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

REPLY BRIEF FOR PETITIONERS

COLIN D. DOUGHERTY
Fox Rothschild LLP
10 Sentry Parkway, Suite 200
P.O. Box. 3001
Blue Bell, PA 19422
(610) 397-6500

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
etager@mayerbrown.com

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

TABLE OF AUTHORITIES—continued

Page(s)

Other Authorities

REPLY BRIEF FOR PETITIONERS

This case involves an acknowledged circuit split on an issue of exceptional importance. The Fourth Circuit expressly rejected the long-settled standards of eight other circuits—all of which assess claims of vertical joint employment under the FLSA by evaluating whether an employment relationship exists between the alleged joint employer and the worker. Opining that these standards focus on the wrong relationship and are hence "improper," the Fourth Circuit fashioned a new test that "turns on the relative association or disassociation between" the putative joint employers "with respect to establishing the essential terms and conditions of a worker's employment." *Salinas* v. *Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017).

Respondents nevertheless contend that we have "manufacture[d] a conflict" by insisting that courts outside the Fourth Circuit "rigidly apply[] a prescribed set of factors to each putative employee in isolation." Opp. 1. That argument disregards the Fourth Circuit's statement that it was charting a new course and fails to confront the conflict that the petition raises. And respondents' heavy reliance on the second step of the Fourth Circuit's framework—during which the court determines whether the worker is an independent contractor or an employee of a fictive *combined* entity—merely highlights the stark difference between the Fourth Circuit's standard and the majority rule: Every other circuit's joint-employment rule requires a determination that there is an employment relationship between the worker and *each* putative joint employer, but the Fourth Circuit's new rule does not. This sea change in the FLSA joint employment standard—a foundational

and frequently recurring issue—plainly warrants review.

1. Respondents first argue that the Fourth Circuit's joint-employment standard is "consistent with that of its sister circuits" (Opp. 18) because those courts, like the Fourth Circuit, consider a variety of factors in determining whether a joint employment relationship exists (*id.* at 15-18). This argument is a red herring.

First, we did not argue that other courts "strictly" (Opp. 16) apply the *Bonnette* factors. Instead, we explained that several circuits "principally" apply those factors (Pet. 15), while other circuits have expanded their tests to incorporate other factors (*id.* at 16-17).

Second, and more fundamentally, we have not asked the Court to resolve a conflict over whether the joint-employment inquiry is "strict[]" or "flexible." Opp. 16, 18. Instead, as the question presented—which respondents distort beyond recognition (see Opp. i)—makes clear, the relevant conflict is over whether courts should focus on the relationship *between the putative joint employer and the worker*, as eight circuits do, or whether they should focus on the relationship between the putative joint employers, as the Fourth Circuit now commands. See Pet. i.

Respondents never deny the existence of *that* conflict. Nor could they, because the Fourth Circuit was unequivocal in identifying "fundamental problems with the use of the *Bonnette* factors—and tests built upon those factors—in the joint employment context." *Salinas*, 148 F.3d at 137. According to the court of appeals, these tests "improperly focus on the relationship between the employee and putative joint

employer, rather than on the relationship between the putative joint employers" (*id.* at 137), and "incorrectly frame the joint employment inquiry as a question of an employee's 'economic dependence' on a putative joint employer" (*id.*).

The Fourth Circuit thus instructed courts not to apply those tests and adopted a new test that "focuses on the relevant relationship—the relationship between the putative joint employers." *Salinas*, 148 F.3d at 142. Respondents identify no other circuit that applies a similar standard. Indeed, they never dispute that *every other circuit* that has addressed the issue examines the relationship between the putative joint employer and the worker to determine whether an employment relationship exists.

2. Attempting to minimize the undeniable conflict, respondents next insist that the new standard is merely "a logical approach to applying the fact-intensive, multifactor totality-of-the-circumstances test for joint employment under the FLSA." Opp. 18. Even if that were correct, it would not justify allowing an acknowledged circuit split to persist. But it is not correct.

Respondents principally contend that the second step of the Fourth's Circuit's two-step framework blunts the impact of its reformulation of the joint-employer test at step one. They argue that the factors considered at step two "overlap considerably with those considered by other circuits in their joint employment case law" and accuse us of "pay[ing] little attention" to those factors. Opp. 19.

By the Fourth Circuit's design, however, the second-step factors do not provide a meaningful escape hatch for an entity deemed a joint employer at step

one. Under the Fourth Circuit's approach, if a court determines at step one that a joint-employment relationship exists, then the two putative joint employers *are treated as one entity* during the second step of the analysis. See *Salinas*, 148 F.3d at 139-40 (explaining that "courts must first determine whether two entities should be treated as joint employers and then analyze whether the worker constitutes an employee or independent contractor of the combined entity, if they are joint employers, or each entity, if they are separate employers"). Thus, if *either* of two putative joint employers is determined to be the worker's employer in stage two, then *both* will be treated as such. Although we discussed this limitation of the step-two analysis in the petition (at 35), respondents ignore it.

Furthermore, the second step of the Fourth Circuit's framework addresses only whether the worker is an employee or independent contractor. Pet. App. 16a-17a. That inquiry concerns the worker's proper classification and entitlement to protection under the FLSA; it does not answer the question ordinarily framed by the joint-employer inquiry: *Which entities* are liable as the employee's employer? See Pet. 33-35. In many cases, moreover, the analysis is never conducted because the plaintiff's classification as an employee rather than an independent contractor is not in dispute. *See id.* at 33. In such cases, the first step of the analysis is the whole ballgame. Although the petition spells out these problems, respondents do not address them.

As a fallback, respondents argue that the first step of the Fourth Circuit's test is aimed at determining whether "one of the entities" has "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." Opp. 21. But that rewrites the Fourth Circuit's standard, which instead evaluates whether the putative joint employers "jointly determine, share or allocate" influence over the worker. Pet. App. 21a.

Indeed, the Fourth Circuit held that "one factor alone can serve as the basis for finding that two or more persons or entities are 'not completely disassociated,'" as long as the "person or entity has a substantial role in determining the essential terms and conditions of a worker's employment." *Salinas*, 148 F.3d at 142. That is a far more expansive standard than one requiring functional or indirect control over the employee. And it is not the standard applied by eight other circuits, which assess whether, "as a matter of 'economic reality,'" the putative joint employer "functions as the individual's employer." *Ling Nan Zheng* v. *Liberty Apparel Co.*, 355 F. 3d 61,66 (2d Cir. 2003).

3. Respondents next argue that this case would be a "poor vehicle" to resolve the circuit split because "the outcome would be the same" under the Fourth Circuit's standard and the test applied elsewhere. Opp. 21. This argument is weightless.

First, under this Court's decisions, the appellate court's terse statement that it would find for respondents under the standard it rejected is not a sound basis for allowing a circuit split to persist. See *Wainwright* v. *Witt,* 469 U.S. 412, 417-18 (1985); *Miller* v. *Fenton*, 474 U.S. 104, 118 (1985). Although we cited these decisions in the petition (at 28-29), respondents ignore them. Respondents do not deny, moreover, that the Fourth Circuit's adoption of a new standard will have a real and immediate impact in this and many other pending cases. Indeed, the deci-

sion already is having such an effect. See, *e.g., Alston* v. *DirecTV, Inc.*, 254 F. Supp. 3d 765, 773 (D.S.C. 2017) (rejecting, in light of *Salinas* and the decision below, defendants' argument that they were entitled to summary judgment based on *Bonnette* and *Zheng*).

Second, the complaint's allegations do not show—as respondents contend—that DirecTV "effectively controls" the hiring and firing, work schedules, conditions of employment, and compensation of technicians. Opp. 22. Instead, the complaint alleges that DirecTV's contracts with suppliers include terms that require drug testing and training of technicians, govern certain aspects of the contractors' delivery of installation services, and provide for payment; and that DirecTV's dispatch system is used to coordinate customer visits. See Pet. 6-7. Such arrangements frequently have been found insufficient to create joint-employment relationships. See *id.* at 24.

Indeed, the district court concluded that these alleged facts were insufficient to make DirecTV respondents' joint employer under the previously settled approach. Pet. App. 46a-47a. Applying its new standard, the court of appeals reached the opposite conclusion. *Id*. at 26a-30a. The facts and procedural posture of this case therefore make it an excellent vehicle for assessing the new standard's validity.

4. Respondents next argue that the Fourth Circuit's decision is faithful to the FLSA's broad language and to the regulation addressing joint employment under the FLSA. Opp. 22. Of course, that would not be a reason for declining to resolve the split, even if they were right. But in fact, they are mistaken.

Respondents first note that the FLSA's definition of "employee" is broad and extends to "workers 'who might not qualify as [employees] under a strict application of traditional agency law principles.'" Opp. 24 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 326 (1992)). That is beside the point. The eight circuits whose standards the Fourth Circuit rejected also were mindful of the FLSA's breadth and remedial purposes. See, *e.g., Bonnette* v. *California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) ("The definition of 'employer' under the FLSA is not limited by the common law concept * * * and is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes."). Respondents never argue that the standards applied by other circuits are too narrow or fail to implement the FLSA's language or purposes.

More to the point, respondents identify nothing in the FLSA that justifies reorienting the vertical joint-employment inquiry away from the employer-employee relationship. Nor could they, because the FLSA's language indicates that the focus must remain on that relationship. See 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly or indirectly in the interest of an employer *in relation to an employee*.") (emphasis added).

Respondents are similarly unable to defend the Fourth Circuit's misinterpretation of the joint-employment regulation. As we noted in the petition (at 30), the regulation states that joint employment exists when two "*employers*" are "not completely disassociated" from one another with respect to the employee. Opp. 23 (quoting 29 C.F.R. § 791.1(2)) (emphasis added). The Fourth Circuit's standard, however, finds joint employment based on an association

between two "entities" that may nor may not qualify as employers independently. See *Salinas*, 148 F.3d at 141 ("the first step of the joint employment inquiry * * * turns on the relative association or disassociation between entities with respect to establishing the essential terms and conditions of a worker's employment"). Thus, while the regulation *assumes* that each putative joint employer qualifies as an "employer" independently, the Fourth Circuit omits that requirement. Respondents neither acknowledge nor defend that deviation from the regulation.

Instead, respondents quibble with the distinction between "vertical" and "horizontal" joint employment. Opp. 26-27. We explained that the FLSA joint-employment regulation is understood by the Department of Labor ("DOL") and courts to supply the standard for evaluating claims of "horizontal" joint employment—where the question is whether multiple employment relationships are joint or separate. See Pet. 31-32. As respondents correctly note (Opp. 26), a DOL Administrator's Interpretation which made this point and which we cited in the petition has since been withdrawn by the new Administration.[1] But the DOL has not renounced this interpretation of its regulation. Indeed, the agency employed the same distinction in another publication that has not been withdrawn. See U.S. Dep't of Labor, Fact Sheet #35, Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal

[1] See DOL News Release, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance* (June 7, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170607.

Agricultural Worker Protection Act (MSPA) (Jan. 2016), https://www.dol.gov/whd/regs/compliance/whdfs35.pdf) (Pet. 31, 32).

Respondents also point out that the regulation has been cited in cases involving claims of vertical joint employment. Opp. 27. But that again misses the point. Although some decisions quote the joint-employment regulation, no other circuit has adopted the regulatory language concerning the "association" among employers as the standard for imposing joint-employer liability when the existence of an employment relationship is disputed. Only the Fourth Circuit has done so.

Respondents contend that concerns about the breadth of the Fourth Circuit's standard are misplaced because liability will attach "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." Opp. 26 (quoting *Salinas*, 848 F.3d at 141). No other circuit holds that merely "play[ing] a role" in establishing the terms and conditions of a worker's employment is sufficient to create an employment relationship under the FLSA. The Fourth Circuit's adoption of such a standard thus counsels strongly in favor of review.

5. Respondents dismiss as "speculative" our contention that the Fourth Circuit's new test will expand joint-employer liability. Opp. 29. Their insistence on the immateriality of the court's ruling is baseless.

Respondents first intrepidly state that "the approach articulated by the Fourth Circuit is not a new

standard." Opp. 28. But the court of appeals *announced* that it had "articulated a new standard." Pet. App. 21a. The new standard is meaningfully different from existing standards. See pages 2-5, *supra.*

Respondents next accuse us of failing to point to a case in which the standard made a difference. Opp. 29. But even a quick review of decisions applying the prevailing approach belies that contention. In *Layton* v. *DHL Exp. (USA), Inc.*, 686 F.3d 1172 (11th Cir. 2012), for example, the Eleventh Circuit considered a claim that DHL, a provider of shipping services, was a joint employer of couriers hired by third-party contractors to deliver packages. DHL required background checks, supervised the couriers' loading of packages, set standards for and audited the couriers' trucks and uniforms, and communicated with the couriers throughout the day. *Id.* at 1178-79.

Because DHL and its contractors shared responsibility for supervising the couriers and determining their working conditions, they likely would be deemed joint employers under the Fourth Circuit's standard. Applying the standard that prevails everywhere else instead, the Eleventh Circuit assessed "the economic realities of the relationship between DHL and [the couriers]." *Id.* at 1178. Concluding that "DHL did not exert control as an employer would have" and that the couriers "were not economically dependent upon DHL"—a consideration that the Fourth Circuit deemed irrelevant to the joint-employment inquiry—the Eleventh Circuit held that DHL was not the couriers' joint employer. *Id*. at 1178, 1181.

Given these starkly different approaches, it would be astonishing if the Fourth Circuit's standard—which was purposefully designed to affect

outcomes—were to turn out to make no difference. But the mere *prospect* of inconsistent results is problematic. As the amicus briefs explain, the Fourth Circuit's departure from settled law will create uncertainty about businesses' legal obligations and encourage the proliferation of novel joint-employment claims. See COLLE Amicus Br. at 5-8; EEAC Amicus Br. at 15-24; U.S. Chamber of Commerce, *et al.* Amicus Br. at 19-21.

Respondents argue that entities "can protect themselves through indemnification agreements" and "by monitoring the wage payment practices of those to whom they delegate such responsibilities." Opp. 29. But these measures are costly and defeat the efficiency that is the principal goal of these arrangements. See AHLA, *et al.* Amicus Br. at 25-27. Respondents' suggestion that companies modify their business arrangements to accommodate the Fourth Circuit's unique test thus underscores the need for review.

6. Finally, respondents argue that the Court should deny review because the House has passed legislation narrowing the definition of joint employment under the FLSA. Opp. 30. If anything, their argument supports granting review.

Although respondents don't say so, the House bill to which they refer was in part a *response* to the Fourth Circuit's decision. The House Report devotes three paragraphs to *Salinas*—and recognizes that it set forth "an expansive" "new test" that "seems to make *any* relationship or collaboration between two businesses a joint employer relationship because the two entities will not be completely disassociated from each other, even if the supposed joint employer has no direct authority or control over the other entity's

employee." H. Rep. No. 115-379, at 9 (2017). The House Report thus confirms both that *Salinas* was a deviation from the existing standard and that the issue is of great importance.

That the House passed a bill that would overturn *Salinas*, moreover, is no reason for this Court to stay its hand. As of December 4, 2017, a companion bill had not been introduced in the Senate. See www.congress.gov/bill/115th-congress/house-bill/3441 (reviewed on Dec. 4, 2017). And, of course, it would take 60 votes in that chamber to obtain passage—the prospects for which in the current political environment are speculative at best. And even if such a bill were to pass the Senate, it would presumptively be prospective only (see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)), meaning that all alleged FLSA violations predating enactment would be affected by the existing circuit split. Only this Court can solve that problem.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

COLIN D. DOUGHERTY
Fox Rothschild LLP
10 Sentry Parkway,
Suite 200
P.O. Box. 3001
Blue Bell, PA 19422
(610) 397-6500

EVAN M. TAGER
Counsel of Record
MIRIAM R. NEMETZ
MATTHEW A. WARING
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
etager@mayerbrown.com

Counsel for Petitioners

DECEMBER 2017