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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE HR POLICY ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL RETAIL FEDERATION, AND THE RETAIL LITIGATION CENTER, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## TABLE OF CONTENTS

**TABLE OF CONTENTS**
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## TABLE OF AUTHORITIES
(continued)

**Page(s)**



**STATUTES**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES**
(continued)

**Page(s)**

## INTERESTS OF THE *AMICI CURIAE*[1]

**The Chamber of Commerce of the United States of America** is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the interpretation of the federal labor laws. *See*, *e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016); *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

**HR Policy Association** represents the most senior human resources executives in more than 380 of the largest corporations doing business in the United States. Collectively, these companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. As America's largest employers, HR Policy Association member companies have

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in this case received notice of the intention to file this brief at least 10 days before its due date. Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs with the Clerk, and Respondents consented to the filing of this brief through their counsel of record by email on June 22, 2017.

employees and business relationships with third-party entities in all 50 states.

**The National Association of Manufacturers** (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

**The National Retail Federation** (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs—42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF advocates for its members on a broad range of matters, including labor and employment issues. NRF also files briefs as *amicus curiae* in cases of importance, such as this one.

**The Retail Litigation Center, Inc.** (RLC) is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. The RLC's members include many of the

country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. The RLC frequently files *amicus* briefs on behalf of the retail industry.

*Amici* have a strong interest in the outcome of this case. In reliance on over 30 years of precedent, many of *amici*'s members have engaged in and structured contracting, franchising, and other business relationships with third-party organizations with the understanding that those relationships do not create joint employment liability under the Fair Labor Standards Act. The decision of the U.S. Court of Appeals for the Fourth Circuit in this case has the potential to disrupt longstanding and settled expectations among the courts, businesses, and the public.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents questions that are extraordinarily important to American commerce. In particular, this case addresses standards applicable to arguments that two entities jointly employ a worker and are jointly liable for obligations due that worker under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq*. There is virtually no industry—retail, construction, agriculture, janitorial services, manufacturing, warehousing and logistics, hospitality—unaffected by legal disputes over this issue. Joint employment liability has become the theory *du jour* among FLSA plaintiffs in recent years. These sorts of cases have exploded, particularly so-called "vertical" joint employment claims in which a plaintiff asserts that a franchisor employs an independent franchisee's employees or that a company jointly employs the employees of a third-party company engaged to provide services to the first company.

In the decision below and a companion case, the U.S. Court of Appeals for the Fourth Circuit departed from eight other courts of appeals and announced a new rule that radically alters the law governing FLSA joint employment claims and the scope of the Act itself. The Fourth Circuit would now treat any business as an FLSA joint employer if it is "not completely disassociated" from a worker's direct employer with respect to the terms of the worker's employment. The test applies even if a business has *no* direct relationship with the putative employee. Likewise, it applies if the business has only a limited

relationship, which standing alone would not itself support a finding of employer status.

By changing the law in these ways, the decision below promises to penalize and deter economically sensible business arrangements, including (but not limited to) relationships between franchisors and franchisees and between general contractors and subcontractors. Businesses and workers have understood for decades that such arrangements do not create FLSA liability in the ordinary course. The Fourth Circuit's expansive new test thus threatens a flood of nationwide collective action lawsuits, challenging years of past conduct by companies that could not have reasonably foreseen that their transactions might entangle them in FLSA suits. Immediate resolution therefore is necessary to avoid the potential imposition of extensive unanticipated liability. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-56 (2012).

Additionally, the Fourth Circuit's new test puts that court into direct conflict with the other courts of appeals, which evaluate vertical joint employment claims by assessing whether the putative joint employer exercises the authority and control over the employee that is typical of employment relationships. Such a split is a particularly pernicious result in the context of FLSA litigation, where geographic consistency is necessary to prevent forum shopping and ensure that a consistent rule applies to American businesses nationwide.

Moreover, the Fourth Circuit's new rule is flatly incorrect. It is inconsistent with the case law of this

Court, it is founded on a misreading of a 1958 Department of Labor regulation that in fact addresses a distinct question, and it relies on the invalid canon that "remedial" statutes should be broadly construed.

For these reasons, and for those raised by Petitioners, this Court should grant the petition for a writ of certiorari.

## ARGUMENT

### I. THIS CASE RAISES AN ISSUE OF GREAT IMPORTANCE TO THE AMERICAN ECONOMY.

Today, FLSA cases are near record levels. During the twelve-month period ending March 31, 2016, plaintiffs filed 9,063 FLSA cases in the federal district courts, compared with 5,507 patent cases, 1,070 antitrust cases, and 1,053 securities cases. *See* Administrative Office of the United States Courts, Federal Judicial Caseload Statistics Table C-2 (June 2017); *see also* Pet. 22.

In these cases, the question of what entity (if any) is the plaintiffs' employer is central, since the statute's obligations run only from "employers" to their "employees." *See*, *e.g.*, 29 U.S.C. § 206(a) ("[e]very employer shall pay to each of his employees" at least the minimum hourly wage); *id.* § 207(a)(1) ("no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives [overtime] compensation").

A related question in many cases is whether two entities constitute "joint employers," who jointly employ a worker for purposes of the Act. Cases raising joint employment issues (and/or related

independent contractor issues) constitute a significant and increasing percentage of the total number of FLSA claims. In recent years, novel joint employment claims have ensnared companies in all industries, including in "the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries." U.S. Department of Labor, Fact Sheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) (revised Jan. 2016), available at www.dol.gov/whd/regs/compliance/whdfs35.pdf; *see also* Pet. 22 n.3 ("A Westlaw search of district court decisions in 2016 revealed over 100 decisions addressing claims of joint employment under the FLSA.").

The consequences of a joint employment finding can be dramatic for a business.

*First*, a joint employment finding can lead to overtime obligations that would not otherwise exist. In most instances, a company can disregard hours worked for another entity when calculating overtime due an employee. *See* 29 C.F.R. § 791.2(a) (distinguishing "joint employment" from "separate and distinct employment"). But where entities are joint employers, "all hours worked by [an] employee on behalf of each joint employer are counted together to determine whether the employee is entitled to overtime pay under the FLSA." Pet. App. 13a-14a; *see also Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 134 (4th Cir. 2017).

*Second*, and more importantly, each joint employer is "jointly and severally liable for *any* violations of the

FLSA's substantive provisions." Pet. App. 4a (emphasis added); *see also Salinas*, 848 F.3d at 134 & n.5. This is so even if the other joint employer is wholly responsible for the violation, and even if the entity being held jointly liable had no practical means to prevent it.

Historically, however, the cases have consistently held that various types of business arrangements do not create significant risk of joint employment liability. *See*, *e.g.*, *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014) (rejecting a claim that an employee of a restaurant franchisee was also an employee of the franchisor); *In re Enterprise Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462 (3d Cir. 2012) (rejecting a claim that a car rental company's parent holding company was a joint employer of its subsidiaries' employees); *Johnson v. Serenity Transp., Inc.*, 141 F. Supp. 3d 974, 981 (N.D. Cal. 2015) (rejecting a claim that a funeral provider was a joint employer of mortuary drivers); *Lepkowski v. Telatron Mktg. Grp., Inc.*, 766 F. Supp. 2d 572 (W.D. Pa. 2011) (rejecting a claim that a financial services company was a joint employer of telephone operators); *Tafalla v. All Florida Dialysis Servs., Inc.*, No. 07-80396, 2009 WL 151159 (S.D. Fla. Jan. 21, 2009) (rejecting a claim that a physician practice was a joint employer of dialysis nurses); *cf. Patterson v. Domino's Pizza, LLC*, 333 P.3d 723, 725, 732-34, 739 (Cal. 2014) (rejecting a similar claim under California law, and noting the "sound and legitimate reasons for business format contracts … to allocate local personnel issues almost exclusively to the franchisee").

It is axiomatic that companies "negotiate[] and structure[] their compensation plans" against "background understanding[s]" of legal principles. *Encino Motorcars*, 136 S. Ct. at 2126 (describing and discussing the importance of "decades of industry reliance" upon a longstanding interpretation of the FLSA). As such, it is plain that a dramatic and unexpected change to the standards applied in joint employment cases has the potential to be highly disruptive. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (recognizing that "[p]redictability is valuable to corporations making business and investment decisions").

## II. THIS FOURTH CIRCUIT'S NEW TEST CREATES A CIRCUIT SPLIT.

### A. The Fourth Circuit's novel approach to questions of FLSA joint employment creates a conflict among the courts of appeals.

When faced with a claim that an entity is a joint employer of a worker who is directly employed by another entity, this Court and the lower courts have long looked to the "economic reality" of the relationship between the worker and the putative joint employer. *See*, *e.g.*, *Falk v. Brennan*, 414 U.S. 190 (1973); *Orozco*, 757 F.3d at 448; *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003); *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

However, in the decision below and *Salinas*, 848 F.3d 125—a companion case decided by the same

panel on the same day[2]—the Fourth Circuit rejected this well-accepted framework in favor of a "new standard" of its own devising. Pet. App. 21a ("instead of adopting a previously existing test, we articulated a new standard"); *see also Salinas*, 848 F.3d at 140 ("we now set forth our own test").

According to the Fourth Circuit's new test:

> [T]he "fundamental question" … is "whether two or more persons or entities are 'not completely disassociated' with respect to a worker such that the persons or entities share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."

Pet. App. 21a (quoting *Salinas*, 848 F.3d at 129-30). To qualify as "not completely disassociated" under this test, a business need "only play a role in establishing the key terms and conditions of the worker's employment." *Id.* at 24a. And, if a worker performs work for entities that are "not completely disassociated," then:

> [C]ourts must aggregate the levers of influence over the key terms and conditions of the worker's employment exercised by *all* of the entities when determining whether the worker is an "employee" within the meaning of the FLSA.

*Id.* at 17a.

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[2] The Fourth Circuit denied the petition for rehearing en banc in *Salinas* on February 22, 2017. *See Salinas*, 848 F.3d 125 (No. 15-1915), ECF No. 78. No petition for a writ of certiorari has been filed.

There is no question that the Fourth Circuit's novel approach creates a circuit split. In fact, the court acknowledged as much. It noted that its sister circuits (and, until now, district courts within the Fourth Circuit) apply "multifactor balancing tests" derived from "the Ninth Circuit's decision in *Bonnette*" to decide cases like this one. *Salinas*, 848 F.3d at 135-36. Nevertheless, in the Fourth Circuit's view, every other court has it wrong. *Id.* at 139 (asserting that other circuits have "failed to develop a coherent test"). And, in light of this supposed "confusion" within the federal judiciary, the panel proceeded to "set forth [its] own test." *Id.* at 140.

There is also little question that this new test will likely lead to different outcomes than the established tests of other circuits. For example, in the *Salinas* companion case, the Fourth Circuit acknowledged that, under its test, two entities may be found to be joint employers even if *neither* has sufficient contacts with a putative employee to qualify as his employer standing alone. *See Salinas*, 848 F.3d at 137-38 (stating that "even if two entities do not independently constitute employers under the *Bonnette* test, their combined influence over the terms and conditions of a worker's employment may give rise to liability under the FLSA"). Heretofore, that has not been the law anywhere—all other courts of appeals would classify the worker as an independent contractor, and none would classify either entity as an employer. *See* Pet. App. 19a (acknowledgement by the Fourth Circuit that "our two-step test 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"); *see also id.* at 15a-16a, 18a.

### B. The lopsidedness of the split does not weigh against certiorari.

To be sure, the circuit split that Petitioners have identified to this Court—and that the Fourth Circuit has acknowledged—is lopsided, with eight other courts of appeals applying a different standard than the Fourth Circuit. *See* Pet. 14-21. For multiple reasons, that is no reason to deny review.

*First*, the circuit split will not go away without this Court's intervention. Below, Petitioners' petition for rehearing en banc was rejected summarily. No judge even called for a vote, and the Fourth Circuit likewise rejected a petition for rehearing en banc in the companion *Salinas* case with no judge calling for a vote. Pet. App. 49a-50a; *Salinas*, 848 F.3d 125 (No. 15-1915), ECF No. 78. It is therefore apparent that the Fourth Circuit will adhere to its deliberate decision to create a circuit split. Similarly, there is no reasonable prospect that all eight other courts of appeals will jettison their own well-settled standards in favor of the Fourth Circuit's novel, radically broad, and unsupported test.

*Second*, geographic consistency is particularly important in this area of the law. Many businesses operate across multiple circuits and will therefore be subject to multiple competing standards for determining compliance with the FLSA. But it is often impractical or impossible for businesses to adopt different contractual arrangements in different circuits. The Fourth Circuit's decision will accordingly have an outsized impact, forcing many

businesses effectively to treat the Fourth Circuit's new test as the law of the land.

*Third*, the Fourth Circuit's new standard will invite widespread forum shopping against businesses that have long relied on contractual arrangements that do not create joint employment relationships under the settled law of other circuits. The FLSA allows for nationwide collective actions. *See* 29 U.S.C. § 216(b). If the decision below stands, collective actions with joint employment claims against national employers are more likely to be filed in the Fourth Circuit rather than in the circuits that have adopted the historic, well-settled, and less expansive readings of the FLSA. Allowing further percolation, then, would offer little benefit and instead would merely invite forum shopping.

## III. THE FOURTH CIRCUIT'S NEW TEST IS WRONG.

### A. The Fourth Circuit's new test is inconsistent with this Court's case law.

The Fourth Circuit's decision is erroneous in multiple respects. At the outset, it fails to follow this Court's teaching.

Specifically, in *Falk*, 414 U.S. 195, this Court addressed a question analogous to the one presented below by looking to the relationship between the putative joint employer and the putative employee. In that case, an apartment management company contracted with the owners of apartment buildings to "perform[] all the functions required for leasing, maintaining, and operating the apartment buildings." *Id.* at 192 n.4. It was clear that the maintenance workers who performed those tasks were "employees

of the building owners." *Id.* at 195. But, for purposes of the FLSA, were they also employees of the management company?

This Court concluded that the management company was "also an 'employer' of the maintenance workers." *Id.* at 195. It reached this conclusion through an assessment of the control that the company exercised over the maintenance workers. *Ibid. (*noting the management company's "substantial control of the terms and conditions of the work of these employees").

For its part, the Fourth Circuit cited *Falk* for the proposition that "[t]he Supreme Court has long recognized that two or more entities may constitute joint employers for purposes of the FLSA." *Salinas*, 848 F.3d at 134-35. Yet the Fourth Circuit's new test bears no relationship to this Court's analysis. Indeed, in reaching its decision in *Falk*, this Court did not even mention the scope of the association between the two companies alleged to be employers (i.e., the building owners and the management company). Rather—like the courts that the Fourth Circuit rebuffed, *see* Pet. App. 20a-21a (quoting *Salinas*, 848 F.3d at 137)—this Court focused its analysis on the management company's relationship with the putative employees.

The Fourth Circuit's failure to follow the path marked by the *Falk* Court is an inexplicable error.

### B. The Fourth Circuit's new test is based on a misreading of a Department of Labor regulation.

The Fourth Circuit also erred by misapplying an FLSA regulation. The court purported to draw its

new test from a 1958 Department of Labor regulation titled "Joint employment." 29 C.F.R. § 791.2; *see* Pet. App. 13a-14a; *Salinas*, 848 F.3d at 137-41. But that regulation does not address the question for which the Fourth Circuit crafted its new test: Does an employment relationship exist between a worker and two or more businesses? Instead, the regulation addresses a distinct question, and one that arises only after employee status has been established: If a worker has employment relationships with two or more companies, should those employment relationships "be considered joint employment or separate and distinct employment"? 29 C.F.R. § 791.2.

In other words, suppose that someone is an employee of Restaurant A and works there on Mondays, Tuesdays, and Wednesdays. In addition, suppose that the individual is also an employee of Restaurant B (a nominally separate establishment) and works there on Thursdays and Fridays. In that context, the regulation that the Fourth Circuit relied upon, 29 C.F.R. § 791.2, operates to assess whether the worker's employment at Restaurant A and his employment at Restaurant B should be considered joint for purposes of the FLSA (because, for example, the restaurants were under common management and had substantial additional economic ties). But the regulation says nothing about the antecedent question—the one asked by the Fourth Circuit—of whether *any* employment relationship exists in the first place.

The text of the regulation makes this clear. The regulation indicates that it *presupposes* that the worker in question is an employee of two (or more)

businesses by, among other things, consistently referring to the businesses as "employers" and the worker as an "employee." As relevant here, the regulation states:

> A determination of whether … employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more *employers* are acting entirely independently of each other and are completely disassociated with respect to the *employment* of a particular *employee*, … each *employer* may disregard all work performed by the *employee* for the other *employer* (or *employers*) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the *employee* is employed jointly by two or more *employers*, i.e., that employment by one *employer* is not completely disassociated from employment by the other *employer(s)*, all of the *employee's* work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

29 C.F.R. § 791.2(a) (emphases added); *see also* 29 U.S.C. § 203(d) (defining "Employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee"); *id.* § 203(e)(1) (defining "employee" to mean "any individual employed by an employer").

Tellingly, when the Fourth Circuit cited the regulation's language, it replaced the key words "employers" and "employee" with the more indefinite

terms "persons or entities" and "worker." *See*, *e.g.*, Pet. App. 18a; *Salinas*, 848 F.3d at 129-30. The Fourth Circuit thus put the cart before the horse by using a regulation applicable only after a worker has been determined to be an FLSA "employee" in order to make that underlying determination.

The Department of Labor does not read the regulation as the Fourth Circuit did. *Cf. Christopher*, 567 U.S. at 158 ("[W]hile it may be possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing,' the 'more plausible hypothesis' is that the Department did not think the industry's practice was unlawful.") (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007) (Posner, J.)). Indeed, in sharp contrast to the new test that the Fourth Circuit adopted, the Department advocated an inquiry based upon the relationship between the putative employee and the putative employer:

> When determining whether workers employed by a subcontractor who provides the workers to work for a contractor are jointly employed by the contractor, *the relationship between the contractor and the subcontractor* does *not* determine whether the contractor is a joint employer [with the subcontractor]. Rather, the economic realities of *the contractor's relationship with the workers* determines whether it is a joint employer.

Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *Salinas*, 848 F.3d 125 (No. 15-1915), 2016 WL 590564 at *21 (emphases added); *see also id.* at *1. In short, the Department of

Labor has never endorsed the Fourth Circuit's novel approach. *See id.* at *1, 21.

### C. The Fourth Circuit's new rule rests on the baseless canon that "remedial" statutes must be construed broadly.

The court below further erred by "invoking the made-up canon" that the FLSA should be construed broadly because it is a "remedial" statute. *Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J., dissenting). Specifically, the Fourth Circuit stated that it was rejecting the standards applied by its sister circuits as a result of its view that "because the Act is remedial and humanitarian in purpose, it should be broadly interpreted and applied to effectuate its goals." *Salinas*, 848 F.3d at 140 (internal quotation marks omitted); *see also* Pet. App. 18a ("Focusing first on the relationship between putative joint employers is essential to accomplishing the FLSA's 'remedial and humanitarian' purpose.").

"There is no basis to infer that Congress means anything beyond what a statute plainly says simply because the legislation in question could be classified as 'remedial.'" *Encino Motorcars*, 136 S. Ct. at 2131 (Thomas, J., dissenting) (citing Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581-86 (1990)). "Indeed, this canon appears to 'rest on an elemental misunderstanding of the legislative process,' viz., 'that Congress intends statutes to extend as far as possible in service of a singular objective.'" *Ibid.* (quoting Brief for Chamber of Commerce of the United States of America et al. as *Amici Curiae* 7, *Encino Motorcars*, 136 S. Ct. 2117 (No. 15-415)

(brackets omitted)); *see also* Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 808-09 (1983).

In reality, "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam); *see also Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2034 (2014). And virtually all statutes aim to remedy some evil, "since one can hardly conceive of a law that is not meant to solve some problem," which means that the canon implausibly implies that *all* statutes must be construed broadly. Scalia, *Assorted Canards*, *supra*, at 583.

The correct rule is that, when a court analyzes the balance struck by Congress in a remedial statute, its goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." *Id.* at 582. The Fourth Circuit did not adhere to that principle here, and this case presents the Court not only with the opportunity to correct that error, but also with the opportunity to jettison the faulty "liberal construction" canon once and for all.

### D. The Fourth Circuit's new rule threatens American businesses with paralyzing uncertainty.

The Fourth Circuit also erred by instituting a highly unpredictable test. This Court has acknowledged that "[p]redictability is valuable to corporations making business and investment decisions." *Hertz*, 559 U.S. at 94. But the Fourth Circuit's new "not completely disassociated" test deprives businesses that operate within its borders of

the ability to predict their obligations under the FLSA.

Despite criticizing its sister circuits for "nebulous factor tests" which "yield[] unpredictable and at times arbitrary results," *Salinas*, 848 F.3d at 137 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1392 (2014) (Scalia, J.)), the Fourth Circuit itself provided six factors for courts to use in determining whether two businesses are "not completely disassociated" with respect to a given worker's labor. *See* Pet. App. 21a-22a. While the multifactor standards applied by other courts have been given more definite meaning through decades of decided cases, the Fourth Circuit's appear to be brand new.

Further draining its test of any power to provide predictability, the Fourth Circuit emphasized that its six broad factors are "nonexhaustive." *Id.* at 21a. And it instructed that the presence of "one factor alone" could be enough to meet the "not completely disassociated" test. *Id.* at 24a (quoting *Salinas*, 848 F.3d at 142).

In a footnote to *Salinas*, the Fourth Circuit confirmed the extent of the uncertainty created by its test. The court explained that "a general contractor that sets the start and end times for all work on a jobsite or establishes site-wide safety protocols *may not* be a joint employer [of its subcontractors' employees] absent additional evidence of the general contractor's codetermination of the essential terms and conditions of the workers' employment." 848 F.3d at 142 n.10 (emphasis added). The Fourth Circuit's own uncertainty over whether such minimal

(and industry-standard) effects on the subcontractors' employees could render the general contractor jointly and severally liable for the subcontractors' FLSA obligations highlights the startling sweep of its rule.

### E. Major expansions of the FLSA must come from Congress, not the courts.

Congress enacted the FLSA nearly 80 years ago. As discussed above, the standard used to determine whether a worker is an "employee" defines the scope of the FLSA and is a matter of vital concern to American businesses. This Court has addressed that question repeatedly over the years, beginning within a decade of the FLSA's enactment. *See*, *e.g.*, *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985); *Falk*, 414 U.S. 190; *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). And the lower courts, like this Court, have consistently addressed that question by looking to the relationship between the putative employee and putative employer.

For decades, businesses have relied on a more or less settled standard for determining whether they have obligations to a given worker. Many business arrangements that are pervasive in the modern economy were created in reliance on existing law.

The Fourth Circuit's decisions in this case and *Salinas* have expanded the law radically. That court's new test jeopardizes many arrangements that make good economic sense by threatening the parties to those arrangements with unanticipated joint and several liability for FLSA violations allegedly

committed by business partners whose actions they can neither monitor nor control.

Twice in recent Terms this Court has rejected attempts by the Department of Labor to introduce novel interpretations that would have upset settled expectations and impermissibly expanded the scope of the FLSA. *See Encino Motorcars*, 136 S. Ct. 2117 (holding that the Department's interpretation of the statutory term "salesman" did not deserve *Chevron* deference); *Christopher*, 567 U.S. 142 (holding that the Department's interpretation of the term "outside salesman" did not deserve *Auer* deference). Likewise, this Court should not countenance a far more sweeping judicial expansion of a major federal statute so long after its enactment. If significant changes are to be made to the FLSA, they should come from Congress.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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