No. 102392-8
No. 57156-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

MR. RHETT GREENFIELD, AN INDIVIDUAL;

Petitioner

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent

PETITION FOR REVIEW
OF DECISION OF COURT OF APPEALS

Mr. Rhett Greenfield
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COVER PAGE

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APPENDICES

I. Identity of Petitioner

Mr. Rhett Greenfield, Petitioner representing himself *pro se*, files this petition for review.

II. Citation to Court of Appeals Decision

Petitioner seeks review of the Published Opinion of the Court of Appeals, Division II in Greenfield v. Dep't of Labor and Industries, Case No. 57156-1-II. That decision was filed on June 21, 2023. See Appendix A. An order denying a motion for reconsideration was filed on August 17, 2023. See Appendix C.

III. Issues Presented for Review

Can nonprofit organizations in Washington State have unpaid interns without violating the Washington Minimum Wage Act (MWA)? What conditions must be met to exempt interns from the Act?

IV. Statement of the Case

This petition urges the Washington State Supreme Court to examine and apply the *primary beneficiary test* adopted in *Benjamin v. B & H Education, Inc.,* 887 F.3d 1139 (9th Circuit, 2017) to an unpaid internship Petitioner held in 2018. Applying that test shows the internship did not meet legal standards, and so was actually an employment relationship.

If I was an intern at the ACLU-WA as the Published Opinion says, the primary beneficiary test applies. If I was not an intern, then working there made me an employee and relevant wage laws apply. The Published Opinion admits I

was not a volunteer. Published Opinion at 21, *footnote.* However, it fails to classify me by any designation recognized within state employment law. Designating me as having performed labor "gratuitously" is not properly defined in statute, has no evidentiary basis, and requires questionable, extra-legal justification. **It is also preempted by the fact that I was an intern, since interns are expected to benefit in some tangible, material way.**

Petitioner believes that the legality of unpaid internships within Washington State is "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The ruling issued by the Court of Appeals conflicts with Supreme Court decisions concerning the broad and remedial nature of basic wage protections. RAP 13.4(b)(1). The ruling also conflicts with at least one decision from the Court of Appeals, Division II. RAP 13.4(b)(2).

From March to December of 2018, I held an internship at the offices of the ACLU-WA in Seattle. See AAR 160, Section 4.10. See also AAR 356 - 358, AAR 577-579 and AAR 790 (Request for Admission, No. 1).[1] While interviewing for the internship, an ACLU-WA staff member asked me why I wanted to *work* there. I said I wanted to work at the ACLU-WA on a full-time basis. I stated that I regarded the internship as a start within the organization that would eventually

[1] I do not have access to the Clerk's Papers sent to the Court of Appeals. One difficulty for me in this case has been the burden of paying court costs in addition to everything else involved in being a *pro se* litigant. I believe there are only a few pages difference between these records and have specified titles and sections of documents I cite whenever possible.

transition into employment. See AAR 160, Sections 4.14 - 4.15.

Before that interview, I submitted a separate job application to work as a "Legislative Session Aide" at the ACLU-WA. See AAR 159, Section 4.8. In other words, at the time of the interview, the organization had already received a job application from me expressing my desire to work there full-time. I never received an answer to that application. That prior application is evidence of my intention to work at the ACLU-WA offices before the internship. It also shows that the statements I made during the interview about why I wanted to work at the ACLU-WA were actually the second time I expressed my interest in eventually working at the ACLU-WA full-time.

I was accepted for the internship position. I began commuting from Tacoma to Seattle two days a week. I worked within the Seattle offices of the ACLU-WA for roughly eight hours each of those days. See AAR 356 - 358. See also AAR 577-579.

I held a part-time internship at the ACLU-WA as an "Intake Counselor" for a total of ten months, even though the description for the internship provided on the "Careers" section of the organization's webpage stated that the duration of the internship would be six months. See AAR 487 (Position Description Submitted to L&I Investigator). See also AAR 709 ("Exhibit A").

During those ten months, I inquired about full-time work several times,

speaking to my supervisor and submitting another job application to work there as a "Legal Assistant." See AAR 237-240 ("Exhibit E-3" from ACLU-WA). Staff at the organization continued to request that I arrive at the organization's offices to perform work as late as three to four months after the internship was supposed to have ended. I kept returning out of confusion as to why I had not been hired, and because I have a dedicated attitude toward my pursuits. See AAR 722-723 (Exhibit C). I eventually stopped returning after an indirect request voiced by my supervisor. By that point, it was December 2018. *Id.*

Uncertain what had happened given my clear, repeated attempts to obtain employment at the organization and never receiving a direct response from anyone at the ACLU-WA, I went on to submit two more job applications for full-time roles there. See AAR 160, Section 4-15. See also AAR 241 - 248 (ACLU-WA's "Exhibit E-3" and "Exhibit E-4"). Two out of the four full-time employment positions I applied for at the ACLU-WA were within the organization's legal department, involving work that would have been similar to the work I performed as an Intake Counselor. Only one of these applications received a response. That response was informal, from a peer acquaintance at the organization. There are no responses to the applications I submitted included within the record of this case.

As an Intake Counselor, I answered letters and phone calls from people contacting the ACLU-WA from across the state of Washington. See AAR 183. I

documented the calls within a word processing table and within a database. See AAR 183. I related the content of the calls to the cases of the attorneys on staff to determine whether the caller and their circumstances could be added to those cases. See AAR 183. See also AAR 720 ("Exhibit C"). When appropriate, I provided literature resources and referrals to legal aid organizations. See AAR 183. These are all ways in which the ACLU-WA benefited from my work. In any other organization, this sort of intake work would typically be performed by a paid legal assistant. **I received no documented benefit.**

My main reason for applying to and accepting the internship was to transition into full-time, paid employment within the ACLU-WA offices. There is objective documentation contained within the OAH record demonstrating the consistency of my intentions before, during, and after my internship. See AAR 232-248 (ACLU-WA Exhibits E-1, E-3, E-4, E-5). I also have personal knowledge that the majority of people who held internship roles as "Intake Counselors" at the ACLU-WA were college graduates such as myself, not students. I do not believe I was the only one who expected the role would lead to future employment opportunities at the ACLU-WA. See AAR 143-144, Section 2.2 (second paragraph).

Although confused and suspicious, I eventually realized I would never be hired and there had been no mistake. I did not arrive at this conclusion in haste.

Rather, I ruled out the possibility of a mistake through additional job applications. See AAR 185.

I filed a complaint about my experience with the Department of Labor and Industries in February, 2020. An exact copy of the L&I complaint form I submitted is contained within the case record. See AAR 356-357. See also AAR 710-711. It includes a brief statement that reads: "I worked at the ACLU-WA as an 'Intake Counselor,' an unpaid internship that I believed would lead to a full-time position at this specific employer. I was never paid, nor was I hired. None of this was consensual." See AAR 356. See also AAR 710. I also marked a checkbox in Section C of the complaint form indicating that other workers had been affected. See AAR 357. See also AAR 711.

My complaint was handled by investigator Debra Zach, who issued a Determination of Compliance in the ACLU-WA's favor on June 19, 2020. See AAR 272-274. I appealed that decision, resulting in a hearing before Judge Jane Shefler at the Office of Administrative Hearings (OAH) on April 28-29, 2021. See AAR 157-158. Judge Shefler affirmed the investigator's decision. See AAR 165.

I appealed Judge Shefler's proposed order on June 30, 2021. See AAR 154. See also AAR 141. On November 23, 2021, the Director's Office at the Department of Labor and Industries upheld the proposed order in a terse document containing absolutely no legal reasoning or explanation. See AAR 26 - 29.

I submitted a Petition for Reconsideration to the Director's Office on

December 1, 2021. See AAR 20-23. That petition was denied, once again without any rational explanation. See AAR 16-18.

I submitted a Petition for Review to Pierce County Superior Court on January 5, 2022. See AAR 2 - 10.

On July 11, 2022, a review hearing was held at the Superior Court. Judge Bryan Chushcoff was the presiding judicial officer. See Record 1505 - 1597.

After brief oral argument delivered by myself and Assistant Attorney General (AAG) Heather Leibowitz, Judge Chushcoff upheld the decisions made by the preceding agencies. *Id.* He did so on the basis of a single example of case law cited in the AAG's brief. He did not allow me to explain why this case law (involving how jurors are exempt to the MWA) was wholly irrelevant. There was no real engagement with any of the law I cited and explained. Nor was there any review of the evidence within the record.

This can be demonstrated by reviewing the transcript from the Superior Court hearing. See Verbatim Report of Proceedings. I do not have access to that document, so I cannot cite to an exact page within the Report of Proceedings. However, I believe information to support my claim lies toward the very end of that document, corresponding to the ending of the hearing.

I appealed Judge Chushcoff's order on August 3, 2022. See Record 1508 - 1512.

The Court of Appeals, Division II issued a Published Opinion on June 21,

2023. The Published Opinion accepted several of my arguments, but was ultimately unfavorable, upholding the general finding that I had performed work for the ACLU-WA on a "gratuitous" basis.

I submitted a Motion for Reconsideration on July 11, 2023. The motion advanced four arguments: (1) the Opinion afforded less weight to binding case law indicating that the MWA is to be given liberal construction than to a dictionary definition of the word "gratuitous" the judges arbitrarily selected, (2) the judges made several sweeping presumptions about my actions and circumstances that have no basis in the evidentiary record, (3) the judges accepted several claims made by ACLU-WA administrators and their attorney that have no supporting documentary or evidentiary basis, and (4) the judges completely misinterpreted the *primary beneficiary test* presented in *Benjamin* (and now presented in Administrative Policy, ES.C.2, *Hours Worked,* Section 7).

My Motion for Reconsideration was denied on August 17, 2023.

Here we are.

V. Argument

A. Standard for Discretionary Review

The issues presented merit discretionary review pursuant to RAP 13.4 for three reasons.

First, discretionary review should be accepted under RAP 13.4(b)(1) because the decision by the Court of Appeals conflicts with state Supreme Court decisions concerning the "broad" or "liberal" construction of RCW 49.46, as well

as the close correspondence between the Washington Minimum Wage Act (MWA) and the federal Fair Labor Standards Act (FLSA) of 1938.

Second, review should be accepted under RAP 13.4(b)(2) because the decision made by the Court of Appeals conflicts with at least one earlier published decision of the Court of Appeals.

Third and finally, the issues presented in the present case are matters of substantial public interest warranting review under RAP 13.4(b)(4).

B. The Court of Appeals' Decision Conflicts with Washington Supreme Court Authority Concerning the Construction and Application of the MWA

The Washington Supreme Court has interpreted RCW 49.46 in several cases relevant to the present proceedings. The Supreme Court has consistently held: (1) the definition of "employment" under the MWA is broad and remedial, (2) the basic categories and definitions of the MWA are derived from the FLSA, and (3) Washington courts may consider provisions of the FLSA as persuasive authority but, in the absence of clear state authority on an issue, FLSA standards provide "helpful guidance." In the present case, the decision from the Court of Appeals conflicts with these decisions made by the Supreme Court.

In the case *Anfinson v. Fedex Ground Package System, Inc.,* 174 Wn.2d 851, 281 P.3d 289 (2012), the state Supreme Court, in an *en banc* ruling, reasoned:

> "The MWA [Minimum Wage Act] defines the term 'employee.' Under RCW 49.46.010(3), 'Employee' includes any individual 'employed by an employer' subject to multiple exceptions not relevant here. Under the MWA, '[e]mploy' includes 'to permit to work.' RCW 49.46.010(2). An '[e]mployer' is 'any individual or entity acting directly or indirectly in the interest of an employer in relation to an employee.' RCW 49.46.010(4). Taken together, these statutes establish that under the MWA, an employee includes any individual permitted to work by an employer. This is a broad definition." *Anfinson* at 867.

The legal definition of employment in Washington State is broad, including any individual who performs work for someone else, unless a valid exemption can be demonstrated.

In the same ruling, the Court continued:

> "The MWA is remedial legislation. As remedial legislation, the MWA is given a liberal construction; exemptions from its coverage are narrowly construed and applied to situations which are 'plainly and unmistakably consistent with the terms and spirit of the legislation' [quoting Drinkwitz, 140 Wn.2d at 301, 996 P.2d 582] […] A liberal construction, therefore, is one that favors classification as an employee […] In sum, we hold that the definition of 'employee' in RCW 49.46.010(3) incorporates the economic dependence test developed by federal courts in interpreting the FLSA [Fair Labor Standards Act]." *Anfinson* at 870-871.

Three important conclusions emerge from *Anfinson*. First, exemptions to the state MWA are narrow since the definition of "employment" is broad and the MWA is remedial, protective legislation. Second, because of these broad legal protections, interpretations of "employment" as it relates to RCW 49.46 should favor classifying an individual as an employee whenever there is any doubt concerning classification. Third, Washington courts look to federal case law surrounding the FLSA to guide interpretation of state wage law.

The MWA's foundation upon the FLSA is explicitly stated in *Anfinson* at 868:

> "We have repeatedly recognized that the MWA is directly based on the Fair Labor Standards Act of 1938.' Stahl 148 Wn.2d at 885, 64 P.3d 10; see also Drinkwitz v. Alliant Techsystems, Inc. 140 W.2d 291, 298, 996 P.2d 582 (2000). The definitions of 'employee' and 'employ' are functionally identical under the two acts. At least where there is no contrary legislative intent, when a state statute is 'taken 'substantially verbatim' from [a] federal statute, it carries the same construction as the federal law and the same interpretation as federal case law.' State v. Bobic, 140 Wn.2d 250, 264, 996, P.2d 610 (2000) [citations in original]."

An expansive body of statutes at virtually every level of law, in addition to state and federal case law, support this legal definition of employment and its broad application. Unless there is a *clear and unambiguous exemption,* a person performing labor for an employer is deemed to be an employee subject to the protections of the MWA. Washington courts look to the federal FLSA in order to interpret the MWA, since the MWA was directly based upon the FLSA when the MWA was established by the state legislature. This is the starting point for correct application of the law to the facts of this case.

Coupled with the definition of "employment" already presented above, the state Supreme Court's remarks in *Anfinson* indicate there is an overwhelming legal presumption that a person performing labor for someone else is an employee of that person.

The close relationship between the state MWA and the federal FLSA is further illuminated in another *en banc* ruling by the Washington State Supreme Court in *Inniss v. Tandy Corp.,* 141 Wn.2d 517, 7 P.3d 807 (2000).

In *Inniss*, the court clarified this legal relationship by stating:

"In 1975, the Legislature enacted RCW 49.46.130 to conform state minimum wage laws to the federal Fair Labor Standards Act of 1938." *Inniss* at 523.

It went on to add:

"When construing provisions of the Washington Minimum Wage Act, this Court may consider comparable provisions of the Fair Labor Standards Act of 1938 as persuasive authority." *Inniss* at 524.

The case *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wn.2d 291, 996 P.2d 582 (2000), cited by the state Supreme Court in *Anfinson,* also warrants discussion.

In *Drinkwitz,* members of the court wrote:

"Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance. However, the MWA and the FLSA are not identical and we are not bound by such authority."
Drinkwitz at 298 [citations omitted]

The dissenting opinion, written by Justice Sanders, still drew upon the general symmetry between the MWA and the FLSA in presenting its reasoning:

"[T]he MWA is 'based upon' the FLSA, and therefore it is 'appropriate and helpful to refer to the approach used by the federal courts' whose analysis is 'helpful' and 'persuasive' even if not controlling on our interpretation. *Chelan County Deputy Sheriff's Ass'nv. Chelan County,* 109 Wn.2d 282, 291, 745 P.2d 1 (1987) [quotations and additional citations omitted] […] It makes imminent sense to look to the substantially more developed body of federal law for guidance. That is probably why, given the dearth of Washington authority on the issue, the majority turned to federal materials for its entire analysis." *Id.* at 310.

Furthermore:

"Significant differences between state statutes and federal statutes will render federal case law inapplicable in interpreting the state statute, cf. *Martini v. Boeing Co.,* 137 Wn.2d 357, 372, 971 P.2d 45 (1999), but the practical

> converse of that principle is nearly identical, and parallel state and federal statutes should be construed in harmony, absent state authority to the contrary." *Id.* at 312.

Although these statements are taken from the dissenting opinion in *Drinkwitz, every justice on the court* referred to the fact that the MWA is based upon the FLSA when presenting their reasoning. Federal rulings concerning the FLSA provide helpful guidance for interpreting the MWA, and may even be essential in circumstances where the MWA and state case law fail to address a particular issue. Every justice on the court agreed with at least the minimal version of this premise.

In summary: (1) the MWA, although not technically identical to the FLSA, is directly modeled upon it, (2) the FLSA provides at least persuasive authority in terms of how to interpret the MWA, (3) parallel state and federal statutes should be construed in harmony, absent state authority to the contrary, and (4) the definitions of "employee" and "employ" are "functionally identical" under the two acts. Where the MWA and the FLSA align, they have the same construction and are to be interpreted in the same way. See *Anfinson* at 868.

In the present case, the judges at the Court of Appeals have ignored these legal principles establishing the breadth of MWA protections and the close relationship between the MWA and the FLSA. Instead, they attribute more weight to a narrow clause within RCW 49.46.010(3)(d) indicating that the definition of "employee" does not include "[a]ny individual engaged in the activities of an […] nonprofit organization […] where the services are rendered to such organizations

gratuitously." Published Opinion at 21-22. They then plug a specious dictionary definition of the word "gratuitous" into this subsection of statute[2] to conclude that I worked at the ACLU-WA on a gratuitous basis. Published Opinion at 22. This has the effect of circumventing the legal protections granted by the MWA and explained in rulings by the WA Supreme Court. Their conclusion also lacks any basis in the evidentiary record.

C. The Court of Appeals Decision Conflicts with an Earlier Court of Appeals Decision

The Published Opinion claims that I worked for the ACLU-WA on a gratuitous basis. The main piece of "evidence" proffered for this claim is that I kept returning to the ACLU-WA offices across ten months without pay. *Id.*

However, **"an employee does not 'knowingly submit' to unlawful withholding of wages by staying on the job even after the employer fails to pay."** *Durand v. HIMC Corp.* 151 Wn. App. 818 (Wash. Ct. App. 2009) at 837, citing *Chelius v. Questar Microsystems,* 101 Wn. App. 678 (2001) [emphasis mine].

There is already reason to believe I was an employee of the ACLU-WA on the basis that I performed work for the organization. The claim that I was not an employee because I kept returning there contradicts the holding in *Durand.* My

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[2] There is no clear rationale to favor the definition selected in the Published Opinion. It is not clear why the definition found in one dictionary should be selected over that found in another dictionary, nor is it clear that the judges' conclusion follows from the definition of the word "gratuitous" they selected. See Appendix B at 9-11.

citation to *Durand* has been challenged on the basis that I was not an employee, but that challenge uses circular reasoning. Notably, treating my return to the ACLU-WA offices across ten months as evidence of performing work "gratuitously" would result in labelling anyone who kept working under unclear or fraudulent circumstances as working "gratuitously," thereby contradicting the broad, remedial protections afforded by the MWA (discussed above).

D. Adopting Current Legal Standards for Unpaid Internships is an Issue of Substantial Public Interest that Should be Determined by the Supreme Court

This case stands as a representative example in a roughly decade-long trend of legal challenges to unpaid internships.

According to the plain language of the FLSA, unpaid internships would likely be categorically illegal, under the Act's general definition of an employee as 'any individual employed by an employer.' 29 U.S.C. § 203(e)(1).

This broad definition of employment within the FLSA went largely uncontested until *Walling v. Portland Terminal Co.,* 330 U.S. 148 (1947). In *Walling,* the US Supreme Court considered a training program for railway brakemen that lasted for an average of seven to eight days. *Walling* at 148, 149. The holding emphasized that the railroad company received no discernible benefit from the short training course it provided. *Walling* at 150. It also compared the trainees to students at a school. *Walling* at 152.

As Rothschild and Rothschild (2020) explain:

> "Following the *Walling* decision, the issue of the legality of unpaid internships had remained a relatively untouched issue for half a century. It wasn't until the last decade that the discussion has been reinvigorated, with two presidents [Obama and Trump] taking radically different approaches to the issue. During the Obama presidency, many employers started paying their interns or ceased offering internships entirely. Under President Trump, the legal landscape looks less labyrinthine than it once did. […] It's clear the debate surrounding the benefits and drawbacks of unpaid internships will be ongoing."
> Philip C. Rothschild and Connor L. Rothschild, *The Unpaid Internship: Benefits, Drawbacks, and Legal Issues,* Vol 10., No. 2, Administrative Issues Journal, 1-17 (2020) at 9.

In 2015, a six-factor test derived from the *Walling* ruling and used by the Department of Labor for decades was deemed "too rigid" by the federal Court of Appeals for the Second Circuit. Legal experts had deemed it "nearly impossible" to meet all six factors. Rothschild and Rothschild (2020) at 8. These six factors were also used by L&I until 2021. See Administrative Policy ES.C.2, *Hours Worked,* Section 7.

The Second Circuit replaced the longstanding six-factor test applied to interns with a seven-factor *primary beneficiary test.* See Appendices A and E. The seven factors are non-exhaustive. Later, the Court of Appeals for the Ninth Circuit adopted the primary beneficiary test in *Benjamin v. B&H Education, Inc.,* 887 F.3d 1139 (9th Circuit, 2017).

The primary beneficiary test was adopted in the Ninth Circuit for three reasons. First, **the test "focuses on what the intern receives in exchange for his or her work"** *Benjamin* at 1146 (my emphasis). Second, it "allows courts flexibility in

examining the economic reality between the intern and the employer, which follows the Supreme Court's economic reality test cases." *Id.* Third, the test "acknowledges the distinction between intern-employer relationships, in which interns typically expect to receive educational or vocational benefits, and employee-employer [sic] relationships, in which employees do not necessarily expect to receive such benefits." *Id*. **The court pointed out the validity of the test's application across a "wide variety of contexts" involving putative interns by citing three other cases where it had been utilized, including at least one at a nonprofit**. *Id.* at 1146-1147.

Unpaid internships started to proliferate within the United States after the 2008 Great Recession. The scarcity of available jobs led an increasing number of recent graduates to take unpaid internships in the hope that they might develop into employment. See Rothschild & Rothschild (2020) at 2. Estimates have placed the number of unpaid internships in the United States at nearly three-quarters of a million people. See Rothschild & Rothschild (2020) at 1.

Criticisms of this practice are widespread.

Unpaid internships are claimed to contribute to income inequality because they exclude low income individuals from entering professions where such internships are commonplace. See Rothschild & Rothschild (2020) at 5. Notably, in 2019, the United States Census Bureau reported that census data from 2018 showed that income inequality in the United States had reached the highest level since the Bureau began tracking it more than fifty years ago. See *Income*

inequality in the United States, Wikipedia, https://en.wikipedia.org/wiki/Income_inequality_in_the_United_States (last visited Sep. 3, 2023). The United States has higher income inequality and a larger percentage of low income workers than any other industrialized nation in the world. See *Id.*

Unpaid internships are also criticized for the lack of legal protections afforded to the interns. Federal employment law prevents discrimination through three main statutes: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Rothschild and Rothschild at 6. Given the language used in these laws, interns who are not considered "employees" are likely not protected from sexual harassment, discrimination on the basis of age or disability, or other forms of discrimination. *Id.*

Another criticism of unpaid internships is their negative impact on the labor market by exerting the same downward pressure on wages minimum wage laws were adopted to prohibit. Employers using unpaid labor this way can also reduce tax revenues, decreasing local, state, and federal budgets through failure to classify interns as employees subject to payroll and other employment-related taxes.

In fact, the public interest concerns at stake in the present case are exactly the same considerations that led the state legislature to adopt the MWA in 1959. As members of this court have indicated:

> "[M]inimum wage laws have a remedial purpose of protecting against 'the evils and dangers of resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health,' and

> 'to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.'" *Anfinson* at 870 [quoting *United States v. Rosenwasser,* 323 U.S. 360, 361, 65 S.Ct. 295, 89 L.Ed. 301 (1945) and *Walling v. Portland Terminal,* 330 U.S. at 152, 67 S.Ct. 639 (1947)]

As the present court has recognized, Washington has a "long and proud history of being a pioneer in the protection of employee rights, enacting a minimum wage law in 1913 prior to the FLSA's enactment, as well as passing a law requiring an eight-hour workday in 1899." See *Drinkwitz* at 300.

Finally, the ruling issued by the Court of Appeals in this case contradicts current L&I guidance. Whereas the Published Opinion states that "[t]he MWA does not distinguish between individuals working at specific kinds of nonprofit organizations as exempt, let alone the reasons why a person may perform gratuitous services for a nonprofit organization," a recent L&I publication states that L&I "looks to the application of the federal Fair Labor Standards Act when determining whether interns are employees under the Minimum Wage Act […] [and] [c]ourts have identified seven factors to determine whether an intern is an employee for wage and hour laws." WA Dep't of Labor & Indus., Unpaid Internships 101 (2022) at 1. L&I has already accepted the primary beneficiary test in its administrative policies.

In short, federal law concerning the FLSA preempts interns working at a nonprofit from being considered as performing services on a "gratuitous" basis because the intern is expected to derive a material benefit from the internship.

The L&I publication elaborates:

> "[I]f the interns are engaged in the operations of the employer or are performing productive work that benefits the employer (such as filing, performing other clerical work, or assisting customers), then the interns may be employees entitled to wage and hour law protections even if they also derive other benefits from this type of placement." *Id.* at 2.
>
> and:
>
> "In general, the more an internship is correlated with a classroom or academic experience, the more likely the internship will be viewed as an extension of the individual's educational experience." *Id.*

Considering these statements relative to L&I's position in this case leads to irreconcilable contradictions. The Washington Supreme Court must resolve those contradictions.

VI. Conclusion

This petition for review should be granted so that the Supreme Court can reverse the decision of the Court of Appeals. That decision contradicts the Supreme Court's prior decisions in *Anfinson*, *Inniss,* and *Drinkwitz* concerning the MWA's remedial nature as well as its relationship to the FLSA. It also contradicts the FLSA legal standards for unpaid internships established by *Benjamin*, standards that have already been accepted by L&I behind the scenes. The legality of unpaid internships is a matter of substantial public interest. If possible, Petitioner also requests an injunction or order to L&I that the agency investigate the circumstances of other people who held unpaid internships within the ACLU-WA offices.

Dated this 11th day of September, 2023 at Tacoma, Washington.
5,000 words

Rhett Greenfield

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 21, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RHETT GREENFIELD, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 57156-1-II PUBLISHED OPINION

LEE, J. — Rhett Greenfield appeals the superior court's findings of fact, conclusions of law, and judgment affirming the Department of Labor & Industries (L&I) "Director's Order."[1,2] The Director's Order found that Greenfield was not an employee under the Washington Minimum Wage Act (MWA), chapter 49.46 RCW, and that the putative employer, the American Civil Liberties Union (ACLU), did not violate wage payment laws. Greenfield argues there is insufficient evidence showing that he was exempt from the MWA.

Substantial evidence supports the finding that Greenfield provided gratuitous services to a nonprofit organization under RCW 49.46.010(3)(d). Therefore, we hold that the employment

[1] Clerk's Papers (CP) at 41.

[2] The Director's Order affirmed an Office of Administrative Hearings (OAH) "Initial Order," dated June 10, 2021, and "Department Determination of Compliance," dated June 19, 2020. CP at 175, 289.

exemption under RCW 49.46.010(3)(d) applies, and the ACLU did not violate the MWA. Accordingly, we affirm.

FACTS

A. BACKGROUND

In 2017, Rhett Greenfield moved to Washington. In anticipation of the move, he searched for jobs in Washington with "stability and kind of a trajectory to move forward" and that would allow him to support himself. CP at 626.

Greenfield searched the ACLU of Washington website for career opportunities. The ACLU is registered as a nonprofit organization with both a 501(c)(3) and a 501(c)(4) designation.[3]

In December 2017, Greenfield applied to an intake counselor internship with the ACLU.[4] The internship posting was in the "careers section" of the ACLU website. CP at 642. It was a part-time position, with a minimum expectation of 12 to 16 hours per week. The internship posting stated, "The Intake Counselor internship provides excellent experience for individuals contemplating careers in public service, law, or public policy." CP at 730. The posting attracted Greenfield because he was considering whether he wanted to attend law school at the time. The posting did not list wages or other compensation for the internship position.

In early 2018, the ACLU contacted Greenfield for an interview for the internship. During the interview, the ACLU asked Greenfield, "'Why do you want to work at the ACLU?'" CP at

[3] The ACLU's 501(c)(3) designation is its charitable arm while its 501(c)(4) designation allows it to engage in political advocacy.

[4] Greenfield applied for a paid, full-time legislative aide position with the ACLU in November 2017, but was not selected for the paid position.

1299. Greenfield told his interviewer that he wished to work full-time for the ACLU. The ACLU did not guarantee or promise a full-time position to Greenfield. Neither Greenfield nor the ACLU ever discussed compensation, either during the interview or afterwards, and Greenfield never asked whether he would be paid.

The ACLU offered Greenfield the internship, which he accepted. Greenfield began interning at the ACLU in March 2018 two days per week. As an intake counselor, Greenfield staffed an "intake line" where he would provide community resource information to members of the public. CP at 1263. On occasion, if a caller had a complex legal issue, Greenfield would refer the caller to an ACLU attorney, who would then provide additional resources. However, the ACLU did not take legal cases from its intake line. The intake line was "primarily . . . a community resource," and was not integral to the ACLU's operations. CP at 1264.

Intake counselors were comprised of volunteers or interns. On any given day, three to four intake counselors staffed the phone lines. If no intake counselor was present to cover the intake line, the intake line would shut down. No intake counselors were paid.

Intake counselors generally completed an orientation with training on how to staff the intake line. The ACLU also hosted regular seminars for interns that covered a wide range of topics, including the ACLU's advocacy and litigation, criminal procedures, and police misconduct.

For the internship, Greenfield did not fill out any employment forms, such as a W-4 or I-9, nor did he ask for such documents. Greenfield did not receive any paystubs or report his hours. However, he considered himself an employee. Greenfield believed the internship position was "training for full-time employment at the ACLU." CP at 638. His understanding of the role was that he "would be directly involved in legal work or . . . receive some sort of legal training in order

to work as a legal professional." CP at 1300. Greenfield arrived at this understanding based on his "personal cognitive expectations . . . [and] personal goals," in addition to the internship's "job description and the way that it was phrased." CP at 642, 643. According to Greenfield, he did not receive information from the ACLU to correct any misunderstanding on his part or that indicated the intake counselor internship was a "'volunteer position.'" CP at 1309. Throughout his internship, Greenfield continued to communicate to his supervisor his desire for full-time employment at the ACLU.

The internship was meant to last six months, but Greenfield continued working as an intake counselor at the request of his supervisor until December 2018. During his internship, Greenfield applied to be a legal assistant—a paid position—with the ACLU. He was not selected for the position. When Greenfield left the internship, he completed an "Intern and Extern Evaluation." CP at 504. The evaluation form stated, "Volunteer interns play a critical role in the functioning of the ACLU of Washington." CP at 504. One of the questions on the evaluation was: "Overall, were you satisfied with your internship experience? Would you recommend this internship to others?" CP at 505. In response, Greenfield wrote:

> Yes, I think the internship was a positive experience overall, even if the lessons I learned from it were not entirely what I had anticipated. I think I began the internship with unclear expectations, and after a prolonged period of personal difficulty. This might have colored my time at the ACLU.

CP at 505.

According to Greenfield, the only time the phrase "volunteer interns" had been communicated to him was on the intern evaluation form. Greenfield asserted he "was very unclear about what had happened and the nature of the internship as [he] completed [the evaluation]." CP

at 669-70. However, Greenfield did not write on his evaluation that he felt he should have been paid.

In 2019, Greenfield applied to two additional paid positions at the ACLU, including one called a "Legal and Intake Assistant." CP at 263. In both his cover letters for the positions, Greenfield wrote that his interest in the positions stemmed from a desire to obtain stable, full-time employment. He did not receive a response from the ACLU on either application; instead, a personal acquaintance at the ACLU contacted Greenfield to let him know his application for one of the positions had been rejected.

B. WAGE COMPLAINT

In February 2020, Greenfield filed a wage complaint with L&I. On the complaint form, he wrote, "I worked at the ACLU-WA as an 'Intake Counselor,' an unpaid internship that I believed would lead to a full-time position at this specific employer. I was never paid, nor was I hired. None of this was consensual." CP at 731. Greenfield left blank the section regarding wages he believed the ACLU owed him. Additionally, on the complaint form, Greenfield stated he did not have an employment agreement with the ACLU and that he believed other workers were affected in the same way he had been.

L&I Industrial Relations Agent, Debra Zach, was assigned to Greenfield's wage complaint. Zach contacted Greenfield and informed him that he appeared to be exempt from the MWA. Specifically, Zach cited to RCW 49.46.010(3)(d),[5] which provides an employee exemption under the MWA, and stated:

[5] RCW 49.46.010(3)(d) provides:

> There are specific exemptions to the Minimum Wage Act found in RCW 49.46.010. . . . The ACLU . . . is a non-profit organization and as they are non-profit they can have unpaid volunteers. In your response it does not appear the employer had a wage agreement to pay you wages. You continued to work from March 2018-December 2018 with no pay, therefore the argument that you didn't consent to volunteer for no pay does not hold true as you continued working without pay. You state that you were not informed you would not be paid at the time of the interview yet you were not given a wage agreement and continued to work on a volunteer basis.

CP at 295. Zach gave Greenfield the option of withdrawing his wage complaint. She stated that if he wished to pursue a wage complaint, she would need additional records and evidence of a wage agreement.

In response, Greenfield cited to L&I's Administrative Policy ES.C.2 (2008).[6] Specifically, Greenfield argued that he was an employee because the following six criteria outlined in Administrative Policy ES.C.2 (2008) distinguishing interns from employees had not been met:

> "Employee" includes any individual employed by an employer but shall not include:
>
> . . . .
>
> . . . Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW.

[6] Greenfield relied on Administrative Policy ES.C.2 (2008), the policy in place at the time of his wage complaint. L&I updated Administrative Policy ES.C.2 in 2021, including the section regarding employment relationships with interns, which Greenfield now relies upon for his appeal. *See* Wash. Dep't of Lab. & Indus., Administrative Policy ES.C.2, at 9 (revised July 19, 2021)

> [T]he department looks to the federal Fair Labor Standards Act for certain training conditions exempted from that act. Under certain conditions, persons who without any expressed or implied compensation agreement may work for their own advantage on the premises of another and are not necessarily employees. Whether trainees are employees depends upon all of the circumstances surrounding their activities . . . . If all six of the following criteria are met, the trainees are not considered employees:
>
> **4.1** The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; and
> **4.2** The training is for the benefit of the trainee; and
> **4.3** The trainees do not displace regular employees, but work under their close observation; and
> **4.4** The business that provides the training derives no immediate advantage from the activities of the trainees, and may in fact be impeded; and
> **4.5** The trainees are not necessarily entitled to a job at the conclusion of the training period; and
> **4.6** The trainees understand they are not entitled to wages for time spent in the training.

CP at 393 (Agency Rec. Ex. 8, L&I Administrative Policy ES.C.2 (2008)[7] at 6).

Zach disagreed with Greenfield's interpretation of Administrative Policy ES.C.2. Zach responded:

> I find that you meet all 6 of the items under trainees. You state that you were not entitled to a job at the conclusion of the period so 4.5 was met. You state you were unpaid for the entire duration of the time you provided services to the non-profit so section 4.6 was also met. However, you were a volunteer and not a trainee. Non-profit organizations such as the one you provided services for are entitled to have volunteers. . . . You were never offered bona fide employment with the company and you were never provided an agreed wage or told upon hiring that you would be compensated per the information you provided in your claim. You were never paid and continued to work in a volunteer capacity.

(Hours Worked), https://www.lni.wa.gov/workers-rights/_docs/esc2.pdf [https://perma.cc/2P4S-JVAW].

[7] Wash. Dep't of Lab. & Indus., Admin. Pol'y ES.C.2 (rev. Sept. 2, 2008) [https://perma.cc/7GMK-G84W].

CP at 298. Nevertheless, Zach requested additional information from Greenfield, such as written correspondence from the ACLU regarding wages or correspondence showing that Greenfield requested payment. Greenfield provided some of the requested information, such as an estimate of the hours and days he spent at the ACLU and the pay he believed he was entitled to. However, Greenfield stated he did not possess correspondence with the ACLU regarding wages; rather, his applications to paid positions at the ACLU were "documented evidence" of his "intention to work there full-time." CP at 299.

As part of the investigation, Zach also contacted the ACLU and requested information. The ACLU provided a written response to Greenfield's claims. Specifically, the ACLU stated:

> Mr. Greenfield joined a team of part-time volunteer interns . . . . The Intake Line provides the ACLU-WA with no direct benefit. . . . What we are is a pass through for various other community organizations that might be able to assist. This has always been an unpaid, part-time, limited term intern/volunteer program . . . . We have [never] displaced a paid employee in this role.
>
> Mr. Greenfield was always aware that the position answering our Intake Line was an unpaid role. . . . During the interview process it was made clear that it was an unpaid position for a limited period of six months. There was never a promise or expectation that this would turn into a paid position at the end of the term.

CP at 502.

In April 2020, Zach recommended a Determination of Compliance in the ACLU's favor. Based on Zach's investigation, L&I issued a Determination of Compliance. Greenfield appealed to the Office of Administrative Hearings (OAH).[8]

[8] As part of Greenfield's appeal of the Determination of Compliance, Greenfield complained about Zach's conduct and competence. Greenfield cited to a complaint Zach had filed against L&I alleging employment discrimination. Zach's own complaint against L&I is irrelevant to Greenfield's claim, and nothing in the record shows that Zach's complaint influenced her recommendation in Greenfield's case.

C. PROCEDURAL HISTORY

In October 2020, the ACLU petitioned for and was granted intervention.[9] In April 2021, OAH held a two-day hearing on Greenfield's appeal.

During the hearing, Zach testified as outlined above. Representatives from the ACLU also testified as outlined above. In addition, the ACLU representatives stated that they did not know why internships are posted in the "career" section of the ACLU website. CP at 1172. The ACLU Director of Human Resources, Karen Riley, stated that none of the internships listed in the careers section of the website were paid. Additionally, ACLU interns were often students who would receive academic credit.

Greenfield testified about his motivations for applying for positions at the ACLU. He stated:

> I respected the ACLU and its history . . . .
>
> . . . .
>
> I was looking for employment, and I also thought . . . that I should probably go into the legal field because it seemed to kind of draw upon my undergraduate interest and background in philosophy. . . .
>
> . . . .
>
> . . . I was looking also for a job and also potentially some kind of training or something substantive that would provide . . . a clear structure with a particular trajectory . . . .

[9] A party may intervene in a matter when its "claim or defense and the main action have a question of law or fact in common." CR 24(b)(2). In an administrative hearing, the presiding officer has discretion to grant a petition for intervention "upon determining that the petitioner qualifies as an intervenor under any provision of law and that the intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings." RCW 34.05.443(1). The ACLU is not a party to this appeal.

. . . .

> . . . I want to be fair and I want to be clear here, I was not promised . . . explicitly anything, but I think you could claim that there was an implicit promise. If I talked about [working full-time] at the interview, if I'd raised it several times afterward, if that's why I'm there and [the ACLU] continue[s] to not clarify or say that's not going to happen . . . I believe it's a form of a contract recognized under the law, like, a unilateral or unwritten contract, maybe. I don't know.
>
> . . . I think that you could claim that there was an implicit promise, so I submitted [the wage claim] because I was trying to report what had happened because I thought that the internship was exploitative.

CP at 1295-96, 1314-15.

After hearing testimony from Zach, the ACLU, and Greenfield, the OAH issued an initial order stating that L&I properly issued a determination of compliance in the ACLU's favor. The initial order concluded:

> [Greenfield] has not met his burden of proving that he was anything other than an unpaid, volunteer intern, assisting with the ACLU-WA's intake program. He presented many arguments as to why his status should be recharacterized [as] an employee, but he did not provide any documentation or other evidence that an employer-employee relationship was established between himself and ACLU-WA. When he began the internship, the parties did not engage in any of the usual protocols or procedures for on-boarding an employee (such as completion of a W-4 form or I-9 form). The parties did not discuss rate of pay. [Greenfield] did not ask to be paid during the course of the internship nor did he complain about the lack of pay.
>
> . . . Relying upon [L&I] Administrative Policy ES.C.2, Section 4.6, [Greenfield] denies that he "consented" to his volunteer status . . . . However, his "consent" and/or understanding of the scope of the intake counselor position is shown by his actions, when he continued to work unpaid in that capacity for the period of March 2018 to December 2018. . . .
>
> . . . .
>
> . . . [Greenfield chose] to work gratuitously for ACLU-WA as an intake counselor for several months, during which time no formal employer-employee relationship was established. Under RCW 49.46.010(3)(d), [Greenfield] was not an employee

> and ACLU-WA did not violate any wage payment laws by not paying him for his volunteer services.

CP at 179-180.

Greenfield petitioned the L&I director for administrative review of the initial order. In his brief to the director, Greenfield noted that L&I had updated its Administrative Policy ES.C.2 in regard to interns based on the "primary beneficiary" test outlined in *Benjamin v. B & H Educ., Inc.*[10] CP at 51. Greenfield argued that the "primary beneficiary" test was the applicable legal standard in his case.

L&I responded by arguing that the "primary beneficiary" test did not apply to nonprofit organizations. L&I stated:

> The test under ES.C.2 laid out by Mr. Greenfield . . . is the test [L&I] applies when determining if an intern at a for profit organization is entitled to compensation. It has no bearing on determining whether a volunteer at a non-profit organization is entitled to payment. The [L&I] policy applicable to volunteers at non-profit organizations is ES.A.1.[11] Mr. Greenfield relies on the wrong standard to try to prove an employment relationship.

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[10] 877 F.3d 1139 (9th Cir. 2017).

[11] Administrative Policy ES.A.1 (2020) states in pertinent part:

> The following exemptions are found in RCW 49.46.010(3). The MWA does not apply to employees covered by these exemptions. Application of these exemptions depends on the facts, which must be carefully evaluated on a case-by-case basis. . .
>
> . . . .
>
> (d) **Volunteer work for an educational, charitable, religious, state or local governmental body or agency or non-profit organization.** Any volunteer engaged in the public service activities of the above type of organizations as long as there is no employer-employee relationship between the organization and the individual *or* the individual gives his or her services gratuitously to the organization.

CP at 90 (citation omitted). L&I also argued that Greenfield volunteered at the ACLU for "humanitarian and civic reasons," and took the position voluntarily; the ACLU did not coerce him into the internship. CP at 89.

The director affirmed the initial order. Greenfield petitioned for reconsideration, which the director denied. Greenfield then petitioned for judicial review under RCW 34.05.546.

In July 2022, the superior court held a hearing on Greenfield's appeal. During the hearing, Greenfield again argued that the "primary beneficiary" test in *Benjamin* applied to his circumstances. Specifically, he argued that L&I misinterpreted RCW 49.46.010(3)(d).

> [I]t's been misinterpreted because [L&I] claims[s] that the portion of the statute[,] . . . RCW 49.46.010(3)(d)[,] which has a phrase or clause, a subsection of the statute that exempts from the definition of employee for certain public agencies or nonprofits . . . basically that the definition of employee within that statute does not apply to nonprofits where the employer/employee relationship does not in fact exist or where labor is performed gratuitously for the organization. And so [L&I] interprets the first portion of that clause to mean there is a default position that the Minimum Wage Act . . . does not apply to nonprofit organizations.

1 Verbatim Rep. of Proc. (VRP) at 20-21.

L&I contended that Greenfield was a volunteer. L&I argued that any distinction between the labels "volunteer" and "intern" was immaterial:

> [M]ost people who take these internships at the ACLU are in school looking for academic credit or to see if they want to work at the ACLU, that's what the motivation is; whether they call it internship, or whether they call it a volunteer, whatever they call it, it doesn't matter. That's the purpose. . . . That Benjamin case only applies if you're looking at for-profit internships and then in a for-profit situation you would apply Benjamin. But here, this is at a nonprofit. That's why

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Wash. Dep't of Lab. & Indus., Administrative Policy ES.A.1, at 3 (revised Dec. 29, 2020) (Minimum Wage Act Applicability), https://lni.wa.gov/workers-rights/_docs/esa1.pdf [https://perma.cc/S8C7-W5LR] (emphasis in original).

> the [B]enjamin test doesn't apply is because we're looking specifically to nonprofit, and there's no cases out there where they're looking specifically at a nonprofit agency under Washington State law to see whether at a nonprofit, if you're volunteering your time, you're doing an internship for a nonprofit, there's no six-factor test such as Benjamin that would apply in that circumstance.
>
> Instead, what we look at is [L&I's] policy interpreting what RCW 49.46.010 says. And [L&I] policy that we've also cited in the record that explains that what it means to render your services gratuitously because that's what we're trying to do here, interpret what the statute means. And, of course, then renders their services gratuitously where they're not pressured or coerced into volunteering and they're not employees.

1 VRP at 30-31.

The superior court affirmed L&I's decision. The superior court acknowledged that the use of the label "'intern'" was troubling, but the superior court likened Greenfield's case to *Rocha v. King County*,[12] where the Supreme Court addressed whether jurors were subject to the MWA. 1 VRP at 41. The superior court ruled that substantial evidence supported Greenfield's status as a volunteer and stated that RCW 49.46.010(3)(d) provides an "express exemption" to the MWA for volunteers. 1 VRP at 39.

Greenfield appeals.

ANALYSIS

Greenfield appeals the superior court's findings of fact, conclusions of law, and judgment affirming a Director's Order.[13] The Director's Order affirmed an Initial Order and Determination

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[12] 195 Wn.2d 412, 424, 460 P.3d 624 (2020) (holding that jurors are not "entitled to minimum wage for the purposes of the MWA because no employer-employee relationships exists statutorily under RCW 49.46.010(3)(d) or otherwise.").

[13] In his brief, Greenfield lists over 20 assignments of error. Almost all of these assignments of error are addressed by the primary issue of whether Greenfield falls within an exemption in the MWA under RCW 49.46.010(3)(d). Greenfield also assigns error to the OAH proceedings when

of Compliance, which found Greenfield to be a volunteer under RCW 49.46.010(3)(d) and therefore exempt from the MWA.

Greenfield argues there is insufficient evidence to support the OAH's finding that Greenfield was a volunteer for the ACLU. Specifically, Greenfield asserts he did not perform services for the ACLU gratuitously because he "accepted the internship on the condition that it would eventually lead to full-time employment." Br. of Appellant at 4. L&I argues that substantial evidence shows that Greenfield performed services for the ACLU gratuitously; therefore, he was a volunteer and exempt from the MWA. We hold that the MWA exemption applies and that the ACLU did not violate the MWA by not paying Greenfield.

A. STANDARD OF REVIEW

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of administrative agency decisions. RCW 49.48.084(4); RCW 34.05.570; *Providence Health & Servs.—Wash. v. Dep't of Health*, 194 Wn. App. 849, 856, 378 P.3d 249 (2016), *review denied*, 187 Wn.2d 1003 (2017). The challenger to the agency action bears the burden of proving the invalidity of an agency action. RCW 34.05.570(1)(a); *Providence Health & Servs.—Wash.*, 194 Wn. App. at 856.

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the administrative law judge stated the scope of its review and jurisdiction was confined to RCW 49.48.084(3) and the Administrative Procedure Act (APA), chapter 34.05 RCW, and not based on Seattle municipal wage laws. However, Greenfield did not include any argument on Seattle wage laws in his briefing. We do not consider arguments a party fails to brief. *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 876, 409 P.3d 160 (2018). Accordingly, we do not address Greenfield's assignment of error to the OAH's conclusion that RCW 49.48.084(3) and the APA apply to its scope of review and jurisdiction, not Seattle municipal wage laws.

We sit in the same position as the superior court when reviewing agency actions. *Kittitas County v. Kittitas County Conservation Coal.*, 176 Wn. App. 38, 47, 308 P.3d 745 (2013). Accordingly, we review "the administrative record rather than the superior court's findings or conclusions." *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731, *review denied*, 188 Wn.2d 1009 (2017).

Reviewing courts may reverse an administrative order if the order is not supported by substantial evidence "when viewed in light of the whole record before the court." RCW 34.05.570(3)(e). Substantial evidence exists if there is "a sufficient quantity of evidence to persuade a fair-minded person of the order's truth or correctness." *Crosswhite*, 197 Wn. App. at 548. We may also grant relief from an agency decision if the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d). We review errors of law de novo. *Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259 (2011), *review denied*, 173 Wn.2d 1019 (2012).

Questions of statutory interpretation are reviewed de novo. *Jametsky v. Olsen*, 179 Wn.2d 756, 761, 317 P.3d 1003 (2014). The objective of statutory interpretation is to carry out the legislature's intent. *Birgen v. Dep't of Lab. & Indus.*, 186 Wn. App. 851, 857, 347 P.3d 503, *review denied*, 184 Wn.2d 1012 (2015). Courts derive legislative intent from the plain meaning of a statute. *Id.* "If the statute's plain language is unambiguous, 'we give the words their common and ordinary meaning.'" *Royal Oaks Country Club v. Dep't of Revenue*, 25 Wn. App. 2d 468, 474, 523 P.3d 1198 (2023) (quoting *Tesoro Refin. & Mktg. Co. v. Dep't of Revenue*, 173 Wn.2d 551, 556, 269 P.3d 1013 (2012)). Courts may use dictionary definitions to discern the plain

meaning of terms undefined by statute. *AllianceOne Receivables Mgmt., Inc. v. Lewis*, 180 Wn.2d 389, 395, 325 P.3d 904 (2014).

Generally, courts accord deference to agency interpretations of statutes when the statute falls within the agency's expertise. *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 274, 490 P.3d 290 (2021). However, courts need not defer to an agency's interpretation of a statute when the language of the statute is unambiguous. *Royal Oaks Country Club*, 25 Wn. App. 2d at 474. Furthermore, "administrative policies do not even have the force of regulations, and deference to such policies is inappropriate because '[courts have] the ultimate authority to interpret a statute.'" *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 624-25, 416 P.3d 1205 (2018) (quoting *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846, *cert. denied*, 552 U.S. 1040 (2007)).

B. MINIMUM WAGE ACT

1. Legal Principles

Washington's Minimum Wage Act is patterned on the federal Fair Labor Standards Act (FLSA), 29 U.S.C §§ 201-219. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 869, 281 P.3d 289 (2012). Because the MWA is based on the FLSA, "courts 'may consider interpretations of comparable provisions of the [FLSA] as persuasive authority.'" *Kilgore v. Shriners Hosps. for Child.*, 190 Wn. App. 429, 435, 360 P.3d 55 (2015) (alteration in original) (quoting *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000)). However, Washington courts are not bound by federal interpretations. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000).

The MWA's purpose is to protect Washington workers and ensure "'every person whose employment contemplated compensation'" is paid a minimum wage. *Anfinson*, 174 Wn.2d at 870 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152, 67 S. Ct. 639, 641, 91 L. Ed. 809 (1947)). The MWA is remedial and liberally construed. *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 303, 495 P.3d 866 (2021). Accordingly, any exemptions from the MWA are narrowly construed; exemptions "apply only to situations that are plainly and unmistakably consistent with the terms and spirit of the legislation." *Rocha*, 195 Wn.2d, 421.

a. Gratuitous services to nonprofit organizations

The MWA does not apply to nonprofit organizations when there is no employer-employee relationship or where an individual provides gratuitous services to the nonprofit organization. RCW 49.46.010(3)(d). Specifically, the MWA excludes

> [a]ny individual engaged in the activities of [a] . . . nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously.

RCW 49.46.010(3)(d); *see Rocha*, 195 Wn.2d at 422 ("The statutory language in RCW 49.46.010(3)(d) provides that when no employer-employee relationship exists, the MWA does not apply.").

In its interpretation of RCW 49.46.010(3)(d), L&I relies on the Code of Federal Regulations[14] to identify individuals who provide gratuitous services as "volunteers" under its administrative policy:

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[14] The C.F.R.'s define a "volunteer" as:

> An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of

> Individuals are considered volunteers only when their services are offered freely and without pressure or coercion, direct or implied, from an employer. Individuals who volunteer or donate their services, usually on a part-time or irregular basis, for public service or for humanitarian objectives, and are not acting as employees or expecting pay, are not generally considered employees of the entities for whom they perform their services.

Admin. Pol'y ES.A.1, at 3-4.[15]

b. Application of MWA to interns/trainees

The MWA is applicable to all Washington employees. RCW 49.46.005(1). An "employee" "includes any individual employed by an employer." RCW 49.46.010(3); *Anfinson*, 174 Wn.2d at 867. An "employer" is "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee." RCW 49.46.010(4). Under the MWA, to "employ" means "to permit to work." RCW 49.46.010(2). The definitions of "employee," "employer," and "employ" are virtually identical under the FLSA and MWA. *See* RCW 49.46.010(2), (3), (4); *Anfinson*, 174 Wn.2d at 868; *see* 29 U.S.C. § 203(e)(1) ("'[E]mployee' means any individual employed by an employer."); 29 U.S.C. § 203(d) ("'Employer' includes any person acting directly

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> compensation for services rendered, is considered to be a volunteer during such hours. . . .
>
> . . . Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

29 C.F.R. § 553.101(a), (c) (2022).

[15] Wash. Dep't of Lab. & Indus., Admin. Pol'y ES.A.1, at 3-4 (rev. Dec. 29, 2020), https://www.lni.wa.gov/workers-rights/_docs/esa1.pdf [https://perma.cc/B6ZS-FWE9].

or indirectly in the interest of an employer in relation to an employee."); 29 U.S.C. § 203(g) ("'Employ' includes to suffer or permit to work.").

In Washington, courts generally consider the economic dependence test developed by the federal courts to assess whether an employer-employee relationship exists. *Anfinson*, 174 Wn.2d at 871. The key inquiry is whether "'as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself.'" *Id.* (quoting *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008)). However, if an express exemption applies, courts need not reach the economic dependence test. *Rocha*, 195 Wn.2d at 423.

In certain circumstances, an intern or trainee, "without promise or expectation of compensation," may work for their own advantage on the premises of another and are not considered employees. *Walling*, 330 U.S. at 152. In such cases, courts consider who is the primary beneficiary of the relationship when assessing whether an employer-employee relationship exists. *Id.* at 152-53. If the employer derives no immediate advantage from work done by trainees, the trainees are not employees. *Id.* at 153.

The MWA does not distinguish interns or trainees from employees. *See* RCW 49.46.010. However, because the FLSA and MWA definitions of "employ," "employee," and "employer" are nearly identical, federal case law may provide guidance to assess whether an intern is an employee under the MWA. *Kilgore*, 190 Wn. App. at 435.

Federal courts have adopted a seven-factor "primary beneficiary" test to determine whether interns are employees for the purposes of the FLSA. *Benjamin*, 877 F.3d at 1147-48. The non-exhaustive factors are:

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

Id. at 1146 (quoting *Glatt v. Fox Searchlight Pictures Inc.*, 811 F.3d 528, 536-37 (2d Cir. 2015)).

2. RCW 49.46.010(3)(d) Exemption to MWA

Greenfield argues that L&I misinterprets the employee exemption under RCW 49.46.010(3)(d). Specifically, he asserts that L&I interprets the exemption as a "blanket exemption" for nonprofit organizations "from wage and employment law" unless "some kind of contract or explicit agreement" exists. Br. of Appellant at 29. Greenfield further asserts that he did not provide his services gratuitously; rather, he accepted the internship only because he understood it would transition to full-time employment with the ACLU.

The objective of statutory interpretation is to carry out the legislature's intent, and courts derive legislative intent from the plain meaning of a statute. *Birgen*, 186 Wn. App. at 857. RCW

49.46.010(3)(d) provides that the definition of "employee" excludes "[a]ny individual engaged in the activities of [a] . . . nonprofit organization where the employer-employee relationship does not in fact exist *or* where the services are rendered to such organizations gratuitously." (Emphasis added.) The disjunctive "or" indicates there are two ways an individual might fall within the exemption: either when an employer-employee relationship does not exist, which would require an economic-dependence test analysis as articulated in *Anfinson*, or an individual provides his or her services gratuitously. If one of the conditions is met, there is no need to address the other condition. *See Rocha*, 195 Wn.2d at 423.

a. Substantial evidence shows Greenfield provided gratuitous services to a nonprofit organization[16]

Here, there is no dispute that the ACLU is a nonprofit organization. The record shows that Greenfield provided gratuitous services to the ACLU. Thus, the exemption found in RCW 49.46.010(3)(d) applies, and the ACLU did not violate the MWA by not paying Greenfield.

The ACLU's intake counselor internship posting did not state that it was a paid position, nor was any salary listed for the position. When Greenfield interviewed for the position, he never asked whether he would be paid and the ACLU did not discuss compensation. Additionally, there

[16] The parties debate the term "volunteer" in their briefing. Greenfield argues that under *Benjamin*, there is no such thing as a "'volunteer intern.'" Br. of Appellant at 21. Conversely, L&I identifies Greenfield as exempt from the MWA based on his "volunteer" status. Greenfield's point is well taken in that RCW 49.46.010(3)(d) does not use the word "volunteer." Further, an employer's designation of an individual as a "volunteer" does not dictate whether an employer-employee relationship exists. *See Mitchell v. PEMCO Mut. Ins. Co.*, 134 Wn. App. 723, 730, 142 P.3d 623 (2006) ("'Employers asserting an exclusion have the burden of proving their employees fit plainly and unmistakably within its terms.'" (quoting *Tift v. Pro. Nursing Servs., Inc.*, 76 Wn. App. 577, 582, 886 P.2d 1158, *review denied*, 127 Wn.2d 1007 (1995), *review denied*, 160 Wn.2d 1016 (2007))). We review the statutory language of the MWA to determine the merits of the appeal.

is nothing in the record showing the ACLU guaranteed or promised a full-time position to Greenfield. During the internship, Greenfield did not fill out any employment forms, such as a W-4 or I-9, nor did he ask for such documents. Greenfield did not receive any paystubs or report his hours. Furthermore, Greenfield continually returned to the ACLU, despite never having received a paycheck and never having inquired as to the possibility of a paycheck, between March and December 2018. These facts show that Greenfield did not contemplate compensation from the internship position. *See Anfinson*, 174 Wn.2d at 870.

RCW 49.46.010 does not define "gratuitous." Courts may use dictionary definitions to discern the plain meaning of terms undefined by statute. *AllianceOne Receivables Mgmt., Inc.*, 180 Wn.2d at 395. "Gratuitous" means "given freely or without recompense : granted without pay." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 992 (2002). As discussed above, Greenfield provided his services as an intake counselor to the ACLU without pay, or any promise of future pay or a paid position, for 10 months. Merely informing the ACLU that he intended to work there full-time—which most people would construe as a hope rather than a belief of entitlement—even coupled with intermittent applications to paid positions, does not negate the fact that Greenfield provided services to the ACLU without pay.

In his briefing, Greenfield assumes that he did not give his services gratuitously; however, despite stating that an employment relationship is a "question of fact," he then neglects to examine his conduct beyond his own subjective beliefs. Br. of Appellant at 31. Instead, he asserts that because the FLSA has an employee exemption for specific kinds of nonprofit organizations, the "MWA is meant to consider" the same sort of "highly specific exemption." Br. of Appellant at 31. Greenfield points to 29 U.S.C. § 203(e)(5), which provides: "The term 'employee' does not

include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries."

However, the plain language of RCW 49.46.010(3)(d) does not support Greenfield's assertion. Washington courts are not bound by federal cases interpreting the FLSA, especially when the MWA departs from the FLSA. *See Carranza*, 190 Wn.2d at 620 n.5,. The MWA does not distinguish between individuals working at specific kinds of nonprofit organizations as exempt, let alone the reasons why a person may perform gratuitous services for a nonprofit organization. *See* RCW 49.46.010(3)(d). Rather, the MWA broadly states: "[a]ny individual engaged in the activities of [a] . . . nonprofit organization." RCW 49.46.010(3)(d).

Because Greenfield performed services for the ACLU, a nonprofit organization, without pay, promise of pay, or promise of future employment, we hold that Greenfield rendered services gratuitously. Therefore, Greenfield falls within the employment exemption under RCW 49.46.010(3)(d).

b. No employment relationship exists

Greenfield also argues that the appropriate test to determine his employment status is the seven-factor "primary beneficiary" test laid out in *Benjamin*. Specifically, Greenfield asserts that "virtually all of these factors [of the primary beneficiary test] are unfavorable" to the ACLU. Br. of Appellant at 40. L&I argues that Greenfield's reliance on *Benjamin* is misplaced because the FLSA does not contain a comparable provision to RCW 49.46.010(3)(d) and there are more recent federal decisions than *Benjamin* that better capture the employer-employee relationship.

Because Greenfield rendered his services gratuitously, we do not determine whether an employment relationship existed between Greenfield and the ACLU. RCW 49.46.010(3)(d);

Rocha, 195 Wn.2d at 423. However, even assuming Greenfield did not provide services gratuitously, his claim of an employment relationship still fails under both *Anfinson* and *Benjamin*.

Here, applying the key inquiry of *Anfinson's* economic-dependence test—that is, whether, as a matter of economic reality, a worker is economically dependent upon an alleged employer—Greenfield was never economically dependent on the ACLU. He was never paid by the ACLU, never promised a paycheck, and presumably could rely on other sources of income because he continued to show up at the ACLU between March and December 2018. Furthermore, the intake counselor position was always temporary. The internship posting listed a commitment of six months, and even though Greenfield continued with the position past six months, there was no pretense that the position constituted permanent employment. Because the record shows that Greenfield was not economically dependent upon the ACLU, he is not an employee under *Anfinson*.

The *Benjamin* primary beneficiary test yields the same result. That test assesses the economic realities in a student-employee context and whether a student or intern should be considered an employee. *Benjamin*, 877 F.3d at 1147-48.

L&I argues that the *Benjamin* primary beneficiary test is outdated in light of more recent cases such as *Dawson v. Nat'l Collegiate Athletic Ass'n*.[17] However, *Dawson* examined a putative employee-employer relationship in a student athlete context and is not applicable here. *See*, 932 F.3d at 907. While Greenfield was not a student intern, students often filled the ACLU internships,

[17] 932 F.3d 905 (9th Cir. 2019).

and in many cases, students would receive academic credit. Therefore, *Benjamin* is more analogous to the circumstances of the current case.[18]

Here, the *Benjamin* factors cut in favor of the ACLU. First, despite Greenfield's insistence otherwise, he appeared to have understood there was no expectation of compensation because he continued to participate in the internship for 10 months without pay and without raising any question about compensation. While he argues that he expected compensation in the form of a fulltime, paid position at the completion of his internship, there is nothing in the record to show that the ACLU ever expressly or impliedly promised Greenfield compensation or a paid position.

Second, Greenfield received intake counselor training and regularly attended seminars for interns. Arguably, those seminars mirrored an educational setting as they were for the interns' benefit, not regular staff.

The third and fourth factors do not apply because Greenfield was not a student. However, the fifth factor favors the ACLU because the intake counselor internship was a temporary position.

As to the sixth factor, the ACLU did not displace any paid employees with intake counselor interns. None of the intake counselors were paid. Indeed, when no intake counselors were available, the entire intake line would shut down.

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[18] L&I contends that *Benjamin* only applies to for-profit organizations based on the language of RCW 49.46.010(3)(d). According to L&I, any individual working without pay for a nonprofit is always a volunteer, exempt from the MWA, absent an explicit employment agreement. While we need not address this assertion, we note that nothing in the plain language of RCW 49.46.010(3)(d) precludes application of *Benjamin* to a nonprofit organization and there may be circumstances where an individual providing services to a nonprofit, such as a student-intern, is not properly designated as one who provides services gratuitously.

Finally, while working as an intake counselor and after, Greenfield continued to apply to paid positions. Greenfield's continued efforts in applying for paid positions contradicts his assertion that he believed he was entitled to a fulltime position on completion of his internship. Accordingly, the *Benjamin* factors establish that Greenfield was not an employee.

CONCLUSION

Because Greenfield performed services for the ACLU, a nonprofit organization, without pay, promise of pay, or promise of future employment, Greenfield rendered services gratuitously. That alone supports the conclusion that the employment exemption under RCW 49.46.010(3)(d) applies and the ACLU did not violate the MWA. But the record also shows that Greenfield was not an employee of the ACLU. We hold that the employment exemption under RCW 49.46.010(3)(d) applies, and the ACLU did not violate the MWA. Accordingly, we affirm.

Lee, J.

We concur:

Cruser, A.C.J.

Veljacic, J.

APPENDIX B

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Rhett Greenfield, Appellant, v. The Department of Labor and Industries of the State of Washington, Respondent.	Court of Appeals No. 57156-1-II **MOTION FOR RECONSIDERATION**

1. REQUEST FOR RELIEF

Mr. Rhett Greenfield, Appellant representing himself *pro se*, asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

Appellant requests that the relevant judges at the Court of Appeals, Division II, who issued their "Published Opinion" terminating review of this case modify their decision in accordance with RAP 12.4(g), which states:

> "If a motion for reconsideration is granted, the appellate court may (1) modify the decision without new argument, (2) call for new argument, or (3) take such other action as may be appropriate."

Specifically, I request that the ruling or final conclusion made in the Published

Opinion be reversed, so that it is determined I was an employee of the ACLU-WA during the internship I held within the organization's offices from March to December 2018. I request the modified decision conclude that the internship did not meet established legal criteria for unpaid internships, and so it was actually a form of concealed or misclassified employment. I also request that the modified decision instruct investigators at the Department of Labor and Industries to take action against the ACLU-WA on behalf of other interns who could have been affected by similar violations of wage, employment, and internship law.

3. FACTS RELEVANT TO MOTION

Three judges working within the Court of Appeals, Division II wrote a ruling on this case, which was filed and issued on June 21, 2023 with the title "Published Opinion." The ruling generally favored the respondent and was largely unfavorable to me as the appellant.

4. GROUNDS FOR RELIEF AND ARGUMENT

A. Brief Explanation of the Legal Authority for This Motion

Rule of Appellate Procedure 12.4 permits a litigating party to file a motion for reconsideration in response to a decision coming out of the Court of Appeals. The motion for reconsideration is expected to present "points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised." RAP 12.4(c).

RAP 12.4(b) states:

> "The party must file the motion for reconsideration within 20 days after the decision the party wants reconsidered is filed in the appellate court."

The judges filed their ruling regarding this case on June 21, 2023. This means I have until (at least) July 11, 2023 to file a motion for reconsideration.

B. Overview of My Response to the Published Opinion Ruling

The Published Opinion advances the central thesis that I performed gratuitous services for a nonprofit organization in the course of my internship as an Intake Counselor at the ACLU-WA from March to December 2018 and, accordingly, that an exemption from the state Minimum Wage Act (MWA) applies to the labor I performed during that internship. The relevant exemption under consideration is contained within RCW 49.46.010(3)(d).

The exemption within RCW 49.46.010(3)(d) has already been quoted and discussed in detail throughout these proceedings. In short, the exemption reads:

> "['Employee' shall not include] [a]ny individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously."

The ruling delivered in the Published Opinion effectively concludes that both of the disjunctive clauses contained in this exemption apply to the internship I held (first disjunct: "nonprofit organization where the employer-employee relationship does not in fact exist," second disjunct: "where the services are

rendered to such organizations gratuitously"). The judges who wrote the Opinion state:

> "Because Greenfield performed services for the ACLU, a nonprofit organization, without pay, promise of pay, or promise of future employment, we hold that Greenfield rendered services gratuitously. Therefore, Greenfield falls within the employment exemption under RCW 49.46.010(3)(d). […] Because Greenfield rendered his services gratuitously, we do not determine whether an employment relationship existed between Greenfield and the ACLU. […] However, even assuming Greenfield did not provide services gratuitously, his claim of an employment relationship fails under both *Anfinson* and *Benjamin."*

Published Opinion at 23-24, [citations omitted].

The reasoning used to arrive at this conclusion is flawed. In fact, the reasoning is so flawed as to call any putative notion of the court's supposed "impartiality" into question. To be fair, the reasoning presented in the Published Opinion is more developed and more objective than any of the reactions to this case originating from the offices of the Department of Labor and Industries (L&I), the administrative law judge at the Office of Administrative Hearings (OAH), or the judge who reviewed it at Pierce County Superior Court. However, the arguments still arrive at predetermined conclusions that seem to be reached out of a questionable level of trust in the perceived authority of my alleged employer, the L&I investigator who handled the case, and the judges at OAH and at the Superior Court. Or perhaps the conclusions arise from the sheer inertia of how this case has been previously addressed.

From my perspective, like throughout most of the American legal system, it is the assumptions and prejudices of a particular socioeconomic class (i.e. the one that most legal professionals occupy) which determine the outcome of court proceedings rather than logical reasoning or facts pertaining to social reality as it exists outside the cloistered confines of a courtroom.

I begin by challenging the evidence and reasoning presented to support the notion that I performed services for the ACLU-WA on a gratuitous basis.

C. The Facts Considered to Show I Worked Gratuitously are Actually Inconclusive

The Published Opinion discusses at least five claims (five "facts") which serve as the basis for the members of the court concluding that I worked at the ACLU-WA gratuitously. These claims are:

1. The ACLU's listing for the internship did not state that it was a paid position, nor was any salary listed for the position;
2. When interviewing for the position, I never asked whether I would be paid and no one from the ACLU-WA discussed compensation;
3. There is nothing in the record showing that anyone at the ACLU-WA guaranteed or promised me a full-time position;
4. I never filled out any employment forms, nor did I ask for such documents; and
5. I continually returned to the ACLU across a period of ten months.

Published Opinion, at 21-22 [reorganized using numbers].

From these claims or set of facts, the members of the court infer that I "did not contemplate compensation from the internship position." Published Opinion at 24. However, this inference is based upon nothing more than assumption. None of these facts, considered either individually or as a group, establish that I did not

contemplate compensation from the internship. Instead, they only show how *totally unclear* the internship was from top to bottom, in terms of: (1) how it was presented, (2) how I was recruited, (3) how staff at the ACLU-WA continued to allow me to work there under the illusion that I would eventually be hired, (4) the nature of the internship, and (5) the duration of the internship. In actual point of fact, every aspect of the internship *was so disorganized and uninformative* that it is virtually impossible to determine whether I did or did not contemplate compensation. No one ever told me I would be paid, but no one ever told me I wouldn't either. No one ever promised me that I would be hired full-time as a result of the internship, but no one stepped in to correct my repeatedly expressed belief or idea that the internship would eventually transition into full-time employment. The internship was supposed to last for six months, but staff at the ACLU-WA kept requesting that I show up at the organization's offices well after that period. AAR 185.[1]

The employer has the responsibility to maintain employment forms and records. "If the employer fails to keep records, the burden is on the employer to prove the claimed hours were not worked. However, the employee must first show by reasonable inference the number of hours worked to shift the burden onto the employer to prove otherwise. […] The worker can shift the burden of proof to

[1] A section of the brief I filed for the OAH hearing, mentions this request and reads: "As late as October 2018, Mr. Nygren contacted me on my personal cell phone to request that I travel to Seattle in order to continue performing the duties associated with the internship."

the employer by proving some quantum of work actually performed. […] *MacSuga v. County of Spokane,* 97 Wn. App. 435 (Wash. Ct. App. 1999) at 445-446, (citations omitted).

From my perspective, the lack of clarity surrounding the internship demonstrates that the entire purpose behind the internship was to recruit gullible interns that could be misled into believing that they would receive some benefit, or to devise a loophole for the purpose of circumventing basic wage and employment protections. This is admittedly an inference that cannot be conclusively demonstrated, but the facts considered by the members of the court to determine I performed work gratuitously could just as easily lead to my preferred inference as to the inference they prefer. Because there is no rational or evidentiary basis to conclude I performed work for the ACLU-WA on a gratuitous basis, it appears that s*ubjective disregard* for the intern, the employee, or the worker leads the judges to consider the amorphous mess surrounding the internship I held to be "substantial evidence" that I worked within the offices of the ACLU-WA without contemplation of pay. From the five claims or facts cited by the members of the court, it could just as easily be concluded that the ACLU-WA constructed totally unclear conditions for the Intake Counselor internship.

Similarly, the judges of the court effectively ignore the MWA's purpose to ensure "every person whose employment contemplated compensation is paid a minimum wage" and that the MWA is remedial and liberally construed. *Anfinson*,

174 Wn.2d at 870 (quoting *Walling v. Portland Terminal Co*., 330 U.S. 148, 152, 67 S. Ct. 639, 641, 91 L. Ed. 809 (1947)). *Port of Tacoma v. Sacks*, 19 Wn. App. 2d 295, 303, 495 P.3d 866 (2021). Even as they note that any exemptions from the MWA are narrowly construed and that exemptions "apply only to situations that are plainly and unmistakably consistent with the terms and spirit of the legislation," (*Rocha*, 195 Wn.2d, 421), the judges evade these legal principles in a rush to cite a dictionary definition of the word "gratuitous" because "courts may use dictionary definitions to discern the plain meaning of terms undefined by statute." *AllianceOne Receivables Mgmt., Inc. v. Lewis,* 180 Wn.2d 389, 395, 325 P.3d 904 (2014). After mentioning that the word "gratuitous" is not defined within RCW 49.46.010, the judges then quote a dictionary definition of the word "gratuitous" as meaning "given freely or without recompense; granted without pay." Published Opinion at 22.

The entire crux of the judges' argument is found in a particular dictionary definition of the word "gratuitous," insofar as they use such a definition to conclude that because I did not receive pay for working at the ACLU-WA, I therefore worked there gratuitously. Notably, this reasoning would render anyone who performs labor at a place of employment without being paid as gratuitously providing service. This would be true even under circumstances where the employer is not a non-profit and does not have any kind of legal exemption to wage and employment law for the "gratuitous" performance of labor. Such

circumstances would still be arbitrarily labeled as "gratuitous" if the reasoning put forward by the judges at the Court of Appeals is accepted. Significantly, "an employee does not 'knowingly submit' to unlawful withholding of wages by staying on the job even after the employer fails to pay." *Durand v. HIMC Corp. 151 Wn. App. 818 (Wash. Ct. App. 2009)* at 837, citing *Chelius v. Questar Microsystems, 107 Wn. App. 678 (2001).* Thus, the members of the court's reliance upon a specific dictionary definition of a single word as well as the way they apply that definition to the facts discussed above and in their Published Opinion are refuted.

The members of the court's reliance upon a dictionary definition of the word "gratuitous" rather than the extensive body of law concerning the liberal and remedial nature of the MWA results in another set of complications.

The dictionary defines words in terms of other words that are, in turn, also defined within the dictionary. If the meaning of the word "gratuitous" is to be understood in terms of being "given freely or without recompense," then I direct the members of the court toward the definition of the word "free," as it is presented in an online dictionary. "Free." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/free. Accessed 11 Jul. 2023.

When used as an adverb, the word "free" has at least three definitions, one of which is "in a free manner." *Id.* When used as an adjective, such as in the previous sentence (i.e. a "free manner") the word "free" has at least fifteen

different meanings, each with distinct connotations of their own. *Id.* One of the fifteen meanings of the word "free" provided by the dictionary I am using is "having a scope not restricted by qualification." *Id.* Another of the fifteen meanings of the word "free" in the dictionary is "not determined by anything beyond its own nature or being: choosing or capable of choosing for itself." *Id.* This particular definition of the word has two additional connotations or senses, "determined by the choice of the actor or performer," and, "made, done, or given voluntarily or spontaneously," as in the example of "gave his free consent." *Id.*

I held the internship at the ACLU-WA with the express hope, belief, or intention of eventually working there full-time and communicated this aspiration repeatedly, as the members of the court correctly recognize. Published Opinion at 3-5. In other words, my acceptance and participation in the internship was "restricted by qualification." Because this qualification was not respected, my acceptance and participation was determined by the failure of ACLU-WA staff to disclose I would never be hired at the organization, and therefore it was not "determined by the choice of the actor or performer," it was not "made, done, or given voluntarily or spontaneously" and I did not "give my free consent." Therefore, the work I performed in my internship role was not "given freely or without recompense," and so it cannot be concluded that it met this aspect of the definition of the word "gratuitous," as provided by the dictionary cited by the judges at the Court of Appeals.

This is all just to say that if the judges prefer to consider dictionary definitions rather than legal authorities, there is no strictly logical reason for preferring one sense or meaning of a word's definition versus another, or even one printed version or edition of a dictionary over another. Instead, the members of the court select *the definitions they subjectively prefer to consider and emphasize.*

D. No Objective Documentation for How ACLU-WA Staff Characterized the Internship

In their Published Opinion, the judges unfairly and incorrectly state: "Greenfield neglects to examine his own conduct beyond his subjective beliefs." Published Opinion at 22.

This statement is presented in the context of a broader discussion of how my repeated inquiries about working at the organization full-time "do not negate the fact that he worked there without pay." *Id.* Although it is true that such inquiries are compatible with not being paid (while the inquiries were repeatedly ignored, one might add), I have demonstrated in both the present document as well as in the brief and reply brief I submitted for this case that I examine the factual evidence contained in the record. The actual, objective documentation concerning the internship I held largely consists of nothing more than the repeated job applications I submitted to the organization. AAR 232 - 248, Exhibits E-1 to E-5. There is also the internship evaluation I filled out roughly one to three months after the internship. CP at 504-505.

Significantly, many of the putative "facts" presented about the internship I held are actually nothing more than fabrications invented by Ms. Fang and/or ACLU-WA staff in the course of representing the ACLU-WA and assisting the relevant administrative staff with evading any accountability for the internship program they had. These distortions have made their way into the Published Opinion, and so I will address them, or at least most of them, before moving on to a discussion of the internship evaluation form.

The Published Opinion contains the following statements: "[T]he ACLU did not take legal cases from its intake line. The intake line was 'primarily […] a community resource,' and was not integral to the ACLU-WA's operations." Published Opinion at 3.

This is not exactly true. Although I am not certain how the class action cases which comprised the majority of the ACLU-WA attorneys' caseloads were originally accepted, an explicit aspect of the Intake Counselor role was to monitor the calls we took for reports that could be included within the attorneys' cases. In fact, some staff members would even encourage us by excitedly mentioning that we might "catch a call" that could be incorporated into the attorneys' litigation efforts. Additionally, a placard attached to the computer we used had the attorneys' names printed on it, along with corresponding statements summarizing the nature of their caseloads. I have testified to this effect. AAR 677-679, Exhibit 28 at 90-92.

The claim that the intake line was primarily 'a community resource' was

first made (i.e. invented) after I filed my initial complaint or grievance to L&I. Someone devised this claim in order to evade a specific criterion within the former version of the ES.C.2 test used to determine whether the employer-employee relationship pertains to interns or trainees, so that the ACLU-WA could falsely be portrayed as not deriving any benefit from the labor of the Intake Counselors. In any case, there is no objective documentation or evidence within the record to substantiate these claims about the intake line.

The Published Opinion continues: "Intake counselors generally completed an orientation with training on how to staff the intake line. The ACLU also hosted regular seminars for interns that covered a wide range of topics, including the ACLU's advocacy and litigation, criminal procedures, and police misconduct." Published Opinion at 3.

If these orientations and seminars were conducted—which I doubt—I certainly never attended them, nor was I ever made aware of them. Once again, there is no objective documentation or physical evidence within the record of this case to substantiate the idea that these orientations or seminars ever occurred. These claims about orientations and seminars taking place are another fabrication concocted by the individuals representing the ACLU-WA, and restated uncritically within the Published Opinion.

Moving over to consider the internship evaluation form, the members of the court seem to attribute significance to the following section of the evaluation:

> "Q: Overall, were you satisfied with your internship experience? Would you recommend this internship to others?
>
> A: Yes, I think the internship was a positive experience overall, even if the lessons I learned from it were not entirely what I had anticipated. I think I began the internship with unclear expectations, and after a period of prolonged difficulty. This might have colored my time at the ACLU-WA."

Published Opinion at 4.

Considering this section, the judges write:

> "Greenfield asserted he was very unclear about what had happened and about the nature of the internship as he completed the evaluation. However, he did not write on his evaluation that he felt he should have been paid."

Published Opinion at 4-5.

Quite frankly, the reason I did not write anything about being paid on the evaluation form is that I filled it out in the early hours of the morning, in desperate fear as to whether the ACLU-WA would hire me and whether I would be able to maintain housing in the tiny studio apartment I had moved into to be close to the bus line into Seattle in anticipation of a job that never arrived after staff at the ACLU-WA strung me along for ten months and my finances began to dwindle. But I do not expect any of these facts to actually be considered by the members of the court, because they are not technical legal formalisms and they cut against the judges' prevailing biases concerning a situation they have probably never experienced themselves. The evaluation was written in an overly flattering and ingratiating tone. I never should have even bothered to take the time to "go the

extra mile" by filling it out and mailing it back. One enduring lesson I learned from my internship at the ACLU-WA is the negative repercussions of being patient and polite with individuals who do not deserve such treatment.

E. Tests of Employment: Anfinson *and* Benjamin

The final sections of the Published Opinion discuss whether an employment relationship existed between myself and the ACLU-WA when applying either the economic dependence test of *Anfinson*[2] or the primary beneficiary test of *Benjamin.*[3] Here again, the reasoning advanced by the members of the court is flawed and relies upon gross assumptions.

No analysis whatsoever is provided in the Published Opinion concerning the economic dependence test developed by federal courts to assess whether an employer-employee relationship exists, and presented in *Anfinson.* Instead, the judges openly rely upon what they admit is a presumption, stating "He [I] […] presumably could rely upon other sources of income because he continued to show up at the ACLU between March and December 2018." Published Opinion at 24.

This claim is a total *non sequitur.* Once again, the judges of the court simply brazenly assume their conclusion. The mere fact that I kept arriving at the offices of the ACLU-WA has absolutely no logical relationship to whether I could rely upon other sources of income at the time. The conclusion the judges reach does not follow from the premise. Instead, it is a mere presumption.

[2] *Anfinson v. FedEx Ground Package System, Inc.* 174 Wn.2d 851, 281 P.3d 289 (2012)

[3] *Benjamin v. B & H Education, Inc.,* 887 F.3d 1139 (9th Circuit, 2017).

And in actual material fact, I did not have another source of income.

Furthermore, the members of the court do not provide an actual definition of what exactly it means to be "economically dependent" upon an employer. For instance, does the phrase mean to rely upon income from a specific employer to survive, to have a particular employer be one's sole source of income, to receive income primarily from one specific employer and not through any kind of third-party contractor, some combination of these factors, or some other factor entirely? No explanation of the *economic dependence test* is given in the Published Opinion. Nor is any explanation provided to connect arriving at the offices at the ACLU-WA for ten months to the economic dependence test. As presented in the Published Opinion, these two ideas are merely thrown together.

Finally, the members of the court consider the *primary beneficiary test* as presented in *Benjamin.*

I appreciate their acknowledgment that *Benjamin* is the most appropriate example of precedent within case law, rather than *Dawson v. Nat'l Collegiate Athletic Ass'n*, 932 F.3d 905 (9th Cir. 2019). I entirely agree with the explanation that *Dawson* is applicable to the context of student athletes, whereas *Benjamin* applies to the context of organizations hosting interns, students, or trainees and is most appropriate in the present case. Published Opinion at 24-25.

However, the judges are mistaken in their finding that the primary beneficiary test factors cut in favor of the ACLU-WA. *Id.*

The *primary beneficiary test* consists of seven factors that have already been repeatedly laid out in the present case, and are also restated in the Published Opinion. Published Opinion at 19-20. For the sake of brevity and careful consideration of my word count, I will not repeat them here. Instead, I consider and reply to how the members of the court apply each of these seven factors to my internship at the ACLU-WA.

Regarding the first factor, the judges write:

> "[D]espite Greenfield's insistence otherwise, he appeared to have understood there was no expectation of compensation because he continued to participate in the internship for 10 months without pay and without raising any question about compensation. While he argues that he expected compensation in the form of a full-time, paid position at the completion of his internship, there is nothing in the record to show that the ACLU ever expressly or impliedly promised Greenfield compensation or a paid position."

Published Opinion at 25.

"An employee does not 'knowingly submit' to unlawful withholding of wages by staying on the job even after the employer fails to pay." *Durand v. HIMC Corp. 151 Wn. App. 818 (Wash. Ct. App. 2009)* at 837, citing *Chelius v. Questar Microsystems, 107 Wn. App. 678 (2001).* The fact that I kept returning to the Seattle offices of the ACLU-WA for 10 months is not sufficient evidence for concluding anything regarding my "understanding" concerning any expectation of compensation. It only demonstrates the total of lack of clarity surrounding the internship I held. Eventually I did realize I would not be paid for the internship

itself, but that was an unfolding process based upon not receiving payment after some time at the internship and rationalizing that on the basis of my belief that I would eventually be working at the organization in a full-time, paid capacity. In addition, as I have testified, the main reason I kept returning to the ACLU-WA offices is because staff at the organization requested and encouraged me to keep showing up after the 10-month period by calling my personal cell phone. AAR 185. Finally, as the members of the court have already recognized in their Published Opinion, I expressed my interest in working at the organization full-time during the interview for the internship, and then the ACLU-WA accepted me for the internship. Published Opinion at 2-3. Accepting me for an internship seems to constitute an implied promise, given how I articulated and qualified the nature of my interest in the internship.

Regarding the second factor, the judges write:

> "Second, Greenfield received intake counselor training and regularly attended seminars for interns. Arguably, those seminars mirrored an educational setting as they were for the interns' benefit, not regular staff."

Published Opinion at 25.

Actually, this is the claim for which there is nothing in the record to support, or at least nothing in the record other than the testimony of a particular administrative staff member at the ACLU-WA. If such testimony is accepted as good coin, then the only possible explanation for why my testimony about expecting compensation in the form of a full-time paid position at the completion

of the internship is subjective bias or prejudice against me. No documentation that these seminars ever took place is contained within the record.

Concerning the third and fourth factors of the *primary beneficiary test,* the judges are inappropriately terse, writing only: "The third and fourth factors do not apply because Greenfield was not a student." Published Opinion at 25.

In other words, the third and fourth factors weigh against the ACLU-WA, but the judges will not say so. If I was not a student, the internship was necessarily not integrated into my coursework, I did not receive academic credit, and the internship did not correspond to the academic calendar. Once again, it appears there is significant bias in how the members of the court evaluate these two factors. Evaluating how these two factors apply to the internship I held also requires revisiting the main purpose of the *primary beneficiary test.* The test "focuses on what the intern receives in exchange for his or her work." *Benjamin* at 1146. The test also "acknowledges the distinction between intern-employer relationships, in which interns typically expect to receive educational or vocational benefits, and employee-employer [sic] relationships, in which employees do not necessarily expect to receive such benefits." *Id.* In the present case, it cannot be shown that there was a single material benefit I received as a result of my internship. Factors three and four of the *primary beneficiary test* cannot be thrown into abeyance, but must be considered to cut against the ACLU-WA because these two factors are intended to evaluate what academic benefit the intern received. In the present case,

the answer is simple: none whatsoever.

The test's fifth factor is treated in an equally cursory manner. The Published Opinion reads: "[T]he fifth factor favors the ACLU because the intake counselor internship was a temporary position."

If the judges were to recognize the fact that there is no objective evidence within the case record to substantiate that any kind of training seminars were held or conducted and that I kept returning to the ACLU-WA for ten months at the request of ACLU-WA staff, this factor must also be determined to weigh against the ACLU-WA.

When it comes to the sixth factor, I generally agree that this factor favors the ACLU-WA.

Finally, regarding the seventh factor, the members of the court write:

> "[W]hile working as an intake counselor and after, Greenfield continued to apply to paid positions. Greenfield's continued efforts in applying for paid positions contradicts his assertion that he believed he was entitled to a fulltime position on completion of his internship."

Published Opinion at 26.

I have already addressed this notion in the brief I filed with the Court of Appeals. That argument is not addressed by what the members of the court have written, so suffice to say that this is another *non sequitur* from the judges and speaks to the fundamental disorganization and incoherence of how the internship was structured. There is no necessary logical relationship between submitting

applications for full-time work and the conclusion that I had an explicit understanding I was not entitled to a full-time position. This only demonstrates the overall lack of clarity regarding everything that happened in relation to the internship. Demonstrating I understood I would not be entitled to a position at the end of the internship probably requires something like a signed statement or disclosure document to that effect. Stringing me along through an unclear process where the relationship between the internship and paid, full-time employment was never elucidated or made explicit is entirely compatible with my submission of multiple job applications. It is also possible that the ACLU-WA may have required such applications as a formality. Again, none of this was clarified, and the *primary beneficiary test* factors "focus on what the intern receives in exchange for his or her work." *Benjamin* at 1146.

Basically, it appears as though the members of the court have breezed past the basic purpose of the *primary beneficiary test*, which is to determine what benefit the intern or trainee receives from the organization, and whether that benefit exceeds any potential benefit to the employer.

In the present case, the employer received the clear benefit of the performance of labor. It cannot be demonstrated that I received a single material benefit from the internship. Accordingly, the primary beneficiary test overwhelmingly favors my classification as an employee of the ACLU-WA rather than as an unpaid intern who benefited from a legally bonafide unpaid internship.

5. CONCLUSION

The reasoning used to determine I performed labor for the ACLU-WA on a "gratuitous" basis is specious, heavily relying upon a single dictionary definition instead of the collective body of law specifying the broad nature of protections under the MWA. In a similar vein, the members of the court rely upon a glaring presumption and tenuous reasoning to reach the conclusion that no employment relationship existed under either the economic dependence test mentioned in *Anfinson* or the primary beneficiary test presented in *Benjamin.*

RCW 49.46 establishes minimum standards of employment within the state of Washington, but standards "which are more favorable to employees than the minimum standards applicable under this chapter **[...]** shall be in full force and effect and may be enforced as provided by law." RCW 49.46.120.

I held the internship in Seattle.

Seattle wage law classifies employers according to at least two different Schedules. A "Schedule 1 employer" refers to "all employers that employ more than 500 employees, regardless of where those employees are employed, and all franchisees associated with a franchisor or a network of franchises that with franchisees that employ more than 500 employees in aggregate." Seattle Municipal Code 14.19.010. A "Schedule 2 employer" refers to "all employers that employ 500 or fewer employees regardless of where those employees are employed.

Schedule 2 employers do not include franchisees associated with a franchisor or a network of franchises with franchisees that employ more than 500 employees in aggregate." *Id*.

In 2018, the hourly minimum wage for a Schedule 1 employer who did not contribute to healthcare benefits was $15.45. "Seattle's Minimum Wage" Seattle Office of Labor Standards, https://www.seattle.gov/documents/departments/laborstandards/ols-mw-multiyearchart.pdf. Accessed 11 Jul. 2023. In 2018, the hourly minimum wage for a Schedule 2 employer who did not contribute to healthcare benefits was $14. *Id*. I believe the ACLU-WA was a Schedule 2 employer. The record shows I worked at the ACLU-WA for 630 hours. AAR 306-309, Exhibit 3 at 10-13. AAR 425-428, Exhibit 11 at 29-32.

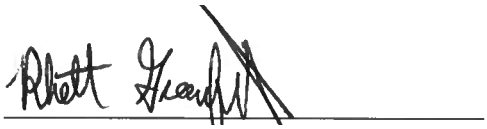
$15.45 x 630 = $9733.50

$14 x 630 = $8820

In addition to these sums, there may be prejudgment interest under RCW 19.52.010 and/or double damages under RCW 49.52.070.

On a final note, I pause to reflect on how I have taught myself all of the relevant law pertaining to this case and have endured and struggled against overwhelming odds to reach this point.

Dated this 11th day of July, 2023 at Tacoma, Washington.
5, 556 words



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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that, on the date indicated below, I caused to be served true and correct copies of Mr. Rhett Greenfield's MOTION FOR RECONSIDERATION to the parties and/or their counsel of record listed below, via the method indicated.

Washington State Court of Appeals, Division II 909 A. St, STE 200 Tacoma, WA, 98402	E-filed through Portal
Christina K. Dallen Office of the Attorney General P.O. Box 40121 Olympia, WA 98504-0121 **Department's Counsel**	Via Email to: christina.dallen@atg.wa.gov
Linda Fang Banyan Legal Counsel 1037 NE 67th St., #7 Seattle, WA 98115 **Employer's Counsel**	Via Email to: lfang@banyancounsel.com

DATED this 11th day of July, 2023 at Tacoma, Washington.

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APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

August 17, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RHETT GREENFIELD, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 57156-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Rhett Greenfield, filed a motion for reconsideration of this court's published opinion filed on June 21, 2023. After consideration, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Lee, Cruser, Veljacic

LEE, JUDGE

APPENDIX D

RCW 49.46.010 Definitions. As used in this chapter:

(1) "Director" means the director of labor and industries;

(2) "Employ" includes to permit to work;

(3) "Employee" includes any individual employed by an employer but shall not include:

(a) Any individual (i) employed as a hand harvest laborer and paid on a piece rate basis in an operation which has been, and is generally and customarily recognized as having been, paid on a piece rate basis in the region of employment; (ii) who commutes daily from his or her permanent residence to the farm on which he or she is employed; and (iii) who has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(b) Any individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession;

(c) Any individual employed in a bona fide executive, administrative, or professional capacity or in the capacity of outside salesperson as those terms are defined and delimited by rules of the director. However, those terms shall be defined and delimited by the human resources director pursuant to chapter 41.06 RCW for employees employed under the director of personnel's jurisdiction;

(d) Any individual engaged in the activities of an educational, charitable, religious, state or local governmental body or agency, or nonprofit organization where the employer-employee relationship does not in fact exist or where the services are rendered to such organizations gratuitously. If the individual receives reimbursement in lieu of compensation for normally incurred out-of-pocket expenses or receives a nominal amount of compensation per unit of voluntary service rendered, an employer-employee relationship is deemed not to exist for the purpose of this section or for purposes of membership or qualification in any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(e) Any individual employed full time by any state or local governmental body or agency who provides voluntary services but only with regard to the provision of the voluntary services. The voluntary services and any compensation therefor shall not affect or add to qualification, entitlement, or benefit rights under any state, local government, or publicly supported retirement system other than that provided under chapter 41.24 RCW;

(f) Any newspaper vendor, carrier, or delivery person selling or distributing newspapers on the street, to offices, to businesses, or from house to house and any freelance news correspondent or "stringer" who, using his or her own equipment, chooses to submit material for publication for free or a fee when such material is published;

(g) Any carrier subject to regulation by Part 1 of the Interstate Commerce Act;

(h) Any individual engaged in forest protection and fire prevention activities;

(i) Any individual employed by any charitable institution charged with child care responsibilities engaged primarily in the development of character or citizenship or promoting health or physical fitness or providing or sponsoring recreational opportunities or facilities for young people or members of the armed forces of the United States;

(j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;

(k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution;

(l) Any individual who holds a public elective or appointive office of the state, any county, city, town, municipal corporation or quasi municipal corporation, political subdivision, or any instrumentality thereof, or any employee of the state legislature;

(m) All vessel operating crews of the Washington state ferries operated by the department of transportation;

(n) Any individual employed as a seaman on a vessel other than an American vessel;

(o) Any farm intern providing his or her services to a small farm which has a special certificate issued under RCW 49.12.471;

(p) An individual who is at least 16 years old but under twenty-one years old, in his or her capacity as a player for a junior ice hockey team that is a member of a regional, national, or international league and that contracts with an arena owned, operated, or managed by a public facilities district created under chapter 36.100 RCW;

(4) "Employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee;

(5) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed;

(6) "Retail or service establishment" means an establishment seventy-five percent of whose annual dollar volume of sales of goods or services, or both, is not for resale and is recognized as retail sales or services in the particular industry;

(7) "Wage" means compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to such deductions, charges, or allowances as may be permitted by rules of the director. [2023 c 269 § 3; 2020 c 212 § 3. Prior: 2015 c 299 § 3; prior: (2014 c 131 § 2 expired December 31, 2019); 2013 c 141 § 1; prior: 2011 1st sp.s. c 43 § 462; (2011 1st sp.s. c 43 § 461 expired December 31, 2011); prior: (2010 c 160 § 2 expired December 31, 2011); 2010 c 8 § 12040; 2002 c 354 § 231; 1997 c 203 § 3; 1993 c 281 § 56; 1989 c 1 § 1 (Initiative Measure No. 518, approved November 8, 1988); 1984 c 7 § 364; 1977 ex.s. c 69 § 1; 1975 1st ex.s. c 289 § 1; 1974 ex.s. c 107 § 1; 1961 ex.s. c 18 § 2; 1959 c 294 § 1.]

Findings—Effective date—2023 c 269: See notes following RCW 49.12.471.

Effective date—2020 c 212: See note following RCW 49.12.471.

Expiration date—2017 c 150: "2014 c 131 s 2 expires December 31, 2019." [2017 c 150 § 3.]

Expiration date—2017 c 150; 2014 c 131: "This act expires December 31, 2019." [2017 c 150 § 2; 2014 c 131 § 5.]

Recognition—Intent—2015 c 299: See note following RCW 49.12.005.

Effective date—2011 1st sp.s. c 43 § 462: "Section 462 of this act takes effect December 31, 2011." [2011 1st sp.s. c 43 § 484.]

Expiration date—2011 1st sp.s. c 43 § 461: "Section 461 of this act expires December 31, 2011." [2011 1st sp.s. c 43 § 483.]

Effective date—Purpose—2011 1st sp.s. c 43: See notes following RCW 43.19.003.

Expiration date—2010 c 160: "This act expires December 31, 2011." [2010 c 160 § 6.]

Short title—Headings, captions not law—Severability—Effective dates—2002 c 354: See RCW 41.80.907 through 41.80.910.

Construction—1997 c 203: See note following RCW 49.46.130.

Effective date—1993 c 281: See note following RCW 41.06.022.

Effective date—1989 c 1 (Initiative Measure No. 518, approved November 8, 1988): "This act shall take effect January 1, 1989." [1989 c 1 § 5.]

Effect of offset of military pay on status of bona fide executive, administrative, and professional employees: RCW 73.16.080.

APPENDIX E

rehabilitation programs. *See Hale v. Arizona*, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc); *see also Williams v. Strickland*, 87 F.3d 1064, 1065 (9th Cir. 1996). In such cases, we looked to the overall economic realities of the relationship: "whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records." *Hale*, 993 F.2d at 1394 (citing *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)). We held that neither the prison inmates nor the rehabilitation participants were employees. *Id.* at 1395; *Strickland*, 87 F.3d at 1067. This is because there was no bargained-for compensation relationship in either case. The prisoners worked because they had to work. *Hale*, 993 F.2d at 1394. And the rehabilitation participants had no expectation of compensation other than treatment. *Strickland*, 87 F.3d at 1067.

The DOL, the agency that administers and enforces the FLSA, has struggled with formulating the appropriate test or guidelines to apply in dealing with issues relating to interns/employees. On the basis of *Portland Terminal*, the DOL issued informal guidance in 2010 as to whether unpaid interns are employees under the FLSA. *See* Wage & Hour Div., U.S. Dep't of Labor, *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* (Apr. 2010), https://www.dol.gov/whd/regs/compliance/whdfs71.pdf. Under the DOL's six-factor test, an intern is an employee unless all of the following factors are met:

> 1. The internship, even though it includes actual operation of the facilities of the

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

Id.

The leading recent Court of Appeals decision to consider the DOL test however, rejected it as "too rigid" and too dependent on the particular facts of *Portland Terminal*. *Glatt*, 811 F.3d at 536. The court in *Glatt* also rejected the plaintiffs' main argument, one that essentially turned *Portland Terminal* on its head. *Portland Terminal* had said that because "the railroads receive no 'immediate advantage' from any work done by the trainees, we hold that they are not employees within the [FLSA's] meaning." 330 U.S. at 153. The plaintiffs in *Glatt*, however, argued that if the employers

received any economic benefit, the plaintiffs were employees. 811 F.3d at 535. The Second Circuit ruled such a position was not consistent with *Portland Terminal*. *Id.* at 537.

The Second Circuit in *Glatt* vacated the district court's order, that had adopted the DOL test, in favor of a different test. *Id.* at 538. The appellate court held that the appropriate test for determining whether interns should receive compensation under the FLSA and New York labor law should be what it termed the "primary beneficiary test." *Id.* at 536. The Second Circuit's opinion set forth a list of seven non-exhaustive factors for courts to weigh and balance under the test. *Id.* at 536–37. The factors are:

> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Id.

The Second Circuit explained it chose the primary beneficiary test due to the test's three important features. *Id.* at 536. First, the test "focuses on what the intern receives in exchange for his [or her] work," which incorporates *Portland Terminal's* focus on the interest of trainees. *Id.* Second, the test allows courts flexibility in examining the economic reality between the intern and the employer, which follows the Supreme Court's economic reality test cases. *Id.* And third, the test acknowledges the distinction between intern-employer relationships, in which interns typically expect to receive educational or vocational benefits, and employee-

employer relationships, in which employees do not necessarily expect to receive such benefits. *Id.*

Other courts have adopted either *Glatt's* primary beneficiary test or have established a similar test in cases involving interns or trainees. *See Schumann*, 803 F.3d at 1211–12 (expressly adopting the *Glatt* primary beneficiary test); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (discussing relevant factors for courts to consider when analyzing "which party derives the primary benefit from the relationship") (*Laurelbrook*).

The cases have arisen in a variety of contexts. In *Glatt*, the plaintiffs were unpaid interns working for a film production company, and the interns argued that they were owed compensation as employees under the FLSA and New York labor law. 811 F.3d at 531–33. During their internships, one plaintiff was enrolled in a degree program, and the other two plaintiffs were not. *Id.* at 532–33. After adopting the primary beneficiary test, the Second Circuit remanded the case for the district court to apply it. *Id.* at 538.

In *Schumann*, nursing students sought wages under the FLSA for work performed in the school's clinic, which was a prerequisite to obtaining a master's degree in the students' program. 803 F.3d at 1202. The Eleventh Circuit adopted *Glatt's* primary beneficiary test and remanded the case to the district court to determine whether the students were employees based on the test. *Id.* at 1211–13.

In *Laurelbrook*, the DOL had sought an injunction against a religious school for allegedly violating the FLSA, arguing that students who were engaged in practical, vocational training to learn various trades and serve sanitarium patients,

were employees. 642 F.3d at 519–21. The Sixth Circuit upheld the district court's conclusion that the students were not employees, noting that the school benefitted from receiving payment for students' services, and that the hours students worked allowed the sanitarium to satisfy its licensing requirements, but that the students, not the school, were the primary beneficiaries. *Id.* at 530–32. The benefits to the school were offset by the burdens, because students did not reduce the number of compensated workers, and instructors had to spend extra time supervising students at the expense of performing productive work. *Id.* at 530–31. The students, on the other hand, received the important benefits of gaining hands-on, practical training that allowed them to be competitive in a variety of vocations upon graduation, to learn how to operate tools used in the trades they were studying, to earn credit for courses approved by the state accrediting agency, and to develop a strong work ethic and leadership skills. *Id.* at 531. Therefore, the Sixth Circuit concluded the students were the primary beneficiaries and hence were not employees.

The primary beneficiary analysis by our sister circuits in *Glatt*, *Schumann*, and *Laurelbrook* represent applications of the Supreme Court's economic realities test, and the courts evaluated the totality of the circumstances of each case as the Supreme Court has directed. *See Rutherford Food Corp.*, 331 U.S. at 730; *Schumann*, 803 F.3d at 1210; *Glatt*, 811 F.3d at 536; *Laurelbrook*, 642 F.3d at 522. *Glatt* in particular provides a helpful list of factors for courts to consider in the specific context of student workers. We agree with those decisions that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most

appropriate test for deciding whether students should be regarded as employees under the FLSA.

II. Applying the primary beneficiary test

The primary beneficiary test as articulated in *Glatt* includes at least seven factors. Applying them to the facts of this case, most if not all militate toward concluding that Plaintiffs are students. With respect to the first, there is no dispute that Marinello students signed on knowing they would not receive remuneration and did not expect compensation. Under the second and third factors, Marinello students received hands-on training in the clinic and academic credit for the hours they worked. The students' clinical work corresponded to their academic commitments under the fourth factor because clinical work allowed students to clock the hours they needed to sit for the state licensing exams. *See* Cal. Code Regs., tit. 16, §§ 950.2, 928(a); Nev. Rev. Stat. §§ 644.200, 644.204, 644.400. Fifth, nothing in the record suggests that Marinello required its students to participate in their programs for longer than was necessary to complete their hour requirement for the state exams. Under the sixth factor, students did not routinely displace the work of paid employees as the school maintained staff to instruct students, run clinics, operate front desks, inventory and stock the dispensary, handle the logistical needs of the clinics, and perform nighttime janitorial services. Finally, students had no expectation of employment with Marinello upon graduation. In summary, application of the *Glatt* factors establishes that students were the primary beneficiaries of their labors. Their participation in Marinello's clinic provided them with the hands-on training they needed to sit for the state licensing exams. Applying the primary

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that, on the date indicated below, I caused to be served true and correct copies of Mr. Rhett Greenfield's PETITION FOR REVIEW to the parties and/or their counsel of record listed below, via the method indicated.

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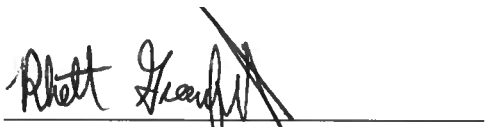
DATED this 17th day of September, 2023 at Tacoma, Washington.



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RHETT GREENFIELD - FILING PRO SE

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Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57156-1
Appellate Court Case Title:	Rhett Greenfield, Appellant v. Department of Labor and Industries, Respondent
Superior Court Case Number:	22-2-04045-4

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