and care for the livestock we all rely on for our food. The COVID pandemic has underscored the critically important work of farm workers. The pandemic also has highlighted the vulnerability of farm workers due to the discriminatory exclusion from key protections other workers enjoy, such as overtime pay.

The history of agriculture in the United States is a history of racism. During the "New Deal" period, President Roosevelt and his allies compromised with southern Congressmen to exclude work traditionally associated with black workers. By excluding farm workers and domestic workers from FLSA, Congress sought to preserve an economic system that exploited black people.

Members of Congress at the time were explicit, they did not believe black people believed the same wage protections as white people. As stated by Representative Wilcox and I quote, "There is another matter of great importance in the south, and that is the problem of our Negro labor. When we turned over to the Federal Bureau of Board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man.

Now, such a plan might work in some sections of the United States, but those of us who know the true situation know that it just will not work in the south. You cannot put the Negro and the white man on the same basis and get away with it."

Today our Nation is painfully aware of our entrenched racism, and the impact it exerts on people of color. Congress must take one step toward addressing systemic racism by ending the discrimination that endures in the FLSA. Farm workers would benefit greatly from overtime pay.

One of the purposes in enacting FLSA was to eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers. Exclusion of farm workers from the overtime protection flies in the face of that purpose.

Farm workers work for low pay and in dangerous conditions, which is exacerbated by long hours. Beyond the increased dangers from the pandemic, agriculture work is among the most dangerous work in the country. Farm workers are disproportionately likely to be harassed, poisoned, injured, or killed on the job.

Overtime is needed to help minimize the damaging effect of agricultural work on the body. Trust me, more than 40 hours a week in agriculture is extremely challenging and can lead to long lasting injuries.

Overtime pay would also provide additional income for farm workers, many of whom live in poverty, who live from poverty, and provide security in other areas. For example, farm workers with

great economic security will feel more confident leaving abusive employers.

The United Farm Workers worked with California's legislature in 2016 to end the race base exclusion of farm workers from overtime pay. The economics of overtime pay for California's agriculture have had a positive impact. Farm workers are able to get more pay. In California agriculture continues to thrive.

Recently the Washington legislature passed a law that phases in an overtime pay for agricultural workers after the state's Supreme Court found that exception of dairy workers from overtime pay was unconstitutional. The Governor of Washington is expected to sign the bill into law.

In conclusion, now is the time to right the wrongs that can no longer be tolerated. We must end the racist exclusion of farm workers from FLSA's overtime protection. It was wrong then. It is wrong now when most farm workers are Latino. I thank Representative Grijalva for his leadership fighting racist exclusion of farm workers from overtime.

We call on Congress to enact Representative Grijalva's Fairness for Farmworkers Act. As our Member, Jorge Maldonado shared on learning about overtime pay in Washington, winning overtime pay is a victory of equality. It is a historic moment, and I am happy to have been part of it. We cannot progress if we're building on the foundation of injustice. Thank you.

[The prepared statement of Ms. Romero follows:]

PREPARED STATEMENT OF THERESA ROMERO

Statement of Teresa Romero, President, UFW
 House Education and Labor Committee's Subcommittee on Health, Employment, Labor, and
 Pensions Subcommittee
 From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers,
 and Tipped Workers from the Fair Labor Standards Act
 May 3, 2021

Chairwoman Adams, Ranking Member Keller, Chairman Scott, Ranking Member Foxx and
 distinguished members of the Subcommittee, thank you for the opportunity to testify today.

My name is Teresa Romero and I am the president of the United Farm Workers (UFW). Today I
 am testifying on behalf of the UFW and the UFW Foundation. The UFW is the nation's first
 successful and largest farm workers union. Our mission is to help protect the rights and interests
 of farm workers by creating a safe and just food supply. The UFW Foundation is a sister
 organization of the UFW that provides critical services and resources to farmworker and
 immigrant communities. Additionally, it is part of a network of farm worker organizations in the
 10 largest agricultural producing states.

There are roughly 2.4 million farm workers who work day in and day out to plant and harvest the
 crops and care for the livestock we all rely on for our food security.¹ The COVID pandemic has
 highlighted the critically important work that farm workers do. Farm work has been deemed
 essential work during the pandemic, and farm workers have continued to work despite the threat
 to their health and their increased economic vulnerability. The pandemic also has highlighted
 the vulnerability of farm workers due to the discriminatory exclusion of farm workers from many
 key protections other workers enjoy, such as overtime pay.

The 1938 Fair Labor Standards Act (FLSA) set minimum wage, overtime and other basic
 protections. This legislation, along with other New Deal legislation of the time, included a grand
 compromise that excluded farm and domestic work—work that was traditionally associated with
 the labor of Black workers—from the protections being afforded to other workers. Members of
 Congress at the time were explicit that they did not believe Black people deserved the same wage
 protections as white people. That was wrong then, when most farm workers were Black, and it is
 wrong now, when most farm workers are Latino. It is past time to end the exclusion of farm
 workers from overtime protections.

Exclusion of Farm workers from Overtime: History of Discrimination

The history of agriculture in the United States is a history of racism. During the “New Deal”
 period of labor reforms in the 1930s, President Roosevelt and his allies entered into a “grand
 compromise” with southern congressmen to obtain their support for legislation. This grand

¹ See Philip Martin, *Immigration and Farm Labor: Policy Options and Consequences*, 95 AM. J. AGRIC. ECON. 470
 (2013).

compromise included exclusions of farm workers and domestic workers from the law's protections.²

The exclusion of farmworkers and domestic workers was widely understood to be a mechanism for excluding Black workers from the laws' protections and preserving the southern plantation style economic system. The representation of Black workers in agriculture in the South leaves little doubt as to the true motive behind the exclusion of farmworkers from FLSA and the other New Deal protections. The majority of the country's agricultural workers at the time were in the South; a majority of the agricultural workers working for wages in the South were Black, as were the majority of sharecroppers; and the majority of Black workers were employed in agriculture or domestic work.³ And on the large, plantation style farms that hired the majority of farmworkers—the employers that would have been subject to the minimum wage as it was enacted in 1938—“virtually all” farm workers in the “cotton belt” southern states were Black.⁴

The exclusion of agricultural workers and domestic workers was certainly not because of a lack of need among farmworkers. In 1937, the year before the passage of FLSA, the average income in the South was \$314, as compared to \$604 in other states. Sharecroppers on cotton farms, however, earned just \$73 per person, with a range of \$38-\$87 per person.⁵ The national daily wage on farms in 1937 was \$1.74; however, in the South, the regional average daily wage was only around \$1.00.⁶ At an hourly rate, these wages were below 10 cents an hour, much lower than the FLSA required minimum wage of 25 cents. Black farm workers would likely have earned even less \$1.00.⁷ Farmworkers outside of the South, however, already earned more than the minimum wage.⁸ Thus, the significance of the minimum wage protections for farmworkers was clear—Black agricultural workers in the South would have greatly benefitted from this boost in wages, yet they were intentionally excluded.

The Congressional record clearly demonstrates some of the racist sentiment at the time. As stated by Rep. Wilcox,

² Lindner, Marc, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *Texas Law Review* 1335 (1987) at 1336. See also Perea, J. F., *Echoes of slavery: Recognizing the racist origins of the agricultural and domestic worker exclusion from the National Labor Relations Act*, *Ohio State Law Journal*, 72(1), 95-138 (2010).

³ Sean Farhang and Ira Katznelson, “The Southern Imposition: Congress and Labor in the New Deal and Fair Deal,” *Studies in American Political Development*, vol. 19 (Spring 2005), p. 15. See also *Migrant workers and minimum wages: regulating the exploitation of agricultural labor in the United States*, Linder, Marc. Boulder: Westview Press, 1992, available at <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=1013&context=books>, p. 174. (“At the congressional hearings in 1935, the NAACP put Congress on notice that the Social Security bill would exclude 3.5 million of 5.5 million black workers because they were employed as farm workers or domestics....” citing 7 Economic Security Act: Hearings Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 644, 640-41 (1935) (statement of Charles Houston)).

⁴ Marc Linder, “Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal,” *Texas Law Review*, vol. 65 (1987), pp. 1335 – 1393, 1377(citing A. MORIN, *THE ORGANIZABILITY OF FARM LABOR IN THE UNITED STATES* 97-98 (1952)).

⁵ Farhang and Katznelson, p. 15.

⁶ Marc Linder, “Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal,” *Texas Law Review*, vol. 65 (1987), pp. 1335 – 1393, 1379.

⁷ *Id.*

⁸ *Id.*, 1380.

[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, the delicate and perplexing problem can be adjusted; but the Federal government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that when we turn over to a Federal bureau of board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.⁹

Presidential interest in extending FLSA minimum wage coverage began in 1944, with President Truman's interest in providing minimum wage protections to "industrialized agriculture;" however, it took decades before Congress amended FLSA to include farmworkers.¹⁰ Presidents Kennedy and Johnson continued to seek expansions of FLSA coverage, including for farmworkers, which they characterized as part of the "War on Poverty."¹¹ The 1965 grape boycott led by Cesar Chavez and the UFW helped focus attention on the challenges faced by farmworkers and coalesce "labor-liberal" support.¹² In 1966, Congress finally amended FLSA to include some agricultural employers in a minimum wage requirement, although it was still only a sub-minimum wage requirement.¹³ When Congress again amended FLSA in 1977, it eliminated the sub-minimum wage and extended coverage to a greater number of agricultural employers.¹⁴ Over 80 years later, FLSA continues to exclude some smaller agricultural employers from the minimum wage requirements, and farmworkers remain excluded from the overtime protections.¹⁵

The large majority of agricultural workers are now Latino.¹⁶ Today, our nation is painfully aware of our country's entrenched racism and discrimination, and the impact it exerts on people of color. We hope that today's Congress can heed the higher call for morality and take one step

⁹ Farhang and Katznelson, p. 14 (citing Congressional Record, 75th Congress, 2nd session, 1937, 82:1404. Also noting that "Representative Martin Dies, a Texas Democrat, articulated the same concern, stating that a "racial question" was implicated by the FLSA because under its minimum wage provisions "what is prescribed for one race must be prescribed for the others, and you cannot prescribe the same wages for the black man as for the white man."').

¹⁰ Phyllis Palmer, "Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act," *Journal of Policy History*, vol. 7, no. 4 (1995), pp. 416 – 440, 421

¹¹ *Id.* at 425.

¹² *Id.* at 426.

¹³ See "History of Changes to the Minimum Wage Law," Department of Labor Wage and Hour available at <https://www.dol.gov/agencies/whd/minimum-wage/history>.

¹⁴ *Id.*

¹⁵ See *id.*; see also Daniel P. Gitterman, "Making the New Deal Stick? The Minimum Wage and American Political History," *The Journal of the Historical Society*, vol. XII, no. 1 (March 2012), pp. 83-84.

¹⁶ Today's agricultural work force is largely an immigrant work force. Approximately 76% of farm workers were born outside of the United States, with the majority born in Mexico (69%). Eighty-three percent of farm workers surveyed in the NAWS survey identified as "Hispanic." Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers. Research Report No. 13, page 1. January 2018, available at https://www.dol.gov/sites/dolgov/files/ETA/naaws/pdfs/NAWS_Research_Report_13.pdf

towards addressing systemic racism by ending the longstanding Jim Crow era racism that still endures in the FLSA.

**Benefits of eliminating longstanding discrimination in FLSA and
Providing Overtime Protections to Farm Workers**

One of the purposes in enacting FLSA was the elimination of “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁷ The exclusion of farm workers from the overtime protection flies in the face of that purpose. Farm workers work long hours for low pay and in dangerous conditions, conditions which are exacerbated by long hours. The hazards of agricultural work and the poverty experienced by farmworkers have become increasingly apparent during the COVID pandemic. The end of the overtime exemption for farm workers is urgently needed and will lead to significant improvements in farm worker economic well-being and health.

Despite their arduous work ensuring food security for the nation, many farm workers experience food and economic insecurity. Even before COVID, farm workers faced extreme economic hardship and, due to long-standing discriminatory exclusions, did not have the safety net available to many other workers. According to the DOL’s National Agricultural Worker Survey, farm workers’ mean and median personal incomes during the 2015-2016 time period was in the range of \$17,500 to \$19,999, with the mean and median total family income in the range of \$20,000 to \$24,999 in the previous year.¹⁸ Ironically, despite their central role in ensuring that food is on the table for American families, farmworkers in some areas are food insecure and often rely on emergency food programs for their own families.¹⁹ Farm worker poverty also means that many farm workers live in substandard housing with crowded conditions and share transportation with multiple workers. Many farm workers have experienced even greater economic insecurity in the face of the COVID pandemic.²⁰

Agricultural workplaces are already dangerous, but have become even more hazardous during the COVID pandemic. The close proximity of many farm workers as they work, combined with the lack of measures to ensure adequate sanitation contributes to a greater exposure of agricultural workers to COVID-19 in the workplace. In addition, many farm workers lack access to health insurance and health care, which is exacerbated by the under-resourced and overwhelmed health care systems in rural communities. Because of these living and working conditions, farm workers have experienced a high infection and death rate from COVID-19. According to the Department of Agricultural Economics at Purdue University, there have been over 570,000 COVID-19 cases.²¹

¹⁷ 29 USC 202(a).

¹⁸ NAWWS Report No. 13, p. 36.

¹⁹ See “Hunger Amidst Plenty: Food Assistance in Farmworker Communities,” Farmworker Justice blog, available at <https://www.farmworkerjustice.org/blog-post/hunger-amidst-plenty-food-assistance-in-farm-worker-communities/>.

²⁰ See e.g., LA Times, “Many California farm workers fear a winter of hunger and homelessness amid the pandemic,” Anita Chabria, Oct. 26, 2020.

²¹ Purdue Food and Agricultural Vulnerability Index, available at https://ag.purdue.edu:443/agecon/Pages/FoodandAgVulnerabilityIndex.aspx?_ga=2.49471334.1159720487.1600111458-250602208.1598985334 (last accessed April 29, 2021). See also New York Times, “Thousands of Farm

Even beyond COVID, agricultural work is among the most dangerous work in the country. Farm workers are disproportionately likely to be harassed, poisoned, seriously injured or killed on the job. Farm work involves exposure to pesticides and extreme weather, the danger of which has been exacerbated by climate change. Farm work is also characterized by difficult, repetitive tasks, often in uncomfortable positions, resulting in musculoskeletal injuries. Other dangerous conditions include handling heavy machinery, working with large animals, and working at heights, among others. The fatality injury rate for the agricultural sector is the highest rate for all sectors at 23.1 per 100,000, and exceeds the rate in other dangerous industries such as construction, mining and transportation.²²

Because of our nation's racism and history of discrimination against farm workers, agricultural work has long been perceived as undesirable work. As a result, many of the country's most vulnerable individuals work as farm workers. Roughly half of the nation's 2.4 million farm workers are undocumented²³ and approximately 10% of the workforce are H-2A workers, nonimmigrants whose ability to work and remain in the country is dependent on the employer that petitioned for them.²⁴ The lack of immigration status and citizenship means farmworkers are often too fearful of retaliation and immigration enforcement to draw attention to themselves by complaining about workplace violations or seeking improved conditions. In this way, our nation's racist exclusion of farm workers from key labor protections has perpetuated the vulnerability of agricultural workers, including by depriving them of the political power needed to improve their circumstances.

Agricultural work is honorable work and should not be treated as inherently undesirable. Many of our members enjoy their work and recognize the valuable contribution they are providing to our nation. Agricultural workers ask only that they be treated with respect, be paid a decent wage and be provided with the protections offered to other workers.

In learning his state would recognize overtime protections for farmworkers, Jorge Maldonado, a UFW member in Washington shared, "[w]inning overtime pay is a victory of equality, overturning hundreds of years of injustice. It is a historic moment, and I am happy to have been a part of it. We cannot progress if we are building on the foundation of injustice. Overtime pay is a step among other protections that is needed to protect agricultural workers."

By ending the racist exclusion of farm workers from overtime pay for hours worked above 40, overtime pay can help to relieve some of the poverty that farm workers experience. According to recent data, farm workers worked an average of 45 hours per week, with many workers

workers Are Prioritized for the Coronavirus Vaccine, "Miriam Jorden, March 1, 2021, available at <https://www.nytimes.com/2021/03/01/us/coronavirus-vaccine-farm-workers-california.html>.

²² Bureau of Labor Statistics, U.S. Dep't of Labor, Number and Rate of Fatal Work Injuries, by Industry, 2019, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>

²³ NAWFS Report No. 13, p. 21.

²⁴ In FY 2020, over 275,000 positions were certified by the DOL, representing over 10% of the roughly 2.4 million farm workers. See https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2020.pdf.

working more hours at different times of the season.²⁵ At a minimum, therefore, overtime pay could mean almost \$20 additional dollars per week and more during the harvest season.

Relief from poverty impacts not only economic well-being, but also helps to provide security in other ways. For example, farm workers with greater economic security will feel more confident leaving abusive employers. Agriculture has extraordinarily high rates of sexual harassment and assault. One recent study on farm worker women and sexual harassment found that 80% of the farm worker women surveyed reported experiencing sexual harassment.²⁶ The study identifies the role that economic vulnerability plays in heightening the risk of sexual harassment. "... [A]s U.S. fieldworkers, women remained in deep poverty. Low pay, in addition to the seasonal nature of fieldwork, left workers unsure as to whether they would have another agricultural job after the harvest. Regardless of whether a woman was the sole wage earner or contributed to the family's income with her partner, she remained below the poverty threshold. Staying employed was crucial to her family's survival and a factor women seriously considered when contemplating how they would respond to sexual harassment."²⁷ For farm workers, the ability to be paid overtime would increase economic security and could help empower women facing sexual harassment. Greater economic security would also help farm workers access safer housing and health insurance, both of which would improve farm worker lives.

Maria Alica Rojo Rocha, a farm worker in Idaho told us, "[i]f I was able to receive overtime pay ... I would use that money to go to the doctor to get a check up. As farmworkers we have to prioritize paying our necessities and we put off seeking medical care because we cannot afford to go to the doctor. I want to ensure that I can continue being healthy so I can contribute to my family."

In addition, farm workers' increased income from overtime pay would bring positive benefits to rural communities. Latinos in rural communities have provided significant economic contributions to their communities and increased income will only help their contributions grow.²⁸

Finally, ending the discrimination against farm workers as to overtime pay would help improve farm worker health, which is one of the primary purposes of FLSA. Farm workers face numerous hazards in their work and should be compensated with overtime pay for their overtime hours. Long working hours have been connected with increased injuries in the workplace.²⁹ As one of our California members, Gonzalo P. Lopez, shares "I have worked in the fields for more than 22 years and this work is very hard because I have worked in decades of high heat, during

²⁵ NAWS Report No. 13, at pp. 21-22.

²⁶ "Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women," Irma Morales Waugh, January 2010, available at <https://journals.sagepub.com/doi/abs/10.1177/1077801209360857>.

²⁷ *Id.* at 245-246.

²⁸ "Part 2: Immigrants and Latinos Bring Economic Growth To Rural Communities," Center For Rural Affairs, June 24, 2016, available at <https://www.cfra.org/blog/part-2-immigrants-and-latino-bring-economic-growth-rural-communities>.

²⁹ "The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018," Kapo Wong, Alan H. S. Chan, and S. C. Ngan, *Int J Environ Res Public Health*, June 2019, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6617405/>.

the rain and during very cold winters. For these reasons I ... support the legislation that would give us overtime pay to all the workers in the field

The time is now to end the racist exclusion of farm workers from overtime pay.

Eliminating longstanding discrimination in FLSA and Providing Overtime Protections to Farm workers is Economically Feasible and Will Put All Employers on the Same Footing

Agricultural employers often claim that requiring overtime pay for farm workers will result in dire scenarios. Growers seek to depict the farming industry as the quintessential family farm that cannot succeed if required to comply with FLSA requirements. Moreover, many growers reinforce the paternalistic and racist notion of the farmworker as lazy and dependent on the farmer for his care. The same was true when Congress sought to amend FLSA to require the minimum wage for some agricultural workers.³⁰ Yet the minimum wage requirement was implemented for farm workers and agriculture in the United States has continued to thrive. The same will hold true when Congress ends the discriminatory exclusion of farm workers from the overtime pay provisions of FLSA. In fact, overtime pay after 40 hours is already being phased in in California and will soon be required in Washington. California and Washington are two of the biggest agricultural states in the United States.

The UFW worked with the California state legislature in 2016 to end the race-based exclusion of farm workers from overtime pay in California. This was a small step to address one of many unfair and racist exclusions that farm workers face in America. Overtime pay in California is being phased in over a period of 4 years. California is now requiring overtime pay at 45 hours in a week; next year overtime pay will be required after a work week of 40 hours. At small farms with fewer than 25 employees, the phase-in is slower, with overtime currently being required after 55 hours.

The economics of overtime pay for California agriculture have had a positive impact. Farm workers are able to get more pay. More pay for farm worker families is important.

California, the largest agricultural state in the US, remains the largest producer for most fruits, vegetables, and dairy in the United States. Over a third of the country's vegetables and two-thirds of the country's fruits and nuts are grown in California. California is the leading U.S. state in cash farm receipts with combined commodities representing nearly 13 percent of the U.S. total. Indeed, in 2019, California's farms and ranches received over \$50 billion for their agricultural output, which represents an increase over the previous year.³¹

³⁰ See Phyllis Palmer, "Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act," *Journal of Policy History*, vol. 7, no. 4 (1995), pp. 416 – 440, p. 421-23. See also Congressional Record, House, May 25, 1966 p. 11361, Ms. May of Washington. "The inevitable effect of the provision of the bill covering agricultural workers and requiring additional overtime for agricultural processing employees would be higher consumer prices for fruits and vegetables and other food products. This would result from passing along some of the increased costs and more importantly from the fact that many marginal producers would be forced out of business, resulting in a reduction in the supply of food and consequent higher prices to the consumer." available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1966-pt9/pdf/GPO-CRECB-1966-pt9-4-1.pdf>

³¹ California Agricultural Production Statistics, available at <https://www.cdfa.ca.gov/Statistics/>

More recently, in Washington in November of 2020, the Washington State Supreme Court found that the exemption of dairy workers from overtime was unconstitutional. This is yet another advancement in attaining equality for the men, women and children keeping our domestic food supply intact. In April, the Washington legislature passed a law that phases in an overtime requirement for agricultural workers over three years, beginning in 2022. The Governor of Washington is expected to sign the farm worker overtime pay bill into law. Washington state, one of the top five agricultural states in terms of number of farm workers, is a leading agricultural state with agricultural production in the billions of dollars.

Recognizing this inequity in our labor laws, other states are also taking steps to correct this unfair and longstanding discrimination against farm workers.³²

As to any concern about the impact on consumers, the likely impact of the increase in wages from overtime pay on consumers is minimal. A recent study found that increasing wages to farm workers by about 40% would only increase consumers' household grocery bills by \$25 for the entire year.³³ According to the study, farm workers' wages are only a fraction of the price that consumers pay for groceries; therefore, increases in their wages would be unlikely to have a significant impact on grocery prices. Only a percentage of the price of groceries goes to farmers and farmers then pay only a percentage – about one-third – to workers. Given these estimates, it seems clear that the additional overtime pay would similarly have a minimal impact on consumers' wages but represent a significant income increase to farm workers. Moreover, many of today's consumers are conscious about the treatment of workers in their food supply chain and would enjoy the satisfaction of knowing that the products they're purchasing did not come at the cost of exacerbating poverty or economic insecurity for the people that feed us.

In conclusion, now is the time to right wrongs that can no longer be justified or tolerated in a society where equal rights and equal justice are supposed to be more than academic theories or political rhetoric. In a world that is ever more conscious of the structural racism underpinning our society, we must end the racist exclusion of farm workers from FLSA's overtime protection.

We call on Congress to enact legislation such as Rep. Grijalva's and now Vice President Harris's Fairness for Farm Workers Act. The Fairness for Farm Workers Act would end the discriminatory treatment of agricultural workers regarding overtime pay and minimum wage in the Fair Labor Standards Act. The legislation would phase in overtime pay over a period of 4 years and would give smaller employers additional time to adjust to these changes.

³² See, e.g. Colorado SB21-087, Oregon HB 2358

³³ "How much would it cost consumers to give farm workers a significant raise?" Daniel Costa and Phil Martin, EPI Working Economics Blog, October 15, 2020, available at <https://www.epi.org/blog/how-much-would-it-cost-consumers-to-give-farmworkers-a-significant-raise-a-40-increase-in-pay-would-cost-just-25-per-household/>.

Chairwoman ADAMS. Thank you very much. Finally, we'll hear from Ms. Yoon, you are recognized for five minutes.

STATEMENT OF MS. HAEYOUNG YOON, JD, SENIOR POLICY DIRECTOR, NATIONAL DOMESTIC WORKERS ALLIANCE

Ms. YOON. Thank you, Madam Chair. Thank you for the opportunity to testify. Domestic workers in the early part of the 20th Century compared to today's workforce have both changed dramatically and remain remarkably similar. In the earlier part of the 20th Century although women increasingly joined the workforce, their job opportunities were limited, and black women and immi-

grant women were virtually shut out of better paying jobs that some white women were able to get.

In 1930s and 40s black women were overwhelmingly represented in domestic service. Today domestic workers are from diverse racial and ethnic backgrounds. To give you a sense of the diversity, when we surveyed domestic workers in 2012, we interviewed workers from 71 countries.

What has remained the same in the last 80 years is that women are over-represented in the sector. Today over 90 percent of domestic workers are women, well over half are women of color, and a third are immigrants. Unlike farm workers, domestic workers were not expressly excluded when the law passed in 1938.

On its face the exclusion appears race and gender neutral. The coverage was based on whether a worker engaged in commerce, or in the production of goods for commerce. But research shows that while more expansive interpretation of the commerce clause was legally permissible, political consideration dictated to conclude that domestic work did not implicate commerce.

Committee debates show that the exclusion of domestic workers, along with farm workers were motivated by racism, allowing employers in the south to dictate the terms and conditions of black labor, and to maintain a racial and social hierarchy. Some legislators opposed the law on the ground that it threatened to equalize wages between black and white workers.

Others compared FLSA to anti-lynching legislation. We also see the workings of sexism. Seeing domestic work as women's unpaid household labor, Roosevelt is quoted to saying that the Fair Labor Standards Act is not intended to apply to "domestic help."

It took a large movement for Congress to extend FLSA coverage to domestic workers in 1974, finding that domestic service affects commerce. While it extended protection to a significant number of domestic workers, it also left many out of its protection.

Congress narrowly exempted companions and casual babysitters from the minimum wage and overtime protection, but entirely excluded live-in workers from overtime protection. The Labor Department took the companionship services exemption and defined it overly broad to carve out a whole class of home care workers whose vocation is to provide home based services to older Americans and people with disabilities, and exempted third-party employers, like a home care agency, from paying their workers minimum wage and overtime.

In 2013 the Labor Department issued new regulations to bring the scope of the exemption in line with congressional intent, and to reflect the dramatic changes in the home care industry. Now millions of home care workers are covered under minimum wage and overtime protection, and third-party employers are required to pay their workers minimum wage and overtime.

But live-in workers who are hired by private households remain excluded from overtime protection. This legacy of racial and gender exclusion continues to shape the working lives of domestic workers. Their work is devalued, they're underpaid and largely unprotected in the workplace.

In 2018 domestic workers earned just about \$16,000.00 a year, significantly lower than other workers whose average annual in-

come was about \$39,000.00. Wage staff and other workplace violations are pervasive across domestic occupations. They often work long hours and are exposed to potentially harmful cleaning products.

Given that the nature of domestic work is intimate, too many workers are subject to sexual assault and harassment, physical and verbal abuse. Domestic workers ongoing exclusion from other Federal workplace laws such as Title VII, health and safety laws leave them without protection.

This is the reason why this Congress must pass the Domestic Workers Bill of Rights to protect domestic workers across the country. Thank you.

[The prepared statement of Ms. Yoon follows:]

PREPARED STATEMENT OF HAEYOUNG YOON



Statement of Haeyoung Yoon, Senior Policy Director, National Domestic Workers Alliance

May 3, 2021 Hearing before the U.S. House of Representatives Education and Labor Committee, Workforce Protections Subcommittee

From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act

Introduction

Chairwoman Adams, Ranking Member Keller, Chairman Scott, Ranking Member Foxx, and Members of the Committee, thank you for holding this hearing, and for the opportunity to speak with you about the historical exclusion of domestic workers from one of our nation's core workplace laws, and protections and standards domestic workers need now as our nation recovers and rebuilds out of the twin crises of public health and economy.

My name is Haeyoung Yoon, and I am the Senior Policy Director at the National Domestic Workers Alliance (NDWA). Founded in 2007, the National Domestic Workers Alliance is the nation's leading voice for 2.2 million domestic workers who work as nannies, home care workers, and house cleaners in private homes.¹ NDWA works to raise and strengthen industry standards to ensure that domestic workers achieve economic security and opportunity, and have protections, respect, and dignity in the workplace. NDWA organizes domestic workers, cultivates the leadership of women and women of color, leads campaigns for policy change, engages in social innovation to deliver greater economic security and benefits to domestic workers and their families. NDWA reaches and engages over 250,000 domestic workers on a regular basis through our 70 affiliate organizations in 36 cities and 17 states, local chapters in Philadelphia, Washington, D.C., and New York City, and through digital platforms.

In my testimony, I will trace the historical exclusion of domestic workers from the Fair Labor Standards Act (FLSA) from its first enactment in 1938 to their progressive inclusion through the 1974 amendments to the FLSA and the 2013 Labor Department regulations and discuss the current exclusion. I will highlight the important roles domestic workers, other women, including women policy makers, and others played to ensure that domestic workers win inclusion in the FLSA. I will then draw the through line to today, explaining how the legacy of exclusions

¹ About the National Domestic Workers Alliance, <https://www.domesticworkers.org/about-us>

continue to subject domestic workers to substandard working conditions and abuse. Finally, I will provide an overview of state and federal laws that have been introduced and passed that would extend protections to domestic workers, including the Domestic Workers Bill of Rights Act, introduced by Congresswoman Pramila Jayapal.

Original Exclusion of Domestic Workers in the Fair Labor Standards Act of 1938

In the 1930s when the New Deal was being negotiated, Black workers and women in the South were highly concentrated in the domestic service sector. In 1930s and 1940s, approximately 79 percent of the South's domestic service sector consisted of Black workers.² While emancipation brought the legal abolition of slavery, it did not end southern plantation owners' motivations to retain the institution for their economic gains, cheap labor, and a racial hierarchy between whites and Blacks.³ As a result, the exploitation of Black labor to support the continued existence of a quasi-plantation society remained extremely important to the South for decades after the Civil War. Southern lawmakers at the state and national level worked to maintain this status quo by creating policies that would keep Black people economically dependent and politically disenfranchised, and prevent them from achieving upward mobility.⁴ For Black women in particular, this meant restricting their employment opportunities to service occupations, such as domestic work,⁵ where they would remain under the control of white households, and be paid extremely low wages, while working long hours to carry out grueling workloads.⁶

The Fair Labor Standards Act was a signature achievement of the New Deal, establishing the federal minimum wage and maximum work hours. Enacted in 1938, Congress aimed to "raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health."⁷ This landmark legislation that was intended to protect workers from "evils and dangers" resulting from low-wages excluded workers working in domestic service and other industries like agriculture, that were overrepresented by Black workers.

At first flesh, the statutory exclusion of domestic workers appears race-neutral, as its coverage and protection reached workers "engaged in commerce or in the production of goods for

² Sean Farhang and Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, *Studies in American Political Development*, p. 15 (2005).

³ Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 *Ohio St. L.J.* 95, 100-104 (2011).

⁴ Perea, *supra* note 3 at 100-104.

⁵ Jessica Pearce Rotondi, *HISTORY, Underpaid, But Employed: How the Great Depression Affected Working Women*, (March 11, 2019)

<https://www.history.com/news/working-women-great-depression>

⁶ Phyllis Palmer, National Archives, *Black Domestic Workers During the Depression*.

<https://www.archives.gov/publications/prologue/1997/summer/domestics-in-the-depression>

⁷ *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (internal quotation marks omitted)

commerce."⁸ Congress concluded that domestic work did not implicate commerce.⁹ However, a closer examination of committee debates and comments of policy makers tell a different story--that the exclusion of domestic workers was indeed racially motivated to intentionally exclude Black workers from FLSA protection and led by efforts of Southern congressmen, who held majority control of the Senate during the 1930s.¹⁰ They understood well that the minimum wage and overtime provisions of the FLSA would primarily benefit rural and impoverished individuals.¹¹ In the South, that would mean helping large numbers of Black workers. And, in the eyes of Southern lawmakers, that could not happen because it would upset the status quo and threaten to give Black workers higher wages and more socioeconomic power.¹² These Southern congressmen refused to support the labor law provisions of the New Deal if they covered Black workers.

During the committee debate of the FLSA, Southern lawmakers expressed dismay at the outcomes of this legislation as meant to deprive the South of cheap, Black labor and provide equality with white workers.¹³ Representative Mark Wilcox of Florida commented that "We may rest assured, therefore, that ... [this bill] will prescribe the same wage for the Negro that it prescribes for the white man.... [T]hose of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result."¹⁴ Senator Ed Smith from South Carolina similarly lamented that "Any man on this floor who has sense enough to read the English language knows that the main object of this bill [the FLSA] is, by human legislation, to overcome the splendid gifts of God to the South."¹⁵

President Roosevelt acquiesced to this racially-motivated pressure in order to get legislative priorities passed. President Roosevelt explained his strategy remarking, "First things come first, and I can't alienate certain votes I need for measures that are more important at the moment by pushing any measures that would entail a fight."¹⁶ Responding to disparities for Black workers under legislation to create fair wages and prices, Roosevelt said that "It is not the purpose of this

⁸ Pub. L. No. 75-718, § 2(a), 52 Stat. 1060, 1060 (1938).

⁹ See *Fair Labor Standards Act of 1937: Joint Hearings Before the S. Comm. on Educ. & Labor and H. Comm. on Labor on S. 2475 and H.R. 7200*, 75th Cong. 1067 (1937) (statement of Sen. Hugo L. Black, Chairman, S. Comm. on Education & Labor) (noting that exclusion of domestic service is "very intentional," as "the bill does not attempt to regulate anything except interstate commerce.")

¹⁰ Perea, *supra* note 3 at 104-126.

¹¹ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 *Tex. L. Rev.* 1335, 1373-1375 (1987).

¹² Farhang and Katznelson, *supra* note 2 at 15.

¹³ Farhang and Katznelson, *supra* note 2 at 14.

¹⁴ Perea, *supra* note 3, at 115.

¹⁵ *Id.*

¹⁶ Perea, *supra* note 3, at 103.

Administration to impair Southern industry by refusing to recognize traditional differentials.¹⁷ Roosevelt tacitly embraced systemic racism by excluding domestic workers along with agricultural workers and tipped workers. When the opponents of the FLSA claimed that the federal law would require housewives to “pay your negro girl eleven dollars a week,” Roosevelt assured them “No law ever suggested intended a minimum wages and hours bill to apply to domestic help.”¹⁸ Notably, Roosevelt’s own characterization of domestic work as “help” as opposed to real labor further exposes the devaluation of domestic labor.

Domestic Workers Make Gains Through the Power of Organizing

Domestic workers remained entirely excluded from the FLSA until the 1970s, when Congress found that domestic service employees in households affect commerce. Thanks to the organizing of Black domestic workers, more domestic workers were included in minimum wage and overtime protections in the 1970s. Organizing domestic workers was challenging because unlike in most other sectors, most domestic workers do not work in the same location, or even for the same employer. Domestic worker leaders like Dorothy Bolden rode the city bus lines to speak with other domestic workers on their commutes,¹⁹ while Carolyn Reed sought out domestic workers in the laundry rooms of apartment buildings.²⁰

Domestic worker activists worked hand-in hand with, and stood at the intersection of several contemporaneous movements. For the civil rights, labor and women’s rights movements, domestic workers became “the quintessential candidate for advocacy as the lowest-paid woman, the poorest-paid African American worker, and the bottom tier of wage labor.”²¹ Organizing around the FLSA became part of the national women’s movement. Women’s testimony helped underscore the actual labor involved in housework, and shift the perception around cooking, cleaning, and childcare as “demanding, socially essential activities.”²² Similarly, civil rights groups and labor organizations helped equate “cleaning work outside the home with such work inside the home” and supported the inclusion of domestic workers in the FLSA to further racial and wage justice.²³

Notably, in Atlanta, Bolden started the National Domestic Workers Union (NDWU), which helped improve labor conditions for workers. NDWU helped workers with job placement and negotiation skills.²⁴ Inspired by the civil rights movement, Bolden’s group also required that all

¹⁷ *Id.*

¹⁸ Suzanne B. Mettler, *Federalism, Gender, & the Fair Labor Standards Act of 1938*, *Polity*, Vol. 26, No. 4, p. 647 (1994).

¹⁹ Daniel E. Slotnik, *The New York Times*, *Overlooked No More: Dorothy Bolden, Who Started a Movement for Domestic Workers*, (Feb. 20, 2019) <https://www.nytimes.com/2019/02/20/obituaries/dorothy-bolden-overlooked.html>

²⁰ Premilla Nadasen, *The Care Deficit*, *Dissent Magazine* (2016) <https://www.dissentmagazine.org/article/care-deficit-hba-domestic-worker-organizing-history>

²¹ Phyllis Palmer, *Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act*, 7 *J. Policy Hist.* 416, 427 (1995).

²² *Id.* at 418, 427-78.

²³ *Id.* at 478.

²⁴ Elizabeth Beck, *The National Domestic Workers Union and the War on Poverty*, *The J. Soc’y & Soc. Welfare* 195, 203-205, (2001) <https://scholarworks.wmich.edu/jssw/vol28/iss4/11>

members register to vote and mobilized workers to boycott racist businesses and to support Black strikers.²⁵ NDWU eventually represented more than 30,000 domestic workers in ten cities, and became the longest surviving domestic workers union.²⁶ Bolden also brought national recognition to the domestic worker movement, becoming an advisor to Presidents Richard Nixon, Gerald Ford, and Jimmy Carter.²⁷

Around the same time, Geraldine Miller organized the Household Technicians of America (HTA). It was the first national organization of domestic workers. They chose the name "household technician" to demand that they no longer be dismissed, but be recognized as workers that have skill and training.²⁸ Among other tactics, the HTA pressured Congress to include domestic workers in the federal minimum wage, as well as pressuring employers to comply with Social Security laws.²⁹ Other groups included the Domestic Workers of America formed by Geraldine Roberts in Cleveland and the Household Workers Organization formed by Mary McClendon in Detroit.³⁰ These domestic worker activists were critical in mobilizing their members to testify before Congress and create a national presence.

Representative Shirley Chisholm, the first Black female member of Congress, was instrumental in advancing the cause of domestic worker advocates. Congresswoman Chisholm connected the through line between FLSA exclusions and the resulting economic insecurity on domestic workers saying: "Of these poor female heads of household who work, over half worked as maids in 1970 and had incomes under the poverty line."³¹ Congresswoman Chisholm also challenged the narrow definition of interstate commerce, through which domestic workers were excluded from the FLSA coverage. Chisholm correctly pointed out that "Every household product used by a domestic from Handy-Andy to a Hoover is a product which has moved in interstate commerce."³² Finally, she acted as a political counterweight to Southern Congressmen that did not want to expand FLSA protections, even successfully recruiting Alabama Governor George Wallace, as an unlikely ally, to intervene with reluctant members of Congress.³³

²⁵ *Id.* at 201-203.

²⁶ Georgia State University Library, *Dorothy Bolden gave voice to Atlanta's "Help"* (Sep. 7, 2011)

<https://blog.library.gsu.edu/2011/09/07/dorothy-bolden-gave-voice-to-atlantas-help/>

²⁷ Rosalind Bentley, *The Atlanta-Journal Constitution*, Dorothy Bolden: Helped black domestic workers harness political power (Feb. 21, 2019) <https://www.ajc.com/lifestyles/dorothy-bolden-helped-black-domestic-workers-harness-political-power/peRGtyDV2cjp7uSHgUuN/>

²⁸ Loretta Ross, *Voices of Feminism Oral History Project* Sophia Smith Collection, Smith College, Geraldine Miller, p. 30 (Oct. 14, 2004) <https://www.smith.edu/libraries/lbs/ssc/vof/transcripts/Miller.pdf>

²⁹ *Id.* at 53

³⁰ Premilla Nadasen, Institute for Policy Studies, *PAY, PROFESSIONALISM & RESPECT: Black Domestic Workers Continue the Call for Standards in the Care Industry*, Report, p. 13 (2018) <http://www.istor.org/stable/resp27076.15>

³¹ Palmer, *supra* note 21, at 430.

³² *Id.*

³³ House of Representatives, Office of Art & Archives, Office of the Clerk, *Guts, Stamina, Audacity: Shirley Chisholm's House Career* (2019) <https://history.house.gov/Blog/2019/January/1-3-Chisholm/>

Inclusion of Some But Not All Domestic Workers in the FLSA 1974 Amendments

In 1974, Congress amended the Fair Labor Standards Act to bring within its minimum wage and overtime protections workers “employed in domestic service in one or more household.”³⁴ Lawmakers estimated that 1.28 million domestic workers gained FLSA coverage, benefitting about 73 percent of whom earned less than the minimum wage.³⁵

In extending coverage, Congress rejected its past rationale for excluding domestic workers, by finding that “the employment of persons in domestic service in households affects commerce.”³⁶ The legislative history of the 1974 amendments pointed out that “employees in domestic service employment handle goods such as soaps, mops, detergents, and vacuum cleaners that have moved in or were produced for interstate commerce and also that they free members of the household to themselves to engage in activities in interstate commerce.”³⁷ The Senate Committee on Labor and Public Welfare noted “that coverage of domestic employees is a vital step in the direction of ensuring that all workers affecting interstate commerce are protected by the Fair Labor Standards Act.”³⁸

At the same time, through the 1974 amendments, Congress created two exemptions from the long overdue full coverage. Domestic service workers who provide companionship services to older adults and people with disabilities³⁹ were exempted from the minimum wage and overtime protections, and domestic workers who reside in the households in which they provide services (i.e. “live-in domestic workers”) were excluded from overtime protection.⁴⁰ The legislative history further clarified that the intent of the 1974 amendments was to expand the FLSA coverage to all employees whose vocation was domestic service, and narrowly exempt from coverage casual babysitters and individuals who provided companionship services.⁴¹ During the debate of the 1974 amendments, Senator Harrison Williams, Chairman of the Senate Subcommittee on Labor and the Senate, “described individuals who provided companionship services as ‘elder sitters’ whose primary responsibility was ‘to be there and to watch’ over an elderly person or person with an illness, injury, or disability in the same manner that a babysitter watches over children, ‘not to do household work.’”⁴²

After Congress extended the FLSA to workers in domestic service with the intent to cover all employees whose vocation was domestic service, the Labor Department interpreted the law’s

³⁴ Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 7, 88 Stat. 55, 62 (1974).

³⁵ H.R. REP. 93-913, at 33 (1974).

³⁶ Pub. L. No. 93-259, § 7, 88 Stat. 55, 62.

³⁷ 29 CFR § 552.99 (1974).

³⁸ S. Rep. 93-690, pp. 21–22 (1974).

³⁹ FLSA defines individuals who receive companionship services as “individuals who (because of age or infirmity) are unable to care for themselves.” See Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (1938). In this testimony, I refer to such individuals as older adults or aging adults and people with disabilities.

⁴⁰ Pub. L. No. 93-259, § 7, 88 Stat. 55, 62.; 29 U.S.C. 13(a)(15), 13(b)(21).

⁴¹ 29 CFR Part 552 at 60457.

⁴² 29 CFR Part 552 at 60457.

narrow “companionship” exemption expansively to deny coverage to caregivers who provide home-based services, even though they would have enjoyed full FLSA rights had they performed the same work in nursing home or similar congregate settings.

The 1975 Department of Labor regulations defined companionship as “fellowship, care, and protection,” which included “household work . . . such as meal preparation, bed making, washing of clothes, and other similar services” and could include general household work not exceeding “20 percent of the total weekly hours worked.”⁴³ In addition, the 1975 regulations permitted third party employers, or employers of home care workers other than the individuals receiving care or their families or households, to claim both the companionship services and live-in domestic service employee exemptions.⁴⁴

The Labor Department’s broad interpretation of a narrow companionship exemption denied home care workers, like Evelyn Coke, a right to minimum wage and overtime pay. Coke took care of elderly people - bathing, dressing and cooking for them.⁴⁵ In return for, at times, working 24-hour shifts, she earned only around \$7 an hour and never earned overtime pay.⁴⁶ Coke challenged her exclusion from the FLSA in the Supreme Court, but the Court unanimously ruled against her in 2007, holding that the “companionship” exemption was still in force and only Congress or the Department of Labor could change the rules.⁴⁷

The 2013 Labor Department Home Care Rule Covers Two Million Home Care Workers

The Obama administration responded four years later by issuing a regulation in 2013 to extend FLSA’s minimum wage and overtime protections to two million home care workers. The Labor Department points out in its Final Rule that, since the 1974 amendments, the home care industry that employs most of the workers that are excluded by the companionship service exemption has undergone dramatic expansion and transformation.⁴⁸ These workers now belong to one of the fastest growing occupations in our economy,⁴⁹ as the caregiving demand has skyrocketed with aging of Baby boomers and more individuals prefer to receive long-term supports and services in home and community settings. This workforce that provides critical services to people with disabilities and older Americans with activities of their daily living, such as bathing and dressing, and often provide medical care, such as managing their medications or performing tracheostomy care, are not the elder sitters that Congress envisioned when it enacted the companionship services exemption in 1974. Rather, they are professional caregivers.

⁴³ 29 CFR § 552.2 at 273.

⁴⁴ 29 CFR § 552.2 at 276.

⁴⁵ Douglas Martin, *Evelyn Coke, Home Care Aide Who Fought Pay Rule, Is Dead at 74*, *The New York Times* (Aug. 9, 2009) <https://www.nytimes.com/2009/08/10/nyregion/10coke.html>

⁴⁶ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). See also Sandra S. Butler, *Home Care Work: The Companionship That Was Exempted*, *The Gerontologist*, Vol. 52, Issue 3, pp. 433–436 (2012).

⁴⁷ *Id.*

⁴⁸ 29 CFR Part 552 at 60458.

⁴⁹ Paraprofessional Healthcare Institute *U.S. Home Care Workers Key Facts* (2019) <https://phinaf.org/wp-content/uploads/2019/08/US-Home-Care-Workers-2019-PHI.pdf>.

The 2013 Final Rule defines the companionship services narrowly to limit to workers who are providing the sorts of limited, nonprofessional services Congress envisioned when creating the exemption in 1974.⁵⁰ Moreover, to ensure that the domestic service employees Congress intended to protect under the FLSA, the Final Rule precludes third party employers (e.g., home care agencies) from claiming the exemption for companionship services or live-in domestic service employees.⁵¹

Domestic Workers Today: The Impact and Legacy of FLSA Exclusions

Demographics, Wages and Working Conditions

As it was when the FLSA was first enacted in 1938, the domestic workforce remains a gendered sector today, carrying the legacy of slavery and exclusion. Domestic work is, by necessity, intensely personal in nature and is largely seen as women's work. As such, it also carries the long legacy of the devaluation of women's labor in the households. Domestic workers are over 90 percent women, well over half are women of color, and more than a third are immigrants.⁵² While women still dominate the workforce, changes in immigration policies and globalization have given rise to more immigrant women taking up domestic work. As of 2019, domestic workers are more likely than other workers to have been born outside the United States; one in five domestic workers is a foreign-born noncitizen, while about one in seven is a U.S. citizen who was born in a different country.⁵³ While noncitizens are overrepresented in all domestic worker occupations, they are particularly concentrated in the house cleaner workforce, making up half of house cleaners.⁵⁴

Steeped in a historically racist and gender-laced perception that domestic labor is merely "help" and not real work, domestic workers continue to be underpaid and undervalued. While many domestic workers are primary breadwinners for their households⁵⁵, they are paid low wages, have few employer-provided benefits, like health insurance or paid time-off, and cannot access paid family and medical leave or paid sick days. The typical domestic worker is paid \$12 an hour, 39.8 percent less than a typical nondomestic worker who is paid \$19.97 an hour.⁵⁶ The average annual income of a domestic worker is less than \$16,000 per year.⁵⁷

⁵⁰ 29 CFR Part 552 at 60454-55.

⁵¹ *Id.* at 60454.

⁵² Julia Wolfe, Jori Kandra, Lora Engdahl, and Heidi Shierholz, Economic Policy Institute, *Domestic workers chartbook* (May 14, 2020) <https://www.epi.org/publication/domestic-workers-chartbook-a-comprehensive-look-at-the-demographics-wages-benefits-and-poverty-rates-of-the-professionals-who-care-for-our-family-members-and-clean-our-homes/>

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Since March 13, 2020, NDWA has been conducting weekly surveys of domestic workers through our online news services. Our surveys in March and early April showed that 77 percent of over 15,000 surveyed workers are primary breadwinners of their households. See National Domestic Workers Alliance, *Coronavirus' Economic Impact on Domestic Workers* (2020) https://domesticworkers.org/sites/default/files/Coronavirus_Report_4_8_20.pdf

⁵⁶ Wolfe, *supra* note 50.

⁵⁷ *Id.*

Today, despite the fact that care work is one of the fastest growing occupations in our economy, wages are not keeping up with the demand for these jobs. Domestic workers are much more likely than other workers to be living in poverty, regardless of occupation.⁵⁸ In addition, workplace violations are pervasive and systemic across domestic occupations, compounded by the stark power imbalance between workers and employers and the fear of termination or other retaliation.⁵⁹ They often perform work that is physically punishing, involving heavy lifting, long hours, and exposure to potentially harmful cleaning products.⁶⁰ Workers are highly exposed to the entire spectrum of labor exploitation, including sexual assault, physical and verbal abuse and trafficking.⁶¹ We have even seen modern day slavery type cases.⁶² Domestic workers' ongoing exclusion from other federal employment laws leave many without protection from anti-discrimination, anti-harassment, and safety and health laws.⁶³

The story of Zofia, a home care worker from Illinois, illustrates the continuing issue of wage theft. Zofia worked 84 hours per week and earned just \$500 weekly while caring for a patient with Parkinson's and dementia. After learning her rights and how to calculate her proper wages from an NDWA affiliate, Zofia found she was owed thousands of dollars for 11 months of work. With support from our affiliate, she led meetings and direct negotiations with the employer, and recovered \$11,000 in owed wages.

Stories from our NDWA affiliates demonstrate also how domestic workers are subject to harassment and abuse. Deborah is from New York state, and got her first job as a nanny when she was 16 years old. She cared for a 3-year-old boy while his parents were at work. She was so excited because it meant helping her family financially. One day, the dad arrived home and immediately went to take a shower. He called for her to help him with something. When she arrived at the bathroom door with the child, he exposed himself to Deborah. She felt scared and paralyzed by shock. She took the child to another room, but the father followed them. He began to touch and sexually assault Deborah right in front of his child. It was one of the most terrifying experiences of her life. Deborah was able to get away when a neighbor knocked on the door. She ran out of the house but out of fear and embarrassment, she kept silent for almost two decades.

⁵⁸ *Id.*

⁵⁹ Annette Bernhardt, Ruth Milkman, and Mik Theodore, National Employment Law Center, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* (2009) <https://www.nelp.org/publication/broken-laws-unprotected-workers-violations-of-employment-and-labor-laws-in-americas-cities/>

⁶⁰ Linda Burnham and Nik Theodore, *Home Economics: The Invisible and Unregulated World of Domestic Work*, National Domestic Workers Alliance, pp. 28-32 (2012) <https://domesticworkers.org/sites/default/files/HomeEconomicsReport.pdf>

⁶¹ John Cavanagh and Ai-jen Poo, Institute for Policy Studies and National Domestic Workers Alliance, *The Human Trafficking Of Domestic Workers In The United States* (2017): https://ips-dc.org/wp-content/uploads/2017/03/Beyond-Survival-2017-Report_FINAL_PROOF-1-1.pdf

⁶² American Civil Liberties Union, *Modern Enslavement of Migrant Domestic Workers by Foreign Diplomats in the United States*, <https://www.aclu.org/other/domestic-workers>

⁶³ Reocio Avila and Lillian Agbeyegbe, National Domestic Workers Alliance and Polaris Project, *Human Trafficking at Home*, pp. 16-17 (2019): https://polarisproject.org/wp-content/uploads/2019/09/Human_Trafficking_at_Home_Labor_Trafficking_of_Domestic_Workers.pdf

Nina, a homecare worker from Florida, worked as a live-in caregiver to a male employer. On her very first night on the job, he asked her to get into bed with him. Over the course of the next several months, he groped her repeatedly. Nina explains that she felt she could not tell the agency she worked for because she knew they would take her off the job, and she needed the income. Nina described feeling isolated and alone and did not know where to turn for help. She left as soon as she could find another job, and it wasn't until months later that she learned her employer had been harassing other women who worked for him as well. Nina says it took her years to get over the shame and embarrassment she felt.

Live-in Domestic Workers and the Current Exclusion from FLSA Overtime Protection

Currently, live-in domestic workers who are hired directly by their household employer remain excluded from the FLSA overtime pay protection. In 2013, the Labor Department concluded that “[b]ecause the live-in domestic service employee exemption is statutorily created, the Department cannot eliminate the exemption... Only Congress could eliminate the overtime exemption for such workers.”⁶⁴

Live-in domestic workers often have no separation between work and their personal life. Their work day does not have an official “end”, as they may be responsible for taking care of the family of the house from morning until evening - and may even need to work in the middle of the night.⁶⁵

Stories of our NDWA members illustrate how live-in domestic workers are treated without the FLSA protection. Carmen has worked as a domestic worker for almost 10 years and lives in Massachusetts. When she worked as a live-in nanny, Carmen worked 12 hours and sometimes up to 20 hours a day. She got paid a total of \$350 a week and never compensated for her overtime hours. Her employer relied on the FLSA overtime exclusion to not pay for all the hours she worked.

Leonora lives in a border state and has been a domestic worker for the past 18 years. For three years she was working as a live-in nanny and house cleaner for a family with three children ages. Leonora worked Mondays to Fridays from 6:30am-7pm and received a total of \$220 each week in violation of both the minimum wage and overtime protection under the FLSA.

Domestic Workers During the COVID-19 Pandemic

The pandemic brought a magnifying glass to how the exclusion from labor protections is tied to and exacerbates domestic workers' economic insecurity. Many domestic workers experienced sudden job losses, without access to unemployment insurances or other COVID relief. For

⁶⁴ 29 CFR Part 552 at 60473-74.

⁶⁵ Burnham and Theodore, *supra* note 60, at 19

instance, NDWA conducted a survey of 800 Black domestic workers in May and June 2020 in Massachusetts, Miami-Dade County, and New York and found that 70 percent of the Black immigrant domestic workers surveyed had either lost their jobs or received reduced hours and pay.⁶⁶ Black undocumented workers were nearly twice as likely to be terminated than documented workers.⁶⁷ NDWA also surveyed more than 20,000, largely Spanish-speaking domestic workers, from March to September 2020, and found that, by late March, 90 percent of workers lost jobs due to COVID-19.⁶⁸

While many experienced sudden unemployment, many other domestic workers continued to go to work, risking their lives and that of their own families to care for children, an aging adult or people with disabilities.⁶⁹ Thus, this pandemic has also been a *crisis of impossible choices* for domestic workers. Without a safety net, domestic workers have no choice but to go to work or risk eviction and the threat of not feeding their families. For months, many workers went without personal protective equipment (PPE) or child care for their own children and did not receive an increase in pay.

Federal and State Efforts to Establish Standards for Domestic Workers

The domestic worker movement has grown since domestic workers were originally excluded from the Fair Labor Standards Act and other New Deal legislation. The National Domestic Workers Alliance was founded in 2007 and over the last decade, our organizing and advocacy have been critical to the passage of the Domestic Workers Bill of Rights Act in ten states and two major cities including Oregon⁷⁰, California⁷¹, Connecticut⁷², Illinois⁷³, New York⁷⁴, Massachusetts⁷⁵, Hawaii⁷⁶, Nevada⁷⁷, New Mexico⁷⁸ and Virginia.⁷⁹ The Domestic Workers Bill of Rights Acts have consisted of ending historical exclusion in state minimum wage and

⁶⁶ The Institute for Policy Studies' Black Worker Initiative, National Domestic Workers Alliance's We Dream in Black program, and National Domestic Workers Alliance Labs, *Notes from the Storm: Black Immigrant Domestic Workers in the Time of COVID-19* (2020): <https://domesticworkers.org/sites/default/files/IPS-WDIB-survey-brief.pdf>

⁶⁷ *Id.*

⁶⁸ National Domestic Workers Alliance Labs, *6 Months in Crisis: The Impact COVID-19 on Domestic Workers* (2020).

⁶⁹ See Madeline R. Sterling, Emily Tseng, and Anthony Poon, *Experiences of Home Health Care Workers in New York City During the Coronavirus Disease 2019 Pandemic*, *JAMA Intern. Med.* (2020), See also Luke Winkie, Vox, *What domestic work looks and feels like right now* (Jan 15, 2021) <https://www.vox.com/the-goods/2021/1/15/22225692/national-domestic-workers-alliance-us-covid-19-rights>

⁷⁰ OR (SB-552A, 2015):

<https:// bills.leg.state.or.us/liz/2015SB1/Downloads/MeasureDocument/SB552/Enrolled>

⁷¹ CA (AB 241, 2013 and SB 1021, 2016): http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1001-1050/sb_1015_bill_20160211_introduced.html

⁷² CT (SB 446, 2015): <https://www.cga.ct.gov/2015/ACT/pa/pdf/2015PA-00249-R00SB-00446-PA.pdf>

⁷³ IL (HB 1288, 2016): <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0758>

⁷⁴ NY (Bill No. A01470B, S-2311-E, 2010): <https://www.labor.ny.gov/legal/domestic-workers-bill-of-rights.shtm>

⁷⁵ MASS (S. 882, 2014): <http://www.mass.gov/ago/docs/workplace/domestic-workers/dw-notice-of-rights.pdf>

⁷⁶ HI (SB535 HD2, 2013): <http://www.capitol.hawaii.gov/session2013/bills/GM1351>

⁷⁷ NV (SB 232, 2017): <https://www.leg.state.nv.us/App/NEILS/REL/79th2017/Bill/5125/Text>

⁷⁸ NM (SB 85, 2019): <https://www.nmlegis.gov/Sessions/19%20Regular/bills/senate/SB0085.pdf>

⁷⁹ VA (SB 1310, 2021): <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0513>

overtime laws, which flowed from the FLSA exclusions and establishing new and innovative standards. In states like Virginia and New Mexico, domestic workers now finally enjoy the rights to state minimum wage law protections, and more domestic workers in Hawaii are covered under its state minimum wage law. In New York⁸⁰, Illinois⁸¹, California⁸² and Oregon,⁸³ domestic workers are entitled to overtime pay for the first time or are entitled to it at the same rate as other workers do. Other protections these local and state laws extend include protections against discrimination and harassment, paid time off, meal and rest breaks, a right to notice of termination, and enhanced retaliation protection. While local and state laws are critical to protecting domestic workers' rights, much more is needed to establish a national baseline standard to ensure that all of our nation's 2.2 million domestic workers are protected and enjoy the same rights and protections.

In 2019, Congresswoman Pramila Jayapal introduced the National Domestic Workers Bill of Rights Act,⁸⁴ and we are working with Congresswoman Jayapal and Senator Kirsten Gillibrand to reintroduce it in this Congress. The National Domestic Workers Bill of Rights strikes the remaining FLSA exclusion for live-in domestic workers and establishes other baseline standards such as earned sick days, privacy protections, meal and rest breaks, safety and health measures, and fair scheduling provisions⁸⁵ to protect domestic workers from substandard working conditions.

Conclusion

Domestic workers epitomize essential work by enabling millions of other workers to participate in the workforce, knowing their homes and families are in good hands. As more people live longer, we're going to need more care than ever before. And, as occupations like home care are set to be the fastest growing over the next decade, this workforce is going to be a huge part of how we care for our families in the 21st century.

This Congress has a profound moment of opportunity to rebuild and reset our economy to be more inclusive and equitable. In the context of jobs and recovery, we could - and we must - invest in caregiving the way we invest in infrastructure. That includes making sure that our care workforce, which includes domestic workers, are able to earn living wages and take care of their own families. In turn, these jobs-enabling jobs, will allow women and everyone else to have the ability to return and remain in the workforce.

⁸⁰ Bill No. A01470B, *supra* note 74.

⁸¹ HB 1288, *supra* at note 73.

⁸² AB 241, *supra* at note 71.

⁸³ SB-552A, *supra* at note 70.

⁸⁴ Domestic Workers Bill of Rights, H.R. 3670/S. 2112 (2019) <https://www.congress.gov/bills/116th-congress/house-bill/3760/text>

⁸⁵ *Id.*

Chairwoman ADAMS. Thank you very much to all of our guests for their testimony. Under Committee Rule 9(a) we're going to now question witnesses under the five-minute rule. I'm going to be recognizing Subcommittee Members in senior order.

Again to ensure that the five-minute rule is adhered to, staff will be keeping track of the time. And the timer will show a blinking light when your time has expired. So please be attentive to the time, wrap up when your time is over, and remute your microphone.

As Chair I'm going to recognize myself for five-minutes. Ms. Dixon there are entire business models that assume, or center around excluding farm workers, domestic workers, or tipped work-

ers from protections afforded to other workers, so does that mean it's too late to correct these exclusions and why is it important for business leaders to examine the impacts of these business models on workers of color?

Ms. DIXON. It's never too late to examine a change in these business models. When something is rooted in white supremacy, and exclusion of workers of color, even those unaware of the roots of these exclusions should not continue to profit and benefit from them.

But because we know that far too many businesses are built on the benefits they reap from these exclusions we know that we cannot erase them immediately without doing undue damage to business. This is why for example, the Raise the Wage Act calls for a gradual elimination of the tipped minimum wage, rather than an immediate eradication of it.

And as we know, the advocates for tipped workers are very open to further discussion about how to ensure that we reach one fair wage in a manner that's economically responsible. But what we are not open to is continuing to enshrine a subminimum wage for tipped workers, and continuing to perpetuate an exclusion that is rooted in the blatant desire to avoid paying wages to black workers who were formerly enslaved, and that operates in a manner and means that women of color who make up a disproportionate share of tipped workers continue to earn lower wages.

Chairwoman ADAMS. Thank you. Ms. Yoon, I came from a long line of domestic workers, my mom and my grandmother both were domestic workers. The workday was hard. It was undervalued, underpaid, and unfortunately that still seems to be the case.

Domestic workers have been called the invisible workers on the frontline of the pandemic. Is this invisibility connected to the history of the FLSA that we are discussing today?

Ms. YOON. Thank you for that question. Very much so. The pandemic has revealed how many workers we've taken for granted. Their labor devalued, and their contribution to the economy made invisible. It took a pandemic to recognize that domestic workers who have been providing care and essential services to our children, aging parents, have been helping us to function as a society, and making it possible for all of us to work.

Au pair job is a job enabling job. While families sheltered at home last year, many domestic workers continued to go to work facing an impossible choice around how they're going to feed themselves, and keep themselves and their families, and those they care for safe without necessary protective equipment and easy access to testing.

The fact that domestic workers faced these impossible choices is because they have been earning poverty wages, living paycheck to paycheck, no access to paid time off. This is both the legacy of exclusion from FLSA which has had a domino effect of being excluded from other laws, and from legislation, even introduced in this Congress like the Health Families Act.

Chairwoman ADAMS. OK thank you. Ms. Romero from my work on the Ag Committee I worked with struggling black farmers who have also faced discrimination in Federal policy, and this Com-

mittee it's clear to me that we must also work to provide our farm workers who are overwhelmingly Latino, with basic protections.

How do we balance these goals? And how would you respond to the concern that farmers are struggling right now, and that making farm workers eligible for overtime pay would be a difficult cost for farmers to bear.

Ms. ROMERO. Thank you, ma'am, for the question. Do you know when I think about those who struggle in agriculture, I think of farm workers and what overtime pay would mean to them. You know a doctor's visit, enough food for their family without having to go to food banks. And while under business law we talk about struggling small family farms. The reality is that most farm workers are hired by big companies who like any other private business should provide their workers with the basic FLSA protections.

Chairwoman ADAMS. Thank you very much. I'm going to now yield my other few minutes. I'm going to give those back. But I want to recognize the Ranking Member for the purpose of questioning the witnesses now. Mr. Ranking Member?

Mr. KELLER. Thank you, Madam Chair. Mr. DeCamp the Workforce Protection Subcommittee is here to help ensure that Congress makes policy decisions based on sound evidence. Our evidence does not support the claim that the one size fits all \$15.00 national minimum wage would benefit economically or geographically diverse parts of our country.

Based on your experience working with employers, what complications should Congress anticipate if legislation takes effect that would increase the national minimum wage to \$15.00 an hour. And apply that to the same thing for tipped employees that work throughout the United States?

Mr. DECAMP. I think we'd see significant job losses, and that would be especially true for younger and less skilled workers. This would be a significant barrier to entry for people trying to get their foot in the door to become employees, to get jobs in the first place. And I think that this would also have a severe impact on tipped industries including restaurants and hospitality that rely on the tip credit as part of the wage structure given how customers typically pay for services.

This would cause devastating effects especially in rural and southern parts of the country where the wage levels are not as high as in certain cities.

Mr. KELLER. And I guess I would just followup in that. Your experience in what you've worked, people you've worked with, whether it's the employers or the employees, a lot of the tip wages are people that might be in college, people that might be you know graduating from high school, first jobs, is that a fair statement to say?

Mr. DECAMP. Yes.

Mr. KELLER. Where people get experience on work and are able to enter the workforce?

Mr. DECAMP. Exactly. I mean most of the folks that are making minimum wage are not people who are adult supporting families who have been in those positions for years. More commonly you have minimum wage workers are either entry level workers achieving their first job, or something early in their employment, or

they're individuals who are getting a tipped wage where their total earnings were substantially in excess of the minimum wage.

Mr. KELLER. Thank you. I appreciate you for clarifying that. Mr. DeCamp businesses across the country, especially those in the restaurant industry, are reporting that they are struggling to find workers to fill open jobs as the economy fully reopens from COVID-19 pandemic.

If Congress were to pass the Raise the Wage Act which eliminates the tip credit, what impact do you believe this radical policy change would have on the ability of restaurants and hotels and related establishments to recruit and retain individuals who enjoy the documented benefits of receiving tips for their services?

Mr. DECAMP. The current estimates have been about close to 700,000 tipped employees would lose their jobs. In addition, I think countless restaurants would close. This would be devastating for the workers who need these wages the most.

Mr. KELLER. Also Mr. DeCamp, farms in the United States face seasonal and weather-based constraints in their annual operations, as well as the challenges that arise when caring for livestock and other animals, all factors that don't follow a regular 9 to 5 office schedule.

In light of these realities can you explain on the impacts that Rep. Grijalva's proposed changes to the FLSA's farm worker overtime exemptions would have on farming and operations and agricultural workers?

Mr. DECAMP. Yes sir. Farmers would face a choice. They'd either have to reduce hours of individual workers and spread the work around which would reduce the pay of individual workers, or they would have to pay higher labor costs. And if they have to pay higher labor costs then they have to charge more for the agricultural products that they sell, which then has ripple effects throughout the economy.

It increases the cost of food in restaurants and groceries stores and also puts those farms at a competitive disadvantage with non-U.S. agricultural producers that don't face the same labor costs.

Mr. KELLER. Seeing that would result in people earning fewer or less wages, and then also would impact maybe people on fixed incomes, retirees, as far as the cost of receipt of being able to purchase food and other items?

Mr. DECAMP. Sure.

Mr. KELLER. Mr. DeCamp as you noted in your testimony the FLSA is over 80 years old. There is bipartisan agreement that many of the FLSA's provisions and regulations are outdated and overly complex. Do you agree with that view?

Mr. DECAMP. Yes. I mean this is a topic that could take a full hearing on, but yes.

Mr. KELLER. OK. I was just going to ask if you could identify elements of the FLSA that should be updated to meet the needs of our 21st Century workforce.

Mr. DECAMP. Clearer standards for who is an employee, possibly having a non-binary employee independent contractor approach. Clearer objective standards for who is exempt or not exempt, clearer standards for what contemplates or what constitutes compensable work, all of those would help a lot.

Mr. KELLER. Thank you. I appreciate it.

Chairwoman ADAMS. Thank you very much gentleman yields back. I want to recognize Mr. Takano of California. Five minutes, sir.

Mr. TAKANO. Thank you, Madam Chair. Mr. DeCamp have you worked farm work? Have you worked on a farm?

Mr. DECAMP. I'm sorry. I have not worked on a farm.

Mr. TAKANO. Thanks for that. I just turned over soil in my yard, just a few square footages, it was hard work. How many college students do you know working farm worker jobs in this country like real farm worker jobs? I mean do you see a large share of college students working farm worker jobs, young people?

Mr. DECAMP. No.

Mr. TAKANO. Well it's mostly mature adult people working back breaking work on farms. What about homecare workers. A lot of teenagers and college students working those jobs?

Mr. DECAMP. No.

Mr. TAKANO. OK. Can I ask Ms. Romero, Ms. Romero can you confirm that the typical farm worker is not a teenager, or a young person that needs an entry into the workforce?

Ms. ROMERO. That is correct sir.

Mr. TAKANO. And typically, I mean what are the ages of people who work on farms doing the back breaking work of hoeing, tilling the soil, you know, all of the stuff in the hot sun, tell me about that.

Ms. ROMERO. We have workers, probably you know I can tell you that we have workers that are in their 20's. We have workers that are, I can tell you that one of our Members, has been working in agriculture for 40 years, he's over 70 years old. So we have workers that are probably older than you know what you're talking about teenagers, or early 20's.

Mr. TAKANO. So I mean the arguments being put forward by Mr. DeCamp is that a minimum wage across the country, one fair wage is going to deny a lot of young people entry into jobs. What do you have to say about that? I mean it's one of the narratives they're using;

Ms. ROMERO. You know there is not a lot of young people that are looking to work in agriculture. It's very demanding, very physically demanding. But there is also actually a study that addresses the question of the cost of our food. The study found that increasing wages to farm workers by about 40 percent would only increase consumer's household grocery by \$25.00 an entire year.

And that study was done by the agriculture economist Phil Martin, and at the Economic Policy Institute. I can tell you the average age of farm workers is 38. About 38-40.

Mr. TAKANO. 38 years old, and they're not protected by the Fair Labor Standards Act. They're not protected by the minimum wage, even the Federal minimum wage. I can't see being 38 years old, let alone 40 years old, or 50 years old, working under the hot sun and then finding out that I have to work longer than the 8 hours a day, or longer than 40 hours a week and am not protected by overtime.

Are there any states that do provide farm workers with overtime protections?

Ms. ROMERO. As I said here in California the UFW worked with the California legislature in 2016, and farm workers, the overtime pay is being phased in. This year farm workers earned overtime pay after 8 and a half hours a day, and next year it's going to be after 8 hours a day in California, and I'm sorry Washington legislature just passed a law that says that it is unconstitutional not to pay workers overtime pay, and it is expected that the Governor will sign it.

Mr. TAKANO. What do you feel about the fact that so many workers across this country who work in demanding physical labor aren't protected by the farm workers are not protected by overtime pay in other states?

Ms. ROMERO. You know as I mentioned sir these protections or exclusion of farm workers were based in racism. Like I said our core commander down in Washington says if we continue to build on these times or the decisions that were made at one time on the foundation of injustice, we're not just going to be able to get these workers to get the pay that they deserve. They deserve overtime pay. They feed our country.

Mr. TAKANO. Well I'm just seething with anger at Mr. DeCamp's testimony which seems to reject any racial motivations for excluding farm workers from the FLSA in 1938, and instead suggests that the nature of farm work led to the farm worker exclusions. I just don't know what to say. Madam Chair I yield back.

Chairwoman ADAMS. Thank you very much. I want to recognize the gentlelady from New York Ms. Stefanik.

Ms. STEFANIK. Thank you, Madam Chair. I wanted to followup on Mr. Takano's questions. Clearly, he represents a district that's very different than upstate New York. I represent tens of thousands of small family farms, and in fact these are multi-generational farms, so college aged students do go home to work at the farm, and also run those farms.

These farms are fighting to hand on. It is a tragedy that family farms have closed over the past decades. We should be making it stronger for domestic agricultural supply, and those multi-generational small family farms to exist, not harder.

So Mr. DeCamp my question is for you. As I mentioned I do represent tens of thousands of small family farms in upstate New York. And I am very concerned about the implications of mandating the -40-hour work week on farmers and farm workers. As you know, and any farm family knows, and any farm worker knows, the inherent nature of farming calls for long hours, often in very short windows in order to cooperate with the unpredictable weather and the narrow harvest times.

New York State has implemented an overtime threshold for agriculture employers which has forced many small family farms in my district and throughout the State to cut hours for workers and eliminate labor intensive crops. Several fruits and specialty crop producers, for example, have cut down fruit trees in order to spare the expense of growing fruit that they cannot hire someone to pick.

So my question Mr. DeCamp is what is the overall economic impact to U.S. agriculture if farmers had to pay overtime after 40 hours? And what effect would this have on the ability of American farms to maintain a strong domestic food supply?

Mr. DECAMP. Well with the caveat that I'm not an economist, and don't claim to be. From a labor incentive standpoint I think it's fair to say that employers in this industry would face great pressure to do something about the overtime cost, either by spreading the work around, which is the policy behind the FLSA's 40 hour work week, or by having to pay the higher costs and find a way to make do with that, either by raising prices, or by having lower profits.

I think the reality is it would cause where possible, farms to employ people for less hours. I can certainly envision situations where farms will employ people for 3 days a week, and then those folks would go to a different farm for the other 2 days a week. The farm workers need the hours. They want the hours. And so I don't think the farm workers would be working less hours, it would be a question of where they'd be doing it.

Ms. STEFANIK. My next question is to you. You mentioned this and Mr. Keller did as well, but the fact that we are in a global marketplace when it comes to agricultural products. My district borders Canada, and in many ways we want to make sure that American farms are not at a competitive disadvantage given that proximity to the northern border, we're in direct competition with Canadian farmers for market access, especially for fruit and vegetable products.

Canada currently has a lower minimum wage than New York State, and exempts agriculture from overtime requirements, and as a result our upstate New York markets are often flooded with Canadian product, putting our New York and American farmers at a severe competitive disadvantage.

So my question is would this 40 hour work week and the increased cost of American product open our markets to further influx of cheaper foreign products, and what kind of affect would that have for farmers who already compete with those foreign products in our U.S. domestic market.

Mr. DECAMP. Again, I think that when you raise your cost structure and you're competing with businesses that have a lower cost structure to produce the same good, it puts you at a disadvantage in the market. I think this would create a lot more difficulty for American farmers to sell their products, especially where they're in a market where there is an easy supply of lower cost produce, and they've the northern border, the southern border, places where there are readily perishable goods coming across the border from a much lower cost structure, it creates huge market pressure for the farmers and could well drive them out of business.

Ms. STEFANIK. And then my last question Mr. DeCamp is there's a lot of discussion between bigger farms and smaller farms, and this mandate would impact all farms, but it would be specifically hurtful and impact small, rural family farms. Can you talk about that? How it would specifically hurt those rural family farms?

Mr. DECAMP. Well smaller farms that don't have the same kind of accumulated savings. They don't have the same kind of lifelines. They don't have the same kind of integrated operations that can perhaps function as a loss leader for other businesses within a chain are unable to weather the storm.

They can't deal with short-term or longer-term drops in profitability. They just don't have the resources to do it.

Ms. STEFANIK. Thank you very much. After a year of unprecedented certainty for our family farms, we need to be making it easier and more supportive for them to grow domestic products, not harder with these one size fits all mandates. I yield back.

Chairwoman ADAMS. Thank you. The gentleman from New Jersey, Mr. Norcross, you're recognized for five minutes.

Mr. NORCROSS. Thank you, Madam Chairman. It's great to have a Committee that's absolutely focused on survival. We're hearing testimony, and we're counting back, it affects business and certainly a part of the equation. But the fact that we are a dozen years, 12 years since the last minimum wage increase, more time than in the history of minimum wage, and that somehow this is a radical move, are you kidding me?

\$7.50 an hour in the wealthiest nation in the world that incrementally and predictably would raise it. Unbelievable we're still having this conversation. And then we look at the tipped worker and I've got to ask. Ms. Dixon when the change took place for tipped workers saying you could combine that \$2.13 and make up for it in tipped wages.

How are the tipped wages reported? How does management estimate or prove that they're actually getting those tipped wages?

Ms. DIXON. So part of the reason why there's so much non-compliance in restaurants is that employers don't actually track the tips, and as required by law. So if you don't keep track of the tips, you don't know how to top up. So that's one of the big issues that we see, and you can see how even—well-meaning employers can get caught up in that, and certainly the ones that want to do it intentionally can do it.

Mr. NORCROSS. Good. So there's a financial incentive not to collect that information.

Ms. DIXON. Correct.

Mr. NORCROSS. OK. Now when we go to Europe so many people tell us, "Oh you don't tip workers over there because they're already making that." So the model for the majority of the world is not using tips, is that correct?

Ms. DIXON. That's correct. In the U.S. we came to tipping in the post-emancipation era as a you know, a way to treat formerly enslaved people where they just get paid whatever they get paid, whatever you want to give them as opposed to paying them a wage.

Mr. NORCROSS. So when we look at trying to level the playing field which should have been done long before this, and raising the minimum wage is incredibly important. But when those tipped workers go to if this law is passed to a minimum wage, that means that their competition is paying the same rate correct? It levels the playing field?

Ms. DIXON. It absolutely does, and it gets rid of this unfair advantage that some minimum tipped wage employers have had versus other employers.

Mr. NORCROSS. Well the idea of competition is that everybody will be paying this. Is there any chance for particularly in the restaurant industry, that foreign competition is going to bring in food and deliver it to people?

Ms. DIXON. You said foreign competition?

Mr. NORCROSS. Yes, yes, foreign competition. In other words are they coming over from Canada to deliver food because they can do it cheaper?

Ms. DIXON. Most of what we've seen is that restaurants are local and that's my point right.

Mr. NORCROSS. There is no foreign competition, for that piece of it now. McDonalds on this side of the river will pay the same as that side, and they don't seek tips with the restaurant. This levels the playing field. Takes that incident that the employer can do for not counting tips out of the equation. Then you know if they want to tip on top of it, they do.

It's time to wake up. I have nothing against the folks on the other side of the aisle, this is a moral obligation to make sure people can live. I know a lot of times taking care of the villagers, we got to remember that people are literally keeping this country running. I yield back.

Chairwoman ADAMS. Thank you. I want to recognize Mrs. Miller-Meeks of Iowa now five minutes ma'am. Mrs. Miller-Meeks? OK. Mr. Owens of Utah? The gentleman from Utah? Mr. Good from Virginia?

Mr. GOOD. Yes ma'am. Thank you, Madam Chairman, third time's a charm here, glad to be with you all.

Chairwoman ADAMS. OK.

Mr. GOOD. Thank you, Madam Chairman, and thank you to our guests today. You know it's sad to see though democrats once again framing every issue in terms of race, seeking to further divide our Nation, perpetuate a false narrative, and further portray a victimhood mentality.

Democrats also never miss an opportunity to put illegal aliens and foreign workers ahead of Americans. If they truly want to protect foreign guest workers, they would support the work of border patrol and customs, and border protection. I have been to the border and I've heard the reports of physical abuse and danger for those illegally crossing.

Those who can't afford to pay smugglers are extorted into carrying drugs and other illicit material. Others are abused as indentured servants to the cartels. If they make it across many are forced to live the rest of their lives with existential threats to themselves and their families.

While democrats romanticize illegal immigration, demonize law enforcement and turn a blind eye to the horrific abuse that people face at the hands of the cartels, my questions are how long will it be until the President, the Vice President visit the border?

When will democrats stop attacking border patrol, ICE and local law enforcement? If the democrats are truly worried about exploitation of guest workers, will they support mandatory E-Verify?

Turning specifically to agriculture concerns in my questions for our witnesses, somebody asked earlier of another Member of our panel. I have worked on farms. I worked on dairy farms, horse farms, agriculture farms, picking crops, baling hay and much more. It is very hard work, but there's honor in that work.

I now have the honor of representing Virginia's 5th District that has over 300,000 farm workers. Recent years have been difficult for

farmers thanks in part to China's trade war, and the mishandling of COVID-19.

But only democrats could look at a struggling industry and think now is the time for more costly and burdensome regulations as they believe more government is the answer to everything. So Mr. DeCamp can you please comment further on the economic impact for farmers if democrats force H.R. 1080 upon them, the Fairness for Farmworkers Act?

Mr. DECAMP. I don't know that I have much to add beyond what I said before which is that it creates pressure on farmers to either reduce hours for workers in order to avoid having to pay an overtime premium, or it forces them to absorb a higher cost structure which threatens their viability and threatens to increase prices substantially in the market, and puts them at a competitive disadvantage with foreign producers.

It's tough and for businesses that are barely making it, especially smaller farms, it can be the final nail in the coffin.

Mr. GOOD. Yes don't you think there's a disconnect in the democrat policy of requiring overtime pay in agriculture to the realities of what farm work is like?

Mr. DECAMP. I think that farm work, much like many other jobs in the Fair Labor Standards Act for which overtime is not provided, is such that it is not susceptible to the policies of the FLSA. It doesn't make sense in other words to apply the overtime premium to this kind of work, much like many other kinds of work that are exempt under the FLSA.

Mr. GOOD. Can you point to any examples of similar policies that have enacted in other states that you know outside of Virginia that have hurt the ag economy?

Mr. DECAMP. I'm not familiar with much State law regulation of agriculture.

Mr. GOOD. If producers are forced to grow less—labor-intensive crops because of this change that's been proposed, how do you think the food supply might be negatively impacted?

Mr. DECAMP. The question would be would those same food products come from somewhere? And if they came from somewhere else would that necessarily involve a higher cost to consumers and then I'd also be wondering about if the farmers are using less—labor-intensive crops, what are the farm workers doing?

Are they going to have jobs? Does that affect employment for those workers in the industry if the farmers are saying we're just not going to plant those crops?

Mr. GOOD. And undoubtedly that would hurt the wallets of consumers as prices might go up with more scarcity of products because they're not grown because labor has shifted to less—labor-intensive products that are grown.

You know again to the panelists, to our guests, and to my fellow Members of this Committee, it's a shame that we think that the majority here at least thinks that governments' answer to everything more government intrusion, more government regulation, instead of letting the free economy work and we want to layer more levels of regulation intrusion upon these farms.

Chairwoman ADAMS. The gentleman is out of time.

Mr. GOOD. I think I've got 10 seconds. I yield back thank you ma'am.

Chairwoman ADAMS. All right thank you, thank the gentleman. The gentlelady from Washington Ms. Jayapal, you have five minutes ma'am.

Ms. JAYAPAL. Thank you very much Madam Chair. I really appreciate this hearing and I'm always stunned at what feels like a lot of hypocrisy in the comments that get made in this Committee. The hypocrisy of exploiting labor, but not wanting to honor that labor with immigration reform, or the hypocrisy of saying we want mandatory E-Verify without immigration reform when even the farmers have told us that they don't want that because they need the workers.

So I hope we can get to a place where we're not denying that overtime premiums should apply to all workers. Why should some workers be asked to work without that overtime? I just don't understand that at all. We're here today to take responsibility for the legacy of the Fair Labor Standards Act, which excluded domestic workers and farm workers from protection.

I want to focus on domestic workers. Today over 2 and 1/2 million nannies, housecleaners, and care workers do the work of caring and cleaning in homes across this country. Over half of these domestic workers are black, Hispanic, Asian-American, or Pacific-Islander.

And in 1930 an estimated 79 percent of domestic workers in the south were black. So domestic workers have traditionally been people of color. Ms. Dixon how would you explain this fact, and how does it relate to the ongoing exclusion of live-in domestic workers from benefits such as overtime protections under the Fair Labor Standards Act?

Ms. DIXON. This rule was rooted in racism as we talked about earlier in my testimony. And the fact that it moved from one set of women of color, to another set of women of color is not a surprise. The moment is now to get rid of this. There is no reason that we allow this exploitation to continue.

Ms. JAYAPAL. Thank you. And Madam Chair thank you for mentioning my Domestic Workers Bill of Rights, that bill would fix this for domestic workers by extending common workplace rights and protections to domestic workers including overtime pay, paid sick days, privacy, and other civil rights protections. The bill also extends new workplace rights and benefits that address the unique challenges of domestic work, requiring written agreements, fair scheduling provisions, a national domestic worker hotline, and a standards board to investigate standards in the industry.

And it would create and fund an interagency task force on protecting domestic workers workplace rights to ensure robust enforcement of the law. These protections are crucial for domestic workers like a woman I'll call Ramona.

She is a home care worker and she's a leader with the National Domestic Workers Alliance in my district. She's an immigrant from Honduras. She identifies as black. Ramona has faced sexual harassment and assault as a domestic worker in every city she's worked in, but she never reported the incidents because she didn't know where to turn.

Ms. Yoon your testimony indicated that Ramona's experience is common among domestic workers. How do we protect domestic workers from sexual harassment and assault on the job?

Ms. YOON. Yes. The experience of domestic worker you just shared is unfortunately too common. Workers know that they have no recourse, but because they're not currently covered by Title VII and thus not protected from sexual harassment assault in their workplace.

This is the reason why we need to pass the Domestic Worker Bill of Rights to protect individual workers, but also establish standards across a country in these workplaces.

Ms. JAYAPAL. Ms. Yoon, Mr. DeCamp seems to deny any racist motivations behind denying domestic workers protections under the FLSA, instead suggesting that a narrow reading of the commerce clause at the time was the only reason these workers were excluded.

Is that the case? And is there any legitimate reason to continue excluding domestic workers from the full protections of the FLSA?

Ms. YOON. No. That is not true. My reading of the Committee debates as well as other research on the Roosevelt administration's drafting of the process depicts a different story. While domestic service certainly was not comparable to the agricultural sector in terms of its importance to the southern economy.

A huge concentration of blacks in the domestic service was unmatched by any other sector in the southern economy. During the Committee debates southern legislators compared FLSA to anti-lynching legislation. I think that statement speaks for itself. And in terms of what we should do now systemic racism and sexism motivated the exclusion in 1938, and then 80 years later this workforce continues to bear the brunt of that legacy.

We have to think about the costs of not protecting these essential workers who help our society to function and make all other work possible. It means that domestic workers are earning poverty wages and cannot support their own children and family when they're working to care for other children.

Ms. JAYAPAL. Thank you so much. I think for Ramona and for so many others like her we are ready to be the authors of a new story, and that begins with passing the Domestic Workers Bill of Rights, thank you so much Madam Chair. I yield back.

Chairwoman ADAMS. Thank you.

Mr. OWENS. Madam Chair can you now hear me? I'm sorry I was trying to talk earlier, this is Owens.

Chairwoman ADAMS. Yes, we can.

Mr. OWENS. OK.

Chairwoman ADAMS. I was getting ready to recognize Mr. Owens of Utah, you have five minutes sir.

Mr. OWENS. Thank you, Madam Chair. And thank you for those who testified today. Let me just start off by saying I totally agree that in 1938 the racist act by the President Roosevelt to put in place what he did, not only in this care but also social security.

It's also a racist act for the democrats to continue to support the Davis Bacon Act which keeps black business owners from starting businesses and hiring black employees. This is not about race. We

have small business owners out there, black, white, Hispanic, Asian, every culture you could possibly think of.

They are right now producing 50 million jobs in the private sector. It is not about race, it's about survival. It's taking a risk, making a profit and then hiring people that you want to keep around and make sure that they're feeling good in that environment.

This would devastate the small business owners, no question about it. A little reminder that it has always been stated as a fact, those that are most at risk, predominantly my race, would not get a raise with this, they'll get fired. They'll get a pink slip. It's proven. It's seen in other places, been shown, and in Chicago, 8 years ago 92 percent of black, young boys were unemployed.

A lot of them because of the high minimum wage, and nobody wanted to hire them with. The other piece of this is the higher cost will be the labor being the higher cost of food. This impacts blacks, Hispanics, those at risk, so this is on a fixed income.

So no, this is not something that will work, and I wish that Members across the board that come in this position would try and start a business at some point before we start putting these type of regulations and dictates on those that are trying to survive a business.

So that being said, Mr. DeCamp can you elaborate on some of the reasons that Congress exempted the agriculture establishment from certain requirements of the FLSA when it was enacted in 1938. And what makes these workplaces unique from wages and the hourly wage perspective?

Mr. DE CAMP. There's a few things about it. First is that the nature of the work tends to be a very short season, intends to involve very long hours during the day when that short season is happening. We're also talking about work that many of the workers in that space are migrant, and so they're moving from place to place.

We're also talking about work where often times the people that are doing this work are receiving housing and possibly food subsidy from the employer, certainly housing, sometimes food. And that affects the calculation of what even is the wage. And so that's another issue under the FLSA.

I think the main issue with the FLSA, and agricultural work is the necessary long hours. The purpose behind or one of the key purposes behind the 40 hour work week under the FLSA is to encourage spreading of work in a time of high unemployment, so that you know you're moving work to more workers as opposed to fewer workers.

And that makes sense when you want to spread the work around, but when the work requires the long hours, you've got to find the workers to do this. We're already talking about an economy where about half the work, at least according to the written testimony from the witnesses today, is being done by workers who are undocumented.

This is already a workplace kind of in chaos, and a workforce that is kind of in chaos. And I think that's just a recognition of the fact that this work requires long hours among other things. And it's also very difficult work. Again the statements that Members have made, and witnesses have made is absolutely right, it is very demanding work.

Mr. OWENS. OK. Thank you so much. For those who do not understand the fact that when a business owner has to pay more for the labor, they don't quite understand how that translates to impacting those of us who have to pay for those services. You stated the fairness of the Farm Workers Act will likely result in higher food prices for consumers at the grocery stores and restaurants.

Again this impacts those of us, like my race, more than anybody else out there. Can you help those who are listening to understand why this would be the case?

Mr. DECAMP. Sure. If a business is not able to spread the work around, so if you're a farm and you have workers and you're not able to hire 50 percent more workers, and instead have to use the same workforce working the same long hours, now you would under this bill have to pay them overtime.

So if you have to pay premium wages for the longer hours, your labor costs go up. If your labor costs go up, you're either going to be losing money, or you have to raise your prices for what you sell in order to not go out of business.

If you raise your prices for what you sell, that then has ripple effects throughout the chain of distribution, so that the business that you sell the product to then has to charge a higher price when it is selling that food in a grocery store, in a restaurant, or wherever it may be.

Mr. OWENS. Thank you, thank you so much and I yield back my time.

Chairwoman ADAMS. Thank you. The gentleman's time is up. The young lady from Minnesota, Ms. Omar you are recognized five minutes ma'am.

Ms. OMAR. Thank you, Chairwoman. The preservation of the tipped minimum wage system has long lasting effects on worsening economic outcomes for workers of color today. It shouldn't be surprising that it is just another system sharing its roots in the legacy of slavery.

In the post-Civil War United States many black workers were concentrated in the hospitality industry and designed to preserve socioeconomic subordination. They were denied base wages, instead had to work for tips. This tipping model wasn't changed by the Fair Labor Standard Act, but we have an opportunity to address this historic discrimination through the Raise the Wage Act.

My State of Minnesota has already taken the necessary steps to establish a fair wage for all but is also one of the only few states that have addressed the tipped minimum wage, largely due for opposition from the restaurant industry.

Ms. Dixon can you respond to some of the concerns over the phaseout of the tipped minimum wage hurting profitability and surging labor costs for local restaurants?

Ms. DIXON. Absolutely. The tipped wage has been \$2.13 since 1991, and that's unconscionable. And we are not talking about phasing it out overnight, we're talking about phasing it out over time, and as I said in my testimony, the advocates are open to compromise on that phaseout.

We know that seven states have already done this, so it's possible, and it's much better for workers. So we're not advocating for getting rid of tips, but we want tips plus the minimum wage like

in those states. And we really don't want employers to continue to get this subsidy for their payroll cost as you mentioned.

Ms. OMAR. And why have restaurant workers in Minnesota not lost their tipped income, or their jobs due to this change?

Ms. DIXON. The amount that employers have to increase their menu price is very small. And so if we're talking about a phased in increase over time, we're talking about very small increases. There was a study in one of the one fair wage areas that looked at an increase in wages of about 25 percent and the menu price had to go up by \$1.10.

So it's really overblown what folks are saying about increasing menu cost.

Ms. OMAR. I really appreciate that. Overblown is something that we should highlight because a lot of these policies that are being pushed by republicans is fear-based and they're not based in reality because some of us live in some of these states where progress has been made and have not suffered the crazy consequences that the republicans like to tell the American people that they will suffer, so I really do appreciate your input in that.

Madam Chair I would like to yield the rest of my time to Mr. Grijalva.

Chairwoman ADAMS. Yes Mr. Grijalva you are recognized.

Mr. GRIJALVA. Thank you and I thank the gentlelady for yielding. Very quickly Madam Chair just thank you and the Ranking Member for bringing these three pieces of legislation forward. I appreciate it very much and the witnesses in the hearing have been very, very good and I appreciate that.

Representative Jayapal, Chairman Scott and myself, I think these bills are essentially corrective actions to address some vestiges of what's already been said by the witnesses. Systemic racism is the standard that codified into law in 1938. And this double standard that some American workers did not receive equal protections that others do is basically wrong and rooted in that racism.

And I think that what these three bills do is provide equity to these workers, and by correcting that mistake in 1938. And so it's ironic that these now are essential workers and they're the ones taking the risks, the ones that we depend on to take the risk for the rest of us to provide services to the rest of us.

And I think it's time that we treated those workers equally, and I appreciate the time. Madam Chair I thank you for the hearing and I yield back, my time back to Ms. Omar.

Chairwoman ADAMS. Thank you. You've got six minutes, OK, the lady's time is up. I'm going to yield to Mr. Cawthorn now from North Carolina. You have five minutes sir.

Mr. CAWTHORN. Madam Chairman thank you very much. My questions are going to be directed at Mr. DeCamp, and Mr. DeCamp thanks for being on, to all my witnesses, really thank you for being on.

You know first I want to touch on this idea of imposing a 40-hour work week on farmers. You know as somebody who has worked on a farm in western North Carolina when I was much younger, I realize that the hours you have to work are very, very long, and it's very difficult for these farmers, especially those who pick specialty

crops to be able to have more workers to spread around because it takes a significant amount of training.

These workers have to be trained on how to work the systems, especially if they're in a packing house, or if they're on picking for any specialty crop. Can you discuss something I really want to touch on is I believe that after the global pandemic that we've been through, we saw in the beginning of COVID-19 how difficult it was to get a lot of the resources that we had offshore manufacturing to other areas.

If we start imposing a 40-hour work week, and we bankrupt all of our farmers, we will essentially be offshoring all of our food processing and food resources off to other countries. Would you not believe that this would be a terrible national security threat Mr. DeCamp?

Mr. DECAMP. I don't claim any expertise on national security. I think generally it would be a bad idea to bankrupt the farming industry, but what affects that might have on national security I have no idea.

Mr. CAWTHORN. I understand OK. So now let me ask you in regards to Title VII of the Civil Rights Act of 1964, it prohibits employment discrimination. This only applies to employer with 15 or more employees. The Title I of the Americans With Disability Act also only applies to employers with 15 or more employees.

The Domestic Worker Bill we're discussing today includes an astonishing sweeping provision, applying Title VII of the Civil Rights Act to any employer with at least one employee, reducing the employee threshold from 15 employees to one. Mr. Decamp can you discuss the radical nature of this change and what it would mean for small businesses in the United States with respect to litigation risk and compliance costs?

Mr. DECAMP. It would be a big change with regard to exposure. I mean part of the reason why you don't have typically these laws applying to small businesses, at least at the Federal level is the commerce clause issue. It's at that level when the businesses are that small, they're typically very local.

But also there's a sense that the compliance costs for small businesses, they don't have the kind of sophistication that you typically see with larger businesses. They don't have in-house counsel, they don't have in-house H.R. staff, they don't necessarily even know what these laws require until they run afoul with it.

And just the transaction costs of defending a demand letter from a Plaintiff's lawyer could put a small business out of business. And so there are lots of good reasons why Congress has seen fit not to apply most of these laws to very small businesses.

Mr. CAWTHORN. Thank you Mr. DeCamp and in closing you know I would encourage any of my democratic colleagues on this Committee to please come to my district and visit a lot of the farms in my district, and you will see the hours that are required to work, and it will become abundantly clear to you that if we impose a 40 hour work week on these farms it will bankrupt our farmers who are absolutely necessary to the survival of our country. With that I yield back Madam Chair.

Chairwoman ADAMS. Thank you, sir. The gentlelady from Michigan, Ms. Stevens you're recognized five minutes ma'am. Ms. Ste-

vens? OK. Let me move on to Mr. Yarmuth of Kentucky. You're recognized for five minutes.

Mr. YARMUTH. Thank you, Madam Chair, and thanks to all the witnesses for being here. I have to say this is my 15th year in the House of Representatives, and I have heard the same arguments raised by republicans for 15 years as to why we shouldn't raise the minimum wage.

It is bizarre to me that for that length of a period of time that republicans continue to raise issues that have no empirical support, yet they continue to say that businesses are going to go bankrupt, we're going to lose businesses, we're going to lose jobs. When really they have no basis for saying that. It's all speculation.

Mr. DeCamp you referenced the CBO report and said that it said that we would lose 1.4 million jobs if the minimum wage were raised to \$15.00. That's not exactly what the report said. It said we could lose 1.4 million jobs, so we also could lose zero jobs.

It also said we could lose more jobs. And that's the problem with these kinds of reports because people seize on numbers that really have, they're speculative as well. We have an economy that is very dynamic that changes very rapidly.

So we know that. Right now in my district, I don't have any farms in my district. I have a handful of farms, I have a very urban district, Louisville, Kentucky. And so I haven't talked to many farmers, but I have talked to a lot of business owners. And right now the business owners say we wouldn't mind pay \$14.00—\$15.00 an hour, we can't find anybody. We can't find anybody to work.

And so in our district we have UPS, which is our largest employer, offering \$14.25 to start there. We have Walmart and Amazon. You have distribution facilities right outside my district paying \$15.00 an hour. I think that's probably the reason that some businesses can't find employees is because they're not paying enough money, they're just not paying enough.

And I once had a conversation, this is when I was campaigning the first time and the minimum wage was \$5.25. And we were talking about raising the minimum wage. And I asked a McDonald's franchisee who was fighting it, and I said let me ask you this. If I can say to you and said I've got the greatest business model in the world, it can't miss, it's a sure-fire hit.

The only condition is that I have to pay my employees nothing. I have to have them work for free. What would you say to me? He said, 'I think I'd say you're crazy.' I said in today's world, and this is 15 years ago, in today's world what's the difference between \$5.25 an hour and zero?

And I would ask the same question today. What's the difference between \$7.25 an hour and zero? And the thing I would also say is at least I still have yet to hear a republican make a counteroffer saying well \$15.00 is too much. Well we've got democrats saying that.

Joe Manchin saying that. He says I could go to \$11.00. I don't hear republicans saying that. They just say we can't afford to raise the minimum wage because it will hurt small businesses, it will hurt farm workers, it will hurt employers.

What about the people who are working? We pay a lot of respect to these people. Last summer we were talking about, we were

praising bus drivers and grocery store clerks, and people who stock the shelves and all of these people as being critical employees, farm workers as well.

Well why don't we pay them like they're critical? We just don't do it. And there's one more anecdote. I don't have questions for the witnesses, but back in 2008 my brother is in the barbecue restaurant business. We were talking about the minimum wage and he had always voted republican because he didn't want to pay as much tax.

And he said to me, he called me the summer of 2008 and said John you'll be happy to know that Judy his wife, Judy and I are maxing out to Barack Obama, and we are voting for all democrats this year. And I said that's great Bob what was your epiphany?

He said well I finally figured out that if nobody can afford barbecue it doesn't matter what my tax rate is. And that's the problem we have right now. Not enough people can afford barbecue. Not enough people make enough money to have a decent standard of living.

And this Congress can and should be the Congress that finally takes a step in that direction and says we're going to make sure that every America who's working hard has a decent standard of living. That's what all these proposals are about, and I strongly support them. With that I yield back Madam Chair.

Chairman ADAMS. Thank you, sir. Working hard is not enough if you don't make enough. I want to recognize the gentlelady from Michigan now Ms. Stevens you have five minutes thank you.

Ms. STEVENS. Thank you, Madam Chair, thank you. Thank you for having this hearing and to our phenomenal witnesses, Ms. Romero, Ms. Yoon and Ms. Dixon and for your just incredible background and expertise and knowledge, particular thanks to our Chair for going to the history and looking at the root of some of these causes and how they impact us today.

Mr. Decamp whatever it is you do you know I guess it's you know we're hearing your viewpoint, although it doesn't seem to be importing into the reality that so many of our workers are facing. I'm in Michigan and I see it and we feel it, and we talk about our workers, our food service workers, the people behind the scenes, the lunch ladies who get forgotten, you know, who have been a major part of what we've been living through with this pandemic.

You know the first people to step up in the middle of this shutdown and making sure our folks, our families had access to prepared meals, when all of a sudden everything was shouldered at home. You know, making sure they're getting their hero pay and their due and you know they're squeezed.

So, I'd love to hear from Ms. Dixon on you know some of these other forgotten workers in our economy, particularly you know what is dubbed the lunch lady, but also in our food service, and dovetailing off of what Ms. Omar was talking about with our Raise the Wage.

You know I'm a proud co-sponsor of the Raise the Wage Act, and you know it's going to phaseout the tipped wage, and I'm hearing from some forms of constituents who hold tipped wage jobs, that they're concerned about the take home pay, and they're concerned it would go down.

So, Ms. Dixon do you also mind just kind of sharing some comments about what you would say to those workers as well based on some of what we've heard here today?

Ms. DIXON. Sure. So one of the things to talk about is who's going to benefit from the Raise the Wage Act? And in fact, 90 percent of workers who are earning at or near the minimum wage are over the age of 20 and the majority of the workers are adult women, many of whom have attended college and who have children.

So more than half, 52 percent would benefit our adults ages 25 to 54, and only one in 10 is a teenager. So nearly 6 in 10 are women, half work full-time and more than 4 in 10 have some college experience. More than a quarter have children.

And then to your other question, could you repeat the other question please?

Ms. STEVENS. I just wanted some comments about you know we've got a lot of brilliant comments on domestic workers or farm workers, obviously you have a big swath with your portfolio and your organization, and I was just looking for some additional feedback around our cafeteria workers or other food service workers who aren't part of the tipped wage, but also have been subject to some of these draconian principles that have held these workers back because they're stuck at an unfair wage, be it the minimum wage where they're not even able to work full-time.

And if you had any data around you know not just our tipped workers in food service, but our you know behind the scenes in our schools with our cafeterias or anything along those lines.

Ms. DIXON. I don't have anything very specific about them. What I will say is that they are a part of the way in which our labor market is segregated right? And certain workers are shunted into low-paying jobs that are not compensated at the rate that they should be, so they're underpaid.

And we need to help those workers in the same way that we're helping tipped workers. So the one fair wage would most likely apply to these women that you were talking about in the cafeteria.

And then one other thing you had mentioned was around what's going to happen to their tips, are their tips going to go down? And I would point out that data from the one fair wage demonstrates that tipped workers earn better wages and make the same or better tips in states that allow them to be paid above the subminimum wage.

So this custom of tipping it's deeply engrained in our culture, and people are happy to continue to do that to have generous tipping for good service. And polling indicates that time and time again customers are also happy to pay higher prices in order to ensure that workers get vastly better wages.

Ms. STEVENS. And while I still have you Ms. Dixon, this is a big question, so maybe we can just do it for the record about you know what does the history of these you know racist essay exclusions teach us about the link between worker's rights and power at the ballot box?

And I know Chairman I have 10 seconds left, so maybe we can pick that one up, but is there a linkage Ms. Dixon?

Ms. DIXON. There absolutely is a linkage. Just because you have constitutional right or law says you do, we know from history you don't, and it can be intimidation or voter suppression.

Ms. STEVENS. Thank you. I yield back.

Chairwoman ADAMS. Thank you very much. I see Mr. Jones is with us, so I'm going to recognize the gentleman from New York, Mr. Jones, you have five minutes sir.

Mr. JONES. Thank you, Madam Chair, and thank you to all of the witnesses for your testimony. It is so important that we shine the light on this issue because it provides yet another example of how the legacy of Jim Crow continues to harm people of color in this country.

The history of the Fair Labor Standards Act is well documented, and as we've heard here today the exclusion of farm workers, domestic workers, and tipped workers in the law was done intentionally to exclude black workers from the basic pay and worker protections afforded to white workers under this landmark legislation.

There is no good reason why nearly a century later we continue to have these exclusions in the law. Congress's failure to act upholds a system that oppresses working class people of color, and especially women of color by the way. That is in fact what Congress in 1938 intended.

Now my grandmother was a domestic worker who spent long hours cleaning homes, and she worked well past the age of retirement because she simply could not afford to retire when most people do. Ms. Yoon, you mentioned in your testimony that domestic work was often seen as not real work. How did that perception prevent the fair and full protection of domestic workers under the Fair Labor Standards Act?

And do we still hear echoes of this argument today in the debate overextending wage and hour protections to domestic workers?

Ms. YOON. Thank you for your question, and thanks for sharing your own story. I think as I've talked about in my testimony the long-standing association of domestic work is unpaid labor, as women's labor, as labor of black women harking back to the days of slavery, in leave of other women of color and working women.

I think all contribute to devaluing this labor as unskilled, and therefore deemed not worth of protection and industry standards. I think all the parents and aunts and uncles, and grandparents on this Committee and my fellow panelists will know that the skills that are needed to raise a child to thrive.

Skills that are needed to care for your own aging parent who may have dementia, to live with dignity, or to care for a kid with a complex medical condition so that that kid could sleep in her own bed right. All of this takes an incredible amount of skill, but we continue to devalue this work, we devalued it back then in 1938, and I think we continued to devalue it today.

I think the most recent debate about whether care is an infrastructure in our economy as we talk about how we recover our country really speaks to this issue. Our care giving infrastructure collapsed during the pandemic. 800,000 left the workforce last September alone, when we were back to 1988 levels of women workforce participation.

Yet some say, largely men, say it's not infrastructure because it's not roads and bridges, even though this investment in the care infrastructure will precisely allow, not just women, but all parents to go back to work, and that will continue to fuel our economy back.

Mr. JONES. Thank you so much Ms. Yoon, and of course a few days ago I introduced the Universal Child Care Early Learning Act with Senator Elizabeth Warren which would fully provide for universal childcare in this country, childcare indeed being infrastructure. And I could tell you, you know what my grandmother did was real work. I know that because I was with her often times when daycare was too expensive, she had to take me to clean homes with her.

Now Ms. Dixon, Mr. DeCamp's testimony seems to question whether the exclusion of farm workers and domestic workers in New Deal legislation, and the Fair Labor Standards Act is rooted in racism. He talks about there being an absence of compelling evidence in his written testimony.

What compelling evidence do we have on this, and why is denying the roots of these exclusions so harmful?

Ms. DIXON. Well my grandmother used to say we know better, do better. And we know better, and we have all of this evidence that tells us that these exclusions are harmful, they are unnecessary, and we need to move on from here.

And so I think the main thing to understand here is that this argument is rooted in the commerce clause, right? To say that in the commerce clause there was no authority to actually put these folks in the Fair Labor Standards Act, but this argument is a red herring because the constitutional justification issue was raised by one senator during a legislative debate over the bill.

And that's suspect on its face. The Supreme Court had already changed the interpretation of the Commerce Act by the time the FLSA was passed, so we know that that is just overblown and not accurate.

Chairwoman ADAMS. OK. Thank you, the gentleman is out of time. Are there any Members on the platform who have not been recognized and would like to ask questions? OK. Well I want to thank all of the witnesses.

I want to remind my colleagues that pursuant to Committee practice, materials for submission to the hearing record must be submitted to the Clerk within 14 days following the last day of the hearing, so by the close of business on May 17, preferably in Microsoft Word format.

The materials submitted must address the subject matter of the hearing and only a Member of the Subcommittee or an invited witness may submit materials for inclusion in the hearing record. Documents are limited to 50 pages each. A document longer than 50 pages will be incorporated into the record via an internet link that you must provide to the Committee Clerk within the required timeframe, so please recognize that in the future that link may no longer work.

Pursuant to House rules and regulations items for the record should be submitted to the Clerk electronically by emailing submission to edandlabordothearings@mail.house.gov. Again, I want to thank the witnesses for their participation today. Members of the

Subcommittee may have some additional questions for you, and we ask the witnesses to please respond to those questions in writing.

The hearing record will be held open for 14 days in order to receive those responses. I remind my colleagues as well that pursuant to Committee practice, witness questions for the hearing record must be submitted to the Majority Committee Staff or Committee Clerk within 7 days. The questions submitted must address the subject matter of the hearing.

I want to now recognize the distinguished Ranking Member for a closing statement. You're recognized Mr. Keller.

Mr. KELLER. Thank you, Madam Chair. This hearing highlights the need to provide flexibility to the American workforce. Continually, we hear from farmers, those in the restaurant industry, small business operators and others in Pennsylvania's 12th Congressional District about their challenges of recruiting and retaining employees during our economic recovery from COVID-19.

We need to be giving employers the tools they need to bring back the American workforce, not creating unworkable mandates that will slow economic recovery. Employers understand the unique challenges facing their businesses, as well as the needs of their employees and work very hard to effectively tailor their workforce practices accordingly.

I look forward to advancing forward looking policy solutions that provide economic freedom and opportunity for employers and employees in the workplace and help them bring their businesses back stronger than ever. Madam Chair, I ask unanimous consent to enter into the record letters from the American Farm Bureau Federation and the National Restaurant Association, statements from the Restaurant Workers of America, and a letter from Valerie J. Graham, who is a tipped worker in Washington, DC. in opposition to the legislation we are discussing here today. Thank you and I yield back.

Chairwoman ADAMS. Thank you. So ordered.

Chairwoman ADAMS. I now recognize myself for the purpose of making my closing statement. I want to thank our expert witnesses for being with us today and reiterate how grateful I am for the diverse perspectives and expertise that you've brought to our discussion.

We cannot build a more equitable future for this country without first confronting the active legacy of slavery throughout our institutions and recognizing the Federal Government's continued role in perpetuating racial discrimination.

This is precisely what we did today. We recognized the significant influence racist law makers and Jim Crow era policies played in inserting racially motivated exclusions into our Nation's foundational labor laws.

We examined how expansions for worker protections under the Fair Labor Standards Act has helped narrow the racial wage gap as well as how persistent exclusions continue to disadvantage workers of color today.

Most importantly however, we affirmed our commitment to passing legislation that will finally eliminate these discriminatory exclusions in the FLSA, and extend basic worker protections to farm workers, domestic workers and tipped workers. So thank you all

again to our witnesses. I look forward to continuing to work with my colleagues to confront of the legacies of slavery and secure equal worker protections for workers of color and forge an economy where everyone can succeed.

I continue to say that working hard is not enough if you don't make enough. And so if there's no further business without objection the Subcommittee stands adjourned.

[Additional submissions by Chairwoman Adams follow:]



STATEMENT FOR THE RECORD

by
Oxfam America
before

**United States House of Representatives Education and Labor Committee,
Workforce Protections Subcommittee**
hearing on

**“From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers,
Domestic Workers, and Tipped Workers from the Fair Labor Standards
Act”**

May 3, 2021

Dear Chairwoman Adams and Members of the Subcommittee,

I am writing to commend you and the Workforce Protections Subcommittee for holding today's hearing to discuss the historic and racist failings in our country's most important piece of labor legislation. As an organization dedicated to end the injustices of poverty, Oxfam America spends a lot of time advocating for Decent Work: by listening to leaders in working communities across the food sector and the service economies; and by researching the reasons why some workers are denied the ability to thrive, through systemic inequities which allows employers to see and treat workers as 'less-than' because their job category is exempt from certain protections. We believe that workers have a universal right to the same level of dignity and protections, regardless of the type of job you do.

Oxfam is in support of language included in The Raise the Wage Act of 2021 (H.R. 603) that would bring an end to the use of a subminimum wage for certain worker categories, mainly tipped workers. We also endorse the re-introduction of bills that would address the exclusion of certain workers, such as the Domestic Workers Bill of Rights; and the Fairness for Farm Workers Act.

Our teams are happy to engage in dialogue and provide evidence to support your committee's work to put an end to the racist legacy of policies that excluded workers in job categories and industries historically staffed by formerly enslaved black workers, immigrants, and women. In the section below I am including excerpts from blogs

written by our research staff, as well as links to additional materials from our work on this issue.

Thanks again for your commitment to ensure that the labor laws in our country provide equal protections for all workers.

Sincerely,

Mark Clack
Director, Government Relations & Public Policy

Excerpts and links from Oxfam materials:

Excerpt from [blog](#) post of November 20, 2020:

While federal labor laws protect workers from abuses by unscrupulous employers, they do not, in fact, protect all workers. This year, Oxfam added a new data point to its [Best States to Work Index](#) to indicate whether or not states have taken steps to cover these workers.

Today, in the United States, it's legal for certain employers not to pay their employees minimum wage, or to ask their employees to work more than 40 hours a week and not provide overtime compensation. Some workers have no protection against sexual harassment in the workplace. Some workers are not guaranteed safety in the workplace. Some workers are not protected if they want to organize.

These are *excluded workers*, a class of employees the federal government specifically wrote out of protections. Millions of workers are left out of governmental protections. And this was done on purpose.

Who are these workers? Most of them are domestic workers and agricultural workers, millions of people laboring without basic rights and protections.

So, the people who harvest the food we eat, take care of our family members, and clean our houses do not enjoy the protections most workers do.

Excerpts from [blog](#) post of February 27, 2019 on the tipped minimum wage:

As a recent [Oxfam report](#) explains, women are disproportionately impacted by both the minimum and subminimum tipped wage. This "two-tiered wage system has hindered progress for women workers, who make up two-thirds of all tipped workers," the report found. The [median wage for tipped workers](#) (including tips) sits at just \$10.22 an hour, just 56 percent of the \$18.12 median for all workers.

As worker testimony and research make clear, tipped work also exacerbates sexual harassment, as servers relying on tips are at risk of being harassed and assaulted on the job. As ROC-United explains, "the restaurant industry is the single largest source of sexual harassment claims in the US."

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Politics of Poverty

Why millions of workers in the US are denied basic protections

November 20, 2020 | Posted by [Kaitlyn Henderson](#)

Farmworkers in the US are excluded from federal labor protections, including mandates for safety and compensation. Here, onion fields in Washington are hot and dry, and workers labor for hours in extreme conditions. Photo: Mary Babic/Oxfam

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While federal labor laws protect workers from abuses by unscrupulous employers, they do not, in fact, protect all workers. This year, Oxfam added a new data point to its Best States to Work Index to indicate whether or not states have taken steps to cover these workers.

Today, in the United States, it's legal for certain employers not to pay their employees minimum wage, or to ask their employees to work more than 40 hours a week and not provide overtime compensation. Some workers have no protection against sexual harassment in the workplace. Some workers are not guaranteed safety in the workplace. Some workers are not protected if they want to organize.

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So, the people who harvest the food we eat, take care of our family members, and clean our houses do not enjoy the protections most workers do.

How did this happen?

The history of excluded workers is deeply racialized and illustrates the unfortunate history of labor rights in this country. When drafting federal legislation in 1935 on **Social Security**, which created the foundation for legislation on **unionization** (National Labor Relations Act, NLRA 1935) and **worker protections** (Fair Labor Standards Act, FLSA 1938), policymakers left out two crucial groups: agricultural workers and domestic workers.

Both groups were, at the time, disproportionately Black laborers, and both continue to be disproportionately represented by people of color today. Not only were these exclusions racialized, they were gendered too. **Domestic workers** were then, and continue to be, overwhelmingly women of color.

Southern politicians specifically pushed for the exclusion of **farmworkers and domestic workers**—based on their racial composition. While drafting the bill that would create the foundation of the US welfare system—one that would allow workers to retire with dignity, organize for rights, and enjoy basic mandates around wages and the work week—Southern legislators complained about the possible negative impact of extending rights to Black workers who were, at the time, **working under Jim Crow**. The fear that a **welfare system** could enable Black workers to leave or refuse work in fields, factories, and kitchens drove Southern congressmen to push for the exclusion of domestic workers and farmworkers.

When the Social Security Act was signed by President Roosevelt, the NAACP protested, "calling the new American safety net 'a sieve with holes just big enough for the majority of Negroes to fall through,'" writes Ta-Nehisi Coates in *We Were Eight Years in Power*. The exclusion of these workers, especially farmworkers, also bolstered the Jim Crow penal system's "vagrancy" laws, which punished Black people who were not working with incarceration or forced labor on plantations, according to Michelle Alexander in *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

Racialized labor laws didn't stop with the New Deal; later legislation **replicated the exclusions**. The Civil Rights Act of 1964 left domestic workers without protections against discrimination or sexual harassment; the Occupational Health and Safety Act of 1970 left both groups without protections from work-based injury or safety standards.

What does this look like now?

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There are in fact many types of "exempt" workers, specifically related to overtime protection. These include temporary or part-time workers: newspaper delivery people, people who work on sea vessels, seasonal amusement or recreation workers. And while these employees are not guaranteed the protections of a set work week, for example, the assumption is that the temporary nature of their employment sets them outside the parameters of traditional labor.

Farmworkers are still excluded from pieces of the FSLA. Also, most protections do not apply to farmworkers who work for small farms, and protections get murky when farmworkers are paid piecemeal and not by the hour. Farms with fewer than 10 full-time employees are excluded from essentially every worker protection provision (wages, child labor, working week), including those around health and safety. So, there are no standards for workers in those environments around the use of poisonous pesticides, heat or cold, or at-work injuries.

Farmworkers are still excluded from the NLRA. This means that though farmworkers can (and have!) organized, they do not enjoy the same legal protections as other workers.

There are several organizations, such as Oxfam partners Farmworker Justice and United Farm Workers of America, working to organize farmworkers and push for their expanded rights.

Domestic workers are excluded from overtime pay and continue to be excluded from sexual harassment protections or workplace safety mandates, especially since they tend to work in private homes. Also, domestic workers

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who are categorized as "companion care workers" or individuals who are full time or live-in caregivers for elderly, injured, or disabled persons who cannot care for themselves, are excluded from protections around minimum wage.

Domestic workers are also still denied protections on the right to organize though they continue to fight and advocate for their rights, including pushing for a Domestic Workers Bill of Rights.

Read more about wage policies and worker protections in the Best and Worst States to Work in America 2020.

Why the U.S. needs a \$15 minimum wage

How the Raise the Wage Act would benefit U.S.
workers and their families

Fact Sheet • January 26, 2021

This fact sheet was updated February 19 with a new section on tipped workers.

The federal minimum hourly wage is just \$7.25 and Congress has not increased it since 2009. Low wages hurt all workers and are particularly harmful to Black workers and other workers of color, especially women of color, who make up a disproportionate share of workers who are severely underpaid. This is the result of structural racism and sexism, with an economic system rooted in chattel slavery in which workers of color—and especially women of color—have been and continue to be shunted into the most underpaid jobs.¹

The Raise the Wage Act of 2021 would gradually raise the federal minimum wage to \$15 an hour by 2025 and narrow racial and gender pay gaps. Here is what the Act would do:

- Raise the federal minimum wage to \$9.50 this year and increase it in steps until it reaches \$15 an hour in 2025.²
- After 2025, adjust the minimum wage each year to keep pace with growth in the median wage, a measure of wages for typical workers.
- Phase out the egregious subminimum wage for tipped workers, which has been frozen at a meager \$2.13 since 1991.³

- Sunset unacceptable subminimum wages for workers with disabilities employed in sheltered workshops and for workers under age 20.

The benefits of gradually phasing in a \$15 minimum wage by 2025 would be far-reaching, lifting pay for tens of millions of workers and helping reverse decades of growing pay inequality.

The Raise the Wage Act would have the following benefits:⁴

- Gradually raising the federal minimum wage to \$15 by 2025 would lift pay for **32 million workers—21% of the U.S. workforce.**
- Affected workers who work year round would **earn an extra \$3,300 a year**—enough to make a **tremendous difference in the life of a cashier, home health aide, or fast-food worker** who today struggles to get by on less than \$25,000 a year.
- A majority (59%) of workers whose total family income is below the poverty line would receive a pay increase if the minimum wage were raised to \$15 by 2025.
- A \$15 minimum wage would **begin to reverse decades of growing pay inequality** between the most underpaid workers and workers receiving close to the median wage, particularly along gender and racial lines. For example, minimum wage increases in the late 1960s explained 20% of the decrease in the Black–white earnings gap in the years that followed, whereas failures to adequately increase the minimum wage after 1979 account for almost half of the increase in inequality between women at the middle and bottom of the wage distribution.⁵
- A \$15 minimum wage by 2025 would **generate \$107 billion in higher wages** for workers and would also benefit communities across the country. Because underpaid workers spend much of their extra earnings, this injection of wages will **help stimulate the economy and spur greater business activity and job growth.**

Raising the minimum wage to \$15 will be particularly significant for workers of color and would help narrow the racial pay gap.

- Nearly one-third (31%) of African Americans and one-quarter (26%) of Latinos would get a raise if the federal minimum wage were increased to \$15.⁶
- Almost one in four (23%) of those who would benefit is a Black or Latina woman.
- African Americans and Latinos are paid 10%–15% less than white workers with the same characteristics, so **The Raise the Wage Act will deliver the largest benefits to**

Black and Latino workers: about \$3,500 annually for a year-round worker.⁷

- Minimum wage increases in the 1960s Civil Rights Era significantly reduced Black–white earnings inequality and are responsible for more than 20% of the overall reduction in later years.⁸

The majority of workers who would benefit are adult women—many of whom have attended college and many of whom have children.

- More than half (51%) of workers who would benefit are adults between the ages of 25 and 54; only one in 10 is a teenager.
- Nearly six in 10 (59%) are women.
- More than half (54%) work full time.
- More than four in 10 (43%) have some college experience.
- More than a quarter (28%) have children.

The Raise the Wage Act follows the lead of the growing number of states and cities that have adopted significant minimum wage increases in recent years, thanks to the ‘Fight for \$15 and a union’ movement led by Black workers and workers of color.

- Since the Fight for \$15 was launched by striking fast-food workers in 2012,⁹ states representing approximately 40% of the U.S. workforce—California, Connecticut, Florida, Illinois, Maryland, Massachusetts, New Jersey, New York, Virginia, and the District of Columbia—have approved raising their minimum wages to \$15 an hour.¹⁰
- Additional states—including Washington, Oregon, Colorado, Arizona, New Mexico, Vermont, Missouri, Michigan, and Maine—have approved minimum wages ranging from \$12 to \$14.75 an hour.¹¹

Not just on the coasts, but all across the country, workers need at least \$15 an hour today.

- Today, in all areas across the United States, a single adult without children needs at least \$31,200—what a full-time worker making \$15 an hour earns annually—to achieve a modest but adequate standard of living.¹² By 2025, workers in these areas and those with children will need even more, according to projections based on

the Economic Policy Institute's [Family Budget Calculator](#).¹³

- For example, in rural Missouri, a single adult without children will need **\$39,800** (more than **\$19** per hour for a full-time worker) by 2025 to cover typical rent, food, transportation, and other basic living costs.
- In larger metro areas of the South and Southwest—where the majority of the Southern population live—a single adult without children will also need more than **\$15** an hour by 2025 to get by: \$20.03 in Fort Worth, \$21.12 in Phoenix, and \$20.95 in Miami.
- In more expensive regions of the country, a single adult without children will need far more than **\$15** an hour by 2025 to cover the basics: \$28.70 in New York City, \$24.06 in Los Angeles, and \$23.94 in Washington, D.C.

Workers in many essential and front-line jobs struggle to get by on less than \$15 an hour today and would benefit from a \$15 minimum wage.

- Essential and front-line workers make up a majority (60%) of those who would benefit from a **\$15 minimum wage**.¹⁴ The median pay is well under \$15 an hour for many essential and front-line jobs; examples include **substitute teachers** (\$13.84), **nursing assistants** (\$14.26), and **home health aides** (\$12.15).¹⁵
- More than one-third (35%) of those working in residential or nursing care facilities would see their pay increase, in addition to home health aides and other health care support workers.
- One in three retail-sector workers (36%) would get a raise, including **42% of workers in grocery stores**.
- More than four in 10 (43% of) janitors, housekeepers, and other cleaning workers would benefit.
- Nearly two-thirds (64%) of servers, cooks, and other food preparation workers would see their earnings rise by \$5,800 on a year-round basis.
- Ten million workers in health care, education, construction, and manufacturing would see a raise—representing nearly one-third (31%) of the workers who would see a raise.

Phasing out the egregiously low \$2.13 minimum wage for tipped workers would lift pay, provide stable paychecks, and reduce poverty for millions of tipped workers.

- There are 1.3 million tipped workers throughout the country who are paid as little as \$2.13 per hour because Congress has not lifted the federal tipped wage in 30 years. Another 1.8 million tipped workers receive wages above \$2.13, but still less than their state's regular minimum wage.¹⁶
- Seven states (Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington) have already eliminated their lower tipped minimum wage. In these "one-fair-wage" states, tipped workers in these states are paid the same minimum wage as everyone else before tips.¹⁷ For restaurant servers and bartenders, take-home pay in one-fair-wage states is 21% higher, on average, than in \$2.13 states.
- Having a lower minimum wage for tipped jobs results in dramatically higher poverty rates for tipped workers. In states that use the federal \$2.13 tipped minimum wage, the poverty rate among servers and bartenders is 13.3%—5.6 percentage points higher than the 7.7% poverty rate among servers and bartenders in one-fair-wage states.¹⁸
- Eliminating the lower tipped minimum wage has not harmed growth in the restaurant industry or tipped jobs. From 2011 to 2019, one-fair-wage states had stronger restaurant growth than states that had a lower tipped minimum wage—both in the number of full-service restaurants (17.5% versus 11.1%) and in full-service restaurant employment (23.8% versus 18.7%).¹⁹

Growing numbers of business owners and organizations have backed a \$15 minimum wage.

- In states that have already approved \$15 minimum wages, business organizations representing thousands of small businesses have endorsed a \$15 minimum wage.
- Business groups that have endorsed a \$15 minimum wage include Business for a Fair Minimum Wage,²⁰ the American Sustainable Business Council,²¹ the Patriotic Millionaires,²² the Greater New York Chamber of Commerce,²³ the Long Island African American Chamber of Commerce,²⁴ and others.
- Growing numbers of employers have responded to pressure from workers and raised their starting pay scales to \$15 or higher. These include retail giants Amazon,²⁵ Whole Foods²⁶ (owned by Amazon), Target,²⁷ Walmart,²⁸ Wayfair,²⁹ Costco,³⁰ Hobby Lobby,³¹ and Best Buy.³² employers in the food service and producing industries, such as Chobani,³³ Starbucks,³⁴ Sanderson Farms (Mississippi),³⁵ and the Atlanta-area locations of Lidl grocery stores;³⁶ health care

employers including Michigan's Henry Ford Health System³⁷ and Trinity Health System,³⁸ Ohio's Akron Children's Hospital³⁹ and Cincinnati Children's Hospital Medical Center,⁴⁰ Iowa's Mercy Medical Center and MercyCare Community Physicians,⁴¹ Missouri's North Kansas City Hospital and Meritas Health,⁴² and Maryland's LifeBridge Health,⁴³ insurers and banks such as Amalgamated Bank,⁴⁴ Allstate,⁴⁵ Wells Fargo,⁴⁶ and Franklin Savings Bank in New Hampshire⁴⁷; and tech and communications leaders such as Facebook⁴⁸ and Charter Communications.⁴⁹

Our economy can more than afford a \$15 minimum wage.

- Workers earning the current federal minimum wage **are paid less per hour in real dollars than their counterparts were paid 50 years ago.**⁵⁰
- Businesses can afford to pay the most underpaid worker in the U.S. today substantially more than what her counterpart was paid half a century ago.⁵¹
- The economy has grown dramatically over the past 50 years, and workers are producing more from each hour of work, with **productivity nearly doubling since the late 1960s.** If the minimum wage had been raised at the same pace as productivity growth since the late 1960s, **it would be over \$20 an hour today.**⁵²

Research confirms what workers know: Raising wages benefits us all.

- High-quality academic scholarship confirms that modest **increases in the minimum wage have not led to detectable job losses.**⁵³
- After the federal minimum wage was raised to its highest historical peak in 1968, wages grew and racial earnings gaps closed without constricting employment opportunities for underpaid workers overall.⁵⁴
- Comprehensive research on 138 state-level minimum wage increases shows that all underpaid workers benefit from minimum wage increases, not just teenagers or restaurant workers.⁵⁵
- Multiple studies conclude that total annual incomes of families at the bottom of the income distribution rise significantly after a minimum wage increase.⁵⁶ Workers in low-wage jobs and their families benefit the most from these income increases, reducing poverty and income inequality.
- By providing families with higher incomes, **minimum wage increases have improved infant health and also reduced child abuse and teenage pregnancy.**⁵⁷

An immediate increase in the minimum wage is necessary for the health of our economy.

- Raising the minimum wage now will tilt the playing field back toward workers who have dangerous jobs and little bargaining power during the pandemic.⁵⁸
- Providing underpaid workers with more money will directly counter the consumer demand shortfall during this recession.⁵⁹
- Even the Congressional Budget Office's 2019 study of the impact of raising the federal minimum wage to \$15 by 2025 clearly showed that the policy would raise incomes of underpaid workers overall and significantly reduce the number of families in poverty.⁶⁰

Low wages threaten the economic security of workers and their families, who then turn to social benefits programs to make ends meet.

- In states without laws to raise the minimum wage to \$15, nearly half (47%, or 10.5 million) of families of workers who would benefit from the Act rely on public supports programs in part because they do not earn enough at work.⁶¹
- These workers and their families account for nearly one-third of total enrollment in one or more public supports programs.⁶²
- In states without a \$15 minimum wage law, public supports programs for underpaid workers and their families make up **42% of total spending** on Medicaid and CHIP (the Children's Health Insurance Program), cash assistance (Temporary Assistance for Needy Families, or TANF), food stamps (Supplemental Nutrition Assistance Program, or SNAP), and the earned income tax credit (EITC), and **cost federal and state taxpayers more than \$107 billion a year.**⁶³

Notes and Sources

This fact sheet is an update of *Why America Needs a \$15 Minimum Wage*, published by EPI and the National Employment Law Project, February 2019.

Unless otherwise indicated, the figures presented in this fact sheet come from a forthcoming EPI analysis of the **2021 Raise the Wage Act**.

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From Excluded to Essential: Tracing the Racist Exclusions in the FLSA
Committee on Education and Labor
Subcommittee on Workforce Protections

Farmworker Justice submits this letter in support of ending the racist exclusions in the Fair Labor Standards Act that deny millions of workers overtime pay and other vital wage protections. These exclusions arose from New Deal compromises that intentionally removed Black workers from the nation's central labor laws. Now, generations later, the burden of these negotiations continues to fall primarily on workers of color.¹ Without the basic safeguards that shield other labor forces from exploitation, farmworkers, domestic workers, and tipped workers are vulnerable to mistreatment. Too many survive on poverty-level wages. These workers have sacrificed their health and safety to keep our country fed and cared for during the COVID-19 pandemic. They deserve respect for their contributions. Farmworker Justice urges Congress to end the exclusions and guarantee our nation's essential workers the right to minimum wage and overtime pay.

Farmworker Justice (FJ) is a national advocacy organization founded in 1981 and based in Washington, DC. FJ's mission is to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety, and access to justice. It provides policy analysis, educational materials, legal representation, training, and technical assistance to farmworkers, farmworker organizations, attorneys, health-care providers, policymakers, the media, academics, and others throughout the nation. FJ collaborates with state and national partners that serve farmworkers to ensure workers are treated fairly and paid the wages they are due. It advocates in Congress, state legislatures and administrative agencies in collaboration with farm labor unions, worker centers, civil rights organizations, immigrants' rights groups, public health organizations and many others. FJ also participates in collaborative corporate responsibility initiatives between workers and companies in the food supply chain.

Farmworker Justice seeks public policies that treat the people employed on our ranches and farms with dignity and fairness. Farmworkers' exclusion from the nation's central labor

¹ See e.g. U.S. Dep't of Labor, *Research Report No. 13, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers* (2018), p. 2, https://www.dol.gov/sites/dolgov/files/ETA/naaws/pdfs/NAWS_Research_Report_13.pdf. (Finding that more than 80% of farmworkers are Hispanic or Latino.)

protections endangers their health, safety, and wellbeing. For this reason, Farmworker Justice has long advocated for reforming the Fair Labor Standards Act and expanding its protections to all workers.

Like domestic workers, tipped workers, and others, farmworkers are valued members of our communities and vital contributors to our economy. In 2019, U.S. farms made up \$136 billion of the U.S. economy.² That number only shows a fraction of the contribution that farmworkers make to our country—every hour of their labor has a multiplying effect on the broader economy. In fact, the food and agriculture industries reliant on these farms made up more than 5% of domestic GDP in 2019.³

Farmworkers' contributions have never been more apparent than over the past year. While many workers began adjusting to telework and video conference calls, farmworkers continued going into the fields every day. Even as COVID spread and death rates spiked, farmworkers showed up at the dairies of New York, apple orchards of Pennsylvania, corn fields of Iowa, cattle ranches of Utah, and cranberry bogs of Wisconsin. They put their health—and sometimes their lives—on the line so that we could continue putting food on our tables. They are the ones responsible for protecting our food supply chain in the midst of the worst crisis of the 21st century.

These essential workers deserve essential protections. But for too long, they have been excluded from labor laws that guarantee other workers minimum standards of pay and safety. Federal law denies them overtime pay and creates too many minimum wage exceptions.⁴ Most states have followed the federal government's lead and have drafted similarly restrictive wage protections.⁵ Notably, the most productive agricultural state in the country, California, has substantially broadened its labor laws.⁶ Its growers have continued producing crops, hiring workers, and profiting off of their labor.

California's continued agricultural productivity demonstrates that farmworkers' exclusion from labor protections is not a necessary prerequisite to ensure a profitable agricultural industry. Rather, farmworker exclusions are the direct result of demands made by Southern legislators at a time when most agricultural workers were African Americans. The race of the

² Economic Research Service (ERS), U.S. Department of Agriculture, *Ag and Food Sectors and the Economy*, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/>.

³ *Id.*

⁴ 29 U.S.C. § 213(b)(12) (FLSA exemption).

⁵ Farmworker Justice, Farmworkers' Rights Under State Employment Laws: An Interactive Map (last visited May 5, 2021), <https://www.farmworkerjustice.org/general-map/>.

⁶ Cal. Dep't. of Industrial Relations, *Overtime for Agricultural Workers* (January 2019), <https://www.dir.ca.gov/dlse/Overtime-for-Agricultural-Workers.html>.

workers who would be affected by the farmworker exclusion was front of mind for the legislators drafting the text.⁷ As Washington Supreme Court Justice González recently explained, “Racism directly influenced these exclusionary policies. Plantation agriculture, which dominated the southern economy, depended on the exploitation of a black labor force. To obtain the support of Southern Democrats, proponents of President Roosevelt’s New Deal agenda made compromises to preserve a quasi-captive, nonwhite labor force and perpetuate the racial hierarchy in the South by excluding agricultural workers.”⁸

This agricultural exceptionalism has not been confined to the FLSA. Farmworkers are also denied the right to unionize without fear of retaliation⁹ and are left out of many key occupational safety and health regulations.¹⁰ Farmworkers exposed to highly toxic pesticides must rely on the Environmental Protection Agency for regulatory protections. Unlike the Occupational Safety and Health Administration, the EPA is required to complete a cost-benefit analysis before it may implement workplace safety standards.¹¹

Excluding farmworkers from legal protections has serious consequences for their health, safety, and economic security. Farmwork is grueling labor that demands long hours. Some workers must bend over for hours at a time to harvest crops that grow low to the ground. Others carry ladders from tree to tree, fill 60 pounds bags with citrus, and chase after trucks to offload their harvest. When pesticides are sprayed, the toxic chemicals can drift into nearby fields and orchards or into children’s schools and playgrounds. The work continues even when temperatures surpass 100 degrees or when wildfires rage on nearby mountains. Despite the 80-to-90-hour work weeks and the back-breaking labor, farmworkers are some of the poorest in the country. In 2015 and 2016, the average annual pay for a U.S. farmworker was just \$17,500.¹² One third of farmworkers live below the poverty line.¹³ This low pay means that farmworkers are often forced to make difficult decisions just to make ends meet. Many live in shared housing, which has created health and safety risks during the COVID-19 pandemic. Most lack

⁷ Sean Farhang and Ira Katznelson, “The Southern Imposition: Congress and Labor in the New Deal and Fair Deal,” *Studies in American Political Development*, vol. 19 (Spring 2005), p. 14 (quoting Florida Congressman James Mark Wilcox’s comments in the debate over FLSA: “[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get away with it.”).

⁸ *Martínez-Cuevas v. DeRuyter Bros. Dairy*, 196 Wash. 2d 506, 529 (2020) (González, J. concurring) (internal citations omitted).

⁹ 29 U.S.C. § 152(3) (NLRA exemption).

¹⁰ See, e.g., Walking-Working Surfaces and Personal Protective Equipment (Fall Protection System), 81 Fed. Reg. 82,494, at 82,504 (Nov. 18, 2016) (declining to extend walking-working surface standards to agricultural operations).

¹¹ Alexis Guild and Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL’Y REV. 157, 178 (2018).

¹² U.S. Dep’t of Labor, *Research Report No. 13, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers* (2018), p. 36.

¹³ https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.

¹⁴ *Id.*

health insurance and have no choice but to forgo preventative care, only seeing a doctor when the situation turns dire.¹⁴ It is therefore not surprising—but no less shocking—that an estimated 581,000 agricultural workers have contracted COVID in the United States alone.¹⁵ This harm has been disproportionately felt by workers of color. A recent UCSF study found that food and agriculture workers in California have experienced the highest “excess mortality” during the pandemic, with a 39% increase in mortality compared to past years. Among Latino food and agriculture workers, that mortality increase reached 59%.¹⁶

Reforming the Fair Labor Standards Act to remove racist exclusions is the moral, responsible, and economically smart approach. The nation’s essential workers deserve the same labor protections guaranteed to employees in every other sector of the economy. Guaranteeing a minimum wage and overtime pay would pull more workers out of poverty and build a stronger, more reliable agricultural labor force. It would encourage growers to adapt and demand fewer hours each week, ensuring a healthier and safer workforce. Finally, establishing a reasonable wage floor would help level the playing field for the many growers who choose to act responsibly. It is not fair that the employers who treat workers with dignity must compete with those who cut corners. The wellbeing of the country relies on the wellbeing of its agricultural workers.

It is deeply troubling that the families who feed America struggle to put food on their own tables. That these same workers are excluded from the foundational labor laws of this country is inexcusable. These hard-working men and women show up every day for their country. It is time for their country to show up for them too.

¹⁴ *Id.* (Finding that only 47% of farmworkers reported that they had health insurance. Cost is the most common barrier to health care reported by farmworkers.)

¹⁵ Jayson L. Lusk, Ranveer Chandra, *Purdue Food and Agriculture Vulnerability Index*, Purdue University, College of Agriculture, <https://ag.purdue.edu/agescon/Pages/FoodandAgVulnerabilityIndex.aspx> (reporting 579,000 agricultural worker COVID-19 cases as of May 13, 2021).

¹⁶ Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18-65 Years of Age, by Occupational Sector and Occupation* (2021), <https://www.medrxiv.org/content/10.1101/2021.01.21.21250266v1.full.pdf>.

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Opinion | Tipping Is a Legacy of Slavery - The New York Times

Tipping Is a Legacy of Slavery

Abolish the racist, sexist subminimum wage now.

Feb. 5, 2021



By Michelle Alexander

Ms. Alexander is a civil rights advocate, the author of "The New Jim Crow," and a contributing Opinion writer.

Once upon a time, I thought that it was perfectly appropriate for restaurant workers to earn less than minimum wage. Tipping, in my view, was a means for customers to show gratitude and to reward a job well done. If I wanted to earn more as a restaurant worker, then I needed to hustle more, put more effort into my demeanor, and be a bit more charming.

I thought this even when I was a waitress, working at a burger and burrito joint called Munchies during the summers when I was a college student. Collecting tips gave me a certain satisfaction. I liked sweeping dollar bills and coins off tables into the front pocket of my blue apron. Each time someone left me a big tip, anything more than I expected, a tiny jolt of dopamine flooded my brain as though I had just hit a mini jackpot. I got upset when people stiffed me, walking out and leaving nothing or just pennies — a true insult — but whenever that happened I reminded myself that I might get lucky next time. Or I would do better somehow.

Never did it occur to me that it was fundamentally unjust for me to earn less than the minimum wage and to depend on the good will of strangers in order to earn what was guaranteed by law to most workers. I had no idea that tipping was a legacy of slavery or that racism and sexism had operated to keep women, especially Black women like me, shut out of federal protections for wage labor. I did not question tipping as a practice, though looking back I see that I should have.

The first week on the job, one of my white co-workers, a middle-aged woman from rural Oregon, pulled me aside after she watched a group of rowdy white men, who had been rude and condescending to me throughout their meal, walk out the door without leaving a tip. "From now on, dear," she said, "I'll take the rednecks. Just pass 'em on to me." This became a kind of joke between us — a wink and a nod before we switched tables — except it wasn't funny. The risk that my race, not the quality of my work, would determine how much I was paid for my services was ever-present.

So was the risk that I would be punished for not flirting with the men I served. Men of all ages commented on my looks, asked me if I had a boyfriend, slipped me their phone numbers, and expected me to laugh along with their sexist jokes. I often played along, after learning from experience that the price of resistance would be the loss of tips that I had rightfully earned.

The truth was, though, that I was shielded from the biggest risk that tipped workers face: not being able to make ends meet. During the summers I spent waitressing, I was living at home with my parents and had my basic needs taken care of. On days when business was slow, and only a few customers trickled in, I was reminded that my situation was not the norm. I remember a co-worker crying at the end of her shift, because she hadn't earned enough in tips to pay the babysitter. I remember a few of us pooling our tips so another co-worker could buy groceries on her way home and feed her kids.

After I graduated from law school, I became a civil rights lawyer and began representing victims of race and gender discrimination in employment, as well as victims of racial profiling and police violence. But it wasn't until I read Saru Jayaraman's book, "Forked: A New Standard for American Dining," that I learned the history of tipping in the United States. After the Civil War, white business owners, still eager to find ways to steal Black labor, [created the idea](#) that tips would replace wages. Tipping [had originated in Europe](#) as "noblesse oblige," a practice among aristocrats to show favor to servants. But when the idea came to the United States, restaurant corporations [mutated the idea of tips](#) from being bonuses provided by aristocrats to their inferiors to becoming the only source of income for Black workers they did not want to pay. The Pullman Company tried to get away with it too, but the [Black porters, under the leadership of A. Philip Randolph](#), formed the nation's first Black union to be affiliated with the American Federation of Labor and fought and won higher wages with tips on top.

Restaurant workers, however — who were mostly women — were not so fortunate. The unjust concept of tips as wages remained in place for them. And [in 1938](#), when Franklin Roosevelt signed the nation's first minimum wage into law, it excluded restaurant workers, a category that included a disproportionate number of Black people.

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Opinion | Tipping Is a Legacy of Slavery - The New York Times



American businesses after the Civil War sought to make tips the only source of income for Black workers they did not want to pay, like restaurant workers and railway porters. **Getty Images**



<https://www.nytimes.com/2021/02/05/opinion/minimum-wage-racism.html>

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Opinion | Tipping Is a Legacy of Slavery - The New York Times



Under the leadership of A. Philip Randolph, left, Black porters won higher wages with tips on top. Restaurant workers, who were mostly women, were not so fortunate. Corbis, via Getty Images

In 1966, when our nation's minimum wage was overhauled, restaurant workers were even more formally cut out with the creation of a subminimum wage for tipped workers. Today, 43 states and the federal government still persist with this legacy of slavery, allowing a tipped work force that is close to 70 percent female and disproportionately Black and brown women to be paid a subminimum wage. A nation that once enslaved Black people and declared them legally three-fifths of a person now pays many of their descendants less than a third of the minimum wage to which everyone else is entitled.

The subminimum wage for tipped workers isn't simply born of racial injustice; it continues to perpetuate both race and gender inequity today.

OPINION DEBATE

What should the Biden administration prioritize?

- EDWARD L. GLAESER, an economist, writes that the president should use his infrastructure plan as an opportunity to "break the country out of its zoning straitjacket"
- THE EDITORIAL BOARD argues the administration should return to the Iran nuclear deal, and that "at this point, the hard-line approach defies common sense."
- JONATHAN ALTER writes that Biden needs to do now what F.D.R. achieved during the depression: "restore faith that the long-distrusted federal government can deliver rapid, tangible achievements."
- GAIL COLLINS, Opinion columnist, has a few questions about gun violence: "One is, what about the gun control bills? The other is, what's with the filibuster? Is that all the Republicans know how to do?"

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Opinion | Tipping Is a Legacy of Slavery - The New York Times

In the mid-1960s, the guaranteed wage for tipped workers was \$0 an hour. Today, the federal minimum wage for tipped workers is just [\\$2.13 an hour](#) — a just over \$2 increase — and a mostly female, [disproportionately women of color work force of tipped workers](#) still faces the [highest levels of harassment of any industry](#). Women restaurant workers in states with subminimum wage report [twice the rate](#) of sexual harassment as women working in restaurants in the seven states that have enacted One Fair Wage — a full minimum wage with tips on top. The women in these seven states — California, Oregon, Washington, Nevada, Montana, Minnesota and Alaska — [can rely on a wage from their employer and are not as dependent on tips](#) and thus feel empowered to reject the harassment from customers.

The unfair power dynamic between women tipped workers and male customers in most states has only worsened during the pandemic. Women restaurant workers report being regularly subjected to [“Maskual harassment”](#), in which male customers are demanding that women servers take off their masks so that they can judge their looks and their tips on that basis. With tips now [down 50 to 75 percent](#), male customers know women workers are more desperate than ever.

For Black women, the situation is especially dire. Before the pandemic, Black women who are tipped restaurant workers earned on average nearly [\\$5 an hour less](#) than their white male counterparts nationwide — largely because they are segregated into more casual restaurants in which they earn far less in tips than white men who more often work in fine dining, [but also because of customer bias in tipping](#).

With the pandemic, these inequities were exacerbated; nearly nine in 10 Black tipped workers reported that their tips decreased by half or more, compared to 78 percent of workers overall. All workers were asked to do more for less — enforcing social distancing and mask rules on top of serving customers, for far less in tips. Black workers were more likely to be punished by hostile customers for attempting to serve as public health marshals than other workers. Seventy-three percent of Black workers reported that their tips decreased due to enforcing Covid-19 safety measures, compared to 62 percent of all workers.

Technically, federal law requires that employers must cover the difference when the hourly wage, subsidized by tips, does not amount to \$7.25 an hour. But in practice, that mandate is frequently ignored. A federal review of employment records from 2010-2012 revealed that [nearly 84 percent of full-service restaurants had committed wage and hour violations](#).

Fortunately, the subminimum wage for tipped workers might finally come to an end if Congress enacts the minimum wage policy in President Biden’s new \$1.9 trillion relief package in its entirety. The Raise the Wage Act, if passed, would not only raise the minimum wage to \$15 minimum wage but also fully phase out the subminimum wage for tipped workers. This would be good news for women and people of color who’ve been denied a living wage and forced to endure harassment on the job, but [it would ultimately benefit all tipped workers — and restaurants too](#). Workers in the seven states that have One Fair Wage receive similar or even higher tips as the workers in 43 states with a subminimum wage, and restaurants in those seven states have higher sales.

The National Restaurant Association has wasted no time [launching a campaign](#) to convince Congress to maintain the subminimum wage for tipped workers and the low minimum wage. This move hardly comes as a surprise. For more than 150 years since Emancipation, the restaurant industry [has poured millions of dollars into lobbying elected officials to maintain their exemption from having to pay their workers a fair wage](#), causing tens of millions of women and men to experience poverty, food insecurity, home insecurity, and inequality over generations.

As the Raise the Wage Act moves through Congress this month, the choice is clear: our representatives can choose to roll over to the trade lobby yet again and perpetuate a legacy of slavery, or they can choose to [listen to the millions of workers — disproportionately women and people of color who increasingly represent this nation’s future voters](#) — and make history during Black History Month by ending the subminimum wage for tipped workers once and for all.

Michelle Alexander is a civil rights advocate, the author of “The New Jim Crow” and a contributing Opinion writer.

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POLITICO



An illustration of the interior of a Pullman dining car. | Library of Congress

HISTORY DEPT.

The Racist History of Tipping

By REV. DR. WILLIAM J. BARBER II | July 17, 2019

his week, the House of Representatives will have a chance to end a pernicious legacy of slavery. Lawmakers will vote on the Raise the Wage Act, which would boost the minimum wage across the country to \$15 an hour by 2024. This would be a crucial step toward the first federal minimum wage increase in more than a decade.

A just-released Congressional Budget Office report finds that a \$15 minimum wage would have tremendous benefits for low-wage workers of all races and ethnicities. Yet the stakes are particularly high for black workers. The share who would benefit from the Raise the Wage Act is far larger than the share of white workers who would benefit—38 percent compared with 23 percent.

There's another provision in the legislation—eliminating the subminimum tipped wage—that corrects a wrong that goes much further back than the previous federal minimum wage increase. For workers regularly making more than \$30 a month in tips, employers can currently pay as little as \$2.13 an hour. That subminimum wage has been frozen at this level for decades. Should the Raise the Wage Act pass the House, it will mark the first time that either chamber of Congress has moved to eliminate the subminimum wage, which not only deepens economic inequalities but also happens to be a relic of slavery.

You might not think of tipping as a legacy of slavery, but it has a far more racialized history than most Americans realize. Tipping originated in feudal Europe and was imported back to the United States by American travelers eager to seem sophisticated. The practice spread throughout the country after the Civil War as U.S. employers, largely in the hospitality sector, looked for ways to avoid paying formerly enslaved workers.

One of the most notorious examples comes from the Pullman Company, which hired newly freed African American men as porters. Rather than paying them a real wage, Pullman provided the black porters with just a meager pittance, forcing them to rely on tips from their white clientele for most of their pay.

Tipping further entrenched a unique and often racialized class structure in service jobs, in which workers must please both customer and employer to earn anything at all. A journalist quoted in Kerry Segrave's 2009 book, *Tipping: An American Social History of Gratuities*, wrote in 1902 that he was embarrassed to offer a tip to a white man. "Negroes take tips, of course; one expects that of them—it is a token of their inferiority," he wrote. "Tips go with servility, and no man who is a voter in this country is in the least justified in being in service."

The immorality of paying an insufficient wage to workers, who then were forced to rely on tips, was acknowledged at the time. In his popular 1916 anti-tipping study, *The Itching Palm*, writer William Scott described tipping as an aristocratic custom that went against American ideals. "The relation of a man giving a tip and a man accepting it is as undemocratic as the relation of master and slave," Scott wrote. "A citizen in a republic ought to stand shoulder to shoulder with every other citizen, with no thought of cringing, without an assumption of superiority or an acknowledgment of inferiority."

Several states sought to end the practice in the early 1900s, often in recognition of its racist roots. But the restaurant industry fought back and was powerful enough to roll back local bans on tipping. And tipped workers—along with most others, as the act applied to industries that together made up only one-fifth of the labor force—were excluded from the first, limited federal minimum wage law passed in 1938.

It took until 1966 for advocates to win a base wage for tipped workers, and that amounted to only 50 percent of the minimum wage already guaranteed to other workers. Congress continued to raise the subminimum tipped wage until 1996, when Herman Cain, who headed the National Restaurant Association at the time, offered legislators a bargain: The industry would accept a small increase in the minimum wage as long as the tipped wage was frozen at \$2.13 an hour.

Congress agreed to the deal, and the tipped minimum wage remains just \$2.13 to this day. Employers are supposed to pay the difference if tips don't bring workers to the full regular minimum wage. But too often that law is not enforced. When the Department of Labor conducted an unusual compliance sweep of 9,000 full-service restaurants between 2010 and 2012, they found that 84 percent had violated the subminimum wage system.

A century later, the industry lobby continues its fight to uphold this two-tiered pay system. Where social movements have gotten cities to pass minimum wage hikes, the lobby has pressured state legislatures to ban local wage increases altogether. The industry also fought to overturn voter-approved initiatives in Maine and Washington, D.C., that would have ended the subminimum tipped wage, while they lobbied legislators in Michigan to keep the issue from reaching the ballot in the first place.

That's why national action to finally reverse this particular vestige of slavery is so vital. No one can live on \$2.13 an hour—a poverty wage.

We may live in a very different society from 150 years ago, but the subminimum tipped wage still exacerbates the inequalities passed down from that time. Workers in the

restaurant industry are far more likely to be poor or near-poor than the general population. Sure, upscale restaurants where wealthy patrons offer servers good tips on expensive menu items can provide a good living, but those jobs are few and far between—and dominated by white men.

Research also shows that tipping itself has a racial component: Customers generally give white workers bigger tips than black workers, regardless of service quality. Thanks in part to segregation within the industry and discrimination from patrons, restaurant worker poverty rates are highest for women and people of color.

Ending the subminimum wage would right one of the historical wrongs keeping certain groups of workers from receiving the full protections they are due, but ultimately, low wages driven by racism hurt workers of all races. Three times as many white workers as black workers stand to get a raise if the federal minimum wage hike passes. Undoing systemic racism opens up opportunities for all people.

With a Republican Senate and president, the Raise the Wage Act might not become national law in the immediate future. But a vote by the House to end the subminimum tipped wage would send an unmistakable signal to the several states considering similar legislation: The days of these racist tiered wage systems are coming to an end.

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The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

THE RESTAURANT INDUSTRY RAN A PRIVATE POLL ON THE MINIMUM WAGE. IT DID NOT GO WELL FOR THEM.

The restaurant industry's own internal survey found huge support for raising the minimum wage, even if it meant a higher check.

Lisa Graves, Zaid Jilani

April 17 2018, 10:39 p.m.



Photo: Michael Nagle/Bloomberg/Getty Images

<https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>

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The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

One of the nation's most powerful anti-minimum wage lobbying groups tapped a longtime Republican pollster to survey the public about a range of issues impacting the industry.

A significant chunk of the survey focused on attitudes toward the minimum wage — and many members of the powerful lobby group aren't going to like the results.

The poll — which was presented on a [slide deck](#) obtained by The Intercept and [Documented](#) — found that seven in 10 Americans want to see the minimum wage raised even if it means that they'd have to pay more for meals. It also found that the industry's various talking points against raising the wage are mostly falling flat with the general public.

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Conducted by GOP pollster Frank Luntz's firm LuntzGlobal on behalf of the other NRA — the National Restaurant Association — the poll found that 71 percent of people surveyed support raising the minimum wage to at least \$10 an hour.

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The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

A majority **SUPPORT** raising minimum wage to (at least) \$10...

Do you personally support or oppose raising the federal minimum wage to at least \$10/hour?

Total	
71%	SUPPORT (NET)
39%	Totally Support
18%	Mostly Support
14%	Somewhat Support
7%	Neutral – Neither Support nor Oppose
8%	Somewhat Oppose
6%	Mostly Oppose
8%	Totally Oppose
22%	OPPOSE (NET)



The NRA, which did not respond to a request for comment, is the trade association for the massive restaurant industry. It has estimated that restaurant sales reached **\$799 billion in 2017**, up 4.3 percent over 2016, and boasts eight years of consecutive growth in revenue for U.S. restaurants.

“The restaurant industry now in the United States is larger than 90 percent of the world economies,” said Hudson Riehle, senior vice president of the NRA’s Research and Knowledge group.

The NRA paid its CEO, Dawn Sweeney, more than \$3.8 million in total compensation, including a bonus of \$1.7 million. If her total compensation were computed hourly, it would amount to \$1,867.88 *per hour* (as of four years ago), which would take a minimum-wage worker 247 hours, or six weeks of full-time work, to earn.

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The NRA has long claimed that increasing the government wage floor would “ratchet up restaurants’ labor costs and result in thousands of jobs lost,” but these results show that the NRA’s rhetoric on the minimum wage is failing to move the American public. Indeed, as Democrats embrace a \$15 per hour minimum wage ahead of the 2020 presidential campaign, the NRA is moving in the opposite direction.

Industry Messaging Backfiring

The leaked NRA poll is the first instance of a known national poll commissioned by the industry itself that shows how widely popular raising the minimum wage is and how small the opposition is, even though other published national surveys have shown a similar level of public support.

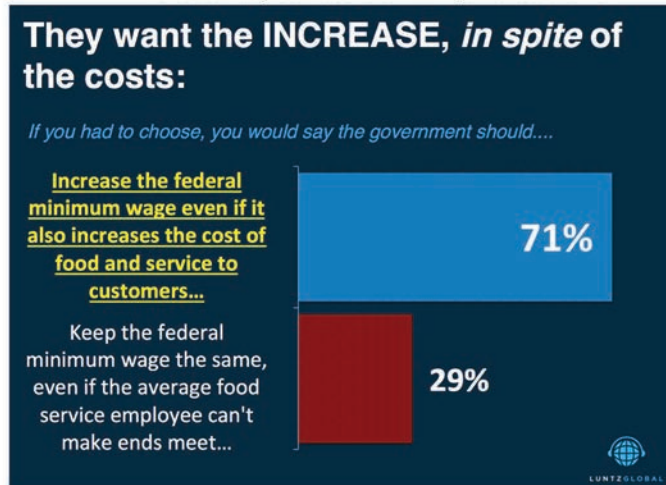
The leaked poll also sheds new light on arguments the NRA has made through its local proxies in its campaigns against raising the minimum wage.

One of the arguments routinely made by industry representatives is that raising the minimum wage will raise the costs for customers. But, the NRA’s own poll shows that, by an overwhelming majority, customers are willing to pay more to support a “fair wage.”

In the words of LuntzGlobal: “They want the INCREASE *in spite* of the costs.”

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The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.



The pollsters asked, “If you had to choose, you would say the government should increase the federal minimum wage even if it also increases the cost of food and services to customers.”

According to the poll results, same portion of people who favor raising the minimum wage are willing to pay more to make it happen: 71 percent.

A small minority of those surveyed don’t care: Twenty-nine percent told the Luntz pollsters that they would not support raising the minimum wage “even if the average food service employee cannot make ends meet.” Twenty-nine percent of respondents also said they were most concerned about cost increases.

The poll did not include information on political party identification of the survey respondents, but it was stratified demographically and

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The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

geographically.

Even though the Luntz survey shows that restaurant customers are willing to pay more, the leaked poll shows the messaging that the NRA is continuing to deploy to try to stop measures to raise the minimum wage. That includes the claim that restaurants will go out of business if the minimum wage goes up.

That is, the NRA's argument disregards its own survey results that customers are willing to pay higher costs to support a higher wage for their neighbors.

The strongest polling message in the poll was on standard of living: "A minimum wage increase will improve people's standard-of-living by providing them with a more appropriate income level to handle cost of living increases."

In the poll, 43 percent found that to be the most persuasive message, followed by the finding that raising the minimum wage would help lift nearly 17 million Americans out of the poverty level despite working full-time.

Another strong argument, according to the leaked poll, was that the raise is needed to help with increases in the cost of living, because the federal minimum wage "has only risen three times in the past three decades."

The least persuasive argument was "reducing inequality" in general, which prompted the Luntz group to proclaim: "Let your OPPONENTS 'own' inequality if they must ..."

Changing the Subject

The leaked poll also showcased arguments the NRA uses to pivot away from efforts to raise wages, changing the subject to things like the claim

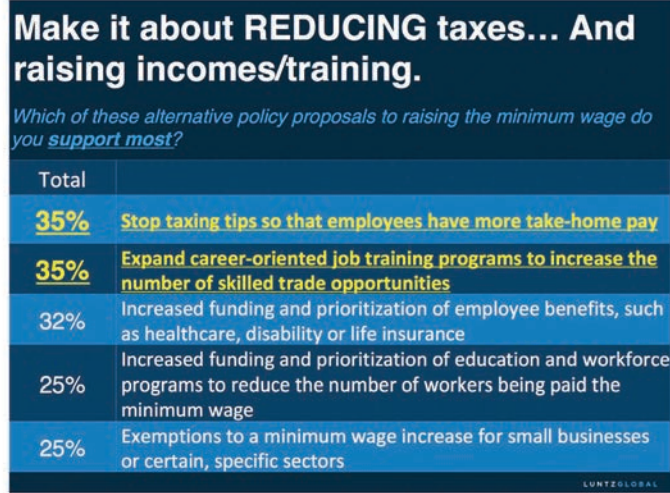
<https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>

6/10

5/6/2021

The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

that “reducing taxes” would give workers more take-home pay, or that “increasing funding” for health care benefits would be a better alternative.



The LuntzGlobal polling shows that the biggest concern among Democrats and “swing” voters is “ensuring that American workers have access to quality, affordable health care,” by 51 percent and 43 percent, respectively.

For Republicans, that was also high priority, but it came in a close second to “protecting American workers by changing immigration policy,” at 33 percent and 29 percent, respectively. (Other parts of the leaked poll and slide deck did not specify support by political party.)

5/6/2021

The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

Yet, the NRA has also joined GOP efforts against the Affordable Care Act and supported efforts to repeal it, in addition to its PAC supporting GOP candidates who had campaigned on repeal.

The leaked poll is similar to a poll the Washington Post obtained in 2016, which showed how LuntzGlobal was working with the Council of State Chambers to aid its opposition to minimum wage increases, paid sick leave, and other benefits.

That poll of 1,000 business executives showed that overwhelming majorities supported those measures, but their trade group continued to oppose those legislative proposals or referenda. (The Center of Media and Democracy, which was led by one of the authors of this piece, Lisa Graves, broke that story with the Washington Post.)

Banking on Fear

According the LuntzGlobal, the NRA message against raising the minimum wage that tested the best was the claim that

Businesses will close. Let's be clear about who makes up the majority of the restaurant industry: It's small businesses and locally owned franchises. They operate with razor-thin margins already. The sad reality is that with a higher minimum wage, many would simply no longer be viable; they'd have to lay off employees or shut their doors entirely.

However, in-depth analysis has shown that despite such fearmongering, raises have not resulted in "many" restaurants closing or laying off workers. The most comprehensive study to date, looking at 137 different hikes in the minimum wage, found:

5/8/2021

The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

For these 137 minimum wage increases, which have a mean real increase of 10.2%, we find a very clear indication that there was a reduction in the number of workers reporting a wage below the new minimum. ... However, we also find a clear increase in the number of jobs paying at or above the new minimum, leaving total employment essentially unchanged. Our baseline specification shows that in the five years following the minimum wage increase, average wages of affected workers rose by 7.0%, while employment of affected workers rose by a statistically insignificant 3.0%.

Surveys of small businesses have also shown **solid support** for higher minimum wages.

Heading Off Measures on Obesity, Immigration, and More

The newly leaked poll also provides the NRA with data on how to avoid popular local measures to require nutrition information on menus to help combat obesity, as well as information on customers' views about immigration and workers with past criminal convictions.

The LuntzGlobal messaging also uses language to emphasize the claim that most minimum wage workers are teenagers, a claim that the Economic Policy Institute has **debunked**. It also echoes the rhetoric around these issues being pushed by Rick Berman, an industry-funded PR executive whose sales pitch to corporations on opposing the minimum wage was **published** by Documented in partnership with The Intercept in December.

Women workers are disproportionately affected by the low minimum wage, according to the National Women's Law Center, which says that

<https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>

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5/8/2021

The Restaurant Industry Ran a Private Poll on the Minimum Wage. It Did Not Go Well for Them.

nearly "two-thirds of minimum wage workers in the United States are women, and the minimum wage falls far short of what it takes to live above the poverty line."

Former GOP presidential candidate Herman Cain **once served** as the organization's president, and his role there came under **scrutiny** during his 2012 presidential bid.

Top photo: Employee Shantel Burris prepares patient meals at Montefiore Medical Center's Wakefield Campus in the Bronx borough of New York, on Oct. 28, 2014.

<https://theintercept.com/2018/04/17/the-restaurant-industry-ran-a-private-poll-on-the-minimum-wage-it-did-not-go-well-for-them/>

10/10

[Additional submissions by Mr. Keller follow:]



May 3, 2021

The Honorable Alma S. Adams, Chair
The Honorable Fred Keller, Ranking Member
U.S. House Education and Labor Committee,
Subcommittee on Workforce Protections
2176 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Adams and Ranking Member Keller:

On behalf of the National Restaurant Association, please accept this letter for the record regarding the hearing on May 3, 2021, titled *"From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act."* We appreciate the opportunity to share our insights and industry knowledge on why tipped workers in the restaurant industry prefer the tipping system, also preferred by consumers and employers.

Tipping is why so many employees choose restaurants as a first job, a side job for extra income, a job while in school, a second chance, or a career. In fact, one in four Americans got their first job in a restaurant. High quality service and flexibility are hallmarks of the industry and why nearly 90% of consumers enjoy going to restaurants. Ending the tip credit would hurt employees, restaurants, and consumers.

Importantly, federal law requires that every employee earn at least the federal minimum wage, or the higher state or local minimum wage in 29 states and 55 municipalities. If the combination of the base wage and earned tips does not total the required minimum wage, the employer must pay the tipped employee more to make up the difference. Should the tip credit be eliminated, many restaurants would terminate tipping, raise prices to cover higher wages, and move to an hourly wage-only system. Tipped employees would likely earn less than they currently do, which is why ending the tip credit would hurt employees.

An additional consideration is the fact that employees and voters uphold the tipping system and have repeatedly opposed ending the tip credit. In fact, recent attempts to eliminate the tip credit in Chicago, Maryland, D.C., Michigan, Virginia, New Mexico and Maine were soundly defeated after tipped workers spoke out about why they prefer the tip credit.

Moreover, on March 5, 2021, the U.S. Senate voted – on a strong bipartisan basis – against an amendment to include the House-passed *"Raise the Wage Act,"* which would raise the minimum wage to \$15/hour and eliminate the tip credit, into the American Rescue Plan (COVID relief bill). Several Senators, who favor preserving the tip credit on its merits, recognized that this bill is the wrong approach.

Thank you for the opportunity to share our views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Shannon L. Meade".

Shannon L. Meade
Vice President, Public Policy and Legal Advocacy

cc: Members of the House Subcommittee on Workforce Protections

Enhancing the quality of life for all we serve

Restaurant.org | @WeRRestaurants
2055 L Street NW, Washington, DC 20036 | (202) 331-5900 | (800) 424-5156



May 3, 2021

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
2101 Rayburn House Office Building
Washington, DC 20515

The Honorable Alma Adams
Chairwoman
Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515

The Honorable Fred Keller
Ranking Member
Subcommittee on Workforce Protections
1717 Longworth HOB
Washington, DC 20515

2130 Stella Court
Columbus, OH 43215
USA

614 487 1117 [Main](tel:6144871117)

525 9th Street NW
Suite 800
Washington, DC 20004
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202 789 2900 [Main](tel:2027892900)

Dear Chairman Scott, Ranking Member Foxx, Chairwoman Adams, and Ranking Member Keller:

Thank you for the opportunity to submit an official letter on behalf of AmericanHort for the hearing record in the wake of today's Workforce Protections Subcommittee hearing on the Fairness for Farmworkers Act.

AmericanHort is the primary national trade organization representing the growers of horticultural plant crops, and the associated supply and market chain. AmericanHort represents and supports nearly 14,000 member and affiliated businesses that include plant breeders, greenhouse and nursery crop growers, garden retailers, distributors, interior and exterior landscape professionals, students, educators, researchers, manufacturers, and all of those who are part of the industry market chain. Greenhouse and nursery plant growers, represent the largest share of our active member firms.

Horticultural growers produce crops including trees, shrubs, flowers, and plants used in residential, commercial, municipal, and other landscapes and buildings, and for environmental, restoration, and reforestation purposes, as well as the vegetative planting stock for commercial and home tree fruit, nut, berry and small fruit, and vegetable production. These crops may be produced in the open, in field or container systems, or under cover in controlled environment settings. Nursery and floriculture crops represent roughly one third of the total value of all specialty crops produced, and roughly 10 percent of the total value of crop agriculture.

It is often said – and it is true – that agriculture is distinct. Farmers have limited control over markets and input costs, and limited leverage over prices. They have even less control over the vagaries of weather and seasons.



AmericanHort.org | Columbus, OH | Washington, DC

Our industry's market chain is heavily dependent on the spring selling season. The general rule of thumb is that 60- to 80-percent of annual sales happen in a ten-week period generally falling from March 15 to Memorial Day (with the season running somewhat earlier in warmer climates). April and May are essential months, and Mothers' Day is often seen as the season peak. History has shown that this is the only period for this level of sales for most of the industry, and sales losses due to events such as bad weekend weather will almost never be recouped as the season progresses. Bad Spring weather is a normal regional phenomenon that is difficult to predict and manage, and has a profound effect on the ability to make a profit.

Horticultural crop production is highly labor intensive, and the cost of labor is by far the single biggest input cost. Labor generally represents more than one-third, and often upwards of 50%, of total production costs. So the elimination of the longstanding agricultural exemption from overtime pay has huge implications for the cost of production in an industry where growers are "price takers." Industry businesses operate on thin margins and sell their goods, which for price-conscious consumers are discretionary purposes, in markets where they face stiff domestic and foreign competition.

As the adage goes, farmers must make hay while the sun shines. In the horticulture industry, this means that more hours are worked in the peak spring season weeks, with more flexibility in non-peak times of the year.

California offers an interesting case study as to the "false promise" activists make to workers and Congressional champions as they push for elimination of the longstanding agricultural overtime exemption. As the hours above which overtime must be paid ratchets down to 40, growers report that they are being forced to limit hours. Workers who want to work, and earn fair wages, for 60 hours during the peak season are seeing their hours limited to 45, and soon 40, because growers cannot recoup the margins needed to pay overtime. Longstanding employees are working fewer hours, earning less money, and seeing smaller paychecks than they did prior.

Agricultural advocates are not the only ones pointing out that perhaps well-intentioned efforts such as the Fairness for Farmworkers Act are actually resulting in negative consequences for workers. A February 18, 2021 article on pandemic-related "hero pay" in the Los Angeles Times featured this quote attributed to a representative of the United Farm Workers union:

Juan Manuel Moran, a United Farm Workers internal organizing coordinator, said farms were already struggling with higher worker pay and may not be able to operate with further wage hikes. Some farms, for example, have been steadily lowering the availability of overtime hours, he said. Hero pay sounds good in theory, he added, but in practice it's possible that "the worker ends up losing."

We cannot support the Fairness for Farmworkers Act and believe it will have negative consequences for both workers and employers in our industry. However, AmericanHort is committed to engaging in "win-win" collaborations that improve the lives and livelihoods of our member employers and their workforce. This is why, for example, we actively supported the negotiation and successful House passage on March 18 of the Farm Workforce Modernization Act, and are urging the Senate to take up its version of such legislation.

Thank you for this opportunity to express our views.

Sincerely,



Craig J. Regelbrugge
Senior Vice President-Advocacy and Research



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April 30, 2021

The Honorable Bobby Scott
Chairman
House Committee on Education and Labor
2176 Rayburn House Office Building
Washington, DC 20515

The Honorable Alma Adams
Chairwoman
Subcommittee on Workforce Protections
2436 Rayburn House Office Building
Washington, DC 20515

The Honorable Virginia Foxx
Ranking Member
House Committee on Education and Labor
2101 Rayburn House Office Building
Washington, DC 20515

The Honorable Fred Keller
Ranking Member
Subcommittee on Workforce Protections
1717 Longworth HOB
Washington, DC 20515

Dear Chairman Scott, Ranking Member Foxx, Subcommittee Chairwoman Adams, and Subcommittee Ranking Member Keller,

As America's farmers and ranchers are called on to provide the food, fuel and fiber a growing nation and world requires, the greatest limiting factor in our ability to achieve those goals is farm labor. Farmers and ranchers pay competitive wages, which have grown at a faster rate over the past five years. Wages and other rising farm costs make it increasingly difficult to remain competitive. Farmers and ranchers do not get to set the price of their products but must take the price set by the buyer, meaning we must control production costs just to break even. On top of these challenges, agriculture struggles to fill open jobs on the farm.

As the nation's largest general farm organization, the American Farm Bureau Federation is deeply troubled by the Fairness for Farmworkers Act which would worsen our existing workforce shortage and incentivize offshoring of labor-intensive agriculture.

The number of H-2A certified positions increased by more than 350% over the last ten years, demonstrating the labor shortage facing U.S. agriculture. While the H-2A program is a lifeline for growers who seasonally need workers but cannot find them domestically, it is an expensive and bureaucratic program that would not be used if other labor options were available. Farmers and ranchers who utilize the H-2A program are responsible for the costs of transporting and housing each worker while also paying a competitive wage.

To minimize production costs, farmers may choose to hire additional farmworkers to remain under the overtime threshold. Since the agriculture industry already lacks an ample workforce, national overtime requirements would exacerbate these employee scarcity challenges.



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In other instances, overtime requirements for agriculture will result in farms changing their production altogether. Some states have already imposed overtime requirements for agriculture, subjecting farmers and farmworkers to the negative impacts of these policies. In these states, farmers have shifted production to less labor-intensive crops or planted fewer acres to minimize additional work hours, resulting in decreased farmworker pay and fewer jobs.

As Congress debates the merits of provisions like those in the Fairness for Farmworkers Act, we should also consider the importance of ensuring we maintain domestic food production. American specialty crop production is declining, while imports of fruits and vegetables from countries with minimum wage requirements that are a fraction of those in the U.S. are increasing. Just last year, production of carrots, iceberg lettuce, onions, oranges, potatoes and strawberries fell 3% from 2019 levels¹. During that period, U.S. production of those commodities fell about 160 million pounds while imports of those same products increased 177 million pounds, a 44% increase. These six commodities provide a representative cross-section of specialty crops and demonstrate that efforts to require overtime pay for agriculture would result in the continuation of this production imbalance, resulting in the U.S. becoming dependent on foreign countries for our nation's food supply.

This legislation is also poorly timed considering the economic impact felt by the COVID-19 pandemic throughout the agriculture industry. The USDA estimates the livestock sector suffered \$17.9 billion in losses in 2020 because of COVID². Additionally, the production of field-grown fresh-market vegetables has declined 2%. This decline encompasses much larger decreases in production for some commodities. For example, production fell 32% for cucumbers, 13% for cauliflower, 11% for tomatoes and bell peppers and 10% for sweet corn. Farmers and ranchers also incurred unaccounted for expenses as they worked to mitigate the spread of COVID-19 among their employees. Farmers provided employees with personal protective equipment and sanitizing supplies, retrofitted housing and packing facilities and secured hotel accommodations to allow for isolation if needed. As the agriculture industry rebounds from the COVID-19 pandemic, Congress should not create laws that would significantly increase labor costs and worsen the existing workforce shortages.

As American agriculture looks for ways to remain viable and ensure our nation's food security, having access to a reliable workforce will be critical. Legislation like the Fairness for Farmworkers Act places devastating constraints on American agriculture and diminishes future farming opportunities. We encourage members of Congress to recognize the negative impacts this legislation would have on American food, fuel and fiber production.

¹ Chenarides, L, Richards, TJ, Rickard, B. COVID-19 impact on fruit and vegetable markets: One year later. *Can J Agr Econ* 2021; 1–12. <https://doi.org/10.1111/cjag.12272>

² <https://www.ers.usda.gov/webdocs/publications/100177/ap-086.pdf?v=6038>



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Sincerely,

A handwritten signature in black ink, appearing to read 'Zippy Duvall'.

Zippy Duvall
President, American Farm Bureau Federation

Chairman Scott and esteemed members of the House Education and Labor committee. My name is Joshua Chaisson and I am a restaurant server of 22 years. In 2016 I began fighting along side other tipped workers from my state to preserve the tip credit and tip wage system after it was eliminated through a disastrous ballot initiative. Much like in Washington DC, when “Restaurant Opportunities Center (ROC)” and “One Fair Wage (OFW)” poured money into a ballot measure to eliminate the tip wage, legislators listened to the local tipped workers who would be most intimately impacted by this law change and reinstated the tip credit.

Many states have increased their minimum wages in the last several years, some with Democratic super majorities. All of them preserved their tip credit and tip wage system after hearing directly from tipped workers. The overwhelming majority of tipped workers support the tip credit because it allows us to maximize our income. The Census Bureau and the Bureau of Labor Statistics have shown that as our base wage increases, tips decrease. Workers know this, and thus show that ROC does not speak for us and our industry.

ROC and One Fair Wage have shown at public hearings that they are interlopers and often don’t work in the industry at all. Yet, all of them have learned to parrot the

language of their leaders and using offensive language of slave wages and the legacy of slavery. To compare the incomes and jobs of present day tipped workers to the greatest atrocity in American history is disingenuous, disgusting, and deplorable. A ROC board member (Jessica Wynter Martin) called a black tip credit supporter an “Uncle Tom” during open debate here in DC. Their abominable language knows no bounds. Their language has furthered the divide from their members of a big money lobbying organization and the real workers of our industry.

The overwhelming majority of tipped workers want to preserve the tip credit and tip wage system. It allows us to thrive and maximize our income. Members of congress should listen to tipped workers, not the offensive members of big money lobbying groups like “Restaurant Opportunities Center” or “One Fair Wage.”

Joshua Chaisson

President

Restaurant Workers of America

Thank you, Chairman Scott and esteemed members of the House Education and Labor committee for the opportunity to hear my story. My name is Valerie Torres, and I have worked in bars and restaurants in DC for over 25 years. In 2018, I became involved in the fight against Ballot Initiative 77 in DC, alongside countless other ACTUAL tipped workers from DC to preserve the tip credit and tip wage system after an outside organization, “Restaurant Opportunities Center (ROC)” (and their counterpart, “One Fair Wage (OFW)”) came to DC to push this initiative. This group of outside interlopers invaded our city and our industry and purported to speak for the tipped workers; however, when actual workers came out to speak for ourselves to say that we support the tip credit system, they REFUSED to listen to the people they claimed to be supporting. They poured excessive amounts of money into a ballot measure to eliminate the tip wage while accusing our own local industry community of investing in millions of dollars to fund the fight against them.

ROC and OFW conducted themselves outrageously throughout the time leading up to Election Day, coming into our establishments and screaming at workers who were trying to fight for our own livelihoods. During the public hearing to overturn the initiative, LOCAL industry turned out in massive numbers—the public hearing itself was one of the largest and LONGEST public hearings in

DC history. ROC/OFW flew in people from all over the country to speak to testify, with only a handful of industry workers who lived and worked in DC. Conversely, hundreds of actual DC tipped workers and members of our industry testified during the almost 16-hour hearing so our voices could be heard over these outside interlopers who felt they knew more about our industry than we did. Their tactics have always been extraordinarily underhanded, using misinformation and outright lies to support their false narratives about the discriminatory effects of the tipped credit on our industry.

As this fight grows on the national level, ROC and OFW continue to spew lies to convince the general public and lawmakers that our industry has failed its workers—they compare women in our industry to sex workers, and say that we subject ourselves to sexual harassment in order to make tips; they say that tipping is rooted in slavery and that tipped workers are being paid “slave wages.” These narratives are categorically and offensively false. As a woman of color who has been in the industry for over 2 decades, I find their arguments and tactics to be profoundly offensive and deplorable; it is insulting to women, to the BIPOC community, and to all tipped workers who they claim are unable to advocate for themselves. Moreover, to attempt to compare the incomes and jobs of present day tipped workers to the

greatest atrocity in American history is unbelievably disingenuous, disgusting, and outright loathsome.

The overwhelming majority of tipped workers support the tip credit because it allows us to maximize our income. If it didn't, there wouldn't be so many of us in the industry. If I didn't, I would not have returned to bartending full time. I graduated from Georgetown University. I have a Masters degree in Special Education from Johns Hopkins University. I CHOSE to leave my chosen field of education to go back to bartending because I felt that it allowed me the flexibility to pursue other interests while making a great income.

The majority of the ROC/OFW team are paid political operatives and not actual workers who have ever worked in the industry. Case in point, the Director ROC-DC has admitted that she never worked in the industry, but has a sister who did. Another board member has been on record multiple times stating that she is a former tipped employee who no longer works in the industry, but will sometimes say she does to fit her current narrative.

The overwhelming majority of tipped workers want to preserve the tip credit and tip wage system. It allows us to thrive and maximize our income. Members of congress should listen to tipped workers, not the offensive members of big money lobbying groups like "Restaurant Opportunities Center" or "One Fair Wage."

Please listen to the workers. Listen to me. Preserve the
Tip Credit.

Thank you.

Valerie Torres

Secretary, Restaurant Workers of America

Co-Chair, DC Service and Hospitality Advocacy Council

Valerie J. Graham
4014 Kansas Avenue, NW
Apartment B4
Washington, District of Columbia 20011

US Representative Robert Scott
2328 Rayburn House Office Building
Washington, District of Columbia 20515

May 3, 2021

Dear Chairman Scott and Esteemed members of the House Labor and Education Committee:

I am writing to you as a professional tipped worker and also as a Black woman who is the descendant of human beings who were enslaved for generations under the one of the United States' most shameful atrocities. I write with the hope that you will invite Black tipped workers to the discussion around our professions and livelihoods. For too long, discourse around this issue has been driven by the Restaurant Opportunity Center (ROC) and One Fair Wage (OFW), organizations that are reviled by the hospitality workforce and whose attempts to shoehorn tip wage elimination legislation into bills at the local level has failed in every instance.

The fact that this committee is hosting a hearing on "the racist origins of the tipped minimum wage" is an indication of how deeply influential ROC and OFW are in guiding dialogue involving our workforce. This is unfortunate and ultimately destructive to a fair and pragmatic discussion about the working conditions and quality of life of workers in the hospitality industry. ROC/OFW's sole mission is to disrupt the restaurant industry and they have seemingly limitless financial resources to fund their "studies" and wage their propaganda battle. The painfully evocative language around "the Legacy of Slavery" is straight out of the ROC/OFW playbook. As effective as this talking point is as a rhetorical strategy, it is incredibly disrespectful to the trauma that my ancestors and subsequent generations have endured throughout the barbaric institution of slavery and its aftermath.

By evoking the legacy of slavery in their arguments, ROC/OFW is harvesting the agony and terror of my ancestors in furtherance of their political agenda and it is opportunistic, offensive and cruel. For 400 years, millions of Black people were abducted, raped, bought, sold and bred as livestock, forced to toil under intolerable conditions, prevented from ever being able or

escape to earn wages from their labor, brutalized, maimed, terrorized, murdered and had their children torn from their arms for the entirety of their lives and their children's lives and their children's children's lives. Descendants of this barbarity still carry the wounds and torment of what our ancestors endured. What was perpetrated upon our People was unforgiveable and the reverberations of that harm are alive and well. With this in mind, invocations of our trauma should be reverent, purposeful and judiciously utilized.

The horrors and enduring inhumanity of slavery remain an emotional touchpoint for most Americans. By continuing to associate a modern professional industry with one of our country's greatest atrocities, ROC/OFW constructs a masteful edifice of manipulation wherein compassionate, well-meaning people are pressured into accepting their agenda at the risk of being held culpable in upholding structural racism.

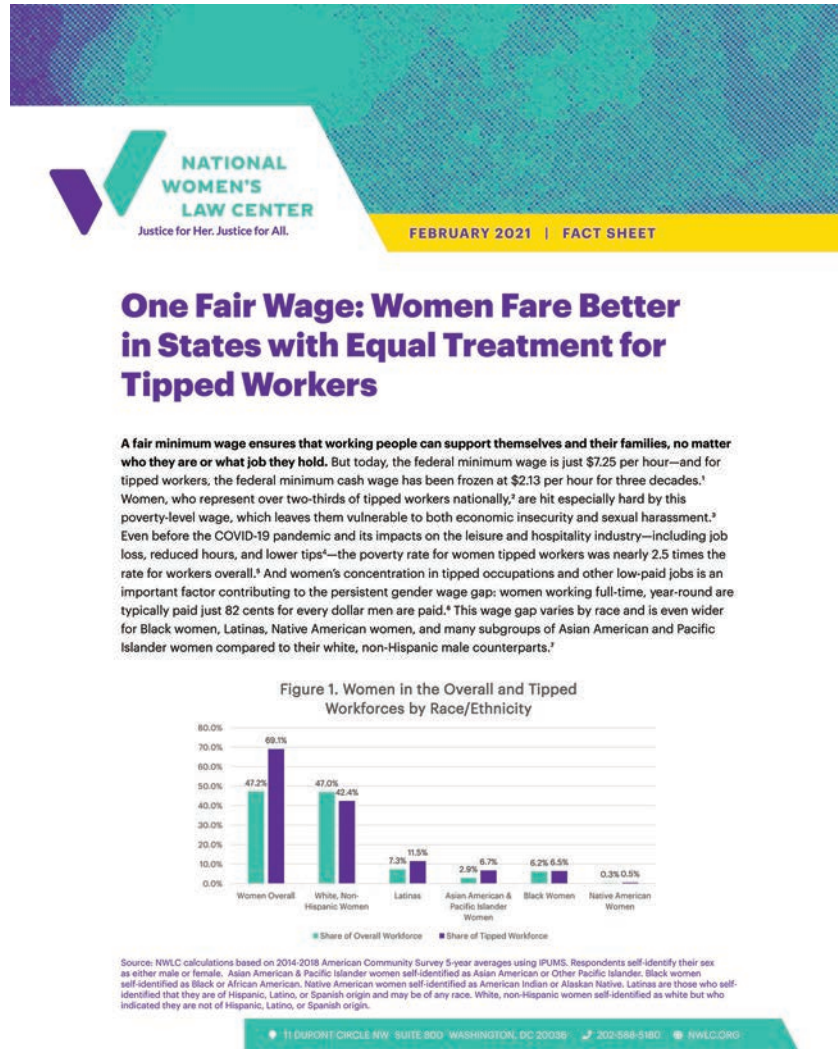
And they are willing to utilize the trauma of slavery to sell this point. They are willing to misrepresent my professional, freely chosen, well compensated labor and they are willing to shame and silence anyone who objects to their misappropriation of our generational harm.

These "advocates" are only capable of seeing Black workers as victims suffering in poverty without agency waiting to be rescued by their noble efforts. The "Legacy of Slavery" rhetoric provides emotionally unassailable weaponry to woke non-Black, non-tipped-worker saviors seeking to assuage the guilt of their perceived relative privilege by taking a position that they often do not fully understand and which will not materially affect their lives in any way.

I am a Black tipped worker and a descendant of survivors of slavery. I am not a victim. I would love to have a seat at the table in discussions of my professional community and to have my voice and the voices of other Black tipped workers heard in the process of finding the best policies to improve the lives of our workforce. ROC/OFW does not speak for most of us. The tip credit does not perpetuate the devastating and shameful harm of the institution of slavery, and comparing our wage structure to the brutality of human bondage is an egregious affront to my ancestors who were coerced into toiling uncompensated, under the threat of death and who survived and fought for their freedom so that I could live as a free woman and to determine my own professional choices without intimidation or fear. The vast majority of tipped workers in the hospitality industry stand in support of preserving the tip credit. Please invite us to the discussion.

Thank you for your consideration,
Valerie J. Graham

[Additional submission by Ms. Omar follow:]



Today, as a result of the pandemic, many women who struggled to get by as restaurant servers, bartenders, salon workers, and in other tipped occupations have lost their jobs⁸—and those who received just \$2.13 an hour from their employers have been especially likely to find that their low and sporadic earnings qualify them for minimal, or no, unemployment benefits.⁹ Those who are still working are now facing far greater risk—given that workplaces such as restaurants where tipped workers tend to be concentrated appear to be a significant driver of COVID-19 outbreaks¹⁰—in exchange for far fewer tips, as social distancing requirements limit restaurant capacity and customers stay away out of health concerns.¹¹ Restaurant servers and other tipped workers also face the challenge of enforcing compliance with mask requirements and other public health measures from the same customers on whom they rely for tips, and often feel compelled to ignore violations to avoid jeopardizing their income.¹² Recent surveys indicate that Black tipped workers are particularly likely to face reduced tips and customer hostility for attempting to enforce public health protocols.¹³

A number of states have set minimum cash wages for tipped workers above the federal level, and seven states require employers to pay tipped employees the regular minimum wage regardless of tips.¹⁴ Compared with states that have a \$2.13 hourly tipped minimum cash wage, women in these “One Fair Wage” states—where tipped workers must be paid the regular minimum wage before tips—face a smaller gender wage gap and a lower poverty rate. Prior to the pandemic, women in tipped occupations in One Fair Wage states experienced poverty at a rate nearly one-third lower than their counterparts in states that follow the federal standard. (We do not yet have data from the pandemic period.)

Raising wages for all working people—tipped and non-tipped alike—has outsized benefits for women and their families, reducing poverty and helping to close the gender wage gap.¹⁵ Ensuring that tipped workers can count on receiving the full minimum wage, before tips, is a crucial step toward equality, dignity, and safety for women at work.¹⁶

KEY FINDINGS:

Nationwide, close to 7 in 10 tipped workers are women.

Even before the COVID-19 pandemic, the poverty rate for women tipped workers was nearly 2.5 times the rate for workers overall.

In One Fair Wage states, compared to states with a tipped minimum cash wage of \$2.13 per hour:

- The wage gap for women overall working full time, year round is 33 percent smaller.
- The poverty rate for women tipped workers is 30 percent lower.
- The poverty rate for Black women in tipped jobs is 34 percent lower.

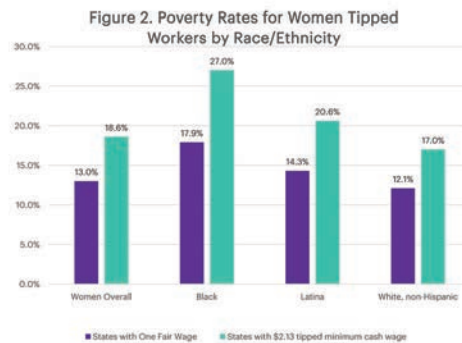
Figures are NWLC calculations based on 2018 2018 American Community Survey (ACS) five year averages using 01000, the most recent data available at the time of publication, and reflect conditions prior to the COVID-19 pandemic.

The wage gap for women working full time, year round in One Fair Wage states is smaller than in states with a tipped minimum cash wage of \$2.13 per hour.

- As of 2018—the most recent year for which the data necessary for this analysis is available—18 states followed the federal standard and required employers to pay their tipped workers a minimum cash wage of only \$2.13 per hour.¹⁷ Overall, women working full time, year round are typically paid 78 cents for every dollar paid to their male counterparts in these states—a wage gap of 22 cents.¹⁸
- One Fair Wage states require employers to pay their tipped workers at least the regular minimum wage, regardless of how much the workers receive in tips. Overall, women working full-time, year-round are typically paid 85 cents for every dollar paid to their male counterparts in these states—a wage gap of 15 cents,¹⁹ which is 33 percent smaller than the 22-cent gap in states that follow the federal standard.

Women working in tipped jobs—especially Black women tipped workers—are less likely to experience poverty in One Fair Wage states than in states with a tipped minimum cash wage of \$2.13 per hour, and poverty rates for working women overall are lower as well.

- Not surprisingly, a higher minimum wage helps lift women out of poverty. Based on the most recent available data, which reflect conditions prior to the COVID-19 pandemic, the poverty rate for women tipped workers in One Fair Wage states was 30 percent lower than in states with a \$2.13 tipped minimum cash wage.²⁰ See **Figure 2**.
- Black women working in tipped jobs face a particularly high risk of economic insecurity, and that risk is highest in states with a \$2.13 tipped minimum cash wage; in those states, more than one in four Black women tipped workers lived in poverty prior to the pandemic. In One Fair Wage states, the poverty rate for Black women tipped workers was 34 percent lower than the rate for their counterparts in \$2.13 states.
- For Latinas working in tipped jobs in One Fair Wage states, the pre-pandemic poverty rate was 31 percent lower than their counterparts in \$2.13 states.
- Among white women working in tipped jobs, the poverty rate before the pandemic was 29 percent lower in One Fair Wage states than in \$2.13 states.
- Overall, prior to the pandemic, the poverty rate for women working in One Fair Wage states (7.3 percent) was 15 percent lower than in states with a \$2.13 tipped minimum cash wage (8.5 percent), and the poverty rate among women of color working in One Fair Wage states was 25 percent lower.²¹



Source: NWLC calculations based on 2014-2018 American Community Survey 5-year averages using IPUMS. Respondents self-identify their sex as either male or female. Black women self-identified as Black or African American. Latinas are those who self-identified that they are of Hispanic, Latina, or Spanish origin and may be of any race. White, non-Hispanic women self-identified as white but indicated they are not of Hispanic, Latina, or Spanish origin.

Women, and especially women of color, make up a disproportionate share of workers who have to depend on tips to get by—leaving them and their families at risk of living in poverty and perpetuating racial and gender pay disparities.²² These disparities have likely only worsened in the wake of the COVID-19 pandemic and ensuing recession.²³ As we look to rebuild an economy that works for all of us, not just the wealthy few, we must ensure that tipped workers are not left behind again. Raising the minimum wage to at least \$15 per hour nationwide—and ensuring that tipped workers receive the full minimum wage before tips—can advance equal pay for women and economic security for their families.

- 1 Sylvia A. Allegretto & David Cooper, Econ. Policy Inst. (EPI) & Ctr. on Wage & Employment Dynamics, Univ. of Ca., Berkeley, *Twenty-Three Years and Still Waiting for Change*, at 3 (July 2014), <http://e2.epi.org/files/2014/EPI-CWED-BP379.pdf>. Under federal law, employers may pay tipped workers a cash wage of just \$2.13 per hour (the “tipped minimum cash wage” or “tipped minimum wage”) and take credit for the tips that customers give the worker toward fulfilling the minimum wage requirement (the “tip credit” for employers).
- 2 Women are 69.1% of the tipped workforce. NWLC calculations based on 2014-2018 American Community Survey (ACS) five-year average using IPUMS. Figures include employed workers only and define tipped workers as all workers in a set of predominantly tipped occupations identified by the Economic Policy Institute (EPI). See Dave Cooper, Zane Mohrhuber & Ben Zipperer, EPI, *Minimum Wage Simulation Model Technical Methodology* (Feb. 2019), <https://www.epi.org/publication/minimum-wage-simulation-model-technical-methodology/>.
- 3 Women who rely on tips rather than wages for the bulk of their income often feel especially compelled to tolerate inappropriate behavior from customers, and women’s lack of economic power in these workplaces perpetuates the already pervasive culture of sexual harassment in industries that employ large numbers of tipped workers. See, e.g., Caitin Enkin & Rachel Abrams, *The Tipping Equation*, N.Y. Times (March 12, 2018), <https://www.nytimes.com/interactive/2018/03/11/business/tipping-sexual-harassment.html>; NWLC, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, at 16-17 (Aug. 2018), <https://nwlc-ciw49tngw0bab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.
- 4 See, e.g., Amanda Fins, NWLC, *Women in Leisure and Hospitality Are Among the Hardest Hit by Job Losses and Most at Risk of Covid-19 Infection* (Nov. 2020), https://nwlc.org/wp-content/uploads/2020/11/OFW_LockedOut_UI_COVID-19_FINALUPDATE.pdf.
- 5 NWLC calculations based on 2014-2018 ACS five-year average using IPUMS. Approximately 6.6 percent of workers overall and 16.4 percent of women tipped workers live in poverty.
- 6 See, e.g., NWLC, *The Wage Gap: The Who, How, Why, and What to Do* (Oct. 2020), <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.
- 7 *Id.*
- 8 See, e.g., Fins, *supra* note 4.
- 9 See, e.g., *One Fair Wage* et al., *Locked Out by Low Wages: Service Workers’ Challenges with Accessing Unemployment Insurance During COVID-19* (May 2020), https://onefairwage.site/wp-content/uploads/2020/11/OFW_LockedOut_UI_COVID-19_FINALUPDATE.pdf.
- 10 See, e.g., Centers for Disease Control and Prevention (CDC), *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥18 Years in 11 Outpatient Health Care Facilities – United States, July 2020* (Sept. 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a5.htm>. This CDC study shows adults with positive COVID-19 test results were approximately twice as likely to have reported dining at a restaurant than were those with negative COVID-19 test results.
- 11 See, e.g., *One Fair Wage* et al., *Take Your Mask Off So I Know How Much to Tip You: Service Workers’ Experience of Health & Harassment During COVID-19* (Nov. 2020), https://onefairwage.site/wp-content/uploads/2020/11/OFW_COVID_WorkerExp_Emb-1.pdf (finding in a survey of 1,675 food service workers in 5 states and Washington, D.C. that 83% had experienced a decline in tips during the pandemic, with nearly two-thirds of respondents reporting that tips had declined by at least 50%).
- 12 See *id.*
- 13 See *One Fair Wage*, Food Labor Research Ctr.—UIC, Berkeley, & Nat’l Black Workers’ Center Project, *Ending a Legacy of Slavery: How Biden’s COVID Relief Plan Cures the Racist Subminimum Wage*, at 2-3 (Feb. 2021), https://onefairwage.site/wp-content/uploads/2021/02/OFW_EndingLegacyOfSlavery-2.pdf.
- 14 The seven “One Fair Wage” states in which no tip credit is permitted under state law are Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington. See U.S. Dept of Labor, Wage & Hour Div., *Minimum Wages for Tipped Employees* (Jan. 1, 2020), <https://www.dol.gov/whd/state/tipped.htm>.
- 15 A higher minimum wage generally would narrow the wage distribution, effectively narrowing the wage gap. Nicole M. Fortin & Thomas Lemieux, *Institutional Changes and Rising Wage Inequality: Is There a Linkage?*, *Journal of Econ. Perspectives*, Vol. 11, No. 2, 75-96, at 78 (Spring 1997), <http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.11.2.75>. See also Francine D. Blau & Lawrence M. Kahn, *Swimming Upstream: Trends in the Gender Wage Differential in the 1980s*, *Journal of Labor Econ.*, Vol. 15, No. 1, 1-42, at 38 (Jan. 1997), https://www.jstor.org/stable/2035313?wp-Page=can_tab_contents; Int. Labour Org., *Minimum Wages*, Ch. 7.3: *Effects on Gender Pay-Gaps*, https://www.ilo.org/global/topics/wages/minimum-wages/monitoring/WCMS_473657/lang-en/index.htm (accessed Feb. 11, 2021).
- 16 The Raise the Wage Act of 2021 would raise the federal minimum wage from \$7.25 to \$15 per hour by 2025, index it to the median wage beginning in 2026, and phase out the tipped minimum cash wage by gradually increasing it until it is equal to the regular minimum wage.
- 17 The 18 states are Alabama, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. See U.S. Dept of Labor, Wage & Hour Div., *Minimum Wages for Tipped Employees—Historical Tables*, <https://www.dol.gov/agencies/whd/state/minimum-wage/tipped/history> (accessed Feb. 11, 2021). 2018 tipped minimum wage levels are used in this analysis because 2018 is the most recent year for which the relevant ACS income data is available in IPUMS. In 2020, the tipped minimum cash wages in New Jersey and New Mexico rose above \$2.13 per hour due to legislative changes enacted in 2019.
- 18 NWLC calculations based on 2014-2018 American Community Survey (ACS) five-year average using IPUMS. Figures include full-time, year-round workers. Wage gap figures in this analysis represent the median wage gaps for women who are employed full time, year round compared to their male counterparts across all of the states in each wage category (i.e., states with One Fair Wage and states with a tipped minimum cash wage of \$2.13 per hour).
- 19 *Id.*
- 20 *Id.*
- 21 *Id.* Poverty rates are calculated for all employed workers in states with One Fair Wage compared to all employed workers in states with a tipped minimum cash wage of \$2.13 per hour based on the federal poverty thresholds established by the Census Bureau. In 2018, the federal poverty threshold for a family of four with two children, for example, was \$25,485. See U.S. Census Bureau *Poverty Thresholds*, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html>. Working women of color include all employed women who did not self-identify as white, non-Hispanic women. Women of color working in One Fair Wage states experience a 9.3 percent poverty rate; the poverty rate for their counterparts in states with a \$2.13 tipped minimum cash wage is 12.6 percent. NWLC calculations based on 2014-2018 ACS five-year average using IPUMS.
- 22 Note that poverty rates are higher for women tipped workers than for men tipped workers in both One Fair Wage states and states with a tipped minimum cash wage of \$2.13 per hour. In One Fair Wage states, the poverty rate for women tipped workers is 13.0 percent, compared to 11.0 percent for their male counterparts. In states with a \$2.13 tipped minimum cash wage, the poverty rate for women tipped workers is 19.1 percent, compared to 14.0 percent for their male counterparts. NWLC calculations based on 2014-2018 ACS five-year average using IPUMS.
- 23 See, e.g., Fins, *supra* note 4.

[Questions submitted for the record and the responses by Ms. Dixon follow:]

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May 11, 2021

Ms. Rebecca Dixon, J.D., M.A.
 Executive Director
 National Employment Law Project
 1350 Connecticut Avenue, NW
 Washington, D.C. 20036

Dear Ms. Dixon:

I would like to thank you for testifying at the May 3, 2021 Subcommittee on Workforce Protections hearing entitled "*From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, May 18, 2021, for inclusion in the official hearing record. Your responses should be sent to Mariah Mowbray and Udochi Onwubiko of the Committee staff. They can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
 Chairman

Subcommittee on Workforce Protections Hearing
"From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act"
 Monday, May 3, 2021
 12:00 p.m. (Eastern Time)

Chairwoman Alma S. Adams (D – NC)

1. Ms. Dixon, your testimony traces the racist origins of tipping. Are you proposing we get rid of the practice altogether?
2. Ms. Dixon, what would you say to workers who may be concerned that their take home pay will actually go down if we ensure one fair wage for tipped workers?
3. Ms. Dixon, as you mention in your testimony, federal law does require that employers ensure that tipped workers make at least the full federal minimum wage? Why is this requirement insufficient?
4. Ms. Dixon, you state in your testimony that there are seven states that ensure that tipped workers make their respective state minimum wage. How do tipped workers in these states fare in comparison to other tipped workers? Do we know if these workers lose tipped income?
5. Ms. Dixon, some have raised concerns about the impact of phasing out the tipped minimum on local restaurants? How would you respond to these concerns?
6. Ms. Dixon, Mr. DeCamp's testimony seems to question whether the exclusion of farmworkers and domestic workers in New Deal legislation and the FLSA is rooted in racism. What "compelling evidence" do we have on this? Why is denying the roots of these exclusions so harmful?



MAY 2021

From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act

**Hearing before the U.S. House of
Representatives Education and Labor
Committee, Workforce Protections
Subcommittee**

Written Responses to Additional Questions

May 18, 2021

Rebecca Dixon
NELP Executive Director

National Employment Law Project
90 Broad Street, Suite 1100
New York, NY 10004

Written Responses to Additional Questions (May 18, 2021)**Chairwoman Alma S. Adams (D – NC)**

1. *Ms. Dixon, your testimony traces the racist origins of tipping. Are you proposing we get rid of the practice altogether?*

No. I want to be clear that we are in no way proposing that we get rid of the practice of tipping. What we want to do, however, is ensure that there is a fair and robust minimum wage that undergirds tipped work in this country. As data from the One Fair Wage states (states that do not have a lower subminimum wage for tipped workers) demonstrates, when tipped workers receive the full minimum wage PLUS tips, they have greater economic security. At the same time, businesses that employ tipped labor also thrive in jurisdictions paying One Fair Wage, at least in part because tipped workers have more income to spend in their local communities.

2. *Ms. Dixon, what would you say to workers who may be concerned that their take home pay will actually go down if we ensure one fair wage for tipped workers?*

I would point them to the data from One Fair Wage states showing that tipped workers earn better base wages AND make the same or better tips that workers in states that allow tipped workers to be paid a subminimum wage. The custom of tipping is deeply engrained in our culture and people are happy to continue generously tipping for good service in tipped industries. And as polling indicates time and time again, customers are also happy to pay higher prices in order to ensure that workers get vastly better wages.

Relatedly, I would also stress the importance of One Fair Wage as a way to mitigate the way in which tipped work reproduces and reinforces structural racism in our society. Recent analysis by the Center for American progress finds that workers of color make up 48 percent of workers in key tipped industries, far above their share of the overall workforce.¹ A 2020 report by the University of California finds that restaurant workers of color in tipped occupations are concentrated in casual full-service restaurants, such as Denny's, Olive Garden, and Applebee's, and significantly underrepresented in fine dining restaurants where tips and earnings are significantly higher.² Within fine dining establishments, workers of color, especially women, are further segregated into positions that underpay them and come with lower tips, such as host and hostesses, baristas, barbacks, runners, and bussers.³

The University of California report also finds that the barriers that workers of color face to entry into fine dining restaurants start early in the process: White applicants are more likely to receive favorable treatment during the interview process and are 27 percent more likely

¹ Justin Schweitzer, "Ending the Tipped Minimum Wage Will Reduce Poverty and Inequality", Center for American Progress, March 30, 2021, <https://cdn.americanprogress.org/content/uploads/2021/03/29133657/Ending-Tipped-Minimum-Wage1.pdf>

² One Fair Wage and the UC Berkeley Food Labor Research Center, *A Persistent Legacy of Slavery*, August 2020, https://onefairwage.site/wp-content/uploads/2020/11/OFW_LegacyOfSlavery_USA-1.pdf

³ Id.

to be offered a job.⁴ Further, the report finds that white customers are significantly more likely to show an unconscious preference for white people.⁵

These findings are consistent with other analyses on the pervasiveness of racial discrimination in tipped occupations: Research from Cornell University shows that Black restaurant waitstaff receive less in tips than white staff, and that the *perception* of the quality of service also negatively affects Black tipped workers.⁶ Separate research published in the Yale Law Journal made similar observations of tipping discrimination affecting Black taxi drivers.⁷

3. Ms. Dixon, as you mention in your testimony, federal law does require that employers ensure that tipped workers make at least the full federal minimum wage? Why is this requirement insufficient?

Thank you for allowing me to elaborate on this issue. There is a reason why the Department of Labor and other studies have found such high rates of wage theft in tipped occupations. To begin, and in all fairness to employers of tipped workers, it is a lot of work to keep track of all the tips a worker makes each week, some of which are in cash, others via credit card, in order to make sure that they make at least the applicable minimum wage when the subminimum wage and tips are added together. So it is easy to see how even the best intending of employers, especially those of smaller businesses without a lot of infrastructure devoted to HR practices, can struggle to keep on top of accurate recordkeeping week to week. But the same opaqueness in how tipped workers earn wages can also make it much easier for unscrupulous employers to look the other way and not make any real good-faith efforts to ensure that workers are earning the full wages. It also puts workers in a very precarious position. The employer holds so much control over an employee under any circumstances, but for tipped workers especially so. Many fear bringing low tips to an employer's attention for fear of retaliation—for being assigned worse shifts, being assigned more non-tip generated work, and being left off the schedule, all of which tipped workers, especially those who earn low wages, will tell you are common occurrences in their lives.

The data bears all of this out. Tipped workers are at significant risk for wage theft. Unscrupulous employers have an opportunity to misappropriate a portion of their workers' income—and in fact, many do. A 2009 detailed report by the National Employment Law Project and researchers at academic institutions found that a significant share of tipped workers (12 percent) had experienced wage theft related to stolen tips.⁸ A 2017 study by the Economic Policy Institute found that wage theft is more likely to occur in bars and restaurants,⁹ where the majority of tipped workers are employed.

⁴ Id.

⁵ Id.

⁶ Michael Lynn et al., *Consumer Racial Discrimination in Tipping: A Replication and Extension*, Cornell University and Mississippi College, 2008, https://ecommons.cornell.edu/bitstream/handle/1813/71558/Lynn18_Consumer_Racial_Discrimination_in_Tipping.pdf.

⁷ Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 Yale L. J. 1613 (2003).

⁸ Annette Bernhardt et al., *Broken Laws, Unprotected Workers*, Center for Urban Economic Development, National Employment Law Project and UCLA Institute for Research on Labor and Employment, 2009, <https://se27147.pcds.co/wp-content/uploads/2015/03/BrokenLawsReport2009.pdf>.

⁹ David Cooper and Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, May 10, 2017, <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>. See also David

Many instances of tipped wage violations have been documented over the years.¹⁰ From 2010-2012, the Department of Labor conducted a compliance sweep of 9,000 restaurants and found that an overwhelming number of them (84 percent) had committed some type of violation, including 1,170 tipped wage violations.¹¹ An egregious case from 2014 illustrates how the difficulty in enforcing tipped wage rules—especially those related to record keeping—can allow employers to knowingly violate the law with little fear of punishment. In Pennsylvania, a chain restaurant was found in violation of the law when it failed to pay over 1,000 of its workers even the low tipped wage of \$2.13 per hour,¹² among other violations.

4. Ms. Dixon, you state in your testimony that there are seven states that ensure that tipped workers make their respective state minimum wage. How do tipped workers in these states fare in comparison to other tipped workers? Do we know if these workers lose tipped income?

According to a 2014 analysis by the University of California and the Economic Policy Institute (EPI), nationwide, tipped workers have a poverty rate that is nearly twice that of non-tipped workers. While the poverty rate for non-tipped workers was 6.5% during the period analyzed (2010–2012), the poverty rate of tipped workers was 12.8%—6.3 percentage points higher. Restaurant servers and bartenders, who comprise the largest share of all tipped workers, had an even higher poverty rate of 14.9 percent.¹³ But there is a significant difference in tipped worker poverty rates in states with a lower tipped wage and “one fair wage” states where tipped workers are guaranteed the full minimum wage as their cash wage. According to a 2021 analysis by EPI, between 2017 and 2019, servers and bartenders had a poverty rate of 13.3 percent in states with a \$2.13 tipped wage. But in one fair wage states, their poverty rate was substantially lower: 7.7 percent,¹⁴ or 42 percent lower.¹⁵

The tipped wage also contributes to the gender and racial wage gaps. Researchers attribute at least some of the pay gaps to occupational segregation, such as the overrepresentation of women and workers of color in underpaid occupations, including tipped jobs.¹⁶ Women in

Well, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division*, Boston University, May 2010, <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

¹⁰ Brady Meisell and Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, September 11, 2014, <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/>.

¹¹ Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>.

¹² Press Release, U.S. Dep’t of Labor, “More Than \$6.8 Million in Back Wages, Liquidated Damages to be Paid to Current & Former Chickie’s & Pete’s Employees for Serious Wage Violations” (Feb. 20, 2014), <https://www.dol.gov/newsroom/releases/whd/whd20140844>.

¹³ Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>.

¹⁴ Economic Policy Institute and National Employment Law Project, “Why the U.S. Needs a \$15 Minimum Wage”, January 26, 2021, <https://www.epi.org/publication/why-america-needs-a-15-minimum-wage/>.

¹⁵ These findings are in line with the earlier 2014 University of California and EPI analysis, which had found that in states with a \$2.13 tipped wage, the poverty rate for non-tipped workers was 7.0 percent between 2010 and 2012, while for tipped workers the poverty rate jumped to more than twice that rate: 14.5 percent. See *supra* note 110.

¹⁶ See AAUW, *The Simple Truth About the Gender Wage Gap: 2020 Update*, https://www.aauw.org/apps/uploads/2020/12/SimpleTruth_2.1.pdf; National Women’s Law Center, “One Fair Wage: Women Fare Better in States with Equal Treatment for Tipped Workers”, February 2021, <https://nwlc.org/wp-content/uploads/2021/02/OFW-Factsheet-2021-v2.pdf>; Lily Roberts and Galen Hendricks, “Short-Changed: How Tipped Work Exacerbates the Pay Gap for Latinas”, Center for American Progress, November

the overall workforce earn just 82 cents for every dollar men make, a gap that reduces women's annual median earnings by over \$10,000.¹⁷ This gap and its impact on women's incomes is much greater for women of color: Black, Native Hawaiian, and Pacific Islander women earn 63 cents for every dollar that white non-Hispanic men earn; Native American women earn 60 cents; and Latinas just 55 cents.¹⁸

However, the gender wage gap is significantly smaller in one fair wage states, where tipped workers are guaranteed the full minimum wage as their cash wage. Per analysis by the National Women's Law Center, in these states, the wage gap shrinks by one-third: Women's earnings increase from 82 cents for every dollar a man makes to 85 cents. Conversely, the wage gap widens significantly in states with a \$2.13 tipped wage, where women earn on average just 78 cents for every dollar their male counterparts earn.¹⁹ These figures illustrate the impact of the tipped wage on the gender wage gap.

5. Ms. Dixon, some have raised concerns about the impact of phasing out the tipped minimum on local restaurants? How would you respond to these concerns?

In seven states (Alaska, California, Minnesota, Montana, Nevada, Oregon, and Washington), employers are required to pay tipped workers the full state minimum wage as their cash wage and cannot claim any portion of tips as a credit towards their obligation to pay all workers the full minimum wage.²⁰ The experience of the seven "one fair wage" states makes it clear that businesses can survive and thrive without a lower tipped wage. There is no indication that tipped industries have suffered from the absence of a lower tipped wage. In fact, the opposite is true. Analysis by the Economic Policy Institute finds that from 2011 to 2019, the restaurant industry was stronger in one fair wage states than in states with a lower tipped wage: Among full-service restaurants, the number of establishments grew by 17.5% in one fair wage states, compared with 11.1% in states with a lower tipped wage. Similarly, the growth in employment in full-service restaurants was 23.8% in one fair wage states, compared with 18.7% in states with a lower tipped wage.²¹ These findings are in line with two separate earlier analyses: A 2014 University of California and EPI study, which found that from 1995 to 2014, leisure and hospitality industries grew significantly faster (43.2%) in one fair wage states than in states with a lower tipped wage (39.2%);²² and a 2018 analysis published by the Federal Reserve of Atlanta, which found that restaurant industries in one fair wage states experienced similar or higher sales and employment growth as states with a lower tipped wage, and that wages also grew at a faster rate.²³

¹⁷ 2019, <https://www.americanprogress.org/issues/economy/news/2019/11/20/577637/short-changed-tipped-work-exacerbates-pay-gap-latinas/>.

¹⁸ National Women's Law Center, "The Wage Gap: The Who, How, Why, and What to Do", October 2020, <https://nwlc.org/wp-content/uploads/2019/09/Wage-Gap-Who-how.pdf>.

¹⁹ *Id.*

²⁰ U.S. Department of Labor, *Minimum Wages for Tipped Employees*, <https://www.dol.gov/agencies/wbdl/state/minimum-wage/tipped>. Accessed April 28, 2021.

²¹ Economic Policy Institute and National Employment Law Project, "Why the U.S. Needs a \$15 Minimum Wage", January 26, 2021, <https://www.epi.org/publication/why-america-needs-a-15-minimum-wage/>.

²² Sylvia Allegretto and David Cooper, *Twenty-Three Years and Still Waiting for Change*, University of California and Economic Policy Institute, July 10, 2014, <https://www.epi.org/publication/waiting-for-change-tipped-minimum-wage/>.

²³ Teofilo Reyes, "One Fair Wage: Supporting Restaurant Workers and Industry Growth." In T. Androson, S. Greene & C. E. Prince, H. and Van Horn (Eds.), *Investing in Work* (Volume 2, pp 27-41). Atlanta, GA: Federal Reserve Bank of Atlanta, <https://www.investinwork.org/-/media/Files/volume-two/One%20Fair%20Wage%20Supporting%20Restaurant%20Workers%20and%20Industry%20Growth.pdf>.

Additionally, I would note that the Raise the Wage Act would gradually phase out the subminimum wage for tipped workers, not eliminate it all at once. Though it is a practice that cannot be allowed to stand, workers, advocates and the champions of the bill all recognize that employers of tipped workers need time to adjust to the change and we know that we need to gradually phase it out in an economically sustainable fashion.

6. Ms. Dixon, Mr. DeCamp's testimony seems to question whether the exclusion of farmworkers and domestic workers in New Deal legislation and the FLSA is rooted in racism. What "compelling evidence" do we have on this? Why is denying the roots of these exclusions so harmful?

My written testimony details the legislative history of the FLSA and demonstrates beyond any shadow of a doubt that far too many legislators, including a controlling block from the Southern states, believed that it was an atrocity to even consider paying Black people the same wages as white people. Nowhere in the bill itself is there any language referring to race, but the FLSA was fashioned in a manner deliberately designed to exclude the occupations which were dominated by Black labor, particularly in the South. The FLSA is far from the only law and federal policy that excluded Black people and other people of color while using racially neutral language as a pretext. Other examples include the original GI bill, the National Labor Relations Act, and New Deal housing programs that led to decades of redlining and segregating Black people from white neighborhoods, just to name a few. White supremacy is baked into the very fiber of this nation, and as a result, we do not even need to use explicit race-based language to perpetuate exclusions and injustices for people of color. The key lesson, to me, is that we need to examine our nation's laws and regulations all with an eye to why they were designed the way they were, how they have operated to ensure or prevent racial equality, and to make corrections where we can and must, such as the exclusions in the FLSA. When something is rooted in white supremacy and exclusion of workers of color, even those unaware of the roots of these exclusions should not continue to profit and benefit from them.

[Questions submitted for the record and the responses by Ms. Romero follow:]

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May 11, 2021

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Ms. Teresa Romero
 President
 United Farm Workers
 7057 W Avenue H
 Lancaster, CA 93536

Dear Ms. Romero:

I would like to thank you for testifying at the May 3, 2021 Subcommittee on Workforce Protections hearing entitled *"From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act."*

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, May 18, 2021, for inclusion in the official hearing record. Your responses should be sent to Mariah Mowbray and Udochi Onwubiko of the Committee staff. They can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
 Chairman

Subcommittee on Workforce Protections Hearing
**“From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic
 Workers, and Tipped Workers from the Fair Labor Standards Act”**
 Monday, May 3, 2021
 12:00 p.m. (Eastern Time)

Chairwoman Alma S. Adams (D – NC)

1. Ms. Romero, what were some of the narratives used to argue for excluding and keeping farmworkers excluded from wage protections under the FLSA? Do we hear echoes of those same arguments today during debates on whether to extend overtime protections to farmworkers?
2. Ms. Romero, there may be those listening to this discussion who are sympathetic to the need to finally extend overtime protections to farmworkers but have questions about how it would impact the cost of food. What would you say to them?
3. Ms. Romero, Mr. DeCamp’s testimony seems to reject any racial motivations for excluding farmworkers from the FLSA in 1938, and instead suggests that the nature of farm work led to the farmworker exclusions. What is your response to those claims?
4. Ms. Romero, what is your response to claims that providing farmworkers with basic wage protections would impact the competitiveness of the U.S. agriculture industry?
5. Ms. Romero, why are overtime protections particularly critical for farmworkers? How would gaining overtime protections impact farmworkers economic security and well-being?
6. Ms. Romero, what is your response to claims that providing overtime protections to farmworkers would lead to job loss or otherwise leave farmworkers worse off?

Representative Ilhan Omar (D-MN)

1. Ms. Teresa Romero: From the exploitation of Black sharecroppers in the Jim Crow South to the mistreatment of Mexican laborers brought under the bracero program, the United States has a long history of oppression in our modern food system. As I’m sure you know, many farmworkers currently make below a livable wage and have been harmed by mass shutdowns and COVID outbreaks at food processing plants across the nation. These workers are vital in protecting our country’s food security and agricultural supply chain, and so the federal government will need to make sure that there are emergency workplace safety standards and sufficient financial support mechanisms in place immediately for vulnerable farmworkers. *However, in regard to more permanent and long-term protections, can you explain how gaining overtime and other FLSA protections for farmworkers would impact their economic security and improve their overall well-being in the post-COVID recovery?*

Chairwoman Alma S. Adams (D – NC)

1. **Ms. Romero, what were some of the narratives used to argue for excluding and keeping farmworkers excluded from wage protections under the FLSA? Do we hear echoes of those same arguments today during debates on whether to extend overtime protections to farmworkers?**

Yes, we absolutely hear many of the same arguments bring used today to maintain FLSA's exclusions of farmworkers as were used in the past. Agribusiness likes to paint a picture of agriculture as the picturesque small family farm that would be driven out of business if required to meet the same basic requirements as other employers. The reality of where farmworkers work, however, is very different. The majority of farmworkers work for big agricultural interests. Even though the majority of farms in the United States are small family farms, very few of those farms rely on hired labor. According to USDA, the majority of farms—approximately 86 percent—are family farms which rely primarily on the principal operator and spouse for labor used on the farm.¹

In addition, in an echo of the paternalism of slave owners, we hear about farmworkers being just like “one of the family,” even as many growers fight efforts to give their workers full rights.

Agriculture in American did not fail when Congress required the minimum wage for most farmworkers and it won't fail when Congress acts to end the discriminatory denial of overtime pay for farmworkers. California agriculture has continued to be very successful, even as we are phasing in overtime and have higher minimum wage rates than the federal minimum wage. Ending the racist exclusion of farmworkers from overtime pay will demonstrate Congress's recognition of the need to address our nation's entrenched systemic racism. American agriculture will continue to be extremely successful and will be able to take pride in the treatment of our nation's valued agricultural workers.

2. **Ms. Romero, there may be those listening to this discussion who are sympathetic to the need to finally extend overtime protections to farmworkers but have questions about how it would impact the cost of food. What would you say to them?**

There is a recent study done by Professor Phil Martin and the EPI that addresses this question—the study found that increasing wages to farm workers by about 40% would only increase consumers' household grocery bills by \$25 for the entire year.² According to the study, farm workers' wages are only a fraction of the price that consumers pay for groceries; therefore,

¹ Family Farming in the United States, USDA ERS Amber Waves, available at <https://www.ers.usda.gov/amber-waves/2014/march/family-farming-in-the-united-states/>

² “How much would it cost consumers to give farm workers a significant raise?” Daniel Costa and Phil Martin, EPI Working Economics Blog, October 15, 2020, available at <https://www.epi.org/blog/how-much-would-it-cost-consumers-to-give-farmworkers-a-significant-raise-a-40-increase-in-pay-would-cost-just-25-per-household/>.

increases in their wages would be unlikely to have a significant impact on grocery prices. Only a percentage of the price of groceries goes to farmers and farmers then pay only a percentage—about one-third—to workers. Given these estimates, it seems clear that the additional overtime pay would similarly have a minimal impact on consumers' wages but represent a significant income increase to farm workers. Moreover, many of today's consumers are conscious about the treatment of workers in their food supply chain and would enjoy the satisfaction of knowing that the products they're purchasing did not come at the cost of exacerbating poverty or economic insecurity for the people that feed us.

Given this minimal increase and the fact that more and more consumers are interested in knowing how the workers who produce their food are treated, this is an argument to pay overtime.

3. Ms. Romero, Mr. DeCamp's testimony seems to reject any racial motivations for excluding farmworkers from the FLSA in 1938, and instead suggests that the nature of farm work led to the farmworker exclusions. What is your response to those claims?

Mr. DeCamp is incorrect. The record clearly reflects the racist sentiment at the time that led to the exclusion of farmworkers. It is impossible to ignore quotes such as following from Representative Wilcox:

[T]here is another matter of great importance in the South, and that is the problem of our Negro labor. ... when we turn over to a Federal bureau of board the power to fix wages, it will prescribe the same wage for the Negro that it prescribes for the white man. Now, such a plan might work in some sections of the United States but those of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it.

To me, this quote is very clear as to the motivation behind the exclusion of farmworkers from FLSA. And there are other such quotes.³ Even beyond the concerns of paying Black and White workers the same wages, some Members of Congress went so far as to compare FLSA and anti-lynching legislation. Rep. Wilcox states "[t]his bill, like the antilynching bill, is another political gold brick for the Negro, but this time the white laborer is also included in the scheme."⁴

4. Ms. Romero, what is your response to claims that providing farmworkers with basic wage protections would impact the competitiveness of the U.S. agriculture industry?

There is no evidence this would happen. As mentioned in my testimony, California now requires overtime pay for farmworkers, in addition to a minimum wage that is far higher than the national

³ See Perea, J. F., *Echoes of slavery: Recognizing the racist origins of the agricultural and domestic worker exclusion from the National Labor Relations Act*, *Ohio State Law Journal*, 72(1), 115-116 (2010).

⁴ *Id.* at 115.

minimum wage. As in Rep. Grijalva's Fairness for Farm Workers Act, overtime pay in California is being phased in over a period of 4 years.

California is the largest agricultural state in the U.S. and even after the passage of its overtime law, has remained the largest producer for most fruits, vegetables, and dairy in the United States. California is the leading U.S. state in cash farm receipts with combined commodities representing nearly 13 percent of the U.S. total. Indeed, in 2019, California's farms and ranches received over \$50 billion for their agricultural output, which represents an increase over the previous year.⁵ Washington State will now also require overtime pay. Governor Inslee signed the Washington overtime legislation into law on May 11, 2021.

In addition, while agribusiness often seeks to argue against labor protections based on the impact it would have on small family farms, the majority of farmworkers are hired by big agricultural businesses. According to USDA, the majority of farms—approximately 86 percent—are family farms which rely primarily on the principal operator and spouse for labor used on the farm.⁶ Thus, even though the majority of farms in the United States are small family farms, very few of those farms rely on hired labor. The continued exclusion of farmworkers from many of our employment laws should not be justified by a misunderstanding about the business of agriculture. It is clear that a small number of large farms dominate agricultural production. The workers that work for these corporations should enjoy overtime protections.

The time is now to end the exclusion of farmworkers from overtime pay.

5. Ms. Romero, why are overtime protections particularly critical for farmworkers? How would gaining overtime protections impact farmworkers economic security and well being?

One of the purposes of FLSA was the elimination of conditions harmful to worker well-being and health. The exclusion of farm workers from the overtime protection flies in the face of that purpose. Farm workers work long hours for low pay and in dangerous conditions, conditions which are exacerbated by long hours. The hazards of agricultural work and the poverty experienced by farmworkers have become increasingly apparent during the COVID pandemic. By ensuring that farmworkers are paid for their hours over 40 each week, the end of the overtime exemption for farm workers will lead to significant improvements in farm worker economic well-being and health.

Overtime pay can help to relieve some of the poverty that farm workers experience. Relief from poverty impacts not only economic well-being, but also helps to provide security in other ways. For example, farm workers with greater economic security will feel more confident leaving abusive employers. Greater economic security would also help farm workers access safer housing and health insurance, both of which would improve farm worker lives.

⁵ California Agricultural Production Statistics, available at <https://www.cdfa.ca.gov/Statistics/>

⁶ Family Farming in the United States, USDA ERS Amber Waves, available at <https://www.ers.usda.gov/amber-waves/2014/march/family-farming-in-the-united-states/>. Note that many large farms are also family farms.

Also, it is important for farmworkers to know that their work is valued and respected. An end to the discriminatory exclusion of farmworkers will demonstrate to farmworkers that this nation recognizes the importance of their work.

Finally, the COVID pandemic has highlighted the critically important work that farm workers do. Even before COVID, farm workers faced extreme economic hardship and, due to long-standing discriminatory exclusions, did not have the safety net available to many other workers. This has been exacerbated by COVID. The time is now to recognize the valuable work of farmworkers and end this discriminatory exclusion.

6. Ms. Romero, what is your response to claims that providing overtime protections to farmworkers would lead to job loss or otherwise leave farmworkers worse off?

Throughout history, employers have claimed that providing basic worker protections will lead to job loss or otherwise harm workers. These arguments were made in 1966 during efforts to end the FLSA minimum wage exclusion and we can expect to hear them when employers are facing the end of the exclusions of farmworkers from other basic protections.⁷ Unfortunately, many agricultural employers have grown accustomed to expecting special treatment for agriculture, even though much of that special treatment is rooted in racism and the southern plantation system as well as the myth of the small family farmer as the employer of farmworkers.

There is no evidence that overtime has resulted in reduced employment or hours. In fact, California has been successfully implementing overtime for farmworkers and Washington will soon be doing the same. If some farmers do choose to reduce hours, those workers would then be able to spend more time with their families and rest their weary bodies to prevent serious injuries that would limit their employment in far more permanent ways.

Representative Ilhan Omar (D-MN)

1. **Ms. Teresa Romero: From the exploitation of Black sharecroppers in the Jim Crow South to the mistreatment of Mexican laborers brought under the bracero program, the United States has a long history of oppression in our modern food system. As I'm sure you know, many farmworkers currently make below a livable wage and have been harmed by mass shutdowns and COVID outbreaks at food processing plants across the nation. These workers are vital in protecting our country's food security and agricultural supply chain, and so the federal government will need to make sure that there are emergency workplace safety standards and sufficient financial support mechanisms in place immediately for vulnerable farmworkers. However, in regard to more permanent and long-term protections, can you explain how gaining overtime and other FLSA protections for farmworkers would impact their economic security and improve their overall well being in the post-COVID recovery?**

⁷ See Phyllis Palmer, "Outside the Law: Agricultural and Domestic Workers Under the Fair Labor Standards Act," *Journal of Policy History*, vol. 7, no. 4 (1995), pp. 416 – 440, 426

As you note, farmworkers earn very low wages. Approximately 30% of farmworkers earn wages below the poverty level. Extra income from overtime pay would help farmworkers to meet basic needs such as groceries, utilities and rent. Additional income would also mean that farmworkers who are going without medical care may have the ability to seek basic health care. An increase in income has a beneficial impact not just on the earning level of farmworkers, but also on their communities, as farmworkers spend their money in the rural communities in which they live, helping businesses thrive. Finally, an increase in overtime pay and income would empower farmworkers to leave abusive workplaces as the economic cushion would help make them feel freer to seek other employment. These benefits are important during the COVID pandemic, but will be equally important in a post-COVID economy.

In addition to the concrete benefits of overtime pay, having the same rights as other workers would demonstrate a recognition and respect for the important work that farmworkers do. For generations, agriculture has suffered a high turnover of its workforce because of the low pay and lack of basic worker protections. Congress's refusal to recognize that farmworkers deserve the same basic protections as other workers sends a signal to farmworkers that their work is not valued. The racist origins of the exclusion and the fact that they now impact a majority Latino workforce is an egregious insult to the valuable contributions of farmworkers to our food system. The well-being and empowerment of farmworkers is integrally linked to their equal rights under the law. As shared by Jorge Maldonado, a UFW member in Washington, "[w]inning overtime pay is a victory of equality, overturning hundreds of years of injustice. It is a historic moment, and I am happy to have been a part of it. We cannot progress if we are building on the foundation of injustice. Overtime pay is a step among other protections that is needed to protect agricultural workers."

[Questions submitted for the record and the responses by Ms. Yoon follow:]

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May 11, 2021

Ms. Haeyoung Yoon, J.D.
 Senior Policy Director
 National Domestic Workers Alliance
 P.O. Box 617852
 Chicago, IL 60661

Dear Ms. Yoon,

I would like to thank you for testifying at the May 3, 2021 Subcommittee on Workforce Protections hearing entitled "*From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act.*"

Please find enclosed additional questions submitted by Committee members following the hearing. Please provide a written response no later than Tuesday, May 18, 2021, for inclusion in the official hearing record. Your responses should be sent to Mariah Mowbray and Udochi Onwubiko of the Committee staff. They can be contacted at 202-225-3725 should you have any questions.

I appreciate your time and continued contribution to the work of the Committee.

Sincerely,

ROBERT C. "BOBBY" SCOTT
 Chairman

Subcommittee on Workforce Protections Hearing
"From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act"
 Monday, May 3, 2021
 12:00 p.m. (Eastern Time)

Chairwoman Alma S. Adams (D – NC)

1. Ms. Yoon, are there any states that provide live-in domestic workers with overtime protections?
2. Ms. Yoon, what would you say to individuals who are concerned that providing live-in domestic workers with overtime protection would make services unaffordable to those who need it or say that overtime itself is inappropriate where the employee is living with the employer?

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May 18, 2021

The Honorable Alma S. Adams
Chairwoman
House Education and Labor Committee
Workforce Protections Subcommittee
United State House of Representatives
Washington, D.C. 20515

Dear Chairwoman Adams,

Enclosed are responses prepared by the National Domestic Workers Alliance to your questions for the record submitted, following the House House Education and Labor Committee, Workforce Protections Subcommittee hearing on May 3, 2021 titled "From Excluded to Essential: Tracing the Racist Exclusion of Farmworkers, Domestic Workers, and Tipped Workers from the Fair Labor Standards Act." Thank you for the opportunity to provide this supplemental material to the Committee.

Sincerely,
Haeyoung Yoon



Questions from Chairwoman Alma Adams

1. **Question:** Are there any states that provide live-in domestic workers with overtime protections?

Answer: There are only eight (8) states that provide live-in domestic workers the right to overtime protection under its state wage and hour laws: California, Massachusetts, New York, New Jersey, Maryland, Minnesota and Oregon. Even in states where overtime is guaranteed for live-in domestic workers, it is at a higher threshold than 40 hours a week (e.g. Minnesota is after forty-eight (48) hours; New York and Oregon are after forty-four 44 hours). This is in contrast to advances in state minimum wages protections, which often rise above the federal floor. Thirty-eight (38) states and the District of Columbia have state minimum wages rates higher than the federal minimum wage, and certain municipalities have also opted for higher rates than even at the state level.

2. **Question:** What would you say to individuals who are concerned that providing live-in domestic workers with overtime protection would make services unaffordable to those who need it or say that overtime itself is inappropriate where the employee is living with the employer?

Answer: We have to think about the long-term cost of not paying workers fair wages. We have heard from domestic workers who are dedicated to and passionate about their jobs, but cannot support themselves and their families on poverty wages and lack of even commonplace benefits, like health care and retirement. As a result, we are losing our best domestic workers to other professions. In this sector, low-wages and poor quality have led to high turnover and worker shortages. We have particularly seen this in the home care industry, where states were facing chronic workers shortages even before the pandemic.¹ Therefore, improving conditions for home care workers will be critical as the demand for home care is expected to grow by 46 percent in the next decade alone, with more than one million new home care jobs.² This is particularly evident in President Biden's American Jobs Plan which invests \$400 billion in the home and community-based services (HCBS) program to help "individuals who otherwise would need to wait as many as five years to get the services they badly need."³

¹ Bob Woods, CNBC, [America's \\$103 billion home health-care system is in crisis as worker shortage worsens](https://www.cnbc.com/2019/04/09/us-home-healthcare-system-is-in-crisis-as-worker-shortages-worsen.html) (April 9, 2021) available at

<https://www.cnbc.com/2019/04/09/us-home-healthcare-system-is-in-crisis-as-worker-shortages-worsen.html>

² Kezia Scales, Paraprofessional Healthcare Institute, [Envisioning the Future of Home Care](#), p. 122 (2019).

³ The White House, *supra* note 6.

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There is much evidence that low wages and low worker voice are associated with poor patient outcomes in home care and nursing homes and can improve with improved wages and working conditions. For example, when the Obama administration enacted the final rule extending minimum wage and overtime protections to home care workers, it highlighted the direct connection between historical FLSA exclusions, low wages and quality of care. In the final rule, the Department of Labor wrote that “Studies have shown that the low income of direct care workers continues to impede efforts to improve both the circumstances of the workers and the quality of the services they provide. Covering direct care workers under the [FLSA] is, thus, an important step in ensuring that the home care industry attracts and retains qualified workers that the sector will need in the future. These low wages are at least in part the result of the application of the companionship services exemption to a wide range of direct care workers who then may not be paid minimum wage for all hours worked and likely do not receive overtime wages for hours worked over forty in a workweek.”⁴

The turnover is also costly to home agencies that constantly need to hire and train new workers, and also leads to higher costs for taxpayer supported programs that fund home care services. PHI noted in their 2013 report that “[t]he cost of high turnover for employers [in the home care industry] is significant. The endless cycle of recruitment, training, and associated administrative tasks cost employers on average at least \$2500 per worker—that’s an annual industry cost of somewhere between \$1.3 and \$2 billion.”⁵

For those who are concerned about the overtime costs, they can hire another worker for hours in excess of 40 hours. Having another worker can benefit from the continuity of care, in case one worker becomes sick.

⁴ 29 CFR Part 552 at 60458.

⁵ Paraprofessional Healthcare Institute, [Value the Care: Minimum wage and overtime protections for home care aides](https://phinational.org/wp-content/uploads/legacy/phi-value-the-care-03.pdf), (2013) <https://phinational.org/wp-content/uploads/legacy/phi-value-the-care-03.pdf>

[Whereupon, at 1:47 p.m., the Subcommittee was adjourned.]

