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,

v.

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* ECONOMIC POLICY INSTITUTE, NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, WRITERS GUILD OF AMERICA EAST, ROSS PERLIN, AND PROFESSOR DAVID YAMADA

IN SUPPORT OF PLAINTIFFS-APPELLEES

Tsedeye Gebreselassie
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
Attorney for *Amici Curiae*

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *Amici Curiae* hereby provide the following disclosure statements:

Economic Policy Institute is a non-profit corporation.

National Employment Law Project is a non-profit corporation.

National Employment Lawyers Association is a non-profit corporation.

Writers Guild of America East is a non-profit labor union.

Amici have no parent corporations, and no publicly-held corporation owns 10% or more of any *amici* organization's stock.

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

Amici are individuals and organizations dedicated to ensuring that the Fair Labor Standards Act, 29 U.S.C. §201 *et seq* ("FLSA") is interpreted and enforced consistent with its broad remedial nature so that workers are paid fairly and fully for all work performed. *Amicus* the Writers Guild of America, East has members residing in Second Circuit states who would be adversely impacted by a ruling against the Plaintiffs. *Amici* submit this brief not to repeat the arguments made by the parties, but rather to shed light on the historical and statutory underpinnings of the FLSA and the adverse impacts of unpaid labor on workers and the broader economy. *Amici* urge the Court to consider the large number of workers whose right to recover unlawfully-withheld wages would be undermined under the employers' misrepresentation of the FLSA.

Amici respectfully submit this brief pursuant to Federal Rules of Appellate Procedure 27 and 29 and Second Circuit Local Rule 29-1. The brief should be permitted without leave of court because all parties have consented to its filing. Fed. R. App. P. 29(a).

The Economic Policy Institute ("EPI") is a non-partisan think tank founded in 1987 to ensure that the interests of working families were considered in economic

[1] Neither party's counsel authored this brief, in whole or in part, and nor did either party or party's counsel contribute money intended to fund the preparation or submission of the brief. No person, including *amici curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief.

policy debates. EPI researches economic conditions and the policies that determine those conditions, and advocates for strong and effective labor standards that provide a solid floor for the labor market. Unpaid labor, especially when it is for the benefit of a for-profit business, undermines the ability of all workers to earn a decent living.

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace, including that involving alleged wage theft and violations of the wage and hour laws.

The National Employment Law Project ("NELP") is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all

employees receive the full protection of labor and employment laws, and that employers are not rewarded for skirting those basic rights. NELP has litigated and participated as *amicus* in numerous cases addressing employee rights under the FLSA. In NELP's experience, an expansive reading of the term "employee" under the FLSA, consistent with that statute's remedial purpose, is crucial in ensuring that low-wage workers in particular are paid fully for their labor.

The Writers Guild of America, East, AFL-CIO, ("WGAE") is a labor union founded in 1912 and based in New York City, representing thousands of writers in motion pictures, television, digital media, and broadcast news. The WGAE seeks to promote, protect, and maintain important artistic and professional principles for its members. The WGAE has a long history of confronting unfair practices that occur in the entertainment industry to protect the rights of its members, including unpaid work. A decision against the workers in this case would adversely impact the WGAE's members seeking to make a living in the film industries.

Ross Perlin is an independent writer and a national and international voice on the issue of internships and unpaid labor. Mr. Perlin became an advocate for the rights of interns in 2006 while working as an unpaid intern himself and spending three years researching his book "Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy," published in 2011. "Intern Nation" was the first full-length study of the internship phenomenon, drawing together all previously

available information and supplementing it with hundreds of interviews and, for the first time, a comparative framework that emphasized the broader issues facing young people in today's economy. Mr. Perlin has written on internships for The New York Times, The Washington Post, Time Magazine, and other publications, and he has spoken on the issue in front of student audiences at numerous public and private universities, as well as to employers, school counselors, and activists.

David C. Yamada is a Professor of Law and Director of the New Workplace Institute at the Suffolk University School of Law in Boston, MA. Professor Yamada shares with other parties to this brief a deep concern about the legalities of unpaid internships and the lack of legal protections for those designated as interns by employers. As the author of two law review articles on unpaid internships, Professor Yamada has become closely familiar with the employment law implications of the intern economy. In addition, Professor Yamada has served as a pro bono subject matter expert for reporters writing news articles and investigative studies on unpaid internships.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act ("FLSA" or "the Act") was enacted to create baseline minimal wage and hour standards and was meant to cover most workers.[2] To reach this result, Congress enacted sweeping definitions of employment in the FLSA, which went far beyond the common-law definition. To "employ" a person under the Act "includes to suffer or permit [the person] to work." 29 U.S.C. § 203(g).

Employers' use of labels like "intern" that take workers outside the protections of the Act is on the rise and undercuts the broad remedial nature of the FLSA. Companies' decisions to offer unpaid internships represents a broader trend towards more employer use of more contingent jobs, including requiring employees to sign an "independent contractor" agreement as a condition of getting a job, and the increased use of volunteers who bid on the right to perform work for a firm. The labels or job title given to a worker does not determine whether there is a covered employment relationship, and any unpaid work should be scrutinized carefully by applying the broad definitions in the FLSA.

Although young workers face pressures to take unpaid internships, these positions provide scant leverage for job prospects and earning capacity. Unpaid

[2] 29 U.S.C. §§ 201 *et seq.*

internships provide no advantage in terms of full-time job offer rates or starting salary, while paid internships provided a substantial advantage. Unpaid internships also disproportionately and adversely impact students who often pay for academic credits in order to work as unpaid interns. And unpaid internships not only harm the workers who are not paid, but also competing employers who pay their employees, and the economy overall.

ARGUMENT

I. THE FAIR LABOR STANDARDS ACT IS MEANT TO COVER MOST WORKERS, SO LABELS LIKE UNPAID INTERNSHIPS THAT SKIRT THE ACT SHOULD BE SCRUTINIZED.

A. The Fair Labor Standards Act Broadly Covers Almost All Work and Must Be Expansively Construed To Ensure That Workers Are Paid.

Congress declared over 75 years ago that the purpose of the FLSA was to "correct and as rapidly as practicable [] eliminate" detrimental labor conditions.[3] The FLSA was passed to "lessen, so far as seemed then practicable, the distribution in commerce of goods produced under subnormal labor conditions,"[4] by "insuring to all our able-bodied working men and women a fair day's pay for a fair day's work."[5]

[3] 29 U.S.C. § 202(b).
[4] *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947).
[5] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), quoting Message of the President to Congress, May 24, 1934; 29 U.S.C. § 202(a).

In light of the FLSA's remedial purpose, Congress adopted an exceptionally broad definition of "employ" to include "to suffer or permit to work,"[6] which "stretches the meaning of 'employee'"[7] to include work relationships that were not within the traditional common-law definition of "employee."[8] It is "the broadest definition [of employ] that has ever been included in any one act."[9]

Despite these purposes and statutory definitions, the Act has been incrementally undermined in recent years as more work is unpaid and labor conditions deteriorate. The growth in jobs with non-employee labels has chipped away at the bedrock of employment rights established by the FLSA, including the rights to minimum wage and overtime.

The label "intern" does not change what otherwise would be considered entry-level paid employment into legitimately unpaid work; it is the relationship between the worker and the company that matters.[10] If workers are suffered or permitted to work, their employer must pay them.[11]

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[6] 29 U.S.C. § 203(g).
[7] *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 326 (1992).
[8] *Rutherford*, 331 U.S. at 729.
[9] *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting the FLSA's principal sponsor, Senator Hugo Black, 81 Cong. Rec. 7657 (1937)).
[10] *See Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (explaining that "'economic reality' rather than `technical concepts' is . . . the test of employment" under the statute); *see also Herman v. RSR Security Services Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) ("[T]he overarching concern is whether the alleged employer possessed the power to control the workers in question.").
[11] 29 U.S.C. § 203(g).

This is true even if workers do not think they are covered employees. In *Tony and Susan Alamo Foundation v. Secretary of Labor*, the U.S. Supreme Court highlighted the danger of extending exceptions under the FLSA to workers who say they work "voluntarily."[12] "Employers could use superior bargaining power to coerce employees to claim they were volunteering, or to waive their protections under the Act. Such exceptions to coverage affect many more than those workers directly at issue in this case and exert a general downward pressure on wages in competing businesses."[13]

In applying the statutory definitions in the Act, courts have created an often-repeated concept of "economic reality" to determine whether a worker is in an employment relationship covered by the FLSA. "Economic reality" is a direction to fact finders to resist accepting technical concepts, contracts, subjective intent, or labels given by the putative employers to their workers, and instead to look to the objective, economic relationships between the parties.[14] The "economic reality" test is an expansion beyond the common-law employment test, but only when it is applied consistently with the FLSA's broad coverage under "suffer or permit to work."

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[12] 471 U.S. 290, 302 (1985).
[13] *Id.* (internal citations omitted).
[14] *Goldberg*, 366 U.S. at 33; *Real v. Driscoll Strawberry Associates,* 603 F.2d 748, 755 (9th Cir. 1979) ("Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA").

Exceptions to the FLSA's broad coverage are discrete and narrow.[15] There is no statutory basis in the FLSA for exempting an "intern" from the Act; the FLSA only recognizes some "trainees" as ineligible for FLSA coverage.[16] Nor can workers enter into agreements purporting to make them non-employees, such as unpaid internships, because they cannot agree to waive their rights to coverage under the Act.[17] The FLSA's broad definitions must be applied rigorously and with an eye to the underlying remedial purposes of the Act.

Proper unpaid internships require an employer to provide an on-going educational experience that is for the benefit of the intern.[18] When employers hire interns to perform work that benefits the company, however, the FLSA requires employers to pay the interns as employees. Reports and anecdotal evidence show that many employers do not meet the criteria required to have unpaid internships.[19]

B. Contingent Work Structures that Undermine The Purposes Of The FLSA Are Common And Should Be Viewed With Suspicion.

Unpaid internships are part of a broader trend to skirt the broad definitions of employment in the FLSA. A growing number of employers mischaracterize their

[15] *See Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (Courts have "consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction.'") (quoting *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207, 211 (1959)).
[16] *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).
[17] *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).
[18] U.S. DEP'T OF LABOR, *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (2010).
[19] *See infra* IV.

workers as non-employees, hurting some of the most vulnerable workers, law abiding employers, and the overall economy. For example, employers (1) misclassify their employees as independent contractors, franchisees, and trainees to place them outside of the protections of labor and employment laws[20], and (2) engage contingent workers, including temporary and subcontracted workers, sometimes creating confusion as to who is the responsible employer.[21]

These practices are contrary to the FLSA's capacious scope and underlying purposes to "eliminate" detrimental labor conditions and to prevent unfair competition.[22] The FLSA was meant to protect workers "from the evil of 'overwork' as well as 'underpay.'"[23] Many of these non-traditional jobs come under the broad FLSA definitions of employment, and when scrutinized do not pass muster.[24]

Unfortunately, these trends are on the rise. The most recent Government Accountability Office (GAO) report on employment arrangements states in 2009

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[20] *See e.g.* Mitchell Rubinstein, "Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship, 14 U. Pa. J. of Bus. L. 605 (2012); *Narayan v. EGL, Inc.*, 616 F.3d 895 (9th Cir. 2010).

[21] *Id. See also Carrillo v. Schneider Logistics, Inc.*, 823 F.Supp.2d 1040 (C.D. Cal. 2011), aff'd, 2012 WL 6734672 (9th Cir. 2012 Mem. Disp.); *Reyes v. Remington Hybrid Seed Co.*, 495 F.3d 403, 407 (7th Cir. 2007).

[22] 29 U.S.C. § 202(b).

[23] *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981).

[24] See infra footnotes 20, 21.

that "[t]he national extent of employee misclassification is unknown; however, earlier and more recent, though not as comprehensive studies suggest that it could be a significant problem with adverse consequences."[25] A 2000 GAO report estimated that almost 30 percent of the workforce in the U.S. was contingent.[26] The report noted that most of these workers were more likely than traditional full-time employees to have low family incomes and many had incomes below the federal poverty threshold.[27]

Many states have studied the problem and find high rates of misclassification, especially in construction, where as many as 47% of employers were found to have misclassified their employees.[28] Most of these studies do not capture the so-called "underground economy," where workers are paid off-the-books, sometimes in

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[25] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, *Employment Arrangements: Improved Outreach Could Help Ensure Proper Worker Classification* 43 (July 2006).

[26] U.S. GOV'T ACCOUNTABILITY OFFICE, HEHS-00-76, *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce* 4 (June 2000), *available at* http://www.gao.gov/assets/240/230443.pdf.

[27] *Id.*

[28] *See* FISCAL POLICY INSTITUTE, NEW YORK STATE WORKERS COMPENSATION: HOW BIG IS THE SHORTFALL? (Jan. 2007); MICHAEL KELSAY, JAMES STURGEON, & KELLY PINKHAM, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS (Dept. of Econ., Univ. of Mo. Kan. City, Dec. 2006); MICHAEL P. KELSAY & JAMES I. STURGEON, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF INDIANA (Dept. of Econ., Univ. of Mo.-Kan. City, 2010); PETER FISHER ET AL, NONSTANDARD JOBS, SUBSTANDARD BENEFITS (Iowa Policy Project, July 2005); FRANCOIS CARRÉ & J.W. MCCORMACK, THE SOCIAL AND ECONOMIC COST OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health, Dec. 2004); STATE OF N.J., COMM'N OF INVESTIGATION, CONTRACT LABOR: THE MAKING OF AN UNDERGROUND ECONOMY (Sept. 1997); WILLIAM CANAK & RANDALL ADAMS, MISCLASSIFIED CONSTRUCTION EMPLOYEES IN TENNESSEE (2010).

cash.[29] These workers are *de facto* misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules. Many of these jobs are filled by immigrant and lower-wage workers.[30]

II. UNPAID INTERNS SHOULD BE COVERED UNDER THE FLSA BECAUSE THERE ARE MORE OF THEM IN FOR-PROFIT FIRMS.

Internships as a whole are on the rise in the United States. Though precise figures are unavailable, conservative estimates show that between 1 to 2 million workers participate in internships each year in the U.S.[31] Between 1981 and 1991, the proportion of college graduates who engaged in paid and unpaid internships increased from one in thirty-six to one in three.[32] Today, there are estimates that half of graduating college students have interned,[33] and more than half of those were not

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[29] Bear Stearns in 2005 estimated that the U.S. is losing $35 billion annually due to off-the-books employment. Robert Justich and Betty Ng, *The Underground Labor Force is Rising to the Surface*, BEARNS STEARNS ASSET MGMT 3 (Jan. 3, 2005), *available at http://www.steinreport.com/BearStearnsStudy.pdf.*

[30] FRANCOIS CARRÉ & J.W. MCCORMACK, THE SOCIAL AND ECONOMIC COST OF EMPLOYEE MISCLASSIFICATION IN CONSTRUCTION 8 (Labor and Worklife Program, Harvard Law School and Harvard School of Public Health, December 2004), *available at* http://www.law.harvard.edu/programs/lwp/Maine%20Misclassification%20Maine.pdf.

[31] ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY, 27 (Verso ed., 1st ed. 2011).

[32] Dawn Gilbertson, *EARNING IT; Glamorous Internships With a Catch: There's No Pay*, N.Y. TIMES, Oct. 19, 1997, *available at* http://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html?emc=eta1.

[33] Steven Greenhouse, *Looking for Experience, Providing Free Labor*, N.Y. TIMES, Apr. 2, 2010, *available at* http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all.

paid for their internship work.[34] Other sources estimate that upwards of 500,000 college students are working without pay at any given time.[35] These positions are often outside of FLSA coverage, leaving millions of workers without workplace protections.

In today's weak economy, it is easy for employers to take advantage of unemployed, vulnerable workers by offering unpaid internships.[36] Some employers tout the purported prestige of an unpaid internship to hire recent college graduates, and workers accept these positions, hoping that it will lead to a paid job.[37] Mark Cuban, the billionaire investor, justified using unpaid interns because "[o]ne silver lining of a 'great recession' that we are now in is that there are a lot of incredibly talented people without jobs, or who have lost their jobs."[38] Employers also turn to unemployed adult professionals for free work. Anecdotal stories show that companies are taking advantage of mid-career professionals who have lost their jobs

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[34] INTERN BRIDGE, 2012 NATIONAL INTERNSHIP SALARY SURVEY RESULTS TO BE RELEASED, Feb. 07, 2013 *available at* http://www.prweb.com/releases/internbridge/02/prweb10400332.htm (finding that 51.3 % of students are not paid for their internship); *see* Gilbertson *supra* note 32 ("Internship experts estimate that 50 to 60 percent of all student internships are unpaid.").

[35] Ross Eisenbrey, *Hillary Clinton Speaks Out for Young Workers*, THE ECONOMIC POLICY INSTITUTE, March 7, 2014, *available at* http://www.epi.org/blog/hillary-clinton-speaks-young-workers/.

[36] Former Secretary of State Hillary Clinton, Address at the Univ. of Cal., Los Angeles (March 5, 2014).

[37] *See* Farah Stockman, *In Tight Market, Interns Struggle to Keep Free Work*, BOSTON GLOBE, Aug. 3, 2003, at B1 (quoting Andrew Sum, director of Northeastern University's Center for Labor Market Studies, as noting that "[w]hen the labor market was good, employers just couldn't get anybody to take unpaid internships. . . .When things are bad, employers say 'Well, maybe we don't have to pay,' and the kid says 'What am I giving up? I don't have a job [anyway]'").

[38] PERLIN, *supra* note 31, at 123.

by hiring them as unpaid interns, luring them with a promise of a job even while they continue to receive unemployment benefits.[39]

As a result, employers have cut the number of paid opportunities and have increasingly hired unpaid interns.[40] Many employers view unpaid internships as a means to reduce labor costs, if not avoid them altogether.[41] Especially since the economic downturn in 2008, employers daily post ads for unpaid internships on Craigslist, Monster.com, and countless job boards, describing work intended for qualified individuals, offering no pay and little-to-no training.[42] The website CollegeRecruiter.com reported in 2009 that compared to a year earlier, the majority of its posted internships appeared to be unpaid.[43] Another popular website, Internship.com, also reported a few years ago that unpaid internships continued to grow at the expense of paid opportunities.[44]

The increase in unpaid internships during this last economic downturn is part of a longer term trend, decades in the making, showing a growth of for-profit

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[39] Laura Casey, *Midcareer job seekers turn to internships, volunteer positions*, CHICAGO TRIBUNE, Oct. 24, 2011, *available at* http://articles.chicagotribune.com/2011-10-24/business/ct-biz-1024-midcareer-interns-20111024_1_internships-career-change-midcareer-professionals; Sheryl Rich-Kern, *N.H. To The Unemployed: Try An Unpaid Internship*, NATIONAL PUBLIC RADIO, *available at* http://www.npr.org/2012/05/01/150906124/n-h-to-the-unemployed-try-an-unpaid-internship.
[40] PERLIN, *supra* note 31, at 28.
[41] *See* Joan E. Rigdon, *Workplace: For Companies Facing Rough Sailing, Students Interns Provide Cheap Labor*, WALL ST. J., Apr. 25, 1991, at B1.
[42] PERLIN, *supra* note 31, at 62.
[43] *Id.* at 139.
[44] *Id.* at 28.

employers' use of unpaid internships. Beginning in the 1970s, scholars began to notice that "[u]npaid internships . . . tended to crowd the paid ones off the road."[45] A study conducted by a University of Missouri professor found that in 1976, 57 percent of television and 81 percent of radio interns received some pay.[46] Almost two decades later, in 1991, there were three to five times as many interns but only 21 percent and 32 percent respectively received pay.[47] Today, only 19 percent of interns in television and radio broadcasting are paid, only 40 percent of interns in arts and entertainment are paid, and only 41 percent of interns in journalism are paid.[48]

This upsurge in unpaid internships in for-profit firms is not limited to the entertainment and communications industry; similar patterns have been noted in a variety of sectors. According to a 2010 report by Intern Bridge, a national college recruiting research firm, compensated internships in some industries were in danger of disappearing altogether: only 11 percent of game design interns were paid; less than 16 percent of interns in law enforcement and security were paid, and only 28 percent of interns in healthcare consulting were paid.[49]

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] INTERN BRIDGE, 2010 INTERNSHIP SALARY REPORT 12–13 (2010), *available at http://utsa.edu/careercenter/pdfs/2010%20salary%20report.pdf.*

III. UNPAID INTERNSHIPS AT FOR-PROFIT FIRMS HURT WORKERS AND THE NATIONAL LABOR MARKET.

There are countless stories of workers across the United States that accept unpaid internships at for-profit firms for the experience and allure but are left struggling, performing menial work for free.

> An NYU student was eager to begin a career in animation, and accepted an unpaid internship at a children's film company in Manhattan. She believed she would be exposed to and learn about animation; instead, she was assigned to work in the facilities department, cleaning bathrooms, the kitchen, and the doorknobs each morning to make sure no one caught the H1N1 swine flu.[50]

Outlandish stories like these highlight the extent to which unpaid interns are exploited as a form of free labor. A more common experience helps illustrate how these arrangements are unfair and illegal, as workers are tasked with doing work that the employer would otherwise hire paid employees to do and who would otherwise be covered under the FLSA.

> Alex Footman majored in film studies and took an unpaid position on the movie "Black Swan" in New York from October 2009 to February 2010, hoping it would lead to paid employment in the film production industry. Mr. Footman did not receive any training or educational instruction. His responsibilities included ensuring that the coffee pot was full, answering and transferring phone calls, watermarking scripts, making deliveries to and from the

[50] Greenhouse, *supra* note 33; *Questioning the Ethics of Unpaid Internships*, NATIONAL PUBLIC RADIO (July 13, 2010), http://www.npr.org/templates/story/story.php?storyId=128490886

> production set, rental houses, and payroll services—similar work to that performed by the office's *paid* Production Assistant.[51]
>
> *Hearst* plaintiff Diana Wang began her seventh unpaid internship at *Harper's Bazaar* from August 2011 to December 2011, hoping this unpaid internship would land her a paid position. Ms. Wang's duties included tracking down clothing and accessories for magazine photo shoots and supervising six to eight other interns, sending them on 30 to 40 errands a day, and helping them file expense reports. She also served as a contact between editors and public relations. These are tasks that would have been performed by paid employees, freelancers, or couriers, if Ms. Wang did not work for free. Ms. Wang did not receive any training—instead, she learned to perform her duties from the intern she replaced.[52]

A. Unpaid Internships at For-Profit Firms Have a Negative Effect on the Labor Market.

As our economy faces chronic long-term and record-high youth unemployment, employers since the economic downturn in 2008 have continued to eliminate staff and replace them with unpaid labor.[53] Employers feel emboldened to hire free 'interns' instead of hiring entry-level employees or paid temporary workers

[51] Plaintiff's Motion for Partial Summary Judgment at 4, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 (S.D.N.Y. Feb. 15, 2013).
[52] Plaintiff's Motion for Partial Summary Judgment and Class Certification at 4, *Wang v. The Hearst Corp.*, No. 12 Civ. 0793 (HB) (AJP) (S.D.N.Y. March. 25, 2013).
[53] Heidi Shierholz, *Six Years From Its Beginning, the Great Recession's Shadow Looms Over the Labor Market*, THE ECONOMIC POLICY INSTITUTE, Jan. 9, 2014, *available at* http://www.epi.org/publication/years-beginning-great-recessions-shadow/; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-14-0354, The Employment Situation — February 2014 2 (2014) (reporting that the number of long-term unemployed grew by over 200,000 in February 2014, accounting for 37 percent of the unemployed), *available at* http://www.bls.gov/news.release/pdf/empsit.pdf.

because young workers believe, incorrectly in many cases, that internships will help them enter the highly-competitive labor market. Paid workers are thereby being replaced or simply not hired.[54]

Defendants engaged plaintiffs Eric Glatt and Alex Footman to perform routine tasks that would have been performed by regular paid employees. Glatt obtained documents for personnel files, picked up paychecks for coworkers, and tracked and reconciled purchase orders.[55] Footman performed similar chores, including assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, answering phones, and watermarking scripts.[56] Glatt's supervisor expressly stated that the unpaid internship likely displaced a regular employee, "[i]f Mr. Glatt had not performed this work, another member of my staff would have been required to work longer hours to perform it, or we would have needed a paid position assistant or another intern to do it."[57] The district court noted that "[t]his is work that otherwise would have been done by a paid employee."[58]

Anecdotal evidence and reports show that this dislocation occurs. For example, the publisher of a small respected California newspaper traveled to top journalism schools in the country to recruit graduating journalists to work for free,

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[54] Kathryn Ann Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection—Reforming the Regulation of Student Internships*, THE ECONOMIC POLICY INSTITUTE, Apr. 9, 2010, *available at* http://www.epi.org/publication/pm160/.
[55] *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 533 (S.D.N.Y. June 11, 2013).
[56] *Id.*
[57] *Id.*
[58] *Id.*

seeking to replace his staff with full-time, unpaid interns.[59] Fact-checking for magazine publishers used to be a paid, entry-level position. In the last few years, however, magazines like *Outside* have started to offer fact-checker positions as unpaid internships.[60]

There is little economic disincentive for employers to stop unpaid intern programs. Companies save some $2 billion annually by not paying interns the minimum wage to which they are entitled.[61] Employers, particularly in highly competitive, labor-intensive sectors, may conclude that it pays to violate the FLSA because they gain a competitive advantage over law-abiding employers that pay minimum wage, overtime, unemployment insurance, workers' compensation, and payroll taxes.

Employers that hire unpaid interns shift the cost of labor onto workers, their families, and state and federal governments. Unpaid interns and their families take the immediate burden, at times needing to take out additional loans, burning through

[59] PERLIN, supra note 31, at 62.
[60] *Id.* at 140; *see also* Connie Sung, *Are Unpaid Internships Exploitative*, LOS ANGELES TIMES, Dec. 30, 2000 (reporting the story of a journalism student that worked without pay 25 hours a week as a fact checker at a local magazine), *available at* http://articles.latimes.com/2000/dec/30/local/me-6350.
[61] PERLIN, supra note 31, at 124.

savings, and seeking family support.[62] State and federal governments collect no taxes on uncompensated labor, losing millions of dollars in potential revenue.[63]

B. Unpaid Internships Strip Workers of Their Basic Workplace Rights.

When employers mislabel employees as unpaid interns, workers lose fundamental rights in addition to wage and hour protections, including the right to workers' compensation, unemployment insurance, and anti-discrimination protections that apply to "employees."[64] Some courts have denied unpaid interns these rights, thereby insulating employers from these obligations.[65] States and cities are passing legislation to address unpaid interns' lack of workplace rights.[66]

IV. STUDENTS WHO WORK AS UNPAID INTERNS ARE HARMED BECAUSE SCHOOLS CHARGE FOR INTERNSHIPS FOR LITTLE VALUE.

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[62] *Id.* at 127.

[63] *Id.* at 27 (Conservative estimates show that 1–2 million individuals engage in unpaid internships each year, which depending on the amount of hours worked, may account for tens of millions dollars of lost payroll taxes, workers' compensation premiums, and unemployment insurance to states and the federal government).

[64] *See generally* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 238–48 (discrimination law), 251–53 (workers' compensation), and 255–56 (National Labor Relations Act) (2002).

[65] Lauren Fredericksen, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 248 (2013).

[66] Oregon extended protections for unpaid interns against sexual discrimination and retaliation for whistleblowing. H.B. 266, 77th Leg. Assemb., Reg. Sess. (Or. 2013), *available at* http://gov.oregonlive.com/bill/2013/HB2669/. New York and New Jersey introduced similar legislation this session. S. 539, 216th Leg., Reg. Sess. (N.J. 2014), *available at* http://www.njleg.state.nj.us/2014/Bills/S1000/539_I1.PDF; S. 595A, 2013–2014 Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?bn=S05951&term=2013; Int. No. 173 "Prohibiting discrimination against interns," N.Y. City Council (2014).

Students who receive academic credit for unpaid internships are often charged substantial tuition to work without pay, for little to no (1) educational value, (2) increased job opportunities, (4) oversight by their school, or (3) increased earning capacity. It is common for for-profit employers to require students to get academic credit as a prerequisite for an internship, even though many of these internships provide little or no educational value and the schools do not oversee the positions.[67] Employers require academic credit because they think that it provides a legal basis to skirt legal responsibilities when their internships provide no educational value.[68]

Students can pay thousands of dollars for academic credits for unpaid work in unsupervised environments. According to an Intern Bridge study in 2011, 90 percent of universities offered academic credit for internships.[69] But only half of the university officials surveyed said their schools had "actively put measures in place to monitor the quality of unpaid internships."[70] Students may pay upwards of $8,500 per term in tuition alone to participate in an internship experience; this cost does not

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[67] Kevin Carey, *Giving Credit, but Is It Due?*, N.Y. TIMES, Jan. 30, 2013, *available at* http://www.nytimes.com/2013/02/03/education/edlife/internships-for-credit-merited-or-not.html?_r=0; *see also* Phil Gardner, *Reaction to the Unpaid Internship Controversy*, note 69 (noting that only half of all educational institutions had oversight over internship positions).

[68] Plaintiffs' Reply To Memorandum of Law In Support of Motions for Partial Summary Judgment and Class Certification at 13, *Wang v. The Hearst Corp.*, No. 12 Civ. 0793 (HB) (AJP) (S.D. N.Y. March. 25, 2013).

[69] PHIL GARDNER, DIRECTOR, COLLEGIATE EMPLOYMENT RESEARCH INSTITUTE, MICHIGAN STATE UNIVERSITY, INTERN BRIDGE, INC., REACTION ON CAMPUS TO THE UNPAID INTERNSHIP CONTROVERSY 11 (2012), *available at* http://www.ceri.msu.edu/wp-content/uploads/2009/10/Reaction-on-Campus-to-the-Unpaid-Internship-Controversy-Whitepaper.pdf.

[70] *Id.* at 7.

include cost of living and rent.[71] Three-quarters of unpaid interns in college report that they needed a second paying job in order to cover living expenses and the payments for the required academic credits for their unpaid internship.[72]

Recently, universities have begun to take positive action to limit the unfair practices of unpaid internships. Columbia University will no longer offer its students registration credits in exchange for an internship experience, saying recently that it "expect[s] companies to appropriately compensate students for work performed during internships."[73] Columbia's policy is consistent with several other institutions that have recently stopped accepting credits for internships, including Harvard[74], Yale[75], Dartmouth[76], and Wellesley.[77] This shift rightly discourages for-profit companies from using academic credits as a justification to hire unpaid workers.

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[71] PROPUBLICA: THE PRICE OF AN INTERNSHIP, http://projects.propublica.org/internships/ (last visited March 28. 2014).
[72] INTERN BRIDGE, The Debate Over Unpaid Internships 13 (2010), *available at* http://www.internbridge.com/Unpaid-College-Internship-Report.pdf.
[73] Zach Schonfeld, *In Another Blow to Free Labor, Columbia University Halts Academic Credit for Internships*, NEWSWEEK, Feb. 28, 2014 (quoting Dean of Academics Kathryn Yatrakis), *available at* http://www.newsweek.com/another-blow-free-labor-columbia-university-halts-academic-credit-internship-230554
[74] HARVARD UNIVERSITY, OFFICE OF CAREER SERVICES: CREDIT FOR INTERNSHIPS, http://www.ocs.fas.harvard.edu/students/internship_credit.htm (last visited March 27, 2014).
[75] YALE COLLEGE, YALE UNDERGRADUATE CAREER SERVICES: ACADEMIC CREDIT, http://ucs.yalecollege.yale.edu/content/academic-credit (last visited March 27, 2014).
[76] DARTMOUTH COLLEGE, DARTMOUTH CAREER SERVICES: INTERNSHIPS AND FAQ: WHAT TO DO IF YOU'RE ASKED ABOUT ACADEMIC CREDIT, https://www.dartmouth.edu/~careerblog/2012/12/internships-and-faq-what-to-do-if-youre-asked-about-academic-credit/ (last visited March 27, 2014).
[77] WELLESLEY COLLEGE: INTERNSHIPS FOR CREDIT, http://www.wellesley.edu/cws/internships/internship101/credit (last visited March 27, 2014).

Young workers face pressure to take unpaid internships, which are perceived as gateways to jobs, but the sacrifices are significant. Although a few unpaid internships may lead to paid positions, studies show that the benefits of unpaid internships are only marginally better than not participating in an internship at all.[78] These studies show that unpaid internships do very little for the job prospects of the students who take them.[79]

For example, in 2011, the National Association of Colleges and Employers studied the effectiveness of various internships on job prospects and found that unpaid internships provided *no advantage* in terms of full-time job offer rates or starting salary, while paid internships provided *a substantial advantage*.[80]

Students who participated in unpaid internships are less likely to turn the experience into a full-time job. In 2013, only 37 percent of unpaid interns at for-profit firms received a full-time job offer; this is only two percent higher than for applicants with no internship experience at all.[81] On the other hand, 67 percent of paid interns at for-profit firms received at least one full-time job offer in that same survey.[82]

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[78] *See* infra note 76.
[79] *Id.*
[80] NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS, THE CLASS OF 2013 STUDENT SURVEY REPORT 38 (2013).
[81] *Id.*
[82] *Id.*

Unpaid interns are likely to receive jobs with lower median wages than paid interns and applicants with no internship experience. In a 2013 survey, the average student who took an unpaid internship in a for-profit firm earned $16,209 less than students with paid internships and $1,366 less than the average student who had never taken an internship.[83] According to this study, not participating in an unpaid internship at all actually increased your prospects of a higher starting salary than participating in an unpaid internship.[84]

CONCLUSION

For the reasons stated above, the Court should affirm the district court's order granting Plaintiff's motion for summary judgment and certifying a class and collective of unpaid interns.

Dated: July 3, 2014

Respectfully submitted,

/S/Tsedeye Gebreselassie

Attorney for *Amici Curiae*
Tsedeye Gebreselassie
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025

[83] *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NATIONAL ASSOCIATION OF COLLEGES AND EMPLOYERS, May 29, 2013, *available at* http://www.naceweb.org/s05292013/paid-unpaid-interns-job-offer.aspx.
[84] *Id.*

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 5,848 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count of the Microsoft Word Count processing system used to prepare the brief.

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 Times New Roman font.

DATED: July 3, 2014

/s/ *Tsedeye Gebreselassie*

Tsedeye Gebreselassie
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2014, I electronically filed the foregoing *Amicus* Brief with the Clerk of the Court of the U.S. Court of Appeals for the Second Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users and will be served by the Appellate CM/ECF system.

/s/ *Tsedeye Gebreselassie*

Tsedeye Gebreselassie
National Employment Law Project
75 Maiden Lane, Suite 601
New York, NY 10038
(212) 285-3025
tsedeye@nelp.org

Attorney for *Amici Curiae*