THE *FOX SEARCHLIGHT* SIGNAL: WHY *FOX SEARCHLIGHT* MARKS THE BEGINNING OF THE END FOR PREFERENTIAL TREATMENT OF UNPAID INTERNSHIPS AT NONPROFITS

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INTRODUCTION

FOR-PROFIT corporations throughout the United States are celebrating the U.S. Court of Appeals for the Second Circuit's recent holding regarding the legality of unpaid internships in *Glatt v. Fox Searchlight Pictures, Inc.*[1] Despite the Department of Labor's ominous warnings to businesses prior to the court's decision,[2] the Second Circuit adopted a business-friendly "primary beneficiary" test for evaluating unpaid internship programs under the Fair Labor Standards Act ("FLSA").[3] Under this test, employers at for-profit entities do not have to pay their interns if the interns are the "primary beneficiary" of the business relationship. The persuasiveness of this test in other circuits remains to be seen. Although the test for unpaid interns will likely be the next great circuit split in employment law,[4] the *Fox Searchlight* opinion also signals the beginning of another high-stakes legal battle. Charitable nonprofits should not be celebrating this opinion—they should be calling their lawyers. This Note argues that *Fox Searchlight* signals that un-

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[1] 811 F.3d 528 (2d Cir. 2016).

[2] See Steven Greenhouse, The Unpaid Intern, Legal or Not, N.Y. Times, Apr. 3, 2010, at B1 (quoting the acting director of the U.S. Department of Labor's Wage and Hour Division as saying that "[i]f you're a for-profit employer . . . there aren't going to be many circumstances where you can have an internship and not [pay] and still be in compliance with the law").

[3] Fair Labor Standards Act, 29 U.S.C. §§ 201, 203(e)(1) (2012); *Fox Searchlight*, 811 F.3d at 536 (applying a "primary beneficiary" test in examining the definition of "employee" under the Fair Labor Standards Act).

[4] Circuits are currently split on the application of the Labor Department's articulation of the analogous "trainee" exception. It is plausible that history will repeat itself with the intern exception. See Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993) (adopting the Labor Department's factors but applying them under a totality of the circumstances approach); McLaughlin v. Ensley, 877 F.2d 1207, 1209 & n.2 (4th Cir. 1989) (declining to rely on the Labor Department test and instead applying "the general test . . . [of] whether the employee or the employer is the primary beneficiary of the trainees' labor"); Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1127–28 (5th Cir. 1983) (giving "substantial deference" to the Wage and Hour Administrator's trainee exception); see also Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010) (adopting a totality of the circumstances approach for the trainee exception).

paid internships at charitable nonprofits are not entitled to preferential treatment under the Act, and it predicts that lawsuits will not be far behind.

Despite the fact that for-profit corporations have been transitioning away from unpaid internships in the wake of lawsuits,[5] nonprofits throughout the United States still routinely employ unpaid interns.[6] The stakes for charitable nonprofits in this practice are extraordinarily high. There are over one million charitable nonprofits in the United States,[7] and approximately forty percent of unpaid internships are affiliated with these nonprofit entities.[8] The nonprofit sector also provides more unpaid internships than either the government or the private sector.[9] But thus far suits only appear to have been brought against for-profit businesses.[10] The absence of cases targeting unpaid internships at nonprofits is especially surprising because the Act does not statutorily exempt nonprofits from paying interns. This anomaly might be explained by the fact that the Labor Department took an official stance on the issue in 2010, using

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[5] See Suzanne Lucas, Conde Nast Ends Internship Program: Will Others Follow Suit?, CBS: MoneyWatch (Oct. 24, 2013, 8:17 AM), http://www.cbsnews.com/news/conde-nast-ends-internship-program-will-others-follow-suit [https://perma.cc/65WA-9K4A]; see also Josh Sanburn, The Beginning of the End of the Unpaid Internship, Time, May 2, 2012, http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it (noting that employers are changing their internship policies in the wake of litigation).

[6] Nat'l Ass'n of Colls. & Emp'rs, The Class of 2013 Student Survey Report 35 (2013), http://career.sa.ucsb.edu/files/docs/handouts/2013-student-survey.pdf [https://perma.cc/AD2S-V47U] (noting that 62% of unpaid internships are hosted by nonprofits or a government employer).

[7] Quick Facts About Nonprofits, Nat'l Ctr. for Charitable Statistics, http://nccs.urban.org/statistics/quickfacts.cfm [https://perma.cc/QJ2S-37AR].

[8] Steven Rothberg, 63.2% Graduate with Experience Due to Completion of Internship or Co-op, Coll. Recruiter (June 19, 2013), https://www.collegerecruiter.com/blog/2013/06/19/63-2-graduate-with-experience-due-to-completion-of-internship-or-co-op [https://perma.cc/9AGR-AVZZ].

[9] Id. (explaining that nonprofits provide 40.7% of unpaid internships, for-profits provide 38.1%, and the government provides the remaining 21.2%). Over 60% of students in the class of 2013 took part in an internship or co-op during their college years. Almost half of those internships were unpaid, and about 40% of these unpaid internships took place at nonprofits. Id. This suggests that approximately 12% of all college students are potential plaintiffs if unpaid internships at charitable nonprofits violate the Fair Labor Standards Act ("FLSA").

[10] Susan Adams, Is the Unpaid Internship Dead?, Forbes (June 14, 2013, 11:47 AM), http://www.forbes.com/sites/susanadams/2013/06/14/is-the-unpaid-internship-dead/#7fb1b12a1458 (discussing suits brought against for-profit businesses in the wake of the ruling against Fox Searchlight Pictures).

a footnote in a "Fact Sheet" to state that unpaid internships at charitable nonprofits[11] are "generally permissible."[12] Unfortunately for charitable nonprofits, the Second Circuit held in *Fox Searchlight* that the Fair Labor Standards Act is not ambiguous regarding unpaid internships and that Fact Sheet #71 is only entitled to *Skidmore* deference.[13] Fact Sheet #71 is therefore only entitled to deference to the extent that its reasoning is persuasive to courts.

Although the Second Circuit did not explicitly reject Fact Sheet #71's assertion that unpaid internships at charitable nonprofits are "generally permissible," it left charitable nonprofits protected by the mere "power to persuade" of *Skidmore* deference.[14] This Note concludes that the Department of Labor will be unable to persuade courts that unpaid internships at nonprofits fall outside the scope of the Fair Labor Standards Act and that the public policy goals of the Act support holding unpaid internships at nonprofits to the same standard as for-profits. This Note stands alone in its argument that America's unpaid internships hosted by charitable nonprofits are not preferenced by the Fair Labor Standards Act. It also provides a breath of fresh air to this issue; law reviews are inundated with scholarship concerning for-profit unpaid internships and

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[11] This Note looks somewhat skeptically on the "charitable" aspect of "charitable nonprofits." The distinction between charitable nonprofits and nonprofits generally narrows the scope of the Labor Department's exception, but the assertion is still incredibly broad. Charitable nonprofits comprise the bulk of nonprofit institutions in the United States, making up over two-thirds of the nonprofit sector. Quick Facts About Nonprofits, supra note 7. And some of the biggest charitable nonprofit organizations are virtually indistinguishable from their for-profit counterparts. See Ray D. Madoff, Op-Ed., How the Government Gives, N.Y. Times, Dec. 7, 2013, at A21 (arguing that nonprofit hospitals are indistinguishable from for-profit hospitals). For an example that might be closer to home, public interest law firms are designated as charitable nonprofits and frequently rely on the labor of unpaid interns. See IRS, Internal Revenue Manual § 4.76.9, Public Interest Law Firms (2001), https://www.irs.gov/irm/part4/irm_04-076-009.html [https://perma.cc/973Q-G27F]; Susan Harthill, Shining the Spotlight on Unpaid Law-Student Workers, 38 Vt. L. Rev. 555, 563–70 (2014).

[12] U.S. Dep't of Labor, Wage & Hour Div., Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act (2010) [hereinafter Fact Sheet #71], http://www.dol.gov/whd/regs/compliance/whdfs71.pdf [https://perma.cc/TE3K-S36Y].

[13] *Fox Searchlight*, 811 F.3d at 534–36 ("And as DOL concedes . . . this interpretation is entitled, at most, to *Skidmore* deference to the extent we find it persuasive."); see also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (stating that the weight given to an agency interpretation depends on "all those factors which give it power to persuade").

[14] See *Fox Searchlight*, 811 F.3d at 536; see also *Skidmore*, 323 U.S. at 140 (describing the "power to persuade" standard).

the possibility of a circuit split.[15] In contrast, only a handful of scholars have written on unpaid internships at nonprofits, and these scholars are universally in favor of extending nonprofits more protection than for-profit entities under the Act.[16] This Note draws support for its conclusion from the first court of appeals opinion on unpaid internships and ex-

[15] As of September 2015, law reviews had published six pieces year-to-date discussing the proper test for evaluating the legality of unpaid internships at for-profit entities. See Cody Elyse Brookhouser, Note, Whaling on *Walling*: A Uniform Approach to Determining Whether Interns Are "Employees" Under the Fair Labor Standards Act, 100 Iowa L. Rev. 751, 768 (2015); Paul Budd, Comment, All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor, 63 U. Kan. L. Rev. 451, 459–60 (2015); Jaclyn Gessner, Note, How Railroad Brakemen Derailed Unpaid Interns: The Need for a Revised Framework to Determine FLSA Coverage for Unpaid Interns, 48 Ind. L. Rev. 1053, 1081 (2015); Madiha M. Malik, Note, The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA, 47 Conn. L. Rev. 1183, 1192–94, 1192 n.51, 1211 (2015); Diana Shaginian, Note, Unpaid Internships in the Entertainment Industry: The Need for a Clear and Practical Intern Standard After the Black Swan Lawsuit, 21 Sw. J. Int'l L. 509, 513 (2015); Matthew Tripp, Note, In the Defense of Unpaid Internships: Proposing A Workable Test for Eliminating Illegal Internships, 63 Drake L. Rev. 341, 342–43, 343 n.7 (2015). These notes do not substantively discuss unpaid internships at nonprofits. New development in this field has been exclusively limited to discussion of a possible circuit split about unpaid internships at for-profits. There is a feeding frenzy in this academic pond, and this Note points towards an untouched ocean. Highlighting the unregulated nature of unpaid internships at nonprofits may generate a significant amount of debate.

[16] See Harthill, supra note 11, at 583, 621–22 (noting in an article on unpaid internships generally that unpaid interns at legal nonprofits may be volunteers, but that the law is currently unclear and that the FLSA should be revisited to more clearly protect nonprofits); 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) (attempting to shoehorn unpaid internships at nonprofits into the "volunteer" exception to the Fair Labor Standards Act); Tripp, supra note 15, at 343 n.7 (claiming inaccurately in a footnote that nonprofits are generally exempted in the text of the Fair Labor Standards Act); Anthony J. Tucci, Note, 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) (arguing for restricting somewhat the unpaid intern exception at nonprofits, but ultimately concluding that they should be preferenced over for-profit entities); cf. Emily Bodtke, Note, When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act to Distinguish Employees from Volunteers, 99 Minn. L. Rev. 1113, 1130, 1153, 1158–59 (2015) (arguing that the threshold-remuneration test used to determine volunteer status under Title VII and other employment discrimination laws should be modified to align with standards for for-profits and nonprofits under the FLSA).

plains why the arguments of the few scholars to address this issue are in tension with the logic of that opinion.[17]

Part I of this Note analyzes *Fox Searchlight* and explains why the Second Circuit's reasoning suggests that unpaid internships at charitable nonprofits constitute violations of the Fair Labor Standards Act. Part II evaluates both Supreme Court and unofficial Department of Labor guidance discussing the Supreme Court's volunteer and trainee exceptions to the Fair Labor Standards Act, and it concludes that once a business or employee is covered by the Act, the law requires any exception be drawn narrowly. The Note then engages with the limited scholarship concerning unpaid internships at charitable nonprofits and disagrees with those who argue that unpaid interns at charitable nonprofits fall into the volunteer exception. Part III goes beyond the text of the Act and argues that a blanket exception for nonprofits encourages market inefficiency at the expense of workers, creates uncertainty, and privileges the upper class and wealthy academic institutions. These public policy arguments further mitigate the "power to persuade" of the Department of Labor's fact sheet footnote exempting nonprofits.[18] Further, even if one finds that nonprofits deserve preferential treatment, this Note suggests that providing additional tax breaks or grants to nonprofits is preferable to leaving interns at charitable nonprofits outside of the protections of the Act. The Note then concludes, warning charitable nonprofits that their unpaid internship programs fall within the scope of the Fair Labor Standards Act, and that any reliance on Fact Sheet #71 is misguided.

I. THE SIGNALS OF *GLATT V. FOX SEARCHLIGHT*

A. The Holding Of Fox Searchlight

In *Fox Searchlight*, a case of first impression, the Second Circuit reviewed a district court holding that two unpaid interns who worked on

[17] This Note does not concern itself with the desirability or legality of unpaid internships in the for-profit sector. This issue has been thoroughly vetted in the literature, although the author generally agrees with those proposals that narrow exceptions to the Fair Labor Standards Act. See Eric M. Fink, No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical, 47 U.S.F. L. Rev. 435, 441 (2013); Patricia L. Reid, Note, Fact Sheet #71: Shortchanging the Unpaid Academic Intern, 66 Fla. L. Rev. 1375, 1396–97 (2014); Tripp, supra note 15, at 366–67; see also Niki Kuckes, Designing Law School Externships that Comply with the FLSA, 21 Clinical L. Rev. 79, 118–24 (2014) (suggesting "best practices" for unpaid law school externships to meet the existing internship exception).

[18] See *Skidmore*, 323 U.S. at 140.

the set of the film *Black Swan* were entitled to partial summary judgment on the issue of whether they were employees for the purposes of the Fair Labor Standards Act.[19] The two interns who moved for summary judgment, Eric Glatt and Alexander Footman, received no payment for their work.[20]

Mr. Glatt interned for two different departments of the *Black Swan* production team between December 2009 and August 2010.[21] During his busiest months, he worked without pay from "approximately 9:00 a.m. to 7:00 p.m. five days a week."[22] His activities included copying documents, "organizing filing cabinets," "tracking purchase orders," "transporting paperwork . . . to and from the *Black Swan* set," and "purchas[ing] a non-allergenic pillow for *Black Swan* Director Darren Aronofsky."[23]

Mr. Footman worked on the set of *Black Swan* from September 2009 until late February or early March 2010.[24] His responsibilities included "picking up and setting up office furniture," "taking out the trash," "answering phone calls," "taking lunch orders," "watermarking scripts," making copies, "bringing tea to (Director) Aronofsky," and "dropping off a DVD of *Black Swan* footage at Aronofsky's apartment."[25]

The district court partially deferred to the Department of Labor in its grant of partial summary judgment. The court adopted the six factors of the Labor Department's test, set forth in Fact Sheet #71, for determining whether an unpaid intern qualifies as an employee for purposes of the Fair Labor Standards Act.[26] But the court refused to consider any factor dispositive.[27] The court then found that both Glatt and Footman were employees for purposes of the Fair Labor Standards Act.[28] On appeal, the Second Circuit decided that the lower court's partial reliance on the

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[19] See *Fox Searchlight*, 811 F.3d at 533–35.

[20] Id. at 531–33. Glatt also received no college credit for his work, and Footman presumably did not seek college credit because he had graduated at the time of his internship. Id. at 532.

[21] Id. at 532.

[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Id. at 534–35.

[27] Id. at 535.

[28] Id.

Fact Sheet's unpaid intern test was inappropriate, and remanded for further proceedings.[29]

The Second Circuit held that any reliance on the six factors of the Labor Department's test was improper.[30] The court adopted a "primary beneficiary" test instead, which is explored in detail in Section I.B, infra.[31] The choice of a "primary beneficiary" test for the evaluation of unpaid internships at for-profit entities is not directly relevant to nonprofits, but the rejection of Fact Sheet #71 and the reasoning employed by the Second Circuit calls into question the unregulated status of nonprofits' unpaid interns.

B. Fact Sheet #71 and the Primary Beneficiary Test

Fact Sheet #71 was published in 2010,[32] and was not promulgated according to the notice-and-comment procedures of the Administrative Procedure Act ("APA").[33] The "Fact Sheet" purported to "provide[] general information to help determine whether interns [in the for-profit private sector] must be paid the minimum wage and overtime under the Fair Labor Standards Act."[34] The Fact Sheet included a six-part test for evaluating whether an unpaid intern at a for-profit entity is actually an employee entitled to compensation under the Fair Labor Standards Act or rather is truly an intern.[35] The six parts of the test are as follows:

> 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;
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> 2. The internship experience is for the benefit of the intern;
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> 3. The intern does not displace regular employees, but works under close supervision of existing staff;

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[29] Id. at 538.
[30] Id. at 535–36.
[31] Id. at 536.
[32] Fact Sheet #71, supra note 12.
[33] 5 U.S.C. § 553 (2012); *Fox Searchlight*, 811 F.3d at 536 (applying *Skidmore* deference to Fact Sheet #71, which is inapplicable to agency documents that were promulgated through notice-and-comment procedures).
[34] Fact Sheet #71, supra note 12.
[35] Id.

> 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;
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> 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.[36]

Fact Sheet #71 states that if an internship at a for-profit entity fails any of the six factors in the Department of Labor's test, then the intern is entitled to compensation.[37] The thrust of the Second Circuit's disagreement with the district court focused on this test—specifically, the district court's unwillingness to look beyond these six factors even though the district court rejected the Labor Department's assertion that each was dispositive.[38]

The "primary beneficiary" test, which the Second Circuit espoused instead, functions as a loose balancing of the totality of the circumstances. The court provided several non-exhaustive factors to help guide lower courts in their evaluation of employer-intern relationships in the context of the Act[39]:

> 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.
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> 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.

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[36] Id.; see also U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter, FLSA2004-18 (Oct. 29, 2004), http://www.dol.gov/whd/opinion/FLSA/2004/2004102918FLSAPre-HireView.pdf [https://perma.cc/CGL3-ZTUU] (including virtually the same factors to describe the Labor Department's test for trainees).

[37] Fact Sheet #71, supra note 12.

[38] See *Fox Searchlight*, 811 F.3d at 534–38.

[39] Id. at 536–37.

> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
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> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
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> 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.[40]

But the test is flexible. Lower courts are free to develop additional factors of their own as circumstances warrant.[41]

C. The Reasoning of Fox Searchlight

Fox Searchlight is at the center of a conflict between the assertion of agency authority, the demands of the modern labor market, and the duty to follow precedent. This Section elaborates on these three facets of the opinion, and sets the stage for discussion of *Fox Searchlight*'s relevance to the Department of Labor's footnote assertion that unpaid internships at charitable nonprofits are unregulated.

1. The Appropriate Level of Administrative Deference

Agencies entrusted with administering a statute are generally given a high level of deference regarding their interpretations of that statute. As the Supreme Court held in *Chevron U.S.A. v. Natural Resources Defense Council*, an agency is entitled to deference regarding a statute that it administers as long as its interpretation is a "reasonable one."[42] Fact Sheet #71 is an interpretation of the Fair Labor Standards Act, and it is undisputed that the Department of Labor is entrusted with administering the Act.[43] Thus, at first glance it may seem surprising that the Department of Labor did not carry the day in *Fox Searchlight*.

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[40] Id.
[41] Id. at 537.
[42] 467 U.S. 837, 845 (1984).
[43] 29 U.S.C. § 204 (2012).

However, an agency is only entitled to *Chevron* deference for its interpretation of a statute if that interpretation has gone through the formal procedures of the APA.[44] If an agency promulgates an interpretation without following these procedures, its opinion is entitled to significantly less weight. The Supreme Court announced this level of deference in *Skidmore v. Swift & Co.* and characterized it as the mere "power to persuade."[45] An agency stands on shaky ground if its argument rests on a publication that has not been vetted according to the APA's rulemaking standards.[46]

Fact Sheet #71 purports to give "general information" and was promulgated without notice-and-comment rulemaking or a formal adjudication.[47] The government conceded in its brief in *Fox Searchlight* that Fact Sheet #71's development did not satisfy the APA requirements for *Chevron* deference.[48] The Second Circuit consequently held that the Fact Sheet is only entitled to *Skidmore* deference regarding its proposed unpaid intern test.[49] Without the heavy weight of *Chevron* deference guiding its hand, the Second Circuit was free to fashion its own interpretation of the for-profit unpaid internship test.

2. The Influence of Economic Pragmatism

The Second Circuit pragmatically justified the choice of a "primary beneficiary" test, which weighs the totality of the circumstances, on the grounds that only a fluid test could meaningfully distinguish between abusive and beneficial unpaid internships.[50] The court noted that unpaid internship programs can take advantage of young labor market entrants

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[44] See 5 U.S.C. § 553 (2012) (describing formal rulemaking procedures); *Fox Searchlight*, 811 F.3d at 536 (applying *Skidmore* deference to Fact Sheet #71, which is inapplicable to agency documents that were promulgated through notice-and-comment procedures); see also United States v. Mead Corp., 533 U.S. 218, 230–31 (2001) (explaining that notice-and-comment rulemaking or formal adjudication support applying *Chevron* deference).

[45] 323 U.S. 134, 139–40 (1944) (noting that the weight given to the Administrator's judgment depends on "all those factors which give it power to persuade").

[46] See, e.g., Wheaton v. McCarthy, 800 F.3d 282, 288–89 (6th Cir. 2015) (reviewing an agency "guidance letter" and writing that "'we find unpersuasive the agency's interpretation'—if one may even call it that—'of the statute at issue in this case.'" (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000))).

[47] Fact Sheet #71, supra note 12.

[48] *Fox Searchlight*, 811 F.3d at 536.

[49] Id.

[50] See id. at 535–37.

without providing meaningful benefits.[51] But the court also explained that "properly designed" internships can "greatly benefit interns."[52] The debate regarding the value of unpaid internships to interns is high profile and controversial,[53] and the Second Circuit hedged its bets by acknowledging the positions of both sides.

The Second Circuit's desire to preserve "properly designed" internships is understandable, but the court's instructions are vague. Depending on one's ideal labor market, a "properly designed" internship could be one that overwhelmingly benefits the intern, one that is acceptable as long as the intern's choice is voluntary, or somewhere in between. By adopting the "primary beneficiary" test, the Second Circuit tried to strike a balance. The court expressed an openness to unpaid internships generally, while allowing for analysis of future developments in the internship market that might increase or decrease the relative value of an internship to interns. If employers take advantage of interns, courts can take this abuse into consideration while using the primary beneficiary test and make them pay. If employers design programs that benefit interns enough to satisfy the court's fluid, flexible test, then they may continue to rely on this unpaid labor.

3. The Command of Precedent

Supreme Court precedent also influenced the Second Circuit's decision to employ a balancing test. The Second Circuit favorably cited *Tony & Susan Alamo Foundation v. Secretary of Labor*[54] as an articulation of the policy underlying the Fair Labor Standards Act.[55] Although this case involved a volunteer—rather than an internship—exception for nonprofits under the Act, the Court's opinion contains strong policy language in support of a broad reading of coverage under the Act and keeping exceptions small, which is informative in the internship context. The Second Circuit directly quoted some of this language in its opinion in *Fox Searchlight*: "[E]xceptions to coverage under the FLSA affect more people than those workers directly at issue because exceptions are 'like-

[51] Id. at 535.

[52] Id.

[53] See discussion supra note 17.

[54] 471 U.S. 290 (1985). For a detailed discussion of this case, see infra Section II.B.

[55] *Fox Searchlight*, 811 F.3d at 533–34 (citing *Tony & Susan Alamo Found.*, 471 U.S. at 302).

ly to exert a general downward pressure on wages in competing businesses.'"[56]

The Second Circuit's holding also drew on the Court's reasoning in *Walling v. Portland Terminal Co.*[57] *Portland Terminal* concerned whether a training program for railroad brakemen fell within the scope of the Fair Labor Standards Act.[58] If the program was covered by the Act, the trainees would have to be paid.[59] The *Portland Terminal* Court held that the program was not covered by the Act, and created a judge-made exception for trainees.[60] The Second Circuit relied heavily on this opinion in choosing a "primary beneficiary" test for interns in *Fox Searchlight*.[61] In *Portland Terminal*, the Court evaluated trainee status by analyzing multiple factors of the trainee/business relationship.[62] Drawing on the Court's fact-intensive approach, the Second Circuit held that the intern exception to the Act required a totality of the circumstances analysis rather than the Department of Labor's suggested test.[63]

D. The Implications of Fox Searchlight *for Unpaid Internships at Nonprofits*

The reasoning of *Fox Searchlight* undercuts the unregulated status of unpaid internship programs at charitable nonprofits. The text of the Fair Labor Standards Act is completely silent on the issue,[64] and resting the legality of retaining unpaid interns on the persuasive value of law review articles and *Skidmore* deference is alarmingly dangerous. Further, the Supreme Court precedent relied upon by the Second Circuit weighs in favor of an equal playing field for nonprofits and for-profits.

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[56] Id. at 534.

[57] Id. at 534–37 (citing and discussing Walling v. Portland Terminal Co., 330 U.S. 148 (1947)).

[58] *Portland Terminal*, 330 U.S. at 149–51.

[59] Id.

[60] Id. at 152–53.

[61] *Fox Searchlight*, 811 F.3d at 534–37.

[62] *Portland Terminal*, 330 U.S. at 152–53.

[63] *Fox Searchlight*, 811 F.3d at 536–37.

[64] Id. at 534 ("The FLSA unhelpfully defines 'employee' as an 'individual employed by an employer.'" (quoting 29 U.S.C. § 203(e)(1) (2012))).

1. The Power—or Lack Thereof—of Skidmore *Deference*

There is no positive law that suggests that unpaid interns at nonprofits are not "employees" for the purpose of the Fair Labor Standards Act. As noted by the Second Circuit, the Act "'unhelpfully' defines 'employee' as an 'individual employed by an employer.'"[65] The main textual limitation of the Act stems from the constitutional boundaries of Congress's interstate commerce power.[66] There is no blanket exception for charitable nonprofits from either enterprise or individual coverage under the Act.[67] There are, however, some limited exceptions to liability implied by the Court, which are discussed in Part II, infra.[68]

Fact Sheet #71 asserts that unpaid internships at charitable nonprofits are "generally permissible," but it does not provide a rationale for this assertion.[69] The Fact Sheet states in a footnote that: "Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible. [Wage and Hour Division] is reviewing the need for additional guidance on internships in the public and non-profit sectors."[70]

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."[71] This should be highly disconcerting to charitable nonprofits, as the Labor Department's attempts at persuasion failed at both the district 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-

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[65] Id. (quoting 29 U.S.C. § 203(e)(1)).

[66] In order for the Act to apply to an employee, the employer must qualify as an "enterprise engaged in commerce" or the individual employee must be engaged in interstate commerce. 29 U.S.C. § 206(a) (2012); see also id. § 203(r)(1) (defining "enterprise").

[67] See, e.g., *Tony & Susan Alamo Found.*, 471 U.S. at 303 (explaining that a religious foundation is not automatically exempt as a result of the Free Exercise Clause; it is only exempt if the FLSA actually burdens the foundation's freedom to exercise); see also Church Employees and Volunteers/Applicability of FLSA, 6A Wage & Hour Man. (BNA), at WHM 99:8082, WHM 99:8082–83 (May 20, 1997) (discussing FLSA applicability for nonprofit religious institutions).

[68] See infra Section II.B.

[69] Fact Sheet #71, supra note 12.

[70] Id.

[71] *Fox Searchlight*, 811 F.3d at 536.

factor internship test that drew on over fifty years of agency interpretation and enforcement.[72]

Indeed, the Sixth Circuit recently issued a colorful opinion based on an agency publication remarkably similar to Fact Sheet #71's footnote assertion. In *Wheaton v. McCarthy*, the State of Ohio argued that the Sixth Circuit should defer to a 2010 "guidance letter" issued by a federal agency.[73] The court found that that the letter was only entitled to *Skidmore* deference and that it lacked any supporting analysis.[74] The court dismissed Ohio's argument and held, "[t]hus, 'we find unpersuasive the agency's interpretation'—if one may even call it that—'of the statute at issue in this case.'"[75] Nonprofit entities will likely face similar skepticism if they present Fact Sheet #71's footnote as positive law entitled to deference.

Fox Searchlight also undermines any argument that the Fact Sheet's six-factor test should somehow be used to exempt nonprofits from coverage. Anthony Tucci, one of only two authors to devote an entire piece to the legality of unpaid internships at nonprofits, proposed just such an argument.[76] Tucci contends that the Department of Labor should modify its six-factor test to explicitly preference charitable nonprofits.[77] He thinks that this additional protection would shield charitable nonprofits from liability under the Act.[78] Tucci's argument is solidly grounded as a public policy defense of charitable nonprofits, but his article focuses on altering a Department of Labor test that is only entitled to *Skidmore* deference and, given *Fox Searchlight*, is arguably incorrect as a matter of law.[79] It seems unlikely that the Second Circuit would accept Tucci's slight modification of a test they specifically rejected in *Fox Searchlight*, and the Second Circuit's holding does not bode well for the adoption of Tucci's modified test in other circuits.[80]

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[72] Id. at 534 (noting that the Labor Department's unpaid intern test draws heavily from "informal guidance" that it published in 1967 regarding its unpaid trainee test).

[73] 800 F.3d 282, 288–89 (6th Cir. 2015).

[74] Id.

[75] Id. (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)).

[76] See Tucci, supra note 16, at 1384; see also Pianko, supra note 16, at 36 (analyzing the legality of unpaid internships at nonprofits).

[77] See Tucci, supra note 16, at 1384–85.

[78] See id.

[79] See *Fox Searchlight*, 811 F.3d at 536.

[80] It is possible that a different circuit might adopt a test such as Tucci's if it were proposed by the Department of Labor. However, the last circuit to defer to the Department of Labor in a similar context was the Fifth Circuit in 1983. See Atkins v. Gen. Motors Corp.,

2. The Supreme Court's Preference for Protecting Labor

The *Fox Searchlight* court's heavy reliance on Supreme Court precedent also signals that nonprofit interns are not exempt from coverage under the Fair Labor Standards Act. The Second Circuit favorably cited the Court's articulation in *Tony & Susan Alamo Foundation* of the policies underlying the Act.[81] In that case, the Supreme Court directly rejected a blanket volunteer exception to the Fair Labor Standards Act for charitable nonprofits.[82] The Court held that the Act contained no unqualified exception for charitable nonprofits and that exempting all charitable nonprofits from the Act would lead to the depression of wages in the labor market.[83] Exempting all unpaid interns at charitable nonprofits from the requirements of the Act may also depress wages.[84] If 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 in favor of ruling against the blanket intern exception for charitable nonprofits found in Fact Sheet #71.

The Second Circuit's reliance on the Supreme Court's argument in *Portland Terminal* also weakens any claim that charitable nonprofits should receive preference relative to for-profit entities. The Second Circuit adopted the "primary beneficiary" test for unpaid interns based largely on the highly analogous precedent regarding unpaid trainees in *Portland Terminal*.[85] *Portland Terminal* held that some workers, based on the benefits of the trainee relationship, are not employees.[86] *Portland*

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701 F.2d 1124, 1127–28 (5th Cir. 1983) (giving "substantial deference" to the Wage and Hour Administrator's interpretation of the trainee exception). It seems unlikely that this precedent from over thirty years ago could trump the reasoning in *Fox Searchlight*.

[81] See *Fox Searchlight*, 811 F.3d at 534; see also discussion infra Subsection I.C.3 (discussing the Second Circuit's favorable reliance on *Tony & Susan Alamo Foundation*).

[82] *Tony & Susan Alamo Found.*, 471 U.S. at 303.

[83] Id. at 302–03.

[84] See Brief for American Federation of State, County & Municipal Employees et al. as Amici Curiae Supporting Appellees at 3, *Fox Searchlight*, 811 F.3d 528 (No. 13-4478-cv), 2015 WL 5076744, at *3 (arguing that unpaid internships defeat the FLSA's "wage floor"); Anya Kamenetz, Op-Ed., Take This Internship and Shove It, N.Y. Times (May 30, 2006), http://www.nytimes.com/2006/05/30/opinion/30kamenetz.html [https://perma.cc/J33X-NP7C]; Ross Eisenbrey, Unpaid Internships: A Scourge on the Labor Market, Econ. Pol'y Inst. (Feb. 7, 2012), http://www.epi.org/blog/unpaid-internships-scourge-labor-market [https://perma.cc/XJ44-48X5]; see also Tucci, supra note 16, at 1378–80 (discussing how unpaid internships hurt the economy).

[85] *Fox Searchlight*, 811 F.3d at 534–37.

[86] *Portland Terminal*, 330 U.S. at 152–53.

Terminal did not address charitable nonprofits specifically, but there is nothing in its logic that suggests that nonprofit-friendly tests will be persuasive. The organizational structure of the entity at issue is irrelevant to this analysis. Nothing in *Portland Terminal* undermines the *Tony & Susan Alamo Foundation* Court's concern that unpaid labor, no matter the business classification of the employer, depresses wages throughout the labor market as a whole.

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. Insofar as the Second Circuit created precedent and persuasive authority with its own holding, *Fox Searchlight* acts as a double-edged sword for charitable nonprofits. The defendants in *Fox Searchlight* advocated for a "primary beneficiary" test with good reason;[87] it is an employer-friendly standard. Fewer charitable nonprofits would be found liable under this test than under many other proposed tests. Now, in determining whether the test applies to charitable nonprofits at all, courts will have the option of choosing a flexible, forgiving standard. Application of a draconian rule to charitable nonprofits might have given courts pause. The more lenient "primary beneficiary" test imposes fewer costs on organizations and is more likely to be broadly applied by courts.

II. THE VOLUNTEER EXCEPTION TO THE FAIR LABOR STANDARDS ACT

If an intern falls within the scope of the Fair Labor Standards Act, their employer can still avoid liability if the Act contains an exception that withdraws coverage. Of the few scholars to write on unpaid interns at charitable nonprofits, three have stated that these interns fall within the scope of the "volunteer exception" to the Act.[88] If these academics are correct, this Note's contention that unpaid internships at charitable nonprofits are protected by the Act will fail. However, the text of the Act, the Supreme Court precedent cited in *Fox Searchlight*, and Department of Labor guidance each suggest that the volunteer exception does not include unpaid interns. Thus, this Part concludes that arguments

[87] *Fox Searchlight*, 811 F.3d at 535 (noting that the defendants argued for "a more nuanced primary beneficiary test" to better reflect the economic realities of the intern-employer relationship).

[88] See Harthill, supra note 11, at 600–02; Pianko, supra note 16, at 36–37; Bodtke, supra note 16, at 1122–23, 1123 n.71 (approving in passing of the Labor Department's classification of unpaid workers at nonprofits as volunteers in some contexts).

suggesting that the volunteer exception covers unpaid interns at charitable nonprofits are not viable.

A. The Fair Labor Standards Act's Volunteer Exception

The Fair Labor Standards Act contains two textual exceptions for volunteer activities. The first excludes volunteers for federal, state, and local governments from the definition of "employee."[89] The second creates an exception for those "who volunteer their services solely for humanitarian purposes to private, non-profit food banks."[90] Neither of these two provisions suggests that charitable nonprofits, aside from food banks, are exempted from coverage. The legislative history for the latter exception indicates that it was intended to be a "very narrow" exclusion from the definition of employee.[91] However, a supporter of the bill also stated that the express exclusion "should not be in any way construed to mean that by [expressly excluding food bank volunteers] Congress is showing an intent that any other individual who performs community services and receives benefits is an employee."[92] This statement suggests that the definition of employee does not cover some workers who labor for their communities, and the Court has drawn out this sentiment in the volunteer exception.

B. The Supreme Court's Interpretation of the Volunteer Exception

Despite the few references to volunteers in the Fair Labor Standards Act, the Court recognized an expanded exception for "ordinary volunteerism" in *Tony & Susan Alamo Foundation v. Secretary of Labor*.[93] In that case, the Supreme Court found that self-described "volunteers" for a nonprofit religious organization qualified as employees under the Act.[94] The volunteers at issue were former "drug addicts, derelicts, or criminals" who worked at commercial businesses such as service stations, retail businesses, and hog farms operated by the nonprofit.[95] The nonprofit did not pay these workers, but instead provided them with "food, cloth-

[89] 29 U.S.C. § 203(e)(4) (2012).
[90] Id. § 203(e)(5).
[91] See 144 Cong. Rec. H5386–87 (daily ed. June 25, 1998) (statement of Rep. Ballenger).
[92] Id.
[93] 471 U.S. 290, 302–03 (1985).
[94] Id. at 292–93, 306.
[95] Id. at 292.

ing, shelter, and other benefits."[96] The Court held that the workers were employees and not volunteers under the Act, because they had an implied compensation agreement to receive benefits in exchange for engaging in commercial activity.[97] The Court noted that carving out an exception for workers—even those at nonprofit religious organizations—who were willing to claim that they donated their time "voluntarily" would inappropriately allow for evasion of minimum wage requirements.[98] The Court expressed additional concern that this evasion would depress wages in the private sector.[99]

However, the Court also suggested that its ruling would not lead to coverage for all volunteers at nonprofits.[100] For instance, it said that volunteers who perform activities like "driv[ing] the elderly to church" or "serv[ing] church suppers" would not be covered.[101] The Court extrapolated from these examples, stating that "[o]rdinary volunteerism is not threatened by this interpretation of the statute."[102]

C. The Department of Labor's Interpretation of Volunteer

The Department of Labor issued a series of opinion letters and publications that further clarify the distinction between "ordinary volunteerism" and commercial activity.[103] These agency communications are not formal adjudications or rulemakings.[104] They are therefore not binding, but they are nevertheless informative.

The Department of Labor takes into account several factors when determining volunteer status. Most importantly, noting that provisions of the Fair Labor Standards Act[105] permit current employees to volunteer their time to public agencies as long as their services are provided for civic, charitable, or humanitarian reasons, the Acting Administrator of

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[96] Id.
[97] Id. at 300–03.
[98] Id. at 302.
[99] Id.
[100] Id. at 302–03.
[101] Id. at 302.
[102] Id. at 303.
[103] See, e.g., Volunteers/Employee Status, 6A Wage & Hour Man. (BNA), at WHM 99:8191, WHM 99:8191–92 (Nov. 9, 1998); Employment Status/Member-Volunteers of Cooperative, 6A Wage & Hour Man. (BNA), at WHM 99:8067, WHM 99:8067–68 (Jan. 21, 1997).
[104] 5 U.S.C. § 553 (2012).
[105] See 29 U.S.C. § 203(e)(4)–(5) (2012).

the Wage and Hour Division stated in 2008 that current agency policy was to apply the same rule to nonprofits as long as the volunteer performed different work as a volunteer than as an employee.[106] This is the most recent publication on volunteer status by the Wage and Hour Division, but the policy of using subjective intent to evaluate volunteer status stretches back several decades.[107]

In determining the scope of the judge-made volunteer exception, the Department of Labor has placed weight on other factors besides the subjective intent of the volunteer. The two most weighty objective factors are whether the services are "for public service, religious, or humanitarian objectives" typically associated with the work of volunteers (as opposed to employees) and whether the volunteer displaces other paid employees.[108] Regarding the former, the Wage and Hour Administrator opined that workers at a co-op who "stock[ed] shelves," "operat[ed] cash registers," and "slice[d] meat" were not volunteers.[109] The Administrator found that the services being donated were "not for public service, religious, or humanitarian objectives"; rather, they primarily served "commercial business purposes" for the co-op.[110] The Administrator relied on similar logic in other opinions.[111] For instance, in one letter the Administrator said that volunteers at a hospice could "sit[] with the patients so that a family may have a break" but not perform services such as "general office or administrative work that are not charitable in nature."[112]

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[106] U.S. Dep't of Labor, Wage & Hour Div., FLSA2008-14, Opinion Letter on Paid Firefighter Volunteering at Same Private Fire Department (Dec. 18, 2008), http://www.dol.gov/whd/opinion/FLSA/2008/2008121814FLSA.htm [https://perma.cc/K3TN-SMMS].

[107] See, e.g., Compensation for Volunteers/Hospital Gift Shop, 6A Wage & Hour Man. (BNA), at WHM 99:8054, WHM 99:8054 (June 28, 1996) (describing volunteers as "[i]ndividuals who volunteer or donate their services, usually on a part-time basis, for public service, religious, or humanitarian objectives"); Wage & Hour Div., U.S. Dep't of Labor, WH Pub. No. 1297, Employment Relationships Under the Fair Labor Standards Act (1980), at 6 (using essentially the same language to describe volunteers).

[108] See Compensation for Volunteers/Hospital Gift Shop, supra note 107.

[109] Employment Status/Member-Volunteers of Cooperative, supra note 103.

[110] Id.

[111] Employee Volunteers, 6A Wage & Hour Man. (BNA), at WHM 99:8035 (Sept. 11, 1995).

[112] Id. at WHM 99:8035–36; see also Compensation for Volunteers/Hospital Gift Shop, supra note 107 (finding that workers for a nonprofit hospital were volunteers when they performed services such as reading letters to the sick, but not when they worked in the hospital's gift shop).

The Department of Labor suggests that an additional factor, whether the volunteer displaces paid employees, is also relevant to any internship program. The Department of Labor's Office of Enforcement Policy has placed great weight on this factor in agency opinion letters.[113] In one non-binding communication, the agency opined that volunteer ushers at a nonprofit arts community center were employees. The dispositive issue was that the use of volunteer ushers would displace some of the nonprofit's paid ushers,[114] and the logic of this argument has been extended even further. In another opinion letter, the Department of Labor 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.[115] While these agency positions are only entitled to *Skidmore* deference, they undermine the argument that the Labor Department would support preferential treatment for charitable nonprofits under the volunteer exception.

D. Criticism of Scholarship Arguing that Charitable Nonprofits Are Exempt Under the Volunteer Exception

The few scholars to address unpaid internships at charitable nonprofits have honed in on the volunteer exception, arguing that internships at charitable nonprofits fall within its scope. This Section addresses each argument in turn, and finds that their conclusions are without merit.

1. Pianko's Argument that Congress Spoke Clearly Regarding Unpaid Internships at Charitable Nonprofits

Maurice Pianko argues that most unpaid internships at nonprofits qualify for the volunteer exception to the Fair Labor Standards Act.[116] Relying on the Court's statements in *Walling v. Portland Terminal*

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[113] Volunteer Ushers/Employee Status, 6A Wage & Hour Man. (BNA), at WHM 99:8186, WHM 99:8187 (Sept. 28, 1998).

[114] Id.; see also Volunteers/Employee Status, supra note 103 (opining that workers at a nonprofit were not volunteers where the employer was contractually obligated to perform the service and competitors relied on paid labor to provide said service).

[115] Volunteers/Employee Status, supra note 103, at WHM 99:8192 (finding that workers "at the entrance gates, [conducting] security patrols, cleaning and compliance checking, acting as backups to campground managers in areas of security and public contact, providing skilled and unskilled labor on campground improvement projects, and assisting in recruiting volunteers" were employees).

[116] Pianko, supra note 16, at 41.

Co.[117] and *Tony & Susan Alamo Foundation*, Pianko applies the principles of *Chevron U.S.A. v. Natural Resources Defense Council*,[118] to say that Congress spoke clearly regarding the meaning of "employ" and its implied volunteer exception and that Congress therefore clearly excluded unpaid interns at charitable nonprofits from the Act.[119] Consequently, he claims that agency interpretations of the volunteer exception as to nonprofits are irrelevant.[120]

Pianko's argument hinges on the Court's statement in *Portland Terminal* that individuals who volunteer "without promise or expectation of compensation, but solely for" their own "pleasure" are exempted from the Fair Labor Standards Act.[121] Pianko argues that this holding announces that Congress spoke clearly for *Chevron* purposes and that the Court's language describes unpaid interns at charitable nonprofits.[122] Pianko's argument fails, however, for several reasons. First, the statement in *Portland Terminal* arose in the context of the "trainee" exception,[123] not the "volunteer" exception, which the Court squarely addressed later in *Tony & Susan Alamo Foundation*.[124] Second, the *Portland Terminal* Court clarified this statement by saying the exception was intended to cover "a person whose work serves only his own interest."[125] The most nonprofit-friendly interpretation of the Court's language was given by the Second Circuit in *Fox Searchlight*. It held that *Portland Terminal* announced a flexible, balanced, "primary beneficiary" test for interns rather than Pianko's assertion of a broad volunteer exception for interns.[126] Third, the *Fox Searchlight* court criticized the vagueness of the Act's definition of the word "employee," saying, "[t]he FLSA unhelpfully defines 'employee' as an 'individual employed by an employer.'"[127] This

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[117] 330 U.S. 148 (1947).

[118] 467 U.S. 837 (1984).

[119] Pianko, supra note 16, at 32–36. This logic rests on basic principles of administrative law. If Congress has spoken clearly regarding the meaning of part of a statute (here, the word "employ"), subsequent judicial and executive interpretations of the statute are irrelevant. See *Chevron*, 467 U.S. at 842–43 (explaining that the first step of reviewing agency regulations involves discerning whether Congress "directly spoke[]" to the matter).

[120] Pianko, supra note 16, at 36.

[121] *Portland Terminal*, 330 U.S. at 152–53.

[122] Pianko, supra note 16, at 32–36.

[123] See *Portland Terminal*, 330 U.S. at 152–53.

[124] *Tony & Susan Alamo Found.*, 471 U.S. at 299–303.

[125] *Portland Terminal*, 330 U.S. at 152.

[126] *Fox Searchlight*, 811 F.3d at 536–37.

[127] Id. at 534.

holding does not support characterizing the word "employ" as a clear statement for *Chevron* purposes, and it completely undermines Pianko's argument.[128]

Pianko's interpretation is also glaringly inconsistent with the *Tony & Susan Alamo Foundation* Court's explicit statement that a broad volunteer exception for nonprofits would depress wages.[129] Research suggests that exceptions elsewhere in the Fair Labor Standards Act have made wage depression a significant problem in today's labor market.[130] Designating unpaid internships at charitable nonprofits as volunteer programs would frustrate Congress's intent, as articulated by the Court, to elevate wages for all covered businesses and employees. It is inconceivable that the word "employ" includes a clear instruction from Congress to exclude interns at charitable nonprofits and dilute the Act's broad policy of coverage.

2. Harthill's Argument that the Volunteer Exception Is Broad Enough to Support Fact Sheet #71

The preceding logic also reveals flaws in Professor Susan Harthill's argument that unpaid law student interns at charitable nonprofits are exempt as volunteers. Harthill states that "[s]ince the DOL has consistently taken the position that volunteers include individuals who provide services to nonprofits, and courts have accepted this view, the nonprofits should remain safe from the threat of lawsuits."[131] Given that the Department of Labor has articulated this assertion in nonauthoritative opinion letters and Fact Sheet #71, Harthill places a great deal of faith in *Skidmore* deference.[132]

Harthill's assertion that the Department of Labor can make a straight-faced argument that the volunteer exception should be read broadly enough to encompass unpaid internships at charitable nonprofits is also

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[128] See *Chevron*, 467 U.S. at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.").

[129] *Tony & Susan Alamo Found.*, 471 U.S. at 302.

[130] See Brief for Am. Fed'n State, Cty., and Mun. Emps. et al. as Amici Curiae Supporting Appellees, supra note 84, at 3 (arguing that unpaid internships defeat the FLSA's "wage floor"); Tucci, supra note 16, at 1378–80; Kamenetz, supra note 84.

[131] Harthill, supra note 11, at 601. But, to her credit, Harthill does note that recent cases "cast doubt" on her position. Id. at 602.

[132] Cf. *Fox Searchlight*, 811 F.3d at 536 ("And as DOL concedes this interpretation is entitled, at most, to *Skidmore* deference to the extent we find it persuasive." (citation omitted)).

questionable. Numerous informal agency publications indicate that the Department of Labor takes a strict stance towards the use of volunteers at nonprofits, despite its assertion in Fact Sheet #71.[133] For instance, the Department of Labor examines whether the activity being performed is the type of work typically associated with volunteers, and classifies activities such as "operat[ing] cash registers,"[134] "stock[ing] shelves" at a co-op,[135] or general administrative work[136] as nonvolunteer work that must be performed by paid labor. One could imagine an unpaid intern performing any of these activities at a charitable nonprofit.

Further, these informal advisory opinions reflect more than a hollow support for the Court's articulation of the volunteer exception; the Labor Department has justified the narrowness of the volunteer exception by strictly evaluating whether unpaid volunteers displace paid employees.[137] This is problematic for Harthill's argument, as any traditional unpaid internship at a nonprofit leads to the displacement of paid labor, and scholars have directly attributed the rise of unpaid internships to a decline in entry-level jobs.[138]

Harthill also cites *Tony & Susan Alamo Foundation*'s creation of the volunteer exception to substantiate her claim.[139] But given that the *Tony & Susan Alamo Foundation* Court denied a nonprofit the use of unpaid labor under the volunteer exception when its self-styled volunteers worked at establishments such as hog farms and service stations,[140] it seems unlikely that the Court would come to a different conclusion if the nonprofit had labeled its workers as interns rather than volunteers. The underlying principle is the same—unpaid labor depresses wages across

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[133] See Volunteer Ushers/Employee Status, supra note 113; Employment Status/Member-Volunteers of Cooperative, supra note 103; Employee Volunteers, supra note 111, at WHM 99:8035–36.

[134] Employment Status/Member-Volunteers of Cooperative, supra note 103, at WHM 99:8068.

[135] Id.

[136] Employee Volunteers, supra note 111, at WHM 99:8036.

[137] Volunteer Ushers/Employee Status, supra note 113 (observing that if volunteers were allowed to usher at a nonprofit event, they would displace paid employees).

[138] See Christopher Keleher, The Perils of Unpaid Internships, 101 Ill. B.J. 626, 627 (2013); Andrew Maguire, Unpaid Internships: Get on the Right Side of History, Looksharp: Employer Blog (Apr. 11, 2013), http://employerblog.looksharp.com/unpaid-internships-get-on-the-right-side-of-history [https://perma.cc/BD35-N7EW] (arguing that unpaid internships have eliminated "hundreds of thousands" of paying jobs).

[139] Harthill, supra note 11, at 581–84.

[140] *Tony & Susan Alamo Found.*, 471 U.S. at 292, 302–03.

the board.[141] Harthill's support for broad protection under the volunteer exception eviscerates the Court's judgment that the Act requires charitable nonprofits to play by the rules in order to prevent them from burdening the labor market as a whole.

III. PROBLEMATIC EFFECTS OF THE UNPAID INTERN EXCEPTION

Parts I and II of this Note challenged arguments by the Department of Labor as well as academics that unpaid internships at nonprofits do not constitute violations of the Fair Labor Standards Act. These Parts relied on *Fox Searchlight*, Supreme Court precedent, and the text of the Fair Labor Standards Act to support this Note's assertion. However, there is one counterargument that has not yet been addressed. A critic might say, "So what? Our government preferences nonprofits all the time. Chalk this up as another advantage we give to support the nonprofit sector and move on." Indeed, many scholars have gone further, arguing that the effects of the nonprofit unpaid intern exception justify the policy's inconsistency with the goals of the Fair Labor Standards Act.[142] This Note responds that the effects of disadvantaging nonprofit interns relative to for-profit interns have serious repercussions that are not meaningfully addressed by other commentators.

The debate regarding the character of nonprofit organizations has raged for decades. Some paint a rosy picture of nonprofits, arguing that they combine the civic and charitable qualities of government with the innovation and ingenuity of the private sector.[143] Others argue that the nonprofit sector has a darker side, hiding wealth, subsidizing inefficien-

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[141] Id. at 302 (noting that a broad exception for volunteers at nonprofits would depress wages).

[142] Pianko, supra note 16, at 27 (arguing that nonprofit print journalism is too valuable to threaten with the end of unpaid internships); Tucci, supra note 16, at 1385–86 (advocating for a "limited-service" exception which would allow nonprofits to take advantage of "part-time" unpaid intern labor); cf. David Lat, Op-Ed., Government Should Allow Most Unpaid Internships, N.Y. Times (July 18, 2013, 11:41 AM), http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/government-should-allow-most-unpaid-internships [https://perma.cc/2HM7-T7E4] (arguing that unpaid internships, even at for-profit institutions, are too valuable to restrict).

[143] See, e.g., John W. Gardner, The Independent Sector, *in* America's Voluntary Spirit ix, xiii–xv (Brian O'Connell ed., 1983) ("To deal effectively with the ailments of our society today, individual initiative isn't enough, there has to be some way of linking the individual with the community.").

cies, and suffering from chronic "mission drift."[144] This Note does not seek to demonize nonprofits, but it does add a realistic discussion of their pros and cons to the unpaid intern debate. At the very least, it indicates that any preference for charitable nonprofits should be balanced against the practical effect of completely denying a class of America's unpaid interns the safeguards of the Fair Labor Standards Act.

A. The Inefficiency of the Nonprofit Corporate Form

The generally accepted argument for the existence of nonprofits is that they provide desirable goods that otherwise would not enter the marketplace due to a combination of market failures and government failures.[145] The market often fails to produce goods that can be consumed collectively due to the "free rider" problem.[146] Although the government excels at producing public goods, its actions are based on majority support, and consequently the government is often slow to develop the necessary consensus to correct a market failure.[147] Nonprofits fill this gap, allowing small groups of private citizens to provide public goods where both the market and government have failed.

But the gap-filling function comes at a price. The nonprofit form "curtail[s] the profit motive" and "reduce[s] incentives for cost efficiency."[148] Indeed, one recent study found that the nonprofit sector wastes $100 billion of value annually.[149] Additionally, 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

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[144] See, e.g., Gilbert M. Gaul & Neill A. Borowski, Free Ride: The Tax-Exempt Economy 1–9 (1993); Lesley Friedman Rosenthal, How Not to Govern: Lessons from the Report to the Board of Regents of the Smithsonian Institution, N.Y. St. B. Ass'n J., Nov.–Dec. 2007, at 35, 35–38.

[145] Lester M. Salamon, America's Nonprofit Sector: A Primer 12–13 (2d ed. 1999).

[146] Id. at 12 (listing clean air, national defense, and safe neighborhoods as examples).

[147] Id. at 13.

[148] Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 507 (1981).

[149] See Bill Bradley et al., The Nonprofit Sector's $100 Billion Opportunity, Harv. Bus. Rev., May 2003, at 94, 102; see also Madoff, supra note 11 (arguing that nonprofits and for-profits are often indistinguishable and that government subsidies to the nonprofit sector are wasteful).

nonprofit status.[150] Managers of charitable nonprofits face little threat of losing their jobs until the nonprofit is faced with dissolution entirely.[151]

Signs of inefficiency have led some scholars to conclude that the playing field between for-profits and nonprofits should be leveled.[152] Others have argued that the altruistic "warm glow" that accompanies nonprofits is increasingly found in for-profit corporations and that they are adapting to exceed the efficiency of nonprofits by bundling public goods with private goods.[153] Each of these theories is hotly contested in the literature, and defenders of nonprofits have risen to the challenge.[154] However, as debates regarding the value of nonprofit subsidies and the efficiency of nonprofits as a whole rage in academia, the relative silence surrounding the Labor Department's terse assertion that unpaid internships at charitable nonprofits are "generally permissible" is deafening. To paraphrase T.S. Eliot, the unpaid intern exception is justified not with a bang but a footnote.[155]

B. The Uncertainty of the Unpaid Intern Exception

Uncertainty is bad for efficiency. And in the wake of *Fox Searchlight*, the status of unpaid internships at nonprofits under the Fair Labor Standards Act is unclear. This Note aside, the few scholars who have examined the subject agree that nonprofits should have continued access to unpaid interns, but they are uncertain how to justify this exception

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[150] Anup Malani & Eric A. Posner, The Case for For-Profit Charities, 93 Va. L. Rev. 2017, 2054 (2007) ("The inefficient nonaltruist, however, has an incentive to choose the nonprofit form purely because of its tax advantage. Without the tax advantage, the inefficient nonaltruist would not be able to survive in a competitive marketplace.").

[151] Id. at 2055–56.

[152] Id. at 2054–56; cf. Kevin E. Davis, The Role of Nonprofits in the Production of Boilerplate, 104 Mich. L. Rev. 1075, 1099 (2006) ("Differential tax treatment of this sort tends to allow relatively inefficient nonprofits to offer contracts at lower cost than more efficient for-profits. This will cause society to expend more resources than necessary in producing contracts of a given quality.").

[153] M. Todd Henderson & Anup Malani, Corporate Philanthropy and the Market for Altruism, 109 Colum. L. Rev. 571, 572–73, 583 (2009); cf. Daniel W. Greening & Daniel B. Turban, Corporate Social Performance as a Competitive Advantage in Attracting a Quality Workforce, 39 Bus. & Soc'y 254, 276 (2000) (finding that firms with reputations for corporate social performance may develop competitive advantages in attracting employees).

[154] See, e.g., Brian Galle, Keep Charity Charitable, 88 Tex. L. Rev. 1213, 1213–14 (2010); Mitchell A. Kane, Response, Decoupling?, 93 Va. L. Rev. In Brief 235, 236–37 (2008), http://www.virginialawreview.org/volumes/content/decoupling [https://perma.cc/V955-DTSD].

[155] T.S. Eliot, The Hollow Men, *in* Collected Poems 1909–1962, at 79, 82 (1963).

under the Act. Some argue that unpaid interns at nonprofits are volunteers.[156] Others contend that modifying the Labor Department's guidance in Fact Sheet #71 is the surest route to protection for nonprofits.[157] And some are in the middle despite their clear support of preferential treatment, urging nonprofits to be wary.[158] Fact Sheet #71 sheds little light on the issue, and the Department of Labor has not published an opinion letter on the subject of internships or the volunteer exception since 2009.[159]

This degree of uncertainty is not conducive to the kind of long-term planning required for efficient competition in the marketplace. What is a nonprofit to do? Neither the volunteer exception nor the intern exception has a sound textual basis in the Fair Labor Standards Act—both were announced in the opinions of the Court and expanded upon in nonbinding publications by government agencies. 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."[160] Each of these choices has consequences, and a misstep could subject nonprofits to liability for unpaid wages. Many of the dollars saved in internship programs could ultimately find their way to the law firms hired to untangle this thorny issue, and many more could find their way to plaintiff's lawyers even if nonprofits approach this issue with the best of intentions.

This Note joins Harthill insofar as she argues that Congress should revisit these exceptions in order to provide greater clarity.[161] Congress should settle the issue by modifying the Fair Labor Standards Act. Con-

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[156] Pianko, supra note 16, at 9.

[157] Tucci, supra note 16, at 1366.

[158] Harthill, supra note 11, at 622–23.

[159] See Fact Sheet #71, supra note 12; Wage & Hour Div., U.S. Dep't of Labor, Non-Administrator Letters – Fair Labor Standards Act, http://www.dol.gov/whd/opinion/flsana.htm [https://perma.cc/XC8U-3TQJ] (listing published opinion letters from employees in the Wage and Hour Division regarding the Fair Labor Standards Act); Wage & Hour Div., U.S. Dep't of Labor, Opinion Letters – Fair Labor Standards Act, http://www.dol.gov/whd/opinion/flsa.htm [https://perma.cc/9252-L2UD] (listing published opinion letters from the Administrator of the Wage and Hour Division regarding the Fair Labor Standards Act).

[160] See Fact Sheet #71, supra note 12.

[161] Harthill, supra note 11, at 601 ("[T]he fact that the nonprofit law-student intern falls outside express statutory and regulatory protection is cause for concern and should be addressed by the DOL.").

gress displayed the will to draw bright lines when it enacted Section 203(e)(4) of the Act and exempted volunteers who perform government service from the definition of employee.[162] This is the kind of clear rule that nonprofits could benefit from, and if preferences for charitable nonprofits are destined to be the law of the land, they should be granted by Congress.

C. The Advantages of the Upper Class and Wealthy Universities

Those who support an expansive exception for unpaid internships argue that they offer a gateway into the business world and provide valuable experience to young professionals.[163] But these justifications do not align with the humanitarian-minded volunteers that the Court imagined when designing the exception for "ordinary volunteerism."[164] It seems strange that the Court's emphasis on humanitarian values could support a broad exception for charitable nonprofits on pragmatic, economic grounds. Even if one concedes that proponents of unpaid internships are correct when they assert that these jobs provide some value to interns, that does not mean that unpaid internships at charitable nonprofits distribute value evenly.

This Note joins and expands on Anthony Tucci's argument that preferencing unpaid internships in the nonprofit sector privileges the upper class.[165] Intern placement agencies are becoming more common in the marketplace. These services match young professionals with internships for a fee, and those who cannot afford to pay are at a disadvantage in an already highly competitive labor market. Paying to obtain an unpaid internship is out of the question for those who cannot afford room and board without working full time for a paying employer. Job seekers with

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[162] 29 U.S.C. § 203(e)(4)(A) (2012). An astute reader might observe that this Note does not challenge the public policy and inefficiencies underlying the use of unpaid internships by government organizations. This self-dealing is approved by statute, so the proper channel for ending this practice does not lie with the courts or government agencies that are the focus of this Note.

[163] See, e.g., Steve Cohen, Op-Ed., Minimum Wage for Interns?, Wall St. J., Jan. 8, 2013, at A17; Lat, supra note 142. But see Keleher, supra note 138, at 627; Maguire, supra note 138.

[164] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302–03 (1985).

[165] See Tucci, supra note 16, at 1381–84; see also Andrew Mark Bennett, Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity, 11 U. Md. L.J. Race, Religion, Gender & Class 293, 295–98 (2011) (asserting that unpaid internships privilege the wealthy).

wealthy families can rely on economic support during their formative professional years, using these resources as a cushion until they develop the skills necessary to obtain high-paying jobs of their own.[166] In contrast, a student with a low-income background is already likely saddled with debt from the loans required to pursue higher education.

Students are not the only ones who suffer from this state of affairs. Nonprofits with unpaid internships are not screening for the best possible employees. Rather, they are screening for those with wealthy backgrounds or those who have an exceptionally high tolerance for risk. This may save labor costs in the short term, but preventing low-income applicants from developing a taste for altruism will hurt nonprofits in the long run by discouraging these individuals from joining the nonprofit sector.

This screening is exceptionally problematic due to the nature of nonprofits. Students from low-income backgrounds with educational loans are incentivized to maximize returns by searching for paid internships, and the Fair Labor Standards Act enforces payment for interns in the private sector. In contrast, broad exceptions for unpaid interns at charitable nonprofits likely reduce the number of paying entry-level positions in the public sector. And because a disproportionate number of racial and ethnic minorities are from low-income backgrounds, the unpaid intern exception privileges white, wealthy intern applicants.[167] The Court has recognized the value of diversity in many settings,[168] and this value is applicable to nonprofits in a unique way. Nonprofits exist to fill in the gaps between the marketplace and the government.[169] These gaps arguably form because minority groups lack the ability to persuade the gov-

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[166] See Andrea Perera, Paying Dues in Internships, L.A. Times, Apr. 22, 2002, at B4 (claiming that summer living expenses for an intern in D.C. hovered around $4,500 in 2002); see also Sue Shellenbarger, Do You Want an Internship? It'll Cost You, Wall St. J., Jan. 28, 2009, at D1 (describing the market for intern-placement services); LawProf, Working for Free and Class Bias, Inside the Law School Scam (Jan. 16, 2012), http://insidethelawschoolscam.blogspot.com/2012/01/working-for-free-and-class-bias.html [https://perma.cc/PHR5-A5RG] (discussing class membership and unpaid legal internships).

[167] Tucci, supra note 16, at 1383.

[168] Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (finding diversity in education to be a compelling government interest); Sweatt v. Painter, 339 U.S. 629, 634 (1950) ("Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."); cf. Steven A. Ramirez, A General Theory of Cultural Diversity, 7 Mich. J. Race & L. 33, 56 (2001) (arguing that opening access to individuals of different backgrounds enhances the cultural diversity of institutions, which in turn has positive effects).

[169] Salamon, supra note 145, at 12–13.

ernment to enter the marketplace and correct market failures.[170] It is inherently problematic for institutions that are designed to give minority groups a voice to develop a screening process that has a disparate impact on racial and ethnic minorities. In the aggregate, these countermajoritarian organizations will continue to trend towards governance by members of the racial and ethnic majority.

The ability of students to finance unpaid internships often depends on their ability to obtain a grant from their university, and this also produces inequities. Wealthy institutions may be able to help their students bear the financial burden of an unpaid internship, but this does little to help those who struggle in the universities outside of the Ivy League. The disparities at law schools provide a stark example. Harvard Law School claims that it "has the most comprehensive support for summer public interest work available" and that "[n]o law school offers a larger pool of guaranteed funding for a broader range of public interest jobs."[171] Students interested in public service at schools outside of legal academia's top tier (and even some of those within it) face a bleaker picture.[172] This funding gap is even more problematic after graduation. Many legal nonprofits require fellowship funding before they will consider employing recent law graduates.[173] When working for free after graduation becomes standard practice in the public sector, students from wealthy academic

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[170] Id.

[171] Summer Public Interest Funding, Harv. L. Sch., http://hls.harvard.edu/dept/sfs/spif [https://perma.cc/K66U-SLF8].

[172] Compare University of Pennsylvania Law School, Directory of Law School Public Interest and Pro Bono Programs, Am. B. Ass'n, http://apps.americanbar.org/legalservices/probono/lawschools/86.html#pi_summer [https://perma.cc/3QXX-QSZM] (offering 175 students public service funding), and PILA Grant Job Locations, Summer 2015, U. Va. Sch. L., http://www.law.virginia.edu/html/publicserv/pilagrantees.htm [https://perma.cc/Q87K-C6NY] (awarding 84 summer public service grants and providing $3,500 to first-year students and $6,000 to second-year students), with Albany Law School, Directory of Law School Public Interest and Pro Bono Programs, Am. B. Ass'n, http://apps.americanbar.org/legalservices/probono/lawschools/3.html [https://perma.cc/G9ZB-3C9T] (offering a small number of fellowships as well as summer stipends of $700–1,000 to fifty students), and University of South Carolina School of Law, Directory of Law School Public Interest and Pro Bono Programs, Am. B. Ass'n, http://apps.americanbar.org/legalservices/probono/lawschools/100.html#pi_summer [https://perma.cc/WFT8-DK9X] (offering six summer stipends of $1,000–2,000 and four additional fellowships sharing $15,000).

[173] See Yale L. Sch. Career Dev. Office, 1 Public Interest Fellowships 3 (2014), https://www.psjd.org/getResourceFile.cfm?ID=22 [https://perma.cc/N6BN-R6MW] (beginning its discussion of public service fellowship funding by noting that "[f]ellowships are a gateway for most entry-level public interest jobs. . . . [A] fellowship is often the only path for new attorneys into larger, national nonprofit organizations").

institutions possess an incredible advantage in fellowship funding.[174] Elite, prestigious universities already hold many of the keys to the job market; the continued dominance of unpaid internships in the nonprofit sector allows them to control—even more firmly—access to these positions. Opportunities in the nonprofit sector should not be restricted to those fortunate enough to attend the most elite academic institutions.

D. Is It Bad Policy to Place Additional Costs on Charitable Nonprofits and Discourage Unpaid Internships?

The logical counterargument to criticisms of the nonprofit corporate form and its reliance on unpaid internships is that these inefficiencies do not justify driving nonprofit entities out of the marketplace entirely. After all, the Second Circuit's decision to adopt the "primary beneficiary" test partly rested on the benefits of unpaid internships to interns. As stated in *Fox Searchlight*, "[w]hen properly designed, unpaid internship programs can greatly benefit interns."[175] Requiring charitable nonprofits to pay their interns will increase costs and likely reduce the number of internships available. Although it is undeniable that reigning in unpaid internships at charitable nonprofits will increase their labor costs, many charitable nonprofits are capable of bearing these costs.[176] In fact, nonprofit entities are often indistinguishable from their for-profit competitors.[177] And despite their "charitable" classification, many charitable nonprofits are sophisticated corporate entities that approach the Fair Labor Standards Act strategically, and will exploit any preference adopted by the courts.[178] Strict enforcement of the Fair Labor Standards Act,

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[174] See LawProf, supra note 166 ("[W]orking for free has become an absolutely routine job search strategy for both law students and actual licensed attorneys . . . ."); cf. David Lat, Would You Work as a Federal Prosecutor—for Free?, Above the Law (May 18, 2011, 4:24 PM), http://abovethelaw.com/2011/05/would-you-work-as-a-federal-prosecutor-for-free [https://perma.cc/2Q7F-ZV7E] (implying that United States Attorneys' Offices abuse free labor because they are not subject to the Fair Labor Standards Act).

[175] *Fox Searchlight*, 811 F.3d at 535.

[176] Liz LeCrone, Unpaid Internships for Nonprofits: Lean In Joins the Controversy, Looksharp (Aug. 15, 2013), https://www.looksharp.com/blog/unpaid-internships-for-non profits-hypocritical-or-necessary [https://perma.cc/QYH5-SHXC] (arguing that many nonprofits can afford to pay their unpaid interns).

[177] See Madoff, supra note 11.

[178] See, e.g., Presentation, Nancy Cooper & Judith Endejan, The Unpaid Intern: Can't Live With Them, But Can't Live Without Them, at Pub. Media Bus. Ass'n Annual Conference (May 29, 2014), http://pmbaonline.org/sites/default/files/2014_Pres_Unpaid_Interns.pdf

therefore, will not drive most sophisticated, efficient nonprofits out of the marketplace.

The benefit of unpaid internships at charitable nonprofits to interns themselves is also questionable. Unpaid interns spend less time on analytical work and more time performing clerical tasks than their paid peers.[179] But fetching coffee or making copies is rarely the biggest problem for unpaid interns. According to a 2014 study by the National Association of Colleges and Employers, only 41% of college students who participated in an unpaid internship program during college and applied for full-time paying positions had a job offer by graduation, from *any company*.[180] For perspective, 38% of students who did not participate in internship programs and applied for at least one full-time job received an offer upon matriculation, and 65.4% of students who participated in paid internship programs had at least one offer.[181] A study by Intern Bridge has been cited as showing that paid interns were twice as likely as unpaid interns to receive a job offer from the company where they worked and that this finding held constant after accounting for a student's grade-point average and major.[182] Further, unpaid internships are less likely than paid internships to lead to well-compensated positions. One study found that the average salary following a paid internship was $51,930, while the averages for those with unpaid intern experience, or no experience at all, were $35,721 and $37,087, respectively.[183] This research suggests that unpaid internships often fail to provide a gateway to finan-

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[https://perma.cc/6Z3J-3WFT] (presenting strategies for classifying unpaid workers as interns and volunteers at nonprofits).

[179] Susan Adams, Odds Are Your Internship Will Get You a Job, Forbes (July 25, 2012, 6:20 PM), http://www.forbes.com/sites/susanadams/2012/07/25/odds-are-your-internship-will-get-you-a-job [https://perma.cc/PZN8-3UA7] (noting that while paid internships yield dividends, the news for unpaid interns is "much less encouraging").

[180] Nat'l Ass'n of Colls. & Emp'rs, The Class of 2014 Student Survey Report 41–42 (2014), http://career.sa.ucsb.edu/files/docs/handouts/2014-student-survey.pdf [https://perma.cc/W8MD-3WB3].

[181] Id. at 40.

[182] See Jordan Weissman, Do Unpaid Internships Lead to Jobs? Not for College Students, Atlantic (June 19, 2013), http://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959 [https://perma.cc/Z4UZ-QCWG]; see also Rachel Burger, Why Your Unpaid Internship Makes You Less Employable, Forbes (Jan. 16, 2014, 8:00 AM), http://www.forbes.com/sites/realspin/2014/01/16/why-your-unpaid-internship-makes-you-less-employable [https://perma.cc/278B-L6GR] (observing that former paid interns earn nearly double that of their unpaid counterparts after matriculation).

[183] See Burger, supra note 182.

cial independence for those burdened by student loans. Even if unpaid interns at nonprofits tend to apply for lower-paying jobs as they approach graduation, these statistics are still troubling.

Legal academics have also extensively criticized unpaid internships in the for-profit sector. While none discuss the problems of unpaid internships at nonprofits, they join this Note in arguing that unpaid interns displace paid labor, hurt the economy, and receive few opportunities to develop substantive experience. These arguments discredit the position that unpaid internships in any sector should be completely unregulated.[184] Thus, even if the Second Circuit is correct that some internships are beneficial, leaving unpaid interns at charitable nonprofits completely unprotected by the Fair Labor Standards Act is not the best course of action.

Even if one concludes that the nonprofit corporate form deserves preferential treatment, it does not follow that denying interns the basic protections of the Fair Labor Standards Act is the proper mechanism for supporting nonprofits. Most of the legal framework that subsidizes nonprofits comes from various tax exemptions or the encouragement of charitable contributions.[185] The costs of these programs are ultimately borne by the federal government and the for-profit sector. The federal government loses tax income, and the for-profit sector faces increased competition from the preferenced nonprofit form. But it makes sense to burden the federal government and for-profit sector with these costs, because the rationale for supporting the nonprofit sector rests on correcting market and government failures.[186]

In contrast, any preference for unpaid interns at charitable nonprofits functionally operates as a subsidy, the cost of which is borne first and foremost by America's workforce. Unpaid interns in any sector depress wages[187] and displace paid labor.[188] By allowing nonprofits to expect la-

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[184] See, e.g., Fink, supra note 17, at 453–54; Melissa Hart, Internships As Invisible Labor, 18 Emp. Rts. & Emp. Pol'y J. 141, 143–44 (2014); Jessica L. Curiale, Note, America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change, 61 Hastings L.J. 1531, 1534 (2010); Lauren Fredericksen, Note, Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern, 21 Geo. Mason L. Rev. 245, 246–47 (2013).

[185] Madoff, supra note 11.

[186] Salamon, supra note 145, at 12–13.

[187] See Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985) (asserting that allowing nonprofits access to unpaid labor would depress wages).

[188] Volunteer Ushers/Employee Status, supra note 113 (denying an exception for ushers at a nonprofit theater that displaced paid labor); Volunteers/Employee Status, supra note 103, at

bor market entrants to work for free, the unpaid intern exception operates as a mechanism that taxes labor market entrants by forcing donations of time. It is inappropriate to further burden those seeking employment. Scholars arguing that charitable nonprofits are entitled to unpaid interns should understand that the burden of this largesse falls on the backs of young employees who are often deeply in debt.[189] Recent studies suggest that the average college student graduates with over $27,000 in debt,[190] and this number is far higher for those who pursue graduate education.[191] And because women are 77% more likely to accept an unpaid internship than men, this subsidy falls more heavily on the backs of women and exacerbates the gender pay gap.[192] Thus, institutions that are meant to represent minority interests that are victims of market failures are themselves contributing to the continued oppression of women in America. And as if that were not enough, unpaid internships depress the wages of paid employees as well—so the cost is not just to those who actually take unpaid positions. While unpaid internships may be beneficial to the bottom line of nonprofits, there is significant evidence that this practice places an unjustifiably large burden on vulnerable young workers. Supporters of the Department of Labor's position must not only address the high price of their largesse, they must also acknowledge who is paying for it.

If the government wishes to further subsidize charitable nonprofits, it should find an alternative that does not sacrifice the rights of young workers. The government could encourage monetary donations by raising the cap on charitable deductions, or it could allocate additional funds

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WHM 99:8192 (denying an exception for unpaid "hosts" at a nonprofit park when they acted as park security or assisted in manual tasks that normally require paid labor at campsites).

[189] LawProf, supra note 166 (noting that the typical cost of a law degree, including cost of living, is $250,000).

[190] Halah Touryalai, More Evidence on the Student Debt Crisis: Average Grad's Loan Jumps to $27,000, Forbes (Jan. 29, 2013, 3:22 PM), http://www.forbes.com/sites/halahtouryalai/2013/01/29/more-evidence-on-the-student-debt-crisis-average-grads-loan-jumps-to-27000.

[191] Allie Bidwell, How Much Loan Debt is from Grad Students? More than You Think, U.S. News (Mar. 25, 2014, 11:38 AM), http://www.usnews.com/news/articles/2014/03/25/how-much-outstanding-loan-debt-is-from-grad-students-more-than-you-think [https://perma.cc/WED8-HF5P].

[192] LeCrone, supra note 176.

for nonprofit grants.[193] Many nonprofits can pay their interns without collapsing. And if the government were to honestly shoulder the burden of paying young workers by assigning nonprofits more funds instead of allocating the cost to the labor market, nonprofits would not even have to worry about where to find the funds in their existing budgets.

CONCLUSION

While the Department of Labor has said that unpaid internships at charitable nonprofits are "generally permissible,"[194] *Fox Searchlight* signals that charitable nonprofits can no longer rely on Fact Sheet #71 for protection. The Labor Department is only entitled to *Skidmore* deference for this document, and its assertion of protection in Fact Sheet #71 contains no justification for the sweeping exception that it announces. The Fact Sheet is therefore unlikely to persuade courts that the Labor Department's stance is correct.

This Note predicts that arguments for preferential treatment of nonprofits proffered by authors such as Tucci, Bianci, and Harthill will fail in the courts. This Note stands alone in forecasting massive liability for the 40% of unpaid internships hosted by charitable nonprofits in the United States today. Once a nonprofit or an employee is covered by the Fair Labor Standards Act, the clear intent of Congress as articulated by the Court (as well as the Department of Labor in the context of the volunteer exception) is to draw exceptions to coverage as narrowly as possible. On top of these textual and precedent-based arguments, plaintiffs have strong public policy arguments that the continued existence of the exception encourages inefficiency, distorts the labor market, creates uncertainty, and privileges whites and elite institutions at the expense of racial and ethnic minorities. At the very least, interns at charitable nonprofits should no longer have to fend for themselves in a completely unregulated market. This Note recommends that charitable nonprofits curtail their unpaid internship programs and calls on the Labor Department to withdraw its unsupported guidance in Fact Sheet #71. It would be as easy as deleting a footnote.

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[193] The government already grants funding directly to nonprofits. See Starting a Nonprofit Organization, USA.gov, http://www.usa.gov/start-nonprofit [https://perma.cc/GW6W-UHUX].

[194] Fact Sheet #71, supra note 12.

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