**Nos. 15-1857 & 15-1858**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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MARLON HALL, *et al.*,

*Plaintiffs-Appellants*,

v.

DIRECTV, LLC, *et al.*,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the District of Maryland
Hon. J. Frederick Motz, Case Nos. 1:14-CV-02355-JFM; 1:14-CV-03261-JFM

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# BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING *EN BANC*

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February 24, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1857 Caption: Marlon Hall, et al., v. DIRECTV, LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Equal Employment Advisory Council (EEAC) and National Federation of Independent Business (NFIB)
(name of party/amicus)

Small Business Legal Center

who is amici curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Rae T. Vann Date: February 24, 2017

Counsel for: EEAC/NFIB amici curiae

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I certify that on February 24, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

*s/ Rae T. Vann*


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February 24, 2017

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The Equal Employment Advisory Council and National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* subject to the granting of the accompanying unopposed motion for leave to file. The brief supports Defendants-Appellees DIRECTV, LLC and DirecSat USA, LLC's Petition for Rehearing *En Banc*.

## INTEREST OF THE *AMICI 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 includes 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 and requirements. EEAC's members are firmly committed to the principles of nondiscrimination, equal employment opportunity, and full compliance with workplace rules and requirements.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through

representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the petition before the Court in this action.

All of *amici*'s members are employers, or representatives of 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. As representatives of potential defendants to FLSA lawsuits, *amici*'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.

*Amici* work closely with many professionals whose primary responsibility is compliance with wage and hour laws and regulations, and thus have perspectives and experiences that can help the Court assess the issues of law and public policy raised in this case beyond the immediate concerns of the parties. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on

the relevant concerns of the business community and the significance of this case to employers generally.

## SUMMARY OF REASONS FOR GRANTING THE PETITION

The panel's decision represents an unprecedented departure from the well-established and longstanding standard for determining joint employment liability under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended. In addition to disregarding over thirty years of precedent, the panel's decision also will have a devastating practical effect on employers nationwide, as well as on many employees and independent contractors. The new standard articulated by the panel focuses improperly and illogically on the relationship between the *companies* at issue rather than the putative employer and relevant *workers*, elevating the risk of nationwide litigation over who is, and is not, a joint employer. It also threatens to dismantle any number of beneficial outsourcing arrangements, including the use of contingent staffing companies and franchisor-franchisee arrangements.

## REASONS FOR GRANTING THE PETITION

### I. THE PANEL DECISION WILL HAVE A SUBSTANTIAL NEGATIVE IMPACT ON EMPLOYERS AND EMPLOYEES NATIONWIDE

The panel's ruling in this case (along with its same-day decision in *Salinas v. Commercial Interiors, Inc.*, 2017 WL 360542 (4th Cir. Jan. 25, 2017), *reh'g denied* (Feb. 22, 2017)), contravenes thirty years of established precedent on the

proper standard for determining joint employer liability under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* *See Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006); *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); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67, 72 (2d Cir. 2003) (applying a six-factor test to determine the economic reality of the relationship between the putative employer and relevant employees); *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) (applying a four-factor test to determine joint employment under the FLSA), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

Until last month, the Fourth Circuit joined every other circuit court in applying some version of an "economic realities" or "control" test to determine joint employer status under the FLSA, focusing in particular on the relationship between the putative joint employer and the employee in question. *See e.g., Jacobson v. Comcast Corp.*, 740 F. Supp. 2d 683 (D. Md. 2010) (holding cable company was not a joint employer of a group of cable technicians). The economic realities test considers, for instance, whether and to what extent the putative joint employer is directly involved in quintessential employment decisions such as hiring and discipline.

The panel's decision represents an unprecedented break from this established standard. It 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 have never been considered as favoring joint employer liability under the FLSA.

As a result of the panel's drastic deviation from established legal principles, employers nationwide will be hard-pressed to structure their third party business arrangements to conform to both the new joint employment liability standard in the Fourth Circuit and the rule that applies in every other jurisdiction. Because it is essential that businesses have clear and uniform rules regarding the scope of their liability under the FLSA, this Court should grant the petition and reverse the panel decision below.

### A. The Joint Employment Standard Devised By The Panel Below Expands FLSA Liability In Contravention Of Longstanding Precedent

On January 24, 2017, the panel below held for the first time in *Salinas v. Commercial Interiors, Inc.* that a company may be considered a joint employer where it is "not completely disassociated" from the plaintiff's direct employer with respect to the plaintiff's employment. 2017 WL 360542, at *7-*11 (4th Cir. Jan.

25, 2017) (citing 29 C.F.R. § 791.2(a)). The *Salinas* Court went on to identify six broad, nonexhaustive factors to consider when determining if the relationship between the two entities gives rise to joint employer liability. One factor, for instance, is:

> 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[.]

*Salinas*, 2017 WL 360542, at *10. Under this framework, merely having informal or indirect influence over the employment terms and conditions of an individual who is directly employed by another company entirely is sufficient to establish joint employment liability under the FLSA. *Id*. Yet neither the FLSA nor its implementing regulations have ever been interpreted so broadly as to reach such a result. By adopting a test that is so broad as to apply any time one business is "not completely disassociated" from the plaintiff's actual employer, the panel decision has created a high degree of uncertainty for any business that enters into subcontractor, franchise, and independent contractor relationships.

The panel below concedes that its new standard will "extend FLSA protection 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," while at the same time denying that its application will result in all independent contractors being considered joint employees in every instance. *Hall*

*v. DIRECTV, LLC*, 846 F.3d 757, 768 (4th Cir. 2017), *petition for reh'g filed*, (Feb. 17, 2017). To the contrary, under the panel's unnecessarily broad new test, whenever a company imposes contract terms on a contractor or subcontractor that may even indirectly affect the terms of the contractor's or subcontractor's employees, it will be at risk for FLSA liability as a joint employer. Indeed, it is difficult to conceive of an independent contractor agreement or contractor-subcontractor arrangement that would not falter under the panel's new test.

### B. The Panel Decision Will Lead Employers To Reconsider, Restrict, And Possibly Eliminate Contracting And Other Independent Contractor Arrangements

Numerous employers, including many of *amici's* member companies, engage in some form of contracting arrangement. These types of arrangements are especially prevalent in the construction/building, hospitality, and telecommunications industries. U.S. Dep't of Labor, Wage & Hour Div., Administrator 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* (2016).[1] They are also an essential component in franchising arrangements and the business model for staffing companies. *Id.* Companies want to be able to utilize these types of business arrangements – which

[1] *Available at* https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf (last visited Feb. 24, 2017).

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 panel's decision is likely to have an unfortunate impact on employers nationwide, particularly if they have operations in the Fourth Circuit, by causing them to reassess and perhaps restrict or eliminate existing business relationships. For decades, the joint employer standard used by this Circuit and others has protected businesses, and in particular small businesses, from being held liable for wage and hour violations alleged by employees over which they do not have actual or direct control. That has always made sense. But now, the Fourth Circuit has redefined what it means to be an employer by implementing an indirect control standard that threatens the future of small businesses both within the Circuit and throughout the country.

In applying its new test, the panel below focused on seemingly mundane connections that are commonplace in the contractor-subcontractor relationship. The act of a contractor checking the progress of a subcontractor's work 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.

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 relationship. 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 panel 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 they are joint employers under other laws, *amici* also are deeply concerned that the decision below will open the door to reevaluation of the joint employment liability standard in other contexts as well, thus imposing significant and widespread impacts on the structure and viability of contractor–subcontractor relationships going forward.

### C. The Panel Decision Will Lead To Increased FLSA Litigation Against More Companies

As outlined above, the joint employment standard articulated by the panel 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. 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, During the 12-Month Periods Ending June 30, 2015 and 2016*.[2] Since at least 2001, the total number of wage-and-hour cases has risen dramatically by more than 400 percent. The panel's decision guarantees 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 others' employees.

[2] *Available at* http://www.uscourts.gov/sites/default/files/data_tables/stfj_c2_630.2016.pdf (last visited Feb. 24, 2017).

## CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully submit that the petition for rehearing *en banc* should be granted.

Respectfully submitted,

*s/ Rae T. Vann*


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February 24, 2017

**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**
**Effective 12/01/2016**

**No.** 15-1857 **Caption:** Marlon Hall, et al., v. DIRECTV, LLC, et al.

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