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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an entity with the authority to direct, control, and supervise nearly every aspect of the day-to-day job duties of a worker is a joint employer for purposes of the Fair Labor Standards Act (FLSA).

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INTRODUCTION

The joint employment analysis is a fact-based, totality-of-the-circumstances inquiry to determine whether, as a matter of economic reality, the worker is dependent on the businesses to which the worker provides services. The court below articulated a two-step approach for analyzing such claims that is faithful to the long-standing premise that, when two entities codetermine the key terms and conditions of a worker's job, the worker's entire employment arrangement must be viewed as a single employment to assess compliance with the FLSA. Otherwise, employers could avoid their FLSA obligations by splitting authority over workers among multiple, associated entities. Thus, the first step in the Fourth Circuit's analysis examines whether the two entities are associated with respect to setting the essential terms and conditions of the worker's employment. If so, the second step asks whether their combined influence over the worker establishes an employer-employee relationship.

Petitioners misapprehend the decision below because they focus entirely on—and misconstrue—the first step. In doing so, Petitioners manufacture a conflict that does not exist. According to Petitioners, a court must analyze claims of joint employment not by looking at the totality of the circumstances, but by rigidly applying a prescribed set of factors to each putative employer in isolation from the other. Petitioners' restrictive view is contrary to the statute, its implementing regulations, and this Court's repeated guidance to look to the circumstances of the whole activity, and it depends on a rarely used distinction between "horizontal" and "vertical" joint employment

that does not appear in the statute or regulations and does not apply here. Moreover, Petitioners incorrectly portray the first step of the Fourth Circuit's framework as applying more broadly than it does. The analysis does not subject an entity to joint employer liability "merely because it is associated with an entity that employs the worker." Pet. 21. Rather, it examines whether the entities "shared, agreed to allocate responsibility for, or otherwise codetermined the key terms and conditions of the plaintiff's work." App. 16a–17a.

In addition, the outcome of this case would be the same under any test used to determine FLSA joint employment, which further reflects that the Fourth Circuit's framework is consistent with long-standing FLSA principles. And the claim that the decision below will expand FLSA liability is unfounded and reflects nothing more than a policy disagreement with the broad reach of the FLSA. Finally, Congress is currently advancing legislation that would change the FLSA joint employment analysis.

For each of these reasons, the Court should deny review.

STATEMENT

Legal Background. The FLSA, 29 U.S.C. §§ 201 *et seq*., requires covered employers to pay their employees both a minimum wage and overtime pay, *id*. §§ 206, 207. 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 "includ[ing] to suffer or permit to work." *Id*. § 203(d), (e), (g). This Court has repeatedly stressed the broad reach of the

FLSA. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) ("The Court has consistently construed the [FLSA] liberally to apply to the furthest reaches consistent with congressional direction." (internal quotation marks omitted)). As early as 1945, the Court explained that "[a] broader or more comprehensive coverage of employees … would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945); *see also id.* at 363 n.3 (explaining that the legislative history of the FLSA shows that "the term 'employee' ha[s] been given the broadest definition that has ever been included in any one act" (quoting S. Rep. No. 75-884, at 6 (1937))). More recently, the Court observed that the FLSA's "striking breadth … stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

A Department of Labor regulation implementing the FLSA recognizes that a worker may have two or more employers at the same time. 29 C.F.R. § 791.2(a). If the two employers are "acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee," they are "separate and distinct" employers and the actions of one with regard to FLSA compliance are not imputed to the other. *Id.* "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 [FLSA]." *Id.* Joint em-

ployers are jointly and severally liable "for compliance with all of the applicable provisions of the act." *Id.*

Determining the existence of joint employment, and whether the putative joint employers employed a particular worker, is a fact-intensive inquiry. As this Court has explained, the determination of an employer-employee relationship under the FLSA "does not depend on … isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). The "test," then, for joint employment under the FLSA is a totality-of-the-circumstances analysis that focuses on "economic reality" rather than "technical concepts." *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961).

Consistent with this Court's precedent, the courts of appeals uniformly view joint employment under the FLSA as "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances." *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 141–42 (2d Cir. 2008); *see also Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1177 (11th Cir. 2012) (explaining that "no one factor is determinative" as "the existence of a joint employment relationship depends on the economic reality of all the circumstances"); *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) ("A court should consider all those factors which are relevant to the particular situation in evaluating the economic reality of an alleged joint employment relationship under the FLSA." (internal quotation marks omitted)). In other words, there is no rigid, single set of factors that universally determines joint employment under the FLSA because there are "different sets of relevant factors

based on the factual challenges posed by particular cases." *Barfield*, 537 F.3d at 141.

Some courts of appeals have developed multifactor frameworks to aid in evaluating the totality of the circumstances for joint employment purposes. *See*, *e.g.*, *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). Although those courts have identified relevant factors for consideration in a joint employment analysis, they have also emphasized that joint employment determinations "should not be confined to 'narrow legalistic definitions' and must instead consider all relevant evidence, including evidence that does not fall neatly within" the factors identified. *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012) (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003)); *see Bonnette*, 704 F.2d at 1470 (explaining the joint employment analysis is "not a mechanical determination" and the four factors considered in the case "are not etched in stone"). Importantly, a joint employer need not interact directly with the worker to be an employer for purposes of the FLSA; rather, indirect influence over the terms and conditions of the worker's job can result in employer liability under the FLSA. 29 C.F.R. § 791.2(b)(2), (3) (explaining joint employment will exist when "one employer is acting directly or indirectly in the interest of" another employer or where employers "may be deemed to share control of the employee, directly or indirectly"); *In re Enterprise*, 683 F.3d at 469 ("Ultimate control is not necessarily required to find an employer-employee relationship under the FLSA, and even 'indirect' control may be sufficient.").

Factual Background. Petitioner DirecTV, LLC, is the nation's largest provider of satellite television services. App. 4a. DirecTV is at the top of a pyramid of entities, including petitioner DirectSat USA, LLC, that engage individual technicians to install and repair DirecTV's equipment in customers' homes and businesses. DirecTV employs some technicians directly, and it "controls and manages" others through "a web of agreements" with intermediaries like DirectSat. *Id.* 3a–5a. The intermediaries are known as "Providers."

Despite the positioning of Providers between DirecTV and the technicians, DirecTV has "the authority to direct, control, and supervise nearly every aspect of [the technicians'] day-to-day job duties." *Id.* 27a. For example, DirecTV imposes hiring criteria for technicians, including background checks and required certifications, and mandates training using DirecTV materials. *Id.* 5a–6a, 60a, 66a–67a. DirecTV dictates the particular methods and standards used by the technicians to install DirecTV's equipment. *Id.* 7a, 62a. DirecTV requires that the technicians buy and wear uniforms bearing the DirecTV logo, display the DirecTV logo on their work vehicles, carry cards identifying them as DirecTV technicians, and introduce themselves to customers as DirecTV technicians. *Id.* 7a, 62a–63a. DirecTV requires technicians to receive their work schedules and job assignments through DirecTV's centralized system, and the technicians must interact with DirecTV's dispatching system to report their arrival at each job site, their completion of the installation, and to activate the DirecTV service. *Id.* 7a, 27a, 62a–63a. DirecTV has personnel in the field to monitor and inspect the technicians' work. *Id.* 67a. DirecTV requires that its Providers maintain a per-

sonnel file for each technician and DirecTV regulates and audits those files. *Id.* 60a–61a. Although DirecTV does not issue paychecks directly to the technicians, DirecTV effectively controls the technicians' earnings through compensation rules imposed by DirecTV's contracts with the Providers. *Id.* 66a–70a. DirecTV can "effectively terminate technicians by ceasing to assign them work orders through the company's centralized work-assignment system." *Id.* 7a.

Respondents are seven technicians who installed and repaired DirecTV satellite television systems. *Id.* 59a. Respondents allege that they were misclassified as independent contractors.[1] *Id.* 6a, 74a–82a. Respondents allege that they were not paid for all hours they worked, and that they regularly worked in excess of forty hours a week without receiving overtime pay, in violations of the FLSA's overtime and minimum wage requirements. *Id.* 7a–8a. 69a–71a.

Proceedings Below. Respondents sued DirecTV in federal district court in Maryland, alleging that DirecTV was their joint employer under the FLSA and is jointly and severally liable for the violations of the statute. *Id.* 3a–4a. Two Respondents also brought parallel claims against Provider DirectSat. *Id.* 3a n.1, 43a. The district court granted defendants' motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6), finding that the facts alleged were insufficient to establish that DirecTV (and DirectSat with respect to two of the Respondents) jointly employed Respondents. App. 46a–47a.

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[1] One respondent was initially classified as a direct employee of a Provider but was later reclassified as an independent contractor. App. 6a n.3.

The district court held that to show a joint employment relationship under the FLSA, a worker must first establish that he is an employee—as opposed to an independent contractor—under the six-factor test set out in *Schultz v. Capital International Securities, Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006).[2] The worker must then show that "an entity other than the entity with which the individual worker had a direct relationship" is also an employer of the worker under a four-factor test derived from *Bonnette*.[3] App. 45a–46a. Apparently concluding that Respondents met the *Schultz* test, the district court purported to apply the *Bonnette* factors. The court concluded that Respondents had alleged facts sufficient to show that DirecTV "at least indirectly supervised" Respondents' work and "directly controlled their schedules," but found that Respondents had not alleged facts showing that DirecTV "has the power to hire and fire technicians, determine their rate and method of payment or maintain their employment records." *Id.* 46a. The district court then announced that "[t]he

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[2] The *Schultz* factors are: "(1) the degree of control that the putative employer has 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." *Id.* (citations omitted).

[3] The *Bonnette* factors are whether the putative joint 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." *Bonnette*, 704 F.2d at 1470.

ultimate test of employment is the hiring and firing of employees and the setting of their compensation amounts," and where these functions are carried out by the entity with which the employee had a direct relationship, joint employment will not be found absent a showing that that the putative joint employer dictated these decisions to the intermediary direct employer who "slavishly followed every suggestion made" by the putative joint employer. *Id.* 46a–47a.

The Fourth Circuit reversed for two reasons. First, it held that the district court applied an unduly restrictive legal test for determining joint employment under the FLSA. *Id.* 13a. Second, it found that the district court misapplied the standard for Rule 12(b)(6) motions by subjecting Respondents to "evidentiary burdens inapplicable at the pleading stage and by failing to credit key factual allegations regarding [DirecTV's] control and oversight of [Respondents'] work as [DirecTV] technicians." *Id.*

With regard to whether DirecTV was Respondents' joint employer for purposes of the FLSA, the Fourth Circuit found that the district court's analysis suffered "from two basic flaws." *Id.* 15a. The district court first erred by considering the workers' relationship with each of the putative joint employers separately and in isolation, rather than determining whether the two entities codetermined the key terms and conditions of the worker's employment, in which case they should have been treated as a single enterprise for purposes of the joint employment analysis. The district court then compounded its error by restricting its analysis to the four *Bonnette* factors, "leading the court to ignore important, relevant aspects of [Respondents'] employment arrangement

during their respective tenures as [DirecTV] technicians." *Id.* 16a. The court of appeals noted that it had "recently joined many of [its] sister circuits in concluding that the *Bonnette* Court's reliance on common-law agency principles ignores Congress's intent to ensure that the FLSA protects workers whose employment arrangements do not conform to the bounds of common-law agency relationships." *Id.* 20a (citing *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 136–37 (4th Cir. 2017)).

Further, the court of appeals held that the district court misapprehended Respondents' allegations regarding DirecTV's authority to hire and fire and otherwise set the rate of compensation for DirecTV technicians. Thus, the Fourth Circuit found that even if the *Bonnette* test was the appropriate joint employment test, the district court's dismissal of Respondents' complaint was in error. *Id.* n.6.

Finally, the court of appeals rejected the district court's assertion that a FLSA defendant that does not directly employ a plaintiff is subject to joint employer liability only where it dictates to the direct employer the key terms and conditions to be imposed on the workers, or where the two entities engage in a bad faith effort to evade their FLSA obligations. *Id.* 23a–25a.

Having found that the district court erred in several respects, the Fourth Circuit applied the appropriate legal standards and concluded that Respondents' allegations were sufficient to state a plausible FLSA joint employment claim. *Id.* 26a. The court first examined whether the defendants "codetermined the essential terms and conditions" of Respondents' work as

DirecTV technicians, using six, nonexhaustive factors from *Salinas*:

> (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 controlled 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.

848 F.3d at 140–43. The court concluded that Respondents' factual allegations established that DirecTV and DirectSat jointly determined, with the entities that directly employed Respondents, the key terms and conditions of Respondents' employment as DirecTV technicians. App. 27a–30a.

The court then turned to the second step of the joint employment inquiry, and considered whether, from the perspective of Respondents' "one employment" with DirecTV and DirectSat and the other entities within DirecTV's tiered structure, Respondents had "sufficiently alleged that they were employees, as opposed to independent contractors, for purposes of the FLSA." *Id.* 30a. Pursuant to the one-employment theory, the court considered "the entire context of [Respondents'] work on behalf of DirecTV and DirectSat and aggregate[d] those aspects of that work that [DirecTV and DirectSat], either jointly or individually, influenced, controlled, or determined." *Id.* 31(a) (citing *Schultz*, 466 F.3d at 307). Focusing on the economic realities of the relationship, and looking to the six factors identified by this Court in *United States v. Silk*, 331 U.S. 704 (1947), the Fourth Circuit concluded that Respondents' allegations demonstrated that they were economically dependent on DirecTV and DirectSat while serving as DirecTV technicians, because those entities "collectively influenced nearly every aspect" of Respondents' work as DirecTV technicians. App. 31a.

DirecTV and DirectSat sought rehearing en banc. The petition was denied. *Id.* 50a.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit's Joint Employment Framework Fits Comfortably Within the Standard Applied by All Other Circuits.

Because the joint employment analysis is a fact-based, totality-of-the-circumstances inquiry, there is no single set of factors that can be applied in all cases. It is therefore not surprising that the Fourth Circuit declined to rely on only the four-factor *Bonnette* test and instead considered factors relevant to the factual context of this case. Petitioners mistakenly assert that the Fourth Circuit's approach is out of sync with other circuits. To the contrary, the other circuits to have addressed the issue—including the Ninth Circuit, where *Bonnette* originated—have concluded that *Bonnette*, standing on its own, fails to capture the complexities of joint employment relationships and cannot be applied in a vacuum. The standard applied by the other circuits is a multifactor totality-of-the-circumstances test, the contours of which will vary from case to case given the variety of employment relationships. The Fourth Circuit's framework fits comfortably within that standard.

A. The *Bonnette* factors are not, and were not intended to be, the sole considerations for joint employment under the FLSA.

In *Bonnette*, the Ninth Circuit considered whether "chore workers" who provided services to disabled public assistance recipients were—for purposes of the FLSA—employees of the state and local governments that established and administered the program. 704 F.2d at 1467–68. The court first explained that "[t]he determination of whether an employer-employee rela-

tionship exists does not depend on 'isolated factors but rather on the circumstances of the whole activity,'" *id.* at 1469 (quoting *Rutherford*, 331 U.S. at 730), and that the joint employment determination "must be based on a consideration of the total employment situation and the economic realities of the work relationship," *id.* at 1470. The court determined that the four factors used by the district court in that case were "relevant to this particular situation," *id.*, but explicitly noted that because the joint employment analysis "is not a mechanical determination," those four factors "are not etched in stone and will not be blindly applied." *Id.* After applying those four factors, the court concluded that the state and local governments were employers under the FLSA—even though not all factors were met—because the facts of the case demonstrated that they "exercised considerable control over the nature and structure of the employment relationship," such that resort to additional considerations was unnecessary. *Id.*

That an entity which satisfies most or all of the four factors identified in *Bonnette* is an employer under the FLSA is unremarkable because the factors reflect considerations for employment determinations under common-law agency principles, which are more restrictive than the broad definition of employ used in the FLSA. *See Darden*, 503 U.S. at 323–24 (explaining the overarching concern under agency principles is "the hiring party's right to control the manner and means" of the work and identifying the ability to hire, control over the hours of work, method of payment, provision of employment benefits, and tax treatment as among the relevant factors to consider). In fact, several circuits have articulated the relevant factors for determining joint employment under the common-

law "control" test as being virtually identical to the four factors discussed in *Bonnette*. *See, e.g.*, *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 411 (4th Cir. 2015); *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1226 (10th Cir. 2014); *Plaso v. IJKG, LLC*, 553 F. App'x 199, 204–05 (3d Cir. 2014); *EEOC v. Skanska USA Bldg., Inc.*, 550 F. App'x 253, 255 (6th Cir. 2013); *cf. Whitaker v. Milwaukee Cnty., Wisc.*, 772 F.3d 802, 810 (7th Cir. 2014) (providing similar but not identical factors). In other words, a finding that an entity satisfies most or all of the four factors discussed in *Bonnette* will almost always be sufficient to establish an employment relationship under the broader standard applicable to the FLSA, but satisfying those factors is not necessary where other relevant factors establish an employment relationship under the FLSA.

B. Every circuit applies a multifactor totality-of-the-circumstances standard to determine FLSA joint employment.

Although at times Petitioners mistakenly suggest that other circuits restrict their FLSA joint employment analysis to the four factors set out in *Bonnette*, elsewhere Petitioners concede that at least some circuits have "liberalized" or "expanded" the factors considered. Pet. 5, 16. In fact, all of the circuits that have spoken directly to joint employment under the FLSA have concluded that the "test" is simply a fact-intensive, multifactor totality-of-the-circumstances standard. The relevant factors will vary depending on the particular facts of the case.

For example, the Third Circuit in *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation* began its analysis by explaining that joint em-

ployment under the FLSA will be found where two or more employers "share or co-determine those matters governing essential terms and conditions of employment." 683 F.3d at 468 (quoting *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1124 (3d Cir. 1982)). Although it noted that the four factors discussed in *Bonnette* provide a useful "starting point," the Third Circuit emphasized that "these factors *do not constitute an exhaustive list* of all potentially relevant facts" because "[a] determination as to whether a defendant is a joint employer 'must be based on a consideration of the total employment situation and the economic realities of the work relationship.'" *Id.* at 469 (quoting *Goldberg*, 366 U.S. at 33).

The same is true for two other circuits—the First and the Fifth—that Petitioners contend strictly follow the four factors from *Bonnette*. Both the First and Fifth Circuits acknowledge that considerations in addition to the four *Bonnette* factors are relevant to the joint employment analysis. *See Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) (explaining joint employment under the FLSA is based on "the totality of the circumstances" and calling the four *Bonnette* factors a "useful framework"); *Williams v. Henagan*, 595 F.3d 610, 620 (5th Cir. 2010) (identifying the four *Bonnette* factors as relevant to the joint employment analysis but explaining the court had previously found simple application of those factors to not be "dispositive").

As to the Eighth Circuit, which Petitioners also claim strictly follows *Bonnette*, that court has not adopted any joint employment test under the FLSA. The cases cited by Petitioners do not indicate otherwise. *See Ash v. Anderson Merchandisers, LLC*, 799

F.3d 957, 961 (8th Cir. 2015) (affirming dismissal of FLSA claims against putative employer because complaint contained only one bare allegation regarding employer status that simply stated legal test for integrated employers and noting the workers did not "include any facts describing the 'economic reality' of their employment, such as their alleged employers' right to control the nature and quality of their work, the employers' right to hire or fire, or the source of compensation for their work"); *Muhammad v. Platt Coll.*, No. 94-1750, 1995 WL 21648, at *1 (8th Cir. Jan. 23, 1995) (per curiam) (citing to *Bonnette* in short, unpublished decision without explanation of proper test for joint employment).

The shortcomings of Petitioners' argument is even more evident with respect to those circuits applying what Petitioners characterize as a "liberalized" *Bonnette* test. The Ninth Circuit—the source of *Bonnette*—long ago recognized that "consider[ing] all of those factors which are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA" will require looking beyond the four factors identified in *Bonnette*. *Torres-Lopez*, 111 F.3d at 639 (quoting *Bonnette*, 704 F.2d at 1470). Indeed, the Ninth Circuit has identified eight additional factors beyond the four discussed in *Bonnette* that are relevant to joint employment determinations under the FLSA. *Torres-Lopez*, 111 F.3d at 640.

The Second Circuit has held that any combination of three *different* multifactor tests could be applied to various factual circumstances to determine FLSA joint employment because "they provide 'a nonexclusive and overlapping set of factors' to ensure that the

economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA." *Barfield*, 537 F.3d at 143 (quoting *Zheng*, 355 F.3d at 75–76). In particular, the Second Circuit noted that the four *Bonnette* factors are useful only "to examine the degree of formal control exercised over a worker," and, thus, represent only one way in which an entity may be found to be a joint employer. *Id.* (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

Finally, the Eleventh Circuit has likewise recognized that several additional factors are relevant to joint employment determinations under the FLSA and has noted that the factors identified by the court are only "aids" to be used in making the ultimate determination of joint employment. *Layton*, 686 F.3d at 1176–78.

Thus, a fair examination of joint employment cases from other circuits reveals that, in each, the four *Bonnette* factors are four among many considered by courts under the "flexible concept" of joint employment under the FLSA for which there will be differing "relevant factors based on the factual challenges posed by particular cases." *Barfield*, 537 F.2d at 141–42. The Fourth Circuit's approach is consistent with that of its sister circuits.

C. The Fourth Circuit's framework is a logical approach to applying the fact-intensive, multifactor totality-of-the-circumstances test for joint employment under the FLSA.

In *Salinas,* the Fourth Circuit set out a framework for applying a nonexhaustive multifactor balancing test to determine whether two or more entities jointly

employ a worker under the FLSA. Under the Fourth Circuit's approach, courts proceed in two steps to determine joint employment under the FLSA. *Id.* at 139–40. At the first step, the court considers the degree of association between the putative joint employers with respect to determining the key terms and conditions of the worker's job to determine whether their actions should be treated as part of "one employment" as required by DOL regulations, *see* 29 C.F.R. § 791.2(a). *Salinas*, 848 F.3d at 140–42. If the entities "share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—*the key terms and conditions* of the worker's employment," *id.* at 141 (emphasis added), the court determines at the second step whether the worker is an employee of the combined enterprise. *Id.* at 150–51. Only where a plaintiff is able to establish both steps will an entity be considered a joint employer under the FLSA.

Although Petitioners make much of the Fourth Circuit's explanation for the factors considered at step one of its joint employment framework, *see* Pet. 18–20, they pay little attention to the factors considered at the second step, *id*. 20–21. And the factors considered at step two overlap considerably with those considered by other circuits in their joint employment case law. *Compare Salinas*, 848 F.3d at 141–42 (providing six factors for consideration at step two: control over manner in which work is performed, opportunity for profit or loss, investment in equipment or material, degree of skill required, permanence of the working relationship, and whether services rendered are integral to putative employers' business), *with Barfield*, 537 F.2d at 142 (providing nearly identical list of five factors under one of Second Circuit's

multifactor tests), *and Torres-Lopez*, 111 F.3d at 640 (identifying investment in equipment or materials, degree of skill required, opportunity for profit or loss, permanence of working relationship, and whether services rendered are integral to employer's business as among eight additional factors considered beyond *Bonnette* factors). Viewed in its entirety, the Fourth Circuit's approach utilizes the same factors found to be relevant by other courts that have had the opportunity to articulate additional considerations beyond the *Bonnette* factors.

Even focusing solely on step one of the Fourth Circuit's framework, it is clear that an explicit part of its totality-of-the-circumstances framework is an issue underlying both the DOL regulations and other circuits' tests: determining whether an entity's indirect control over the nature and structure of the employment relationship is sufficient to rise to the level of an employer under the FLSA. *See* 29 C.F.R. § 791.2(b)(2), (3); *In re Enterprise*, 683 F.3d at 469; *Torres-Lopez*, 111 F.3d at 642–43; *cf. Barfield*, 537 F.3d at 143 (explaining that joint employment exists where entity exercises "functional control" over workers, even in the absence of "formal control"). Indeed, the factors considered at step one make clear that the determination is aimed at identifying both formal and direct joint employment, as well as functional and indirect joint employment. *See Salinas*, 848 F.3d at 141–42 (listing within four of the six factors considered at step one whether such authority was exercised "formally or as a matter of practice" and/or whether the action was taken "directly or indirectly"). This approach is consistent with the FLSA's broad definition of "employ" as "includ[ing] to suffer or permit to work,", which was derived from state child-labor laws

that imposed liability "not only on businesses that directly employed children but also on 'businesses that used middlemen to illegally hire and supervise children.'" *Id.* at 133 (quoting *Antenor v. D & S Farms*, 88 F.3d 925, 929 n.5 (11th Cir. 1996), and *Rutherford*, 331 U.S. at 728 & n.7). As such, step one of the Fourth Circuit's framework simply provides a more formal determination of whether the association between two or more entities indicates that one of the entities, although lacking direct control over the workers, has nevertheless been given or exercises indirect or functional control over those workers to such a degree that it effectively "employs" the worker for the purposes of the FLSA.

The Fourth Circuit's articulation of the totality-of-the-circumstances standard for FLSA joint employment in *Salinas*, when viewed in its entirety, fits comfortably within the frameworks utilized by other circuits. Although the sequence of the Fourth Circuit's framework for analyzing the issue may differ from the approach used by other courts, the underlying considerations are the same. In short, the circuits are not divided on the question presented here.

II. This Case Is a Poor Vehicle to Address the FLSA Joint Employment Standard Because the Outcome Would Be the Same Under Any Approach.

This case does not warrant review for the additional reason that the outcome would be the same under the approach advocated by DirectTV and the district court, the four-factor *Bonnette* test. As the court of appeals explicitly stated, "even assuming that the *Bonnette*-like test applied by the district court was the appropriate joint employment test, the district court's

dismissal of [Respondents' FLSA] claims was in error." App. 16a, n.6.

The district court identified the relevant factors as whether the alleged joint employer, directly or indirectly, "(1) had the power to hire and fire the employee; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records." *Id.* 46a (citation omitted). Respondents' complaint includes factual allegations showing that DirecTV effectively controls all these things. Thus, the court of appeals concluded that DirecTV has "the authority to direct, control, and supervise nearly every aspect of [the technicians'] day-to-day job duties." *Id.* 27a.

As explained above, the court below evaluated several factors, as do the other courts of appeals. Thus, DirectTV's question presented does not accurately reflect the opinion below. In any event, as the opinion demonstrates, the outcome of this case would be the same under DirectTV's test. The petition should therefore be denied.

III. The Fourth Circuit's Framework Is Faithful to the FLSA and the Implementing Regulations.

The FLSA defines "employ" as "includ[ing] to suffer or permit to work," 29 U.S.C. § 203(g), a standard drawn from state child-labor laws, *see Rutherford*, 331 U.S. at 728 & n.7. Congress adopted that standard knowing that it would extend FLSA liability to entities beyond those traditionally regarded as employers. For example, a Massachusetts child-labor law prohibited "employ[ing]" or "permit[ting]" a child to work during certain hours. Mass. Gen. Laws ch. 149,

§ 66. Interpreting that language in 1927, the Supreme Judicial Court of Massachusetts concluded that even if the children "were employed by an independent contractor," such was not a defense to the violation by the defendant because the defendant nonetheless "permitted them to work in his establishment within the prohibited time." *Commonwealth v. Hong*, 158 N.E. 759, 759–60 (Mass. 1927). Indeed, the FLSA defines "employer" to include "any person acting directly *or indirectly* in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (emphasis added).

To effectuate the guarantees and protections of the FLSA, the DOL's implementing regulations explicitly provide for joint employment coverage:

> [I]f 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 is considered as one employment for purposes of the [FLSA]. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions, with respect to the entire employment for the particular workweek.

29 C.F.R. § 791.2(a). The regulation further provides a nonexhaustive list of examples of situations where joint employment will be found to exist, such as when "one employer is acting directly *or indirectly* in the interest of the other employer (or employers) in relation to the employee" or when "the employers are not

completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly *or indirectly*, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer." *Id.* § 791.2(b)(2), (3) (emphases added).

The "striking breadth" of the FLSA's definition of "employ"—described by this Court as "the broadest definition that has ever been included in any one act," *Rosenwasser*, 323 U.S. at 363 n.3 (quoting 81 Cong. Rec. 7657 (1937))—was designed to include workers "who might not qualify as [employees] under a strict application of traditional agency law principles." *Darden*, 503 U.S. at 326. Moreover, as this Court has explained, the FLSA's "'remedial and humanitarian purpose' cautions against 'narrow, grudging' interpretations of its language." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 13 (2011) (quoting *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

Congress has repeatedly reaffirmed this broad definition of employ by explicitly incorporating the FLSA's joint employment standard into subsequent federal legislation. *See Salinas*, 848 F.3d at 135 (citing S. Rep. No. 99-159, at 12 (1985) (legislation to amend FLSA overtime requirements recognizes "FLSA joint employment rule" that "there are some situations in which an employee who works for two separate employers or in two separate jobs for the same employer has all of the hours worked credited to one employer for purposes of determining overtime liability"), and 128 Cong. Rec. S11,749 (daily ed. Sept. 17, 1982) (explaining the Migrant and Seasonal Agricultural

Workers Protection Act's (MSAWPA) adoption of "[t]he exact same principles … to define the term 'employ' in joint employment situations as are used under FLSA")); *see also* H.R. Rep. No. 97-885, at 7 (1982) (explaining that MSAWPA's use of the FLSA definition of employ "was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute. … Inherent in this expansive interpretation is the intent of the [House] Committee that the terms 'employee,' 'employer' and 'independent contractor' not be construed in their limiting common law sense."); S. Rep. No. 103-3, at 22–23 (1993) (noting the adoption of the FLSA definition of employ in the Family and Medical Leave Act ensures "broadly inclusive" coverage under that Act).

The Fourth Circuit's framework is faithful to the language of the FLSA and the implementing regulations, as well as this Court's precedent regarding the breadth of coverage under the FLSA. As the court of appeals explained, its approach begins by capturing joint employment as defined by the DOL's regulations, where "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)). As indicated by DOL's regulations, the focus of the inquiry is whether two or more 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 141. Then, when this consideration is met, the Fourth Circuit moves to consideration of economic dependence, either based on the employee's "one employment" by the joint enterprise if the putative employers are "not completely

disassociated" with respect to setting the essential terms and conditions of employment, or of each separate working relationship if the putative employers are completely disassociated with respect to the workers. *Id.* at 150. Although Petitioners complain that "[t]he [Fourth Circuit's] 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," Pet. 12, Petitioners are mistaken. Liability attaches only if an alleged joint employer has *sufficient* authority over the worker, through sharing or coordination with another entity, *such that* the entity plays a role in "establishing the essential terms and conditions of a worker's employment." *Salinas*, 848 F.3d at 141. Such conclusion stems directly from the FLSA, its implementing regulations, and this Court's jurisprudence.

Petitioners further complain that the Fourth Circuit conflates considerations for "horizontal" joint employment with those underlying "vertical" joint employment. *Id.* at 14. But neither term appears in the FLSA or the DOL's regulations. Petitioners base their claim of such a distinction on a withdrawn Administrator's Interpretation from DOL and two inapposite cases. *Id.* at 30–32. None establishes that the Fourth Circuit's approach is erroneous. Rather, Petitioners err by suggesting that there must be a rigid distinction between "horizontal" and "vertical" joint employment, with separate analyses for each.

The withdrawn Administrator's Interpretation sought to explain the relevant considerations for situations it characterized as "horizontal" and "vertical" joint employment. Critically, however, it recognized

that "the concept of joint employment, like employment generally, 'should be defined expansively' under the FLSA" and that at least some cases would require evaluation of both the "horizontal" and "vertical" joint employment factors discussed therein. DOL, Administrator's Interpretation No. 2016-1 at 2 & n.7 (Jan. 20, 2016; withdrawn June 7, 2017) (quoting *Torres-Lopez*, 111 F.3d at 639). Moreover, to the extent the withdrawn Administrator's Interpretation and Petitioners contend that DOL's joint employment regulation pertains *solely* to "horizontal" joint employment, their argument is belied by several of the cases Petitioners identify as "vertical" joint employment analyses, which themselves rely on the joint employment regulation. *See Bonnette*, 704 F.2d at 1469–70 (citing 29 C.F.R. § 791.2 for joint employment under the FLSA); *Baystate Alternative Staffing*, 163 F.3d at 675 (same); *In re Enterprise*, 683 F.3d at 467 (same); *Barfield*, 537 F.3d at 141 (same); *Torres-Lopez*, 111 F.3d at 638 (same); *Layton*, 686 F.3d at 1175 (same).

With respect to the decision in *Chao v. A-One Medical Services*, 346 F.3d 908 (9th Cir. 2003), the court there noted only that its eight-factor test was developed with "vertical" joint employment as its focus, such that the factors were not helpful to the analysis of the factual circumstances presented in that case and resort to the plain language of the regulations was necessary. *Id*. at 917; *cf. Torres-Lopez*, 111 F.3d at 639 ("A court should consider all those factors which are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA." (quoting *Bonnette*, 704 F.2d at 1470)). At no point did the court

purport to limit the applicability of the joint employment regulations to "horizontal" joint employment.

The Fourth Circuit's framework is applicable to all forms of joint employment, whether "vertical" joint employment or "horizontal" joint employment. This approach is consistent with the FLSA, which does not distinguish between vertical and horizontal relationships. Because the Fourth Circuit's framework is faithful to the language of the FLSA and its implementing regulations, review by this Court is not warranted.

IV. Petitioners' Speculation that the Fourth Circuit's Framework Will Expand Joint Employer Liability Is Unfounded.

Petitioners and their amici predict that use of the Fourth Circuit's framework for analyzing joint employment claims will extend liability for FLSA violations to entities that previously could insulate themselves from such liability through the use of a variety of contractual mechanisms, and will impose new burdens on businesses and the judicial system. Such speculation provides no basis for this Court to grant review.

As explained above, the approach articulated by the Fourth Circuit is not a new standard. Under well-established law, joint employers are jointly and severally liable for FLSA violations. And whether an entity employs a particular worker is determined by a fact-intensive, multifactor totality-of-the-circumstances test that focuses on the putative employer's influence over the worker's terms and conditions of employment. The Fourth Circuit's framework simply recognizes that, where two entities share responsibility for determining the key terms and conditions of employ-

ment, they are treated as a single enterprise for purposes of applying the multifactor totality-of-the-circumstances test.

Petitioners' prediction that the Fourth Circuit's decision in this case will extend FLSA liability to entities unable to exert influence over the entities that interact directly with the workers is speculative at best. Petitioners claim that "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," Pet. 23 (quoting App. 21a)), but that is not the first step of the Fourth Circuit's framework. Rather, the association between the businesses must be with respect to determining "the essential terms and conditions of the worker's employment." App. 21a. Associations between businesses with respect to other matters will not satisfy the first step of the Fourth Circuit's framework. Petitioners and their amici have not identified a single case where application of the Fourth Circuit's framework expanded FLSA liability; indeed, the court of appeals in this case noted that Petitioners would have been found to be joint employers even under the most restrictive approach. App. 16a n.6; *see also Salinas*, 848 F.3d at 146 n.12 (concluding the *Salinas* defendants would be employers under the more restrictive *Bonnette* test as well). Moreover, entities that may be jointly liable for the FLSA violations of their contractors or franchisees can protect themselves through indemnification agreements, and by monitoring the wage payment practices of those to whom they delegate such responsibilities.

Petitioners' and their amici's objection to joint employer liability under the FLSA amounts to little

more than a policy disagreement with the broad reach of the FLSA. That policy disagreement does not provide a basis for review.

V. Pending Legislation May Alter the FLSA Provision at Issue.

As noted above, Congress has repeatedly reaffirmed the broad joint employment coverage under the FLSA by explicitly adopting the FLSA's broad definition of "employ" as "includ[ing] to suffer or permit to work" in subsequent federal legislation. *See supra* Part III. A bill currently pending before Congress, however, would amend the FLSA's definition of "employer" to limit the definition of a joint employer to an entity that "directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline." H.R. 3441, 115th Cong. § 2 (as passed by House of Representatives, Nov. 7, 2017).

The import of this legislation to this case is twofold. First, that Congress would amend the definition of joint employer under the FLSA to capture only entities that "directly" take the listed actions reflects that the FLSA's current joint employment coverage extends more broadly. Second, congressional action to amend the FLSA's coverage of joint employers would render action by this Court regarding a prior definition of little value. The pending legislation thus provides another reason why the Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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