Ron Gardner
Dady& Gardner, P.A.
5100 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402

Lee J. Plave
Plave Koch PLC
12005 Sunrise Valley Drive, Suite 200
Reston, Virginia 20191

March 8, 2021

The Hon. Bobby Scott
Chair
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

The Hon. Patty Murray
Chair
Health, Education Labor and Pensions Committee
U.S. Senate
Washington, D.C. 20510

The Hon. Virginia Foxx
Ranking Member
Committee on Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

The Hon. Richard Burr
Ranking Member
Health, Education Labor and Pensions Committee
U.S. Senate
Washington, D.C. 20510

Re: Protecting the Right to Organize (PRO) Act (HR 842)

Dear Chairs and Leaders:

Working with the International Franchise Association (IFA), Coalition of Franchisee Associations (CFA), and their members –a collection of franchisors, franchisees, franchise associations and suppliers – we wish to respectfully submit some top-level thoughts on the proposed PRO Act (HR 842) that is pending before the House. In particular, we address ourselves to Section 101(a) – the definition of the term "joint employer." As presently drafted, Section 101(a) may be broad enough to render franchisors a "joint employer" of their franchisees' employees.

We represent both franchisors and franchisees. By way of introduction:

Ron Gardner is a founding partner of Dady & Gardner, P.A., the nation's leading firm representing franchisees. He was the first franchisee lawyer ever elected to be chairman of the American Bar Association's Forum on Franchising, and acts as outside general counsel to the Coalition of Franchise Associations, as well as many of the nation's largest franchisee associations. He is also an advisor to the Special Franchise Project Group of the North American Securities Association. Chambers USA has called him "the nation's premier franchisee attorney."

Lee Plave is a founding partner of Plave Koch PLC, one of the country's leading law firms representing franchisors. Who's Who Legal of London concluded a global peer review and ranked Lee as the top global franchise lawyer in 2018, 2019, and 2020, after having been ranked as the top practitioner in North America from 2013 to 2017. In 2019, the American Bar Association Forum on Franchising conferred its "Lewis Rudnick Award" on Lee, in recognition of his excellence in the field of practice.

We are aware of previous letters written by other franchisee advocacy groups in support of a broad rule related to franchisors becoming joint employers with their franchisees. Those letters, by and large, paint a picture that suggests virtually all franchisors exert unlimited control over their franchisees and their staff. They have suggested that franchisors exercise control over franchisees by virtue of their ownership of the goodwill associated with the trademark, the right to approve the location of a franchised business, controlling suppliers, and setting hours of operation, among others.

That picture is painted with a brush that is far too wide.

While we acknowledge an inherent and normal tension in the relationship between franchisees and franchisors, and that a handful of franchisors may take positions on matters unrelated to the core franchise relationship (e.g., on labor management relations) that could raise a legitimate question of whether there is a joint employer relationship, it is far more common, and certainly the case that in a healthy franchise system, the franchisor – the trademark owner – sets brand standards for what those businesses stand for to customers, and what customers ought to expect when they patronize establishments, buy products, services, etc. from the franchisees that chose to join that franchise network. Those who would impose the current language of Section 101(a) reflect a rejection of the standards that franchisors must apply to create and administer a consistent presentation to consumers. By and large, franchisees succeed when they implement intelligent and well-considered brand standards. Although there is always room for most systems to improve their performance, the success of a franchise system is most often found when all of the players – the franchisor and the franchisees – adopt and implement a common brand.

When franchisees deviate in a significant manner from brand standards – those franchisees not only harm the franchisor, but they also likely harm other stakeholders – such as franchisees that operate elsewhere under the same brand. In 2021, no longer does a business in one town operate on an island unto itself. Rather, if that unit – whether a company-owned operation or a franchised business – fails to meet brand standards in a consequential way, their actions will likely impact franchisees that operate in a neighboring state or almost anywhere elsewhere in the country. As a result, all of the players in a franchise system must pull with one oar and operate in compliance with smart brand standards.

For that reason, a law that would eviscerate all ability to control quality would run contrary to the basic need of any franchise – to convey a consistent message to consumers, and to deliver on the promise of that message.

With respect to personnel decisions, and as independent contractors, franchisees who are smart and safe operators and who are acting in compliance with their Franchise Agreements want to be the ones to make their own staffing decisions. They do not consider themselves to be managers implementing the franchisor's staffing edicts. Franchisees make investments, take risks, and want to engage meaningfully with their own staff. That entails making decisions involving hiring and firing, compensation and benefits, timing, and scheduling choices among others. These HR choices (and many others) must be (and are) made by the franchisee, and without a need to first check with the franchisor.

If a more broad joint employer standard is applied as is suggested in the Protecting the Right to Organize (PRO) Act, then the franchisor might be deemed responsible for the franchisee may hire, on what terms, when, how much to compensate that employee, what benefits to offer, when to dismiss that employee, and other fundamental HR decisions. If a franchisor is exposed to liability for a franchisee's mistakes, then it will likely follow that the franchisor will want to have a say in those decisions. However, neither franchisors nor franchisees support this proposal. In fact, very few legitimate franchisors would want to play a role in decision-making when it comes to personnel matters. Rather, franchisors legitimately want – and need – to set brand standards for what the franchised businesses in a network stand for and offer to their customers using the franchisor's trademark, and let their franchisees make local staffing decisions.

When every business starts, its owner must develop and adopt brand standards. Some businesspeople invent their own standards; others see advantages in adopting a franchisor's already-developed standards. Those businesspeople opt to become franchisees – specifically seeking out systems that feature smart and strong brands, advertising, and standards – precisely because the franchisee believes it will stand a better chance of success by adopting those elements. Vital to that outcome is choosing a system where the franchisor sets and maintains (sometimes enforcing) standards regarding myriad details including where units should be located and operated, standards for suppliers to the system (high-quality input items such as safe food ingredients serve to protect consumers as well as the brand), and whether the units need to remain open to match system standards (e.g., "you can rely on us being open to serve you when you need a break").

Franchisors help to set expectations for consumers; franchisees fulfill those expectations.

In doing so, franchisors are not dictating how franchisees run their own businesses or handle key staffing decisions. All stakeholders in this debate, even those writing in favor of Section 101(a), have agreed that brand standards should not trip the wire of joint employment. Indeed, that is the sine quo non for this issue. The balance to be struck is between letting franchisors set brand standards (essential to the functioning of a successful franchise) and including additional, broad language that automatically creates (or exempt franchisors from) joint-employer liability in all cases. Such language threatens the independence of the franchise relationship. Put bluntly, Section 101(a) tilts too far in one way and upsets this balance.

We respectfully urge that Section 101(a) of the PRO Act should be clarified to make certain that it does not apply to franchisors when they set reasonable brand standards that serve franchisees as well as the consuming public.

Respectfully submitted,

Ron Gardner

Lee J. Plave