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* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, SERVICE EMPLOYEES INTERNATIONAL UNION, AND UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, IN SUPPORT OF PLAINTIFFS-APPELLEES

Matthew Stark Blumin
American Federation of State, County and Municipal Employees, AFL-CIO
1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775 5900

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:

American Federation of State, County, and Municipal Employees, AFL-CIO ("AFSCME"), is a non-profit labor union.

Communications Workers of America, AFL-CIO ("CWA"), is a non-profit labor union.

Service Employees International Union ("SEIU") is a non-profit labor union.

United Food and Commercial Workers International Union, AFL-CIO ("UFCW"), 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 labor unions dedicated to ensuring that all people who work receive the rewards of their work—decent paychecks and benefits, safe jobs, respect and fair treatment. As part of this mission, *amici* regularly advocate 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.

Amici respectfully submit this brief pursuant to Federal Rule of Appellate Procedure 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).

Amicus the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"), is a union comprised of a diverse group of people who share a common commitment to public service. AFSCME's 1.6 million members include workers in both the public and private sectors, including hundreds of thousands of members located within the jurisdiction of this Court. Together AFSCME and its members advocate for prosperity and opportunity for

[1] Neither party's counsel authored this brief, in whole or in part, 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.

all of America's working families through the efforts of approximately 3,400 local unions and 58 councils and affiliates in 46 states, the District of Columbia and Puerto Rico.

Amicus the Communications Workers of America, AFL-CIO ("CWA"), is an international labor union representing more than 700,000 workers in the telecommunications, media, manufacturing, airlines and health care industries and in a wide variety of public sector positions in the United States, Canada and Puerto Rico. CWA is actively involved in representing, organizing, educating and mobilizing workers throughout the United States and abroad on issues of public concern, including wages and working conditions, workplace rights, health care and retirement benefits, improving bargaining rights and other civil and human rights issues. CWA, in alliance with other progressive organizations, is an advocate for increased enforcement of rights guaranteed by the FLSA and provides training for staff and members so that they can better understand and assert their rights as employees under various federal and state statutes, including the FLSA.

Amicus the Service Employees International Union ("SEIU") is an international labor union representing more than 2.2 million men and women in healthcare, property services, and public service employment in the United States, Canada and Puerto Rico. SEIU advocates for workers on a diverse range of issues, such as wages, benefits, working conditions, discrimination in employment,

immigration reform, and other matters of concern in the workplace. SEIU is committed to fighting for the protections of FLSA for both its members and all workers nationwide to ensure a fair and equitable labor market for all.

Amicus the United Food and Commercial Workers International Union, AFL-CIO ("UFCW"), is a labor organization of 1.3 million members representing workers across the United States in various industries, including poultry, meat packing and other food processing, retail food and non-food retail, hospitals, nursing homes, other healthcare, and the chemical industry. UFCW operates to promote the interests of its membership, which is composed of individual members, local unions, and other chartered bodies. UFCW members confront persistent challenges across the industries in which they are employed that operate to reduce their standard of living, including safety and health hazards, wage theft, employment discrimination, and stagnant minimum wages for the general population. UFCW organizes and represents workers and fights to broaden civil, labor, and human rights for all workers in the U.S. A robust FLSA is a pillar of workers' rights. UFCW is interested in ensuring that the FLSA is interpreted broadly to protect workers as Congress intended in order to prevent widespread worker exploitation.

SUMMARY OF ARGUMENT

The Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.*, is a remedial statute targeting the unlivable wages that can result from workers' lack of bargaining power vis-à-vis employers. It does so by establishing a wage floor in order to prevent workers (and employers) from competing to undercut one another by accepting (or offering) inhumane wages. Unlike many other labor and employment statutes, the text of the FLSA explicitly defines the term "employee" broadly enough to reach beyond the common law definition, in an effort to capture a large enough swath of the labor market to make the Act's remedy effective for society.

Unpaid internships like those at issue in this case – in which workers undertake productive labor for the benefit of a for-profit corporation free of charge – provide a case in point of the mischief targeted by the FLSA, and the pressing need for the Act's remedy. Many workers have so little bargaining power that they are willing to accept so-called "internships" in which they perform the same work as regular employees, but for no pay. The FLSA's wage floor was designed to prevent exactly this sort of race to the bottom.

Nothing in the text or legislative history of the FLSA justifies this exploitation of labor. Nor did the Supreme Court imply otherwise by creating a narrow exception to FLSA coverage for "trainees" who provide no net benefit to

employers, and displace no regular employees, while receiving vocational training on an employer's premises.

Appellants nevertheless urge this Court to absolve them, and other for-profit employers, from paying an FLSA-required wage to any worker who receives the "primary benefit" of her job. This "primary beneficiary" test has no basis in the FLSA, or in any Supreme Court or Second Circuit case law interpreting the Act. And although Appellants advance this test as appropriate for evaluating "internships," the test is so subjective that it could easily be manipulated to exclude even traditional common-law employees from FLSA protection.

If this Court were to adopt the primary beneficiary test urged by Appellants, it would significantly narrow the scope of the FLSA and thereby increase the number of workers in the labor market who are not entitled to any pay. Doing so would not only deny productive workers the living wages they legally deserve for their labor, but would also strip them of a slew of other statutory workplace rights – concerning sexual harassment, discrimination on the basis of race or gender, workplace safety, and collective bargaining – that apply only to wage earners. The result would be a sweeping denial of legal protections to the struggling workers who need them most.

ARGUMENT

I. THE PRIMARY BENEFICIARY TEST URGED BY APPELLANTS IS CONTRARY TO THE FLSA

A. The FLSA's Broad Definition of "Employee" Was Designed to Buttress Plaintiffs' Lack of Bargaining Power and Set a Wage Floor for Their Labor

The FLSA's definition of employee is "'the broadest definition that has ever been included in any one act.'" *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657). An employee is anyone whom an employer "suffers or permits to work." 29 U.S.C. § 203(g). In determining whether workers are employees under this broader-than-common-law definition, "the overarching concern is whether the alleged employer possessed the power to control the workers in question." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (citation omitted). As a threshold matter, Appellants nowhere contend that they lacked the power to control the Plaintiff interns in this case, nor that employers tend to lack control over unpaid interns generally.

"Above and beyond the plain language . . . the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have 'the widest possible impact in the national economy.'" *Id.* (quoting *Carter v. Duchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)). This "remedial purpose" includes, *inter alia*, the improvement of workers' "bargaining strength vis-à-vis

employers" as well as "the establishment of minimum standards in the workplace" in order to eliminate "unfair competition, not only among employers, but also among workers looking for jobs." *Carter,* 735 F.2d at 12-13 (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960)).

The need for FLSA coverage is thus at its apex where, as here, employers' superior bargaining power exerts downward pressure on wages all the way to zero.

1. Lack of Bargaining Power

Unpaid workers like the Plaintiffs in this case are not outside the broad coverage of the FLSA – they are its central target. The "prime purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (summarizing legislative history of the FLSA).

It is undisputed that Plaintiffs, like millions of unpaid interns nationwide, undertook productive work on behalf of a for-profit corporation free of charge. SPA25. That they lacked the bargaining power to secure a minimum subsistence wage in exchange for their labor is self-evident. The "prime purpose" of the FLSA is to rectify that lack of bargaining power by maintaining a wage floor, not to

sanction the power imbalance by excluding from the statute those who would benefit from its protection the most.

2. Downward Pressure on Wages

Unpaid internships are a hallmark example of the race to the bottom in wages that results when, in the perceived absence of FLSA coverage, workers at the lowest rungs of the labor market are forced to compete against one another to offer their services at the cheapest possible rate. As the District Court correctly held, the Plaintiff interns in this case performed work "that otherwise would have been done by a paid employee." SPA24-25. Had Appellants hired paid employees for that work, the FLSA would have set a minimum wage for their labor. But because Appellants treated Plaintiffs as excluded from the FLSA, Appellants were able to circumvent that wage floor and obtain the same benefit cost-free.

This evasion frustrates the purpose of the FLSA. In the contemporary economy, plagued by the Great Recession and an "increasingly competitive labor market for college graduates," young workers have rushed to accept unpaid work and displace paid employees. *See* Kathryn Ann Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection – Reforming the Regulation of Student Internships*, The Economic Policy Institute, April 9, 2010, *available at*

http://www.epi.org/publication/pm160/ (last accessed June 30, 2014).[2] But as the Supreme Court has held, "the purposes of the Act require that it be applied even to those who would decline its protections" because making "exceptions to coverage" for them privileges employers' "superior bargaining power to coerce employees" to volunteer their labor for free and thereby "exert[s] a general downward pressure on wages." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985).

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[2] Against this argument, Appellants' *Amici* the Chamber of Commerce and California Employment Law Council contend that "there is not a direct trade-off between interns and paid entry-level employees." Chamber Br. 14 & n.38. But the Chamber's contrary view is based on a survey of employers who have a clear legal incentive for responding in ways that would shield them from potential liability, especially since the survey gives no indication that it was anonymous. *See* Phil Gardner, *Framing Internships from an Employers' Perspective: Length, Number, and Relevancy*, Collegiate Employment Research Institute, *available at* http://www.ceri.msu.edu/wp-content/uploads/2010/01/internshipCERI-Research-Brief-XX.pdf (last accessed July 2, 2014). Moreover, even that inherently biased study found that the "primary purpose" of 23% of the employers' internship programs was to "supplement staffing for special projects and targeted assignments," suggesting that unpaid interns are in fact being used for work which would otherwise require paid employees. *Id.* at 2. The study goes on to say:

> From anecdotal inferences from years of observing internships patterns, unpaid internships tend to become more prominent in recessionary periods when employers reduce financial expenditures on labor. Tight labor market conditions provide conditions where organizations, that typically do not pursue college students, can prey upon students' fear of not obtaining a job by offering "experience" but at a price – no remuneration for the students' efforts. The current business down turn has sharpened the focus on unpaid internships because of its severity.

Id. at 13.

B. Neither *Portland Terminal* Nor Second Circuit Precedent Supports Use of the Highly Subjective and Overbroad Primary Beneficiary Test

As demonstrated by the foregoing, there is simply nothing about the FLSA – not its purpose, its statutory language, or its legislative history – that even remotely suggests that a company should be allowed not to pay interns like the Plaintiffs for their productive work. Nor did the Supreme Court suggest otherwise in *Portland Terminal v. Walling*, 330 U.S. 148 (1947), which held only that a trainee who provides no "immediate advantage" to a company – in that case, a railroad that provided trainees free-of-charge "the same kind of instruction" as "courses in railroading" at a vocational school, even though doing so "actually impede[d] and retard[ed]" the company's business, without displacing "any of the regular employees" – is not an employee under the FLSA because his "work serves *only* his own interest." 330 U.S. at 150, 152-53 (emphasis added).

Recognizing that *Portland Terminal* announced an exceedingly narrow exception, the Department of Labor ("DOL") has required since 1967 that at least six factors, modeled on the essential features of the trainee program at issue in *Portland Terminal*, each be satisfied for an intern to be excluded from FLSA coverage. SPA22 n.61. The District Court correctly applied the DOL test below, concluding, as have many other courts, that "the DOL factors have support in *Walling*." *Id.* That conclusion was consistent with this Court's guidance that

because the FLSA is a "remedial statute," exceptions to it must be "narrowly construe[d]." *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 104 (2d Cir. 2010) (citations omitted). *See also* SPA21 ("*Walling* created a narrow exception to an expansive definition.").

Nevertheless, Appellants have asked this Court to adopt a categorical exception for interns who receive the "primary benefit" of their work, regardless of how much productive labor the employer receives from them for free; whether or not the interns receive instruction akin to vocational training; or even whether the interns displace regular employees and thereby drive down wages in the entire labor market.

This test unjustifiably eschews the multiple outcome-determinative factors relied upon by the Supreme Court in *Portland Terminal* and enforced by the DOL, replacing them with a single ends-driven question that essentially asks whether an unpaid worker matches the contemporary notion of an intern, a term that is nowhere mentioned in the FLSA, its legislative history, or *Portland Terminal*. Adopting Appellants' single-minded approach would thus run directly counter to this Court's admonition in *Carter* that "courts should refrain from exempting a whole class of workers, based on technical labels, from coverage of the FLSA, because such action would have the potential for upsetting the desired equilibrium

in the work force." 735 F.2d at 13 (holding that prisoners may be considered employees under the FLSA).[3]

Worse, Appellants' articulation of the primary beneficiary test is overbroad and not confineable to interns. A judge employing the test could exclude from FLSA coverage any worker who, according to a highly subjective standard, the judge believes "derives the primary benefits from the supposed employment relationship." *See* Appellant's Br. 28. Among the "benefits" for interns touted by Appellants are "hands-on training and practical development of their skills"; "developing contacts in the field"; and "performing tasks critical and typical of the profession in which they are interested." Appellant's Br. 4-5. Yet typical entry-level workers also derive great benefit from training, experience, and access to higher-paying jobs. In fact, many may value those benefits more than their

[3] Appellants' insistence that this Court previously "approved" the primary beneficiary test, *see* Appellant's Br. 33, is inaccurate. The case on which Appellants rest this assertion, *Velez v. Sanchez*, 693 F.3d 308 (2d Cir. 2012), used a multi-factor test to determine whether a domestic worker satisfied the specific statutory provision defining employees employed in domestic service, 26 U.S.C. § 206(f), which is not at issue in the instant appeal. In doing so, *Velez* urged judges to consider multiple factors, including but not limited to "who is the primary beneficiary of benefits from the relationship," to distinguish "a domestic service worker from a member of a household who incidentally performs household tasks." 693 F.3d at 329-30. It therefore did not adopt the "primary beneficiary test" as the sole lens through which to determine employee status for domestic workers – which is what Appellants urge this Court to do with respect to interns. Moreover, any observation by this Court in *Velez* that other circuits have employed the primary beneficiary test to trainees was merely dicta.

employers value their services. But that comparison is entirely subjective. As the District Court recognized, these so-called "benefits" are "the results of simply having worked as any other employee works." SPA26. If such benefits count for the primary beneficiary test, as Appellants insist, then an internship is just a run-of-the-mill job that pays less than minimum wage.[4]

Ultimately, the subjective and overbroad "primary beneficiary test" could easily, and impermissibly, exclude from the FLSA many workers who would otherwise meet the common-law test for employment, which focuses on "the formal right to control the physical performance of another's work." *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 69 (2d Cir. 2003). This Court noted in *Zheng* that district courts should not apply a "narrow approach" to determining employee status that is "*more* rigid than the common-law approach." *Id.* at 69-70 (emphasis in original). To the contrary, the FLSA's definition of employee "encompasses 'working relationships which, prior to the FLSA, were not deemed to fall within an employer-employee category.'" *Id.* at 69 (quoting *Portland Terminal*, 330 U.S. at 150-51). Thus, because the primary beneficiary test could

[4] A for-profit employer seeking an exception to the FLSA for its interns might even argue that, under the primary beneficiary test, if it pays interns a stipend below the minimum wage, that stipend only enhances the "benefit" to the so-called "interns" and therefore strengthens the case for excepting them from the FLSA. In contrast, this absurd argument would not survive the DOL's requirement that the intern and employer both understand that the intern is not entitled to any wages for the time spent in the internship. *See* U.S. Dep't of Labor Fact Sheet # 71 (April 2010).

imperil FLSA coverage even for common-law employees, it further violates Supreme Court and Second Circuit FLSA case law.

* * *

In addition to the above, the District Court's opinion and Appellee's brief both explain astutely, and in much greater detail, precisely how the primary beneficiary test is unmoored from *Portland Terminal*; flies in the face of DOL guidance that is entitled to substantial deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); and is far too subjective to create reasonable expectations of coverage (or lack thereof) for either workers or businesses. We join those arguments in full, but will not address them further here.

Instead, we now draw this Court's attention to the havoc in labor and employment law more generally that the primary beneficiary test urged by Appellants would cause.

II. THE PRIMARY BENEFICIARY TEST WOULD SWELL THE RANKS OF AN UNDERCLASS OF WORKERS WHO LACK ESSENTIAL WORKPLACE PROTECTIONS

It is beyond dispute that substituting the entirely subjective "primary beneficiary" test for the DOL's six-factor *Portland Terminal* test would lead to a greater number of productive workers being exempted from FLSA coverage and, therefore, from the payment of wages entirely. As we now explain, increasing the number of unpaid workers does much more than just deny productive workers a

paycheck for their valuable labor; it does violence to the entire regime of workplace rights designed to protect them from employer misconduct.

A. By Expanding the Number of Unpaid Workers, the Primary Beneficiary Test Robs Workers of Rights and Protections under Other Statutes

1. Unpaid Workers Are Not Protected by Most Antidiscrimination Statutes

This Circuit has held that uncompensated workers are not employees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and therefore cannot bring suit for violations of their civil rights to be free from sexual harassment or discrimination on the basis of race or gender. The Court made this rule crystal clear in *O'Connor v. Davis,* holding that "economic remuneration or the promise thereof" is required for an employee to be covered by Title VII. *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997). "'Where no *financial benefit* is obtained by the purported employee from the employer, no plausible employment relationship of any sort can be said to exist'" for the purposes of Title VII. *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361, 372 (2d Cir. 2006) (emphasis added) (quoting *O'Connor*, 126 F.3d at 115–16).

Courts in this Circuit have also applied the *O'Connor* rule to other federal antidiscrimination statutes, such as the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Age Discrimination in Employment Act

("ADEA"), 29 U.S.C. § 621 *et seq.* *See, e.g., Pastor v. P'Ship for Children's Rights*, 2012 WL 4503415 (E.D.N.Y. Sept. 28, 2012) (ADA); *Brown v. Nationscredit Commercial Corp.*, 2000 WL 887593 (D. Conn. June 26, 2000) (ADEA). Because coverage under state antidiscrimination statutes in the Second Circuit tracks their federal analogues, financial remuneration is also a requirement of coverage under state antidiscrimination law. *See, e.g., Wang v. Phoenix Satellite Television US, Inc.*, 976 F. Supp. 2d 527 (S.D.N.Y. 2013) (New York State Human Rights Law ("NYSHRL"), N.Y. Exec. L. § 290 *et seq.* and New York City Human Rights Law ("NYCHRL"), N.Y. City Admin. Code §8–101 *et seq.*);[5] *Colby v. Umbrella, Inc.*, 184 Vt. 1, 8, 955 A.2d 1082, 1088 (Vt. 2008) (Vermont Fair Employment Practices Act ("FEPA"), 21 V.S.A. § 495 *et seq.*); *Brown*, *supra* (Connecticut Fair Employment Practices Act ("CFEPA"), Conn. Gen. Stat. §§ 46a–60).

Thus, if this Court were to adopt Appellants' primary beneficiary test, it would free employers not only from financially compensating many workers for their productive labor, but also from liability for discrimination on the basis of race, gender, sexual harassment, disability, age, and more.

[5] The *Wang* case prompted New York City to amend the NYCHRL to cover unpaid interns. *See* Zach Schonfeld, *Mayor de Blasio Signs Bill Protecting New York's Unpaid Interns From Sexual Harassment,* Newsweek, April 16, 2014, *available at* http://www.newsweek.com/mayor-de-blasio-signs-bill-protecting-new-yorks-unpaid-interns-sexual-harassment-246502 (last accessed July 2, 2014).

2. Unpaid Workers Lack Collective Bargaining Rights and Threaten the Bargaining Power of Paid Workers

The National Labor Relations Act ("NLRA") grants employees the right "to organize and bargain collectively" in order to ameliorate, *inter alia,* the "inequality of bargaining power between employees . . . and employers" which "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry." 29 U.S.C. § 151.

The NLRA does not, however, cover "unpaid staff." *WBAI Pacifica Found.*, 328 NLRB No. 179 (1999). Therefore denying productive workers like the Plaintiffs the right to a wage under the FLSA has the corollary effect of not protecting their right to collectively bargain any terms and conditions of employment – including "hours and working conditions" as distinct from pay. *See, e.g.*, 29 U.S.C. § 174(1) (requiring employees, their bargaining representatives, and management to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions").[6]

[6] This exclusion can also exist under public sector labor law. *See, e.g., Comm. of Interns and Residents v. N.Y. City Office of Collective Bargaining*, 13 PERB ¶ 7522, 13 Off. Dec. of N.Y. Pub. Employee Rel. Bd. ¶ 7522, 1980 WL 612607 (N.Y. Supreme Court 1980) (upholding agency's rule "that the New York City Collective Bargaining Law does not contemplate the existence of public employees who are unsalaried and not subject to remuneration"). That said, in most cases the FLSA will not be relevant to public sector interns at the state and local level because the FLSA contains an explicit exception for true volunteers at a public agency. *See* 29 U.S.C. § 203(e)(4)(A).

Furthermore, as the District Court held, the Plaintiff interns here performed "essential" work "that would have required paid employees" if interns had not been available. SPA25. Thus the primary beneficiary test, by increasing the number of workers that for-profit employers can use cost-free, would lead to more competition between paid staff and unpaid staff for the same work opportunities. This naturally weakens the bargaining power of paid staff, forcing them to cede ground to employers in order to stave off the threat that if they demand too much, they will be replaced with interns. This competition is especially pronounced during the "recurrent business depressions" whose effect on employees' wages and purchasing power the NLRA was designed to mitigate, *see* 29 U.S.C. § 151, as evidenced by the "trend of replacing full-time workers with unpaid interns" during the recent Great Recession. *See* Edwards and Hertel-Fernandez, *supra.*

In sum, more unpaid interns means more of the inequality in bargaining power that the NLRA (and, of course, the FLSA too) was designed to remedy – not just for interns, but for all workers.

3. The Primary Beneficiary Test Would Make Workplaces Less Safe

The Occupational Health and Safety Act ("OSHA") is designed to foster "safe and healthful working conditions" by requiring, *inter alia,* that employers report workplace injuries and satisfy occupational safety and health standards in the workplace, or else face fines and penalties. 29 U.S.C. § 651.

The Department of Labor, however, interprets OSHA as excluding unpaid interns. The DOL has stated unequivocally that "an uncompensated intern or volunteer is NOT considered to be an employee under the OSH Act. Therefore, OSHA Recordkeeping rules do NOT apply to unpaid interns or volunteers." *See* elaws-OSHA Recordkeeping Advisor, U.S. Dept. of Labor, *available at* http://webapps.dol.gov/elaws/osha/recordkeeping/05.aspx (last visited July 2, 2014). Courts have reached consistent results, finding that unpaid volunteers are not protected by OSHA. *See, e.g., Jones v. McKitterick*, 215 F.3d 1337 (10th Cir. 2000) (collecting cases) (holding that OSHA did not protect plaintiff who volunteered to work on defendant's addition in order to gain construction experience) (Unpublished).

By increasing the scope of unpaid jobs permitted under the FLSA, the primary beneficiary test would also increase the number of workers whose injuries are neither reportable nor punishable under OSHA. This would make all employees less safe by allowing more accidents to slip through the cracks without oversight or cost, thereby failing to identify and mandate correction of dangerous workplace conditions. Perhaps most worrisome, the increased ranks of unpaid interns would not be protected from retaliation for complaining about unsafe conditions, which would in turn discourage them from reporting problems at their worksites that affect everyone, including the public.

B. Denying These Workplace Rights to More Unpaid Workers Would Strip Protection from Those Who Need It Most

The increased number of workers who would qualify for unpaid status under the primary beneficiary test, and thus who would lose the workplace rights and protections described above, are precisely the vulnerable individuals whom those statutes were designed to protect in the first place.

The same biases that make antidiscrimination statutes necessary for ensuring equal employment rights also make members of protected classes more likely to be forced to consider unpaid work. For instance, racial and ethnic minorities protected by Title VII have suffered significantly more joblessness since the Great Recession. *See* Heidi Sherholz, *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/ (last accessed June 30, 2014). Because racial and ethnic minorities are disproportionately represented among the jobless, according to Appellants' *Amici's* own logic these minorities should also be disproportionately represented among workers who "look[] to internships . . . that will allow them to be more competitive in the job market" for paid work in the future. *See* Chamber Br. 14.

Unfortunately, the efforts of unemployed racial and ethnic minorities to reenter the labor market using internships will likely be impeded by their lack of statutory protection against unlawful bias both in obtaining and performing their internships. Appellants' *Amici* portray internships as a great equalizer because they "expose businesses to a larger, more diverse group of candidates" who get a chance to prove themselves in the "real world" that they otherwise would not have. *Id.* at 17. But many of the unpaid interns who will proliferate under the primary beneficiary test will be exposed to discrimination during their internships without the protection of antidiscrimination statutes, thus reproducing the unequal employment opportunities targeted by those statutes in the first place.

This problem is acute in the context of sexual harassment. Studies suggest that interns are particularly vulnerable to sexual harassment. *See, e.g.*, David C. Yamada, *The Employment Rights of Student Interns*, 35 Conn. L. Rev. 215, 219-20 (2002). Yet young women interns like the plaintiff in *O'Connor* – who was asked by a male supervisor to "participate in an 'orgy'" on one occasion, and told to "remove her clothing for preparation for a meeting with him" on another, 126 F.3d at 114 – have no recourse under the law to ensure that their internship experiences are not predatory. Quite the opposite, they are easy targets for harassers looking for victims without consequences. The permissive primary beneficiary test will only add to the number of women in this precarious position.

Perhaps the most dangerous confluence of all this workplace disenfranchisement, however, would stem from removing collective bargaining rights from employees whose bargaining power is already so small that they are willing to accept unpaid jobs. The FLSA and the NLRA were passed within three years of one another, at the height of the New Deal, with the goal of leveling the playing field between workers and employers by empowering workers to bargain under the NLRA while ensuring them minimum wages under the FLSA to build upon through bargaining. *See* James Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 Tex. L. Rev. 1563, 1569 n.27 (1996) ("[T]he FLSA was regarded as establishing a floor on which collective bargaining would then build."). Yet somehow, since then, the institution of unpaid internships – which are mentioned nowhere in the language or legislative history of either Act – gained prominence, with employers purporting to owe productive workers no financial compensation for their labor under the FLSA and thus, as a corollary, taking from these same workers their chief mechanism for improving their condition, collective bargaining.

The loss of each of the aforementioned workplace rights – the right to equal employment opportunity, to be free from sexual harassment, to work in a safe environment, and to bargain collectively – is damaging enough, but the compound harm of removing all of them together is potentially devastating to those who most

need legal protection. So many of the unpaid workers who would be swept into this underclass by the adoption of the primary beneficiary test, which would create a far more expansive exception to the FLSA than what *Portland Terminal* currently allows, are already struggling. As internships are "increasingly becoming prerequisites for skilled jobs," Chamber Br. 6, college graduates are faced with a Hobson's choice: donate your productive labor to a for-profit company (and, for those of lesser means, work a second job on the side to make ends meet) and leave your other workplace rights at the door, or be left behind. The FLSA was designed to prevent employers from asking workers to make such choices, not to empower them to do so.

CONCLUSION

For the reasons stated above, this Court should affirm the District Court's grant of summary judgment.

Dated: July 7, 2014

Respectfully submitted,

/s/ Matthew Stark Blumin

Attorney for *Amici Curiae*

Matthew Stark Blumin
Associate General Counsel
American Federation of State, County and Municipal Employees, AFL-CIO

1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775 5900

William Lurye
Judith Rivlin
American Federation of State, County and Municipal Employees, AFL-CIO
1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775 5900

Mary K. O'Melveny
Communications Workers of America, AFL-CIO
501 3rd Street NW, Suite 800
Washington, DC 20001
(202) 434 1213

Judith A. Scott
Nicole G. Berner
Service Employees International Union
1800 Massachusetts Ave. NW
Washington, DC 20036
(202) 730 7455

Nicholas Clark
Renee L. Bowser
United Food and Commercial Workers International Union, AFL-CIO
1775 K Street NW
Washington, DC 20006
(202) 466 1593

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 5,434 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 word-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 7, 2014

/s/ Matthew Stark Blumin

Matthew Stark Blumin
Associate General Counsel
American Federation of State, County and Municipal Employees, AFL-CIO
1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775 5900

Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 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/ Matthew Stark Blumin

Matthew Stark Blumin
Associate General Counsel
American Federation of State, County and Municipal Employees, AFL-CIO
1101 17th Street NW, Suite 900
Washington, DC 20036
(202) 775 5900

Attorney for *Amici Curiae*

RULE 32.1(b) ADDENDUM

Pursuant to Fed. R. App. P. 32.1(b), appended hereto is a copy of the decision in *Jones v. McKitterick*, 215 F.3d 1337 (10th Cir. 2000) (Unpublished).

215 F.3d 1337, 2000 WL 668061 (C.A.10 (Colo.)), 2000 CJ C.A.R. 2849
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 215 F.3d 1337, 2000 WL 668061 (C.A.10 (Colo.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA 10 Rule 32.1 before citing.)

United States Court of Appeals, Tenth Circuit.
Daniel K. **JONES** and Tracy L. **Jones**, Plaintiffs-Appellants,
v.
Monte McKITTERICK, Defendant-Appellee.

No. 99-1043.
May 23, 2000.

Before MURPHY and McWILLIAMS, Circuit Judges, and ROGERS, Senior District Judge.[FN**]

FN** The Honorable Richard D. Rogers, Senior United States District Judge for the District of Kansas, sitting by designation.

ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir.R. 36.3.

ROGERS.

***1** This is a personal injury action where there is diversity jurisdiction. This appeal was filed following a jury verdict for the defendant. Plaintiffs, Daniel **Jones** and his wife Tracy **Jones**, present five issues for review. Upon due consideration, the court shall affirm the judgment of the district court.

Daniel **Jones** was injured while hammering a nail into a joist hanger at defendant's home addition construction site. A nail he struck ricocheted and damaged **Jones**' left eye. **Jones** was not wearing eye protection at the time. **Jones** had not worked on a construction site before. He was in the military but scheduled to get out in some months. He asked to work on the home addition project to get some experience or training in the construction trade. He was not paid.

When he was injured **Jones** was above an open garage door on the joist hangers he was nailing. Beforehand, defendant had tacked nails into the joist hangers. **Jones**' job was to "nail off" the joist hangers. In other words, he finished hammering the nails into the hangers.

Plaintiffs alleged negligence on the grounds that defendant did not provide **Jones** eye protection or warn him of the dangers of hammering nails without eye protection. However, prior to trial, the district court granted a motion in limine which excluded any testimony about OSHA eye protection regulations from a witness plaintiffs had endorsed as an expert. Plaintiffs also alleged that defendant negligently failed to instruct **Jones** regarding how to safely position himself to drive a nail.

At trial, plaintiffs argued that the injury occurred because, unbeknownst to **Jones**, defendant had broken a nail in the joist hanger and, when **Jones** tried to hammer a new nail into the hole, it struck the broken nail and ricocheted into his eye. Defendant asserted that the injury occurred because **Jones** mishit and bent back a nail which caused it to weaken and break when **Jones** tried to hammer the nail again.

215 F.3d 1337, 2000 WL 668061 (C.A.10 (Colo.)), 2000 CJ C.A.R. 2849
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 215 F.3d 1337, 2000 WL 668061 (C.A.10 (Colo.)))

Voir dire

The first two issues raised by plaintiffs on appeal concern voir dire. First, plaintiffs contend that a new trial should be ordered because the trial judge told the jury during voir dire that the State Farm Insurance Company was "not a party to this case." The comment was made in the following context:

> THE COURT: Okay. Do any of you have any interests, stock, shareholder, or other interest in State Farm Insurance Company? Okay.
>
> PROSPECTIVE JUROR DEWIRE: Excuse me.
>
> THE COURT: Yes, ma'am.
>
> PROSPECTIVE JUROR DEWIRE: My parents are in a lawsuit right now with State Farm. I don't know whether that will affect anything. It was an accident case.
>
> THE COURT: How does that make you feel sitting here today in view of the spirit in which these questions are asked of you?
>
> PROSPECTIVE JUROR DEWIRE: I would try to be as truthful as I could be, but I can't help but see what they have gone through and the feeling that they've had. That's something I cannot help.
>
> THE COURT: Do you feel that this really-well, you know, we can't look into your mind. And I've tried to set the spirit of what we're after here, and I appreciate your bringing this to our attention. So I guess we're going to kind of need to trust you on this as to whether you would be comfortable serving as a judge of the facts in this particular case.
>
> ***2** PROSPECTIVE JUROR DEWIRE: It honestly just depends on how much the insurance company is involved.
>
> THE COURT: Well, they're not-you know they're not a party to this case.
>
> PROSPECTIVE JUROR DEWIRE: They are not?
>
> THE COURT: No.
>
> PROSPECTIVE JUROR DEWIRE: Okay. Then that would make a difference.
>
> THE COURT: Okay. I mean the parties are Daniel K. **Jones** and Tracy L. **Jones**, Plaintiffs, versus Monte McKitterick, Defendant. Okay?
>
> PROSPECTIVE JUROR DEWIRE: Okay.
>
> App. at 220-222.

The question regarding State Farm was made at plaintiffs' request presumably because State Farm *was* involved in the defense of this case, although it was not a party. The prospective juror who responded to the question was not selected to hear the case.

Plaintiffs assert that the comment of the court violates the rule in Colorado that "during the actual trial of a case, it is improper to mention insurance in either a positive or negative manner." *Liber v. Flor,* 415 P.2d 332, 339 (Colo.1966). See also, *Bonser v. Shainholtz,* 983 P.2d 162 (Colo.App.1999) (error to admit evidence of commonality of liability insurance to show bias of a witness).

In this instance, the trial court's statement did not admit or deny the presence of insurance in the case. The statement only denied the presence of *one* insurance company as a party in the case. Contrary to plaintiffs' claim, the trial court did not say there was no insurance. Moreover, plaintiffs engage in sheer spec-

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ulation when they assert that the trial court's statement limited the jury from responding to the question regarding "interests" in State Farm. Therefore, the trial court's statement regarding State Farm does not provide grounds for ordering a new trial.

Plaintiffs' second issue related to voir dire also concerns the question asking whether the prospective jurors were stockholders or had "any interest" in the State Farm Insurance Company. Plaintiffs assert that two jurors gave false answers to this question because they failed to state that they were State Farm policyholders. Plaintiffs further assert that as policyholders these jurors were entitled to rebates from the company and that both jurors had been involved in automobile accidents while insured with State Farm.

Whether these allegations warrant a new trial is governed by the standard set forth in *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 556 (1984): "To obtain a new trial ... a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Neither part of the standard has been satisfied in this case. The jurors could have honestly believed that holding a State Farm policy was not the same as having an "interest" in the company. In addition, this information by itself would not have provided a sufficient basis to excuse a juror for cause. See *Oglesby v. Conger,* 507 P.2d 883, 885 (Colo.App.1972); see also, *Nathan v. Boeing Co.,* 116 F.3d 422, 425 (9th Cir.1997) (employee of defendant may serve on employment discrimination jury); *Vasey v. Martin-Marietta Corp.,* 29 F.3d 1460, 1466-68 (10th Cir.1994) (employee of consultant for defendant may serve on jury); *Ramirez v. IBP, Inc.,* 938 F.Supp. 735 (D.Kan .1996) *aff'd,* 131 F.3d 152 (10th Cir.1997) (table) (employee of company that did business with defendant may serve on jury). For these reasons, plaintiffs' second grounds on appeal must be rejected.

Surprise exhibits

***3** Plaintiffs' third contention on appeal is that they were unfairly prejudiced by defendant's use of undisclosed "exhibits" during the trial. The only exhibits to which plaintiffs make specific reference are a joist hanger and a bag of nails. The hanger was admitted only as a demonstrative exhibit.

The trial record contains no objection to these exhibits from plaintiffs. Rule 103 of the Federal Rules of Evidence provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected" and "[i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears on record, stating the specific ground of the objection if the ground was not apparent from the context." In light of plaintiffs' failure to make a proper and timely objection at trial and the substantial discretion afforded trial judges in making evidentiary decisions, the court shall reject plaintiffs' third argument on appeal. See *Sorensen v. City of Aurora,* 984 F.2d 349, 355 (10th Cir.1993).

OSHA regulations

Plaintiffs next challenge the decision of the trial court to exclude expert testimony on OSHA eye protection regulations. The trial court, in an oral ruling, found that the regulations were not applicable because: there was no employer/employee relationship between defendant and Daniel **Jones**; application would affect or enlarge the common law duties of employers contrary to 29 U.S.C. § 653(b)(4); and their own definition excluded their application. App. at 111.

We find no error in the analysis of the trial court. Because there was no employer/employee relationship between Daniel **Jones** and defendant, OSHA regulations do not directly apply and should not be considered under Colorado law. *Auxier v. Auxier,* 843 P.2d 93, 95-96 (Colo.App.1992); see also, *Lynch v. Reed,* 944 P.2d 218, 223-24 (Mont.1997); *Kerker v. Elbert,*

634 N.E.2d 482, 486 (Ill.App.1994) (no duty owed under OSHA to volunteer laborers). In addition, if an employer/employee relationship did exist, defendant does not qualify as an "employer" under OSHA, i.e., a person "engaged in a business affecting commerce." 29 U.S.C. § 652(5); see *Dekle v. Todd*, 207 S.E.2d 654, 656 (Ga.App.1974) (repairing roof on employer's farm was not being "engaged in a business affecting commerce").

Accordingly, we reject plaintiffs' fourth argument on appeal.

Weight of the evidence

Finally, plaintiffs contend that the jury verdict was against the weight of the evidence. "A motion for a new trial made on the ground that the verdict of the jury is against the weight of the evidence normally presents a question of fact and not of law and is addressed to the discretion of the trial court." *Richardson v. City of Albuquerque*, 857 F.2d 727, 730 (10th Cir.1988). Our standard of review on such matters is whether the denial of the motion for new trial was "a manifest abuse of discretion." *Id.* We must determine "whether the verdict is clearly, decidedly or overwhelmingly against the weight of the evidence." *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119, 1125 (10th Cir.1995) *cert. denied*, 516 U.S. 1146 (1996). Here, our review of the trial record reveals substantial evidence to support the jury's verdict. The record indicates uncertainty by Daniel **Jones** as to the cause of his injury. Moreover, the jury was entitled to credit the testimony of defendant's expert over the evidence and testimony presented by plaintiffs. The verdict was not clearly, decidedly, or overwhelmingly against the evidence. We therefore find no abuse of discretion in the district court's denial of plaintiffs' motion for a new trial.

***4** In conclusion, we find that a new trial is not warranted by the arguments presented on appeal and that the jury verdict is not contrary to the clear weight of the evidence.

Therefore, we affirm the judgment of the trial court.

C.A.10 (Colo.),2000.
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