No. 13-179

IN THE
SUPREME COURT OF THE UNITED STATES

RISA KAPLAN and LINDA O'NEILL,
Petitioners,

vs.

CODE BLUE BILLING & CODING, INC., LINDA M. YON; and EAST FLORIDA EYE INSTITUTE
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

A clearly articulated circuit split exists concerning which test courts must use to determine whether an intern qualifies as an "employee" under the Fair Labor Standards Act (FLSA). 29 U.S.C. § 203(e)(1) (2012). Although all circuit courts refer to this Court's precedent in *Walling v. Portland Terminal*, 330 U.S. 148 (1947) to make such a determination, contrary to Respondents' contentions, they use three functionally different tests that often yield different results on the same facts. The Eleventh Circuit applies an economic realities test; the Fourth, Fifth, and Sixth Circuits apply a primary benefits test; and the Tenth Circuit and lower courts within the Second Circuit apply a totality of the circumstances test rooted in the Department of Labor's (DOL), Wage and Hour Division's (WHD) six-factor test. *See infra* § I.A.

Although Respondents call the circuit split "illusory," Resp. Br. 9, federal courts have expressly recognized this split, and criticized competing tests. As described fully in Petitioners' opening brief ("Pet'r's Br.), had the Eleventh Circuit applied a primary benefits test, instead of the economic realities or DOL six-factor test, the outcome likely would have been different.

Additionally, contrary to Respondents' characterization, there is also a clearly defined circuit split concerning the level of deference to afford the DOL's six-factor test. Finally, Respondents neglect to address Petitioners' argument that at least portions of the DOL's test

violate this Court's precedent in both *Portland Terminal* and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985).

ARGUMENT

I. Circuit and District Courts Acknowledge a Circuit Split Concerning the Proper Test to Determine Whether an Intern is an "Employee" Under the FLSA.

Far from a difference of mere "terminology," as Respondents contend (Resp. Br. 9), federal courts throughout the country have expressly noted the existence of different tests to determine whether an intern is an "employee" under Section 203(e)(1) of the FLSA. Although courts consider *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), they have derived analytically and functionally distinct tests from this Supreme Court precedent, which lead to different outcomes on the same or similar facts.

For example, the Sixth Circuit stated: "There is no settled test for determining whether a student is an employee for purposes of the FLSA." *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 521 (6th Cir. 2011). Recently, the Southern District of New York, after applying the DOL's six-factor test to determine whether workers were "trainees" or "employees" under the FLSA, and after expressly rejecting the "primary benefits" test, certified this issue for interlocutory appeal precisely because "application of a standard different from the one adopted by [that] Court could result in the reversal

of a final judgment." *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 WHP, 2013 WL 5405696, at *2 (S.D.N.Y. Sept. 17, 2013), *motion to certify appeal granted,* 11 Civ. 6784 WHP, (S.D.N.Y. July 25, 2013).[1] Moreover, the *Fox* court noted other circuits have applied the primary benefits test it rejected, but had it applied that test, the outcome likely would have been different. *See id.* (citing *Laurelbrook*, 642 F.3d at 525; *Blair v. Willis*, 420 F.3d 823, 829 (8th Cir. 2005); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989)). The Southern District of New York noted the existence of both an intra-district split and a circuit split. *Id.*

Indeed, the fact that circuit courts have reversed lower courts precisely *because* they applied the incorrect standard to determine whether a student was an employee under the FLSA demonstrates the tests are functionally distinct. For example, the Fourth Circuit in *Ensley* overturned the lower court's application of the DOL's six-factor test, and instead applied the primary benefits test. 877 F.2d at 1208-10. The appellate court reversed the district court's finding that individuals who had spent a week training by shadowing employees and helping them in their tasks were not "employees" under the FLSA. *Id.*

[1] Although the Second Circuit has not yet determined which test is appropriate to determine whether an intern is an employee under the FLSA, when it does, this will not resolve the circuit split; it will further exacerbate the already-established circuit split. *See, e.g.,* Pet'r's Br. § I. (addressing the circuit split fully).

Specifically, the Fourth Circuit held that had the district court applied the correct primary benefits test, it would have been required to consider "the nature of the training experience" and "whether [the defendant] or the new workers principally benefited from the weeklong orientation arrangement." *Id.* at 1209. Both of these factors demonstrated that, despite the shadowing and training, "the very limited and narrow kinds of learning that took place," and the fact that "the trainees were taught only simple specific job functions related to [the defendant's] own business" meant they were employees, not trainees. *Id.* at 1210. Thus, on the *same facts*, the application of different tests yielded different results and the application of the incorrect test was reversible error.

Moreover, circuit courts and lower courts have criticized the use of competing tests to determine whether an intern is an employee under the FLSA. If the tests were functionally the same, there would be no need for circuit courts to elect one test over another. For example, the Sixth Circuit has criticized the economic realities test, which the Eleventh Circuit used in this case to conclude the students were not "employees" under the FLSA: "To state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves. There must be some ultimate question to answer, factors to balance, or some combination of the two." *Laurelbrook*, 642 F.3d at 522-23.

Similarly, the Sixth and Fourth Circuits have rejected the DOL's six-factor test. *See id. at* 525 (finding the DOL test "to be a poor method for determining employee status in a training or educational setting"); *Ensley*, 877 F.2d at 1209 n.2 (noting it does not apply the DOL test because case law within the circuit better articulates the primary beneficiary test as the applicable standard).

Rejecting both the economic realities and DOL six-factor tests, the Sixth Circuit has held the primary benefits test "readily captures the distinction the FLSA attempts to make between trainees and employees," and most closely resembles the inquiry suggested by this Court's decision in *Portland Terminal. Laurelbrook*, 642 F.3d at 529 (citations omitted); *see also Portland Terminal,* 330 U.S. at 153 (analyzing whether the training "*most greatly benefit[ted]*" the trainee).

The Tenth Circuit and the Southern District of New York, on the other hand, reject the primary benefits test, and apply a totality of the circumstances test rooted in the DOL's six-factor test. *See, e.g., Reich v. Parker Fire Prot. Dist.*,, 992 F.2d 1023, 1026 (10th Cir. 1993); *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 WHP, 2013 WL 2495140, at *11 (S.D.N.Y. June 11, 2013) (holding the primary beneficiary test "has little support in [*Portland Terminal*]" because "[t]he Supreme Court did not weigh the benefits to the trainees against those of the railroad, but relied on findings that the training program served only the

trainees' interests and that the employer received 'no "immediate advantage" from any work done by the trainees.'") (quoting *Portland Terminal*, 330 U.S. at 153).

Thus, circuit and district courts alike acknowledge distinct tests have emerged for determining whether an intern is an employee under the FLSA.

II. Had the Eleventh Circuit Applied the Primary Benefits Test, it Likely Would have Reached a Different Outcome.

Respondents argue circuit and lower courts all consider the "relative benefits to the trainees versus the benefits and burdens to the employer." Resp. Br. 7. Neither *Portland Terminal* nor any of the recent cases, including Petitioners' cases, however, discussed "relative benefits" as the applicable test. As demonstrated in Petitioners' opening brief, and further herein, had the Eleventh Circuit considered additional evidence concerning the nature of Petitioners' training and educational experience, which is required under the primary benefits test, it likely would have reached a different conclusion.

The Eleventh Circuit in this case applied an economic realities test and, alternatively, the DOL six-factor test to conclude the Petitioners were not "employees" under the FLSA. App. A-7. It did not, however, consider other factors relevant to the primary benefits test. *See* Pet'r's Br. §§ I.A & I.B.; App. A-6-A-7. The panel relied on *Donovan v. New*

Floridian Hotel, Inc., 676 F.2d 468, 470-71 (11th Cir. 1982) to support its use of the economic realities test, but that case did not concern the so-called "trainee" exception to the FLSA, nor did it otherwise analyze the application of *Portland Terminal* to facts akin to the working situation of an intern. Indeed, the Eleventh Circuit's economic realities test has never before been applied to the "trainee" circumstance and most often applies in the context of determining whether an independent contractor is an "employee" under the FLSA, which is not derived from *Portland Terminal*. *See, e.g., Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013); *see also* Pet'r's Br., § I.A.2-3.

The Eleventh Circuit's economic realities test has been expressly criticized by the Sixth Circuit for its imprecision and conclusory approach. *Laurelbrook*, 642 F.3d at 522-523. Specifically, although an employment relationship "is not fixed by labels that parties may attach to their relationship nor by common law categories nor by classification under other statutes," to state that such a relationship is governed by economic realities does nothing more than state a conclusion. *Id.* (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950)).

Here, Respondents contend the Eleventh Circuit, even if applying what it termed an "economic reality" test, nevertheless considered the "relative benefits to the trainees versus the benefits and burdens to the employer." Resp. Br. 7, 9. Neither this analysis, nor the economic realities

test, however, takes into consideration the full nature, depth, and quality of the educational and training experience, as required under the primary benefits test.

First, the economic realities test emphasizes, as the name connotes, the *economics* of the arrangement, but it does not determine to whom the *primary* benefit flows, economic or otherwise; nor does it evaluate the quality or sufficiency of the educational experience. There is simply no indication the Eleventh Circuit assessed who was the primary beneficiary of the work relationship in this case. Rather, the panel made clear it was focusing on "'the economic realities' of the relationship, including whether a person's work confers an economic benefit on the entity for whom they are working." App. A-6 (citing *New Floridian*, 676 F.2d at 470). *Cf. Laurelbrook*, 642 F.3d at 526-28 (analyzing with approval *Marshall v. Baptist Hosp.*, 473 F. Supp. 465, 474-76 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981), which assessed whether the educational program at issue was "sound" and considered the sufficiency of the training and supervision).

In this vein, the panel noted the Defendants spent half their time away from their duties training Plaintiffs, and the Plaintiffs made the Defendants' businesses run "less efficiently," causing at least "some duplication of effort." App. A-7. Notably absent from the panel's assessment, however, was any analysis about "the very limited and narrow kinds of learning that took place," the

specific functions the Petitioners learned or an analysis concerning whether they were "taught only simple specific job functions related to [the defendant's] own business." *See Ensley*, 877 F.2d at 1209-10 (applying these factors under a primary benefits test and arriving at a different conclusion than the district court when it applied the DOL's six-factor test); *see also Laurelbrook*, 642 F.3d at 527-528 (discussing *Baptist Hospital*, 668 F.2d at 235 and noting "the training was deficient, [and] the educational benefits were slight"); *id.* ("[B]ecause the trainees were shortchanged educationally," the court found the employer was "the primary benefactor from the relationship between it and the trainees.").

Here, the evidence demonstrated Petitioners did not emerge from the program trained generally for jobs in medical coding and billing, but rather were merely trained to work for Respondents. *See* App. A-6-8; *see also* App. B-10 (stating she "did not apply what [she] was learning at school while [she] was working at Code Blue . . . [because] [she] spent all of [her] time on one aspect of medical billing."). Indeed, Petitioners performed rote and repetitive tasks, including spending 80% to 99% of their time checking the status of insurance claims. *See* App. B-3; App. C-2.

Additionally, rather than assess the quality of Petitioners' training at Respondents' businesses, the panel relied chiefly on two factors that cannot be considered under this Court's precedent: (i) Petitioners received academic credit for their work,

and (ii) Petitioners were eligible to earn their degrees. App. A-6; A-7. Whether the student receives academic credit and was able to earn her degree does not mean the primary benefit of the relationship inured to the employer. *See, e.g., Laurelbrook*, 642 F.3d at 523-24 (rejecting the argument that no vocational students can be "employees" under the FLSA because a "full consideration of the realities surrounding its program" is required under *Portland Terminal*); *see also* Pet'r's Br. § II. Indeed, no one factor is dispositive under the primary benefits analysis.

For all these reasons, had the Eleventh Circuit analyzed the entirety of Petitioners' educational experience, or lack thereof, under the primary benefits test, the outcome would have been different.

III. There is an Important Circuit Split Concerning the Level of Deference, If Any, Afforded the DOL's Six-Factor Test.

Respondents contend there is no circuit split concerning the level of deference afforded to the DOL's six-factor test. At least one Circuit Court has expressly articulated the split:

> Courts differ on whether the [DOL] test is entitled to controlling weight in determining employee status in a training context. Some courts have said that the test is entitled to "substantial deference." *See, e.g., Atkins v. Gen. Motors Corp.,* 701 F.2d 1124, 1128 (5th Cir. 1983). Others have rejected it

> altogether. *See, e.g., McLaughlin v. Ensley,* 877 F.2d 1207, 1209-10 & n.2 (4th Cir. 1989). Still others strike a balance and consider the factors as relevant but not dispositive to the inquiry. *See, e.g., Reich v. Parker Fire Prot. Dist.,* 992 F.2d 1023, 1027 (10th Cir. 1993); *see also Harris v. Vector Mktg. Corp.,* 753 F. Supp. 2d 996, 1006-07 (C.D. Cal. 2010).

Laurelbrook, 642 F.3d at 525.

Respondents also deny certain circuits have rejected the DOL test outright. But the Sixth and Fourth Circuits afford the DOL's six-factor test no deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). *See Laurelbrook*, 642 F.3d at 525 (finding the DOL test to be "rigid," "a poor method for determining employee status in a training or educational setting," and inconsistent with *Portland Terminal*, which "suggests that the ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed."); *Ensley*, 877 F.2d at 1209 n.2 (noting it did not rely on the DOL six-factor test because its "clear precedent," which dictates the application of the primary benefits test, provided the "proper analysis") (citations omitted).

The Tenth Circuit, on the other hand, has found the DOL test is entitled to diminished persuasive force because there is little support for the test's "all or nothing" approach, which is inconsistent with past WHD interpretations and opinions endorsing a flexible approach. *See Parker Fire,* 992 F.2d at 1026-27. The Southern District of New York

noted the DOL's Fact Sheet No. 71 has only "add[ed] to the confusion," because it simultaneously requires all six factors be met in order for the intern to be exempt from FLSA coverage and encourages courts to consider "all of the facts and circumstances of each such program." *Wang v. Hearst Corp.*, 12 CV 793 HB, 2013 WL 1903787, at *4 (S.D.N.Y. May 8, 2013); *see also* DOL Fact Sheet No. 71, App. F.

In this case, the Eleventh Circuit panel held the DOL six-factor test, although not "controlling," was "pertinent" to determining whether an intern qualifies as an employee under the FLSA. App. A-7-8. It concluded all the factors were present, but did not analyze whether all must be satisfied in order to meet the "trainee" exception. *See id.* (citing *Skidmore*, 323 U.S. at 140). Additionally, even under the DOL's six-factor test, the panel did not assess to whom the primary benefit flowed or the quality of the educational experience, which violates this Court's precedent in *Portland Terminal*. App. 7-8.

IV. Respondents Ignored Petitioners' Argument that the DOL's Six-Factor Test Conflicts with This Court's Precedent in *Portland Terminal* and *Tony & Susan Alamo Foundation.*

Respondents ignore Petitioners' argument that the DOL test violates this Court's precedent in *Portland Terminal* and *Tony & Susan Alamo Foundation*, despite the recognition of such by several courts. App. A-7-8. The panel's consideration of the DOL factors conflicts with

Portland Terminal because this Court made clear the nature of the work and training, should be considered without limitation. *See* 330 U.S. at 152-53. Indeed, there is nothing in *Portland Terminal* to suggest either that all of the DOL factors must be satisfied or that courts should not consider factors beyond the six factors the DOL expressly identified. *See Parker Fire*, 992 F.2d at 1026-28 (rejecting the "all or nothing" approach as unsupported by *Portland Terminal*).

Finally, the sixth DOL factor concerning whether the intern understands she is not entitled to wages, conflicts with this Court's precedent in *Tony & Susan Alamo Foundation*. DOL Fact Sheet No. 71, App. F. This Court has made clear a worker cannot waive her protections under the FLSA. *Tony & Susan Alamo Foundation*, 471 U.S. at 302; *see also Fox Searchlight*, 2013 WL 2495140, at *13 (disregarding this factor entirely because it violates this Court's precedent in *Tony & Susan Foundation*).

Thus, the DOL six-factor test violates this Court's precedent.

CONCLUSION

For all these reasons, this Court should grant this Petition on the questions presented.

Dated: October 21, 2013 Respectfully submitted,

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