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EMPLOYEE, VOLUNTEER, OR NEITHER? PROPOSING A TAX-BASED EXCEPTION TO FLSA WAGE REQUIREMENTS FOR NONPROFIT INTERNS AFTER *GLATT V. FOX SEARCHLIGHT*

Jane Pryjmak*

Abstract: The Fair Labor Standards Act (FLSA) mandates compliance with various requirements, including minimum wages, for individuals classified as “employees.” But courts have grappled with the definition of “employee” for decades. They have struggled to determine whether individuals who are not classified as employees by their employer and are instead labeled “trainees,” “interns,” “externs,” or otherwise must be paid fair wages under the FLSA. This question became more pronounced amid the rise of unpaid internships for students and recent graduates in the post-2008 recession years. In *Glatt v. Fox Searchlight*, the Second Circuit became the first federal court of appeals to specifically address the unpaid intern issue in the context of for-profit employers, holding that interns were employees if the employer received the “primary benefit” from the relationship. The case did not touch on unpaid nonprofit internships, which some scholars believe are—and should be—exempt from employee tests under a broad nonprofit exception. However, recent scholarship exploring the Second Circuit’s logic in *Fox Searchlight* indicates that unpaid nonprofit internships may not be so safe for employers after all, and suggests that these internships should *not* be exempt from FLSA requirements for public policy reasons.

This Comment argues that *some*, but not all, nonprofits deserve differential treatment with regard to internships given their budgetary constraints and the important role they play in society. It attempts to balance the policy concerns on both sides of the issue by proposing three narrow exceptions which track the Internal Revenue Code’s treatment of nonprofit organizations: one for interns supporting exempt purpose activities; another for interns working at organizations classified as public charities; and the last for interns at small nonprofits, as determined by their annual tax filing. This tax-based approach would be easy for nonprofits to apply and current law supports it. Finally, this Comment calls for legislative action to amend and clarify the FLSA by adopting one of these three exceptions.

INTRODUCTION

For college-educated young adults in the United States, internships have become a career rite of passage.¹ The merits of a position are

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1. *See Percentage of Students with Internship Experience Climbs*, NAT’L ASS’N OF COLLS. & EMP’RS (Oct. 7, 2015), <http://www.nacweb.org/s10072015/internship-co-op-student-survey.aspx> [<https://perma.cc/NW9C-FJWB>] (noting that sixty-five percent of those who graduated with a bachelor’s degree in 2015 participated in an internship and/or co-op).

obvious: résumé value, networking opportunities, exploration of a potential future career, and a path to a full-time position.² Some say these benefits are compensation enough, particularly given the time and effort required to train interns for the often-short length of time they serve an organization.³ In the wake of the 2008 recession, these unpaid internships became far more common, if not the norm in both for-profit and nonprofit organizations.⁴

Eventually, the interns began to fight back.⁵ The grounds for their complaints lay in the federal Fair Labor Standards Act (FLSA), which provides (among other things) a national minimum wage for covered employees.⁶ But the question remained—were interns “employees” under the FLSA?

The FLSA’s definition of “employee” is murky at best.⁷ The Department of Labor’s Wage and Hour Division (WHD) has put forth various guidance documents regarding individuals with questionable employment status, such as trainees, interns, and externs.⁸ But this agency guidance has not gone through the notice-and-comment process and lacks the force of law, so courts will defer to it only to the extent they find it persuasive.⁹

Courts have spent decades trying to make sense of the “employee” question, and their opinions have resulted in little more than continued confusion across circuit lines.¹⁰ In 2015, the Second Circuit heard the now-quintessential intern case, *Glatt v. Fox Searchlight*,¹¹ which

2. Heather R. Huhman, *Why You Should Get a Summer Internship*, U.S. NEWS: CAREERS (Apr. 29, 2011), <http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship> [https://perma.cc/MZY3-3EUR].

3. See Sanjay Sanghoo, *Should All Interns Get Paid?*, FORTUNE (Apr. 17, 2014), <http://fortune.com/2014/04/17/should-all-interns-get-paid/> [https://perma.cc/YE9K-GTVA].

4. ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* xvii (2012).

5. Maya Pope-Chappell, *We Talked to the Black Swan Intern Who Sued Fox. He’s Not Giving Up.*, LINKEDIN: PULSE (July 10, 2015), <https://www.linkedin.com/pulse/former-unpaid-intern-who-sued-fox-searchlight-speaks-pope-chappell> [https://perma.cc/Y4WH-K8SV].

6. Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (2012).

7. See *id.* § 203(e)(1); discussion *infra* section I.A.

8. E.g., U.S. DEP’T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (Apr. 2010), <https://www.dol.gov/whd/regs/compliance/whdfs71.htm> [https://perma.cc/42JA-S2B3] [hereinafter *Fact Sheet #71*]; 6 WAGES & HOURS MANUAL 91:156 (2016) [hereinafter *W&H MANUAL*].

9. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

10. See *infra* Part II.

11. 811 F.3d 528 (2d Cir. 2016).

involved unpaid interns on the set of a big-budget, award-winning film.¹² In *Fox Searchlight*, the court outlined a new test for delineating interns from employees, at least in the narrow context of for-profit organizations.¹³ While companies are abuzz with the crisis of losing their unpaid interns, the case has resulted in nonprofits asking the same question: Do we have to pay interns now, too?¹⁴

There is a persistent belief, propagated by the Department of Labor (DOL), that nonprofits are exempt from the strictures of the FLSA with regard to unpaid internships.¹⁵ This idea is supported by the policy argument that nonprofits, particularly charitable ones, deserve such an exception given their altruistic purposes and the important role they play in society.¹⁶ But this exception rests on unsteady legal ground, particularly in the wake of *Fox Searchlight*.¹⁷ Recent scholarship suggests that the *Fox Searchlight* decision is the “beginning of the end” for unpaid nonprofit internships.¹⁸ This Comment will argue that the above conclusion is premature, given the confusion created by the circuit split.¹⁹

Up to this point, scholarship surrounding nonprofit internships and the FLSA has focused only on blanket nonprofit exceptions and tests applicable to all nonprofits.²⁰ This Comment will use statutory text, legislative history, Supreme Court precedent, and policy considerations

12. *Id.* at 532–33 (describing plaintiffs Eric Glatt, Alexander Footman, and Eden Antalik).

13. *Id.* at 536. However, as will be explored in Part II, this test is not actually new at all. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989).

14. *See* Andrew J. Rotherham, *The High Cost of Unpaid Internships*, U.S. NEWS: OPINION (Apr. 4, 2016), <http://www.usnews.com/opinion/knowledge-bank/articles/2016-04-04/education-or-exploitation-should-all-internships-be-paid> [<https://perma.cc/DVA2-C8RB>].

15. *See* Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 600–01 (2014); *Fact Sheet #71*, *supra* note 8; Blair Hickman & Christie Thompson, *When Is It OK to Not Pay an Intern?*, PROPUBLICA (June 14, 2013), <https://www.propublica.org/article/when-interns-should-be-paid-explained> [<https://perma.cc/3ZZX-EU7K>].

16. *See infra* section III.B.2.

17. *See infra* section III.C.1.

18. *See generally* Thomas Johnson, Note, *The Fox Searchlight Signal: Why Fox Searchlight Marks the Beginning of the End for Preferential Treatment of Unpaid Internships at Nonprofits*, 102 VA. L. REV. 1127 (2016).

19. *See infra* Part II.

20. *See* Harthill, *supra* note 15; Johnson, *supra* note 18; Maurice S. Pianko, *Dealing with the Problem of Unpaid Interns and Nonprofit/Profit-Neutral Newsmagazines: A Legal Argument that Balances the Rights of America’s Hardworking Interns with the Needs of America’s Hardworking News Gatherers*, 41 RUTGERS L. REC. 1, 36–37 (2014); Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1384 (2012).

to show that a blanket exception is a misguided approach.²¹ As a novel alternative, it will propose three new, narrow nonprofit exceptions based in the Internal Revenue Code—the law governing the very existence of nonprofits—and advocate for Congress to adopt one of them.²²

Part I will explore the background of the FLSA and its requirements, what the text of the statute and limited Supreme Court precedent contribute to the interpretation of the “employee” definition, and the guidance the WHD has offered on the topic. Part II will survey the tests circuit courts have developed to classify interns and similar workers as employees or non-employees. Part III will apply these tests to nonprofit interns and examine the arguments for broadly exempting nonprofits from FLSA requirements. Finally, Part IV will advocate for a narrow exception derived from tax law.

I. FAIR LABOR STANDARDS ACT REQUIREMENTS FOR MINIMUM WAGE

The FLSA was first proposed to Congress in 1932, amid the employment crisis of the Great Depression.²³ After years of conflict between President Franklin D. Roosevelt and Congress, the bill finally became law in 1938.²⁴ By the time of its passage, political wrangling had narrowed the legislation to the point that it only applied to one-fifth of the U.S. working population,²⁵ yet it introduced major standards that American workers would enjoy in the decades to come: the prohibition on child labor, a minimum wage, and overtime payment for non-exempt employees working more than forty hours in a week.²⁶ While many perceive that its purpose was to eliminate harsh conditions for workers, it also targeted unemployment. Said one proponent of the law: “[U]nnecessarily long hours which wear out part of the working population . . . keep the rest from having work to do.”²⁷ This job-creating

21. *See infra* section IV.A.

22. *See infra* section IV.C.

23. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T OF LABOR, <https://www.dol.gov/oasam/programs/history/flsa1938.htm> [<https://perma.cc/62TP-745K>].

24. *Id.*

25. *Id.*

26. *Id.* At the time, however, the standard workweek was forty-four hours. *Id.*

27. 81 CONG. REC. 1480 (1937) (statement of Sen. Minton).

sentiment has undergirded discussions of the FLSA's scope ever since, including its application to internships.²⁸

The past eighty years have seen many changes and amendments to the FLSA: added provisions for overtime pay,²⁹ the prohibition of various forms of discrimination,³⁰ protection for migrant workers,³¹ and others. However, the law is still limited in one major aspect: It covers only individuals classified as "employees."³²

Yet the term "employee," as defined under the FLSA, is broad and ambiguous.³³ Both the Supreme Court³⁴ and the DOL³⁵ have taken steps to clarify when individuals who are not treated as traditional employees by their employers are "employees" for the purposes of the FLSA.

A. *The FLSA's Definition of "Employee" Is Ambiguous*

The relevant portion of the FLSA states the requirements for minimum wage:

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the [rate of] . . . \$7.25 an hour³⁶

28. See, e.g., Katherine S. Newman, *The Great Recession and the Pressure on Workplace Rights*, 88 CHI.-KENT L. REV 529, 531 (2013) ("We have seen growth in reliance on contingent/temporary workers and unpaid interns, which typically provide few job protections and no benefits to such employees, as well as negatively impact the wages and bargaining power of the core labor force and overall job creation.")

29. *Wage and Hour Division History*, U.S. DEP'T OF LABOR, <https://www.dol.gov/whd/about/history/whdhist.htm> [<https://perma.cc/B6HW-6LCX>].

30. *Id.*

31. *Id.*

32. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)* (July 2009), <https://www.dol.gov/whd/regs/compliance/whdfs14.htm> [<https://perma.cc/A4ZD-E4R5>]. Employees may fall under the auspices of the FLSA as either part of an enterprise or as an individual, but due to the broad scope of individual coverage, nearly all employees are covered individually regardless of the size or business of their employer. See Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a) (2012). This Comment will primarily concern itself with nonprofit interns as covered individuals.

33. 29 U.S.C. § 203(e)(1).

34. See *Portland Terminal v. Portland Terminal Co.*, 330 U.S. 148 (1947); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985); discussion *infra* section II.B.

35. See *Fact Sheet #71*, *supra* note 8 and discussion *infra* section II.C.

36. 29 U.S.C. § 206(a). The section provides three different rates with staggered starts beginning in 2007; the current rate is \$7.25. *Id.*

In the definitions section of the statute, “employee” is defined as “any individual employed by an employer.”³⁷ The FLSA lists several exceptions to this broad definition, including family members engaged in agriculture and volunteers.³⁸ However, the volunteer exception is very narrow; it only expressly extends to individuals who volunteer for (1) a public agency, or (2) private nonprofit food banks “solely for humanitarian purposes.”³⁹

The text’s definition of “employ” is the broadest of all: “to suffer or permit to work.”⁴⁰ Understandably, the limits of this five-word phrase have required substantial judicial interpretation and incited a great deal of scholarly debate.

B. The United States Supreme Court Narrowed the Definition of “Employee” in Portland Terminal and Alamo Foundation

Despite the numerous lower court cases on the “employee” definition, the Supreme Court has only heard a handful of cases on the issue, and only two of them are relevant here.⁴¹ *Walling v. Portland Terminal Co.*⁴² addressed the question of when a trainee is an employee in the for-profit context, while *Tony and Susan Alamo Foundation v. Secretary of Labor*⁴³ considered whether participants in a nonprofit rehabilitation program are employees.⁴⁴ Together, the two opinions primarily focused on three factors: (1) whether the organization and individual had agreed to some form of compensation;⁴⁵ (2) which party received the

37. *Id.* § 203(e)(1).

38. *Id.* § 203(e)(2)–(5).

39. *Id.* § 203(e)(4)–(5).

40. *Id.* § 203(g).

41. Other cases which are beyond the scope of this Comment include *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012) (holding that pharmaceutical sales reps fell under the “outside salesmen” exemption and were not employees); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996) (holding that live-haul livestock workers were employees and not exempt as agricultural workers); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (evaluating the independent contractor-or-employee question); *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945) (holding that “[t]he time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act”); and *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942) (holding that redcaps at railroad stations were employees).

42. 330 U.S. 148 (1947). The Court also heard and decided *Walling v. Nashville, C. & St. L. Ry.*, a case with essentially the same facts, on the same day by applying the *Portland Terminal* holding. 330 U.S. 158 (1947).

43. 471 U.S. 290 (1985).

44. *Id.* at 291–92.

45. *Alamo Found.*, 471 U.S. at 300–02; *Portland Terminal*, 330 U.S. at 151–53.

“immediate advantage” from the individual’s work;⁴⁶ and (3) whether the activities the individual’s work supported were of a commercial or charitable nature.⁴⁷ Despite the age of these decisions,⁴⁸ both opinions offer key guidance to determining whether interns are employees under the FLSA.

1. *Portland Terminal Looks for Agreement to Compensation and “Immediate Advantage” in the Context of Railroad Trainees*

Portland Terminal, a case originally brought in the Federal District Court of Maine at the end of World War II,⁴⁹ involved railroad brakemen who received a training course prior to entering full-time work in the field.⁵⁰ This preliminary training lasted roughly a week and included observations of brakemen in their regular activities, followed by completion of “actual work under close scrutiny.”⁵¹ The railroad did not guarantee full-time positions to brakemen who completed the training course; however, brakemen had to complete the course to be considered for full-time positions.⁵² The Court noted that the trainees’ work did not displace that of full-time employees or “expedite the company[’s] business”; rather, it had quite the opposite effect.⁵³

The Court began its analysis by further noting that the FLSA contained a provision for flexible wages for trainees and apprentices but concluded that “the section carries no implication that all instructors must either get a permit or pay minimum wages to all learners; the section only relates to learners who are in ‘employment,’” and turned to the definition of “employ” found in section 3(g).⁵⁴ The Court determined that Congress intended that definition to be broad enough “to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage,” but not so broad as to include “all persons . . . who, without any express or implied compensation agreement, might work for their own

46. *Portland Terminal*, 330 U.S. at 153.

47. *Alamo Found.*, 471 U.S. at 295–99.

48. *Alamo Foundation* was decided in 1985. *Id.* at 290. *Portland Terminal* was decided in 1947. *Portland Terminal*, 330 U.S. at 148.

49. *Portland Terminal v. Portland Terminal Co.*, 61 F. Supp. 345 (D. Me. 1945).

50. *Portland Terminal*, 330 U.S. at 148.

51. *Id.*

52. *Id.* at 150.

53. *Id.* (noting that trainees’ work “may, and sometimes does, actually impede and retard” company business).

54. *Id.* at 152.

advantage on the premises of another.”⁵⁵ The Court took particular issue with the fact that the brakemen trainees could have received the same training in a vocational school “wholly disassociated” from the railroad, in which case no one could have reasonably argued that they were railroad employees.⁵⁶ It also highlighted that the railroad received no “immediate advantage” from the trainees and therefore held they were not employees.⁵⁷

2. *Alamo Foundation Considers Agreement to Compensation and the Nature of Work Activities in the Context of Rehabilitation Program Participants*

Nearly forty years after *Portland Terminal*, the Court revisited the “employee” definition in *Tony and Susan Alamo Foundation v. Secretary of Labor*.⁵⁸ The defendant was a private religious foundation which, among other activities, rehabilitated “drug addicts, derelicts, [and] criminals.”⁵⁹ The Foundation did not receive support from the public and instead funded itself by operating several business ventures including a motel, hog farms, and retail stores.⁶⁰ Individuals involved in the rehabilitation program, known as “associates,” provided the majority of staffing for these businesses.⁶¹ The associates received benefits including housing, food, and clothing, but were not paid wages.⁶²

The Court evaluated three questions in its review of the case: first, whether a nonprofit such as the foundation could be considered an “enterprise” under the FLSA; second, if the associates were employees and therefore entitled to minimum wage; and third, if application of the FLSA to the Foundation would infringe on the organization’s religious freedom under the First Amendment.⁶³ Only the first two issues are relevant to this Comment.

In determining whether or not the associates were employees of the Foundation, the Court referenced its holding in *Portland Terminal*.⁶⁴

55. *Id.*

56. *Id.* at 152–53.

57. *Id.* at 153.

58. 471 U.S. 290 (1985).

59. *Id.* at 292.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 291–92.

64. *Id.* at 300.

Like the railroad trainees, the Foundation associates had no expectation of compensation.⁶⁵ But unlike the trainees, associates worked for the Foundation for months, not days, and received in-kind benefits as part of their arrangement.⁶⁶ These benefits, the Court held, created an “implied” compensation agreement and were “wages in another form.”⁶⁷ The true test of employment hinged on the “economic reality” of the situation, and an implied agreement indicated an employer-employee relationship as much as an express one would.⁶⁸

The “enterprise” question derives from the fact that the FLSA may cover employees in one of two ways: as individuals or as part of an enterprise.⁶⁹ Whereas individual coverage applies to any individual who is engaged in commerce or in the production of goods for commerce, enterprise coverage requires that the employer business have gross annual sales of more than \$500,000 in addition to this commercial engagement.⁷⁰

Here, the Court noted that the statute contained no express exception for commercial activities conducted by nonprofit or religious organizations, and that it had been “consistently construed . . . ‘liberally to apply to the furthest reaches consistent with congressional direction.’”⁷¹ It also gave deference to the Labor Department’s regulations, which state that “where [religious] organizations engage in ordinary commercial activities, . . . the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise.”⁷² In addition, the Court referenced the legislative history of the Act, which indicated an intent to exclude non-commercial activities of nonprofits, but not to create a blanket exemption for nonprofits.⁷³ The Court concluded that “the Foundation’s businesses serve the general public in competition with ordinary commercial enterprises,” and were therefore enterprises under the FLSA.⁷⁴ It noted, however, that FLSA coverage of these activities would not “lead to

65. *Id.* at 301.

66. *Id.*

67. *Id.*

68. *Id.*

69. Fair Labor Standards of Act of 1938, 29 U.S.C. § 206(a) (2012).

70. *Id.*

71. *Alamo Found.*, 471 U.S. at 296 (quoting *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959)).

72. 29 C.F.R § 779.214 (2012).

73. *Alamo Found.*, 471 U.S. at 297–98. For further discussion, see *infra* section IV.A.

74. *Id.* at 299.

coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy”; it reached only the “ordinary commercial activities” of such organizations, and the Court’s interpretation would not threaten “ordinary volunteerism.”⁷⁵

C. *The WHD Develops a Six-Part Test*

In the wake of the *Portland Terminal* decision, the WHD outlined a six-part test for determining whether trainees were employees for the purposes of the FLSA.⁷⁶ As internships became a widely accepted part of education and career development, the WHD revisited the test and developed Fact Sheet #71, which applies the same six factors to unpaid internships.⁷⁷ The test is substantively the same, save for slightly different language that reflects the new terminology.⁷⁸ The test draws upon factors provided in *Portland Terminal* and consists of the following criteria:

- (1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- (2) The internship experience is for the benefit of the intern;
- (3) The intern does not displace regular employees, but works under close supervision of existing staff;
- (4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- (5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
- (6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁷⁹

The Fact Sheet makes clear that the WHD expects employers to meet *all* of the factors to avoid having their interns classified as employees.⁸⁰ It also specifies that the test is only applicable to for-profit internships,⁸¹ but contains one footnote referencing non-profits:

75. *Id.* at 302–03.

76. W&H MANUAL, *supra* note 8.

77. Fact Sheet #71, *supra* note 8.

78. Exchanged terminology includes “intern” instead of “trainee,” “educational environment” instead of “vocational school,” etc. See W&H MANUAL, *supra* note 8.

79. Fact Sheet #71, *supra* note 8.

80. *Id.*

81. *Id.*

The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. WHD is reviewing the need for additional guidance on internships in the public and non-profit sectors.⁸²

While this guidance is clear on its face, it is unfortunately only that—guidance. As the agency tasked with implementing the FLSA, the DOL is afforded some deference when it interprets that statute.⁸³ The amount of deference the interpretation receives depends on how the agency takes action.⁸⁴ A regulation, for example, must go through a lengthy public comment process or formal adjudication before it gains the force of law.⁸⁵ Once it does, courts will defer to the DOL’s interpretation as long as (1) the statute has not unambiguously spoken to the issue and (2) the interpretation is “a permissible construction” of the statute.⁸⁶ This process is known as “*Chevron*” deference, for the case from which it is derived.⁸⁷ If a court determines in the first step that the statute is clear on its face, the DOL interpretation becomes irrelevant, and there is no need to consider the second step.⁸⁸ Informal guidance such as a WHD fact sheet, however, does not proceed from notice and comment rulemaking and is therefore only entitled to “*Skidmore*” deference: deference to the extent courts find the guidance persuasive.⁸⁹ As will be discussed in Part II, the circuit courts have disagreed over how persuasive they find the trainee test and Fact Sheet #71.⁹⁰ The result is confusion as to how the tests should be applied—and if they should even be applied at all.

82. *Id.* at n.1.

83. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

84. *Id.*

85. *Id.*

86. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837, 842–43 (1984).

87. *See, e.g., Mead Corp.*, 533 U.S. at 225 (using the term “*Chevron* deference” and citing *Chevron*, 467 U.S. 837).

88. *Chevron*, 467 U.S. at 842–43.

89. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

90. *See infra* Part II.

II. THE CIRCUIT COURTS ARE DIVIDED AS TO HOW TO CLASSIFY INTERNS AND COMPARABLE WORKERS UNDER THE FLSA

In the decades since *Portland Terminal*, *Alamo Foundation*, and the publication of the WHD's guidance, many of the federal appellate courts have considered whether trainees, interns, and other similar individuals are employees under the FLSA.⁹¹ These courts deliberated how much deference to give the WHD's guidance, how persuasive they found the guidance, how to apply the six factors (if at all), and ultimately, which test to use in classifying these workers.⁹²

In *Fox Searchlight*, the Second Circuit became the first—and to date, only—circuit court to specifically address interns in the context of FLSA wage requirements.⁹³ “Intern” certainly has a different connotation than “trainee” or “extern,”⁹⁴ but the similarities between the positions would undoubtedly lead other circuits to look to their own precedent before following the *Fox Searchlight* holding.⁹⁵ The WHD's guidance on interns is modeled almost word-for-word after its guidance on trainees,⁹⁶ and if a court previously found WHD guidance on trainees to be persuasive, it seems likely it will do so again with WHD guidance on interns.

91. Compare *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831 (11th Cir. 2013) (granting deference), and *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993) (granting deference), and *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983) (granting deference), with *Glatt v. Fox Searchlight, Inc.*, 811 F.3d 528 (2d Cir. 2016) (no deference), and *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011) (no deference), and *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (no deference).

92. See *supra* Part II.

93. *Fox Searchlight*, 811 F.3d at 535.

94. Compare *Intern*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/intern> [<https://perma.cc/MQQ7-RRAZ>] (defining “intern” as, among other things, “a student or recent graduate who works for a period of time at a job in order to get experience”), with *Trainee*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/trainee> [<https://perma.cc/ML3A-D5YY>] (defining “trainee” as “one that is being trained especially for a job”); Jacquelyn Smith, *Externships: What They Are and Why They're Important*, FORBES (May 30, 2013), <https://www.forbes.com/sites/jacquelynsmith/2013/05/30/externships-what-they-are-and-why-theyre-important/#f85f84e5100c> [<https://perma.cc/42VN-PR7M>] (describing externships as “short-term, unpaid ‘shadowing’ experience[s]”). See also *Fox Searchlight*, 811 F.3d at 537–38 (concluding that the *Portland Terminal* test for trainees was inapplicable to modern internships).

95. See, e.g., *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 290–91 (2016) (declining to follow *Fox Searchlight* and instead looking to its own precedent). Likewise, in its opinion on *Fox Searchlight*, the Second Circuit neglected to cite to any other circuits' precedent regarding deference to the WHD test. Stephen E. Smith, *Glatt v. Fox Searchlight and the Rhetorical Value of Inter-Circuit Dialogue*, 50 U.S.F.L. REV. F. 479, 485–87 (2016).

96. Compare *Fact Sheet #71*, *supra* note 8, with *W&H MANUAL*, *supra* note 8.

The Fifth, Tenth, and Eleventh Circuits have all found the WHD's guidance persuasive and relied upon the six-factor test.⁹⁷ The Second, Fourth, and Sixth Circuits have rejected WHD guidance and adopted their own approaches, primarily centered around the "primary beneficiary" of the work.⁹⁸ The Eighth and Ninth Circuits fall somewhere in between, choosing to home in on two of the WHD's factors: immediate benefit and agreement for compensation.⁹⁹ Only the First, Third, Seventh, and D.C. Circuits have yet to explore this issue in any depth post-*Portland Terminal*.¹⁰⁰

This Comment is not intended to evaluate the merits of any particular test noted within this Part. Rather, this Part will summarize the current, muddled state of the law as applied to all internships, paving the way for a discussion of nonprofit internships in Part III.

A. *The Fifth, Eleventh, and Tenth Circuits Embrace the WHD's Six-Part Test*

Three circuits have granted some level of deference to the WHD and directly applied the six-part test.¹⁰¹ Within this group a split exists between those that believe *all* factors must be met to preclude employee classification and those that do not.¹⁰²

97. *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 834–35 (11th Cir. 2013); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993); *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983).

98. *Fox Searchlight*, 811 F.3d at 536; *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 n.2 (4th Cir. 1989).

99. *Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996); *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 417 (8th Cir. 1984).

100. The Seventh Circuit, however, did recently decline to apply the Second Circuit's *Fox Searchlight* test to student athletes on the grounds that the factors did not "take into account . . . the reality of the student-athlete experience" and "fail[ed] to capture the true nature of the relationship" between student athletes and their schools." *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 291 (7th Cir. 2016) (quoting *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)). The athletes argued that they were analogous to interns; however, the court glossed over the idea of a multifactor test and instead looked to DOL guidance with regard to treatment of college students participating in extracurricular activities. *Id.* at 293. *Berger* will not be discussed in any detail in this Comment.

101. *Atkins*, 701 F.2d at 1128; *Kaplan*, 504 F. App'x at 834–35; *Reich*, 992 F.2d at 1026.

102. Compare *Atkins*, 701 F.2d at 1128, with *Reich*, 992 F.2d at 1026.

1. *The Fifth and Eleventh Circuits Use an “All-or-Nothing” Approach*

The Fifth and Eleventh Circuits have both looked to the WHD’s six-part test and determined that an individual must meet all six factors to avoid being an “employee.”¹⁰³

The Fifth Circuit first took note of the six-part test in *Donovan v. American Airlines*,¹⁰⁴ a case involving airline trainees who were being trained at a school affiliated with the employer company.¹⁰⁵ The fact pattern was substantially similar to that of *Portland Terminal*, so much so that the court stated “if we return to the *Portland Terminal* opinion and change the word ‘railroad’ to the word ‘airline,’ the decision fits this case.”¹⁰⁶ There, the WHD guidance was treated as almost supplementary to a conclusion the court had already reached based on its own logic and the parallelism with *Portland Terminal*.¹⁰⁷

But a year after the *Donovan* decision, the Fifth Circuit faced a similar case involving trainees that was not so straightforward. In *Atkins v. General Motors Corp.*,¹⁰⁸ the Court went immediately to the six-part test, expressly stating that “the [WHD] Administrator’s interpretation is entitled to substantial deference by this court.”¹⁰⁹ Five of the six criteria were already met in *Atkins* and were not in dispute.¹¹⁰ The fourth criterion, regarding the employer receiving “no immediate advantage from the trainees’ activities[,]” was the determinative issue.¹¹¹ While the court did not explicitly say that they were applying an all-or-nothing approach to the test, the prior decision of the district court had stated that

103. *Atkins*, 701 F.2d at 1128; *Kaplan*, 504 F. App’x at 834–35.

104. *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 268 (5th Cir. 1982).

105. *Id.*

106. *Id.* at 272.

107. *Id.* at 273 (noting after reaching conclusion, “the Wage and Hour Administrator’s interpretation of *Portland Terminal* supports the district court’s conclusion”).

108. 701 F.2d 1124 (5th Cir. 1983).

109. *Atkins*, 701 F.2d at 1128. Because *Atkins* was decided prior to *Chevron*, the opinion does not discuss or apply *Chevron* deference. It is, however, the only circuit-level precedent where a court has found the WHD guidance entitled to the high level of deference now associated with *Chevron*. The holding indicates that were *Atkins* to be decided post-*Chevron*, the court would still follow the WHD guidance, but would do so from the sense that it found the guidance to be “persuasive.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

110. *Id.*

111. *Id.*

“the absence of any one of [the six factors] signals ‘employee’ status,”¹¹² and the Fifth Circuit did not refute this interpretation.¹¹³

The Eleventh Circuit also looked to the WHD’s six-part test in *Kaplan v. Code Blue Billing and Coding*.¹¹⁴ *Kaplan* is closer to the unpaid intern debate than many of the “trainee” cases because it involved students who were required to complete an externship while enrolled at a medical billing college.¹¹⁵ Like the Fifth Circuit in *Donovan*, the *Kaplan* Court treated the test as supplementary support of its conclusion,¹¹⁶ which was based primarily off of an “economic realities” test—a test that originated in the Fifth Circuit.¹¹⁷ While the court did not expressly say that all six factors had to be met, a footnote in the case includes the six factors and states that “[u]nder the Administrator’s test, a trainee is not an ‘employee’ if these six factors apply.”¹¹⁸ This footnote implied that if the test is to be applied, all factors must be met.¹¹⁹

2. *The Tenth Circuit Uses a “Totality of the Circumstances” Approach*

Unlike the Fifth and Eleventh Circuits, the Tenth Circuit does not require all six factors to be met to avoid “employee” status. Instead, the circuit applies a “totality of the circumstances” approach, as demonstrated in *Reich v. Parker Fire Protection District*.¹²⁰

The case involved firefighter trainees who sought wages for the time they were enrolled in the defendant’s training academy.¹²¹ The trainees met five of the six criteria but contended that they were employees because there was an expectation of full-time work at the end of the course.¹²² The relevant issues on appeal were (1) what test should be

112. *Atkins v. Gen. Motors Corp.*, 524 F. Supp. 307, 309 (W.D. La. 1981), *aff’d in part, vacated in part*, 701 F.2d 1124 (5th Cir. 1983).

113. *Atkins*, 701 F.2d at 1128.

114. 504 F. App’x 831 (11th Cir. 2013).

115. *Id.* at 832–33.

116. *Id.* at 834–35.

117. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (quoting *Weisel v. Sing. Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979)).

118. *Kaplan*, 504 F. App’x at 834 n.2.

119. *Id.*

120. 992 F.2d 1023 (10th Cir. 1993).

121. *Id.* at 1025.

122. *Id.* at 1026.

applied to distinguish employees from trainees under the FLSA, and (2) how strictly the WHD's six-factor test should be applied.¹²³

The Tenth Circuit found that the DOL was not entitled to a high level of deference with regard to either the test or its interpretation of how the test should be applied.¹²⁴ The Court still concluded that the WHD test was the "relevant[,] but not conclusive" test to differentiate trainees from employees and that the district court had applied the proper legal standard by using the test.¹²⁵ The Court noted that "[t]he six criteria in the Secretary's test were derived almost directly from *Portland Terminal*" and had consistently been used by both the WHD and other courts.¹²⁶ However, it was not persuaded to strictly apply an all-or-nothing approach to the test because there was "nothing in *Portland Terminal* to support" such an approach.¹²⁷ The introductory language to the WHD test further supported this view: "Whether trainees are employees . . . will depend upon all of the circumstances surrounding their activities on the premises of the employer."¹²⁸ Furthermore, the court's own precedent in the "analogous situation" of distinguishing an independent contractor from an employee had used other "totality of the circumstances" tests.¹²⁹ Ultimately, the court determined firefighter trainees were not employees, despite expecting full time employment at the conclusion of the training course.¹³⁰

B. *The Eighth and Ninth Circuits Look to Immediate Benefit and Agreement for Compensation*

Where the Fifth, Tenth, and Eleventh Circuits relied heavily on the WHD test, the Eighth and Ninth Circuits seemed content to acknowledge the test, then pick and choose which factors from it to apply.

The Eighth Circuit has had little to say on the issue save for one case: *Donovan v. Trans World Airlines*.¹³¹ The facts were substantially similar to the Fifth Circuit's case of *Donovan v. American Airlines* and involved

123. *Id.* at 1024.

124. *Id.* at 1026.

125. *Id.* at 1027.

126. *Id.* at 1026.

127. *Id.*

128. *Id.* at 1027 (quoting W&H MANUAL, *supra* note 8).

129. *Id.* (quoting *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir.1989)).

130. *Id.* at 1029.

131. 726 F.2d 415 (8th Cir. 1984).

flight attendant trainees who received food, lodging, and other benefits during a four-week training period.¹³² The district court looked to *American Airlines* for guidance and acknowledged the WHD test, but its read of the opinion focused primarily on who received the “immediate benefit” of the work.¹³³ On appeal, the Eighth Circuit mentioned the district court’s conclusion that Trans World Airlines (TWA) trainees were not employees “because TWA received no immediate benefit from their efforts during training[.]” and stated simply that “[a]fter careful examination of the record, . . . we affirm on the basis of the district court’s analysis.”¹³⁴ Neither the district court nor court of appeals expressly discussed what level of deference to give to the DOL or whether they found the WHD test persuasive. The Eighth Circuit has not explored the issue further in the twenty-plus years since this decision.

The Ninth Circuit heard a case similar to *Alamo Foundation in Williams v. Strickland*.¹³⁵ In *Williams*, the plaintiff was a resident at a Salvation Army Adult Rehabilitation Center in San Francisco.¹³⁶ As part of his treatment program, Williams received room, board, counseling, work therapy, and a small stipend (seven to twenty dollars per week) for six months.¹³⁷ After being dismissed from the program for drinking, Williams sued the Salvation Army and alleged he was entitled to wages for his services during work therapy.¹³⁸

The majority looked to both *Portland Terminal* and *Alamo Foundation* and focused on the latter’s holding: that the expectation of benefits in exchange for services is the proper test in this case.¹³⁹ It found that Williams had neither an express nor implied agreement for compensation and was therefore not an employee.¹⁴⁰ The dissenting judge, however, seemed to call attention to a question of economic benefit, noting that “a material dispute of fact remained regarding the Salvation Army’s claim that Williams’s labor was purely rehabilitative and served only his own interest, producing no immediate economic

132. *Id.* at 416.

133. *Donovan v. Trans World Airlines, Inc.*, No. 77-0881-CV-W-9, 1983 WL 2017, at *9 (W.D. Mo. Mar. 4, 1983), *aff’d*, 726 F.2d 415 (8th Cir. 1984).

134. *Trans World Airlines*, 726 F.2d at 416–17.

135. 87 F.3d 1064 (9th Cir. 1996).

136. *Id.* at 1065.

137. *Id.*

138. *Id.*

139. *Id.* at 1067.

140. *Id.*

benefit to the Salvation Army.”¹⁴¹ Neither the majority nor the dissent referenced the WHD test.

While the Ninth Circuit has yet to expressly state that these two parts make up the definitive employee test for the jurisdiction, at least one lower court has interpreted the *Williams* holding as a dual test: (1) whether the employer received an “immediate advantage” from the individual’s work and (2) whether there was an express or implied agreement for compensation.¹⁴² Other lower courts in the Ninth Circuit have ignored the *Williams* holding entirely and arrived at the WHD test after looking to more on-point cases in other circuits, such as *American Airlines* and *Atkins*.¹⁴³ In sum, it is not entirely clear which test the Ninth Circuit has adopted.

C. *The Second, Fourth, and Sixth Circuits Reject WHD Guidance and Focus on the “Primary Beneficiary” of the Individual’s Work*

Unlike the Fifth, Tenth, and Eleventh Circuits, the Second, Fourth, and Sixth Circuits have not found WHD guidance persuasive. Instead they have adopted their own tests, which primarily ask: Who is the primary beneficiary of the possible employee’s work?

In 1989, the Fourth Circuit became the first federal court of appeals to apply the “primary beneficiary” test to trainees, long before the Second Circuit would put it to use in *Fox Searchlight*.¹⁴⁴ That case, *McLaughlin v. Ensley*,¹⁴⁵ centered on “routemen”—workers who restocked vending machines and sold snacks to retailers on behalf of a food distributor.¹⁴⁶ Before being hired for a full-time position, potential routemen participated in a weeklong, unpaid orientation period where they shadowed current employees.¹⁴⁷

The district court applied the six-part test and concluded that the workers were not employees.¹⁴⁸ But, on appeal, the Fourth Circuit looked to its own precedent in interpreting *Portland Terminal* with

141. *Id.* at 1069 (Poole, J., dissenting).

142. *Nance v. May Trucking Co.*, No. 3:12-CV-01655-HZ, 2014 WL 199136, at *5 (D. Or. Jan. 15, 2014).

143. *See Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010); *Ulrich v. Alaska Airlines, Inc.*, No. C07-1215RSM, 2009 WL 364056, at *2–3 (W.D. Wash. Feb. 9, 2009).

144. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989).

145. *Id.*

146. *Id.* at 1208.

147. *Id.*

148. *Id.* at 1210.

regard to underpaid workers.¹⁴⁹ In those cases the court had held that “when the employer received no immediate advantage from the trainees’ services, that is, when the principal purpose of the seemingly employment relationship was to benefit the person in the employee status, the worker could not be brought under the Act.”¹⁵⁰ The court looked to who was the “primary beneficiary” of the workers’ labor and found that in the case of *Ensley*, it was the employer; therefore, the workers were entitled to FLSA protection.¹⁵¹ The majority opinion’s only comment on the lower court’s use of the six-part test was in a footnote that stated “[w]e do not rely on the formal six-part test issued by the Wage and Hour Division. Instead, because of the clear precedent of [this court], we believe proper analysis derives from the principles stated in those cases.”¹⁵² One judge from the panel dissented, saying that the six-part test was the correct standard to apply because it was “a reasonable application of the Fair Labor Standards Act and *Portland Terminal* and entitled to deference.”¹⁵³

More than twenty years later, the Sixth Circuit came up against the issue in *Solis v. Laurelbrook Sanitarium and School*.¹⁵⁴ Laurelbrook, a nonprofit corporation, operated a boarding high school and nursing home facility (“the sanitarium”).¹⁵⁵ Students at the school participated in vocational courses, the curriculum of which included work at the sanitarium.¹⁵⁶ Laurelbrook operated the sanitarium purely for the purposes of training students.¹⁵⁷

In an excellent summary of this issue, the Sixth Circuit stated that “[t]here is no settled test for determining whether a student is an employee for purposes of the FLSA.”¹⁵⁸ The district court did not comment on the WHD’s test, instead concluding that under *Portland Terminal* the appropriate question was whether the student or the school received the primary benefit.¹⁵⁹ The Sixth Circuit, however, did address

149. *Id.* at 1209.

150. *Id.* (quoting *Isaacson v. Pa. Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971)) (internal quotation marks omitted).

151. *Id.* at 1209–10.

152. *Id.* at 1209 n.2.

153. *Id.* at 1211 (Wilkins, J., dissenting).

154. 642 F.3d 518 (6th Cir. 2011).

155. *Id.* at 520.

156. *Id.*

157. *Id.*

158. *Id.* at 521.

159. *Id.*

the six-part test, acknowledging the myriad stances other courts had on the subject.¹⁶⁰ It found the “WHD’s test to be a poor method for determining employee status in a training or educational setting[.],” noting that “it [was] overly rigid and inconsistent with a totality-of-the-circumstances approach,” and “inconsistent with *Portland Terminal* itself.”¹⁶¹ And while the Court had previously “not directly spoken to the issue,” it had “suggested that identifying the primary beneficiary of a relationship [would provide] the appropriate framework for determining employee status in the educational context.”¹⁶²

In 2015, the Second Circuit decided the case at hand: *Glatt v. Fox Searchlight*.¹⁶³ In *Fox Searchlight*, plaintiffs were initially three individuals working as unpaid interns either on the Fox Searchlight film *Black Swan*, or in the corporate offices of Fox Searchlight (a for-profit company).¹⁶⁴ Two of the three were not enrolled in degree programs, while the third was supposed to receive credit for her internship but never did.¹⁶⁵ Eventually, the district court certified two classes of plaintiffs: New York State interns working at several Fox divisions and nationwide interns working at those same divisions.¹⁶⁶

The district court applied the WHD test under a “totality of the circumstances” approach to determine whether the interns were employees.¹⁶⁷ The court found that four of the six factors weighed toward plaintiffs being employees while the remaining two factors weighed toward them being trainees.¹⁶⁸ On this basis the lower court found plaintiffs to be employees entitled to FLSA protection.¹⁶⁹

On appeal, plaintiffs advocated for a test of whether or not the employer receives “immediate advantage” from the interns’ work, while defendants pushed for a primary beneficiary test.¹⁷⁰ The DOL filed an amicus brief defending the WHD test (now formulated in Fact Sheet #71)¹⁷¹ along with an all-or-nothing approach to applying it.¹⁷² The

160. *Id.* at 524–25.

161. *Id.* at 525.

162. *Id.* at 526 (citing *Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234, 236 (6th Cir. 1981)).

163. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016).

164. *Id.* at 531–32.

165. *Id.* at 532–33.

166. *Id.* at 533.

167. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013).

168. *Id.* at 532–34.

169. *Id.* at 534.

170. *Fox Searchlight*, 811 F.3d at 535.

171. *Fact Sheet #71*, *supra* note 8.

Second Circuit rejected the WHD test on the basis that it was only entitled to *Skidmore* deference, and that it was “too rigid for [the court’s] precedent to withstand” while “attempt[ing] to fit *Portland Terminal’s* particular facts to all workplaces.”¹⁷³ The court accepted the primary beneficiary test because it focused “on what the intern receive[d] in exchange for his work,” gave “courts the flexibility to examine the economic reality as it exists between the intern and the employer,” and “acknowledge[d] that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship.”¹⁷⁴ The court also suggested a list of non-dispositive factors that could assist in making this determination:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.
5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.¹⁷⁵

172. *Fox Searchlight*, 811 F.3d at 535–36.

173. *Id.* at 536.

174. *Id.*

175. *Id.* at 536–37.

The court then remanded the case to the district court for further fact-finding under the new test.¹⁷⁶ In July 2016, Fox and the interns reached a settlement agreement rather than return to trial.¹⁷⁷

As this Part indicates, for all the excitement surrounding *Fox Searchlight*, the law does not have one clear rule for internships.¹⁷⁸ The obvious place an employer would first look for guidance—the WHD—cannot be relied upon in all jurisdictions.¹⁷⁹ Currently any organization, for-profit or nonprofit, that wishes to hire an intern must either pay them or engage in a highly fact-specific inquiry based on the case law in its jurisdiction.¹⁸⁰ This inquiry may be further complicated for nonprofits due to uncertainty surrounding a possible nonprofit exception.¹⁸¹

III. REGARDLESS OF THE TEST APPLIED TO FOR-PROFIT INTERNS, NONPROFIT INTERNS MAY BE EXEMPT UNDER A BROAD EXCEPTION FOR CHARITABLE NONPROFITS

While most recent discussion has focused on unpaid internships at for-profit organizations, little has been written about their nonprofit counterparts.¹⁸² Of the handful of scholarly pieces on the subject, only one Note has commented on the issue since *Fox Searchlight*.¹⁸³ The WHD appears to support a broad nonprofit exception to intern wage requirements, and some scholars agree that further legal support exists for one.¹⁸⁴ Others argue that in the wake of *Fox Searchlight*, no exception exists and nonprofits will be held to the same standard as for-profits.¹⁸⁵ Compelling policy interests stand on both sides of the debate.¹⁸⁶

176. *Id.* at 541.

177. Dominic Patten, *Fox Settles 'Black Swan' Interns Lawsuit After Five Years*, DEADLINE HOLLYWOOD (July 12, 2016), <http://deadline.com/2016/07/black-swan-intern-lawsuit-fox-settles-1201785666/> [<https://perma.cc/YVW3-2TNA>].

178. *See supra* Part II.

179. *Id.*

180. *Id.*

181. *Infra* Part III.

182. *See* Harthill, *supra* note 15; Johnson, *supra* note 18; Pianko, *supra* note 20; Tucci, *supra* note 20.

183. *See* Johnson, *supra* note 18. Johnson's Note was published in June 2016, after the amended *Fox Searchlight* opinion was published in January 2016.

184. *See generally* Harthill, *supra* note 15; Pianko *supra* note 20.

185. *See generally* Johnson, *supra* note 18.

186. *Infra* section III.C.

This Part will first attempt to apply the current for-profit tests to nonprofit internships and examine the effect this would have on organizations. It will then summarize the legal and policy arguments for and against a nonprofit exception, as articulated by scholars and other sources.

A. *Applying the Circuits' Tests to Nonprofit Interns Yields the Same Confusion That It Does for Interns at For-Profits, but with More Problematic Results*

If no nonprofit exception exists, then nonprofits must evaluate their internship programs under the applicable circuit's test for interns generally. As shown in Part II, the inquiry is very fact-specific, requires knowledge of the case law in a given circuit, and is subject to varying interpretation.

To demonstrate the potential results of the current tests, consider a sample relationship between a nonprofit and its interns. The interns are recent graduates working thirty hours per week at a small environmental nonprofit. The nonprofit has four paid employees and two interns. Neither intern is paid but both receive free, modest shared housing just outside a high-rent area. The interns' time is split between (1) shadowing and assisting paid staff with regular programs of the organization; (2) working on an intern-specific long-term project for the organization; and (3) basic, sometimes menial, office tasks. While items (1) and (3) would be completed by existing staff with or without the interns, item (2) would not be unless an additional employee was hired. During the internship, training is provided in many areas common to nonprofit management, including fundraising, program development, community interaction, and more. Internships are six months in length, but interns often stay on up to a month longer than planned. The interns do not expect a full-time job at the end of the internship, but the organization's executive director is well known in the sector and can make connections for them afterward, pending good performance.

In the Fifth and Eleventh Circuits, these interns are likely employees. Because these circuits apply the all-or-nothing approach to the WHD tests, all six factors must be met for organizations to avoid having to comply with FLSA requirements.¹⁸⁷ The interns receive educational training and they benefit from the internship, in terms of experience, skills development, and networking. The interns know they are not

187. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834–35 (11th Cir. 2013); Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983).

entitled to a full-time position. However, it is debatable whether the nonprofit derives immediate advantage from the interns or if the interns would be deemed to displace regular employees, given the intern-specific project. Additionally, it is unclear how a court would rule on the agreement to wages question. Here there is no expectation of payment, but in-kind benefits in the form of housing are expected and exchanged. Given the Supreme Court's reasoning in *Portland Terminal* that "implied compensation agreement[s]" could create an employment relationship,¹⁸⁸ and the follow up in *Alamo Foundation* that in-kind benefits created an implied agreement and were just "wages in another form,"¹⁸⁹ a court could very easily interpret "wages" broadly and conclude that this factor was met here. So, meeting all six factors would be a challenge for this internship program.

The nonprofit might have better luck under the Tenth Circuit's totality of the circumstances approach, where all six factors are not necessary.¹⁹⁰ One could argue that the educational components, benefit to intern, and temporary nature of the internship are enough to outweigh the other factors. Still, it is even less clear here than in the all-or-nothing approach, as it is impossible to accurately predict which factors the court might prioritize over others.

In the Eighth or Ninth Circuits, where agreement to compensation and immediate benefit are the determining factors,¹⁹¹ the interns would probably be deemed employees, but again, the outcome is unclear. As noted above, there is certainly room for debate on both counts.

Finally, the organization might have its best luck in the Second, Fourth, or Sixth Circuits. Focusing on the "primary beneficiary" still creates an open question, but there is a solid argument for the intern receiving the primary benefit here. The *Fox Searchlight* factors do not all work in the organization's favor—most notably, those tying the internship to an academic program either by credit or the calendar year—but the Second Circuit itself has said that these factors are non-dispositive.¹⁹²

Regardless of the test applied, one thing is obvious: It takes a lawyer to make sense of it, and even then, there is still room for an argument on

188. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

189. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985).

190. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993).

191. *Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996); *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 416–17 (8th Cir. 1984).

192. *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2016).

both sides.¹⁹³ Many nonprofits lack the resources to hire an attorney to help appropriately structure their internship program and do not want to risk a potential lawsuit.¹⁹⁴ This sets such nonprofits apart from for-profits, where the risk trade-off may be more palatable. Unless they are exempt from the murky tests, nonprofits are then left with two options: Pay interns, or do not have interns at all. The policy implications of these results will be further considered in section III.C.

B. Scholars Disagree Whether a Broad Nonprofit Exception Exists Under Current Law

A variety of legal arguments have been made both in support of and against the existence of an exception for all nonprofits.¹⁹⁵ While no positive law expressly states such an exception, a court would likely consider many of these arguments if the question of a nonprofit exception were left up to judicial determination.

1. Pianko and Harthill Argue That a Nonprofit Exception Exists

The majority of scholars who have written on nonprofit internships have argued for an exception; however, their commentary pre-dates *Fox Searchlight*.¹⁹⁶ Still, given the disarray among the circuits explored in Part II, many if not all of the authors' arguments below remain viable and warrant consideration. Three scholars have explored the issue in some level of depth: Anthony J. Tucci, who examined it broadly;¹⁹⁷ Susan Harthill, who focused on unpaid internships among law students;¹⁹⁸ and Maurice Pianko, who discussed internships at nonprofit newsmagazines.¹⁹⁹

193. See *Interns: Employee or Volunteer*, NAT'L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/interns-employee-or-volunteer> [https://perma.cc/H4KT-JNC5]; Megan H. Mann & David R. Warner, *Turns Out, There's No Such Thing As "Free Labor" Either: Why Most Employers Should be Paying Interns or Modifying/Abandoning Their Unpaid Internship Programs*, VENABLE LLP: LABOR AND EMP'T ALERT (June 2010), <https://www.venable.com/files/Publication/49ba8983-c152-420b-a574-4fa0d1bf37bd/Presentation/PublicationAttachment/0a202d50-8f59-415e-96da-521aa6430a13/Internships.pdf> [https://perma.cc/TT3T-2KRV].

194. Johnson, *supra* note 18, at 1154.

195. See generally Harthill, *supra* note 15; Johnson, *supra* note 18; Pianko, *supra* note 20.

196. Harthill, *supra* note 15 (published in 2014); Pianko, *supra* note 20 (published in 2014); Tucci, *supra* note 20 (published in 2012).

197. Tucci, *supra* note 20.

198. Harthill, *supra* note 15.

199. Pianko, *supra* note 20.

The most straightforward argument is that where the WHD test (and by extension, presumably Fact Sheet #71) has been considered persuasive, the footnoted statement—that unpaid internships at nonprofits are generally permissible—would also be considered persuasive enough for courts to follow. But as shown in Part II, only a handful of circuit courts have embraced the WHD test.²⁰⁰ If the Supreme Court were to resolve the circuit split in favor of the WHD, a nonprofit exception would almost be guaranteed. Alternatively, if the WHD ever decided to put Fact Sheet #71 through notice and comment proceedings, the included exception would be entitled to *Chevron* deference and hold more weight in *all* the circuit courts.²⁰¹ No scholar has explicitly made this argument *for* a nonprofit exception, although Thomas Johnson relied on the Second Circuit finding a lack of persuasiveness to effectively argue the opposite.²⁰²

In the alternative, Maurice Pianko argues that the DOL's interpretation of the FLSA is irrelevant to nonprofit internships because under step one of a *Chevron* analysis, the statute has unambiguously provided that nonprofits may legally refrain from paying intern volunteers.²⁰³ In *Portland Terminal* and *Alamo Foundation*, he says, "the Supreme Court . . . interpreted the [FLSA] to mean that unpaid intern volunteers [at nonprofits] are legal because such volunteers without promise or expectation of compensation, but solely for their own pleasure, labor in the service of a cause that they believe in."²⁰⁴ Pianko concludes that the Court's statements in *Portland Terminal* and *Alamo Foundation*—that "any person who, solely for his personal purpose or pleasure, worked in activities (such as charities) was not an employee who had to be paid the minimum wage under the [FLSA]"—indicate that the Court viewed the question as one of law that Congress had already spoken to.²⁰⁵ Therefore, the Court decided that unpaid nonprofit interns were allowed under the first step of *Chevron*, and there was no need to determine whether the agency's interpretation of the statute was a permissible construction under the second step.²⁰⁶

Susan Harthill argues that unpaid interns at nonprofits fall under the FLSA's volunteer exception in spite of the lack of an express exemption

200. *Supra* Part II.

201. *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001).

202. Johnson, *supra* note 18, at 1140–41.

203. Pianko, *supra* note 20, at 36.

204. *Id.* (emphasis in original) (internal quotations omitted).

205. *Id.* at 32–33 (internal quotations omitted).

206. *Id.*

for nonprofits outside of food banks.²⁰⁷ She states that the DOL has applied the exemption to other types of nonprofits through opinion letters and “courts have accepted this view.”²⁰⁸ Therefore, “nonprofits should remain safe from the threat of lawsuits.”²⁰⁹ That said, there is currently no clear line as to when nonprofit interns fall under the umbrella of nonprofit volunteers and when they do not. But, notes Harthill, “the DOL has consistently taken the position that volunteers include individuals who provide services to nonprofits [I]nterns at nonprofit organizations are thus probably considered ‘volunteers,’ but they fall into an illusory exemption.”²¹⁰

Harthill admits that her position is somewhat weak given the Sixth Circuit’s decision to ignore the volunteer exception in its discussion of the nonprofit corporation in *Solis v. Laurelbrook Sanitarium and School*²¹¹ and the nonbinding nature of the DOL’s opinion letters.²¹² However, her argument appears to be the prevailing view in favor of a nonprofit exception for interns.²¹³ The congressional record of the discussion behind the food bank amendment further supports this position.²¹⁴ The record shows the bill’s sponsor stating that the amendment “should not be in any way construed to mean that . . . Congress is showing an intent that any other individual who performs community services and receives benefits is an employee,” and a supporter responding that “[t]his incident [was] just one example of the fact that the Fair Labor Standards Act is flexible, [and] the Fair Labor Standards Act will yield to common sense after due deliberation.”²¹⁵ If the FLSA was intended to be flexible, its flexibility may allow it to encompass not only more than the expressly mentioned nonprofits, but also individuals who serve them for no pay and with a title other than “volunteer.”

207. Harthill, *supra* note 15, at 660–62.

208. *Id.* at 601.

209. *Id.*

210. *Id.*

211. 642 F.3d 518, 525 (6th Cir. 2011).

212. *Id.* at 582–84.

213. *Id.* at 601.

214. 144 CONG. REC. H5386 (daily ed. June 25, 1998).

215. *Id.* (statements of Reps. Ballenger and Owens).

2. *Johnson Argues That a Nonprofit Exception Does Not Exist*

The primary scholarly voice against a nonprofit exception comes in a 2016 Note by Thomas Johnson.²¹⁶ Johnson argues that the exception rests on unstable legal ground, particularly following the outcome of *Fox Searchlight*.²¹⁷ However, he neglects to take notice of the current circuit split demonstrated in Part II.²¹⁸

Johnson correctly points out that “[t]here is no positive law that suggests that unpaid interns at nonprofits are not ‘employees’ for the purpose of the Fair Labor Standards Act.”²¹⁹ The only text of the FLSA related to nonprofits provides a limited exception for those who volunteer at public agencies or nonprofit food banks.²²⁰ This exception was created *after* the Supreme Court articulated a broad exception in *Alamo Foundation* and would seem to indicate Congressional intent to narrow the exception; however, as discussed above, the legislative history is somewhat less clear on this point.²²¹ Regardless, outside of the three examples provided in the *Alamo Foundation* exception and the situation at issue in the case,²²² it is unclear where the Court would draw a line between ordinary volunteerism and employee activities absent definitive legislative or agency action.

Johnson also points to the Supreme Court’s opinion in *Alamo Foundation* for support of his argument, given the Second Circuit’s reliance on it.²²³ He notes that the *Alamo Foundation* Court “directly rejected a blanket volunteer exception to the Fair Labor Standards Act for charitable nonprofits” and that “[i]f the Second Circuit found the logic of *Tony & Susan Alamo Foundation* persuasive in the context of unpaid interns at for-profit entities, it is highly likely that this precedent would weigh heavily . . . against the blanket intern exception for charitable nonprofits found in Fact Sheet #71.”²²⁴ Johnson interprets the

216. Johnson, *supra* note 18.

217. *Id.* at 1128–29.

218. *Id.* at 1139–43.

219. *Id.* at 1140.

220. Fair Labor Standards of Act of 1938, 29 U.S.C. § 203(e)(5) (2012).

221. *Alamo Foundation* was decided in 1985, while the FLSA amendment was passed in 1998. See discussion *supra* section III.B.1.

222. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302–03 (1985) (differentiating between “volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy” and self-described “volunteers” in the commercial ventures of a nonprofit).

223. Johnson, *supra* note 18, at 1142.

224. *Id.*

Alamo Foundation holding as saying that nonprofits and for-profits should be treated identically under the FLSA.²²⁵

Johnson references the same conflicting legislative history as Harthill, but frames it from the perspective of the DOL's inconsistent guidance on the subject.²²⁶ The Department indicates in Fact Sheet #71 that one of the key factors in the intern or employee question is whether the intern displaces paid employees.²²⁷ But in a later opinion letter, the Department stated that "even when volunteers do not displace paid labor at a nonprofit, if it is the type of labor that a for-profit competitor would have to pay for, the workers cannot be classified as volunteers."²²⁸ Despite the fact that this is discussing volunteers rather than interns, this seems to be directly at odds with the Fact Sheet #71 footnote regarding unpaid nonprofit internships as "permissible."²²⁹ Johnson points out that "these agency positions are only entitled" to persuasive deference under *Skidmore* and claims that "they undermine the argument that the Labor Department would support preferential treatment for charitable nonprofits under the volunteer exception."²³⁰

From Johnson's perspective, the only thing keeping unpaid nonprofit internships afloat is Fact Sheet #71.²³¹ As mentioned earlier, Fact Sheet #71 focuses primarily on unpaid internships at for-profits, but it includes a footnote stating that unpaid nonprofit internships are "generally permissible."²³² Johnson argues that because Fact Sheet #71 was thrown out by the Second Circuit, the belief in a nonprofit exception has nothing left to stand on:

Fox Searchlight signals that nonprofits can no longer safely rely on Fact Sheet #71's conclusory assertion as a bulwark against liability. Even the Labor Department conceded that Fact Sheet #71 is limited to the "power to persuade." This should be highly disconcerting to charitable nonprofits, as the Labor Department's attempts at persuasion failed at both the district

225. *Id.* at 1143 (following discussions of reliance on *Alamo Foundation* and *Portland Terminal* with the statement that "Fox Searchlight supports, in one additional way, the argument that courts will obey the Supreme Court's guidance in *Tony & Susan Alamo Foundation* to treat for-profits and nonprofits identically").

226. *Id.* at 1147.

227. *Fact Sheet #71*, *supra* note 8.

228. Johnson, *supra* note 18, at 1147 (citing *Volunteers/Employee Status*, 6A WAGE & HOUR MANUAL (BNA), at WHM99:8191, 99:8191-92 (Nov. 9, 1998)).

229. *Fact Sheet #71*, *supra* note 8.

230. Johnson, *supra* note 18, at 1147.

231. *Id.* at 1140-41.

232. *Fact Sheet #71*, *supra* note 8.

court and circuit court levels in *Fox Searchlight*. There is no reason to think that the Labor Department's terse assertion in a footnote will be more persuasive to courts than its developed, six-factor internship test that drew on over fifty years of agency interpretation and enforcement.²³³

This is a bold statement, for it presumes that “the Labor Department’s attempts at persuasion”²³⁴ will fail at all circuit courts because they failed before the Second Circuit. As shown in Part II, several circuit courts *have* found the WHD’s trainee test persuasive enough to rely upon,²³⁵ and the WHD trainees test is nearly identical to Fact Sheet # 71.²³⁶ It is likely that at least those courts would find Fact Sheet #71 persuasive enough to follow, including the footnote reference to nonprofits.

C. *A Broad Exception Furthers Certain Policy Goals While Inhibiting Others*

Regardless of whether or not an exception currently exists, the question remains of whether one *should*. The true merits of the charitable sector are a subject of considerable debate²³⁷ and are beyond the scope of this Comment. This debate extends to the idea of exempting nonprofit internships from FLSA compliance.²³⁸ Still, Congress has determined that charities deserve subsidies, and that policy underlies the decision to exempt them from certain legal requirements.²³⁹ The question then becomes, how far should that exemption go? Considering the policy grounds of a broad exception forces an evaluation of who is more deserving: nonprofits, or the interns who serve them.

233. Johnson, *supra* note 18, at 1140–41.

234. *Id.* at 1140.

235. *See supra* section II.A.

236. *Compare Fact Sheet #71, supra* note 8, with W&H MANUAL, *supra* note 8.

237. *See, e.g.,* GILBERT M. GAUL & NEILL A. BOROWSKI, FREE RIDE: THE TAX-EXEMPT ECONOMY 1–9 (1993) (noting that nonprofits subsidize inefficiency, hide wealth, and suffer from mission drift); Miranda Perry Fleischer, *How Is an Opera Like a Soup Kitchen?*, in THE PHILOSOPHICAL FOUNDATIONS OF TAX LAW 256 (Monica Bhandari ed., 2017) (examining the paradox of the nonprofit tax exemption equally subsidizing both charities that serve the wealthy, like operas, and those that serve the poor, like soup kitchens).

238. Johnson, *supra* note 18, at 1158–62.

239. Perry Fleischer, *supra* note 237, at 256–62.

1. *The Positive: A Broad Exception Furthers the Beneficial Work of the Nonprofit Sector and Provides More Opportunities for Interns Interested in Public Service*

A broad exception favors nonprofits and the policy interests they serve. The nonprofit, “independent,” or “third” sector has been widely regarded as an important gap-filler between the government and private sectors.²⁴⁰ Writes John Gardner, “Unlike government, an independent sector group need not ascertain that its idea or philosophy is supported by some large constituency, and unlike the business sector they do not need to pursue only those ideas which will be profitable.”²⁴¹ The freedom from these two constraints thus allows nonprofits to meet societal needs that might otherwise go unaddressed, or to respond more quickly to issues where government bureaucracy would increase reaction time.²⁴² This is to say nothing of the more philosophical argument for a nonprofit sector: that the existence of one is “uniquely American” and rooted in a long national philanthropic tradition.²⁴³

The importance of this third sector begets a major policy argument for a nonprofit exception. If nonprofits are intended to fill a gap left by the for-profit market, then they should not be subjected to market forces with regard to labor.²⁴⁴ Many nonprofits are low-budget organizations that simply cannot afford to pay interns.²⁴⁵ Requiring them to do so could result in nonprofits substantially reducing or even cutting internship programs entirely.²⁴⁶ In some cases, where interns provide a cost-effective way to advance the mission of the organization,

240. LESTER M. SALAMON, *AMERICA’S NONPROFIT SECTOR: A PRIMER* 12–13 (2d ed. 1999).

241. John W. Gardner, *The Independent Sector*, in *AMERICA’S VOLUNTARY SPIRIT* ix, xiii (Brian O’Connell ed., 1983).

242. *Id.* at xiii–xiv.

243. *Id.* at ix; see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 975 (Henry Reeve trans., Auckland, The Floating Press 2009) (1840). De Tocqueville, in his 1835 tour of the United States, noted the presence and value of philanthropic ideals to the fledgling country:

It would seem as if every imagination in the United States were upon the stretch to invent means of increasing the wealth and satisfying the wants of the public. The best-informed inhabitants of each district constantly use their information to discover new truths which may augment the general prosperity; and if they have made any such discoveries, they eagerly surrender them to the mass of the people.

Id.

244. Pianko, *supra* note 20, at 39.

245. Kate Newman, *For Interns at Nonprofits, Don’t Expect a Paycheck*, ALJAZEERA AM. (Aug. 25, 2014), <http://america.aljazeera.com/articles/2014/8/25/nonprofit-interns.html> [<https://perma.cc/C4DR-G8AN>]; see also *infra* tbl.2 (showing roughly fifty percent of nonprofits have less than \$100,000 in annual revenues or assets).

246. Newman, *supra* note 245.

eliminating internships could effectively serve to reduce the power and reach of the nonprofit itself.²⁴⁷ Smaller organizations are likely to feel these effects the hardest—and they are the nonprofits who arguably are best positioned to achieve the goals of the third sector, as they tend to be nimbler and better attuned to local needs.²⁴⁸

Forcing all nonprofits to pay interns would hinder not only organizations, but individuals seeking internships as well. While the focus of most discussion on the topic has been primarily on compensation-related benefits to interns, requiring payment would result in a tradeoff: fewer internships would be available, meaning fewer intangible benefits for interns.²⁴⁹ Furthermore, a lack of available positions could be a deterrent for possible interns otherwise interested in a career in public service.²⁵⁰

2. *The Negative: A Broad Exception Causes Inefficiency and Uncertainty While Perpetuating Income Inequality*

Broadly exempting nonprofits may advance nonprofit missions, but it raises policy concerns about the treatment of interns. Johnson pays heed to many of the policy arguments in favor of a nonprofit exception but also notes that “[t]he debate regarding the character of nonprofit organizations has raged for decades,” as to whether nonprofits “combine the civic and charitable qualities of government with the innovation and ingenuity of the private sector,” or “hid[e] wealth, subsidiz[e] inefficiencies, and suffer[] from chronic ‘mission drift.’”²⁵¹ He points to

247. See, e.g., BARRY HESSENIUS, *HARDBALL LOBBYING FOR NONPROFITS: REAL ADVOCACY FOR NONPROFITS IN THE NEW CENTURY* 93 (2007) (“Unpaid internships . . . are an excellent way to provide [a] struggling advocacy organization with some of the help it requires.”); *Interns: Employee or Volunteer*, *supra* note 193 (“Interns can be terrific additions to a nonprofit’s capacity building journey”); *Would College Interns Help Your Nonprofit?*, GELMAN, ROSENBERG, & FREEDMAN (June 4, 2012), <http://www.grfcpa.com/resources/articles/would-college-interns-help-your-nonprofit/> [<https://perma.cc/B9CT-FCTJ>] (“[S]tudents at the master’s level may be available to do a research project for you that would normally cost tens of thousands of dollars.”).

248. Melissa Kushner, *Small Nonprofits, Big Nonprofits: The Where to Give Dilemma*, HUFFINGTON POST: THE BLOG (July 30, 2015), http://www.huffingtonpost.com/melissa-kushner/small-nonprofits-big-nonp_b_7905482.html [<https://perma.cc/5PL7-VDKK>] (“[S]mall nonprofits tend to bring an intimacy with the challenges faced in particular communities, which are culturally specific and unique.”); Marc Koenig, *Famous Nonprofits Are Overrated: Three Advantages of Being a Small Nonprofit*, NONPROFIT HUB (Feb. 18, 2013), <http://nonprofitHub.org/nonprofit-marketing-plan/advantages-of-being-a-small-nonprofit/> [<https://perma.cc/QV84-8L78>] (noting “agility” as one of the advantages of a small nonprofit).

249. Rotherham, *supra* note 14.

250. *Id.*

251. Johnson, *supra* note 18, at 1151–52.

three primary policy concerns implicated by a possible exception: (1) inefficiency, (2) uncertainty, and (3) economic inequality.²⁵²

Johnson argues that allowing unpaid internships in the nonprofit sector leads to income stratification because it “privileges the upper class.”²⁵³ He points to the growth of intern placement agencies, which essentially require students to pay to have an unpaid internship, and the fact that students from wealthy families are more likely to have the economic support necessary to take on an unpaid internship.²⁵⁴ Johnson also alleges that nonprofits suffer from these effects as well because they are screening for interns with wealthy backgrounds rather than the best possible employees, and in the long run, this practice will discourage low-income applicants from later involvement in the nonprofit sector.²⁵⁵

Nonprofits may be viewed as inefficient because while they are deemed a “gap-filler” (providing public goods where both the market and government have failed), in filling this gap they curtail profit motive and reduce incentives for cost efficiency.²⁵⁶ According to one statistic, the nonprofit sector “wastes \$100 billion . . . annually” and some scholars argue that “the unregulated status of nonprofits allows inefficient entrepreneurs, who would be driven out of the for-profit market, to survive and draw a salary as long as they adopt nonprofit status.”²⁵⁷ Given these concerns, some have concluded that leveling the playing field between for-profits and nonprofits is necessary.²⁵⁸ Allowing nonprofits a broad exception for unpaid interns would do the opposite.²⁵⁹

Johnson says that the current uncertainty surrounding the FLSA further compounds this inefficiency.²⁶⁰ The uncertainty leaves nonprofits with few options, none of which are particularly desirable:

252. *Id.* at 1152–58.

253. *Id.* at 1155.

254. *Id.* at 1155–58; see also Christopher Zara, *Paying a Fee to Work for Free: Pricey Intern Placement Agencies Raise Eyebrows Among Fair Wage Advocates*, INT’L BUS. TIMES (Sept. 12, 2014), <http://www.ibtimes.com/paying-fee-work-free-pricey-intern-placement-services-raise-eyebrows-among-fair-wage-1686392> [https://perma.cc/38UF-T2ED].

255. Johnson, *supra* note 18, at 1156. However, Johnson cites no support for this assertion.

256. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 507 (1981).

257. Johnson, *supra* note 18, at 1152–53 (citing Bill Bradley et al., *The Nonprofit Sector’s \$100 Billion Opportunity*, HARV. BUS. REV., May 2003, at 94, 102; Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2054 (2007)).

258. Johnson, *supra* note 18, at 1153–55.

259. *Id.* at 1154.

260. *Id.*

Nonprofits must either pay their interns (which is possibly unnecessary), structure their internships to avoid liability under any of the plausible tests for the intern exception (which is tricky), place their faith in the narrowly drawn volunteer exception (which is risky), or rely on the Labor Department's assertion in a footnote merely entitled to *Skidmore* deference that unpaid internships are "generally permissible." Each of these choices has consequences, and a misstep could subject nonprofits to liability for unpaid wages.²⁶¹

In sum, Johnson's point is that acting as though there is a nonprofit exception when there is no clear statement from either Congress or the Supreme Court will only result in money flowing to lawyers rather than mission-oriented nonprofit activities.²⁶² Whatever the line is, it needs to be drawn by Congress.²⁶³

This Part has shown that neither applying the same standard to nonprofits as for-profits nor broadly exempting nonprofits from that standard is ideal. To move forward, a clear rule is needed—preferably one that balances both nonprofit and intern concerns.

IV. CONGRESS SHOULD AMEND THE FLSA TO INCLUDE A NARROW, TAX LAW-BASED EXCEPTION FOR INTERNS AT CERTAIN NONPROFITS

Most scholars writing about unpaid nonprofit intern have focused on making an argument for or against a nonprofit exception under current court holdings and DOL guidance.²⁶⁴ Only one, Anthony Tucci, made a totally new proposal: to establish a nonprofit-specific test, along the lines of those articulated in Fact Sheet #71 or *Fox Searchlight*.²⁶⁵ But Tucci's test was still designed to apply to *all* nonprofits.²⁶⁶ No scholar has yet explored the idea of a bright-line exception that only applies to *some* nonprofits. This Part will explain why a narrowly tailored exception makes sense from both a legal and policy standpoint and will propose three possible narrow exceptions based on type, activities, or size of organization.

261. *Id.*

262. *Id.*

263. *Id.* at 1154–55.

264. *See id.*; Harthill, *supra* note 15; Pianko, *supra* note 20.

265. *See generally* Tucci, *supra* note 20.

266. *Id.*

A. *A Narrowly-Tailored Exception Is Preferable to a Broad One*

As shown in Part III, the question around a possible nonprofit exception has up to this point been, “Does it exist or not?” It demands a blanket yes or no: Either a rule applies to all nonprofits, or it applies to none. But this question is inherently problematic under existing case law and legislative history, and it neglects to take notice of the extreme diversity present in the nonprofit sector. A narrow, non-blanket exception, however, would conform with current law and balance many of the conflicting policy goals articulated in Part III.

1. *Alamo Foundation and Legislative History Support an Exception, but Not a Blanket One*

The text of the FLSA, its legislative history, and Supreme Court precedent all suggest an exception for nonprofits. But all three indicate a strong push against a *blanket* exception.

As discussed earlier, the text of FLSA does contain the basis for some form of a nonprofit exception.²⁶⁷ But despite the push from scholars, the DOL, and even the Supreme Court to create a more expansive exception, what remains in the text is very limited: private, nonprofit food banks.²⁶⁸ This exception remained narrow despite congressional discussion that it was not intended to be exclusive.²⁶⁹ If anything, this shows that future legislative action on the FLSA may come in the form of narrow exceptions, rather than broad ones.

Similarly, in *Alamo Foundation*, the Supreme Court rejected a blanket exemption on the basis of legislative history.²⁷⁰ The Court cited the Senate Committee report and Congressional Record from the bill that expanded the FLSA to include enterprise coverage.²⁷¹ These documents indicate that “the activities of nonprofit groups were excluded from coverage only insofar as they were not performed for a ‘business purpose,’” and that a proposed floor amendment was debated that would have expressly excluded 501(c)(3) tax-exempt organizations from the “employer” definition.²⁷² The amendment was rejected on the grounds

267. Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e)(5) (2012).

268. 144 CONG. REC. H5386 (daily ed. June 25, 1998) (statements of Reps. Ballenger and Owens).

269. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 297–98 (1985).

270. *Id.*

271. *Alamo Found.*, 471 U.S. at 297 (referencing 106 CONG. REC. 16704 (1960) (statement of Sen. Kennedy)).

272. *Id.* at 297 (quoting 106 CONG. REC. 16704 (1960) (statement of Sen. Kennedy)).

that it would broaden the exception too far and would allow a “‘profitmaking corporation or company’ owned by ‘an eleemosynary institution’” to be exempt from FLSA requirements.²⁷³ While this may not be perfect evidence of Congress’ intent, the Court relied on this information to conclude that Congress did not mean to broadly exclude nonprofits from enterprise coverage under the FLSA.²⁷⁴ While this Comment is not particularly concerned with enterprise coverage, the *Alamo Foundation* decision indicates a Supreme Court preference toward a non-blanket exemption.

Thomas Johnson’s Note makes many great points about the current status of the nonprofit exception, but in his comments on *Alamo Foundation*, he overlooks an important distinction. Whereas Johnson states the Supreme Court’s guidance in the case is to “treat for-profits and nonprofits identically,”²⁷⁵ the Court actually only stated that nonprofits and for-profits should be treated identically so far as their activities mirror each other—namely, when those activities are commercial in nature.²⁷⁶ As will be discussed further in sections IV.B and IV.C.1, this position with regard to commercial activities tracks an important distinction the Internal Revenue Service makes in its treatment of tax-exempt organizations, and one that may be used as a guidepost for other possible narrow exceptions.

2. *A Narrow Exception Accounts for the Diversity of Tax-Exempt Organizations and Balances Competing Policy Aims*

A narrow exception not only has legal support; put simply, *it makes sense*. Unlike a broad exception, a narrow exception takes notice of the diverse nature of tax-exempt organizations and allows for some, but not all, to have unpaid interns. By crafting such an exception, Congress could create a “scalpel” rather than a “cleaver,” effectively balancing pro-intern and pro-nonprofit policy goals.

People frequently underestimate the diversity of the nonprofit sector or misunderstand the scope and definition of the term.²⁷⁷ An

273. *Id.* at 298 (quoting 106 CONG. REC. 16704 (1960) (statement of Sen. Kennedy)).

274. *Id.* at 299.

275. Johnson, *supra* note 18, at 1143.

276. *Alamo Found.*, 471 U.S. at 297–99.

277. See *Myths About Nonprofits*, NAT’L COUNCIL OF NONPROFITS, <https://www.councilofnonprofits.org/myths-about-nonprofits> [https://perma.cc/6JDA-SDY6]. Compare Allison Gaus, *Is It Time to Ditch the Word “Nonprofit”?*, STAN. SOC. INNOVATION REV. (June 13, 2016), https://ssir.org/articles/entry/is_it_time_to_ditch_the_word_nonprofit [https://perma.cc/7QES-68GA], with Jim Schaffer, *Can We Stop Arguing over “Nonprofit”?*, NONPROFIT Q. (June 20,

organization can be a “nonprofit” at the state level without being tax-exempt federally.²⁷⁸ Among those organizations granted federal tax exemption, there is still a great deal of diversity. Section 501 of the U.S. Code provides tax exemptions for no less than twenty-eight different types of organizations, including social welfare organizations,²⁷⁹ chambers of commerce,²⁸⁰ fraternal organizations,²⁸¹ credit unions,²⁸² cemeteries,²⁸³ and more.²⁸⁴ The diversity among, and even within, these types of organizations has led some scholars to question the merits of granting them tax exemption.²⁸⁵

The most well-known entities from these categories are 501(c)(3) organizations, which are operated for a limited set of purposes such as charitable, religious, educational, literary, and other objectives.²⁸⁶ These are generally referred to as “charitable nonprofits” and are essentially the only tax-exempt organizations to which donations are eligible for a tax deduction.²⁸⁷ Although scholars and politicians do not always say so explicitly, most discussions around a potential exception to the FLSA focus only on an exception for charitable nonprofits.²⁸⁸

2016), <https://nonprofitquarterly.org/2016/06/20/can-we-stop-arguing-over-nonprofit/> [<https://perma.cc/ESJ9-5SDQ>] (debating the suitability of the term “nonprofit” to describe the sector).

278. Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 57 (1981); *What Is the Difference Between Nonprofit, Tax Exempt, and Charitable?*, IRS STAY EXEMPT (last updated Feb. 21, 2015), <https://www.stayexempt.irs.gov/Resource-Library/What-is-the-difference-between-nonprofit-tax-exempt-and-charitable> [<https://perma.cc/ZV7X-U824>]; see, e.g., WASH. REV. CODE § 24.03.015 (2016) (providing for the incorporation of nonprofit corporations at the state level in Washington State).

279. I.R.C. § 501(c)(4) (2012).

280. *Id.* § 501(c)(6).

281. *Id.* § 501(c)(8).

282. *Id.* § 501(c)(14).

283. *Id.* § 501(c)(13).

284. See *id.* § 501(c)(1)–(29).

285. See, e.g., Perry Fleischer, *supra* note 237, at 256 (considering the charitable merits of the opera, in comparison to the soup kitchen).

286. I.R.C. § 501(c)(3).

287. *Id.* § 170(a)(1), (c)(2). Gifts to other entities are deductible on the following limited bases: (1) a state or the United States, or any subdivision thereof if the gift is for exclusively public purposes; (2) a veterans’ organization, so long as no part of its net earnings “inures to the benefit of any private shareholder”; (3) a fraternal organization, if the gift is used exclusively for the charitable purposes outlined in § 501(c)(3); or (4) a cemetery company, which is not operated for profit and is owned and operated solely for its members’ benefit. *Id.* § 170(c)(1), (3)–(5).

288. See, e.g., 106 CONG. REC. 16703 (1960) (statements of Sen. Goldwater and Sen. Kennedy) (debating the merits of Sen. Goldwater’s proposed amendment that would “specifically exclude from the term ‘enterprise’ any employer exempt from taxation under section 501(c) (3) of the Internal Revenue Code”); Harthill, *supra* note 15, at 605; Johnson, *supra* note 18, at 1129–32; Lisa

But even 501(c)(3) organizations are divided further by the International Revenue Service (IRS). Some organizations are designated “private foundations” while others are “public charities,” a distinction that turns on how the organization operates and from where it receives its support.²⁸⁹ There are member organizations and nonmember organizations.²⁹⁰ Then there is possibly the most important differentiator of all: size, in terms of both impact and budget. Where some nonprofits are operating with budgets in the tens and hundreds of millions of dollars, more than half have annual revenues of less than \$100,000.²⁹¹

This diversity is actually helpful because it enables line-drawing in a way that can balance policy interests far better than a broad exception. A broad exception forces us to ask, “Should we resolve this at the expense of the intern or the organization?” No one wants to see interns taken advantage of, but they also do not want to inhibit the positive contributions nonprofits make to society. A narrow exception can instead cut along already existing lines to provide more leeway to nonprofits that actually need it, while taking care of interns as much as possible. As explored further in sections IV.B and IV.C, these bright lines already exist in a statute familiar to nonprofits: the Internal Revenue Code.

B. Tax Law Provides a Simple, Clear, and Supported Basis for a Narrow Exception

The Internal Revenue Code offers a clear, easy route to implementing a narrow nonprofit exception with bright-line rules that support policy goals. This route makes even more sense given the structure of the FLSA, Supreme Court precedent, and the Code’s existing relationship to nonprofits.

Admittedly, clarity is not usually what people think of when they think about tax law. The Tax Code on the whole is extremely complex

M. Milani, *The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations*, 43 WASH. & LEE L. REV. 223, 237–38 (1986); Tucci, *supra* note 20, at 1385 (“Under the proposed limited-service-exemption prong, work typically associated with public-service volunteerism is intentionally broad. It allows a bona fide unpaid intern to volunteer his or her ‘services needed to carry out [the nonprofit’s] charitable, educational, or religious programs.’”).

289. I.R.C. § 509(a) (providing all 501(c)(3) organizations are classified as private foundations unless they fall into one of four exceptions); Treas. Reg. §§ 1.509(a)-2–(a)-4 (2016) (explaining the four exceptions).

290. *See* Treas. Reg. § 1.509(a)-3 (2016) (allowing membership fees to be included in the “support test” establishing a 501(c)(3) as a public charity).

291. *Infra* tbl.2.

with layers upon layers of rules and exceptions.²⁹² But several of the parts that apply to nonprofits are very straightforward. These include the split between private foundations and public charities,²⁹³ annual filing requirements,²⁹⁴ and paying tax on income from commercial activities.²⁹⁵ They are bright-line rules that have stood the test of time. And as the following section will explore, these rules balance key policy concerns explored in Part III.

In addition to its clarity on the subject, the Tax Code makes sense to use in conjunction with the FLSA because the FLSA is already a “tax-aware” statute. As discussed earlier, the FLSA only applies to “employees,” not independent contractors or other quasi-classes of workers.²⁹⁶ This distinction tracks the divisions that the IRS makes for employers regarding which individuals are subject to payroll tax and withholding requirements.²⁹⁷ Contrast this with other major employment statutes like the Occupational Health and Safety Act (OSHA), which can apply to a much broader class of individuals.²⁹⁸ While this “awareness” is not overt or obvious by any means, it is worth consideration.

The Supreme Court has also previously lent its support (albeit perhaps unintentionally) to distinctions that track the Tax Code. In *Alamo Foundation*, the Court made two notable statements: (1) that in-kind benefits were “wages in another form,”²⁹⁹ and (2) that the FLSA would apply only to the “ordinary commercial activities” of the Foundation, rather than its charitable ones.³⁰⁰ Under the Tax Code, in-kind benefits such as housing are included in an individual’s taxable income and effectively treated as “wages in another form” for the purposes of

292. Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Simplification*, 2 GEO. MASON INDEP. L. REV. 319, 320 (1994); J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191, 193 (2015).

293. I.R.C. § 509(a).

294. Treas. Reg. § 1.6033-2.

295. I.R.C. § 511.

296. See Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a) (2012); discussion *infra* Part I.

297. *Publication 15, (Circular E), Employer’s Tax Guide*, DEPT. OF THE TREAS., INTERNAL REV. SERV. 9 (2017).

298. On its face, OSHA also applies to “employees,” and has a similarly ambiguous definition of the term to the FLSA. Occupational Health and Safety Act, 29 U.S.C. § 652(6) (2012) (defining “employee” as “an employee of an employer who is employed in a business of his employer which affects commerce”). However, the Supreme Court has interpreted the term in such a way that it can include a broader range of individuals. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

299. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985).

300. *Id.* at 302–03.

income tax, subject to some exceptions.³⁰¹ And as will be discussed further in section IV.C.1, the split between commercial and charitable activities already exists in the Tax Code for determining when tax-exempt organizations must pay unrelated business income tax, and when organizations may qualify as tax-exempt, period.³⁰²

Lastly, while the Tax Code governs nearly every individual and organization in the United States, it has special relevance to nonprofits. Nonprofit organizations can be nonprofit without being tax-exempt,³⁰³ but to many the crux of nonprofit status (or, at least, charitable nonprofit status) is the ability to receive tax-deductible donations and avoid paying taxes.³⁰⁴ Because of this, the Code is arguably the most important statute governing nonprofits and the one nonprofit managers are the most familiar with. If there is a source that already contains bright-line distinctions to define a narrow exception, it is the Tax Code.

C. *Three Proposals for a Tax-Based Exception*

The *Alamo Foundation* Court may have unintentionally laid out the bare bones of a framework for narrowing a nonprofit exception by tracking the IRS distinction between commercial and noncommercial activities. While many of the laws and regulations surrounding tax-exempt organizations are extremely complex, the three possibilities below offer comparatively simple ways to narrow an exception and are based in (for the most part) well-settled law. While none of these exceptions are perfect, nor will any one of them address every policy concern, any of them would offer gains over a blanket exception and would be an easy solution for both Congress and nonprofits to adopt.

1. *An Exception for Interns Who Support Exempt Purpose Activities, but Not Commercial Ones*

The first possible exception would allow nonprofits to have unpaid interns if the interns' work supports exempt purpose activities, but not if

301. I.R.C. § 61(a).

302. I.R.C. § 511.

303. *E.g.*, WASH. ATT'YS ASSISTING CMTY. ORGS./KING CTY BAR ASS'N YOUNG LAWS. DIV., WASHINGTON NONPROFIT HANDBOOK: HOW TO FORM AND MAINTAIN A NONPROFIT CORPORATION IN WASHINGTON STATE 8 (2009 ed.) ("Organizations can be incorporated under Chapter 24.06 RCW, the Nonprofit Miscellaneous and Mutual Corporation Act, for any lawful purpose, including, but not limited to, mutual, social, cooperative, fraternal, beneficial, service, labor organization and other purposes.").

304. *Id.* at 51–52.

they support commercial activities. This exception has strong legal support but faces several practical and logistical challenges.

The exempt purpose/commercial split is one way in which tax law treats certain 501(c)(3) organizations differently. The split derives from the language of section 501(c)(3), which states that such organizations must be “organized and operated exclusively for religious, *charitable*, scientific, testing for public safety, literary, or educational purposes.”³⁰⁵ Despite the “exclusive” language, later code provisions allow for limited commercial activities, which some organizations use to raise funds for their exempt purpose.³⁰⁶ Organizations that engage in such activities, as in *Alamo Foundation*, must pay income tax on those revenues if the business is regularly carried on and is not substantially related to the organization’s purpose.³⁰⁷ If this “unrelated business income” constitutes a large percentage of an organization’s overall revenues, the organization can lose its tax exemption.³⁰⁸

Supreme Court precedent supports an exception based on the exempt purpose/commercial split. The *Alamo Foundation* Court already determined that the “associates” in the foundation’s rehabilitation program were employees because their work was done in the Foundation’s commercial businesses.³⁰⁹ It is a short and easy extrapolation to extend the same principle to nonprofit interns.

The *Portland Terminal* holding further supports this exception.³¹⁰ The Court concluded that “employee” does not encompass individuals who, “‘solely for’ their own ‘pleasure,’ labor in the service of a cause that they believe in.”³¹¹ Whereas an intern working in furtherance of an

305. I.R.C. § 501(c)(3) (emphasis added).

306. *Id.* § 511; JAMES J. FISHMAN, STEPHEN SCHWARZ, & LLOYD HITOSHI MAYER, *TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 311 (4th ed. 2015).

307. I.R.C. §§ 511(a), 512(a), 513(a); JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 604 (4th ed. 2010).

308. I.R.C. §§ 511(a), 512(a), 513(a). Unfortunately for nonprofits, there is no set number as to what percentage will cause an organization to forfeit tax-exempt status. INTERNAL REV. SERV., *HOW TO LOSE YOUR 501(C)(3) TAX-EXEMPT STATUS (WITHOUT REALLY TRYING)*, <https://www.irs.gov/PUP/charities/charitable/How%20to%20Lose%20Your%20Tax%20Exempt%20Status.pdf> [<https://perma.cc/W3SG-QRQR>] (“Earning *too much* income generated from unrelated activities can jeopardize an organization’s 501(c)(3) tax-exempt status.” (emphasis added)); *Unrelated Business Income Taxes (UBIT) in a Nutshell*, AM. INST. OF CPAS, <https://www.aicpa.org/InterestAreas/NotForProfit/Resources/TaxCompliance/Pages/UBITinaNutshell.aspx> [<https://perma.cc/TE6K-PCN6>] (“[Nonprofits] can lose their tax-exempt status if the IRS determines that the percentage of their income that is from business activities unrelated to their specific exempt purposes is *excessive*.” (emphasis added)).

309. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985).

310. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

311. Pianko, *supra* note 20, at 36 (quoting *Portland Terminal*, 330 U.S. at 152).

exempt purpose easily fits “labor[ing] in the service of a cause they believe in,”³¹² an intern working in a commercial purpose—one that would be subject to unrelated business income tax—is much harder to fit into the *Portland Terminal* holding.

That said, both nonprofit managers and the DOL would likely struggle logistically to apply and enforce such an exception. Nonprofit interns may—and probably would—work across both commercial and exempt purpose activities.³¹³ This puts nonprofits in the difficult position of either limiting interns to working on certain tasks or only paying interns for the work they do in commercial activities. Furthermore, the line between exempt purpose activities and commercial activities is not always clear, especially in comparison to the other exceptions proposed below.³¹⁴

2. *An Exception for Interns Who Work at Public Charities, But Not for Those Who Work for Private Foundations*

Under the second possible exception, 501(c)(3) organizations that are public charities would be allowed to have unpaid interns, while those that are private foundations would not. A preference for public charities already exists in the tax code,³¹⁵ and allows for easy line drawing. It also aligns, for the most part, with the policy goal of differentiating between organizations that can afford to pay interns and those that cannot.

The split between public charities and private foundations is an important division among 501(c)(3) organizations. Private foundations generally have a higher concentration of wealth and historically have

312. *Id.*

313. See Hannah S. Ostroff, *How to Manage Interns to Drive Your Nonprofit's Mission this Summer*, CAPTERRA: NONPROFIT TECH. BLOG (June 25, 2015), <http://blog.capterra.com/how-to-manage-interns-nonprofits-mission-this-summer/> [<https://perma.cc/G9SH-VSTA>] (suggesting that “an intern could make a great event planning assistant for the fundraising gala coming up in a few months, or writing posts for your organization’s blog”).

314. FISHMAN & SCHWARZ, *supra* note 307, at 605 (“The ‘substantially related’ test is more difficult to apply. The regulations offer little more than abstract generalizations . . .”). Take, for example, Revenue Ruling 73-105, which involved gift shop sales at a tax-exempt art museum. The gift shop sold art-related items including reproductions of artistic works and art literature, as well as non-art-related items like scientific books and local souvenirs. The IRS deemed that income from the sale of art-related items was related to the museum’s organizational purpose, whereas income from the sale of non-art-related items was not. The income from non-related items thus had to be separated out and taxed accordingly under the unrelated business income provisions. Rev. Rul. 73-105, 1973-1 C.B. 264.

315. See, e.g., I.R.C. § 507(c)–(d) (imposing certain taxes on private foundations which are not imposed on public charities); FISHMAN ET AL., *supra* note 306, at 450–52 (explaining the private foundation excise tax regime in detail).

been seen as more susceptible to abuse or use for tax evasion,³¹⁶ so they are subject to greater regulation by the IRS.³¹⁷ On the other hand, public charities have fewer regulatory requirements but are harder to form. A new 501(c)(3) organization is presumed to be a private foundation unless it presents evidence to the contrary.³¹⁸ To be classified as a public charity, an organization must demonstrate that it is either one of a select subset of organizations,³¹⁹ or that it receives a certain portion of its total support from public sources.³²⁰ An exception favoring public charities tracks the legislative preference behind these provisions of the Code.

The line between private foundations and public charities is very clear, unlike the one between organizational purpose and commercial activities. The IRS generally classifies organizations as one or the other immediately upon conferring tax-exempt status.³²¹ Although a public charity can lose its status and be reclassified as a private foundation, this occurs only with significant lead time.³²² An exception narrowed along this line would therefore be easy to implement.

Private foundations are also generally in a better position to pay interns without suffering some of the consequences raised supra in section III.C.1. These organizations tend to have a higher amount of financial capital than public charities and are therefore unlikely to be

316. *Tax Abuse of Charitable Organizations: Before the U.S. Senate Committee on Finance*, 108th Cong. 4–5 (2004) (Statement of Jay D. Adkisson) (June 22, 2004), <http://www.finance.senate.gov/imo/media/doc/062204jatest.pdf> [<https://perma.cc/ZPG4-BEBU>]; FISHMAN & SCHWARZ, *supra* note 307, at 712.

317. *Private Foundations*, IRS.GOV, <https://www.irs.gov/charities-non-profits/charitable-organizations/private-foundations> [<https://perma.cc/3XNQ-UWTG>] (noting five extra restrictions on private foundations).

318. *Id.* (“Even if an organization falls within one of the categories excluded from the definition of private foundation, it will be presumed to be a private foundation, . . . unless it gives timely notice to the IRS that it is not [one].”).

319. I.R.C. §§ 509(a)(1), 170(b)(1)(A) (churches, schools, hospitals, medical research organizations, agricultural research organizations, and governmental units).

320. *Id.* § 509(a)(2) (providing that one-third of its annual support must come from public sources, and no more than one-third of its annual support may come from the sum of investment income and unrelated business income).

321. *See Private Foundations*, *supra* note 317 (“Generally, organizations use Form 1023, *Application for Recognition of Exemption*, for this purpose.”).

322. *Advance Ruling Process Elimination - Public Support Test*, IRS.GOV, <https://www.irs.gov/charities-non-profits/charitable-organizations/advance-ruling-process-elimination-public-support-test> [<https://perma.cc/FL7W-VSQZ>] (stating that an organization’s public charity status is reassessed on an annual basis starting five years after its tax exemption is obtained, and that an organization that meets the public support test in a given year is classified as a public charity for the two years following).

forced out of the market.³²³ There would still be a large number of internships available, as low-budget public charities would not be prevented from offering them due to cost.

An exception for public charities would not, however, account for a policy concern raised in the Johnson Note. Many large public charities are sophisticated corporate entities that are almost indistinguishable from their for-profit counterparts.³²⁴ Allowing these nonprofits a privileged status with regard to interns would further contribute to the inefficiency outlined in section III.B.2. The size-based exception articulated below, however, will better address this specific concern.

3. *An Exception for Interns Who Work at Small Nonprofits, as Determined by the Organization's Annual Tax Filing*

With the final potential exception, small nonprofits would not have to pay interns, while large nonprofits would be required to do so. But how big is too big? Fortunately, the IRS already breaks down 501(c)(3) organizations by size in a way an exception could easily track. This exception would provide the same advantages of the public charity/private foundation distinction above, but with additional benefits.

The IRS distinguishes between organizations by size for the purposes of annual filing requirements.³²⁵ Despite their tax-exempt status, most 501(c)(3) organizations are required to file an annual return (Form 990) in some format.³²⁶ The breakdown of what organizations file which form, determined by gross receipts and assets, is as follows:

323. Per 2013 statistics, the average assets of a public charity were just over \$3 million, while the average assets of a private foundation were more than double that, at \$6.5 million. *Compare Number of Public Charities in the United States, 2013*, NAT'L CTR. FOR CHARITABLE STATS., <http://nccsweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PC> [https://perma.cc/466B-VAFW] (dividing total assets by total number of public charities to get \$3,064,751.86), *with Number of Private Foundations in the United States, 2013*, NAT'L CTR. FOR CHARITABLE STATS., <http://nccsweb.urban.org/PubApps/profileDrillDown.php?state=US&rpt=PF> [https://perma.cc/TP8Q-WBCK] (dividing total assets by total number of private foundations to get \$6,421,856.65). *But see* King McGlaughon, *Think You Know Private Foundations? Think Again.*, STAN. SOC. INNOVATION REV. (Jan. 2, 2014), https://ssir.org/articles/entry/think_you_know_private_foundations_think_again [https://perma.cc/XMG6-SC7T] (noting that for private foundations, the average is a misrepresentation as two-thirds have endowments of less than \$1 million).

324. Johnson, *supra* note 18, at 1158.

325. Treas. Reg. § 1.6033-2(a)(2)(i); *see also* *Which Forms Do Exempt Organizations File?*, IRS.GOV, <https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in> [https://perma.cc/2VYA-3QBD] [hereinafter *IRS Filing Requirements*].

326. Treas. Reg. § 1.6033-2(a)(1). A few categories of 501(c)(3) organizations are exempt from filing requirements, including religious organizations, subsidiaries of other nonprofits which are

Table 1:
IRS Filing Requirements by Organization Type and Size³²⁷

Status	Form to File
501(c) organization with gross receipts normally \leq \$50,000	990-N
501(c) organization with gross receipts $<$ \$200,000 and total assets $<$ \$500,000	990-EZ
501(c) organization with gross receipts \geq \$200,000, or total assets \geq \$500,000	990
Private foundation, regardless of financial status	990-PF

Like the public charity/private foundation line, it would be relatively easy for the IRS to offer an exception to certain nonprofits by size. As shown in Table 1, 501(c) organizations are required to file one of four tax forms on an annual basis dependent on their gross receipts and assets.³²⁸ While the exact numbers attached to each form may be adjusted over time,³²⁹ tying an exception to the specific form an organization must file would likely provide long-term consistency. An exception that allows unpaid interns at 501(c)(3) organizations eligible to file the 990-N or 990-EZ, but not at those who must file the regular 990 or 990-PF, would effectively encompass the exception proposed in section IV.C.2 while further narrowing it for public charities above a certain size. Therefore, a filing-based exception would address the same policy concerns articulated above along with excluding the “sophisticated corporate entities” Johnson mentions.³³⁰

The potential tradeoff of this exception is swinging too far in the opposite direction—excluding too many “middle class” public charities

covered under a group return, government corporations, and state institutions that provide essential services. *Id.* § 1.6033(2)(g).

327. *IRS Filing Requirements*, *supra* note 325.

328. *Id.*

329. See *Exempt Organizations Annual Reporting Requirements – Overview (Who Must File and Return Required)*, IRS.GOV, https://www.irs.gov/pub/irs-tege/faqs_annualreporting_overview.pdf [<https://perma.cc/4U5V-7BLZ>] (indicating that the 990 filing threshold would be raised from \$25,000 to \$50,000 in 2010, and that organizations which previously had no filing requirement would be required to file the 990-N starting in 2008).

330. Johnson, *supra* note 18, at 1158.

who may be just above the threshold for filing a regular 990, but don't have a large enough budget to reasonably support paid interns. More than 932,000 organizations (including all 501(c)s) were projected to file a return other than the 990-PF in 2015, and roughly 49% of them were projected to file the regular 990, compared to 18% for the 990-EZ and 33% for the 990-N.³³¹

However, looking at statistics as of August 2016, roughly 440,000 reporting public charities showed the following breakdown in terms of revenue and assets:

Table 2:
Public Charities by Revenue and Assets, August 2016³³²

Total Revenue	% Reporting Charities	Total Assets	% Reporting Charities
< \$100,000	48	< \$100,000	51
\$100,000–249,000	17	\$100,000–249,000	12
\$250,000–499,999	10	\$250,000–499,999	9
\$500,000–999,999	7	\$500,000–999,999	7
\$1–5 mil.	10	\$1–5 mil.	12
\$5–10 mil.	2	\$5–10 mil.	3
\$10–100 mil.	3	\$10–100 mil.	4
> \$100 mil.	1	> \$100 mil.	1

While this data set does not directly track the 990 filing increments, it shows that a relatively small percentage of public charities fall into the “middle class” area where they must file the regular 990 but have sub-million dollar assets and revenues. Only a combined 17% have revenues between \$250,000 and \$1 million, while only 7% have assets in the range of \$500,000 to \$1 million.³³³ This indicates that although there is a downside to a filing-based exception, its overall effects may be minimal compared with the other proposals.

331. See Brett Collins, *Projections of Federal Tax Return Filings: Calendar Years 2009–2016*, IRS.GOV: STATS. OF INCOME BULL., fig.A (Winter 2010), <https://www.irs.gov/pub/irs-soi/10winbulreturnfilings.pdf> [<https://perma.cc/C4SH-W8SZ>].

332. *Registered Nonprofit Organizations by Level of Total Assets (BMF 08/2016)*, NAT'L CTR. FOR CHARITABLE STATS., <http://nccsweb.urban.org/tablewiz/showreport.php> [<https://perma.cc/J8JL-UF2D>].

333. *Id.*

Ultimately, Congress will have to decide who to favor and who to burden with any decision related to FLSA exceptions. An activities-based exception would create logistical headaches for nonprofit managers, while a filing-based exception would leave a “donut hole” for middle-class organizations. An exception for public charities would add to an already-existing regulatory burden on private foundations. But any of the proposals described above would provide a better balance of burdens than what currently exists under the broad exception framework.

CONCLUSION

Glatt v. Fox Searchlight is only one in a long line of cases debating who must be paid a minimum wage under the FLSA.³³⁴ The most significant thing that has emerged from that debate is confusion over whether interns and similar individuals are “employees” as defined by the statute. This lack of clarity is even more challenging for nonprofits than for-profits, as many lack the resources to seek legal assistance on the matter.³³⁵

A broad exception would make things easier for nonprofits but at this time lacks a strong foundation in law.³³⁶ Without such a foundation, an “illusory exemption” only creates more uncertainty for nonprofits while making life harder for interns.³³⁷ A broad exception is also in conflict not only with the goals of the FLSA but also with the case law interpreting it.³³⁸

Instead, a narrow exception is the answer. A narrow nonprofit exception would track legislative intent, fit within existing Supreme Court precedent, and address many of the policy concerns inherent within the issue.³³⁹ Tax law offers an easy route to such an exception.³⁴⁰ Any of the three possible exceptions outlined in this Comment would also have the merits of being both easy to implement and already familiar to the nonprofit sector. Congress should move to amend the FLSA and adopt a narrow exception on one or more of these grounds.

334. *See supra* Parts I & II.

335. *See supra* section III.A.

336. *See supra* section III.B.

337. Harthill, *supra* note 15, at 601. *See also supra* notes 260–63 and accompanying text.

338. *See supra* section IV.A.

339. *See supra* section IV.A.

340. *See supra* section IV.B.