Testimony on HB 4152
Submitted by Dutch Bros Coffee
House Business & Labor Committee
February 7, 2022

Chair Holvey, and members of the committee, we write in **opposition to HB 4152.**

Dutch Bros Coffee is a proud homegrown Oregon business, founded in 1992. Dutch Bros Coffee was born out of a milk barn in Grants Pass with a single espresso machine and 100 pounds of beans. Today, we have 155 coffee shop and drive-thru locations in Oregon that employ around 5,100 full and part-time employees. Nationwide, we have 554 locations, with a strategy to expand into new markets. Our headquarters, still in Grants Pass, has more than 400 employees. We are proud of the company we've built and our positive impact in communities where we have coffee store locations.

Our business model is based on having both company-owned stores and ones owned by franchisees. The success of Dutch Bros is based on culture, the commitment of our dedicated employees and the consistent and quality experience our customers will experience at any of our locations – whether it be Eugene, Oregon; Santa Fe, New Mexico; Austin, Texas; or Nashville, Tennessee. Dutch Bros would not be where it is today without collaborative partnerships with our franchisees.

This is why we support balanced and well-reasoned policies governing the franchise industry, which is a significant economic driver for Oregon and our nation.

Unfortunately, HB 4152 is neither balanced nor well-reasoned. The bill contains many overreaching policy changes, combined with restrictive and ambiguous language. We believe, if passed, this bill would make Oregon an undesirable state for franchise industry operation and expansion.

We appreciate that Rep. Janelle Bynum invited us along with franchisees to a few meetings in the fall to discuss possible franchise legislation. Our group got as far as identifying values and principles for a healthy franchise industry for Oregon. However, the provisions in HB 4152 take a significant leap away from what we discussed. We believe that before legislation is enacted to change franchise law in Oregon, the issues and challenges with the current framework need to be identified and supported by substantive evidence so that changes to the law are tailored to remedy actual existing problems. This necessarily requires widespread franchisee and franchisor participation in the conversations and thorough analysis of factual information.

If there is a desire by Oregon policymakers to make changes to Oregon franchise law, then we suggest the important next step is to identify where problems exist in the industry. A keen eye should be placed on fixing those issues, while still maintaining a legal and regulatory structure that encourages a strong franchise industry. Good actors in the franchise space should not be punished, if indeed it is determined that targeted changes to Oregon franchise policy are needed.

Dutch Bros is committed to working with Rep. Bynum and legislators to review Oregon franchise law. Discussions moving forward should include a broader group of stakeholders, including franchisors working with franchisee partners in Oregon.

With respect to the current bill, many of the provisions contained in HB 4152 are unworkable for Oregon's franchise industry and come into conflict with existing federal law. Below are specific problems we have identified with HB 4152. We outlined these concerns for Rep. Bynum and Chair Holvey when a draft of this bill was released last month.

We ask this committee not to act on HB 4152. If work needs to be done to address franchise policy, then it should include all stakeholders and with an eye toward addressing specific problems. Our goal through this process was and remains to serve as a collaborative partner that seeks to find common ground for the franchise community of Oregon where possible.

Dutch Bros section-by-section concerns with HB 4152:

Section 3: This Section conflicts with federal law by forcing franchisors to make a financial performance representation (FPR) which essentially imposes disclosure obligations that will increase the liability a franchisor has in preparing its annual Franchise Disclosure Document. Coupled with Section 10, it creates a whole new class of liability for franchisors: compelled FPRs. It is worth noting that providing disclosures of this type is optional under the Federal Trade Commission Act and other state franchise relationship laws. In addition, the New Jersey Franchise Practices Act (which HB 4152 reportedly mirrors) does not include a provision requiring FPRs at the time of advertising or offering a franchise. Placing unique onerous requirements on the establishment of Oregon franchise relationships will lead to increased cost, uncertainty and litigation.

Section 4: Dutch Bros has no issue with Section 4(a); indeed, franchisee communication and feedback has strengthened and enhanced our brand. However, many of the provisions in this Section, including subsections (b), (c), (d), and (e) strike at the very heart of business-format franchising. Franchising requires the establishing of uniform products, services, hours, and standards. This uniformity is both necessary for the overall strength of a brand and required by federal law. This uniformity is also not limited to the selling of "proprietary" products or services. Many items, components, and products contribute to the overall experience that a customer expects when they come to Dutch Bros. Dutch Bros carefully selects products, equipment, suppliers, and has built a brand that is recognized for having unparalleled service and value to customers. As a result of these efforts, Dutch Bros outlets have some of the strongest average unit volumes in the industry and we maintain excellent relationships with our franchisees.

The new restrictions imposed by this bill on how Dutch Bros can establish and manage uniform system standards will create uncertainty in how Dutch Bros can maintain these going forward. Many of the key terms in this Section are ambiguous and undefined, which, when coupled with Section 10 (discussed below), could lead to costly disputes. Examples of ambiguous key terms include “reasonably necessary,” “substantially affect competition,” “fair and reasonable market price,” and “reasonably acceptable to the franchisee.” Compliance with these new and novel legal standards would lead to litigation and decreased uniformity. While the Lanham Act insists that franchisors meticulously protect their licensed trademarks through system standards, the new Oregon law would force franchisors to undergo costly litigation or relax standards where a franchisee challenges a particular product or practice as not “reasonably necessary” or the franchisee doesn’t believe the prices are “reasonably acceptable.” In short, many of the provisions in this Section will lead to a decrease in brand quality and customer satisfaction.

Lastly, the restrictions on arbitration in this Section are most certainly a violation of the Federal Arbitration Act. Legislation prohibiting mandatory arbitration clauses in certain types of agreements have been repeatedly struck down by the U.S. Supreme Court. If included in the bill that is ultimately passed, this provision will inevitably lead to costly litigation with the foreseeable result that the provision will be declared invalid.

Section 7: Franchising at Dutch Bros is about relationships. We partner with specific people who know our brand and care as much as we do about upholding our standards and culture. We do not partner with a business owner’s extended family or heirs. This Section limits our ability to act when this relationship changes by imposing transfer requirements on our system. Forcing a franchisor to accept a new franchisee who it may not have initially agreed to do business with, or even greatly increasing the risk of not accepting a newly proffered franchisee who inherits an existing franchise, as this Section does, will not benefit franchised business, where the overall quality of the system supports all franchisees. When there is a change in the franchise relationship, Dutch Bros needs the ability to react quickly to manage that transition and assure our expectations of quality and customer service are continuously being met. Dutch Bros’s existing franchise agreements allow us to repurchase a franchise from a franchisee upon their death, disability, or incapacitation. This is a critically important tool that allows Dutch Bros to assure that our brand’s goodwill doesn’t suffer damage when our chosen business partner is no longer running the shop. This Section impedes that right.

Section 8: This Section includes a hard and fast rule that does not leave room for discussion or practical business considerations based on complex market evaluations and could subject the franchisor to treble damages for a violation of its terms. The duty of good faith and fair dealing already requires parties to a contract to act consistently with the terms of that contract, and franchisors will be subject to this duty if they elect to infill the territory based on market data. However, the language in this Section is ambiguous, using terms like “close geographic proximity” and would not allow for consideration of facts on the ground that could warrant increasing saturation in the area. For example, it may be important to capture additional market share in a region even though it may cause an impact on existing shops. And sometimes, it is critical to reduce the volume, and thus revenue, of a shop to alleviate congestion and traffic issues. As a final example, at times it may be necessary to grow the brand into an area where a franchisee is unable or unwilling to add more shops to their business, and yet the market would support additional capacity. These situations, and others, would be greatly complicated if a franchisor was facing a claim for knowing violations of this provision and the attendant treble damages. This language leaves no flexibility to address these and many other scenarios that could be best for the entire brand, though they may have (or could be alleged to have) an impact on one specific franchisee.

Section 10: This Section creates new causes of action, increases the total damages that might be sought in an action, and seeks to reverse negotiated forum and choice of laws clauses. The standards of “willful” and “knowing’ are such low bars that every cause-of-action will assert treble damages. The only winners in this Section are the lawyers, certainly not the brands or consumers. This will only serve to increase the cost of doing business without creating any appreciable benefits. As explained in the workgroup and repeatedly above, while ostensibly intended to punish bad actors, the real impact of this provision will be to chill the development of the franchise industry in Oregon and limit the ability of franchisors to remove noncompliant franchisees.

Section 12: Dutch Bros has been in the franchise business for over 20 years. We have long-standing contractual relationships with our franchisees. This provision would reach back and upend these settled contractual relationships by purporting to impose new contractual requirements retroactively. If the Oregon Legislature chooses to go forward with this bill, this Section needs substantial revision. At a minimum, the legislature should protect settled contractual relationships and expectations by removing the retroactive effect of this bill, and by imposing these new requirements only on new franchise relationships created after the passage of the legislation. It should also explicitly provide for an operative date that allows franchises to amend and update franchise agreements to comply with the many new provisions. As written, a franchisee would have a cause of action immediately upon the effective date of this legislation for any requirement in their franchise agreement that does not meet the new requirements.