No.

In the Supreme Court of the United States

DIRECTV, LLC AND DIRECTSAT USA, LLC,
Petitioners,

v.

MARLON HALL, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. ("FLSA"), liability extends only to an "employer" of a covered "employee." Often, employees who work for an entity that supplies services to another entity will allege that both entities are their employers. This is known as "vertical joint employment." In contrast, an employee who has direct employment relationships with two or more employers may contend that the two relationships should be treated as a single employment for purposes of the Act. This is known as "horizontal joint employment."

Eight circuits have assessed allegations of vertical joint employment by evaluating the relationship between the employee and the putative joint employer under a variety of factors. In the decision below and in a companion decision, however, the Fourth Circuit stated that these courts "improperly focus on the relationship between the employee and putative joint employer" when they instead should focus on the relationship between the putative joint employers. Relying on a Department of Labor regulation that addresses *horizontal* joint employment, the court of appeals articulated a "new test" under which the "fundamental question" is "whether two or more persons or entities are 'not completely disassociated' with respect to a worker."

The question presented is whether the Fourth Circuit misinterpreted the FLSA and its implementing regulation in holding—in conflict with the decisions of eight other circuits—that a claim of vertical joint employment must be evaluated by focusing on whether the putative joint employers are "completely disassociated" from one another with respect to the putative employee.

PARTIES TO THE PROCEEDING

The parties in the court of appeals were plaintiffs-appellants Marlon Hall, John Wood, Alix Pierre, Kashi Walker, Jay Lewis, Kelton Shaw, and Manuel Garcia and defendants-appellees DirecTV, LLC, and DirectSat USA, LLC.

CORPORATE DISCLOSURE STATEMENT

DirecTV, LLC, a California limited-liability company, is a wholly owned subsidiary of DirecTV Holdings LLC. DirecTV Holdings LLC, a Delaware limited-liability company, is a wholly owned subsidiary of The DirecTV Group, Inc. The DirecTV Group, Inc., a Delaware corporation, is jointly owned by Greenlady Corp. and DirecTV Group Holdings, LLC. Greenlady Corp., a Delaware corporation, is a wholly owned subsidiary of DirecTV Group Holdings, LLC. DirecTV Group Holdings, LLC, a Delaware limited liability company, is a wholly owned subsidiary of AT&T Inc. AT&T Inc., a Delaware corporation, is a publicly traded company on the New York Stock Exchange. No one person or group owns 10% or more of the stock of AT&T Inc.

DirectSat USA, LLC ("DirectSat") is wholly owned by UniTek USA, LLC. UniTek USA, LLC is wholly owned by UniTek Acquisitions, Inc. UniTek Acquisitions, Inc. is wholly owned by UniTek Global Services, Inc. ("UGS").

UGS is owned in part by Cetus Capital II, LLC; Littlejohn Opportunities Master Fund LP; SG Distressed Fund, LP; New Mountain Finance Corporation ("NMF Corp."); New Mountain Finance Holdings, LLC ("NMF Holdings"); and members of the Cerberus Group, which include Cerberus ASRS Holdings, LLC; Cerberus AUS Levered Holdings LP;

Cerberus Offshore Levered Loan Opportunities Master Fund II, L.P.; Cerberus Onshore, II CLO LLC; and Cerberus Levered Loan Opportunities Fund II, L.P. No other entity owns more than 10% of UGS's stock.

The sole member of Cetus Capital II, LLC is Littlejohn Fund IV, LP, the general partner of which is Littlejohn Associates IV, LLC. Littlejohn Associates, IV, LLC has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

The general partner of Littlejohn Opportunities Master Fund LP and SG Distressed Fund, LP is Littlejohn Opportunities GP LLC. Littlejohn Opportunities GP LLC has no corporate parent, and no publicly held corporation owns 10% or more of its stock.

NMF Holdings is wholly owned by NMF Corp., which is publicly traded. NMF Corp. has no corporate parent, and DirectSat is aware of no publicly held corporation that owns 10% or more of its stock.

DirectSat is aware of no publicly held corporation that owns 10% or more of any entity in the Cerberus Group.

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JURISDICTION

The judgment of the court of appeals was entered on January 25, 2017. Petitioners' timely filed petition for rehearing *en banc* was denied on March 6, 2017. App., *infra*, 49a-50a. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at App., *infra*, 51a-53a.

INTRODUCTION

This petition concerns an express conflict on an exceptionally important question arising under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA" or "the Act"): Under what circumstances may an entity that is not a direct employer be held liable under the Act as a joint employer?

Previously, courts have evaluated such claims by assessing whether the putative joint employer exercises the authority and control over the employee that is typical of employment relationships. In this inquiry, they have examined a variety of relevant factors, including whether the alleged employer has the right to hire and fire the employee; pays or sets the pay of the employee; maintains employment records for the employee; or otherwise controls the essential terms and conditions of the worker's employment—either formally or informally.

But in this case and a companion case, the Fourth Circuit jettisoned that heretofore uniform approach. Under the Fourth Circuit's new standard, it is the relationship *between the putative joint employers* that matters. In its view, an entity may be deemed a joint employer of employees who work for another entity if it is not "completely disassociated" *from that entity* with respect to the employee. That is a low bar: A business may be held liable as a joint employer of another entity's employees if, through its relationship with that entity, it "play[s] a role" in establishing the essential terms and conditions of employment of the other entity's employees.

As a practical matter, this means that countless businesses will be treated as joint employers of workers who are employed by third-party contractors or franchisees. Yet nothing in the statute or its implementing regulations justifies such a dramatic expansion of liability under the FLSA. To the contrary, the Department of Labor ("DOL") has indicated that this standard applies only to claims of "horizontal joint employment," not to claims of "vertical joint employment" like those in this case and its Fourth Circuit companion case. To correct the Fourth Circuit's manifest error and restore uniformity in this critical area of employment law, this Court should grant review and reverse.

STATEMENT

A. Legal Background.

1. The FLSA provides that "no *employer* shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives [premium compensation for overtime hours]." 29 U.S.C. § 207(a)(1) (emphasis added). The statute

defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee"; it defines "employee" as "any individual employed by an employer"; and it defines "employ" as "to suffer or permit to work." See 29 U.S.C. § 203(d), (e), (g). Recognizing that the FLSA contains "no definition that solves problems as to the limits of the employer-employee relationship" (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 728 (1947)), this Court has held that "'economic reality,'" rather than "'technical concepts,'" provides "the test of employment" under the Act. *Goldberg* v. *Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961).

A DOL regulation implementing the FLSA provides that "[a] single individual may stand in the relation of an employee to two or more employers at the same time." 29 C.F.R. § 791.2(a). When an employee works for two employers, the two employments may "be considered joint employment or separate and distinct employment for purposes of the [A]ct." *Ibid.* If "employment by one employer is not completely disassociated from employment by the other employer(s)"—*i.e.*, if the employment is "joint"—then the employee's work for all of the employers "is considered as one employment for purposes of the Act." *Ibid.* In that event, the hours worked by the employee for each employer are aggregated for purposes of determining overtime pay, and each employer must comply with the Act's requirements "with respect to the entire employment for the particular workweek." *Ibid.* In addition, "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act * * * with respect to the entire employment." *Ibid.*

The DOL has explained that "guidance provided in the FLSA joint employment regulation—which focuses on the relationship between potential joint employers—is useful when analyzing potential *horizontal* joint employment cases." U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1, 3 (Jan. 20, 2016) (emphasis added). "Horizontal joint employment exists where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee." *Id.* at 2-3. In contrast, "where there is potential vertical joint employment"—for example, when a putative joint employer "contracts with [an] intermediary employer to receive the benefit of the employee's labor"—"the analysis focuses on the economic realities of the working relationship *between the employee and the potential joint employer*." *Id.* at 3 (emphasis added).

2. The seminal decision addressing a claim of vertical joint employment is *Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds by Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The question posed in *Bonnette* was whether, under the FLSA, county social-service agencies were "employers" of so-called "chore workers" who provided domestic in-home services to aged and disabled persons under a governmental program. *Id.* at 1468. The defendant agencies denied that they (as opposed to the service recipients) were "employers" of these employees under the FLSA.

To determine whether the agencies were employers, the district court, seeking to discern "the total employment situation and the economic realities of

the work relationship" (*id.* at 1470), had considered whether the agencies:

> (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Ibid. The Ninth Circuit held that these factors, while "not etched in stone," provided "a useful framework for analysis in this case." *Ibid.* Applying them to the facts, the court of appeals held that the agencies were the plaintiffs' "employers" under the FLSA. *Ibid.* In its view, the fact that the agencies "delegated * * * various responsibilities * * * to the recipients" of the services "d[id] not alter" this conclusion; "it merely [made] them joint employers." *Ibid.*

As the Fourth Circuit acknowledged (App., *infra*, 14a), several circuits apply *Bonnette*'s four-factor test to determine whether an entity that does not employ a worker directly nevertheless should be deemed an employer of that employee under an "economic reality" analysis. Other circuits, including the Ninth Circuit itself, have "liberalized" the test to incorporate other factors. *Ibid.* These tests are frequently referred to as establishing the standard for "joint employment" under the Act; but to be more precise, they address only claims of vertical (as opposed to horizontal) joint employment, and the question they answer is simply "whether an individual or entity is an employer for the purposes of the FLSA." *Martin* v. *Spring Break '83 Prods., L.L.C.*, 688 F.3d 247, 251 (5th Cir. 2012).

B. Factual Background.

1. DirecTV's outsourcing of installation work.

Petitioner DirecTV, LLC (DirecTV") is the nation's largest provider of satellite television services. App., *infra*, 4a. DirecTV regularly contracts with third-party entities such as Petitioner DirectSat USA, LLC ("DirectSat") to install its television receiving systems in customers' homes and businesses in particular regions. *Id.* at 4a-5a. These independent entities are called "Home Services Providers" ("HSPs") or "Secondary Providers" (together, "Providers"). Providers either directly employ local installation technicians or subcontract with other entities ("Subcontractors") that engage the technicians. *Ibid.*

Respondents allege that the agreements between DirecTV and Providers (the "Provider Agreements") establish "'hiring' criteria for * * * employees and contractors." App., *infra*, 60a. Specifically, the agreements "require[] that all technicians pass prescreening and background checks, and obtain a certification from the Satellite Broadcasting & Communications Association." *Id.* at 66a-67a. Additionally, respondents allege that DirecTV "publishes training materials that technicians * * * are required to review." *Id.* at 66a.

The Provider Agreements also impose requirements applicable to the performance of contract work. For example, they "mandate[] particularized methods and standards of installation" for DirecTV's equipment. App., *infra*, 62a. They require technicians performing DirecTV's work orders to wear shirts bearing the DirecTV insignia (*id.* at 62a-63a); display the DirecTV insignia on vehicles driven to

customers' homes (*id.* at 63a); and carry cards identifying them as DirecTV technicians (*id.* at 62a). Respondents further allege that the Provider Agreements require the incorporation of these provisions into all subcontracts, including Subcontractors' contracts with individual technicians. *Id.* at 61a-62a, 67a.

According to respondents, DirecTV uses a computerized dispatching system to coordinate the assignment of work orders to technicians working for Providers and Subcontractors, with the HSP "serving as a middleman" between DirecTV and the technicians. App., *infra*, 62a. After receiving work orders, technicians call customers directly to confirm their anticipated arrival time and then travel to each job site. *Ibid.* Technicians check in via DirecTV's "dispatching system" upon arrival and, upon completion of the installation, "work[] directly with DIRECTV employees to activate the customer's service." *Id.* at 62a-63a. DirecTV also employs "quality control personnel and field managers" to "oversee" technician's work. *Id.* at 67a.

DirecTV does not maintain "time records and other employment documentation" for technicians working for Providers or Subcontractors. App., *infra*, 68a. Instead, each Provider allegedly maintains "a contractor file for each technician working under its control" that DirecTV may audit. *Id.* at 60a-61a.

2. Respondents' work on DirecTV installations.

Respondents are seven individuals who formerly worked installing DirecTV's satellite television systems. App., *infra*, 59a. All respondents allege that they were classified as independent contractors (*id.*

at 74a-77a, 78a-79a, 80a, 82a); one respondent alleges that he was instead classified as an employee for a period of time (*id.* at 74a). The complaint does not allege that any respondent had a direct relationship with DirecTV. On the contrary, the complaint's theory is that DirecTV exercised control over respondents "[t]hrough the Providers." See, *e.g.*, *id.* at 66a. Only two respondents claim any relationship with DirectSat, and they do not allege that this relationship was a direct employment relationship. *Id.* at 75a-76a, 79a-80a.

According to the complaint, respondents were paid on a piece-rate basis for the satisfactory completion of an installation or other "enumerated 'productive' tasks" designated as such by DirecTV. App., *infra*, 68a-69a. Respondents do not contend that DirecTV paid them, but claim that DirecTV "effectively controlled [their] pay through the common policies and practice mandated in its Provider Agreement." *Id.* at 68a. Specifically, they allege that, "[t]hrough the providers," DirecTV "defined Plaintiffs' compensable work and non-compensable work and imposed 'rollbacks' and 'chargebacks.'" *Id.* at 66a. Respondents assert that they were not compensated for certain tasks (*id.* at 69a-70a) and that they regularly worked more than 40 hours per week and did not receive premium pay for overtime (*id.* at 70a).

C. Procedural Background.

1. Respondents sued DirecTV and DirectSat in federal district court, alleging claims under the FLSA and Maryland law. They claimed that DirecTV (and DirectSat where applicable) were their "employers subject to liability under the FLSA and state law" because "[t]hrough the Provider Network, DI-

RECTV imposed its policies and practices uniformly" on them and all other technicians. App., *infra*, 68a.

2. The district court granted DirecTV and DirectSat's motion to dismiss. App., *infra*, 43a. As the district court explained, the plaintiffs' FLSA claims presented two distinct questions: First, was each plaintiff "'an employee' under the FLSA"—as opposed to an independent contractor? *Id.* at 45a. Second, assuming that a plaintiff was an "employee," was "an entity other than the entity with which the individual [plaintiff] had a direct relationship * * * a 'joint employer' of that [plaintiff]"? *Ibid.*

The district court did not reach the first question but answered the second question in the negative. App., *infra*, 45a-46a. Applying the four-factor test outlined in *Bonnette*, it concluded that the facts alleged were legally insufficient to show that DirecTV was the plaintiffs' joint employer. *Id.* at 46a-47a. It also held that the complaint failed to state any claim against DirectSat. *Id.* at 47a.

3. The Fourth Circuit reversed, holding that the district court had "applied an improper legal test for determining whether two entities constitute joint employers for purposes of the FLSA." App., *infra*, 13a. It explained that in a companion decision it had "instruct[ed] district courts not to follow *Bonnette*." *Id.* at 20a (citing *Salinas* v. *Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017)).

The Fourth Circuit acknowledged that other circuits apply the *Bonnette* test or standards derived from it. App., *infra*, 14a. Deeming these standards to be fundamentally flawed, the court of appeals "articulated a new standard" for determining whether an entity is the joint employer of an employee under the

FLSA. *Id.* at 21a. Quoting a phrase from the joint-employment regulation, 29 C.F.R. § 791.2(a), it held:

> [T]he "fundamental question" guiding the joint employment analysis is "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."

Ibid. (quoting *Salinas*, 848 F.3d at 141).

The court of appeals then "identified the following six, nonexhaustive factors" for "determining whether the relationship between two entities gives rise to joint employment":

1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means;

2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;

3) The degree of permanency and duration of the relationship between the putative joint employers;

4) Whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is con-

trolled by, or is under common control with the other putative joint employer;

5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

App., *infra*, 21a-22a.

The court emphasized that an entity does not need "unchecked—or even primary—authority over all—or even most—aspects of a worker's employment for the entity to qualify as a joint employer." App., *infra*, 23a-24a. Instead, an entity may be deemed a joint employer if it merely "play[s] a role in establishing the key terms and conditions of the worker's employment." *Id.* at 24a. The court also "reject[ed]" the notion that "a majority of factors must weigh in favor of joint employment." *Ibid.* In its view, "one factor alone * * * can give rise to a reasonable inference that plaintiffs will be able to develop evidence" of a joint-employment relationship. *Ibid.* (internal quotation marks omitted).

According to the court of appeals, "the district court's reliance on the *Bonnette* factors in this case rendered [its] consideration of Plaintiffs' joint employment allegations fundamentally flawed and un-

duly restrictive." App., *infra*, 22a-23a. "In particular," because "the district court's control-based analysis omitted consideration of the relationship between the putative joint employers," it had "ignored important elements of coordination between Defendants, as well as many of Defendants' shared levers of influence over Plaintiffs' work as DIRECTV technicians." *Id.* at 23a. The court of appeals concluded that "[b]ecause the district court applied an improper test in determining whether Plaintiffs were 'separate[ly]' or 'joint[ly]' employed," it had "erred in granting Defendants' motions to dismiss." *Ibid.*

REASONS FOR GRANTING THE PETITION

Before the Fourth Circuit's wayward opinions in this case and *Salinas*, every circuit to have considered the issue had agreed on the following fundamental principle: In a case of possible vertical joint employment, a defendant may be deemed a joint employer under the FLSA only if, based on analysis of the *Bonnette* factors or similar indicia of employer status, its relationship *with the putative employee* justifies treating the defendant as an "employer" under the statute. In the decision below and in *Salinas*, the Fourth Circuit expressly rejected the decisions of its sister circuits embracing this approach, labeling them "improper." Instead, it adopted a "new" paradigm that hinges the inquiry in cases alleging vertical joint employment on "the relationship *between the putative joint employers*." App., *infra*, 23a (emphasis added). The new approach means that an entity that has no direct relationship with an employee may be found to be a joint employer so long as it is "not completely disassociated" from the direct employer "with respect to [the] worker." *Id.* at 21a. That is true even if the putative employer's own relationship with the

employee would not independently support a finding of employer status.

Under the Fourth Circuit's broad test, many legitimate and long-standing arrangements that have never previously supported allegations of joint employment will give rise to FLSA liability. After all, in virtually any agreement in which a firm imposes requirements on an outside contractor or franchisee, it might be said that the two companies have "allocate[d] the ability to direct * * * the worker * * * by direct or indirect means." App., *infra*, 21a. Thus, businesses and governmental entities sued within the Fourth Circuit may be deemed liable under the FLSA to their contractors' or franchisees' employees, while similarly situated entities sued elsewhere will not be. If allowed to persist, this inconsistency will create confusion, promote forum-shopping, and make it difficult for companies that operate in multiple jurisdictions to structure their business relationships.

The burdens imposed by the Fourth Circuit's expansion of joint-employer liability, moreover, will be substantial. FLSA litigation is already taking up an increasing share of federal district courts' dockets, and the threshold joint-employer issue arises frequently in these cases. The Fourth Circuit's permissive standard will encourage additional litigation and make that litigation more costly. Faced with the prospect of expanded liability, businesses in every industry will have to reevaluate their relationships with contractors and franchisees. Businesses wishing to minimize the risks associated with joint-employer liability may strictly limit the companies with which they deal, or may feel compelled to forgo the benefits of those arrangements entirely.

This conflict and the associated new burdens should not be tolerated because the Fourth Circuit's standard for assessing claims of vertical joint employment is patently wrong. The court based the test on a phrase in the 1958 joint-employment regulation, which states that joint employment exists when two employers of a single employee are "not completely disassociated" with respect to the worker. As the DOL itself has repeatedly stated, however, that language applies to claims of horizontal joint employment, and it *presupposes* that each joint employer has an employment relationship with the worker. By eliding the requirement that each defendant be shown to be an "employer," the Fourth Circuit's standard—unlike the rule in other circuits—eliminates a basic limitation on the FLSA's scope.

This Court accordingly should grant certiorari to repudiate the Fourth Circuit's erroneous standard and restore uniformity to this important area of the law.

I. THE FOURTH CIRCUIT'S NEW STANDARD CONFLICTS WITH THE RULE APPLIED BY EIGHT OTHER CIRCUITS.

A. Eight Circuits Assess Claims Of Vertical Joint Employment By Evaluating The Defendant's Relationship With The Plaintiff.

Aside from the Fourth Circuit, every one of the nine circuits to consider claims of vertical joint employment under the FLSA has adopted standards derived from or similar to the *Bonnette* standard.[1] In

[1] The Sixth, Tenth, and District of Columbia Circuits have not

contrast to the Fourth Circuit, these eight circuits do not treat the joint-employment inquiry as turning on the association between the two putative joint employers. Instead, they focus on the relationship between the defendant and the employee and assess whether the defendant exercises the prerogatives and responsibilities of an employer with respect to that employee.

The First, Third, Fifth, and Eighth Circuits adjudicate claims of vertical joint employment by considering factors that closely track the *Bonnette* factors. Thus, they principally examine "whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 675 (1st Cir. 1998); see also *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012) (holding under four-factor test that parent company was not joint employer of subsidiaries' employees); *Orozco* v. *Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (holding under four-factor test that restaurant franchisor was not joint employer of franchisee's workers); *Gray* v. *Powers*, 673 F.3d 352, 355 (5th Cir. 2012) (holding under four-factor

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adopted tests for evaluating a vertical joint-employment claim under the FLSA, but district courts within these circuits apply standards based on *Bonnette* and its progeny. See, *e.g.*, *Coldwell* v. *Ritecorp Envtl. Prop. Solutions*, 2017 WL 1737715, at *6 (D. Colo. May 4, 2017); *Ivanov* v. *Sunset Pools Mgmt, Inc.*, 567 F. Supp. 2d 189, 194-96 (D.D.C. 2008); *Politron* v. *Worldwide Domestic Servs, LLC*, 2011 WL 1883116, at *2 (M.D. Tenn. May 11, 2011).

test that member of limited-liability company that owned restaurant was not a joint employer of the restaurant's employees): *Ash* v. *Anderson Merchandisers, LLC*, 799 F.3d 957, 961 (8th Cir. 2015) (holding that complaint failed to allege sufficient facts to establish "an employer-employee relationship" under the FLSA, such as "[the] alleged employers' right to control the nature and quality of [the plaintiff's] work, the employers' right to hire or fire, or the source of compensation for [the plaintiff's] work"); *Muhammad* v. *Platt Coll.*, 46 F.3d 1136 (table), 1995 WL 21648, at *1 (8th Cir. 1995) (citing *Bonnette* and concluding that defendant college was not the "employer" of the plaintiff because it "did not actually control [the plaintiff's] work assignment, set his work schedule, or determine the rate and method of payment" and did not "maintain[] employment records for" the plaintiff).

The Second, Ninth, and Eleventh Circuits have expanded the *Bonnette* test to include additional factors. See, *e.g., Barfield* v. *New York Health and Hospitals Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008); *Torres-Lopez* v. *May*, 111 F.3d 633, 639-641 (9th Cir. 1997); *Layton* v. *DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1176 (11th Cir. 2012). Such additional factors are considered when they may "indicate that an entity has functional control over workers even in the absence of the formal control measured by the *[Bonnette]* factors." *Zheng* v. *Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003). Even courts that have expanded the *Bonnette* test, however, will find a vertical joint-employment arrangement to exist only if the defendant meaningfully supervises, controls, and otherwise performs the functions of an employer with respect to the relevant employees. See, *e.g.*, *Layton*, 686 F.3d at 1176 (determining that provider

of shipping and logistics services was not joint employer of couriers hired by third-party contractors to deliver packages for its customers); *Gonzalez-Sanchez* v. *Int'l Paper Co.*, 346 F.3d 1017, 1021-22 (11th Cir. 2003) (determining that paper manufacturers were not joint employers of agricultural workers hired by farm-labor contractor to plant seedlings in manufacturers' forests); *Martinez-Mendoza* v. *Champion Int'l Corp.*, 340 F.3d 1200, 1209-15 (11th Cir. 2003) (same).

Although the Seventh Circuit has not adopted the *Bonnette* test expressly, it too has held "that for a joint-employer relationship to exist, each alleged employer must exercise control over the working conditions of the employee." *Moldenhauer* v. *Tazewell-Pekin Consol. Comm. Center*, 536 F.3d 640, 644 (7th Cir. 2008) (citing *Reyes* v. *Remington Hybrid Seed Co., Inc.*, 495 F.3d 403, 404-08 (7th Cir. 2007)). And prior to *Salinas* and the decision below, even the Fourth Circuit had deemed the *Bonnette* factors "useful." See *Schultz* v. *Capital Int'l Security, Inc.*, 466 F.3d 298, 306 n. 2 (4th Cir. 2006).

Thus, until the Fourth Circuit's decisions in this case and *Salinas*, there had been a broad and longstanding consensus among the circuits that "the focus" of the vertical joint-employment inquiry is "on each employment relationship as it exists between the worker and the party asserted to be a joint employer." *Layton*, 686 F.3d at 1177 (internal quotation marks omitted). No circuit other than the Fourth Circuit has held that claims of vertical joint employment are instead assessed by examining whether the two putative joint employers are "not completely disassociated" with respect to the worker. Indeed, the Ninth Circuit has stated explicitly that the "not com-

pletely disassociated" language drawn from the FLSA regulation is relevant only to allegations of "horizontal" joint employment and that the "eight-factor 'economic reality' test" derived from *Bonnette* applies in cases of "'vertical' joint employment." *Chao* v. *A-One Med. Servs., Inc.,* 346 F.3d 908, 916-18 (9th Cir. 2013).

B. The Fourth Circuit Has Expressly Rejected The Approach Of Its Sister Circuits And Ruled That The Vertical Joint-Employment Inquiry Turns On The Association Between The Putative Joint Employers.

In *Salinas*, issued contemporaneously with the decision in this case, the Fourth Circuit instructed that "district courts should not follow *Bonnette* and its progeny in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA." 848 F.3d at 139. Deeming the *Bonnette* standard and tests derived from it to be fundamentally flawed, the court "articulated a new standard" that focuses on whether the putative joint employers are "not completely disassociated" from each other with respect to the plaintiff. App., *infra*, 21a. Applying that standard in this case and in *Salinas*, 848 F.3d at 150, it determined that the defendants were joint employers of their contractors' workers.[2]

The Fourth Circuit acknowledged that "a number of courts" apply the four-factor *Bonnette* test "to determine whether two or more entities constitute joint

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[2] No petition for certiorari has been filed in *Salinas*.

employers under the FLSA." App., *infra*, 14a; see also *Salinas*, 848 F.3d at 136 (citing cases from the First and Fifth Circuits applying *Bonnette*). It also recognized that the Second, Ninth, and Eleventh Circuits have "elected to supplement the four *Bonnette* factors with additional factors." *Salinas*, 848 F.3d at 136; see also App., *infra*, 14a.

However, the Fourth Circuit found "fundamental problems with the use of the *Bonnette* factors—and tests built upon those factors—in the joint employment context." *Salinas*, 848 F.3d at 137. Most important by the Fourth Circuit's lights, these tests "improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers." *Ibid.* The court rested this critique principally on the DOL's FLSA regulation, which "state[s] that joint employment exists when employment by *one employer* is 'not completely disassociated from employment by the *other employer* * * *.'" *Salinas*, 848 F.3d at 137 (quoting 29 C.F.R. § 791.2(a)). In the Fourth Circuit's view, "[t]ests focusing on the relationship between a worker and a putative joint employer—like the *Bonnette* test"—are inadequate because they "do not address" that issue. *Ibid.*

The court of appeals thus instructed courts to determine whether an entity is a joint employer by assessing "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment." App., *infra,* 21a (quoting *Salinas*, 848 F.3d at 141). It listed six non-exhaustive factors to

guide that inquiry. *Id.* at 21a-22a; see pages 10-11, *supra* (listing factors); see also *Salinas*, 848 F.3d at 141-42.

In contrast to the *Bonnette* factors, these factors shift the focus away from each putative employer's relationship with the worker and instead address the connections between the putative joint employers. For example, whereas courts in the Ninth Circuit must evaluate "whether there was permanence in the working relationship" between the putative employer and the worker (*Torres-Lopez*, 111 F.3d at 640) (internal quotation marks omitted), courts in the Fourth Circuit now must evaluate "[t]he degree of permanency and the duration of the relationship *between the two putative joint employers*" (App.*, infra*, 22a) (emphasis added). And while a court applying the *Bonnette* test would consider whether the putative joint employer possesses "the authority to hire and fire the relevant employees" (*Enterprise Rent-a-Car,* 683 F.3d at 469), courts in the Fourth Circuit now must consider whether the putative joint employers merely "share, or allocate" the authority to hire and fire the worker (App., *infra*, 21a), meaning that the defendant will be deemed a joint employer if it merely "play[s] a role" (*id.* at 24a)—large or small—in hiring or firing.

In fact, under the Fourth Circuit's framework, whether the putative joint employer has an employment relationship with the putative employee is not part of the joint-employment inquiry at all. The connection to the worker is assessed only at "[t]he second step of the analysis—which asks whether a worker was an employee or independent contractor for purposes of the FLSA." App., *infra*, 17a. Specifically, once the court "determine[s] that the defendant

and another entity codetermined the key terms and conditions of the worker's employment," it then "consider[s] whether the two entities' *combined* influence over the terms and conditions of the worker's employment render the worker an employee as opposed to an independent contractor." *Ibid.*

Indeed, "even if two entities do not independently constitute employers under the *Bonnette* test," they both may be held liable under the FLSA if "their combined influence over the terms and conditions of a worker's employment" is sufficient. *Salinas*, 848 F.3d at 137-38. Hence, unlike everywhere else, in the Fourth Circuit an entity that lacks sufficient control over a worker to be deemed the worker's employer in its own right may be subject to liability under FLSA as a joint employer merely because it is associated with an entity that employs the worker.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE EXCEPTIONALLY IMPORTANT ISSUE FRAMED BY THE FOURTH CIRCUIT'S DECISION.

As just discussed, the Fourth Circuit's approach represents a sea change from the *Bonnette* standard and related standards. Whereas courts in other circuits evaluate claims of vertical joint employment by examining the relationship between the putative joint employer and the worker in light of the *Bonnette* factors and other relevant considerations, the Fourth Circuit assesses whether the putative joint employers are "completely disassociated" from each other with respect to the worker. The fundamental differences between the Fourth Circuit's standard and those applied in every other circuit will be outcome-determinative in many cases. Businesses and governmental entities whose contractual ar-

rangements with other entities have never been deemed to create obligations under the FLSA may now be subject to FLSA liability within the Fourth Circuit. The conflicting rules will generate costly litigation, make district courts within the Fourth Circuit a magnet for FLSA litigation, and create uncertainty about the legal status of a wide variety of business arrangements.

This case—being one of the two in which the Fourth Circuit articulated its new standard—is an appropriate vehicle for resolving that destabilizing conflict.

A. The Issue Presented Arises Frequently In Litigation And Affects The Legal Obligations And Relationships Of Countless Private And Public Entities.

Litigation under the FLSA has been steadily increasing over the last decade. During the twelve-month period ending on March 31, 2016, 9,063 new cases were initiated—a 12% increase over the prior year and more than double the number filed in the year ending March 31, 2006. See Admin. Office of U.S. Courts, Federal Judicial Caseload Statistics, Table C-2 (2016 and 2006). Joint-employment questions arise frequently in these cases—with scores of district court decisions addressing the issue each year.[3]

The Fourth Circuit's expansive new standard will assuredly invite additional litigation—both in

[3] A Westlaw search of district court decisions in 2016 revealed over 100 decisions addressing claims of joint employment under the FLSA.

the Fourth Circuit and around the country—seeking to predicate liability on business arrangements that have not previously been equated with joint employment. Indeed, it is difficult to imagine any arrangement between a business and its contractor in which the two are "'*completely* disassociated' with respect to a worker" (App*., infra*, 21a (emphasis added))—because, if they were "completely disassociated," the contractor relationship normally would not exist in the first place. The same is true of franchisor-franchisee relationships. In courts in which the Fourth Circuit's standard is applied, therefore, many claims that would not have been filed at all, or would once have been dismissed on the pleadings or at the summary-judgment stage, may now have to be tried to judgment and potentially give rise to liability.

For example, when financial institutions engage accounting firms to supply internal audit services, the auditors typically work at the client's premises and the client exercises supervision over the audit function. Under the Fourth Circuit's standard, there is a grave risk that the client could be deemed a joint employer of the accounting firm's non-exempt employees—something that simply could not happen under the *Bonnette* standard. Similarly, under the Fourth Circuit's test—but not under the *Bonnette* standard—a tenant in an office building could be at risk of being deemed a joint employer of workers in the cleaning crew merely by insisting that they undergo background checks and specifying what services should be performed and when they could have access to its space. Even a federal agency's hiring of a contractor to run its cafeteria could lead to allegations of joint employment. Other examples abound.

In fact, this case itself amply demonstrates the impact of the Fourth Circuit's ruling. In cases across the country, courts have held that cable and television companies are not the joint employers of technicians working for companies with which the cable and television companies have contracted. See, *e.g.*, *Crosby* v. *Cox Commc'ns, Inc.*, 2017 WL 1549552, at *7 (E.D. La. May 1, 2017); *Gremillion* v. *Cox Commc'ns Louisiana*, 2017 WL 1321318, at *7 (E.D. La. Apr. 3, 2017); *Thornton* v. *Charter Commc'ns, LLC*, 2014 WL 4794320, at *14-17 (E.D. Mo. Sept. 25, 2014); *Zampos* v. *W&E Commc'ns, Inc.*, 970 F. Supp. 2d 794, 803 (N.D. Ill. 2013); *Valdez* v. *Cox Commc'ns Las Vegas, Inc.*, 2012 WL 1203726, at *6 (D. Nev. Apr. 11, 2012); *Lawrence* v. *Adderley Indus., Inc.*, 2011 WL 666304, at *10 (E.D.N.Y. Feb. 11, 2011); *Jacobson* v. *Comcast Corp.*, 740 F. Supp. 2d 683, 693-94 (D. Md. 2010); *Smilie* v. *Comcast Corp.*, 2009 WL 9139890, at *2-4 (N.D. Ill Feb. 25, 2009). In contrast, the decision below holds that the features present in these arrangements indicate joint-employer status. See pages 27-28, *infra*. Although petitioners do not suggest that there can *never* be joint employment in this context, there can be no doubt that the distinction between the Fourth Circuit's standard and those applied everywhere else makes a difference.

If the Fourth Circuit's decision is permitted to stand, therefore, businesses across many industries will have to reassess whether their connections to contractors, subcontractors, or franchisees will now cause them to be deemed joint employers of the other firm's workers. *See Salinas*, 848 F.3d at 129 (holding that general construction contractor was joint employer of drywall installation subcontractor's employees). This undertaking will be particularly prob-

lematic for companies that operate in multiple jurisdictions and thus may be deemed joint employers with their contractors or franchisees in one part of the country, but not another. Companies that employ uniform procedures nationwide, moreover, may be forced to arrange their affairs so as to comply with the Fourth Circuit's distinctly minority rule. Some companies may find compliance concerns so onerous that they will strictly limit the firms with which they do business or give up subcontracting or franchising arrangements altogether.

The burdens that the Fourth Circuit's new standard will place on such business arrangements are real and substantial. The court of appeals itself recognized that contracting arrangements often represent "a reasonable business decision." *Salinas*, 848 F.3d at 144. Such "outsourcing" may, for example, allow companies to focus on their core mission, take advantage of other companies' expertise, or provide services efficiently in widespread locations. As the Second Circuit has explained, the "'economic reality' test * * * is manifestly not intended to bring normal, strategically-oriented contracting schemes within the ambit of the FLSA." *Zheng,* 355 F.3d at 76. In an era in which both private and governmental entities commonly contract out an increasing number of functions, however, a holding that sweepingly expands liability in this context is exceptionally important and warrants immediate review.

B. The Case Is An Appropriate Vehicle For Resolving The Conflict.

This case squarely presents the question whether the Fourth Circuit's joint-employment standard or the standard based on *Bonnette* is the correct one. As one of the two companion cases in which the Fourth

Circuit undertook to part ways with eight other circuits, this case is a fully appropriate one in which to resolve the conflict.

The Fourth Circuit predicated its reversal of the judgment below on its belief that the district court had "applied an improper legal test." App., *infra*, 13a. After critiquing the *Bonnette* test at length and explaining its new test, the court of appeals stated that the district court's use of a "control-based analysis" "rendered [its] consideration of Plaintiffs' joint employment allegations fundamentally flawed and unduly restrictive." *Id*. at 22a-23a; see also *id*. at 16a (explaining that district court's "improper[]" reliance on the *Bonnette* factors "[led] the court to ignore important, relevant aspects of Plaintiffs' employment arrangement"); *id.* at 23a (opining that "the district court's control-based analysis omitted consideration of the relationship between the putative joint employers and thus ignored important levels of coordination between Defendants, as well as many Defendants' shared levers of influence over Plaintiffs' work as DIRECTV technicians").

The court of appeals then examined the complaint's allegations under its freshly minted standard and deemed them sufficient to establish joint employment. App., *infra*, 4a, 26a-30a. It paid no heed to the absence of any allegations that DirecTV or DirectSat actually hired, fired, or paid the plaintiffs; supervised them on a day-to-day basis; dictated their schedules; or maintained their employment records. Instead, applying its new test, the Fourth Circuit held that petitioners would be deemed joint employers if respondents could prove their allegations that petitioners "allocated, through provider agreements

with one another and with subcontractors," authority over the technicians. *Id.* at 27a.

In support of its conclusion that respondents had stated an FLSA claim, the court of appeals cited respondents' allegations that the Provider Agreements established qualification standards for technicians; "compelled [technicians] to obtain their work schedules and job assignments though DIRECTV's centralized system" and to follow "particularized methods and standards of installation" of DirecTV's equipment; required them to identify themselves as DirecTV technicians when entering customers' homes; and defined what work would be compensated under the contract. App., *infra*, 27a-29a.

Courts applying the *Bonnette* standard have routinely deemed agreements imposing similar requirements insufficient to establish joint employment. See, *e.g.*, *Gremillion*, 2017 WL 1321318, at *5-8 (agreement between provider of cable services and its contractor required technicians to pass background check and drug test, wear badges, and display cable provider's branding on their vehicles; accorded cable provider a preliminary role in assigning work orders; and authorized cable provider to conduct random quality-control checks); *Smilie*, 2009 WL 9139890, at *3-5 (agreement between provider of cable services and its contractor required technicians to wear shirts identifying them as its contractors; provided for it to make routing suggestions using technicians' identification numbers; and authorized cable provider to inspect their work); *Jacobson*, 740 F. Supp. 2d at 689 (agreement between provider of cable services and its contractor "require[d] that each technician pass a criminal background check and a drug test" and "reserve[d] to [cable provider] the

power to 'deauthorize' technicians who install its equipment").

The Fourth Circuit's gratuitous suggestion in a two-sentence footnote that the district court's order dismissing the complaint would have to be reversed even under the *Bonnette* standard does not make this case any less appropriate a vehicle for resolving the circuit split created by the decision.

The footnote states that, "[a]s previously described, * * * the district court's analysis turned largely on its misapprehension of Plaintiffs' allegations regarding the degree to which Defendants maintained the authority to hire and fire or otherwise set the rate of compensation for DIRECTV technicians like plaintiffs." App., *infra*, at 16a n.6. It continues that, "[i]n this sense," the district court's dismissal order "was in error," "even assuming that the *Bonnette*-like test applied by the district court was the appropriate joint employment test." *Ibid.* This assertion is wrong on its face, because the opinion's critique of the district court's analysis was inextricably intertwined with its view that the lower court applied the wrong standard. See *id.* at 13a, 16a, 23a.

In any event, this Court has made clear that an assertion by the court of appeals that the outcome would be the same under the legal standard from which it had deviated does not warrant allowing the circuit split to fester. See *Wainwright* v. *Witt,* 469 U.S. 412, 417-18 (1985) (explaining that the Court granted certiorari to resolve the "considerable confusion in the lower courts" on the issue presented notwithstanding the lower court's statement "[i]n a footnote" that "it would reach the same result regardless" of the rule applied); *Miller* v. *Fenton*, 474

U.S. 104, 118 (1985) (reversing and remanding for "fuller analysis under the appropriate standard" where the court of appeals had "suggested in a brief footnote that it 'would reach the same result'" under the legal standard ultimately adopted by the Court).

Unless review is granted, moreover, the standard announced by the Fourth Circuit will govern not only the remaining proceedings in this case but those in every other case filed in the district courts of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. See *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) ("Certiorari is granted * * * in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.") (internal quotation marks omitted). The effects of the Fourth Circuit's holding are neither speculative nor remote; they are immediate and real, justifying immediate review.

III. THE FOURTH CIRCUIT'S APPROACH IS WRONG.

The Fourth Circuit's new approach is fundamentally misguided. In fashioning its standard for joint employment, the court of appeals placed inordinate weight on a few phrases from the DOL's 1958 joint-employment regulation, which it took out of context and misunderstood. The resulting rule elides an inquiry that the FLSA undeniably requires: Is the defendant an employer of the plaintiff? As a result, the Fourth Circuit's new joint-employment rule effectively rewrites the law—expanding the FLSA's coverage to include persons or entities that are not "employers" themselves but merely have relationships with entities that are employers. Simply put, an entity cannot be a "joint employer" unless it *first* is shown to be the plaintiff's employer based on the factors

outlined in *Bonnette* and its progeny. But the Fourth Circuit's approach overlooks that threshold question.

A. The Fourth Circuit's Rule Rests On A Misreading Of The DOL's Joint-Employment Regulation.

The Fourth Circuit's rejection of the majority approach was based largely on the court's interpretation of the DOL's joint-employment regulation. Based on the regulation's provision "that joint employment exists when employment by *one employer* is 'not completely disassociated from employment by the *other employer*'" (*Salinas*, 848 F.3d at 134 (quoting 29 C.F.R. § 791.2(a)), the court of appeals concluded that the test for joint employment should consider only the relationship between the putative joint employers. The court deemed it immaterial to the joint-employment inquiry whether each putative joint employer's separate relationship with the employee qualifies as an employment relationship. *See id.* at 137-38.

That interpretation is at odds with the regulation's plain language, which *presupposes* that each putative joint employer has an "employment relationship" with the plaintiff. The regulation comes into play only when a worker has employment relationships with multiple employers. See 29 C.F.R. § 791.2(a) ("[T]here is nothing in the [A]ct which prevents an individual employed by one employer from entering into an employment relationship with a different employer."). Under the regulation, moreover, joint employment exists when two "*employers*"—not merely two persons or entities—are "not completely disassociated" with respect to the "employee." *Id.* (emphasis added); see also *id.* n.5 ("employees generally should be paid overtime for working more than

the number of hours specified in section 7(a), irrespective of the number of employers they have").

In other words, the "not completely disassociated" language applies when there are two employment relationships and the question is whether they are joint. Nowhere does the regulation suggest that mere association provides a basis for finding that an employment relationship exists in the first instance.

More fundamentally, the DOL itself has explained that the "association" between potential joint employers is "relevant" *only* in "horizontal joint employment cases." Administrator's Interpretation No. 2016-1, at 5; see also U.S. Dep't of Labor, Fact Sheet #35, Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (Jan. 2016) ("Fact Sheet") ("The focus of this type of joint employment is the degree of association between the two (or more) employers, and it is sometimes called *horizontal joint employment* by the courts."). In such cases, "there is typically an established or admitted employment relationship between the employee and each of the employers, and often the employee performs separate work or works separate hours for each employer." Administrator's Interpretation No. 2016-1, at 5. In these cases, the "joint employment analysis focuses on the relationship of the employers to each other." *Id.* at 7.

The DOL has accordingly emphasized that "[the] FLSA regulation, 29 CFR 791.2, provides guidance regarding the [horizontal] scenario for joint employment." Fact Sheet; see also*, e.g.,* Administrator's Interpretation No. 2016-1, at 5 ("The FLSA regulation provides guidance on horizontal joint employment."); *A-One*, 346 F.3d at 917 (explaining that "the relevant

regulations" apply to allegations of "'horizontal' joint employment"); *Cavallaro* v. *UMass Mem'l Health Care, Inc.*, 971 F. Supp. 2d 139, 147-48 (D. Mass. 2013) (explaining that 29 C.F.R. § 791.2 applies "where a single employee has provided work for two or more related employers during the same work week" but is inapplicable "where there is no allegation that the plaintiff was ever employed at more than one facility").

"In contrast," the DOL has explained, "the focus in vertical joint employment cases is *the employee's relationship with the potential joint employer* and whether that employer jointly employs the employee." Administrator's Interpretation No. 2016-1, at 9 (emphasis added). "Unlike in horizontal joint employment cases, where the association between the potential joint employers is relevant, the vertical joint employment analysis instead examines the economic realities of the relationships" between the putative joint employer and the employees "to determine whether the employees are economically dependent on those potential joint employers and are thus their employees." *Id.* at 5; see also *id.* at 10 ("[T]he vertical joint employment analysis must be an economic realities analysis."); Fact Sheet ("The focus of this type of joint employment is the employee's relationship with the other employer (as opposed to the intermediary employer).").

The DOL's own statements thus flatly refute the Fourth Circuit's reading of the regulation to hinge the joint-employment inquiry in all cases—including cases of alleged vertical joint employment—on the association between the putative joint employers, without regard to whether each has an employment relationship with the plaintiff.

B. The Fourth Circuit's Framework Omits The Required Inquiry Into Whether The Defendant Is An "Employer."

As explained above, the Fourth Circuit acknowledged that its test for joint employment does not require each joint employer to have an employment relationship with the relevant worker. See*, e.g., Salinas*, 848 F.3d at 139 ("whether an individual is an entity's 'employee'" * * * is inapposite to the joint employment inquiry"). It suggested, however, that the necessary finding of an employment relationship would be made at the second step of the analysis—when the court examines whether the worker is an employee as opposed to an independent contractor. App.*, infra*, 17a. The second-step inquiry, however, is an inadequate substitute for requiring as part of the joint-employment analysis that each putative joint employer have an employment relationship with the plaintiff.

First of all, this second-step inquiry occurs only when the defendant contends that the worker should be categorized as an independent contractor rather than an employee. In many cases, no such argument is made, and the only question is whether the defendant is the plaintiff's employer. See, *e.g.*, *Layton*, 686 F.3d at 1174-75; *Bonnette*, 704 F.2d at 1468. In such a case, it is *assumed* that the worker is an "employee" of the direct employer, and *only* the joint-employment analysis is conducted.

Second, the joint-employer and independent-contractor inquiries include different factors and address analytically distinct questions. See, *e.g., Zheng*, 355 F.3d at 67-68 (distinguishing between the two inquiries); *Johnson* v. *Unified Gov't of Wyandotte County/Kansas City, Kan.*, 371 F.3d 723, 727-28

(10th Cir. 2004) (explaining that plaintiffs had to prevail on both inquiries). In the independent-contractor inquiry, the court considers:

> (1) the degree of control that the putative employer[s] ha[ve] over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer[s'] business.

App*., infra*, 31a (internal quotation marks omitted). These factors do not assess "the extent to which typical employer prerogatives govern the relationship between the putative employer and employee." *Henthorn* v. *Dep't of Navy*, 29 F.3d 682, 684 (D.C. Cir. 1994). They are instead primarily "relevant to separating employees from independent contractors." *Saleem* v. *Corporate Transp. Group, Inc.*, 854 F.3d 131, 139 (2nd Cir. 2017)).

As the Second Circuit has explained, "workers' investment in the business, and the degree of skill and independent initiative required of workers * * * do not bear directly on whether workers who are already employed by a primary employer are also employed by a second employer." *Zheng*, 358 F.3d at 67-68. "Instead, [these factors] help courts determine if particular workers are independent of *all* employers." *Id.* at 68; see also *Aimable* v. *Long & Scott Farms*, 20 F.3d 435, 443 (11th Cir. 1994) (observing that the "investment" factor "would indicate that ap-

pellants were not independent contractors" but "would not assist us in determining whether [the defendant] was appellants' joint employer"). The DOL's joint-employment guidance makes the same point. See Administrator's Interpretation No. 2016-1, at 11 n.16 ("[T]he exact factors applicable when determining whether a worker is an employee or an independent contractor cannot apply in a vertical joint employment case because they focus on the possibility that the worker is in business for him or herself.").

Third, the Fourth Circuit's framework considers only "the two entities' *combined* influence" on the plaintiff's employment. App., *infra*, 17a. Thus, at this stage, the extent of each putative joint employer's involvement with the employee is irrelevant. Even if one of the entities exercises very little "control * * * over the manner in which the work is performed," and even if the work is not "an integral part of [its] business" (*id.* at 31a), it may be deemed liable under the FLSA based solely on the finding at the first phase that it was not "completely disassociated" from another entity that has a more substantial relationship with the plaintiff.

Under the Fourth Circuit's test, therefore, an entity may be deemed a joint employer even when it does not, as a matter of "economic reality," function as such. *Goldberg*, 366 U.S. at 33. This will extend liability under the FLSA to all manner of business arrangements that have not previously been considered to create employment relationships. Indeed, even the federal government, which relies heavily on outside contractors, may well be deemed the joint employer of a contractor's employees under the Fourth Circuit's test. See 29 U.S.C. § 203(d) (defin-

ing "employer" to "include[] a public agency"); *cf. Murphy* v. *Volt Info. Scis., Inc.*, 2013 WL 5372787, at *2 (D. Or. Sept. 24, 2013) (holding that federal government's waiver of sovereign immunity in Family Medical Leave Act extends to joint employment).

Because the Fourth Circuit's reformulated test for vertical joint employment thus ignores a fundamental limitation on the FLSA's reach—one that every other circuit to have considered the issue has recognized—this Court should grant certiorari and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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