No. 16-1449

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

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

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July 2017

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief supports the petition for a writ of certiorari.[1]

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises over 250 major U.S. corporations, collectively providing employment to millions of workers. EEAC's directors and officers include many of the nation's leading experts in the labor and employment field. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of employment policies. EEAC's members are firmly committed to the principles of nondiscrimination, equal employment opportunity, and full compliance with workplace rules and requirements.

All of EEAC's members are employers subject to the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, and other federal employment-related laws and regulations. EEAC's members have a substantial interest in the issue presented in this case concerning the appropriate standard for determining joint employment liability under the FLSA.

EEAC works closely with many professionals whose primary responsibility is compliance with wage and hour laws and regulations, and thus has perspectives that may be useful to the Court in evaluating the issues of law and public policy raised in this case beyond the immediate concerns of the parties. Because of its practical experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

DirecTV, LLC (DirecTV) provides satellite television services to consumers. Pet. App. 4a. As part of its business model, the company contracts with third-party providers, including DirectSat USA, LLC (DirectSat), to arrange for the installation and repair of satellite systems for DirecTV customers. *Id.* at 4a-5a. DirecTV maintains agreements between itself and these third-party providers governing, among other things, the work to be performed and the qualifications of the technicians who perform that work (the "Provider Agreements"). *Id.* at 3a-6a. The third-party providers fulfill their contractual obligations by entering into subcontracts, by using their own employees, or by contracting separately with independent technicians. *Id.* at 5a.

Respondents were engaged by subcontractors of DirectSat and other third-party providers as independent contractors to perform installation and repair work on DirecTV satellite systems. Pet. App. 6a. In 2013, they brought an action in federal court against DirecTV and DirectSat for unpaid wages in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*., and Maryland state law. *Id.* at 7a-8a. Although the subcontractors classified them as independent contractors, Respondents alleged that the Provider Agreements between DirecTV and the service providers made DirecTV and, where relevant, DirectSat jointly and severally liable for the alleged wage and hour violations. *Id.* at 63a-65a.

In particular, Respondents alleged that the Provider Agreements enabled DirecTV to exercise "significant control" over the terms and conditions of their employment by requiring them to pass prescreening and background checks, undergo certain training

and certifications, comply with DirecTV installation methods, wear shirts with DirecTV insignia, drive vehicles with a DirecTV logo, and receive work orders through a centralized system operated by DirecTV. Pet. App. 60a-68a.

Applying the traditional joint employer test derived from the Ninth Circuit's ruling in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the district court granted DirecTV and DirectSat's (hereinafter Petitioners) motion to dismiss. *Bonnette* outlines four factors in determining joint employer status under the FLSA: "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." 704 F.2d at 1469-70 (internal quotation omitted). In this case, the district court found that Respondents had not "alleged facts that would show that DIRECTV has the power to hire and fire technicians, determine their rate and method of payment or maintain their employment records." Pet. App. 46a.

The Fourth Circuit reversed. Pet. App. 41a. Applying an entirely new joint employer test announced by the same three-judge panel in a different decision published the same day, see *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), it held that Respondents had sufficiently alleged that they were employees of both DirecTV and, where relevant, DirectSat. *Id*. at 20a, 41a.

Under the *Salinas* test, two companies will be considered employers of a particular worker under the FLSA if they (1) both share, even indirectly, in setting the terms and conditions of employment, making them

joint employers, and (2) exert sufficient "*combined* influence" over those terms and conditions such that the employee is "an employee as opposed to an independent contractor." Pet. App. 16a-17a. According to the Fourth Circuit, the "fundamental question" under step one 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." *Id.* at 21a (quoting *Salinas*).

The Fourth Circuit went on to outline six factors to consider in making that determination:

1. Whether, formally or in practice, the two entities jointly determine, share or allocate the power directly or indirectly to direct, control, or supervise the worker;

2. Whether, formally or in practice, the two entities jointly determine, share or allocate the power directly or indirectly to hire or fire the worker or modify his terms and conditions of employment;

3. The length and nature of the entities' relationship;

4. Whether one entity controls, is controlled by, or is under common control with the other entity, either through shared management or a direct or indirect ownership interest;

5. Whether the work is performed on premises owned or controlled by one or more of the entities; and

6. Whether the entities jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, either formally or in practice, such as payroll, providing workers' compensation insurance, paying payroll taxes, or providing the facilities, equipment, tools or other materials necessary to complete the work.

Pet. App. 21a-22a.

Applying these factors, the Fourth Circuit found that Respondents had alleged facts sufficient to demonstrate that DirecTV was "not completely disassociated" from the service providers or subcontractors with respect to Respondents' employment. Pet. App. 30a, 33a. Among other things, the court found that DirecTV and the service providers or subcontractors jointly determined the key terms and conditions of Respondents' work assignments through the Provider Agreements, which authorized DirecTV to provide work schedules, job assignments, and installation procedures, and determine whether work was compensable or noncompensable. *Id.* at 26a-30a. In doing so, it departed dramatically from the *Bonnette* standard, concluding that the various iterations of that test were flawed and "improperly focus on the relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers." *Id.* at 20a-21a.

Having concluded that the entities were "not completely disassociated" under step one of the *Salinas* test, the Fourth Circuit then assessed, under step two, whether the "economic realities" of Respondents' relationship with both DirecTV and the providers or subcontractors established an employment relationship. Pet. App. 31a. Among other things, the court credited

Respondents' contention that DirecTV was the "primary, if not the only" client for which they provided installation services, and thus "was the source of substantially all" of their income. *Id.* at 6a.

In other words, the Fourth Circuit found that the Respondents "were economically dependent on—and therefore jointly employed by—DIRECTV and DirectSat." Pet. App. 33a.

After their petition for rehearing *en banc* was denied, Petitioners filed a petition for a writ of certiorari with this Court on June 5, 2017.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision represents a dramatic departure from the traditional standards for determining joint employment liability under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended. Until now, every other court of appeals to consider the issue has adhered to an "economic realities" test, which in determining joint employer status examines the relationship between the worker(s) in question and the putative joint employer.

The new standard articulated by the Fourth Circuit below abandons that test in favor of one that focuses illogically on the relationship between the *companies* at issue. In doing so, the Fourth Circuit disregards a fundamental principle of joint employment—that it cannot exist in the absence of an actual *employment* relationship. See 29 C.F.R. § 791.2.

Traditional standards for assessing joint employment serve to protect businesses from liability for alleged wage and hour violations against workers over whom they have no actual or direct control. They also

ensure that intermediary businesses that do exercise actual control over their employees know that they, and they alone, will be held accountable for failing to comply with the FLSA. The practical effect of the decision below is to deprive both employers and employees of much needed consistency on a threshold question under the FLSA—who is the individual's "employer"?

Under the Fourth Circuit's new standard, agreements between a contractor and subcontractor designed to establish even basic parameters regarding the work to be performed and the qualifications needed to perform that work may trigger joint employment simply because the companies are "not completely disassociated." The uncertainty created by the Fourth Circuit's decision elevates the risk of increased joint employer litigation. It also invariably will lead many employers to reconsider, restrict, and possibly eliminate many beneficial contracting arrangements – to the detriment of businesses and workers alike.

REASONS FOR GRANTING THE WRIT

I. REVIEW OF THE DECISION BELOW IS NEEDED TO RESOLVE ISSUES OF SUBSTANTIAL IMPORTANCE TO THE EMPLOYER COMMUNITY

A. The Fourth Circuit's New Joint Employment Standard Represents An Unwarranted Departure From Long-standing Judicial And Regulatory Precedents

The Fourth Circuit's broad new standard for evaluating joint employer liability under federal wage-and-

hour law departs from well-established principles followed by eight other courts of appeals. Pet. Cert. 14-17. It thus creates substantial uncertainty for every business operating in multiple jurisdictions that relies on any number of different outsourcing arrangements, elevating the risk of nationwide litigation over who is and is not a joint employee under not only the FLSA, but also other federal workplace laws as well.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, provides that "no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). An "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), and an "employee" is defined simply as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ," in turn, is defined broadly as "to suffer or permit to work." 29 U.S.C. § 203(g).

The Department of Labor's (DOL) FLSA regulations provide that an individual can be an "employee to two or more employers at the same time[, but that such a determination] depends upon all the facts in the particular case." 29 C.F.R. § 791.2(a). Specifically, if the facts in any given case establish that an individual's "employment by one employer is not completely disassociated from employment by the other employer(s)," *id.*, then all of the employers will be responsible for ensuring compliance with the FLSA's overtime provisions during the particular workweek in which the work was performed.

According to DOL, Section 791.2 is intended to apply in cases of "horizontal joint employment," that is, "[w]here the employee has two (or more) technically separate but related or associated employers." See 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)* 1 (Jan. 2016).[2] An analysis of horizontal joint employment focuses on the "the degree of association between the two (or more) employers." *Id.* at 2.

In contrast, vertical joint employment focuses on "the employee's relationship with the other employer (as opposed to the intermediary employer)," *id.* at 2, and the "economic realities of the relationship to determine the degree of the employee's economic dependence on the other employer – the potential joint employer." *Id.* at 2. According to DOL, vertical joint employment is governed by 29 C.F.R. § 500.20(h)(5) of its Migrant and Seasonal Agricultural Worker Protection Act (MSPA) regulations. *Id.* at 1.

The Fourth Circuit simply should have adhered to the standard used by every other court of appeals, rather than search for a nonexistent basis for its new test in Section 791.2. As the DOL explains in its Fact Sheet, that provision applies where an employee "has two (or more) technically separate but related or associated employers, [such as where] an employee works for two restaurants that are technically separate but have the same managers, jointly coordinate the scheduling of the employee's hours, and both benefit from that employee's work." U.S. Dep't of

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[2] https://www.dol.gov/whd/regs/compliance/whdfs35.pdf (last visited July 5, 2017).

Labor, *Fact Sheet #35*, supra, at 1-2. It exemplifies horizontal joint employment, and does not apply to the circumstances presented in this case.

Where, as here, the workers in question are retained by an intermediary, and "the issue is whether they are also employed by the employer who engaged the intermediary to provide the labor," every court of appeals to consider the issue has focused, consistent with DOL's guidance, on "the employee's relationship with the other employer (as opposed to the intermediary employer)." U.S. Dep't of Labor, *Fact Sheet #35*, supra, at 2. According to the DOL's guidance, vertical joint employment issues such as these are governed by 29 C.F.R. § 500.20, not by Section 791.2.[3]

1. Every other court of appeals to consider the issue adheres to the traditional "economic realities" test in evaluating joint employer status under the FLSA

The Fourth Circuit's decision below upends thirty years of established circuit court precedent on the proper standard for determining joint employer liability under the FLSA. In 1983, the Ninth Circuit in *Bonnette v. California Health & Welfare Agency* established a relatively straightforward, four-factor test: "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." 704 F.2d at 1469-70 (internal quotation omitted).

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[3] DOL states that "[b]ecause the FLSA and MSPA share the same definition of employment, both types of joint employment can exist under either the FLSA or MSPA." *Id.* at 1.

Since that time, every circuit to address the issue has applied some version of the *Bonnette* test. See, e.g., *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (applying *Bonnette* and holding that "to determine whether an employment relationship exists for the purposes of federal welfare legislation, courts look not to the common law conceptions of that relationship, but rather to the 'economic reality' of the totality of the circumstances bearing on whether the putative employee is economically dependent on the alleged employer"); *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012) (establishing a four-factor test focusing on the relationship between the putative employer and relevant employees); *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (applying the four-factor economic reality test); *Ash v. Anderson Merch., LLC*, 799 F.3d 957, 961 (8th Cir. 2015) (assessing the "economic reality" of plaintiffs' employment, including whether the putative employers paid the plaintiffs, controlled the nature and quality of work, or could hire or fire them), *cert. denied*, 136 S. Ct. 804 (2016); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 306 n.2 (4th Cir. 2006) (*Bonnette* factors "useful" is assessing fact patterns not explicitly listed in 29 C.F.R. § 791.2(b)). In particular, until this year, every court of appeals to consider the question, including the Fourth Circuit, held that whether a joint employer relationship exists for FLSA purposes depends on the nature and extent of the relationship between the putative joint employer and the other employer's employees. Even in circuits that have adopted modified versions of the *Bonnette* test, the focus has remained on the relationship between the employee and the putative joint employer. See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir.

2003) (applying a six-factor test to determine the economic reality of the relationship between the putative employer and relevant employees); *Layton v. DHL Express, Inc.*, 686 F.3d 1172, 1177-78 (11th Cir. 2012) (applying an eight-factor test, and holding that the "focus of each inquiry must be on each employment relationship as it exists between the worker and the party asserted to be a joint employer").

The decision below represents an unprecedented break from this sound approach to evaluating a business's compliance obligations under the FLSA as a joint employer. The Fourth Circuit's new standard illogically focuses on the relationship between the potential joint *employers* rather than on the nature of the relationship between the *worker* in question and putative employer or employers. In doing so, it implicates some of the most fundamental aspects of the contractor-subcontractor relationship that before now had never been sufficient on their own to trigger joint employer liability under the FLSA.

2. Administrative regulations promulgated by the Department of Labor require an actual employment relationship between the employee and the putative joint employer

The Fourth Circuit's decision rests on the faulty notion that to avoid joint employer liability under the FLSA, two companies must be "completely disassociated" from one another with respect to an individual's employment – an idea plucked, out of context, from the DOL's FLSA administrative regulations. 29 C.F.R. § 791.2. The court misread the regulations to extend FLSA protections "to individuals who are independent contractors when their work for each entity is

considered separately but employees when their work is considered in the aggregate …." Pet. App. 19a.

Section 791.2 provides, in relevant part:

> If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, *who during the same workweek performs work for more than one employer*, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act.

29 C.F.R. § 791.2(a) (emphasis added) (footnote omitted). But:

> On the other hand, if the facts establish that the employee is employed jointly by two or more employers, *i.e., that employment by one employer* is not completely disassociated *from employment by the other employer(s)*, all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

Id. (emphasis added) (footnote omitted).

Read in context, the true meaning of "completely disassociated" as used in the FLSA regulations is evident. The regulations (1) envision a scenario in which an individual was performing different work for different employers, also known as "horizontal" joint employment; and (2) assume, albeit without analysis, that an *employment relationship* actually existed between the individual and each employer. In fact, until changing course in the decision below and in

Salinas, the Fourth Circuit itself applied joint employer principles consistent with that regulatory interpretation. See *Schultz v. Capital International Security, Inc.*, 466 F.3d 298 (4th Cir. 2006).

The horizontal joint employment situation described in the DOL regulations is quite different from the "vertical" joint employment construct at issue here, where one business (the putative joint employer) enters into a relationship with an intermediary business (such as a staffing agency or labor provider). Under that scenario, the focus of inquiry is on the nature and extent of the relationship between the putative joint employer and the staffing agency's or labor provider's employees.

The distinction between horizontal and vertical joint employment is critical to understanding the FLSA regulations, and to implementing a joint employer standard that can be applied consistently by employers. The Fourth Circuit's new test fails to appreciate that distinction, and as a result creates substantially more confusion and uncertainty than it resolves.

B. If Permitted To Stand, The Decision Below Will Have A Substantial, Negative Impact On Employers Nationwide

Third party and independent contracting arrangements are ubiquitous among U.S. businesses of virtually every size. These types of arrangements are especially prevalent in the construction/building, hospitality, and telecommunications industries. See, e.g., *Salinas*, 848 F.3d at 147 (construction); see also U.S. Dep't of Labor, *Fact Sheet #35*, supra, at 2 (joint employment also common "in other industries that

use subcontracting, staffing agencies or other intermediaries, such as construction, warehouse and logistics, and hotels").

Companies wish to utilize these types of business arrangements—which allow for flexibility, efficiencies and cost-savings that benefit businesses, workers and consumers alike—without risk of significant legal liability. The uncertainty created by the decision below is likely to have a substantial, negative impact on employers nationwide, causing them to reassess and perhaps restrict or eliminate existing third party contractual relationships.

1. The Fourth Circuit's new test will make it nearly impossible as a practical matter to avoid joint employer liability in most instances

Under the Fourth Circuit's new joint employer test, a company may be considered a joint employer where it is "not completely disassociated" from the direct employer in terms of setting any of the terms and conditions of the plaintiff's employment. *Salinas*, 848 F.3d at 141. Among the factors relevant to that determination is, "[w]hether, 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[.]" *Id*. Thus, under this new framework, merely having informal or indirect *influence* over the terms and conditions of employment of an individual who is directly employed by another company is sufficient to establish joint employment liability under the FLSA. *Id.*

Here, the Fourth Circuit found that DirecTV's efforts to promote basic quality control, such as by

providing instructions and training on how its equipment should be installed and requiring that the technicians installing the equipment be qualified to perform those tasks were enough to trigger joint employment. Such a low bar would make it nearly impossible for any company to outsource even a marginal function of its business without incurring joint employer liability, triggered by nothing more than a desire to maintain high standards of quality for its products and services. For example, a company that outsources portions of its customer support function to a third-party call center may require that representatives be available from 8:00 a.m. to 6:00 p.m. to service its customers. Under the Fourth Circuit's new standard, even such marginal control over scheduling could render the company "not completely disassociated" from the call center and at risk for FLSA liability as a joint employer. Neither the FLSA nor its implementing regulations reasonably can be interpreted so expansively as to reach such a result.

In devising a standard that is so broad as to apply any time one business is "not completely disassociated" from the plaintiff's actual employer, the Fourth Circuit has created a high degree of uncertainty for any business that enters into subcontractor, franchise, and independent contractor relationships. Indeed, employers nationwide will be hard-pressed to structure their third party business arrangements in a way that conforms to both the Fourth Circuit's new test and the rule that applies in every other jurisdiction to have considered the question. Because businesses must have clear and uniform rules regarding the scope of their liability under the FLSA, this Court should grant the petition and reverse the decision below.

2. The uncertainty created by the decision below invariably will lead many employers to reconsider, restrict, and possibly eliminate many beneficial contracting arrangements

Under the Fourth Circuit's expansive test, whenever a company imposes contract terms on a contractor or subcontractor that may even indirectly affect the terms of the primary or subsidiary contractor's employees, it will be at risk for FLSA liability as a joint employer. That risk will be too great for many employers, and likely will lead to a drastic reduction in their reliance on third party staffing and other contracting arrangements. The inevitable shift away from such arrangements not only will impact business efficiencies, leading potentially to higher consumer costs, but also invariably will limit employment opportunities for the rapidly-growing ranks of on-demand workers.[4]

Studies suggest that the advantages of independent contractor arrangements to businesses and individuals far outweigh any potential disadvantages. Steven Alan Cohen & William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia U. Acad. Commons (2013).[5] For the employer, such arrangements can enhance efficiencies, provide many tax- and benefits-related cost savings, and allow the

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[4] This references the growing number of workers shifting away from "more stable employment relationships" in favor of "arms-length" relationships, such as contract work, temporary employment, or "one-off gigs." U.S. Dep't of Labor, *The Future of Work: Diving into the Data* (June 17, 2016), https://blog.dol.gov/2016/06/17/the-future-of-work-diving-into-the-data (last visited July 5, 2017).

[5] https://doi.org/10.7916/D8CR5SR9 (last visited July 5, 2017).

business to "scale [its] workforce according to need." *Id.* at 19. For the individual, such arrangements can offer valuable flexibility regarding when and where (or how long) work is performed, as well as promote and encourage "entrepreneurial activity and business skills." *Id.*

In applying its new test, the court below focused on seemingly mundane connections that are commonplace in the contractor-subcontractor relationship. The act of a contractor checking the progress of, and exercising quality control over, a subcontractor's work, for instance, would not have been sufficient in the past to establish a joint employer relationship between the two entities. Nor should it suffice now.

Because the new test focuses on the relationship between the two businesses, and not on the relationship between the putative employer and relevant workers, its application almost always will result in a joint employment finding no matter how careful the parties are in crafting their business arrangement. This will make it more arduous and costly for contractors and subcontractors to enter into such arrangements, which benefit employers and workers alike. The extremely broad test established by the court below will be especially damaging to many small businesses that rely on contracting relationships as part of their business models.

While a finding that two entities are joint employers for FLSA purposes does not automatically mean that they are joint employers under other laws, *amicus* also is deeply concerned that the decision below will open the door to reevaluation of the joint employment liability standard in other contexts as well, thus profoundly affecting the structure and viability of

contractor–subcontractor relationships going forward. See infra, pp. 21-22.

3. The decision below will likely lead to increased FLSA litigation against more companies

As outlined above, the Fourth Circuit's new standard creates an extremely broad interpretation of joint employment under the FLSA. Under the new standard, a general contracting company may be sued under the FLSA by an employee of a lower tier subcontractor even if it has no relationship with the employee, merely because the company has a business relationship with the contractor's employer. Indeed, based on the standards outlined in the decision below, an individual need only allege that the general contractor is a joint employer, forcing the general contractor to engage in costly litigation and discovery trying to disprove that it is "not completely disassociated" from its subcontractor. Such an outcome does not square with the policies and intents underlying the FLSA.

Wage-and-hour cases are already the most active type of litigation in the employment law sphere, with 8,849 cases filed under the FLSA in federal courts in the 12-month period ending June 2016, which is an increase over the 8,452 cases filed during the same period in 2015. Admin. Office of the U.S. Courts, *Table C-2: U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit* (June 30, 2015 – June 30, 2016).[6] Since at least 2001, the total number of wage-and-hour cases has risen dramatically by more than 400 percent. Admin. Office of the

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[6] http://www.uscourts.gov/sites/default/files/data_tables/stfjc2_630.2016.pdf (last visited July 5, 2017).

U.S. Courts, *Caseload Statistics Data Tables, Table C-2* (June 30, 2001 & June 30, 2016).[7] The decision below ensures that this trend will continue by increasing the number of potential defendants that a plaintiff can include in a lawsuit, as more and more companies up the chain are accused of having exercised "indirect" or "potential" control over the terms and conditions of each other's employees.

C. The Fourth Circuit's Test Undermines Uniformity And Predictability In The Law

The Fourth Circuit's broad new standard further unsettles an area of law in which consistency and uniformity are essential, but increasingly are under attack. In the last two years alone, both the National Labor Relations Board (NLRB or Board) and the DOL have overturned more than three decades of joint employer administrative guidance.

In *Browning-Ferris Industries of California, Inc.*, for instance, the NLRB rescinded its longstanding joint employment standard, deciding for the first time that even theoretical or potential control over the terms and conditions of an individual's employment could render a company a joint employer under the National Labor Relations Act, regardless of whether that control was actually exercised. 362 N.L.R.B. No. 186 (2015). Abandoning the traditional standard, a divided Board concluded that two or more employers may be considered joint employers of a single workforce "if they 'share or codetermine those matters governing the essential terms and conditions of employment.'" *Id.* at *5 (citation and footnote omitted).

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[7] http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited July 5, 2017).

The Board thus no longer requires that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a "limited and routine" manner – as had been the case for the previous three decades. *Id.* at *13 (footnote omitted).

The DOL also recently announced a major shift in its own policy interpretation of joint employer principles, only to rescind it 18 months later. U.S. Dep't of Labor, Wage & Hour Div., Adm'r Interpretations Letter – Fair Labor Standards Act, FLSA 2016-1 *Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act* (Jan. 2016),[8] *rescinded* (June 2017). In January 2016, it issued an "Administrator Interpretation" expanding the scope of joint employment to encompass situations in which an individual is "economically dependent" on another entity. *Id.* at 1.

The expansive approach outlined in that guidance document involved not just making the joint employer determination based on whether a business has control over the work performed by a given worker, but also weighing whether the worker depends on the business for his or her livelihood. Because a worker arguably can depend on a business without being controlled by it, the DOL's Administrator Interpretation would have increased the likelihood of establishing joint employment, even where a court using the traditional "control" test would not find one. The January 2016 Administrator Interpretation was unceremoniously removed from the Labor Department's

[8] http://www.hallrender.com/wp-content/uploads/2016/01/DOL_Joint_Employment_1_20_16.pdf (last visited July 5, 2017).

website in June 2017, shortly after Petitioners filed their petition for a writ of certiorari with this Court.

Although the NLRB and DOL both arguably have taken a more expansive view of what constitutes a "joint employer" under federal employment laws than have most courts,[9] even they have not gone so far as to ignore – as the Fourth Circuit did below – whether a meaningful relationship actually existed between the individual and putative joint employer.

The Fourth Circuit's efforts to further erode a legal standard that already has been "tweaked" and modified more than is necessary recently are especially worrisome in light of the evolving nature of work in the U.S.:

> [T]he nature of work and American workplaces has changed and will likely continue to change. There are fewer full-time employees and more part-time employees, temporary employees, independent contractors, and home workers. Today, there can even be workers without workplaces, and some employees work together in virtual worlds. Indeed, some believe that there is a movement away from employees having long-term, established relationships with their employers in favor of a more short-term contingent relationship.

Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and*

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[9] For its part, the Equal Employment Opportunity Commission (EEOC) applies yet another standard, looking only at whether the putative joint employer exerts "sufficient control over the worker[]." EEOC, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (Dec. 1997), https://www.eeoc.gov/policy/docs/conting.html (last visited July 5, 2017).

Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship, U. Pa. J. of Bus. Law 640 (2012) (footnotes omitted). Without definitive and immediate guidance from this Court, businesses and individuals – especially those operating in the ever-expanding "gig" economy – will continue to face great uncertainty in this critical area of labor law.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2017