Nos. 13-4478, 13-4481 (con)

IN THE 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 THE SECRETARY OF LABOR AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of plaintiffs-appellees. The district court correctly concluded that the Department of Labor's ("DOL" or "Department") longstanding, objective six-part test for determining whether a trainee or intern is an employee for purposes of the Fair Labor Standards Act ("FLSA" or "Act") is the proper method for ascertaining employment status, rather than a "primary benefit" test that relies upon subjective assessments to make that determination.

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary, who is responsible for the administration and enforcement of the FLSA, *see* 29 U.S.C. 204(a) and (b), 216(c), 217, has compelling reasons to participate as *amicus curiae* in this appeal in support of the plaintiff-appellee interns, because the determination of whether an intern is an employee covered by the FLSA's minimum wage and overtime compensation guarantees, rather than a trainee who is not entitled to those protections, is critical to the enforcement of the FLSA. The Department's six-part test, which is based on the Supreme Court's opinion in *Walling v. Portland Terminal Co.*, 330 U.S. 149 (1947), provides a consistent, comprehensive, and objective standard for measuring employment not only in this case, where former interns of Fox Searchlight Pictures ("Fox") allege

that they were employees of the company and therefore entitled to minimum wage and overtime compensation under the FLSA, but in other cases involving interns and trainees.

STATEMENT OF THE ISSUE

The FLSA's definition of an "employee" has been recognized almost from the Act's inception as the "broadest definition that has ever been included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945) (internal quotation marks and citation omitted). In *Portland Terminal*, however, the Supreme Court concluded that the FLSA's definition of "employee" does not include within its scope an individual who, *inter alia*, works "for [his or her] own advantage on the premises of another" and "without any express or implied compensation agreement." 330 U.S. at 152. The Department, as early as 1967, enunciated a six-part test based on that decision, which it applies to determine whether trainees or interns are employees under the FLSA. *See Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993); Wage & Hour Div., Field Operations Handbook ("FOH"), Ch. 10, ¶10b11 (1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf. The issue presented by this case is whether this longstanding *Portland Terminal* test for determining whether a trainee or intern is an employee for purposes of the FLSA is the proper test to

apply in these "intern" cases, rather than a "totality of the circumstances" or "primary benefit" test.

STATEMENT OF THE CASE

Statement of Facts and Course of Proceedings[1]

Glatt v. Fox Searchlight Pictures is an action brought by four unpaid interns, Eric Glatt, Alexander Footman, Kanene Gratts, and Eden Antalik, against a motion picture distribution company, Fox Searchlight Pictures ("Searchlight"), and its parent company, Fox Entertainment Group ("FEG"), alleging violations of, *inter alia*, the FLSA. 293 F.R.D. 516 (S.D.N.Y. 2013). Glatt and Footman worked without compensation on the production of the *Black Swan* film in New York. *Id.* at 522. After the production phase of *Black Swan* ended, Glatt performed post-production work on the film during a second unpaid internship. *Id.* Gratts worked as an unpaid intern on the production of the film *500 Days of Summer* in California. *Id.* Antalik worked as an unpaid intern at Searchlight's corporate offices in New York. *Id.*

Gratts, Glatt, and Footman moved for summary judgment before the district court on the issue of whether they were employees under the FLSA and therefore were owed compensation for work performed as unpaid interns. *Fox Searchlight,*

[1] For reasons of economy, a fuller accounting of the specific facts of the case is provided in the Argument section.

293 F.R.D. at 530-31.[2] The district court rejected Searchlight's argument that it should apply a "primary benefit" test to analyze the interns' employment status, concluding that that test "has little support in *Walling*[*v. Portland Terminal*]"; the district court also noted that because the trainee exception recognized by *Portland Terminal* is necessarily narrow given the FLSA's expansive definition of employee, courts should be "cautious" in expanding that exception. *Id.* at 531-32 (citing *Portland Terminal*, 330 U.S. at 153). The district court further concluded that a primary benefit test has limited utility because it is both "subjective and unpredictable." *Id.* at 532. Since the Department's longstanding six-factor trainee test, in contrast to the primary benefit test, has support in *Portland Terminal* and was issued by the agency charged with administering the FLSA, the district court concluded that it was entitled to *Skidmore* deference and was applicable. *Id.* Applying the Department's six-factor test to the undisputed material facts of that case, the district court concluded that the totality of the circumstances showed that Glatt and Footman "d[id] not fall within the narrow 'trainee' exception to the FLSA's broad coverage." *Id.* at 534.

Defendants moved to certify the court's Opinion and Order for immediate appeal, which the district court granted. *Glatt v. Fox Searchlight Pictures*, No. 11-cv-6784 (S.D.N.Y. Sept. 17, 2013). In an Order dated November 26, 2013, this

[2] The district court concluded that Gratts' claim was time barred. *Fox Searchlight*, 293 F.R.D. at 525. Antalik did not move for summary judgment on this issue.

Court granted the defendants-appellants' petition for interlocutory appeal, which included the question "[w]hat is the appropriate legal standard for determining whether an unpaid intern qualifies as an 'employee' under the FLSA?" and stated that it would consider the appeal in tandem with another case arising from the Southern District of New York that identified almost the identical issue for interlocutory appeal. Order at 2, ECF No. 3; *see Wang v. Hearst Corp.*, No. 12-cv-793 (S.D.N.Y. June 27, 2013).[3]

SUMMARY OF ARGUMENT

The Department's longstanding six-part *Portland Terminal* test is the best method for determining employment status under the FLSA in a trainee or internship setting for several reasons. As an initial matter, the Department's test is derived from and finds support in the Supreme Court's *Portland Terminal* decision, which acknowledged that an individual "whose work serves only his own interest" can under very limited circumstances be outside of the scope of the FLSA's definition of employment. *See* 330 U.S. at 152. Because the Department's test is based on the factors present in the *Portland Terminal* decision, it accurately outlines the very narrow parameters of the "trainee" exception to the FLSA's expansive coverage. The test also encompasses the relevant criteria – the educational nature of the training, benefit to the intern or trainee, the level of

[3] On April 4, 2014, the Secretary filed an amicus brief with this Court in *Wang* in support of the unpaid interns.

supervision provided, displacement of current employees, advantage to the employer, impediment to an employer's business operations, entitlement of a job upon completion of the training, and expectation of wages for training – that inform whether a trainee or intern is an employee for purposes of the FLSA, and thus most accurately captures the economic reality of the relationship. *See, e.g.*, *Barfield v. New York Health & Hosps. Corp.*, 537 F.3d 132, 141 (2d Cir. 2008). This test will be dispositive in the vast majority of cases, and should be strictly applied absent unusual circumstances.

As applied to the facts and circumstances of each particular trainee or internship program, the Department's *Portland Terminal* test is an objective means of measuring employment status because the analysis is conducted within the confines of the six factors. The Department developed its six-part test not only to give effect to the *Portland Terminal* decision, but to ensure that the agency applies a consistent standard across the country. The trainee test helps employers to know their legal obligations to trainees and interns, and assists trainees and interns, who oftentimes are new entrants into the workforce, to understand their legal rights under the Act. In this way, the Department's test stands in stark contrast to a "totality of the circumstances" or "primary benefit" test, both of which would introduce subjectivity into the analysis and invite inconsistent results.

ARGUMENT

THIS COURT SHOULD DEFER TO THE DEPARTMENT'S LONGSTANDING SIX-PART TRAINEE TEST, WHICH IS DERIVED FROM AND FINDS SUPPORT IN *PORTLAND TERMINAL*, AND ACCURATELY MEASURES EMPLOYMENT STATUS IN A TRAINEE OR INTERNSHIP SETTING

1. As this Court recognizes, the Supreme Court has interpreted the FLSA "liberally and afforded its protections exceptionally broad coverage" in recognition of its "remedial and humanitarian goals." *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2d Cir. 2008) (citations omitted). The FLSA's definition of an "employee," for example, has been described as "the broadest definition [of that term] that has ever been included in any one act." *Rosenwasser*, 323 U.S. at 363 n.3 (internal quotation marks and citation omitted); *see* 29 U.S.C. 203(e)(1) (defining "employee" as "any individual employed by an employer").

2. In most instances, individuals who work for a for-profit entity are considered employees under the FLSA and are entitled to its protections unless they are subject to a specific statutory exemption or exclusion.[4] The Supreme

[4] As the Intern Fact Sheet ("I.F.S." or "Fact Sheet"), described further herein, notes, "[i]nternships in the 'for-profit' private sector will most often be viewed as employment" unless the trainee test is met. I.F.S., p.1. Generally, the FLSA does not permit individuals to volunteer their services to for-profit businesses unless they meet the trainee test discussed *infra*. Different rules apply to individuals who volunteer or perform unpaid internships in the public sector or for non-profit charitable organizations. *See* I.F.S., p.2; *see generally* 29 U.S.C. 203(e)(4)(A); 29 C.F.R. 553.101; *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 298 (1985).

Court's decision in *Portland Terminal*, however, recognized that individuals who participate in unpaid internships or training programs conducted by for-profit entities may not be "employed" within the meaning of the FLSA if certain criteria are met. In *Portland Terminal*, the railroad offered prospective brakemen the opportunity to take a hands-on training course, which typically lasted seven to eight days. *See* 330 U.S. at 149. Brakemen trainees were "turned over to a yard crew" from whom they learned the job of a brakeman first by "observation[,]" and then by performing the tasks "under close scrutiny." *Id.* Because they were closely supervised, the trainees did not displace any of the regular employees. *Id.* at 149-50. Nor did their work expedite the railroad's business; at times, it actually impeded it because the regular employees had to monitor the trainees in addition to performing their normal duties. *Id.* at 150. Although the training was mandatory for an individual to be considered for employment with the railroad, trainees were not guaranteed a job upon completion of the training. *Id.* The trainees did not expect compensation and did not receive compensation during their training period other than a retroactive $4.00 per day allowance, contingent upon their having been accepted and available for work as brakemen, which was negotiated between the railroad and the union for the "war period." *Id.*

In considering whether the railroad trainees were "employees" for purposes of the FLSA, the Supreme Court noted the expansive nature of that term as defined

in the Act. *Portland Terminal*, 330 U.S. at 150-51 (citation omitted). The Court observed that trainees, apprentices, and learners would be covered by the FLSA if they are actually employed to work. *Id.* at 151 (citing 29 U.S.C. 214(a)). On the other hand, the Court noted, the Act's definitions of "employ" and "employee" are not so broad that they cover individuals who "without any express or implied compensation agreement, might work *for their own advantage* on the premises of another." *Id.* at 152 (emphasis added). The Court further observed that the Act was not intended to make an individual "*whose work serves only his own interest* an employee of another person who gives him aid and instruction." *Id.* (emphasis added). To this point, the Court noted that the Act would not apply to the railroad trainees if they had taken the railroad training program at a school "wholly disassociated from the railroad" instead of on the worksite. *Id.* at 152-53. Accordingly, based on the "unchallenged findings . . . that the railroads received no 'immediate advantage' from any work done by the trainees," the Supreme Court held that the trainees were not employees within the meaning of the FLSA, and therefore were not entitled to be paid the minimum wage. *Id.* at 153.

3. The Department has identified six criteria, distilled from *Portland Terminal*, to determine whether a trainee is an "employee" for purposes of the FLSA. *See* FOH ¶10b11(b); *see also Parker Fire*, 992 F.2d at 1026 (DOL's six factor test was "derived almost directly from *Portland Terminal*"); *compare Solis*

v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 526 n.2 (6th Cir. 2011).

These criteria are:

> (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
>
> (2) the training is for the benefit of the trainees or students;
>
> (3) the trainees or students do not displace regular employees, but work under their close observation;
>
> (4) the employer that provides the training derives no immediate advantages from the activities of the trainees or students; and on occasion his operations may actually be impeded;
>
> (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
>
> (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

FOH ¶10b11(b); *see Parker Fire*, 992 F.2d at 1026-27 (DOL six-part trainee test has been in use since at least 1967). The Department's longstanding position is that the narrow "trainee" exception from the Act's broad definition of an "employee" is established when all six criteria apply. *Id.*; *see* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter ("Op.Ltr."), 2006 WL 1094598 (Apr. 6, 2006); Op.Ltr., 2002 WL 32406598 (Sept. 5, 2002); Op.Ltr., 1998 WL 1147717 (Aug. 11, 1998); Op.Ltr., 1986 WL 1171130 (Mar. 27, 1986); Op.Ltr., 1975 WL 40999 (Oct. 7, 1975). The FOH also states that whether all six criteria are satisfied in a

particular case depends "upon all of the circumstances surrounding their activities on the premises of the employer." FOH ¶10b11(b); *see* Op.Ltr., 1975 WL 40999 (Oct. 7, 1975).[5]

The Department's test is a faithful application of the Supreme Court's decision in *Portland Terminal*. *See Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504, 532-33 (S.D.N.Y. 1998) (Sotomayor, J.) (Department test requires findings that are nearly identical to those considered in *Portland Terminal*). This is evidenced by the fact that *Portland Terminal* analyzed the brief, targeted training offered by the railroad to individuals who wished to become railroad brakemen and noted that similar training might be obtained through a vocational school; that trainees did not displace any of the regular employees; that the trainees' work did not expedite the railroad's business because, in addition to their regular duties, the

[5] The Department has issued a Fact Sheet applying the Department's six-factor *Portland Terminal* test to internships. *See Hearst*, 293 F.R.D. at 492-93 (citing U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71, *Internship Programs Under the Fair Labor Standards Act* (April 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.pdf). The Fact Sheet emphasizes that the Act's broad definition of "employee" necessitates that exceptions from employee status be narrowly construed, and provides specific examples of situations that commonly arise in the intern setting. I.F.S., p.2. It also explains how the factors in the six-part test, applied to "all of the facts and circumstances" of each internship program, can help to distinguish interns who are trainees and therefore not covered by the Act from interns who are employees entitled to the FLSA's protections. *Id.* The Fact Sheet does not make any substantive changes to the six-part test articulated in the FOH; it applies the six *Portland Terminal* factors to an internship rather than a training program.

railroad employees had to closely supervise the trainees; that trainees did not receive compensation during their training period other than a retroactive $4.00 per day allowance, contingent upon their having been accepted and available for work as brakemen; that the trainees were not guaranteed a job at the completion of the training; and, based on the "unchallenged findings," that the railroads did not receive an advantage from the trainees' work. 330 U.S. at 149-53.

4. *Portland Terminal* demonstrates that the circumstances under which individuals who participate in employer-sponsored training programs are not covered employees for purposes of the FLSA are limited. The *Portland Terminal* criteria are also applicable to unpaid internships, which have proliferated over the past few decades and which take many forms across vastly different sectors of the economy. *See, e.g.*, I.F.S.; Ross Perlin, Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy 28, 30-36, 89 (Verso 2011); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 Conn. L. Rev. 215, 217 (2002). Even within one organization, interns might perform very different tasks, depending on the section or manager to which they are assigned. *See, e.g.*, *Hearst*, 293 F.R.D. at 491-92. Given the rapid expansion of unpaid internships across various sectors of the economy and the varied nature of those internships, it is important for the uniform enforcement of the FLSA to have an objective test to measure interns' employment status.

The Department's six-part test accurately measures the very narrow trainee exception to FLSA coverage against the "circumstances surrounding [an intern's] activities on the premises of the employer." FOH ¶10b11. It ensures that internships are uniformly analyzed by employers, interns, and courts across the country to determine whether interns are essentially engaged in the sort of training described in *Portland Terminal* that serves only their own interest, or are performing the sort of routine, productive work for which they are entitled to compensation under the FLSA. *Id*. The Department's test is also an important backstop to ensure that this very limited trainee exception to the FLSA's broad coverage is not unduly expanded, particularly in difficult economic times when employers are eliminating paid staff positions and the promise of free labor is both tempting and available. *See, e.g.*, *Hearst*, 293 F.R.D. at 491; *see also* Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. Times, Apr. 2, 2010.[6]

5. An analysis of the individual factors demonstrates the importance of each factor to the overall determination of whether an employment relationship exists. The first *Portland Terminal* factor asks whether "the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school." FOH ¶10b11(b)(1); *see* I.F.S., p.1. This

[6] An intern who is entitled to compensation under the FLSA cannot waive that right. *See, e.g.*, *Gotham*, 514 F. 3d at 290 (citing *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (FLSA rights cannot be waived)).

factor is usually met when the training incorporates the practical application of material taught in a classroom. *See* Op.Ltr., 2006 WL 1094598 (Apr. 6, 2006). This factor is also likely to be met when the internship teaches skills and content applicable to many different employment settings, as opposed to the organization's specific operations. *See* I.F.S., p.2. Put another way, a training program which emphasizes a particular employer's practices can be comparable to a vocational program if it "teaches skills that are fungible within the industry." *Parker Fire*, 992 F.2d at 1028. This training, however, must not be limited to simple job functions; such a "limited and narrow kind[] of learning" does not match the level of instruction comparable to that provided to students in a bona fide vocational course. *See McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (servicing a snack food distribution truck's route did not provide trainees with instruction comparable to a vocational training course on outside salesmanship). Employers must also be aware that the training, although substantial at the outset, might not meet this factor if the interns perform "clerical chores long after the educational value of that work [is] over." *Marshall v. Baptist Hospital, Inc.*, 668 F.2d 234, 236 (6th Cir. 1981). In sum, an educational component that extends throughout the entirety of the internship and imparts substantial educational content that is transferable beyond the confines of the particular workplace is critical for this factor to be met.

The second *Portland Terminal* factor examines whether "the training is for the benefit of the trainees or students." FOH ¶10b11(b)(2); *see* I.F.S., p.1. Although almost all interns will derive some basic benefits from the internship, such as learning new skills or work habits or getting general exposure to a particular industry, such benefits are insufficient to meet the second factor of the *Portland Terminal* test. In order to exclude a trainee or intern from the FLSA's guarantee of the minimum wage and overtime compensation, the training must provide the trainee or intern with more than the general skills and exposure that any new employee would receive in his or her first few months on the job. Thus, in *Archie*, the district court stated that while it was not disregarding the considerable benefit that formerly homeless and unemployed individuals derived from the on-the-job training, including basic job skills and an employment history, those benefits were insufficient to meet that factor, particularly where the defendant was able to offer its services at below-market rates because of the productive work performed by its trainees. *See* 997 F. Supp. at 533. If the business is dependent upon the work of the intern, which happens when the intern performs the routine work of the business on a regular basis or is otherwise performing productive work, the benefit factor cannot be met. *See* I.F.S., p.2.

The third *Portland Terminal* factor measures whether "the trainees or students do not displace regular employees, but work under their close

observation." FOH ¶10b11(b)(3); *see* I.F.S., p.1. In order to determine whether interns displace regular employees, the organization should consider whether it "would have hired additional employees or required existing staff to work additional hours had the interns not performed the work." I.F.S., p.2. An internship where the intern shadows the employer's regular employees, who in turn exercise close supervision over the intern, is more likely to meet this factor. *Id*. A program that provides interns with the same level of supervision as the rest of the workforce, on the other hand, suggests an employment relationship rather than an educational or training environment. *Id.* In *Baptist Hospital*, for example, evidence that interns performed work alone or under supervision of fellow trainees compelled the court to conclude that the training program was "seriously deficient" in supervision, and that the interns had "bec[ome] functioning members" of the institution, "performing all duties required of them in a fashion that displaced regular employees." 668 F.2d at 236 (internal quotation marks and citations omitted).

The fourth *Portland Terminal* factor measures whether "the employer that provides the training derives no immediate advantages from the activities of the trainees or students; and on occasion operations may actually be impeded." FOH ¶10b11(b)(4); *see* I.F.S., p.1. The Department has stated that this factor was not met when interns' work directly contributed toward the daily operations of a youth

hostel, thus providing the employer with an immediate advantage from that labor. *See* Op.Ltr., 1994 WL 1004761 (Mar. 25, 1994). The Department has also observed, however, that minimal productive work by the intern can be offset by the burden assumed by the employer in providing training and supervision. *See* Op.Ltr., 2002 WL 32406598 (Sept. 5, 2002); *see also* Op.Ltr., 1995 WL 1032473 (Mar. 13, 1995).

The fifth *Portland Terminal* factor measures whether "the trainees or students are not necessarily entitled to a job at the conclusion of the training period." FOH ¶10b11(b)(5); *see* I.F.S., p.1. As a safeguard against blurring the line between trainees and employees, or coercing new employees to complete their training period without compensation, the internship should not be used as a trial period for permanent employment, and should therefore be for a fixed, rather than an open-ended, period of time. *See* I.F.S., p.2; *see also Portland Terminal*, 330 U.S. at 152. Relatedly, the last *Portland Terminal* factor measures whether "the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training." FOH ¶10b11(b)(6); *see* I.F.S., p.1. As *Portland Terminal* recognizes, trainees are covered by the FLSA when they are employed for compensation. *See* 330 U.S. at 151.

In sum, an internship that has, *inter alia*, been set up for the specific purpose of providing targeted educational training to the intern, rather than being a general

introduction to the workplace or a particular industry; benefits the intern because of the educational nature of the internship, rather than supplying the employer with free entry-level labor; provides close supervision and therefore does not displace regular employees; and does not include compensation or promise of a job, is less likely to be employment, because all six factors of the Department's test will usually be met under those circumstances. *See* Op.Ltr. FLSA2006-12 (Apr. 6, 2006); Op.Ltr., 1995 WL 1032473 (Mar. 13, 1995). The Department's comprehensive six-factor test allows employers, interns, and adjudicators to determine in an objective manner whether there is an employment relationship as broadly defined by the FLSA, thus most accurately reflecting the economic reality of the situation. It should therefore be adhered to strictly absent unusual circumstances.[7]

6. Applying the *Portland Terminal* factors to the undisputed material facts of this case, the district court correctly concluded that Glatt and Footman were employees of Fox Searchlight for purposes of the FLSA. *See Fox Searchlight*, 293 F.R.D. at 534. Considering the first *Portland Terminal* factor, which addresses the educational component of the training, the district court observed that Footman had only general exposure to how a production office functioned, and that his learning was limited to skills specific to *Black Swan*'s office procedures, such as how to

[7] There do not appear to be any unusual circumstances here that would justify deviating from the Department's test.

imprint watermarks on a document and operate the coffee pot and photocopier. *Id.* Thus, the district court correctly concluded that the internship lacked the formal training or education sufficient to meet the first factor. *Id.* The district court noted that the record for Glatt on the education factor was "inconclusive." *Id.* at 533.

With respect to the second *Portland Terminal* factor, whether the internship experience is for the benefit of the intern, the district court observed that Glatt and Footman "[u]ndoubtedly" received some benefit from the internship, such as job and resume references and a general understanding of how a production office works. *Fox Searchlight*, 293 F.R.D. at 533. The district court properly concluded, however, that these benefits were incidental to the actual work performed and were common to any job: "Resume listings and job references result from any work relationship, paid or unpaid, and are not the academic or vocational training benefits envisioned by this factor." *Id.* Searchlight, on the other hand, unquestionably benefitted from the interns' work, which its employees otherwise would have had to perform. *Id.* Therefore, the district court correctly concluded that the interns did not receive the benefit of the internship experience. *Id.*

With respect to the third *Portland Terminal* factor, the district court concluded that the interns displaced regular employees because they performed routine tasks that would have been performed by regular Searchlight employees. *See Fox Searchlight*, 293 F.R.D. at 533. Glatt's assigned duties during his first

internship, for example, included picking up coworkers' pay checks, tracking and reconciling purchase orders and invoices, and going to the set for signatures. *Id.* His supervisor admitted that if Glatt had not performed the work, another paid employee or intern would have had to work longer hours to perform it. *Id.* Similarly, Glatt's duties at his second, post-production internship included basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands, work that would have been done by a paid employee if Glatt had not performed those tasks. *Id.* Footman's internship duties included assembling office furniture, taking lunch orders, answering phones, watermarking scripts, and making deliveries. *Id.* When Footman reduced his internship from five to three days a week, *Black Swan* hired another intern, thereby indicating displacement. *Id.*

The fourth *Portland Terminal* factor asks whether the employer that provides the training derives any immediate advantage from the interns' work, or whether its work is impeded by the interns' presence. Searchlight did not dispute that it obtained an immediate advantage from Glatt's and Footman's work because they performed work that paid employees would otherwise have had to perform. *See Fox Searchlight*, 293 F.R.D. at 533. The district court stated that there was no evidence that the interns ever impeded Searchlight's work, and that "[m]enial as it was, their work was essential" to the production company's operations. *Id.*

Finally, with respect to the fifth and sixth *Portland Terminal* factors, the district court concluded that there was no evidence that Glatt or Footman were entitled to a job at the end of their internships, and that the two interns understood that they would not be paid for their work for Searchlight. *Id.* at 534.

Thus, after applying the Department's six *Portland Terminal* factors to the undisputed material facts of this particular case and "[c]onsidering the totality of the circumstances," the district court correctly concluded that Glatt and Footman were employees covered by the FLSA. *Fox Searchlight*, 293 F.R.D. at 534.

7. As the agency charged with administering the FLSA, the Department's interpretation of the Act's definition of "employee," as reflected in its FOH, Fact Sheet, Opinion Letters, and this amicus brief, is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (deference for EEOC's statutory interpretation embodied in policy statements contained in compliance manual and internal directives); *Barfield*, 537 F.3d at 149.

The Department's six-factor test is entitled to *Skidmore* deference for several reasons. First, it is consistent with the criteria discussed in *Portland Terminal*, and thus accurately captures the very limited "trainee" exception to the FLSA's definition of employment recognized in that decision. Second, the test contains objective criteria that can be applied to a variety of different training environments,

including internships. Third, because the test requires all six factors to be met, it gauges the relevant circumstances presented by any one particular training or internship program and thus captures all indicia of an employment relationship. *See* FOH, ¶10b11(b). These criteria, which can be applied to evaluate each internship—to determine its educational nature; benefit to intern; displacement and supervision; advantage to employer; entitlement to a job; and pay—are just as relevant to determining employment status under the FLSA today as they were in *Portland Terminal*. Indeed, the six-part test, through the requisite meeting of every criterion, best reflects the reality of whether an employment relationship exists in the overwhelming majority of cases.

8. Two circuit courts have deferred to the Department's six-factor *Portland Terminal* test. *See Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983); *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. App'x 831, 834-35 (11th Cir. 2013);[8] *see also Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 n.7 (5th Cir. 1982) (applying six-factor test). *Atkins* addressed whether participants in a training program that was conducted under the auspices of a training institute but was specifically designed to teach individuals how to work on a General Motors ("G.M.") assembly line were G.M. employees under the FLSA. The court, ruling

[8] Eleventh Circuit Rule 36-2 states that although unpublished opinions are not binding precedent, they may be cited as persuasive authority.

for G.M., relied on the Department's six-part test in its analysis of this issue, stating that the test, which helps to apply the broad statutory definition of "employee" in the training context, was entitled to "substantial deference." 701 F.2d at 1127-28 (citing *Am. Airlines*, 686 F.2d at 267).

In *Kaplan*, the Eleventh Circuit concluded that the analysis of externs' employment relationship with medical billing companies required an examination of the economic realities of the relationship, measuring whether the externs' work "confer[red] an economic benefit on the entity for whom they are working." 504 Fed. App'x at 834 (citation omitted). Utilizing this analysis, the court concluded that the externs were not employees under the FLSA because they received academic credit for their work and fulfilled a prerequisite for graduation as a result of the program; received substantial supervision; and caused the companies to run less efficiently, thus resulting in those companies receiving little if any economic benefit from the externs' work. *Id.* The Eleventh Circuit observed that its conclusion was also supported by the application of the Department's six-factor *Portland Terminal* test, which the court stated was an interpretation of the Act that, while not controlling, was something that the courts could look to for guidance. *Id.* at 834-35 (citing, *inter alia*, *Skidmore*, 323 U.S. 134).[9]

[9] In a recent case concluding that H&R Block tax professionals who were required to complete continuing professional education in order to be considered eligible for employment for the tax season were not "employees" of H&R Block during that

9. The Tenth Circuit has utilized a totality of circumstances test to consider a trainee's employment status under the FLSA. *See Parker Fire*, 992 F.2d at 1026-27. In *Parker Fire*, the Tenth Circuit, while agreeing that the Department's six criteria were "relevant" to the determination of employee status, ultimately concluded that the Department's requirement that all six criteria be met was inconsistent with a totality of the circumstances inquiry. *Id.* at 1029. Contrary to this conclusion, the Department's factors taken together effectively consider the totality of the circumstances of the training or internship program and will be dispositive in the usual course. The absence of any single factor undermines whether there is a bona fide trainee/intern relationship sufficient to place such a relationship outside the FLSA's broad coverage. Moreover, permitting fewer than six factors to be sufficient to meet the trainee exception necessarily weakens the test, and permits it to be applied differently in each case. Such subjectivity also

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training period, the Eighth Circuit did not explicitly adopt a standard for assessing employment status in the context of a training program. *Petroski v. H&R Block Enters., LLC*, 750 F.3d 976, 2014 WL 1719660, at *4, *6 (8th Cir. 2014). Rather, noting the Sixth Circuit's description of *Portland Terminal* as a case that "'focus[es] principally on the relative benefits of the work performed by the purported employees,'" the court considered the benefits of the training to the trainees and the employer, but added that its conclusion was supported by the Department's six-part test. *Id*. (quoting *Laurelbrook*, 642 F.3d at 526); *see Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (considering the "totality of the economic circumstances" as they relate to students performing chores at their school and the school itself, and concluding that the performance of such chores did not make students school "employees" for purposes of the FLSA).

makes it more difficult for employers to determine whether their interns are employees subject to the FLSA.

10. The Fourth and Sixth Circuits have utilized a primary benefit analysis to determine whether a trainee is an employee under the FLSA, although several factors from the Department's six-part test are incorporated into those primary benefit inquiries. *See Laurelbrook*, 642 F.3d at 529; *see also Ensley*, 877 F.2d at 1210 n.2. In *Laurelbrook*, the Sixth Circuit acknowledged that the Department's six factor test "resemble[s]" the facts presented by *Portland Terminal*, but concluded that "the Court gave no indication that such facts must be present in future cases to foreclose an employment relationship." 642 F.3d at 526 n.2; *see Parker Fire*, 992 F.2d at 1027. The *Laurelbrook* court concluded that a "primary benefit" test was the appropriate test for employee status in a trainee setting, particularly in an educational environment. 642 F.3d at 526.

As applied to an internship or trainee situation, however, an analysis that utilizes primary benefit as the sole criterion would yield results that do not fairly measure true intern or trainee status. Moreover, a relative benefit analysis ignores whether work has been suffered or permitted. In an internship context, a primary benefit test could be applied to exclude from the protections of the FLSA interns who are receiving very basic training on the employer's operations while performing productive work for the employer, on the theory that because the

interns are new entrants to the workforce, even the most rudimentary instruction or general exposure to a particular industry inures to their benefit. The use of "intangible benefits," upon which the *Laurelbrook* court also relied, 642 F.3d at 531, is an amorphous standard that could easily be utilized to place more student learners, trainees, and interns, who would otherwise qualify as employees, outside the Act's protections. It is so broad and open-ended that it is reasonable to expect that students, trainees, and interns, who all arguably receive some "intangible" benefits from their exposure to a work environment, particularly a specialized one, would necessarily have a more difficult time establishing that they are employees under the FLSA. Such a construction of the Act, which relies on subjective judgment rather than the objective analysis of whether the intern was employed to work, cannot stand. Employers should not be able to use the primary benefit factor by itself to avoid their minimum wage or overtime obligations that pertain under the FLSA's broad construction of who is an employee under the Act; it is simply not sufficient to measure the narrow exception for trainees.

As the district court recognized in this case, a primary benefit test does not objectively measure an employment relationship in a training setting, but invites greater subjectivity into the employee/trainee analysis. *See Fox Searchlight*, 293 F.R.D. at 532. As a stand-alone criterion, it provides great leeway for arguing either side, and does not afford the certainty or thoroughness that the Department's

encompassing six-factor test supplies, not only to the courts but to defendants and plaintiffs as well. As then-judge Sotomayor observed in *Archie*, permitting a primary benefit test to play the decisive role in determining employee status potentially will have the most detrimental effect on disadvantaged individuals who have the most need for training *and* the greatest need for the Act's protections. *See* 997 F. Supp. at 533*; cf. Velez v. Sanchez*, 693 F.3d 308, 330 (2d Cir. 2012) (using primary benefit in a different context as one of seven factors relevant to employee status under the FLSA).[10] Application of the primary benefit test to the facts in *Archie* could have resulted in the participants being deemed trainees, even when they performed productive work for the company. And, as the district court also recognized in this case, a primary benefit test does not give effect to the Supreme Court's decision in *Portland Terminal*, which did not weigh the relative benefits to the parties but accepted as unchallenged the fact that only the trainees benefitted

[10] *Velez* is not applicable to the question presented here because that case addresses the proper test to apply to determine whether an individual who lives and works in an individual's home is "employed" as a domestic service worker for purposes of the FLSA. *See Wang v. Hearst Corp.*, No. 12-cv-793, slip op. at 3 (S.D.N.Y. June 27, 2013) (citing *Velez*, 693 F.3d at 326). *Velez* notes that different tests have been developed to measure employment status under the FLSA depending on the context in which the question of employment arises, and that this Court has utilized some of those tests to determine, for example, joint employment and independent contractor status. *See* 693 F.3d at 326-27. Noting that it "has not clarified the test to determine the 'economic reality' in a domestic service context," this Court proceeded to set forth the factors it found "particularly relevant" to that inquiry, although it noted that it was doing so only "in the absence of further guidance from the Department of Labor." *Id.* at 327, 329, 330-31.

from the training. *See Fox Searchlight*, 293 F.R.D. at 531 (citing *Portland Terminal*, 330 U.S. at 153).

In sum, by requiring each of the six *Portland Terminal* factors to be met before excluding a trainee or intern from the FLSA's protections, the Department's test gives effect to what is a very narrow exception to the Act's broad definition of employment. Nothing in the FLSA or in *Portland Terminal* suggests that for-profit employers should be permitted to circumvent their obligation to compensate individuals who are performing productive work by categorizing entry-level or temporary workers as interns or trainees. The Department's test excludes from the protections of the FLSA those trainees or interns who are receiving bona fide training that is for their own benefit, and who receive the training under such close supervision that their efforts do not provide the employer with the productive work that it receives from its regular employees. Only under such limited circumstances does an internship resemble the training program in *Portland Terminal*, and only under such circumstances can it be said that the intern is not performing productive work for the employer for which he or she must be compensated.

CONCLUSION

For the foregoing reasons, this Court should adopt the Department's test for determining whether a trainee or intern is an "employee" under the FLSA.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing amicus brief of the Secretary of Labor:

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 7,000 words, excluding exempt material, according to the count of Microsoft Word.

The brief was prepared using Microsoft Word 2010.

July 7, 2014
DATE

/s/Maria Van Buren
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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that, on this 7th day of July 2014, the Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's appellate CM/ECF system. Counsel of record listed below are registered CM/ECF users and service to them was accomplished by the Court's appellate CM/ECF system:

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In addition, I hereby certify that six copies of the foregoing Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, which are exact copies of the CM/ECF filing, were sent by prepaid,

overnight delivery to the Clerk of the Court for the United States Court of Appeals for the Second Circuit pursuant to Local Rule 31.1.

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