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**

AMICUS CURIAE BRIEF OF AMERICAN HOTEL & LODGING ASSOCIATION, ASIAN AMERICAN HOTEL OWNERS ASSOCIATION, COALITION OF FRANCHISEE ASSOCIATIONS, INTERNATIONAL FRANCHISE ASSOCIATION, AND RESTAURANT LAW CENTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

I. American Hotel And Lodging Association 1

II. Asian American Hotel Owners Association ... 2

III. Coalition Of Franchisee Associations 2

IV. International Franchise Association 3

V. Restaurant Law Center 3

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. The Fourth Circuit's New Joint-Employer Standard Adds To A Clear And Developed Conflict Among The Circuits 6

A. The Commonly Accepted Joint-Employer Tests 6

1. Common Law Agency 7

2. Economic Realities 8

B. There Are Dozens Of Different Joint-Employer Tests That The Circuits Use Now 8

1. First Circuit 9

2. Second Circuit 10

TABLE OF CONTENTS – Continued

Page

3. Third Circuit 11
4. Fourth Circuit 12
5. Fifth Circuit 12
6. Sixth Circuit 13
7. Seventh Circuit 13
8. Eighth Circuit 14
9. Ninth Circuit 14
10. Tenth Circuit 15
11. Eleventh Circuit 15
12. D.C. Circuit 16

II. Federal Agencies And Private Litigants Have Recently Made The Joint-Employer Standard A Prominent Issue Of Federal Law, Especially For The Franchise Industry....... 17

III. *Salinas/Directv* Makes It Too Challenging For A Franchisor To Avoid A Joint-Employer Finding – A Result Which Has An Adverse Domino Effect On The Entire Franchise System.. 23

CONCLUSION.. 28

TABLE OF AUTHORITIES

Page

CASES

Al-Saffy v. Vilsack, 827 F.3d 85 (D.C. Cir. 2016) 16

Ash v. Anderson Merchandisers, LLC, 799 F.3d 9571 (8th Cir. 2015)..14

Bacon v. Subway Sandwiches & Salads LLC, 2015 U.S. Dist. LEXIS 19572 (E.D. Tenn. Feb. 19, 2015) 13

Baystate Alternative Staffing v. Herman, 163 F.3d 668 (1st Cir. 1998) 9

Bonnette v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983)....................................8

Bridge v. New Holland Logansport, Inc., 815 F.3d 356 (7th Cir. 2016)..14

Browning-Ferris Industries of California, Inc., 362 NLRB No. 186, slip op. at 11 (2015) 20

Butler v. Drive Auto. Indus. of America, 793 F.3d 404 (4th Cir. 2015)..12

Casey v. HHS, 807 F.3d 395 (1st Cir. 2015)................10

Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003)..7

Coldwell v. Ritecorp Envtl. Prop. Solutions, 2017 U.S. Dist. LEXIS 68252 (D. Colo. May 4, 2017)....... 15

Community for Non-Violence v. Reid, 490 U.S. 730 (1989)..7

EEOC v. Skanska USA Bldg., Inc., 550 Fed. Appx. 253 (6th Cir. 2013) 13

TABLE OF AUTHORITIES – Continued

Page

Faush v. Tuesday Morning, Inc., 808 F.3d 208 (3d Cir. 2015) 11, 12

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 8

Garcia-Celestino v. Ruiz Harvesting, Inc., 843 F.3d 1276 (11th Cir. 2016)................................15, 16

Grenawalt v. AT&T Mobility LLC, 642 Fed. Appx. 36 (2d Cir. 2016)...10

Hall v. DirecTV, LLC, 846 F.3d 757 (4th Cir. 2017) 5, 25

In re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig., 683 F.3d 462 (3d Cir. 2012)...........11

Ivanov v. Sunset Pools Mgmt., 567 F. Supp. 2d 189 (D.D.C. 2008) 16

Kelly v. Southern Pac. Co., 419 U.S. 318 (1974)...........7

Knitter v. Corvias Military Living, LLC, 758 F.3d 1214 (10th Cir. 2014)..15

Lacero Transportation, 269 NLRB 324 (1984)...........19

Lopez v. Johnson, 333 F.3d 959 (9th Cir. 2003)..........15

Meller v. Wings Over Spartanburg, LLC, 2016 U.S. Dist. LEXIS 35792 (D.S.C. Mar. 21, 2016) 21

Moldenhauer v. Tazewell Pekin Consol. Communs. Ctr., 536 F.3d 640 (7th Cir. 2008) 13

Nationwide Mutual Insurance Company v. Darden, 503 U.S. 318 (1992) 7, 11

TABLE OF AUTHORITIES – Continued

Page

NLRB v. Browning Ferris, 691 F.2d 1117 (3d Cir. 1982) 19, 20

Ocampo v. 455 Hospital LLC, 2016 U.S. Dist. LEXIS 125928 (S.D.N.Y. Sept. 14, 2016) 21

Orozco v. Plackis, 757 F.3d 445 (5th Cir. 2014) 12

Peppers v. Cobb County, 835 F.3d 1289 (11th Cir. 2016) 16

Salinas v. Commercial Interiors, Inc., 848 F.3d 125 (4th Cir. 2017) 5, 12, 25, 26

Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298 (4th Cir. 2006) 12

Scott v. Sarasota Doctors Hosp., Inc., 2017 U.S. App. LEXIS 10178 (11th Cir. June 8, 2017) 16

Shiflett v. Scores Holding Co., 601 Fed. Appx. 28 (2d Cir. 2015) 11

Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606 (5th Cir. 1999) 13

Stepan v. Bloomington Burrito Group, LLC, 2014 U.S. Dist. LEXIS 176084 (D. Minn. Dec. 22, 2014) 14

TLI, Inc., 271 NLRB 798 (1984) 19

Torres-Lopez v. May, 111 F.3d 633 (9th Cir. 1997) 14

Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983) 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* .... *passim*

Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*) 9

The Family Medical Leave Act (29 U.S.C. § 2601 *et seq.*) 9

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 *et seq.* .... *passim*

RULES

S. Ct. R. 37.6 1

TREATISES

Restatement of Agency (3d) § 1.01 (Agency Defined) 7

OTHER AUTHORITIES

Brief of the EEOC as *Amicus Curiae*, *Browning-Ferris*, 3C-RC-109684 (filed June 15, 2014) 20

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TABLE OF AUTHORITIES – Continued

Page

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STATEMENT OF INTEREST

Amici are the American Hotel and Lodging Association, Asian American Hotel Owners Association, Coalition of Franchisee Associations, International Franchise Association, and the Restaurant Law Center (collectively, "*Amici*").[1] As demonstrated more fully below, *Amici* represent a substantial portion of the nation's workforce, payroll, and economic output. *Amici* submit this brief to illustrate how the growing divergence of the various joint-employer standards has real-world adverse effects on *Amici*'s membership and to demonstrate how the Fourth Circuit's new joint-employer standard makes it difficult for the franchise business model to continue in the form that it has been in for decades.

I. American Hotel And Lodging Association

The American Hotel and Lodging Association ("AHLA"), founded in 1910, is the sole national association representing all segments of the lodging industry, including hotel owners, REITs, chains, franchisees, management companies, independent properties, bed and breakfasts, state hotel associations, and industry

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[1] On June 21, 2017, counsel for Petitioners filed with the Court a blanket consent to all *amicus* briefs. *Amici* are submitting a letter of consent executed by counsel for Respondents concurrently with this filing. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *Amici*, its members, or its counsel made any monetary contribution specifically for the preparation or submission of this brief. S. Ct. R. 37.6. The parties received 10 days' notice of this filing.

suppliers. Supporting 8 million jobs and with over 24,000 properties in membership nationwide, the AHLA represents more than half of all the hotel rooms in the United States. The mission of AHLA is to be the voice of the lodging industry, its primary advocate, and an indispensable resource. AHLA serves the lodging industry by providing representation at the federal, state, and local level in government affairs, education, research, and communications. AHLA also represents the interests of its members in litigation that raises issues of widespread concern to the lodging industry.

II. Asian American Hotel Owners Association

The Asian American Hotel Owners Association ("AAHOA") is the largest hotel owners association in the world. Its membership includes more than 16,000 hotel owners, accounting for almost one out of every two of the nation's hotels. In total, AAHOA members own over 22,000 properties, employ over 600,000 workers, and account for nearly $10 billion in annual payroll.

III. Coalition Of Franchisee Associations

The Coalition of Franchisee Associations (the "CFA") is the only association dedicated exclusively to franchisees. The CFA brings together reputable and independent franchisee associations to leverage the collective strength of the community. Its membership includes over 30,000 franchisees who operate 70,000

franchise locations and employ over 1.3 million workers.

IV. International Franchise Association

Founded in 1960, the International Franchise Association ("IFA") is both the oldest and largest trade association in the world dedicated to the entire franchise industry. The IFA's mission is to protect, enhance, and promote franchising through government relations, public relations, and educational programs, on a broad range of legislative, regulatory, and legal issues that affect this economic sector. Its membership spans more than 300 different industries and includes more than 733,000 franchise establishments, 13,000 franchisees, 1,400 franchisors, and 500 suppliers nationwide. Together, its members have an economic impact of nearly 7.6 million jobs, $674.3 billion in economic output, and 2.5 percent of the GDP.

V. Restaurant Law Center

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing almost 15 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second largest private-sector employers. Despite its size, small businesses dominate the industry; even

larger chains are often collections of smaller franchised businesses. The Law Center seeks to provide courts with the industry's perspective on legal issues significantly impacting the industry. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as this one, through *amicus* briefs on behalf of the industry.

SUMMARY OF THE ARGUMENT

The question of under what circumstances an entity that is not a direct employer should be held liable as a joint-employer is an unsettled question of law. This question has not been answered in every circuit and, where it has, the response has evolved from a common law agency theory of control, to an economic realities analysis of aspects of the work relationship, to a mix and expansion of these tests that can differ wildly from circuit to circuit.

This question has become an increasingly important and recurring issue of federal law, particularly for the franchise industry. In recent years, private litigants and federal agencies like the Department of Labor ("DOL"), National Labor Relations Board ("NLRB"), and Equal Employment Opportunity Commission ("EEOC") have taken advantage of the unsettled state of the law and pursued new, broader joint-employer standards. During this pursuit, they have demonstrated through their actions and public statements that one of their primary goals is to show

that the same franchise model – a model that has existed since franchising's inception – should be considered a *de facto* joint-employer relationship. In and of itself, this pursuit has hurt both franchisors and franchisees and has put the entire franchise industry on edge.

The Fourth Circuit's decisions in *Hall v. DirecTV, LLC*, 846 F.3d 757 (4th Cir. 2017) (hereinafter, "*DirecTV*") and its companion case *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017) (hereinafter, "*Salinas*") go beyond the franchise industry's worst nightmares. Therein, the Fourth Circuit held that the "fundamental question" guiding the joint-employment analysis 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." *DirecTV*, 846 F.3d at 769 (emphasis added); *Salinas*, 848 F.3d at 142. Prior to the matter below, the only unifying, fundamental question that guided the circuits' joint-employment analysis was if the entity controls the direct employer's employees. Thus, this holding both departs from every other circuit court's joint-employer analysis under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA") and deepens the circuit divide over the appropriate joint-employer test under the FLSA and several other relevant statutes. Relevant to *Amici*, the Fourth Circuit's "not completely disassociated" test is nearly impossible for a

franchisor to pass and, as a result, poses a direct threat to the franchise model. *Amici* therefore respectfully request that the Court grant the petition for certiorari and resolve the conflict among the circuits by adopting a common law agency joint-employer standard.

ARGUMENT

I. The Fourth Circuit's New Joint-Employer Standard Adds To A Clear And Developed Conflict Among The Circuits

The court's analysis of whether multiple entities should be held jointly responsible for the same employees has changed dramatically. What were once two narrowly focused joint-employer tests have become many, increasingly broad tests that differ substantially from circuit to circuit.

A. The Commonly Accepted Joint-Employer Tests

The circuits primarily use two baseline tests, or variations thereof, when making joint-employment determinations. The first test consists of factors drawn from the common law agency standard while the alternative is referred to as the "economic realities" test. Although these two standards take into account different factors, the ultimate objective of both analyses is to determine how much control a putative employer exercises over an employee – not the relationship between

the putative employer and the employee's direct employer.

1. Common Law Agency

At its heart, the determination of whether an entity is a joint-employer stems from the English common law of agency. Under the common law, agency is defined as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement of Agency (3d) § 1.01 (Agency Defined). The traditional common law agency test "focus[es] on the master's control over the servant." *Clackamas Gastroenterology Assocs., P.C.*, *supra*, 538 U.S. at 448. Said differently, the common law agency joint-employer test focuses on whether a putative employer has control over an employee's terms and conditions of employment.[2]

[2] "[W]hen Congress has used the term 'employee' without defining it, [the Supreme Court has] concluded that Congress intended to describe the conventional master-servant relationship as understood by the common law agency doctrine." *Community for Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) (relating to the Copyright Act of 1976); *see also Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318, 319 (1992) (relating to Employee Retirement Income Security Act of 1974); *Kelly v. Southern Pac. Co.*, 419 U.S. 318, 322-323 (1974) (relating to Federal Employers' Liability Act); *see, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445-449 (2003) (relating to the Americans with Disabilities Act).

2. Economic Realities

The economic realities test places a similar emphasis on the amount of "control" a putative employer has over an employee but also provides that "consideration of the total employment situation and the economic realities of the work relationship" is necessary to make a joint-employer determination. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The standard joint-employer economic realities test considers whether a putative 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." *Ibid*.

B. There Are Dozens Of Different Joint-Employer Tests That The Circuits Use Now

While some circuits have opted to strictly adhere to a common law agency test or the economic realities test when evaluating joint-employment, most circuits have gradually chosen to mix and match factors from both tests into various formulations depending on the statutory scheme they are analyzing. Two statutory schemes that highlight these numerous variations are

the FLSA and Title VII of the Civil Rights of 1964, 42 U.S.C. 2000 *et seq.* ("Title VII").[3]

1. First Circuit

The First Circuit adheres to a strict interpretation of the four-factor economic realities test when evaluating joint-employer status under the FLSA. *Baystate Alternative Staffing v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998). The First Circuit's analysis of joint-employment is more complex for Title VII actions. Indeed, while the First Circuit states that the amount of control a putative employer exerts carries the most weight in its joint-employer analysis, it also utilizes the following 15 factors from the Equal Employment Opportunity Commission Compliance Manual: (i) whether the employer has the right to control when, where, and how the worker performs the job; (ii) the level of skill or expertise that the work requires; (iii) whether the work is performed on the employer's premises; (iv) whether there is a continuing relationship between the worker and the employer; (v) whether the employer has the right to assign additional projects to the worker; (vi) whether the employer sets the hours of work and the duration of the job; (vii) whether the worker is paid by the hour, week, or month rather than the agreed cost of performing a particular job; (viii) whether the worker hires and pays assistants; (ix) whether the

[3] There are further nuances in the joint-employer analysis under the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*), the Family Medical Leave Act (29 U.S.C. § 2601 *et seq.*), and other federal laws that are not discussed in this brief.

work performed by the worker is part of the regular business of the employer; (x) whether the employer is in business; (xi) whether the worker is engaged in his or her own distinct occupation or business; (xii) whether the employer provides the worker with benefits, such as insurance, leave, or worker's compensation; (xiii) whether the worker is considered an employee of the employer for tax purposes; (xiv) whether the employer can discharge the worker; and (xv) whether the worker and the employer believe that they are creating an employer-employee relationship. *Casey v. HHS*, 807 F.3d 395, 404-405 (1st Cir. 2015).

2. Second Circuit

For FLSA claims, the Second Circuit utilizes a six-factor joint-employer test to determine whether a putative employer exerts "functional control" over an employee. *Grenawalt v. AT&T Mobility LLC*, 642 Fed. Appx. 36, 37 (2d Cir. 2016). These six factors include: (i) whether the alleged employer's premises and equipment were used; (ii) whether workers could or did move from one joint-employer to another; (iii) how integral the workers were to the alleged employer's business; (iv) whether the workers' duties could be assigned without any material change; (v) the extent of the alleged employer's supervision; and (vi) whether the workers performed work solely for the alleged employer. *Id.* at 38.

The Second Circuit has not explicitly adopted a joint-employment standard for Title VII actions.

Shiflett v. Scores Holding Co., 601 Fed. Appx. 28, 30 (2d Cir. 2015). It has, however, examined factors that are akin to the economic realities test when faced with a joint-employer claim including whether an entity possesses the authority to hire, fire, impose discipline, distribute wages, maintain necessary insurance and employment records, and supervise. *Ibid*.

3. Third Circuit

Under the FLSA, the Third Circuit utilizes a variation of the economic realities test where, in addition to the standard four-factor test, the Third Circuit considers whether a putative employer can impose discipline on an employee. *In re Enterprise Rent-A-Car Wage & Hour Empl. Practices Litig.*, 683 F.3d 462, 468-469 (3d Cir. 2012). Conversely, the Third Circuit applies a variation on the common law agency test for Title VII actions that considers twelve factors that focus on the employee as opposed to the entity. *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 213-214 (3d Cir. 2015), citing *Darden*, 503 U.S. at 323-324. These factors include: "the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party

is in business; the provision of employee benefits; and the tax treatment of the hired party." *Id.* at 214.

4. Fourth Circuit

Prior to *Salinas*, the Fourth Circuit used a two-step analysis for joint-employer determinations under the FLSA: (i) whether the entities codetermined essential terms and conditions of employment; and, if so (ii) whether the employee was an employee or independent contractor. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 305-309 (4th Cir. 2006). The Fourth Circuit recently established a new and unique joint-employer analysis for Title VII with nine factors that incorporate aspects of both the economic realities test and common law agency test. *Butler v. Drive Auto. Indus. of America*, 793 F.3d 404, 414 (4th Cir. 2015).

5. Fifth Circuit

The Fifth Circuit follows a strict interpretation of the four-factor economic realities test for FLSA matters. *Orozco v. Plackis*, 757 F.3d 445, 448 (5th Cir. 2014). Conversely, the Fifth Circuit uses a four-factor joint-employer analysis for Title VII actions that is wholly separate from both the common law agency test and the economic realities test:

> The rule has emerged that superficially distinct entities may be exposed to liability upon a finding that they represent a single, integrated enterprise: a single employer. Factors considered in determining whether distinct

> entities constitute an integrated enterprise are (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

Skidmore v. Precision Printing & Packaging, Inc., 188 F.3d 606, 616-617 (5th Cir. 1999), citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983).

6. Sixth Circuit

In the Title VII context, the Sixth Circuit uses three of the four factors of the economic realities test, choosing not to consider whether a putative employer maintains employment records. *EEOC v. Skanska USA Bldg., Inc.*, 550 Fed. Appx. 253, 256 (6th Cir. 2013). Although the Sixth Circuit "has not formulated a test for identifying a joint-employer for FLSA purposes," a district court within the circuit has applied the same joint-employer standard that the circuit uses in Title VII cases. *Bacon v. Subway Sandwiches & Salads LLC*, 2015 U.S. Dist. LEXIS 19572 at *8 (E.D. Tenn. Feb. 19, 2015).

7. Seventh Circuit

While the Seventh Circuit has not explicitly adopted a test for determining joint-employer liability in FLSA claims, it has held that for the putative employer to be a joint-employer, it must "exercise control over the working conditions" of an employee. *Moldenhauer v. Tazewell Pekin Consol. Communs. Ctr.*, 536

F.3d 640, 644 (7th Cir. 2008). Similarly, the Seventh Circuit has not adopted a formal joint-employer test for Title VII actions but has stated that, to be a joint-employer, the putative employer must exercise control over the working conditions of an employee. *Bridge v. New Holland Logansport, Inc.*, 815 F.3d 356, 363 (7th Cir. 2016).

8. Eighth Circuit

Under the FLSA, the Eighth Circuit has not explicitly adopted a test for determining joint-employer liability but has found that employee allegations of joint-employment are insufficient without facts showing the "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." *Ash v. Anderson Merchandisers, LLC*, 799 F.3d 957, 961 (8th Cir. 2015). The Eighth Circuit has adopted the same joint-employer standard as the Fifth Circuit for Title VII actions. *Stepan v. Bloomington Burrito Group, LLC*, 2014 U.S. Dist. LEXIS 176084 at *6 (D. Minn. Dec. 22, 2014).

9. Ninth Circuit

For joint-employment determinations under the FLSA, the Ninth Circuit evaluates thirteen factors which incorporate the essence of the four-factor economic realities test and the Second Circuit's six-factor test. *Torres-Lopez v. May*, 111 F.3d 633, 639-640 (9th

Cir. 1997). The Ninth Circuit has not established a joint-employer test for Title VII claims.[4]

10. Tenth Circuit

The Tenth Circuit has not adopted a specific test for evaluating joint-employment under the FLSA, but a district court in that circuit has used a test that combines the four-factor economic realities test with a consideration of the control a putative employer exercised over employees and whether the putative employer provided equipment and facilities to the employee. *Coldwell v. Ritecorp Envtl. Prop. Solutions*, 2017 U.S. Dist. LEXIS 68252 at *17-22 (D. Colo. May 4, 2017). For Title VII claims, the Tenth Circuit uses the same variation of the common law agency test the Third Circuit uses for FLSA claims. *Knitter v. Corvias Military Living, LLC*, 758 F.3d 1214, 1226 (10th Cir. 2014).

11. Eleventh Circuit

For FLSA purposes, the Eleventh Circuit evaluates eight factors in making a joint-employment determination. *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016). This eight-factor test wholly incorporates the four-factor economic realities test while also looking at the amount of control a

[4] Under section 501 of the Rehabilitation Act, the Ninth Circuit found that there was no joint-employment relationship where the putative employer did not "retain sufficient control" over the terms and conditions of the employee's work. *Lopez v. Johnson*, 333 F.3d 959, 963-964 (9th Cir. 2003).

putative employer has over workers, who owns the premises where the work is performed, how integral the work is to the overall business, and the "investment in equipment and facilities." *Ibid.* While in the Title VII context, the Eleventh Circuit has relied on factors similar to the four-factor economic realities test without making any specific reference to the test, it has also focused its inquiry on "which entity or entities controlled the fundamental and essential aspects of the employment relationship when taken as a whole." *Peppers v. Cobb County*, 835 F.3d 1289, 1300-1301 (11th Cir. 2016). Less than a month ago, and less than a year after its decision in *Peppers*, the circuit articulated a new eleven-factor test for a Title VII claim without any reference to *Peppers*. *Scott v. Sarasota Doctors Hosp., Inc.*, 2017 U.S. App. LEXIS 10178 at *18-19 (11th Cir. June 8, 2017).

12. D.C. Circuit

Although the D.C. Circuit has not adopted a joint-employer test under the FLSA, a district court has relied on a test that combines the four-factor economic realities test with the Second Circuit's six-factor test. *Ivanov v. Sunset Pools Mgmt.*, 567 F. Supp. 2d 189, 194-195 (D.D.C. 2008). Conversely, for Title VII claims, the D.C. Circuit's joint-employer analysis focuses on how much control a putative employer has over an employee without reference to specific factors. *Al-Saffy v. Vilsack*, 827 F.3d 85, 96-97 (D.C. Cir. 2016).

II. Federal Agencies And Private Litigants Have Recently Made The Joint-Employer Standard A Prominent Issue Of Federal Law, Especially For The Franchise Industry

For decades, it was a rare occurrence for a plaintiff to assert that a franchisor was a joint-employer with a franchisee. As detailed above, however, there has been an ever-expanding conflict between and within the circuits that has resulted in no less than 20 active joint-employer tests. As a direct result of the unsettled state of the joint-employer analysis, the last decade has been witness to several federal agencies and a plethora of plaintiffs unashamedly attempting to reshape the joint-employer analysis and attack the well-settled franchise model.

Directly relevant here, the Wage and Hour Administrator under President Obama, Dr. David Weil, has been an advocate for the "Fissured Workplace" theory. David Weil, *The Fissured Workplace: Why Work Became So Bad For So Many And What Can Be Done To Improve It* (Harvard University Press 2014); *see also* David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to The Wage And Hour Division* (2010); David Weil, *The Fissured Workplace*, U.S. Department of Labor Blog (Oct. 17, 2014), https://blog.dol.gov/2014/10/17/the-fissured-workplace/. Under his theory, Dr. Weil argues the government must rethink its definitions of who an employer is and the structure of liability that the law imposes in order to change modern employers' behavior. *Id.* at pp. 214-242.

Addressing the franchise model, Dr. Weil stated the following:

> System-wide Impacts: Recovering back wages for workers is a critical goal of WHD investigations. However, more fundamental than that is changing the incentives of employers to underpay in the first place. WHD efforts should therefore aim to alter the larger, system-wide incentives for compliance, thereby encouraging all employers to follow the law. Given the increasingly complex workplace settings described in this section, achieving more system-wide impacts on employer compliance requires investigators to examine how to achieve geographic-, industrial-, and/or product market-effects. The WHD can do so by finding ways to influence the behavior of firms at the "top" of fissured industries in order to improve compliance at the "bottom" of those industries. . . .
>
> Creating this kind of system-wide impact can be applied to other sectors with large numbers of vulnerable workers. For example, by identifying wide-scale patterns of noncompliance among different franchisees in various parts of the country, a major brand may be willing to increase its programs to encourage more compliance across its outlets, thereby magnifying the effects of investigations carried out at separate franchisees. Bringing an understanding of the impact of these larger factors into the regulatory scheme potentially allows enforcement to have systemic effects going beyond the workplaces directly investigated.

> (David Weil, *Improving Workplace Conditions Through Strategic Enforcement: A Report to The Wage And Hour Division*, at pp. 16-17.)

Echoing these sentiments, on January 20, 2016, the WHD released an Administrator's Interpretation ("AI") concerning joint-employment under the FLSA.[5] Department of Labor, *Administrator's Interpretation No. 2016-1: Joint Employment Under the Fair Labor Standards Act and Migrant Seasonal Agricultural Worker Protection Act* (Jan. 20, 2016), https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm/. Therein, the AI provided yet another joint-employer analysis stating that joint-employment should be defined "expansively" under the FLSA, and was explicit that the AI's purpose was to collect back wages from larger businesses. *Id.* at pp. 2-4.

Similar to the DOL, the NLRB has recently focused on broadening its joint-employer analysis. Previously, the NLRB followed the common law agency theory of joint-employer liability requiring a finding that a putative employer exerts "direct and immediate" control over employees for a joint-employer finding. *See TLI, Inc.*, 271 NLRB 798 (1984); *Lacero Transportation*, 269 NLRB 324 (1984). Under this standard, even direct control exercised in a "limited or routine" manner was "insufficient to show the existence of a joint-employer relationship." *NLRB v. Browning Ferris*, 691 F.2d 1117, 1122-1125 (3d Cir. 1982). On August

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[5] On June 7, 2017, Secretary of Labor Acosta rescinded the AI but did not provide any further guidance.

27, 2015, the NLRB ruled that this well-settled joint-employer standard was "narrower than statutorily necessary" and made the following finding:

> We reject those limiting requirements that the Board has imposed – without foundation in the statute or common law – after *Browning-Ferris*. We will no longer require that a joint employer not only *possess* the authority to control employees' terms and conditions of employment, but also *exercise* that authority. Reserved authority to control terms and conditions of employment, even if not exercised, is clearly relevant to the joint-employment inquiry. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186, slip op. at 11 (2015).

The combination of these two federal agencies' efforts to pursue expansive joint-employer standards has emboldened other agencies to do the same. For instance, in the Equal Employment Opportunity Commission's *amicus* briefs in support of the NLRB in *Browning-Ferris*, the EEOC argued that the NLRB should adopt the EEOC's standard, which it described as "more flexible, more readily adaptable to evolving workplace relationships and realities, and more consistent with the goals of remedial legislation such as Title VII and the NLRA." Brief of the EEOC as *Amicus Curiae*, *Browning-Ferris*, 3C-RC-109684 (filed June 15, 2014). As another example, in or around August 2015, an internal Occupational Safety and Health Administration ("OSHA") memorandum leaked that specifically asked "whether for purposes of the OSH Act, a

joint-employment relationship can be found between the franchisor (corporate entity) and the franchisee so that both entities are liable as employers under the OSH Act." OSHA, Internal Memorandum, *Can Franchisor (Corporate Entity) and Franchisee Be Considered Joint Employers*, available at http://edworkforce.house.gov/uploadedfiles/osha_memo.pdf/.

The result of the uncertain state of the joint-employer analysis and federal agencies' pursuit of an even broader joint-employer standard has resulted in a significant expenditure by franchisors and franchisees attempting to defeat more and more joint-employer allegations. In fact, district court and circuit court decisions relating to joint-employer and franchisees has increased steadily from only three in 2007, to fifteen in 2012, to thirty-eight in 2016.

In addition to the increase in joint-employer cases that franchisors and franchisees are fighting, there has been a growing trend to allow cases to proceed in an unjustifiable manner. For instance, in *Ocampo v. 455 Hospital LLC*, 2016 U.S. Dist. LEXIS 125928 (S.D.N.Y. Sept. 14, 2016), a complaint that merely alleged facts that are common to all franchise relationships was sufficient for a prima-facie showing of joint-employment. As another example, in *Meller v. Wings Over Spartanburg, LLC*, 2016 U.S. Dist. LEXIS 35792 (D.S.C. Mar. 21, 2016), the complaint's allegations were similarly thin but the court allowed costly discovery to proceed about whether a class should be certified.

The most troubling franchise case involving joint-employer allegations is the McDonald's matter presently before the NLRB. There, the NLRB took the unprecedented steps of:

(i) issuing over a dozen complaints against McDonald's USA, LLC and independently owned and operated franchisees located in New York, Philadelphia, Chicago, Indianapolis, Sacramento, and Los Angeles;

(ii) consolidating those cases – cases that involved more than 70 unfair labor practice charges – into a single case that would be heard in New York, then Chicago, then Los Angeles, and then New York;

(iii) issuing to every entity involved both a narrow subpoena related to the unfair labor practice charges and a voluminous subpoena for documents related exclusively to the NLRB's joint-employer allegations; and

(iv) trying the case beginning with the joint-employer allegations – a portion of the case that took more than 100 trial days, involved more than 50 witnesses, and had more than 20,000 pages of exhibits – instead of trying whether the franchisees had even committed the unfair labor practices.

The NLRB took all of these actions – actions that have cost the franchisees hundreds of thousands of dollars – in spite of the fact that all of the unfair labor practice charges were possible to remediate immediately, the maximum exposure for many, if not most, of the franchisees was less than $10,000, and many franchisees offered to resolve these claims.

While the McDonald's matter is certainly an extreme example, simply stated, unjustifiable actions against franchisors and franchisees attacking the very basis of the franchise model will continue in courts throughout the country unless and until this Court intervenes.

III. *Salinas/DirecTV* Makes It Too Challenging For A Franchisor To Avoid A Joint-Employer Finding – A Result Which Has An Adverse Domino Effect On The Entire Franchise System

Today, there are more than 733,000 franchise establishments in the United States that employ over 7.6 million people, and have an economic output in excess of $674.3 billion – approximately 2.5% of the nation's gross domestic product. The most important aspect of the franchise model's success is the franchisor's and franchisee's shared desire for brand standardization. Brand standardization involves basic aspects that allow the franchisee to take advantage of the franchisor's reputation such as its logo, marketing materials, design, layout, and other business identifiers. Brand

standardization also involves providing the franchisee with the information necessary to maintain consistent product quality across all of the franchises and best management and operations practices that the franchisor has found will give the franchisee the best chance of success. Without this brand standardization, a franchisee receives no benefit for its investment in the franchisor and the franchisor runs a substantial risk that an inept franchisee will ruin the franchisor's brand.

While the franchisor and franchisee do share a concern for brand standardization, intertwined into the franchise model's success is a reasonable allocation of risks and liabilities that are oftentimes set forth in the franchise agreements. For the franchise business model to be worthwhile for either the franchisor or franchisee, the parties will often agree that the franchisor cannot involve itself in the day-to-day operations of a franchisee or the franchisee's employees. To do otherwise would require the franchisor to pay for the overhead of having its representatives monitor the franchisee – an expenditure of time and resources that would either disincentivize the franchisor from franchising or disincentivize the franchisee because it would lose control over its operations and likely result in higher royalties to pay for this oversight. Said differently, it is both a contractual obligation and in the franchisor's and franchisee's best interests for the franchisor not to exert direct control over terms and conditions of employment of a franchisee's employees.

In *DirecTV* and *Salinas*, the Fourth Circuit announced a joint-employer standard that was unprecedented. Rather than use the common law agency test, the economic realities test, or even build on one of these tests, the Fourth Circuit created a new test that it advocates every other circuit should adopt. *Salinas*, 848 F.3d at 125; *DirecTV*, 846 F.3d at 769. In both cases, the Fourth Circuit stated that the "fundamental question" guiding the joint-employment analysis 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." *DirecTV*, 846 F.3d at 769; *Salinas*, 848 F.3d at 141.

This test represents a repudiation of all previous variations of joint-employer tests. More importantly for *Amici*, this test is problematic for a franchisor and franchisee to pass because brand standardization is an association between the franchisor and franchisee. Additionally, inherent in any franchisor/franchisee relationship is an agreement "to allocate responsibility for" essential terms and conditions of employees' employment. In many such relationships, there is an express allocation of the responsibility to comply with applicable legal requirements, specifically including compliance with the wage and hour requirement of the FLSA, to the franchisee.

Seemingly belittling the concerns a putative employer/franchisor may have about joint-employer liability, *Salinas* offers the following solution:

> "[I]f everyone abides by the law, treating a firm . . . as a joint employer will not increase its costs." . . . Only when the general contractor "hires a fly-by-night operator . . . or one who plans to spurn the FLSA" is the entity "exposed to the risk of liability on top of the amount it has agreed to pay the contractor. And there are ways to avoid this risk: either deal only with other substantial businesses or hold back enough on the contract to ensure that workers have been paid in full." *Salinas*, 848 F.3d at 149 (internal citations omitted).

This specious advice would have a domino effect that may threaten the franchise model.

Taking the Fourth Circuit's advice is akin to telling a franchisor that it must monitor and correct franchisees to ensure compliance with the FLSA. If a franchisor ensures that its franchisees are abiding by the FLSA, this necessarily means that it is exercising direct and immediate control over the wages, hours, and terms and conditions of employment for its franchisees' employees. This exercise of control would not avoid a joint-employer finding under the FLSA; it would lead to a joint-employer finding under FLSA, Title VII, and NLRA under the common law agency joint-employer test, the economic realities test, as well

as every other joint-employer test in the Fourth Circuit.[6]

The domino effect of this ruling is not limited to just the Fourth Circuit. The majority of franchisors either operate or desire to operate nationally. For these operations, business efficiencies prevent them from distinguishing between the various standards adopted by different circuits. The default for these operations must be compliant with the most expansive joint-employer interpretation. So even though other circuits may not require the same direct and immediate control of a franchisee, a franchisor operating nationally who abides by the Fourth Circuit would inevitably violate the FLSA, Title VII, and NLRA under every joint-employer test for every circuit. Moreover, this adverse result would be in addition to the substantial costs that the franchisor will incur for monitoring its franchisees nationwide – costs that likely would be passed on to the franchisee and disincentivize its and the franchisor's participation in the franchise model.

For numerous reasons, the aforementioned domino effect is not what *Amici* desire. Ultimately, the result that franchisors and franchisees throughout the country want is the ability to run their businesses in the manner that they have since franchising began. This includes working together to protect the brand while at the same time allocating responsibility to one

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[6] It could also be a violation of the franchisor's and franchisee's franchise agreement.

another, including the franchisee's ability to direct control over its employees' terms and conditions of employment. For this reason, *Amici* respectfully request that the Court grant the petition for writ of certiorari and resolve the growing conflict among the circuits and federal agencies by adopting a common law agency joint-employer standard that would not only be applicable to FLSA claims, but could serve as guidance to every court that is confronted with a joint-employer allegation under any statute or regulation.

CONCLUSION

For the aforementioned reasons, *Amici* respectfully request that the Court grant DirecTV, LLC and DirectSat USA, LLC's petition for writ of certiorari.

July 6, 2017 Respectfully submitted,

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