13-4478-cv(L), 13-4481-cv(CON)

United States Court of Appeals

for the

Second Circuit

ERIC GLATT, on behalf of himself and all others similarly situated, ALEXANDER FOOTMAN, on behalf of himself and all others similarly situated, EDEN M. ANTALIK, DAVID B. STEVENSON, KANENE GRATTS, on behalf of themselves and all others similarly situated, BRIAN NICHOLS,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 1:11-CV-6784 (HON. WILLIAM H. PAULEY)

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL ON EDUCATION, AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES, AMERICAN ASSOCIATION OF COMMUNITY COLLEGES, COLLEGE AND UNIVERSITY PROFESSIONAL ASSOCIATION FOR HUMAN RESOURCES AND NASPA: STUDENT AFFAIRS ADMINISTRATORS IN HIGHER EDUCATION IN SUPPORT OF NEITHER PARTY

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– v. –

FOX SEARCHLIGHT PICTURES INC.,
FOX ENTERTAINMENT GROUP, INC.,

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *amici curiae* American Council on Education, American Association of Community Colleges, American Association of State Colleges and Universities, Association of Public and Land-grant Universities, College and University Professional Association for Human Resources, and NASPA: Student Affairs Administrators in Higher Education state that they are non-profit associations with no parent corporations and no privately-owned stock.

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STATEMENT OF SOURCE OF AUTHORITY TO FILE

Leave to file this brief is being sought from the Court by motion submitted herewith.

THE INTEREST OF THE *AMICI*[1]

Amici curiae submit this brief in support of maintaining the national availability of internships undertaken by college students. This brief does not support of any of the parties in the two cases before this Court.[2] *Amici* are non-profit organizations whose members include more than 2,000 institutions of higher

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[1] No party or counsel for any party authored or paid for this brief in whole or in part or made a monetary contribution to fund the brief's preparation or submission. No person or entity other than *amicus* American Council on Education made a monetary contribution to this brief.

[2] The two decisions on appeal to the Court are *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013) and *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013).

education and the professionals that serve at those institutions. *Amici* represent all sectors of higher education, including public, independent, rural, urban, large, and small institutions, community colleges, undergraduate and graduate institutions. *Amici* work to educate millions of students who will graduate and enter the workforce as productive citizens.

Amicus American Council on Education ("ACE") represents approximately 1,800 institutions of post-secondary education which span the breadth of higher education, and include a substantial majority of all colleges and universities in the United States. Founded in 1918, ACE works to promote the fundamental interests of higher education, believing that a strong higher education system is the cornerstone of a democratic society. For many years, there has been an increasing recognition that it is important to extend students' education beyond classrooms and campuses to include experiential and internship opportunities in real work settings. At the 2011 Internationalization Collaborative Annual Meeting, an event supported by ACE, panelists spoke of the value for students of experiential education and internships that require collaborative efforts between educational institutions and the business community as a crucial aspect of education and career preparation for students. The proliferation of internships has directed attention to the regulatory questions raised here and in cases brought elsewhere.

Amici regularly submit *amicus* briefs on issues of importance to higher education. This brief does not take a position with regard to the outcomes sought by the particular parties, or the specific internship experiences, now before the Court. Rather, *amici* seek to acquaint the Court with the importance of internships to the success of higher education, and to offer a more effective and nuanced alternative to the United States Department of Labor's test for examining the legality of internships under the Fair Labor Standards Act.

The Addendum to this brief sets forth information describing the other *amici* on this brief.

SUMMARY OF ARGUMENT

This appeal is likely to determine whether educationally-beneficial internships, particularly in the business sector, will continue to be widely available, or whether these interns will hereafter have to be treated as "employees" under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 200 *et seq.* ("FLSA"). The language and intent of the FLSA is to protect workers from exploitative labor practices. When it was drafted in the 1930s, internships as they are known today did not exist. It is therefore not surprising that the FLSA does not define or contemplate the condition or status of the modern student intern. The Department of Labor's six-factor test, while a laudable attempt to clarify the appropriate

application of the FLSA, is an inadequate framework when strictly applied in the context of student internships.

The Department of Labor's test, referred to by many as the "all-or-nothing" approach, requires that each standard of the six-factor test be satisfied and therefore can easily result in disqualifying an internship even where the primary and overwhelming benefit is to the intern. Further, because the six factors have never been clearly understood, consistently applied, subject to the administrative rulemaking process, or fully adopted by the courts, there is widespread uncertainty as to how employers are supposed to treat student interns. The District Court's decisions on appeal here reflect that lack of clarity.

Colleges understand that a valuable component of total education is the opportunity to apply academic knowledge in actual work settings. Experiential learning opportunities, routinely referred to as "internships," enable students to integrate classroom knowledge and theory with practical applications in ways that cannot be accomplished within the four walls of a lecture hall or through on-line learning. Colleges and universities are uniquely qualified to assess whether an internship holds educational value, and have devoted substantial resources to helping students to pursue and benefit from internships as integral parts of their education. The significant growth of internships and the widespread participation of students reflect the educational value which they confer.

Amici accordingly suggest that the proper starting point for analysis is whether an internship experience is integral to a student's education; the value of the educational experience should be given paramount importance. The analysis which we propose would accord deference to a higher education institution's determination that an internship is of primary benefit to the educational development of the intern. By employing a "primary benefit" analysis, the Court will be able to develop a standard that continues to prevent abuse or exploitation, while permitting varied and flexible learning experiences which the business community can be confident it can continue to offer without facing significant potential liability. The uncertain and chilling prospect of employer FLSA liability for a legitimate educational internship restricts, if not altogether eliminates, opportunities which college students need in the public sector, in the non-profit sector, and in the business world. These experiences should not be curtailed by the mechanical application of a law intended to regulate employment, but which was not intended to regulate education.

Accordingly, the proposed test for student internships offered here is not constrained by a strict checklist of six factors, but rather looks to whether the intern is the primary beneficiary of the relationship. A primary beneficiary analysis will do no violence to the salutary purpose and intent of the FLSA – indeed, by its very nature a primary beneficiary analysis will protect interns from

abuse at the hands of unscrupulous employers. The Court should avoid a decision here that would needlessly curtail opportunities for experiential learning.

ARGUMENT

I. THE DEPARTMENT OF LABOR'S CURRENT GUIDANCE IS AN INSUFFICIENT FRAMEWORK TO ASSESS INTERNSHIPS UNDER THE FAIR LABOR STANDARDS ACT

A. The Plain Meaning of the Fair Labor Standards Act is Unhelpful in Assessing Internships

The FLSA is a product of a reform movement intended to protect American workers from abusive and exploitative employment practices. *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1944); *Velez v. Sanchez*, 693 F.3d 308, 326 (2d Cir. 2012). It does so by regulating the length of the workday and by setting overtime and minimum wage standards. *See Portland Terminal, supra,* 330 U.S. at 150; *Rutherford Food Corp., supra,* 331 U.S. at 723, 727; *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005).

The FLSA's definition of "employee" is broad, *see United States v. Rosenwasser*, 323 U.S. 360, 363 (1945), but Congress attempted to limit its scope with a number of specific exemptions: "learners," "apprentices" and full-time

students are not covered by the Act. *See* 20 U.S.C. § 214.[3] The FLSA contains no definition of "intern," nor does it address where interns fit into its statutory scheme. In all likelihood, the absence of a statutory definition is due to the fact that internships as we know them today did not exist when Congress drafted the statute.

The Supreme Court recognized that there were limits to the reach of the FLSA shortly after the law was enacted, and cautioned against literal adherence to the FLSA definitions in all situations: "broad as they are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." *Portland Terminal, supra,* 330 U.S. at 152. In *Portland Terminal,* the Supreme Court determined that there was no indication in the FLSA that Congress intended to outlaw a relationship in which a person, solely for his or her own personal purposes, works in activities carried on by what would otherwise be an "employer" without promise or expectation of compensation. *Ibid.* The core finding of

[3] The FLSA protects "employees," who are (tautologically) defined as individuals "employed by an employer." 29 U.S.C. § 203(e)(1); *see Portland Terminal, supra,* 330 U.S. at 150; *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003). An employer "employs" an individual if it "suffers or permits" that individual to work. 29 U.S.C. 203(g); *see Zheng, supra,* 355 F.3d at 66. The Supreme Court has defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily *and primarily* for the benefit of the employer and his business." *Tennessee Coal Co. v. Muscoda Local,* 321 U.S. 590, 598 (1944) (emphasis supplied).

Portland Terminal is that the FLSA was enacted to protect employees from abuse, but not to regulate those engaged in an educational program benefiting the student. 330 U.S. at 152–53.

The Supreme Court recognized that the trainees in *Portland Terminal* benefited from completing their training in an actual work setting and by applying what they had learned to the real world; this "benefit" analysis yielded the rationale for the Court's holding. 330 U.S. at 153. It cannot be denied that the "employer" in *Portland Terminal* also derived a benefit from the trainee's unpaid experience, because it gave the employer access to a knowledgeable, trained work force. *Ibid.* If the facts of *Portland Terminal* were converted from a train yard to a modern business setting, they would be akin to students participating in internships in order to test and apply their knowledge in a real work setting for their own educational benefit – not as employees, but as individuals participating in another phase of their education.[4]

B. The Department of Labor Guidance and Related Case Law Is Inadequate for Determining Whether a Student Internship has Educational Value

[4] The cases now before the Second Circuit were brought under the New York Labor Law as well as the FLSA, and both opinions below determined that New York Labor Law embodies the same standard as the FLSA for the purpose of defining "employment." *See Wang*, *supra*, 293 F.R.D. 489; *Glatt*, *supra*, 293 F.R.D. 516.

In an attempt to flesh out the FLSA's minimalist definitions, the Department of Labor has created a six-factor test to determine whether an intern in a business setting is an "employee." U.S. Department of Labor *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* (April 2010) ("*DOL Fact Sheet*").[5] This document has been characterized by the Court below in *Wang* as the Department of Labor's attempt to put some "meat on the *Walling* bones." 293 F.R.D. at 493.

The Department of Labor takes the position, as stated in the *DOL Fact Sheet*, that unless all of the six factors it has identified are met, an employment relationship must be found, and that the FLSA's wage and overtime requirements

[5] *DOL Fact Sheet*, *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf, states that all of the following six criteria must be met in order to make a determination that an internship is exempt from the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

then apply. While some of the factors are non-controversial (such as whether there is an understanding about compensation, or a promise of a job at the conclusion of the internship), other factors (primarily whether the employer derives any immediate advantage from the relationship, or whether there is sufficiently close supervision) are far more problematic when applied in the internship context.

The Department of Labor's six-factor test is not law. The document itself states that "this publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations," *DOL Fact Sheet.* Lacking any other standard, however, courts routinely cite to the *DOL Fact Sheet* in their FLSA analyses, according deference to the Department's "general information" guidance: "Because they [the six DOL factors] were promulgated by the agency charged with administering the FLSA and are a reasonable application of it, they are entitled to deference." *Wang*, *supra*, 293 F.R.D. at 494; *Glatt*, *supra,* 293 F.R.D. at 532. The six-factor test is, indeed, entitled to some deference, but it is an imperfect tool, and least helpful when applied rigidly, especially with the almost infinite variety of internships undertaken by students. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) ("the issue of the employment relationship does not lend itself to a precise test") (citing *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)); *see also Rutherford Food Corp.*, *supra*, 331 U.S. at 730; *Reich v. Parker Fire*

Protection District, 992 F.2d 1023, 1027 (10th Cir. 1993) ("the six criteria are relevant, but not conclusive to the determination of whether ... trainees were employees under the FLSA....").

Furthermore, courts apply the Department of Labor's six-factor test inconsistently, which has created a body of case law both contradictory and confounding. Some courts use *Portland Terminal* as a guide for interpreting and applying the Department's six-factors. *See Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127 (5th Cir. 1983). Other courts reject the six-factor test altogether. *See Solis*, *supra*, 642 F.3d at 525 ("it is overly rigid"); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-1210, n.2 (4th Cir. 1989). Still other courts recognize the limitations of the *DOL Fact Sheet* standard, but use some elements of the six factors. *See Rutherford Food Corp.*, *supra*, 331 U.S. at 730 (the determination of an employer-employee relationship "does not depend on ... isolated factors but rather upon the circumstances of the whole activity"); *Solis*, *supra*, 642 F.3d at 525. The confusion in this area of the law demonstrates that we need a functional standard, particularly for use with student internships, that is sufficiently flexible and nuanced to accommodate the many arrangements in today's internship environment.

II. THE PRACTICAL STANDARD FOR ANALYZING STUDENT INTERNSHIPS SHOULD BE: WHO IS THE PRIMARY BENEFICIARY?

No court has explicitly addressed the status of interns and internships under the FLSA, which is an issue of first impression before this Court: "There is no settled test for determining whether a student is an employee for the purposes of FLSA." *Solis, supra,* 642 F.3d at 521. While it is clear that the FLSA was designed to prevent exploitation of workers, it was not intended to penalize employers who choose to offer internships for the experiential education of college students.

An appropriate standard for looking at internships should consider the educational value of the experience, based upon who is the primary beneficiary of the relationship. Case law supports a focus on the primary beneficiary: "A court should also consider who is the primary recipient of the benefits from the relationship. This is the approach taken by some courts determining if trainees and students providing services as part of their education are also employees." *Velez, supra,* 693 F.3d at 330; *see also McLaughlin, supra,* 877 F.2d at 1209; *Blair, supra,* 420 F.3d at 829. Similarly, the Sixth Circuit in *Solis v. Laurelbrook Sanitarium,* declared that, based on its reading of *Portland Terminal* and precedent in that Circuit, "[I]dentifying the primary beneficiary of a relationship provides the

appropriate framework for determining employee status in the educational context." 642 F.3d at 526.

Even the *DOL Fact Sheet*'s explanation of the six factors refers to the "primary beneficiary of the activity" when discussing internships; so giving primacy to this factor would not do violence to the Department of Labor's own analysis. With the involvement of the higher education sector in setting standards for internships as integral to the college and university educational experience, there would be confidence that internships serve as an extension of the classroom educational environment, primarily benefiting the student.

Other *DOL Fact Sheet* criteria, such as the displacement of regular workers, or use of an internship as a trial period for a job, remain useful tools in making sure that students working without pay, or for less than minimum wage, are not being exploited. Evidence of actual exploitation would have a persuasive role, such as whether an intern is replacing a paid employee or whether the intern's acceptance of an unpaid internship is a pre-condition to the start of a paid position. However, these factors should be considered as part of a flexible, non-prescriptive analysis which gives primacy to the educational value of the student's learning experience.

A "primary beneficiary" standard will prevent abuse and exploitation, while at the same time permitting varied and flexible experiential learning

opportunities. Further, the standard will allow the business community to continue to offer educationally valid internships without facing significant and unpredictable potential liability. The prospect of FLSA liability under the current system curtails, and quite possibly eliminates, opportunities which college students need in order to become successful members of the workforce and of their communities. These experiences should not be foreclosed by the mechanical application of a law intended to regulate employment, and not education.

Reliance on a "primary beneficiary" test which starts with recognition of educational value will provide a comprehensible standard for evaluating internships, will give predictability for internship sponsors, and will promote the continued availability of a wide range of internship experiences. The test will preserve the spirit and intent of the FLSA, and will ensure that internships that are genuinely focused on education are not unnecessarily categorized as employment.

III. INSTITUTIONS OF HIGHER EDUCATION ARE UNIQUELY QUALIFIED TO ASSESS WHETHER AN INTERNSHIP HOLDS EDUCATIONAL VALUE

Education "is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). It "provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Investment in and support of education in all its forms and applications does not just benefit the individual: an

"educated populace is essential to the political and economic health of any community." *Mueller v. Allen*, 463 U.S. 388, 395 (1983). As President Barack Obama observed in his February 12, 2013 State of the Union Address, the nation has a real stake in supporting the best education for the next generation: "[i]t's a simple fact the more education you've got, the more likely you are to have a good job and work your way into the middle class."[6]

Educational institutions have, accordingly, a responsibility to prepare students to be good citizens, be thoughtful, productive members of society, and enter the labor market ready and able to work from the day they graduate. Colleges and universities have taken this responsibility seriously, and have shaped their educational programs to achieve individual and societal goals through classroom, on-line and experiential learning.

Colleges and universities are entitled to deference in matters relating to education, just as the Department of Labor is entitled to deference in employment matters. Colleges and universities are uniquely suited to make the complex educational judgments that lie within the expertise of academia and courts have historically deferred to the judgment of the academic community with regard to educational decisions. *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (citing

[6] President Barack Obama, State of the Union Address (Feb. 12, 2013), *available at* http:///www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address.

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985), *Board of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 96, n. 6 (1978), *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 319, n. 53 (1978)); *see also Keyishian v. Board of Regents of Univ. of N.Y.,* 385 U.S. 589, 603 (1967); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

Congress recognizes that colleges and universities deserve deference in matters relating to education. For example, the General Education Provisions Act precludes the federal government from "exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution...." 20 U.S.C. § 1232a (Prohibition Against Federal Control of Education). The success of American academic institutions rests on their independent authority to decide matters which relate to the education that they offer: "Academic freedom thrives ... on autonomous decisionmaking by the academy itself." *Ewing*, *supra*, 474 U.S. at 226 n.12. There is ample authority that when educators, in the exercise of professional judgment, conclude that there is a sound educational basis for a particular practice, the Government should be hesitant to intrude.

Giving deference to higher education in determining the value of an internship need not diminish the role of the Department of Labor in regulating true employment relationships, in enforcing minimum wage requirements, or in

preventing exploitative employer practices. It has been recognized from the inception of the FLSA that not all experiences in the workplace represent an employee-employer relationship, and that there are distinctions applicable to trainees, learners, and even volunteers. Where an internship is an integral part of a student's education, it should be outside the scope of the FLSA; and higher education institutions, in exercising their expertise with respect to education, are entitled to deference in determining educational relevance. Once such a determination has been made, the presumption of educational benefit to the student should be the foundation of the remaining FLSA analysis. This will not prevent the Labor Department from regulating employee/employer relationships with respect to entry level jobs, or unpaid arrangements that replace or duplicate the jobs of actual employees, even if the dislocation is part-time and short-term.

IV. STUDENT INTERNSHIPS ARE INTEGRAL COMPONENTS OF THE MODERN EDUCATIONAL EXPERIENCE

It is widely accepted that education outside the classroom is important to prepare students to be productive citizens and competent employees. As a form of experiential learning, internships are actively encouraged and supported by colleges and universities. Students pursue internships in record numbers, whether or not they are paid, because of the benefit they derive from reinforcing their knowledge and skills in actual workplace settings. Colleges benefit from having students use internship experiences to enrich subsequent classroom and campus

dialogue. Courts, in assessing whether or not a particular internship program is covered by the FLSA, should consider the judgment of higher education professionals that an internship constitutes an educational extension of the college program, and confers valuable benefits for students and the entire educational enterprise.

The Department of Labor's test is insufficient to address experiential learning, and it cannot be used to evaluate the educational value of a particular internship. Further, there is simply no evidence that the application of the six-factor test has improved the quality of internship experiences, has served to root out workplace exploitation, or has created more jobs. However, business concern about enforcement of the six-factor test – not to mention the prospect of substantial civil liability under the FLSA – has a profound negative impact on the availability of internships, and leads businesses to conclude that internship programs for college students may be too risky to be a worthwhile collaboration with colleges.

Indeed, the pressure to treat student internships as "employment" under the FLSA may create actual incentives to dilute the educational value of what would otherwise be educational mentoring experiences: businesses which are required to classify internships as paid work will have decreased incentives to provide any experiential learning components, and increased incentives to treat

these programs as cheap, minimum-wage labor for the sole benefit of the employer.

Therefore, *amici* encourage the Court to craft a standard which takes into account the educational determination of higher education institutions which consider internships to be valid educational experiences. Colleges and universities certainly understand what is, and what is not, educational; and given their collective investment in promoting internship opportunities for their students, there should be a presumption that they are not accrediting internship programs for the purpose of furnishing unpaid labor to unscrupulous employers. Recognition of this role would bring predictability to internship opportunities, would strengthen the educational emphasis and would be consistent with existing FLSA jurisprudence. The presumption would be rebutted if the Department of Labor were to find that an internship was a sham in terms of educational value, or that interns or other employees were actually being exploited.

A. The Higher Education Community's Definition of "Internship" Provides the Foundation for a Useable Standard

The National Association of Colleges and Employers ("NACE"), a nonprofit professional organization representing nearly 2000 American colleges and universities, more than 5000 college career services professionals and

approximately 3000 campus recruiters,[7] defines internships, for higher education purposes, as:

> "[A] form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent."[8]

NACE, which focuses on the employment of college-educated individuals, takes the logical position that government scrutiny of internships needs to "account for the incredible diversity of students, higher education institutions, and employing organizations involved in internships," and that the primary purpose of an internship is to enable the student to engage in projects and tasks that are part of the actual work of the host entity. The core question, NACE asserts, should be whether or not work performed by an intern will primarily advance the education of the student, even if there is some corollary benefit for the employer:

> "*At the foundation of such an assessment is the tenet that the internship is a legitimate learning experience benefitting that student and not simply an operational work experience that just happens to be conducted by a student.*"[9]

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[7] National Association of Colleges and Employers, About the Association, https://www.naceweb.org/about-us/index.aspx?mainindex-col-1-about-nace.
[8] National Association of Colleges and Employers, Position Statement: U.S. Internships (2011), http://www.naceweb.org/advocacy/position-statements/united-states-internships.aspx.
[9] *Ibid.*

Accordingly the Department of Labor's blanket position that the employer which hosts an intern must be barred from an immediate advantage is misplaced, and should not outweigh a test grounded in primary educational benefit to the intern.

B. The Growth of Internships Demonstrates Their Educational Value to Students and the Higher Education Sector

A 1992 study at Northwestern University found that 17% of graduating students had held internships, and by 2008 that number had climbed to 50%, and experts estimate that one-quarter to one-half of the college student internships are unpaid.[10] Research results from the College Employment Research Institute show that three-quarters of the ten million four-year college students will hold an internship at least once before graduating, and Intern Bridge reports that one-third to one-half of those internships will be without compensation.[11] NACE's survey of graduating Class of 2013 seniors documented that 63.2% of the students

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[10] Steven Greenhouse, *The Unpaid Intern*, N.Y. Times, April 2, 2010, at B1, *available at* http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&_r=0.

[11] Sarah Braun, *The Obama Crackdown: Another Failed Attempt to Regulate the Exploitation of the Un-Paid Intern*, 41 Sw. L.Rev. 281, 283–84 (quoting Ross Perlin, *The Unpaid Intern, Legal or Not*, N.Y. Times, April 2, 2012, at WK11, *available at* http://www.nytimes.com/2011/04/03/opinion/03perlin.html?pagewanted=all.

took part in an internship or "co-op" position, or both,[12] and, for example, 80% of Fordham University students complete internships before they graduate.[13]

Even as internship participation was rapidly expanding, the Department of Labor issued *Fact Sheet #71*, setting forth its six prescriptive criteria. Although described as "guidance," the Department of Labor's approach did not go unnoticed by the higher education community. In response to the Department of Labor's initiative, thirteen college presidents, including the presidents of Northeastern University, Boston University, New York University, the University of California, the University of Wisconsin system and Southern Methodist University, wrote to Secretary of Labor Solis in 2010 to emphasize the essential educational role of internships:

> "The integration of rigorous classroom study with real world experience, including internships, is a powerful way to learn. Recognizing the value of experiential learning, a growing number of colleges and universities are expanding and integrating internships into their curriculum. Some internships are paid and some, on a mutually agreed upon basis, are uncompensated."

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[12] National Association of Colleges and Employers, Class of 2013 Survey Majority of Graduating Seniors Took Internships or Co-Op During College Career (2013), http://www.naceweb.org/s06262013/internship-co-op-during-college.aspx.

[13] Fordham University, Internships, http://www.fordham.edu/campus_resources/student_services/career_services/undergraduate/internships/.

> "[O]ur institutions take great pains to ensure students are placed in secure and productive environments that further their education. We constantly monitor and reassess placements based on student feedback."[14]

Joseph Aoun, the President of Northeastern University and a signatory to the letter to Secretary Solis, further argued that:

> "[When] "students participate in well developed internships … they immerse themselves in professional settings, ranging from multi-national corporations to small not-for-profits. They bring their experiences back to the classroom, enriching the curriculum for themselves and their peers. They gain knowledge that will serve them for a lifetime." [15]

President Aoun correctly observed that "the role of determining the educational value of an internship … should rest with educational institutions" which can work with internship hosts to provide detailed position descriptions, set clear expectations, and outline learning outcomes for interns.[16] In further support of unpaid internships, President Aoun quoted from a letter sent by then-Senator John

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[14] Letter from Joseph E. Aoun, President of Northeastern University, Robert A. Brown, President Boston University, *et al.* to Hilda L. Solis, Secretary of Labor (April 28, 2010), http://chronicle.com/items/biz/pdf/FINAL_US%20Department%20of%20Labor%20letter.pdf.

[15] Joseph E. Aoun, *Protect Unpaid Internships*, Inside Higher Ed, July 13, 2010, *available at* http://www.insidehighered.com/views/2010/07/13/aoun.

[16] *Ibid.*

Kerry to Secretary of Labor Solis, urging the Department of Labor to proceed cautiously due to the value of internships.[17]

More recently, both the American Bar Association and the Chief Judge of the State of New York have endorsed proposals for unpaid internships for law students engaged in *pro bono* work.[18] In a letter urging the Department of Labor to sanction the expansion of unpaid *pro bono* internships at law firms and corporate legal departments, the ABA stated that the value and primary purpose of such internships is "to advance and expand the education of the students," "to work on *pro bono* matters in real-life practice settings," and to "work side-by-side with experienced lawyers."[19]

Thus, academic and government leaders recognize the educational relationship among colleges, their students and internship experiences. The real-work internship affords the student the chance not only to apply what he/she

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[17] *Ibid.*

[18] Debra Cassens Weiss, "Law Students May Work as Unpaid Interns, Labor Department Says," ABA Journal, http://www.abajournal.com/news/article/law_students_may_work_as_unpaid_interns_on_pro_bono_matters_for_law_firms_1 (Sept. 17, 2013, 11:44 a.m. CDT); Jonathan Lippman, Chief Judge of the State of New York, The State of the Judiciary 2014: Vision and Action in Our Modern Courts (Feb. 11, 2014), *available at* https://www.nycourts.gov/whatsnew/pdf/2014-SOJ.pdf.

[19] Letter from Laurel G. Bellows, President American Bar Association, to M. Patricia Smith, Solicitor, U.S. Department of Labor (May 28, 2013), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may28_probonointerns_1.authcheckdam.pdf.

already has learned in class or on-line to an actual work assignment, but also to bring that practical experience back to class to inform peers about problem solving challenges and analytic tasks. Furthermore, students discover what additional course work they need to be able to pursue certain fields, and colleges learn where they will want to enhance and broaden their curriculum.

C. Higher Education Takes An Active Role In Integrating Internships Into The Educational Experience

Colleges and universities actively support experiential learning, as evidenced by the substantial resources which they devote to facilitating internships. New York University, for example, lists more than 90 faculty and staff members who assist students by identifying suitable internship placements, providing oversight, answering college-credit related questions, responding to internship concerns and providing guidance on what a student should consider when assessing an internship.[20] Similarly, the State University of New York at Albany identifies approximately 39 members of the faculty and administration from its individual schools, divisions and departments who provide details on internship

[20] New York University, Internship Directory: Internship Coordinators, http://www.nyu.edu/life/resources-and-services/career-development/find-a-job-or-internship/internship-directory.html (NYU implemented a recent addition to its monitoring of internship programs with a requirement that employers make clear details of internships, including whether unpaid internships are consistent with NYU policies and the FLSA). Kara Brandeisky, *New York University Ramps up Internship Oversight*, ProPublica, www.propublica.org/article/new-york-university-ramps-up-internship-oversight (February 11, 2014 5:00 p.m.).

contacts and programs and work with students to integrate internships into the curriculum and a student's course of study.[21]

Colleges and universities work to promote productive internship experiences in order to prepare students for careers. Some – such as Syracuse University, Fordham University, Cornell University, SUNY Albany, New York University and St. John's University – combine internships with campus seminars, tutorials or independent study for course or degree credit.[22] A number of them set academic pre-requisites for internships: for example, St. John's University requires that a student seeking an internship be an upperclassman, have completed at least 60 credits, and have completed 12 credits in their major area of study with a grade point average of 2.75 or better.[23] SUNY Albany sets detailed credit and

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[21] State University of New York at Albany, Finding Internships, http://www.albany.edu/career/internshipsnew/finding_internships.shtml.

[22] Syracuse University, Internships, http://careerservices.syr.edu/undergraduates/internships.html; Fordham University, Internships, http://www.fordham.edu/campus_resources/student_services/career_services/undergraduate/internships/; Cornell University, Career Paths: Internships, http://www.career.cornell.edu/paths/service/internships/; State University of New York at Albany, Internship Handbook, http://www.albany.edu/career/internshipsnew/internshiphandbook.pdf; New York University, Internship Directory and Internship Coordinators, http://www.nyu.edu/life/resources-and-services/career-development/find-a-job-or-internship/internship-directory.html; Saint John's University, Internships, http://www.stjohns.edu/academics/schools-and-colleges/st-johns-college-liberal-arts-and-sciences/internships.

[23] *Ibid.*

grade point average requirements for internship participation in different academic programs.[24] Syracuse University has an established procedure for helping students obtain faculty sponsors for internships.[25] Fordham University requires a minimum 3.0 grade point average and the completion of 60 academic credits prior to an internship.[26] These varying determinations reflect the mechanisms, judgments and expertise which higher education institutions already bring to experiential learning, all of which the Department of Labor is ill-equipped to duplicate.

While the Department of Labor has a mandate to discourage exploitation in employment, experiential data leads strongly to the conclusion that the great majority of interns do not feel exploited. College students have evaluated internships as to whether or not they have had an opportunity to test their competencies and skills in real work settings, and whether they have benefited from challenging assignments and supervisor support; and sixty-five percent of 2400 students surveyed in 2008 were very satisfied with their experiences.[27] A survey on how interns spend their time shows that almost 60% of their time is devoted to work that is analytical, problem solving and project management; and these are the very skills Northeastern University President Aoun identified as a key

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[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] Philip Gardner, George T. Chao, et al., "Ready for Prime Time?," MonsterTRAK (2008), http://ceri.msu.edu/publications/pdf/internwhitep.pdf.

part of the education necessary for this generation of college students.[28] In fact, some educators have suggested that the Department of Labor's view (that unpaid internships will rarely qualify as exempt, and should be treated as paid employment) will cause internships to devolve into a classic employer/employee relationship, and that the educational/mentoring aspect emphasized by the higher education community will diminish.[29] The current data however, indicates that many interns do receive valuable educational benefits from these opportunities and continue to participate in them willingly in growing numbers.

Internships have also become a major factor in the ability of college graduates to obtain employment. Commentators have noted that internships are professionally invaluable because they provide the necessary hands-on learning experience that employers seek, and that employers prefer to hire a student who has had experience through an internship.[30] Michigan State University's Collegiate Employment Research Institute reported in 2008 that some employers will not consider a candidate for employment who has not completed an internship

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[28] *National Association of Colleges and Employers, How Interns and Co-Ops Spends Their Time (2013),* http://www.naceweb.org/s06122013/intern-co-op-time-on-the-job.aspx; *see also* Aoun, n. 15, *supra.*

[29] Clinical Legal Education Association, *Comment on Interpretations 305-3 and the Question of Paid Externships in Law Schools*, January 31, 2014, at p.3, http://cleaweb.org/Resources/Documents/Paid%20Externships.pdf.

[30] Braun, n. 11, *supra.*

and that at companies they surveyed 90% of new hires will have completed an internship or co-op placement.[31]

D. Unduly Rigid Regulation Will Harm Internship Opportunities

From the time the Department of Labor first announced its increased scrutiny of unpaid internships, there has been concern both in the higher education community and among legislators. College presidents cautioned the Department of Labor against "significantly erod[ing] employers' willingness to provide valuable and sought-after opportunities for American college students."[32] This risk was echoed by Northeastern's President Aoun when he wrote an article expressing his opinion that "just the threat of increased regulation could have a chilling effect on the willingness of employers to offer internships – paid or unpaid."[33] Senator John Kerry expressed a similar concern: "I hope you will consider any potential chilling effects on college internship programs before any regulatory steps are taken."[34] The American Bar Association wrote to the Department of Labor to secure clearance for unpaid law student internships in for-profit law firms and corporate legal departments because the uncertainty about the application of the FLSA

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[31] Gardner, n. 27, *supra*.
[32] Aoun, n. 14, *supra*.
[33] Aoun, n. 15, *supra*.
[34] David R. Sands, *Rules Push on Interns Worries College Chiefs*, The Washington Times, May 30, 2010, (quoting Senator Kerry), *available at* http://www.washingtontimes.com/news/2010/may/30/rules-push-on-interns-worries-college-chiefs/?page=all.

"inhibits law firms from offering students the opportunity to work on *pro bono* matters in a real-life practice setting."[35]

The Department of Labor test, rather than creating predictability and confidence, results in precisely the opposite unless employers automatically treat all internships as employment under the FLSA. By contrast, a test which relies on a presumption of regularity for internships which confer a primary benefit on the students who pursue them as part of their educations will mitigate uncertainty for businesses and students and will promote a full spectrum of opportunities.

V. CONCLUSION

Both the important role and the ubiquity of internships, primarily for college students, is a significant social phenomenon, and one which is more complicated than examining a few trainees learning to move rail cars in a train yard. It is a phenomenon most properly examined according to the spirit of the *Portland Terminal* decision, rather than according to its literal expression.

Experiential learning, which is now a part of the educational programs offered by thousands of colleges and universities at a time when our students'

[35] Bellows, n. 19, *supra*; Letter from M. Patricia Smith, Solicitor, United States Department of Labor to Laurel G. Bellows, Immediate Past President, American Bar Association (September 12, 2013), http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf. The core of the Department of Labor's approval of unpaid internships in for-profit settings for law students appeared to hinge on the requirement that law students not work on fee generating activity, which does not translate easily to other settings.

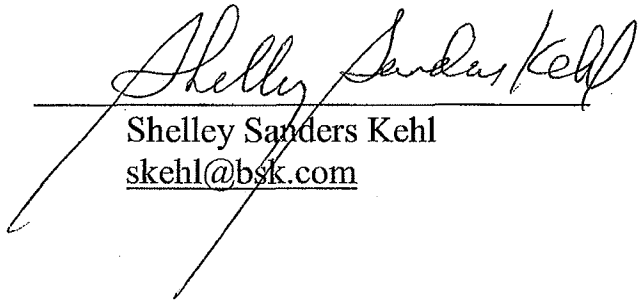
competitiveness is a topic of national concern, relates both to the continuing economic vitality of the business and non-profit sectors, and to the core credentials of college graduates. A significant proportion of current internships reflect the active engagement of colleges to integrate them into the educational program; and the cases before the Court can provide a selecting principle which separates true educational experiences from exploitative thinly-disguised evasions creating unpaid labor. Internships which are recognized as having a primary educational and mentoring purpose for the interns, which do not displace or duplicate the work of paid employees, and as to which it is made clear from the outset that there will be neither compensation nor a promise of a job, should be defined as consistent with public policy and beyond the ambit of the Fair Labor Standards Act.

The Government's responsibility to prevent exploitation of workers, or the displacement of paying jobs, is not inconsistent with preserving legitimate unpaid internships. The Department of Labor has expertise in employment – but not in education. The educational approval of an internship by a college or university should provide a presumption of compliance with the FLSA, so that colleges and universities, students, and businesses can cooperatively create a variety of *bona fide* educational experiences with confidence that they are complying with the law. While the presumption can be rebutted with actual evidence of non-compliance, a consistent and reliable standard will enable all

parties to concentrate on the educational benefits of the arrangements. Such deference is wholly consistent with accepted jurisprudence.

Dated: New York, New York
April 3, 2014

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), the undersigned certified that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 329a)(7(B).

1. Exclusive of the exempted portions in Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 6,772 words.
2. This brief has been prepared in proportionally spaced 14-point font typeface using Microsoft Office in Times New Roman typeface.

Shelley Sanders Kehl

April 3, 2014

ADDENDUM

ADDENDUM: *AMICI CURIAE* ON THIS BRIEF

- American Council on Education is described at page 2 of this brief.

- American Association of Community Colleges (AACC) is the primary advocacy organization for community colleges in the United States. It represents nearly 1,200 two-year, associate degree-granting institutions.

- American Association of State Colleges and Universities (AASCU) has as members more than 400 public colleges, universities, and systems whose members share a learning-and-teaching-centered culture, a commitment to underserved student populations, and a dedication to research and creativity that advances their regions' economic progress and cultural development.

- Association of Public and Land-grant Universities (APLU) is a research, policy, and advocacy organization representing 235 public research universities, land-grant institutions, state university systems, and affiliated organizations. Founded in 1887, APLU is North America's oldest higher education association with member institutions in all 50 U.S. states, the District of Columbia, four U.S. territories, Canada, and Mexico. Annually, member campuses enroll 4.7 million undergraduates and 1.3 million graduate students, award 1.1 million degrees, employ 1.3 million faculty and staff, and conduct $41 billion in university-based research.

- College and University Professional Association for Human Resources (CUPA-HR) serves as the voice of human resources in higher education, representing more than 17,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 two-year and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

- NASPA: Student Affairs Administrators in Higher Education (NASPA) is the leading association for the advancement, health, and sustainability of the student affairs profession. It serves a full range of professionals who provide programs, experiences, and services that cultivate student learning and success in concert with the mission of our colleges and universities. NASPA has more than 13,000 members in all 50 states, 29 countries and 8 U.S. Territories.