Testimony of

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On Behalf of the

National Association of Home Builders

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and

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H.R. 3441, the *"Save Local Business Act"*

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Introduction

On behalf of the approximately 140,000 members of the National Association of Home Builders (NAHB), I appreciate the opportunity to testify today on the National Labor Relations Board's (NLRB) expanded joint employer standard.

My name is Granger MacDonald, and I am CEO of the MacDonald Companies based in Kerrville, Texas. I am a proud second-generation builder with 40 years of experience in real estate development. I run the business my parents founded in the mid-1950s to meet post-war demand for affordable housing. My son Justin serves as president of our business, continuing our family legacy.

I also serve as the 2017 Chairman of the Board of NAHB, a Washington, D.C.-based trade association focused on enhancing the climate for housing, homeownership and the residential building industry. We represent builders and developers who construct many types of housing — including single-family for-sale homes, affordable and market-rate rental apartments, and remodelers. About one-third of our members are builders and remodelers; the other two-thirds work in closely related specialties, such as sales and marketing, insurance, and financial services.

NAHB is also a member of the Coalition to Save Local Businesses, a diverse group of locally owned, independent small businesses, associations and organizations seeking fairness and clarity on the new rules of the unlimited joint employer doctrine.

My company specializes in developing, building, and managing affordable multifamily housing across Texas, and we currently own and manage 4,700 units in 41 communities in 25 cities. We directly employ 146 workers, from construction supervisors and property managers to maintenance and repair staff, many of whom are full-time salaried individuals.

The building industry is made up of a vast system of general contractors and subcontracted businesses. Beyond our regular staff, MacDonald Companies contracts with 80 companies and specialty trades to perform a range of services across all of our properties, including HVAC work, tiling, and drywalling, amongst other specialties.

The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process as well as the builder's ability to pass those corresponding savings through to homeowners.

The current definition of "joint employment" adopted by the NLRB in *Browning-Ferris* for purposes of the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) is the antithesis of "certainty and predictability," and is alarming.

The dangerously vague paradigm of "direct, indirect or potential" control established by the

NLRB calls into question the very basic idea of what it means to be a business. Employers in the residential construction sector have been forced to re-examine their entire business model since it affects their responsibilities not only at the NLRB, but with other federal agencies such as the Wage and Hour Division at the Department of Labor. Builders of all sizes are now potentially exposed to unlimited and unpredictable joint employment liability.

That is why a legislative solution to provide employers certainty and clarity in their employment obligations under the law is necessary, and why NAHB urges the Committee to favorably report out H.R. 3441 without delay.

Joint Employer is an Indefinite, Evolving Area of the Law

Under the expanded standard, MacDonald Companies could be considered a joint employer if it has "indirect or potential" ability to exercise control or co-determine the essential terms of a subcontractor's employee's employment, including hiring and firing, discipline, supervision, scheduling, seniority and overtime, and assigning work and determining the means and methods of performance. Simply by applying responsible, everyday business practices, we could still be held accountable for the labor and employment practices of third-party vendors, suppliers, and contractors over whom we have no direct control. Whether a builder has exercised too much influence or control over the subcontractor's work is a moving target.

One of the most significant factors of concern for the construction industry, discussed at length in both the majority and dissenting opinions in *Browning-Ferris*, is scheduling. Timely delivery of homes is inextricably tied to our ability to promptly schedule a myriad of trades and manage issues that could lead to production delays, such as weather-related incidents or labor shortages.

Let me provide a few examples.

If MacDonald Companies contracted with a painting company for a multifamily building in San Antonio, by telling the subcontractors when to paint the walls or even when the walls would be constructed, we could be found a joint employer. To avoid a joint employer finding, would we be prevented from scheduling installation of the fire sprinklers or cabinets? Would the roof be completed in time for the codes inspector to visit? This would be akin to ordering a pizza, but allowing the delivery service to show up at the driver's discretion.

It is also common for general contractors to request additional labor or time on the job site when severe weather delays work and jeopardizes deadlines. Would the act of requesting two additional workers to get a deck installed trigger a finding of joint employment? If the completion of a project is behind due to heavy rainfall, would I not be able to tell the contractor to double his labor and meet the construction deadline?

While *Browning-Ferris*'s new approach to joint employment under the NLRA has been described as a radical departure from existing precedent, the 4th Circuit's decision in *Salinas v. Commercial Interiors Inc.*, (848 F.3d 125 (4th Cir. 2017), has been described by some as far more unprecedented. In *Salinas,* the 4th Circuit discarded the settled approach of focusing on

the relationship between the worker in question and the putative joint employer, shifting the focus instead to the relationship between the alleged joint employers. These inconsistent tests contribute to the uncertainty and undermine traditionally recognized business relationships.

My project managers are responsible for overseeing the work done at MacDonald Companies worksites throughout the build process. Would they not be able to check in on a subcontractor's progress? If they find work to be deficient, would they not be able to request a contractor correct it to ensure the safety and stability of the overall project? If I know one of the trades' employees is a diligent and efficient worker, would I not be able to request the specific worker on my job site? By the 4th Circuit's interpretation, any number of these seemingly commonplace interactions in contractor-to-subcontractor relationships could be viewed as establishing joint employment between the two separate businesses.

Under such a broad joint employer standard, it could be argued that indirect or potential control over just one of the essential terms of employment would not be sufficient to justify a finding of joint employment. In reality, however, businesses can be found to be joint employers of another company's workers by merely doing or having the authority to do (even if not exercised) one of the aforementioned actions − scheduling or requesting additional labor or even a specific worker. The scope of liability will only grow as the courts explore and expand the limits of the new standard. The resulting consequence of the NLRB's decision in *Browning-Ferris* is that there is no certainty or predictability regarding the identity of the employer.

The Expanded Joint Employer Standard Hurts Housing Affordability

The determination of joint employment is particularly significant for residential construction, an industry that is large and decentralized with a workforce that is spread out nationwide. Like most of the construction sector, home building is dominated by small firms. The median gross receipts for NAHB builder members is just under $2.5 million. Seventy-two percent of NAHB's builder members have fewer than ten employees and 66 percent construct fewer than ten homes annually. [1] For most builders, there is simply insufficient internal demand to justify hiring an employee for the numerous specialized tasks required to complete a home project. Consequently, builders rely on an average of 22 subcontracting firms to build a home, including framers, roofers, electricians and other types of specialty trades. MacDonald Companies itself relies on an average of 40 contractors on a typical build. Without them, my company and many other family-owned home building firms like it would simply cease to be viable operations.

Collectively, however, home builders represent a massive industry, employing millions of people and directly generating 3.5 percent of our nation's gross domestic product (via residential fixed investment). Housing contributes to the national economy in two basic ways: through residential fixed investment and consumption spending on housing services. Historically, residential

[1] http://eyeonhousing.org/2017/05/who-are-nahbs-builder-members-3/

investment has averaged roughly 5 percent of GDP, while housing services have averaged between 12 and 13 percent, for a combined 17 to 18 percent of GDP.

Residential investment includes construction of new single-family and multifamily structures, residential remodeling, production of manufactured homes, and brokers' fees. Consumption spending on housing services includes gross rents (which include utilities) paid by renters, and owners' imputed rent (an estimate of how much it would cost to rent owner-occupied units), and utility payments.

Home builders are major job creators. Currently, the industry employs 766,000 individuals in the builder category and 1.94 million as residential specialty contractors, for an industry total of 2.7 million. These workers and entrepreneurs are spread out across the nation. Over the last 12 months, 11,700 jobs have been added by home builders and remodelers. More are expected with continued gains in construction activity.

In order to meet the housing needs of a growing population and replacement requirements of older housing stock, the industry should be constructing about 1.3 million new single-family homes each year and approximately 1.5 to 1.6 million total housing units. In comparison, home builders in 2017 are forecasted by NAHB to start construction on only 842,000 single family homes and 362,000 multifamily units.

According to NAHB estimates, construction of 1,000 single family homes creates 2,970 full-time equivalent (FTE) jobs. Similarly, 1,000 new multifamily units results in 1,130 FTE jobs and $100 million in remodeling expenditures creates 890 jobs. As we return to normal levels, home builders will have millions of jobs to fill. As the recovery continues, there will be millions of more jobs in home building and related trades, but shortages for most specialty construction occupations are more widespread now than at any time since 2000, according to NAHB's most recent Housing Market Index survey.[2] For subcontractors, shortages of painters, framing crews and electricians are at their all-time worst.

Congress should consider policies that support a continued housing recovery, starting with undoing the harmful precedent set by the NLRB's expanded joint employer doctrine and other policies that reduce labor market flexibility. Limiting or deterring the use of independent contractors and subcontractors will reduce the number of local home building firms.

Small, Local Businesses Suffer the Most Under the Expanded Standard

Where this standard hits the hardest is on small businesses. As I previously mentioned, MacDonald Companies is a family business spanning decades and generations. We pride ourselves on the relationships we have built with our local communities and the businesses that grow in and around them. This includes longstanding relationships with many small contractors and subcontractors – trusted partners that we enlist again and again for projects across the state of Texas.

[2] http://eyeonhousing.org/2017/08/share-of-builders-reporting-labor-shortages-rises-again/

The home building industry is highly decentralized, supporting a large number of competitive firms. Each of the specialty trades we contract with has an average of 15 employees, varying from 5 to 150 employees. Besides being a sector that supports local small businesses, having a significant number of such small firms operating in the same industry promotes competition, providing a benefit for prospective home buyers. However, the ever-evolving liability that the expanded joint employer standard has created for longstanding contractor-subcontractor relationships may lead to a point where utilizing these local businesses may not be worth the risk for us. The line that once clearly separated two employers is so blurry in the post-*Browning-Ferris* legal landscape that neither I nor many others in our industry can see where it lies.

If the joint employer standard poses this much of a challenge to my company, you can imagine its impact on even smaller companies operating in the home building industry. Without the in-house human resources capabilities typical of large firms, small firms will find it increasingly challenging to compete. This will lead to a centralization of the industry, with less competition among small firms and higher home prices. Decentralization of the market is better for the housing recovery because more competition among small firms will yield more affordable housing options for consumers. As NAHB has cautioned before, if the goal of the NLRB is to put small home builders out of business, then the Pandora's Box opened by *Browning-Ferris* may very well lead to such an outcome.

Conclusion

NAHB welcomed Labor Secretary Alexander Acosta's decision earlier this year to rescind a 2016 Department of Labor administrative interpretation on joint employment that had further expanded the test for what constitutes a joint employer for purposes of agency enforcement actions. This was a necessary and important first step in undoing the damage of the runaway joint employer standard. However, so long as the NLRB's underlying decision in *Browning-Ferris* remains in place, it will continue to threaten the marketplace and housing affordability.

The bipartisan *Save Local Business Act* offers a common sense solution to the uncertainty generated since the NLRB's ruling by affirming that a company may be considered a joint employer of a worker only if it "directly, actually, and immediately" exercises significant control over the primary elements of employment. Codifying this definition would provide my company and the contractors with whom I work with more certainty for determining the identity of the employer, and allow us to operate with certainty in our labor and employment obligations under the law. We urge the Committee to act on this bill expeditiously.

Thank you again for the opportunity to testify today.