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 OF COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Circuit misinterpreted the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. (FLSA), and its implementing regulation in holding—in conflict with the decisions of eight other circuits—that a claim of vertical joint employment must be evaluated by focusing on whether the putative joint employers are "completely disassociated" from one another with respect to the putative employee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTEREST OF *AMICUS CURIAE*[1]

The Council on Labor Law Equality (COLLE), a national association of employers, deals regularly with the Fair Labor Standards Act (FLSA). COLLE represents FLSA-covered employers in virtually every business sector. COLLE also monitors the Department of Labor (DOL) and the courts in their application of the FLSA. Through *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation and interpretation of national labor policy on issues affecting a broad cross-section of industries.

The issue of joint employment presented in the petition is of significant concern to COLLE and its members. If permitted to stand, the novel rule adopted by the Fourth Circuit (in conflict with every other court of appeals to confront the issue) will upend traditional relationships between businesses and contractors. It will override well-established boundaries between parent corporations and subsidiaries, and between franchisors and franchisees. And it will increase litigation—especially class actions that previously would have been dismissed early in the process. Particularly

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[1] Pursuant to Rule 37.6, the *amicus* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amicus* files this brief with the written consent of all parties, copies of which are on file in the Clerk's Office. All parties also received timely notice of this filing.

given the explosion of FLSA litigation across the Nation, these threats are real and substantial, and *amicus* respectfully requests that the Court grant the petition and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

In "articulat[ing] a new standard" for analyzing "joint employment relationship[s]" under the FLSA, *Hall* v. *DirecTV, LLC*, 846 F.3d 757, 768 (4th Cir. 2017) (citation omitted), the Fourth Circuit has broken from every other court of appeals that has decided the issue. That court now holds that a joint-employment relationship exists whenever a multi-factor test discloses that "two or more persons or entities 'are not completely disassociated' with respect to a worker" and share responsibility even "indirectly" for "the essential terms and conditions of the worker's employment." *Ibid.* (quoting *Salinas* v. *Comm. Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017)). That novel standard subjects businesses to liability under the FLSA—regarding things such as overtime payments—for employees they have not hired, paid, or controlled in a way traditionally understood to constitute an employer relationship. In doing so, the Fourth Circuit's new standard will upset long-standing commercial relationships in at least two ways.

First, by allowing mere indirect influence over a worker's daily responsibilities to create "joint employment," the Fourth Circuit's rule radically alters

existing business relationships by converting virtually every contract between a business and a vendor into an "employment agreement" that makes the business a joint employer of the vendor's employees. As a practical matter, when a business enters into a contract with a vendor to provide goods or services, the contract nearly always sets standards and expectations that the vendor must meet. Now, however, under the Fourth Circuit's novel rule that these expectations suffice to establish the requisite "control" of the *vendors*' employees, nearly every contract between a business and a vendor threatens to establish a joint-employment relationship—even though such contracts have never before been thought to give rise to such a relationship. The consequences of such a radical shift are pervasive and significant, and threaten to generate liability on overtime payments for businesses that choose to contract for work rather than hire their own employees to do it.

Second, the Fourth Circuit's new rule threatens to create tremendous uncertainty and unpredictability by disregarding well-established corporate forms. Most significantly, the rule erases the fundamental distinction between parents and subsidiaries by creating a legal test that will virtually always make them joint employers—based on nothing more than the relationship that parents inevitably have with their subsidiaries. Similarly, the Fourth Circuit's rule negates a key attribute of the relationship between a franchisor and a franchisee, whereby the franchisor legitimately expects to be able to set uniform

requirements, work product measures, and the like. All of these now become the potential basis for a finding of "joint employment" by the franchisor of the franchisee's employees—who were never chosen, hired, or paid by the franchisor.

This Court's review is needed now to restore uniformity on this exceedingly important, recurring issue of law before it results in serious practical consequences for businesses large and small alike across the Nation, who are now faced with two entirely different regimes for determining the fundamental question of who is an employer.

ARGUMENT

I. This Court's Review Is Needed Now Because The Fourth Circuit's "New Standard" For Determining Joint-Employer Liability Radically Alters Widespread, Existing Contractual Relationships.

Under the Fourth Circuit's self-proclaimed "new standard," routine contractual provisions setting out the scope of a subcontractor's undertaking will now expose businesses to joint-employer liability under the FLSA. *Hall*, 846 F.3d at 769. These provisions are standard in virtually every service contract—*e.g.*, specifying that a cleaning service will clean particular office buildings on particular days, or that a contractor will renovate a particular building to particular specifications, or that a catering service will staff a

particular event at a particular time. No business would contract with a service provider without measurable, basic guidelines as to what assistance is sought, when, and how. Yet now, under the Fourth Circuit's new standard, every service contract that includes these routine provisions could give rise to an unintended employment relationship—each and every time a business engages a contractor to perform services.

Indeed, under the Fourth Circuit's new "non-exhaustive" six-factor standard (see Pet. at 19-21), a business need not have "primary—authority over all—or even most—aspects of a worker's employment * * * to qualify as a joint employer." *Hall*, 846 F.3d at 770. Moreover, the court made clear that "'*one factor alone*' * * * can give rise to a reasonable inference" of joint-employer status. *Id.* at 771 (emphasis added) (quoting *Salinas*, 848 F.3d at 142). Merely having the ability to "indirectly" control the work of an individual employed by another company can therefore trigger joint-employment liability under the Fourth Circuit's new standard. But this sort of indirect influence is pervasive in common commercial relationships.

Individual grocery stores, for instance, may contract with dozens of distributors to deliver meat, produce, and other products to stock their shelves—and those distributors engage drivers to deliver the products to the stores. The stores undoubtedly set parameters for those deliveries—the delivery day (to keep up with customer demand), a time window for arrival (so that dozens of trucks are not backing up to the

loading dock all at once), and so forth. In this way, the grocery stores are at least "indirectly" controlling certain aspects of the work of the distributor's drivers. Yet no one would reasonably think that the delivery driver is somehow an employee of the grocery store. The Fourth Circuit's new standard, however, would seem to countenance precisely that result. Assuming that the same delivery driver stops at more than one grocery store, he or she arguably would be employed by all of those stores. Any legal standard that produces such nonsensical results cannot be the correct one. To the contrary, it engenders precisely the sort of "unfair surprise" that this Court has "long warned" against. Cf. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (citations omitted).

Even providing negative feedback on a contractor's employee could lead to joint-employment liability under the Fourth Circuit's new standard. That is because a court may not only consider, but also find dispositive, whether a business plays a role "indirectly" in the hiring or firing of a worker, or has the ability to "modify the terms or conditions of the worker's employment." Certainly, reporting that a contractor's employee showed up late, or completed a job with poor workmanship, would have at least an "indirect" effect on whether the employee was fired or his employment terms modified by being suspended or retrained. Any of these circumstances could result in joint-employment liability under the Fourth Circuit's standard.

Also potentially dispositive under the Fourth Circuit's standard is whether the work is performed "on a

premises owned or controlled by" the putative joint employer. *Hall*, 846 F.3d at 770. Any time a business engages a contractor to perform services at its offices or facilities—perhaps to wash windows, park cars, or provide security—the business will now risk being found a joint employer of the contractor's workers. The Fourth Circuit's standard will thus result in joint-employer liability in common circumstances never before thought to engender that liability.

The Fourth Circuit's attempt to limit the breath-takingly broad application of its new standard to what it dubbed the "essential terms and conditions" of a worker's employment does not serve as a restraint on the Fourth Circuit's wide-reaching standard. The instant case proves the point. If, as here, contractually agreeing that a contractor's employees will have the baseline qualifications to perform the job for which the customer is contracting counts as providing "hiring criteria" that are "essential terms and conditions" of employment, one is hard-pressed to identify what would not qualify. And, of course, courts will be left to guess which terms and conditions are "essential," given the absence of any definition of "essential terms and conditions" in the Fourth Circuit's decision.

In sum, it is difficult to imagine applying the Fourth Circuit's test to any service contract *without* finding joint-employment liability, given that all service contracts have performance specifications that at least indirectly affect the vendor's employees' scope of work, assignments, scheduling, work hours, and so forth. No business would sign a contract with a vendor

stating, "we will pay you $100,000 a month to do something beneficial for us. You figure out the specifics, and we will tell you on the next renewal date whether or not we approve of your performance." Anything more specific than that, however, risks creating joint-employer liability under the Fourth Circuit's new standard. As eight other circuits agree, that makes no sense and threatens to upend contracting parties' reasonable expectations in countless routine, commonplace service contracts. See, e.g., *Gonzalez-Sanchez* v. *Int'l Paper Co.*, 346 F.3d 1017, 1021-22 (11th Cir. 2003).

II. If Permitted To Stand, The Fourth Circuit's New Standard Would Fundamentally Alter Corporate Relationships, Including Parents And Subsidiaries and Franchisors and Franchisees.

The proper inquiry—as it always is for determining if a worker is *de facto* employed by a business—*deals with the relationship between the company and the worker*. See, e.g., *In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.*, 683 F.3d 462, 468-69 (3d Cir. 2012); *Gray* v. *Powers*, 673 F.3d 352, 355 (5th Cir. 2012). It focuses on the degree of control exercised by the putative true employer, *and demands that it be significant*. See, e.g., *Whitaker* v. *Milwaukee Cty., Wis.*, 772 F.3d 802, 810 (7th Cir. 2014) ("[A]n entity other than the actual employer may be considered a 'joint employer' only if it exerted significant control over the employee.") (citation and emphasis omitted); see also *In re Enterprise*, 683 F.3d at 468 ("Although

the *Bonnette* court set out four specific inquiries to determine joint employment status, close examination of those inquiries reveals that they serve to identify whether the alleged joint employer exerts significant control over the relevant employees.").

The Fourth Circuit has jettisoned these long-accepted principles, instead making any minimal relationship *between the alleged employers* central. In so doing, the decision below radically alters not only traditional contract law, as discussed above, but well-established corporate forms. Under the Fourth Circuit's decision, a corporation may be treated as an alter ego of one of its subsidiaries (or even one of its contractors) simply by providing instructions to the contractor on how it would like a job performed. See *Salinas*, 848 F.3d at 149 (allowing joint-employer liability when an employer and a defendant "codetermine[] the key terms and conditions of [a] worker's employment" in any sense).

The law widely recognizes, however, the distinct legal identities of parent and subsidiary corporations. See, e.g., *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 475 (2003) (noting that a "corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary"). At the same time, a parent company's decisions regularly affect its subsidiaries. For example, a parent often sets a tone for the business culture that filters down to its subsidiaries, impacting the way that downstream employees approach their jobs and carry out their work. Thus parent corporations arguably will

often *indirectly* "control" the employees of its subsidiaries.

The Fourth Circuit, however, has now established FLSA liability for a company that even indirectly controls the employees of another company, in any regard. This collapses the distinct parent-subsidiary relationship that the law commands should be respected. See, e.g., *Dow Chemical*, 326 NLRB 288 (1998) (holding that typical parents and subsidiaries are not a sole "employer" for bargaining purposes).

In the case of franchisors and franchisees, the franchisor will likely develop things such as employee hiring or work performance standards ahead of time for businesses that will carry their corporate name. Indeed, under the Lanham Act, a franchisor that fails to maintain sufficient control over its marks—including policing licensee activities for misuse—will be considered to have engaged in "naked franchising" and thereby abandoned the mark. See 15 U.S.C. § 1064(5)(A). A franchisor could not, though, obey the Lanham Act's commands without risking liability as a joint employer under the Fourth Circuit's new standard.

That conflict is but one of the serious, unintended consequences of the decision below, which breathtakingly extends FLSA liability and essentially converts the FLSA into a strict liability statute where every business is an employer of every employee it so much as indirectly affects. Under the Fourth Circuit's standard, FLSA litigation—already a rapidly increasing component of federal-court dockets nationwide—can

only grow as commonplace business relationships give rise to joint-employer status and thus FLSA liability. This Court's review is needed now to avoid that unfortunate result, reject the Fourth Circuit's new standard, and restore uniformity on this exceedingly important, frequently recurring question of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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