Nos. 15-1857 & 15-1858

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARLON HALL; JOHN WOOD; ALIX PIERRE; KASHI WALKER,
Plaintiffs-Appellants,
v.
DIRECTV, LLC; DIRECTSAT USA, LLC,
Defendants-Appellees.

JAY LEWIS; KELTON SHAW; MANUEL GARCIA,
Plaintiffs-Appellants,
v.
DIRECTV, LLC; DIRECTSAT USA, LLC,
Defendants-Appellees.

On appeal from the United States District Court for the District of Maryland
Hon. J. Frederick Motz, Case Nos. 1:14-CV-02355-JFM; 1:14-CV-03261-JFM

DEFENDANTS-APPELLEES' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes, Rules and Regulations

Other Authorities

INTRODUCTION AND RULE 35 STATEMENT

Rehearing en banc is warranted because the panel's decision involves the following question of exceptional importance: What is the appropriate standard for determining joint employment under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. §§ 201, *et seq.*? Consideration of this question en banc is necessary to avoid a circuit conflict and to maintain uniformity of this Court's decisions.

In two companion cases (*see Salinas v. Commercial Interiors, Inc.*, 2017 WL 360542 (4th Cir. Jan. 25, 2017), pet. for reh'g filed Feb. 8, 2017, and *Hall v. DirecTV, LLC*, Nos. 15-1857 & 15-1858), the same panel "articulated a new standard" (Slip Op. at 23) for determining whether two (or more) entities are joint employers under the FLSA. In the first case, *Salinas*, the panel announced its newly fashioned six-factor test. In this case, the panel applied its new standard and reversed the district court's decision granting a motion to dismiss.

The panel explicitly created a circuit split by rejecting tests based on factors first articulated in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), an approach that governs in almost every other circuit. The panel's decision also deviates from this Court's endorsement of the *Bonnette* standard in *Schultz v. Capital International Security, Inc.*, 466 F.3d 298 (4th Cir. 2006).

In addition, the panel's decision, which drastically changes the law and

expands potential liability, is simply wrong: To derive its standard, the panel misapplied the FLSA regulations and borrowed factors intended to measure joint employment in one specific context under a different statute. The Court should grant rehearing en banc to bring the law of this Circuit back into line with that of the other circuits and to resolve the incongruity with *Schultz*.

STATEMENT

1. The FLSA provides that "no employer shall employ any of his employees" for a workweek longer than forty hours unless the employee is paid at "a rate not less than one and one half-times the regular rate" for the overtime work. 29 U.S.C § 207(a)(1). Recognizing that employees may enter into multiple employment relationships (29 C.F.R. § 791.2(a)), the statute's implementing regulations establish standards for distinguishing between "separate and distinct employment" and "joint employment." Under the regulation, if "two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer," then each employer "may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act." *Id.* But 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)"—then "all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act, including the overtime provisions, with respect to the entire employment for the particular workweek." *Id.*

According to the regulation:

> Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees;
>
> (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Id. § 791.2(b) (footnotes omitted).

2. In this action, seven former satellite installation technicians sued DirecTV, LLC ("DirecTV"), a provider of satellite television services, under the FLSA and Maryland state law, claiming that they had not received mandatory overtime compensation for their work installing DirecTV's products. Two of them

also sued DirectSat USA, Inc. ("DirectSat"), which supplies installation and repair services under a contract with DirecTV. Plaintiffs did not contend that they were directly employed by DirecTV and DirectSat. Instead, they alleged that DirecTV contracts with independently owned and operated companies such as DirectSat, known as "Home Service Providers" ("HSPs"), to perform installation and repair services and that the HSPs then entered into subcontracts with other companies or employed or contracted with individual technicians to perform the work. AA93-AA97.

Plaintiffs asserted that DirecTV should be deemed their employer under the FLSA (and Maryland law) because it imposed requirements on them through its contracts with HSPs. For example, Plaintiffs alleged that DirecTV: (1) required technicians to pass drug tests and obtain training and certification (AA109); (2) mandated methods of installation (AA96); (3) used quality-control personnel to review technicians' work (AA101); (4) required technicians to display DirecTV insignia on their uniforms and vehicles (AA97); and (5) sent work orders through HSPs and/or subcontractors using "technician ID's" provided by DirecTV (AA95-AA96).

3. The district court dismissed the complaint, holding that Plaintiffs had failed to plead that DirecTV and DirectSat were their employers. According to the district court, "[t]he first question that must be resolved is whether the individual

worker is 'an employee' within the meaning of the FLSA" (AA376)—as opposed to an independent contractor. If so, then "it must next be determined whether an entity other than the entity with which the individual worker had a direct relationship is a 'joint employer' of that worker." AA377.

The district court found the absence of a joint-employment relationship to be dispositive. According to the district court, although Plaintiffs had "alleged facts sufficient to show that DIRECTV at least indirectly controlled their work and directly controlled their schedules," they had not alleged "that DIRECTV has the power to hire and fire technicians, determine their rate and method of payment or maintain their employment records." AA377. It therefore held that DirecTV was not Plaintiffs' employer under either the FLSA or Maryland law. AA378. Holding that Plaintiffs' sparse allegations against DirectSat also were insufficient (*id.*), it dismissed the complaint.

4. The panel reversed, holding that Plaintiffs had sufficiently pleaded that DirecTV and DirectSat were their joint employers. In doing so, it relied on a newly articulated standard for "joint employment" that the same panel announced that same day in *Salinas*.

The panel explained that, "instead of adopting a previously existing test," it had "articulated a new standard that draws on the history and purpose of the FLSA, as well as the Department of Labor [("DOL")] regulation that implements the

statute and recognizes the existence of joint employment arrangements." Slip Op. at 23.[1] "Under this framework," the panel explained, "the 'fundamental question' guiding the joint employment analysis" is whether two entities "share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment." *Id.* Applying this new standard, it concluded that Plaintiffs had adequately alleged joint employment.

REASONS FOR GRANTING THE PETITION

I. THE PANEL ACKNOWLEDGED THAT ITS UNPRECEDENTED SIX-FACTOR STANDARD CREATES A CIRCUIT SPLIT.

Rehearing en banc is warranted because the panel "articulated a new standard" (Slip Op. at 23) for joint employment that is in direct and acknowledged conflict with the standard applied in other circuits.

In *Hall* and *Salinas*, the panel identified "six, nonexhaustive factors" for lower courts to address "in determining whether the relationship between two

[1] That test borrowed from, but modified in significant ways, a seven-factor test drawn from the Migrant and Seasonal Agricultural Workers Protection Act ("MSAWPA") (*see* 29 C.F.R. 500.20(h)(5)(iv)), which was proposed by the Secretary of Labor in an amicus brief filed in *Salinas* but not in this case. *See* Brief for the Secretary of Labor as *Amicus Curiae* In Support of Plaintiffs-Appellants at 27, *Salinas*, 2017 WL 360542 (No. 15-1915), Dkt. 23-1 ("DOL Amicus Br."); *see also* U.S. Dep't of Labor, Administrator's Interpretation No. 2016-1, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act* at 11-12 (Jan. 20, 2016) ("DOL Guidance") (listing factors based on MSAWPA regulation that provide guidance in FLSA cases); *infra* at Part IV.

entities gives rise to joint employment":

> (1) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the ability to direct, control, or supervise the worker, whether by direct or indirect means;
>
> (2) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;
>
> (3) The degree of permanency and duration of the relationship between the putative joint employers;
>
> (4) Whether through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;
>
> (5) Whether the work is performed on a premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and
>
> (6) Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment, tools, or materials necessary to complete the work.

Slip Op. at 24; *see also Salinas*, 2017 WL 360542, at *10-11. These six factors each assess the relationship *between the two putative employers* in determining whether joint employment exists.

Quoting a phrase from the FLSA regulation discussing joint employment (29

C.F.R. § 791.2), the panel summarized the new test as follows:

> Under our framework, 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."

Slip Op. at 23-24 (quoting *Salinas*, 2017 WL 360542, at *10).

This standard—and its focus on the "not completely disassociated" regulatory language—diverges sharply from the rule applied in other circuits. The seminal decision on joint employment is *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), *abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). In *Bonnette*, the Ninth Circuit articulated a non-exhaustive, four-factor test for joint employment: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Bonnette*, 704 F.2d at 1470. Each factor focuses on the relationship between the *putative employer and the employee*, not on the relationship between the putative joint employers.

Courts around the country have fashioned their own multi-factor tests modeled on or similar to *Bonnette*. *See Baystate Alternative Staffing, Inc. v.*

Herman, 163 F.3d 668, 675 (1st Cir. 1998); *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 67, 72 (2d Cir. 2003); *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); *Muhammed v. Platt College*, 46 F.3d 1136 (8th Cir. 1995) (unpublished); *Dole v. Snell*, 875 F.2d 802, 804-05 (10th Cir. 1989); *Freeman v. Key Largo Volunteer Fire & Rescue Dept., Inc.*, 494 F. App'x 940 (11th Cir. 2012). To be sure, "several circuits have liberalized the *Bonnette* test" by "supplement[ing] the four *Bonnette* factors with additional factors." *Salinas*, 2017 WL 360542, at *6. But *Bonnette* remains the doctrinal foundation for these multifactor standards, which focus on the relationship between the putative employer and employee in determining joint employment. As Judge Chasanow has observed, "every circuit has applied some variation of the *Bonnette* test." *Roman v. Guapos III, Inc.*, 970 F. Supp. 2d 407, 415 (D. Md. 2013); *see also id.* at 413 (collecting district court cases from this Circuit applying the *Bonnette* factors).

The panel was both candid and unequivocal in its rejection of the *Bonnette* standard. The panel criticized "the *Bonnette* Court's reliance on common-law agency principles," an approach the panel believed "ignores Congress's intent to ensure that the FLSA protects workers whose employment arrangements do not conform to the bounds of common-law agency relationships." Slip. Op. at 23. Furthermore, according to the panel, existing tests "'(1) improperly focus on the

relationship between the employee and putative joint employer, rather than on the relationship between the putative joint employers, and (2) incorrectly frame the joint employment inquiry as solely a question of an employee's "economic dependence" on a putative joint employer.'" *Id.* (quoting *Salinas*, 2017 WL 360542, at *6). The panel thus opted to "articulate[] a new standard" (*id.*)—one focused on the ties between the two firms alleged to be joint employers.

In its companion opinion in *Salinas*, the panel was similarly blunt in rejecting *Bonnette*. It conceded that a "number of courts, including district courts in this Circuit, apply the *Bonnette* factors in determining whether two entities constitute joint employers for purposes of the FLSA"—and that others use variants of the *Bonnette* test. *Salinas*, 2017 WL 360542, at *5 (citing *Baystate*, 163 F.3d at 675-76 (1st Cir.); *Gray*, 673 F.3d at 355 (5th Cir.); and *Dalton v. Omnicare, Inc.*, 138 F. Supp. 3d 709, 717 (N.D.W. Va. 2015)). The panel nevertheless instructed "courts [to] no longer employ *Bonnette* or tests derived from *Bonnette* in the FLSA joint employment context." *Id.* at *10. Thus, the panel in *Salinas* expressly acknowledged that it was departing from the standards adopted by, *at least*, the First and Fifth Circuits.

The panel, moreover, condemned the *Bonnette* factors at a fundamental level. The core of *Bonnette* is an examination of the relationship between a putative joint employer and the employee. *See* Slip Op. at 23 (criticizing *Bonnette*

on this ground). The panel explicitly rejected this approach and re-oriented the joint-employment doctrine toward an examination of the relationship between the two purported employers. *Id.* This radical doctrinal transformation will have a drastic impact on employment law, as it classifies even minor amounts of coordination between two entities as evidence of a joint-employer relationship. *See infra* at Parts III & IV. The panel's explicit rejection and replacement of the *Bonnette* factors creates a clear circuit split and warrants rehearing en banc.

II. THE PANEL'S DECISION DEVIATES FROM THIS COURT'S PRIOR DECISION IN *SCHULTZ*.

In addition to creating a circuit split, the panel's six-factor standard is impossible to square with this Court's decision in *Schultz v. Capital International Security, Inc.*, 466 F.3d 298 (4th Cir. 2006).

In *Schultz*, this Court held that a Saudi prince and a security firm were joint employers of private security guards. In reaching that determination, the Court stated that "it may be useful . . . to consider factors such as those listed in *Bonnette*." *Id.* at 306 n.2. It proceeded to determine joint employment by looking at the *direct* involvement of the putative joint employer in such quintessential employment decisions as hiring and discipline. As this Court summed up the evidence:

> Both the Prince and [the security firm] were involved in the hiring of agents, although the Prince (through Abushalback) exercised a greater degree of authority.

> [The security firm] advertised for agents and screened responses, which were forwarded to the detail leader. The detail leader, who was on the [the security firm's] payroll and reported to Abushalback, interviewed selected applicants; Abushalback had the final word on hiring. Abushalback generally handled agent work schedules, compensation, discipline, and terminations, but [the security firm] played some role in these matters. [The security firm] maintained the authority to discipline agent and change the terms of their employment.

Id. at 306.

Given *Schultz*'s endorsement and application of *Bonnette*, it is unsurprising that district courts in this Circuit have relied on the *Bonnette* factors in conducting the joint-employment inquiry. *See Dalton*, 138 F. Supp. 3d at 717 (N.D. W. Va.); *Crumbling v. Miyabi Murrells Inlet, LLC*, 192 F. Supp. 3d 640, 645 (D.S.C. 2016); *Ramsay v. Sanibel & Lancaster Ins., LLC*, 2012 WL 12821744, at *4 (E.D. Va. Mar. 28, 2012); *Jones v. American Airlines, Inc.*, 2008 WL 9411160, at *2 (E.D.N.C. Oct. 16, 2008); *Miller v. County of Rockingham*, 2007 WL 2317434, at *10-11 (W.D. Va. Aug. 9, 2007); *see also Roman*, 970 F. Supp. 2d at 413 (D. Md.) (collecting additional cases).

The panel's approach contrasts sharply with the analysis applied in *Schultz*. Whereas the Court in *Schultz* evaluated the putative joint employer's direct involvement with the employee, the panel in *Hall* focused on the relationship between the putative joint employers—holding that joint employment may be found where the defendant, via that relationship, "*only play[s] a role* in

establishing the key terms and conditions of the worker's employment." Slip Op. at 26 (emphasis added). In deciding that the complaint sufficiently alleged joint employment, the panel thus focused not on the relationship between DirecTV and the technicians but on *the terms of DirecTV's contracts with HSPs* relating to installation standards, quality control, terms of payment, and the like. *Id.* at 29-33.

This represents a sea change from *Schultz*. Because the panel's decision is in significant tension with *Schultz*—and with the manner in which district courts in this Circuit have interpreted and applied *Schultz*—rehearing en banc is warranted.

III. THE ISSUE IS EXCEPTIONALLY IMPORTANT AND ARISES FREQUENTLY.

The panel's rejection of the *Bonnette* factors and its announcement of a new standard work a dramatic change in employment law. The decision raises an exceptionally important question that warrants rehearing en banc.

The potential reach of the panel's decision is breathtaking. The panel's six-factor standard applies to *all* forms of joint employment covered by the FLSA. *See* 29 U.S.C. § 203(d) (definition of employer); *id.* § 203(s) (definition of enterprise); 29 C.F.R. § 791.2 (joint-employment regulations). In light of the decision, businesses across a wide range of industries will have to reassess whether their connections to contractors or subcontractors will now classify them as joint employers of the other firm's workers under the FLSA—thus making them jointly and severally liable for overtime wages. *See, e.g.*, *Salinas*, 2017 WL 360542, at *1

(construction industry); *Schultz*, 466 F.3d at 301 (security services); *Baystate Alternative Staffing*, 163 F.3d at 671 (temporary staffing agency); *Zheng*, 355 F.3d at 63 (garment industry); *Roman*, 970 F. Supp. 2d at 409 (restaurant industry); *Dalton*, 138 F. Supp. 3d at 712 (couriers).

Furthermore, joint-employment questions arise frequently in litigation. Indeed, Plaintiffs' opening brief contains an appendix listing nineteen cases against DirecTV *alone* that raise the issue. *See* Appellants' Corrected Addendum of Orders in Related Cases, Dkt. #31-2. Given the number of industries covered by the FLSA and *Salinas*'s dramatic break with precedent, the panel's decision will assuredly invite litigation in this Circuit—and around the country—challenging practices and arrangements that hitherto would not have been considered joint employment. This litigation will be particularly problematic for large companies, like DirecTV, that operate in multiple circuits and thus may be deemed joint employers with their contractors in one part of the country, but not another.

Finally, the panel's novel test and the broad language of the opinion threaten to impose liability on participants in various contracting arrangements that have not heretofor been equated with joint employment. It is difficult to imagine any arrangement between a business and its contractor in which the two are "*completely* disassociated with respect to [] worker[s]" (Slip Op. at 23 (emphasis added)). By re-orienting the joint-employment inquiry from the relationship

between the putative employer and the employee to the relationship—direct *or indirect*—between the putative employers, the panel's decision substantially broadens the FLSA's coverage.

IV. THE PANEL'S NEW JOINT-EMPLOYMENT STANDARD IS INCORRECT.

Finally, the panel lacked a sound basis for its dramatic revision of joint-employment doctrine. It hinged its decision largely on two DOL regulations, but neither justifies the Court's rejection of the *Bonnette* standard.

First, the panel placed inordinate weight on a phrase from the DOL's 1958 FLSA regulation, which states that when two "employers" of a single employee are "not completely disassociated" with respect to that employee's employment, they are jointly responsible for ensuring FLSA compliance "with respect to the entire employment for the particular workweek." 29 C.F.R. § 791.2(b)(3)); *see* Slip Op. at 15, 18-23, 27-28, 33-34 (referencing the phrases "completely disassociated" or "not completely disassociated"). Seizing on that language, the panel concluded that "two or more persons or entities are 'not completely disassociated' with respect to a worker"—and thus are joint employers—when they "codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment." *Id.* at 23-24 (quoting *Salinas*, 2017 WL 360542, at *10)). On the face of the regulation itself, however, one cannot be a *joint* employer unless one is first an "employer." 29 C.F.R. § 791.2(b)(3)). In ignoring that key

prerequisite, the panel uncoupled joint employment from employment itself. The panel's opinion suggests that a company may be sued under the FLSA by an employee of a contractor or subcontractor, even if it has *no* relationship with the employee, merely because the contract terms indirectly affect the terms and conditions of the employee's employment.

The panel also erred in concluding that factors from the MSAWPA joint-employment regulation should be used to determine joint employment in all FLSA cases. As the DOL acknowledges, those regulations are inapplicable in FLSA cases and describe "seven economic realities factors in the context of a farm labor contractor acting as an intermediary employer for . . . *an agricultural grower*." DOL Amicus Br. at 22 (emphasis added); *see id.* at 25 ("The Secretary is not arguing that the [MSAWPA] joint employment regulation itself applies in FLSA cases."). As the Eleventh Circuit, in interpreting a prior version of the MSAWPA regulation, explained: "Although the [MSAWPA] defines joint employment by reference to the definition provided in the FLSA, that does not mean that the reverse holds true—that joint employment under the FLSA is invariably defined by [MSAWPA] regulations." *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1177 (11th Cir. 2012); *see also* DOL Amicus Br. at 26 n.10 (acknowledging this precedent).

Furthermore, the panel modified the MSAWPA regulations—which are

inapplicable in this context—to expand FLSA coverage even beyond that advocated by the DOL. Whereas the DOL's proposed factors evaluate the relationship between the putative joint employer and the worker (DOL Amicus Br. at 27; DOL Guidance at 11-12), the panel re-oriented the factors to focus on the relationship between the two putative joint employers.[2] The panel's conception of an entirely new standard to govern a core employment issue justifies rehearing en banc.

CONCLUSION

Rehearing en banc should be granted.

[2] For example, the standard proposed in the DOL's interpretive guidance looks to the "long-term relationship *by the employee with the potential joint employer*" (DOL Guidance at 12 (emphasis added)), but the panel listed as a factor "[t]he degree of permanency and duration of the relationship *between the putative joint employers*" (Slip Op. at 24 (emphasis added)).

Dated: February 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing petition for rehearing or rehearing on banc complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 3,898 words, including footnotes and excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification to all counsel of record in this matter who are registered with the Court's CM/ECF system.

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