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

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-*APPELLEES*

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I. INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") 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. An important function of the Chamber is to represent the interests of its members in matters before the courts, the Executive Branch, and Congress. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber has a strong interest in the outcome of this proceeding. In reliance on over 30 years of precedent, many of the Chamber's members have structured and engaged in 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 ("FLSA"). The panel's decision has the potential to disrupt long-standing and settled expectations among the courts, businesses, and the public.

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[1] *Amicus Curiae* certifies that: (a) no party's counsel authored any part of this brief; (b) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (c) no person other than the *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

II. INTRODUCTION

In the instant case (and a companion case decided the same day), a panel of this Court proclaimed a "new standard" applicable to claims that a company is an FLSA joint employer. Slip Op. at 23; *see also Salinas v. Commercial Interiors, Inc.,* --- F.3d ---, 2017 WL 360542, at *10 (4th Cir. Jan. 25, 2017) (announcing the Fourth Circuit's "own test"). But the panel was not writing on a blank slate. More than 10 years ago, another panel – *Schultz v. Capital Int'l. Sec., Inc.,* 466 F.3d 298 (4th Cir. 2006) – assessed how Fourth Circuit litigants should address FLSA joint employment questions. What's more, the decade-old directives of *Schultz* were quite different from those of the instant panel and *Salinas*. Most notably, *Schultz* advised consideration of factors first identified by *Bonnette v. California Health & Welfare Agency,* 704 F.2d. 1465 (9th Cir. 1983). The panel deciding the instant case and *Salinas* advised the opposite, instructing that "courts should no longer employ *Bonnette* or tests derived from *Bonnette*." *Salinas*, 2017 WL 360542, at *10.

This, then, is the classic case for *en banc* review. Since one Fourth Circuit panel may not overrule another, *see*, *e.g.*, *McMellon v. U.S.,* 387 F.3d 329, 334 (2004), *en banc* review is necessary to prevent confusion as to whether courts should follow the historical instructions of *Schultz* or the new, conflicting instructions of the instant case and *Salinas*. *En banc* review also is warranted

because the instant case and *Salinas* threaten to create a split among the circuits, inviting forum shopping by FLSA litigants.

Moreover, *en banc* review is warranted because FLSA joint employment standards are extremely important to litigants throughout the country. Joint employment liability has become the theory *du jour* among FLSA plaintiffs. Joint employment cases have exploded, and the novel theories under which plaintiffs hope to establish joint employment have multiplied. There is virtually no sector of the economy – construction, agriculture, janitorial services, warehousing and logistics, staffing, hospitality, franchising – immune to joint employment claims. For that reason, it is imperative that the Circuit set clear expectations with respect to FLSA joint employment standards, and that those standards remain predictable.

III. ARGUMENT

A. The Standard For Analyzing FLSA Joint Employment Claims Is A Matter Of National Significance.

As an initial matter, *en banc* review is warranted because the standard for evaluating FLSA joint employment claims is exceptionally important to an increasing number of litigants. *Cf.* Fed.R.App.Proc. 35(b)(1)(B) (an *en banc* petition should note if the proceeding involves "questions of exceptional importance").

Today, FLSA cases are at near record levels. In these cases, the question of what entity (if any) constitutes plaintiffs' employer is central, since the statute's

protections extend only to "employees" and its obligations run only to "employers." 29 U.S.C. § 203(e). A related question in many cases is whether two entities constitute "joint employers," such that the hours an employee works for either must be aggregated to determine overtime eligibility, and potential liability will be shared between the two. *See* 29 C.F.R. § 791.2 (a) ("[a] single individual may stand in the relation of an employee to two or more employers").

Cases raising joint employment issues constitute a significant and increasing percentage of the total number of FLSA claims. A potential reason is that, in recent years, the Department of Labor's Wage and Hour Division ("WHD") has invited unprecedented joint employment claims (carrying the corresponding risk of unexpected, retroactive liability) against what it termed "fissured industries." *See* U.S. Department of Labor, Strategic Enforcement Plan Fiscal Years 2014-2018, at p. 39 (referencing situations involving "subcontracting, third-party management, franchising, independent contracting and other contractual forms").[2] WHD's goal was to use litigation – especially *amicus* briefs – in hopes of pushing FLSA joint employment into previously uncharted territory. *See* David Weil, Improving Workplace Conditions Through Strategic Enforcement, at p. 79 (May 2010)[3] ("WHD, in consultation with the Office of the Solicitor, should seek to clarify joint

[2] Available at https://www.dol.gov/sites/default/files/documents/agencies/osec/stratplan/fy2014-2018strategicplan.pdf.

[3] Available at https://www.dol.gov/whd/resources/strategicEnforcement.pdf.

employment the in many industries and sectors where the locus of employment has blurred."); *id.* at 80 (recommending that the Solicitor "actively review cases involving . . . franchising, branding, joint employment, subcontracting, and joint ventures, and consider filing *amicus curiae* ('friend of the court') briefs"); *see also* Brief for the Secretary of Labor as *Amicus Curiae* In Support of Plaintiffs-Appellants, *Salinas*, 2017 WL 360542 (No. 15-1915), Dkt. 23-1. Frequently, WHD's positions were contrary to settled expectations, and they involved theories that had been rejected by courts (often decades ago). *Cf. Love's Barbecue Rest. No. 62*, 245 NLRB 78, 118 (1979) (rejecting claim that franchisor and franchisee were National Labor Relations Act joint employers, noting that "the need for uniformity of operation [among franchise outlets] will not, of itself, suffice to establish a joint employer relationship"); *Patterson v. Domino's Pizza, LLC,* 333 P.3d 723, 725, 732-34, 39 (Cal. 2014) (rejecting similar claim under California wage law, noting the "sound and legitimate reasons for business format contracts . . . to allocate local personnel issues almost exclusively to the franchisee").

Regardless of the cause, however, novel FLSA joint employment claims have ensnared companies "in all industries, including the construction, agricultural, janitorial, warehouse and logistics, staffing, and hospitality industries." Administrator's Interpretation No. 2016-1, *Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Workers Protection Act*

(Jan. 20, 2016); *see also Johnson v. Serenity Transportation, Inc.,* 141 F. Supp. 3d 974, 981 (N.D. Cal. 2015) (rejecting claim that funeral provider was joint employer of mortuary drivers); *Lepkowski v. Telatron Mktg. Grp., Inc.*, 766 F. Supp. 2d 572 (W.D. Pa. 2011) (rejecting claim that financial services company was a joint employer of phone operators); *Tafalla v. All Florida Dialysis Servs., Inc.,* 2009 WL 151159 (S.D. Fla. Jan. 21, 2009) (rejecting claim that a physician practice was a joint employer of dialysis nurses); *Singh v. 7-Eleven, Inc.,* 2007 WL 715488 (N.D. Cal. Mar. 8, 2007) (rejecting claim that franchisor was joint employer); *Beck v. Boce Grp., L.C.,* 391 F. Supp. 2d 1183 (S.D. Fla. 2005) (rejecting claim that administrative services provider was a joint employer of restaurant servers). Any change in this Circuit's standards for evaluating FLSA joint employment claims, then, could have significant repercussions in many sectors of the economy, including ones that to date have not been subject to joint employment litigation. For that reason alone, this Court should grant *en banc* review.

B. The Panel's Decision Is Inconsistent With The Prior *Schultz* Decision.

This Court should also grant rehearing *en banc* because the panel's standards for evaluating joint employment claims are contrary to those of the earlier *Schultz* panel. *Cf.* Fed.R.App.Proc. 35(b)(1)(A) (a petition for rehearing *en banc* should note if "a panel decision conflicts with a decision of . . . the court"). In the absence

of *en banc* review, this discrepancy will create unnecessary confusion for district courts and litigants.

The *Schultz* panel instructed Fourth Circuit litigants confronted with FLSA joint employment questions to consider the "useful" *factors* articulated in the Ninth Circuit's *Bonnette* decision. *Schultz,* 466 F.3d at 306 fn. 2. The *Schultz* panel taught that litigants should start with the FLSA's joint employment regulation, 29 C.F.R. § 791.2. *See id.* at 305-306. Under that regulation, joint employment "generally will be considered to exist:"

> (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> (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.

29 C.F.R. § 791.2(b). The *Schultz* panel went on to note that, in some cases, the regulation alone may be insufficient to settle the question. *See Schultz,* 466 F.3d at 306 fn. 2. In those instances, the *Schultz* panel instructed, "it may be useful for a court to consider factors such as those listed in *Bonnette,* 704 F.2d at 1469–70" and

its progeny.[4] *Id. (*citing *Zheng v. Liberty Apparel Co., Inc.,* 355 F.3d 61, 71–72 (2d Cir.2003)). Thus, *Schultz* gave district courts and FLSA litigants permission, if not encouragement, to apply *Bonnette* and cases founded on it.

The panel in this case (and *Salinas*) took a contrary view. The panel acknowledged that FLSA joint employment analysis starts with 29 C.F.R. § 791.2. *See Salinas*, 2017 WL 360542 at *10. The panel also acknowledged that *Bonnette* is the seminal FLSA joint employment case, and that most courts apply a version of *Bonnette's* test. *See id.* at *5 (noting that "[a] number of courts, including district courts in this Circuit, apply the *Bonnette* factors"). The panel further acknowledged that the Ninth Circuit and other courts have expanded *Bonnette's* original formulation, electing "to supplement the four *Bonnette* factors with additional factors." *Id.* at *6.

Nevertheless, and notwithstanding *Schultz's* endorsement of *Bonnette*, the panel here and in *Salinas* stated that *Bonnette* and its progeny were fundamentally wrong. *Id.* at *9 (stating that the "myriad existing tests" are not "coherent" and are

[4] In its earliest iteration, the *Bonnette* test consisted of four factors: whether the putative joint employer "(1) had the power to hire and fire 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. As the *Salinas* court recognized, subsequent cases have added more factors, but *Bonnette*-derived tests continue to focus on the relationship between the putative employee and putative joint employer, as well as the putative employee's level of economic dependence on the putative joint employer. *Salinas*, 2017 WL 360542 at *5-6.

"improperly" focused). For that reason, the panel admonished that "courts should no longer employ *Bonnette* or tests derived from *Bonnette* in the FLSA joint employment context." *Id.* at 10.

The settled rule is that one Fourth Circuit panel may not overrule another. *See, e.g., McMellon v. U.S.,* 387 F.3d 329, 334 (4th Cir. 2004) (holding that "the first case to decide the issue is the one that must be followed"). What, then, to make of: (1) *Schultz's* instruction that *Bonnette* and its progeny are "useful," and (2) the instant panel's instruction that *Bonnette* and *Bonnette*-derived inquiries "should no longer [be] employ[ed]"? The potential for confusion and uncertainty within this Circuit is manifest, and rehearing *en banc* is warranted to clarify the applicable test in the Circuit and to reaffirm the principle that one panel may not overrule another. *See id.* at 333-34 (noting that "the binding effect of a panel opinion on subsequent panels is of utmost importance to the operation of this court and the development of the law in this circuit," and critical to "minimize[] the instability and unpredictability that intra-circuit conflicts inevitably create").

C. The Panel's Decision Threatens A Split Between Circuits

In addition, rehearing *en banc* is warranted because the panel's new joint employment test threatens to create a circuit split. *Cf.* Fed.R.App.Proc. 35(b)(1)(B) (an *en banc* petition should note if the panel's decision "conflicts with the authoritative decisions of other United States Courts of Appeals").

As noted, *Salinas* recognized that most circuits use *Bonnette* or a *Bonnette*-derived test in analyzing FLSA joint employment claims. At least three circuits apply the original *Bonnette* factors. *See Gray v. Powers,* 673 F.3d 352, 355 (5th Cir. 2012) (applying the *Bonnette* factors); *Baystate Alt. Staffing, Inc. v. Herman,* 163 F.3d 668 (1st Cir. 1998) (same); *Muhammad v. Platt College,* 46 F.3d 1136 (8th Cir. 1995) (unpublished) (same); *cf. Salinas*, 2017 WL 360542 at *5 (citing *Gray* and *Baystate Alt.Staffing*). At least three others use tests fashioned from *Bonnette*. *See In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig.,* 683 F.3d 462 (3d Cir. 2012) (test similar to the *Bonnette* factors, focusing on alleged direct control of putative employee); *Layton v. DHL Exp.,* 686 F.3d 1172, 1177 (11th Cir. 2012) (eight-factor test focusing on "each employment relationship as it exists between the worker and the party asserted to be a joint employer"); *Zheng,* 355 F.3d at 66-67 (Second Circuit's six factor test, incorporating *Bonnette* factors); *cf. Salinas*, 2017 WL 360542, at *6 (citing *Enterprise, Layton* and *Zheng*). Likewise, the Ninth Circuit has expanded *Bonnette*, and "not expressly replaced the *Bonnette* test." *Salinas*, 2017 WL 360542, at *6.

As also noted, the panel in the instant case and *Salinas* concluded that these courts (and, by implication, *Schultz*) have it wrong. *See Salinas*, 2017 WL 360542 at *9 (summarizing the purported maladies of the "myriad existing tests – most of which derive from *Bonnette*"). So concluding, the panel advocated an FLSA joint

employment test more expansive than any other, if for no other reason than the Act is a "remedial" statute. *Id.* at *10.

The Chamber respectfully submits that the instant panel is on the wrong side of this avoidable circuit split. *Cf. Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2131 (2016) (Thomas, J., dissenting) (explaining that "[t]here 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'" and noting that Supreme Court majorities have declined to apply the so-called liberal-construction canon in recent FLSA cases) (internal citations and quotes omitted). That, however, is a question for another day. For present purposes, it is enough that the instant case and *Salinas* (if controlling) would create a circuit split, and one in which the Fourth Circuit would be the outlier. That circuit split, in turn, would invite plaintiffs' attorneys to bring nationwide FLSA cases in the Fourth Circuit, thereby exporting the minority approach of this Court to the operations of businesses far beyond this Circuit. Rather than risking this, and rather than permitting a departure from established Fourth Circuit precedent, the Court should grant *en banc* review.

IV. CONCLUSION

For reasons stated here and by the parties, rehearing *en banc* should be granted.

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 2,594 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 24, 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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