

NEW SEVENTH STAGE OF THE CHATGPT-4 APPEAL EXPERIMENT: AI Analyzes Petition for Rehearing *En Banc*.

Ralph Losey, October 15, 2023

GPT put my picture in the record of all my prompts, plus I have added a short break line for clarity.



Please prepare complete detailed summary of the following Petition for Rehearing *En Banc*, which due to its length, I will submit to you in parts. Here is the first part.

"STATEMENT OF ISSUES THAT MERIT EN BANC CONSIDERATION 1. Does Supreme Court precedent permit the judicial creation of an "intern exception" to the definition of a public agency "employee" that Congress did not recognize when it added the public agency volunteer exception to the FLSA? 2. Does the panel's decision conflict with Supreme Court precedent enforcing the party-presentation principle by applying a rule of law that the parties agreed was inapplicable? 3. Does the majority opinion conflict with other decisions in this circuit by failing to recognize an intern's entitlement to compensation for work performed after a training period ends when the work period is substantially longer than the training period? USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 8 of 26 2 STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION Brandi McKay ("McKay") filed a complaint against Miami-Dade County ("County") on February 12, 2020 alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq., based on the County's failure to pay McKay minimum wage and overtime for services she provided to the County. (Doc. 1) The district court entered summary judgment against McKay. (Doc. 43) McKay filed a notice of appeal from the court's summary judgment order on October 28, 2020. (Doc. 44) The court of appeals concluded that the district court erred by failing to give deference to an administrative regulation defining volunteers for a public agency but affirmed the district court's decision that McKay was not the County's employee at any point during her internship. The court's decision is appended to this petition. USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 9 of 26 3 STATEMENT OF FACTS Relevant facts are summarized in the majority opinion at pages 2 to 4 and in the concurring and dissenting opinion at pages 44 to 48. In brief, McKay was selected for the County's Forensic Imaging Preceptorship Program ("FIPP"), an unpaid internship that lasts six months. McKay v. Miami Dane Co., No. 20-14044, at *2 (11th Cir. June 9, 2022). During the first four weeks, McKay was trained to be an autopsy photographer. Id. at *44 (Jordan, J., concurring and dissenting). She needed and received no additional training to perform the job of an autopsy photographer after those four weeks ended. Id. During her remaining weeks in the program, McKay worked for more than 500 hours as a primary autopsy photographer. Id. at * 45. She received no additional training, was not closely supervised, and worked on weekends with

no supervision at all. *Id.* at *44-45. The work performed by interns after their initial training allowed staff photographers to perform other work and saved labor costs for the County, which otherwise would have needed to hire more staff photographers or to pay existing photographers overtime compensation. *Id.* at *46-47. As the Director of Operations conceded, interns were treated “much like temporary employees, much like part-time employees” except they were not paid wages for their work. *Id.* at *47. USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 10 of 26 4 ARGUMENT I. Supreme Court Precedent Does Not Permit the Judicial Creation of an “Intern Exception” to the Definition of a Public Agency “Employee” that Congress Did Not Recognize When It Added the Public Agency Volunteer Exception to the FLSA The majority opinion is in conflict with a rule of statutory construction that the Supreme Court has long mandated: When Congress creates exceptions to a general statutory provision, “additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). See also *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001) (courts may not “supplement the explicit exception”); *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (“explicit listing of exceptions” to statute indicates “that Congress did not intend courts to read other unmentioned . . . exceptions into the statute that it wrote”); *United States v. Smith*, 499 U.S. 160, 167 (1991) (“Congress’ express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception”). Prior to the *McKay* decision, circuit precedent followed this rule. See, e.g., *United States v. Alabama*, 778 F.3d 926, 934 (11th Cir. 2015) (when “Congress has explicitly enumerated a discrete exception to a general rule, [the court] will not imply additional exceptions absent a clear direction to the contrary”); *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1296 (11th Cir. 2015) (citing *Andrus* and circuit precedent and noting that when USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 11 of 26 5 “Congress knows how to say something but chooses not to, its silence is controlling”). The Fair Labor Standards Act (FLSA) defines an employee as “any individual employed by an employer.” 29 U.S.C. § 201(e)(1). “Employ” means “to suffer or permit to work.” *Id.* at § 201(g). While an employee is therefore a person who is suffered or permitted to work, the Supreme Court concluded that trainees in a railyard are not employees while they are learning to be brakemen if the railyard receives “no ‘immediate advantage’ from any work done by the trainees.” *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947). The Court decided that the FLSA was not intended to penalize businesses for providing the same instruction that a vocational school would provide “at a place and in a manner which would most greatly benefit the trainees.” *Id.* That decision gave birth to the private sector intern exception to the FLSA, an exception that asks whether the trainee or the business that provides the training is the primary beneficiary of the training program. See, e.g., *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209 (11th Cir. 2015) (applying the “primary beneficiary” test to a student who interned at a medical practice to earn an advanced degree in nurse anesthesia). USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 12 of 26 6 The panel decision relies solely on *Portland Terminal* for its conclusion that an intern exception also applies to public agencies.¹ *McKay v. Miami Dade Co.*, No. 20-14044, at *11 (11th Cir. June 9, 2022). While *Portland Terminal* addresses individuals who work without pay in the private sector in exchange for training benefits, it does not purport to address individuals who work without pay in the public sector. The Supreme Court could not have intended *Portland Terminal* to create an exception to FLSA coverage for public agency employees because Congress did not subject public agencies to FLSA coverage when *Portland Terminal* was decided. Employees of “public agencies” were not covered until 1974. *McKay*, No. 20-14044, at

*9. In that year, Congress created a definition of employee that is unique to public agencies. See 29 U.S.C. § 201(e)(2) (“In the case of an individual employed by a public agency, such term means . . .”). The Supreme Court in 1947 could 1 The situation in the McKay case is “a far cry from that in Portland Terminal,” a case in which “trainees enrolled in a course lasting approximately seven or eight days, during which time they did some actual work under close supervision.” *Alamo Found'n v. Secy. of Labor*, 471 U.S. 290, 299-300, 301 (1985). As the McKay dissent recognizes, the County’s internship lasted six months but only provided training for one month. The work that McKay performed in the last months of the internship was not closely supervised and, unlike the training program in Portland Terminal, displaced work that would otherwise have been performed by paid employees. McKay, No. 20-14044, at *44-47 (Jordan, J., concurring and dissenting). USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 13 of 26 7 not have intended to create an exception to a statutory definition that did not exist until 1974. Because the Supreme Court held that Congress exceeded its authority by extending the FLSA to public agency employees, the FLSA was not enforced against public agencies until the Court upheld the coverage extension in 1985. McKay, No. 20-14044, at *10. Whether an internship exception applied to public agencies was not a question the Court had any reason to address before 1985 because public agencies were not subject to the FLSA. When the law finally took effect in 1985, Congress amended² the FLSA to add an exception to the definition of public agency “employee” that appears in § 201(e)(2). It excepted “any individual who volunteers to perform services for a public agency,” provided certain conditions are met. 29 U.S.C. § 201(e)(4)(A). That was the only exception that Congress authorized to the statute’s new coverage of public agency employees. While Congress could have imported Portland Terminal’s “intern exception” into the FLSA’s coverage of public agency employees, it chose not to do so. Since Congress created an express exception to the new FLSA definition of a public agency employee, “additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Andrus*, 446 U.S. at 2 Pub. L. No. 99-150, § 4, 99 Stat. 790 (1985). USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 14 of 26 8 616-17. No language in the public agency volunteer exception expresses or implies an intent to create any additional exceptions to the new definition of “employee” that appeared in § 201(e)(2). The panel decision in McKay creates an exception to the public agency definition of “employee” for interns who agree to provide uncompensated services in exchange for training, even if they do not satisfy the conditions required to meet the public agency volunteer exception. Implying an exception that Congress did not authorize and that is unsupported by a statement of Congressional intent contravenes Supreme Court holdings that a court may not “supplement the explicit exception,” *TRW*, 534 U.S. at 29, by reading unmentioned exceptions into a statute that explicitly creates exceptions, *Brockamp*, 519 U.S. at 352. Since Congress knew how to create exceptions to the definition of public agency employees (and in fact created one), its silence about an additional “intern exception” is “controlling.” *Batchelor-Robjohns*, 788 F.3d at 1296. All members of the panel agreed that the public agency volunteer exception did not exempt McKay from the FLSA because she was not working for civic, humanitarian, or charitable reasons, as the regulations implementing the exception require. McKay, No. 20-14044, at *14-18. Supreme Court precedent governing statutory construction required the court’s analysis to end USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 15 of 26 9 at that point. Congress created an explicit exception to the definition of an “employee” for certain individuals who agree to work for a “public agency” without pay. Since Congress did not create an additional exception for individuals who provide unpaid services to public agencies as interns, the panel improperly added an unmentioned

exception to the definition of an “employee” of a “public agency” that Congress did not authorize. The court should rehear this appeal en banc and issue a decision that does not conflict with Supreme Court precedent.”

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Summary of Petition for Rehearing En Banc

Statement of Issues That Merit En Banc Consideration

1. The petition questions whether the judiciary can create an "intern exception" to the definition of a public agency "employee" under the FLSA, which Congress did not explicitly recognize.
2. It asks if the panel's decision is in conflict with Supreme Court precedent enforcing the party-presentation principle by applying a rule of law that both parties agreed was inapplicable.
3. The petition also questions whether the majority opinion conflicts with other decisions in the 11th Circuit by not recognizing an intern's entitlement to compensation for work performed after a training period ends, especially when the work period is substantially longer than the training period.

Statement of the Course of Proceedings and Disposition

Brandi McKay filed a complaint against Miami-Dade County for FLSA violations. The district court ruled against McKay, and she appealed. The appellate court affirmed the district court's decision, despite acknowledging an error in not giving deference to an administrative regulation defining volunteers for a public agency.

Statement of Facts

McKay was part of a six-month unpaid internship program. She was trained for four weeks and then worked for more than 500 hours as a primary autopsy photographer without additional training or close supervision. Her work saved labor costs for the County.

Argument

1. **Judicial Creation of an "Intern Exception":** The petition argues that the majority opinion conflicts with Supreme Court precedent, which states that additional exceptions to a statute should not be implied unless there is evidence of contrary legislative intent. The petition contends that the FLSA's definition of a public agency "employee" does not include an "intern exception," and the court erred in creating one.
2. **Conflict with Supreme Court Precedent:** The petition argues that the panel's decision conflicts with the Supreme Court's enforcement of the party-presentation principle, as both parties agreed that the public agency volunteer exception did not apply to McKay.

3. Conflict with 11th Circuit Precedent: The petition argues that the majority opinion conflicts with other decisions in the 11th Circuit by failing to recognize an intern's entitlement to compensation for work performed after a training period ends, especially when the work period is substantially longer than the training period.

The petition concludes by urging the court to rehear the appeal en banc and issue a decision that aligns with Supreme Court precedent.

Would you like to proceed with the analysis of the next part of the petition?



Here is the second and last part for you to provide a detailed and complete summary:

"II. The Panel's Decision Conflicts with Supreme Court Precedent Enforcing the Party-Presentation Principle by Applying a Rule of Law that the Parties Agreed Was Inapplicable The Supreme Court recently reminded lower courts that "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). That principle requires the parties to "frame the issues for decision" and limits the court's role to acting as a "neutral arbiter of matters the parties present." *Id.* (citation and internal quotation marks omitted). The principle is premised on the belief that parties who are represented by counsel "know what is best for them." *Id.* In the summary judgment motion that the district court granted, Miami-Dade County framed the argument clearly. The County argued that the FLSA USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 16 of 26 10 cannot "create an employment relationship between an individual who, without any express or implied compensation agreement, works to serve their own interest, and the entity providing aid and instruction." (Doc. 32: 3) The County reasserted that argument on appeal. The panel rejected it because it "undercuts a primary purpose of the FLSA by allowing states to ignore the statute as to anyone the state can convince to work without pay." *McKay*, No. 20-14044, at *16. The County's reliance on the argument that no trainee who agrees to work for free can ever be classified as an employee motivated its concession that the private sector "primary beneficiary" test for determining whether trainees are employees does not apply to public agencies. The County argued that "*McKay*'s participation in the Miami-Dade County Medical Examiner Department Forensic Imaging Preceptorship Program is not subject to the primary beneficiary test applicable to internships with for-profit employers." (Doc. 32: 4) *McKay* agreed with that position. (Doc. 36: 5, 8-9, 16) Thus, the issues as framed by the parties in the district court made clear that neither party believed the "primary beneficiary" test applied to public agency interns. The panel nevertheless decided the case in the County's favor by applying the "primary beneficiary" test. *McKay*, No. 20-14044, at *24-26. The panel thus decided the case in a way that was contrary to the position USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 17 of 26 11 advanced by both parties in the district court. The panel's decision conflicts with the Supreme

Court's articulation of the party-presentation principle because the court based its decision on a rule of law that both parties agreed was inapplicable to their dispute. Without mentioning the party-presentation principle or the Supreme Court precedent that requires its enforcement, the panel commented in a footnote that the County did not waive its opportunity to have the court apply the primary beneficiary test because she discussed that test in her motion. The County's prophylactic discussion briefly addressed how the test should be applied if the court disagreed with its position that the test did not apply at all. That cursory discussion did not alter the County's stance that the test applies only to "for-profit employers" and not to public agencies. (Doc. 32: 4-5) When the parties agree upon the controlling law, the party-presentation principle requires courts to decide the dispute as the parties have framed it. *Sineneng-Smith*, 140 S. Ct. at 1579. The panel and the district court disregarded that principle by applying an intern exception that both parties urged the district court to reject because it did not apply to public agency interns. En banc review is necessary to correct a panel decision that conflicts with Supreme Court precedent requiring enforcement of the party-presentation principle. USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 18 of 26 12 III. The Majority Opinion Conflicts with Other Decisions in this Circuit by Failing to Recognize an Intern's Entitlement to Compensation for Work Performed After a Training Period Ends When the Work Period Is Substantially Longer than the Training Period Although McKay does not agree that the primary beneficiary test applies to public agency internships, she argued on appeal that the district court erred in its application of that test. McKay acknowledged that she received beneficial training for the first four weeks of her internship. However, she offered evidence that she received no additional benefit and no additional training for ten weeks, including weekends, during which she replaced staff photographers by working as a primary autopsy photographer. McKay, No. 20-14044, at *46 (Jordan, J., concurring in part and dissenting in part). She also offered evidence that she received one partial day of training in other aspects of forensic photography during each of the alternating weeks when she was not the primary autopsy photographer but was required to be available as a backup autopsy photographer. *Id.* (Doc. 30: ¶¶ 22, 36-37) McKay sought compensation for the weeks when the County was the primary beneficiary of the relationship — the weeks that followed the completion of her four-week training when she was working as a primary or backup autopsy photographer for free and getting almost nothing in return. As the dissenting panel member recognized, evidence in the record would allow a jury to find that the primary training provided to McKay lasted USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 19 of 26 13 "only four weeks," that she was "ready to be a primary autopsy photographer" after those four weeks of training, and that interns received "no significant new training, instruction, coaching, or advice to improve their performance." McKay, No. 20-14044, at 44 (Jordan, J., concurring in part and dissenting in part). After completing the four weeks of training, interns worked as primary autopsy photographers on weekends with no supervision. *Id.* at 45. After her first four weeks as an intern, McKay "worked 508.75 hours (including 50.75 hours of overtime) as a primary autopsy photographer over 10 weeks and nine weekends. She was not compensated for that work." *Id.* at 46. Those facts would allow a jury to conclude that, after four weeks of training that benefitted McKay, the County benefitted from months of McKay's unpaid labor as a primary or backup autopsy photographer that would otherwise have been provided by a staff member. *Id.* at 46-48. Circuit precedent recognizes that the primary beneficiary test allows a finding that the intern was at times the primary beneficiary of a training program and that the employer was the primary beneficiary at other times. In *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1214 (11th Cir. 2015), the court "caution[ed] that the

proper resolution of a case may not necessarily be an all-or-nothing determination.” The court “envision[ed] a scenario where a portion of the student's efforts constitute a bona fide internship that primarily USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 20 of 26 14 benefits the student, but the employer also takes unfair advantage of the student's need to complete the internship by making continuation of the internship implicitly or explicitly contingent on the student's performance of tasks or his working of hours well beyond the bounds of what could fairly be expected to be a part of the internship.” Schumann, 803 F.3d at 1214-15. As the dissent observed, “[a] jury could find that this is what happened with Ms. McKay after the first four weeks of the FIPP.” McKay, No. 20-14044, at *49 (Jordan, J., concurring in part and dissenting in part). The dissent discusses evidence in the record at length that the majority opinion fails to acknowledge. Id. at 43-48. How should courts apply the primary beneficiary test when both the intern and the employer are primary beneficiaries at different times? Shumann suggests that the intern should not be compensated “for work performed within the legitimate confines of the internship” but should be compensated for labor that benefitted the employer but “did not serve to further the goals of the internship.” Schumann, 803 F.3d at 1215. The Sixth Circuit recently took a different approach, holding that “when a plaintiff asserts an entitlement to compensation based only on a portion of the work performed in the course of an educational relationship, courts should apply the primary-beneficiary test . . . only to that part of the relationship, not to the broader relationship as a USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 21 of 26 15 whole.” Eberline v. Douglas J. Holdings, 982 F.3d 1006, 1014 (6th Cir. 2020). The Eberline court noted that other circuits have “also use a targeted approach that focuses on the segments of work at issue.” Id. at 1015. As the dissent noted, any conflict between the Schumann approach and the Eberline approach need not be resolved in this case because, even under the Schumann approach, 80% of McKay’s time in the internship was devoted to uncompensated work rather than training. McKay, No. 20-14044, at *49 n. 12 (Jordan, J., concurring in part and dissenting in part). The majority opinion follows neither Schumann nor Eberline. It does not recognize, as did Schumann and the dissent, that the primary beneficiary test does not require an “all-or-nothing” result. Nor does it follow the Sixth Circuit approach by applying the primary beneficiary test only to the portion of the internship for which the plaintiff seeks compensation. Notwithstanding the evidence that the dissent correctly viewed as creating a jury issue, the majority opinion decided that McKay received an educational benefit and was therefore the primary beneficiary of the internship. McKay, No. 20-14044, at *24-26. The majority suggested no objective means of valuing that benefit. It agreed with the district court that the dispositive question was whether the benefit received by the County was “grossly excessive” compared to the benefit received by McKay. Id at *24. The majority offers no measuring stick for USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 22 of 26 16 determining when free labor for an employer becomes “grossly excessive.” If requiring 80% of an internship to be devoted to uncompensated labor with no additional training does not confer a grossly excessive benefit upon an employer, what does? The decision offers no guidance to courts as they weigh the factors described in Schumann. The majority opinion gives no significant weight to the undisputed cost-saving benefit that the County enjoyed during the weeks that McKay worked for free as a primary autopsy photographer, displacing staff photographers who would otherwise have been paid to perform that work. The district court minimized the importance of displacing paid workers with unpaid interns on the ground that there is “nothing wrong with” employers benefitting from internships. McKay, No. 20-14044, at *24. If there is nothing wrong with using an uncompensated intern to displace workers, why is displacement a factor in the Schumann test?

The majority adopts the district court's analysis, *id.*, but offers no rationale to explain how much paid labor can be displaced with free labor before an internship becomes employment. By endorsing the displacement of paid employees for five months of a six-month internship during which the intern receives no additional training, the majority opinion undermines a key purpose of the FLSA: expanding the universe of laborers who receive a wage for their work. See *Mechmet v. Four Seasons* USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 23 of 26 17 Hotels, Ltd., 825 F.2d 1173, 1176 (7th Cir. 1987) (one purpose of FLSA was to reduce unemployment and "spread work"). The majority opinion applied the primary beneficiary test to reach an "all-or-nothing" result without regard to Circuit precedent that recognizes an intern is not an employee "for work performed within the legitimate confines of the internship" but becomes an employee for "all hours" spent on work that benefits the employer without "further[ing] the goals of the internship." *Schumann*, 803 F.3d at 1215. See also *Axel v. Fields Motorcars of Fla., Inc.*, 711 F. App'x 942, 947 (11th Cir. 2017) (reversing summary judgment when evidence showed that at some point the plaintiff's work primarily benefitted the employer rather than the plaintiff because the work was not "limited to the period in which the training provided beneficial learning"). En banc review should be granted to conform the McKay decision to the holdings in *Schumann* and *Axel*, including their recognition that interns may be entitled to compensation after they are no longer the primary beneficiary of an internship. USCA11 Case: 20-14044 Date Filed: 06/29/2022 Page: 24 of 26 18 CONCLUSION For the reasons stated, McKay respectfully requests en banc review of the panel's decision in this appeal."

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Summary of the Second Part of the Petition for En Banc Review

Conflict with Supreme Court Precedent on Party-Presentation Principle

The petition argues that the panel's decision is in tension with the Supreme Court's emphasis on the "party-presentation principle," as articulated in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This principle posits that courts should act as neutral arbiters, relying on the issues framed by the parties. Both parties had agreed that the "primary beneficiary" test, commonly applied to private-sector internships, was not applicable to public agencies. Contrary to this mutual understanding, the panel applied the "primary beneficiary" test, thereby deviating from the principle of party presentation.

Inconsistency with Circuit Precedent on Intern Compensation

The petition also contends that the panel's decision conflicts with previous 11th Circuit decisions, notably *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1214 (11th Cir. 2015), which allows for a nuanced application of the "primary beneficiary" test. The panel's decision, according to the petition, failed to consider that both the intern and the employer could be primary beneficiaries at different times. The petition criticizes the panel for adopting an "all-or-

nothing" approach, which neither aligns with *Schumann* nor with the Sixth Circuit's approach in *Eberline v. Douglas J. Holdings*, 982 F.3d 1006, 1014 (6th Cir. 2020).

Lack of Objective Criteria

The petition further argues that the panel's decision lacks objective criteria for determining when the benefit to the employer becomes "grossly excessive." It questions the panel's failure to provide guidance on how much paid labor can be displaced by unpaid labor before an internship becomes employment, thereby undermining the Fair Labor Standards Act's (FLSA) objectives.

Conclusion

The petition concludes by urging that en banc review is necessary to align the panel's decision with Supreme Court precedent on the party-presentation principle and with 11th Circuit precedent on the nuanced application of the "primary beneficiary" test.

This summary captures the intricate legal arguments presented in the petition, underscoring the tension between the panel's decision and established legal principles. The petition raises substantive questions about the adherence to precedent and the interpretive latitude of courts, particularly in the context of labor laws and internships.



Two questions regarding the Petition for Rehearing: 1. How do you think the court should rule?
2. How do you think the court will in fact rule?

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1. How the Court Should Rule

From a jurisprudential standpoint, the petition raises compelling arguments that merit en banc review. The panel's decision appears to be in tension with both Supreme Court and 11th Circuit precedents, particularly concerning the "party-presentation principle" and the nuanced application of the "primary beneficiary" test.

- **Party-Presentation Principle:** Courts are traditionally limited to the issues framed by the parties. The panel's decision to apply a test that both parties agreed was inapplicable could be seen as a departure from this principle, as articulated in *United States v. Sineneng-Smith*.

- Primary Beneficiary Test: The panel's "all-or-nothing" approach seems to conflict with the 11th Circuit's own precedent in *Schumann*, which allows for a more nuanced evaluation. This is especially pertinent given that labor laws like the FLSA are remedial in nature and should be broadly interpreted to effectuate their social welfare objectives.

Given these considerations, a strict adherence to precedent and interpretive principles would suggest that the court should grant the petition for en banc review to resolve these conflicts.

2. How the Court Will Likely Rule

Predicting court decisions is inherently speculative, but a few factors could influence the outcome:

- Precedential Weight: If the court finds that the panel's decision indeed conflicts with higher or circuit-level precedents, it may be more inclined to grant en banc review.
- Social and Policy Implications: The case touches on labor rights and the definition of employment in the context of internships, issues that have broad societal implications. Courts may consider the broader impact of their rulings, although this is secondary to legal considerations.
- Judicial Economy: En banc reviews are relatively rare and consume significant judicial resources. The court may weigh whether the legal issues at stake are sufficiently significant to warrant such a review.

Given the compelling legal questions raised, and considering the societal importance of labor laws like the FLSA, there's a reasonable chance the court may grant the en banc review. However, the considerations of judicial economy and the court's own interpretive leanings could sway the decision in either direction.

In summary, while the petition presents a strong case for en banc review based on legal principles, the actual outcome will depend on a complex interplay of jurisprudential, societal, and practical considerations.



I understand it is difficult to predict how the court will rule, but please prepare a memorandum speculates on how the Eleventh Circuit will rule on the Petition. Provide a numerical value of the probability the motion will be granted from 0% to 100% and set forth your reasons for this predicted outcome.

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Memorandum

Subject: Speculative Analysis on Eleventh Circuit's Ruling on Petition for Rehearing En Banc in McKay Case

Date: October 15, 2023

Probability of Motion Being Granted: 60%

Introduction

This memorandum aims to provide a speculative analysis of how the Eleventh Circuit may rule on the Petition for Rehearing En Banc in the McKay case. It is important to note that this analysis is purely speculative and based on a review of the legal issues presented, the court's past behavior, and broader jurisprudential considerations.

Factors Influencing the Decision

1. Precedential Conflicts

The petition argues that the panel's decision conflicts with both Supreme Court and Eleventh Circuit precedents. The "party-presentation principle" and the nuanced application of the "primary beneficiary test" are cited as key points of contention. Courts generally take conflicts with existing precedents seriously, as they undermine the stability and predictability of the law.

2. Societal and Policy Implications

The case involves the Fair Labor Standards Act (FLSA) and has broader implications for labor rights and internships. Given the societal importance of these issues, the court may be more inclined to grant a rehearing to ensure that its jurisprudence aligns with the legislative intent and social welfare objectives of the FLSA.

3. Judicial Economy

En banc hearings are resource-intensive and relatively rare. The court will weigh the importance of the legal issues against the resources required for a rehearing. Given that the petition raises questions about fundamental legal principles like the "party-presentation principle," the court may find that the issues are significant enough to warrant a rehearing.

4. Panel Composition and Judicial Philosophy

The ideological leanings and interpretive philosophies of the judges on the Eleventh Circuit could also influence the decision. Judges who favor strict adherence to precedent and textualist interpretations may be more inclined to grant the petition.

Conclusion and Probability Assessment

Given the compelling legal questions, the societal importance of the issues, and the potential conflicts with existing precedents, there is a reasonable likelihood that the Eleventh Circuit may grant the petition for a rehearing en banc. However, considerations of judicial economy and the court's own interpretive leanings could influence the decision.

After weighing these factors, I estimate a 60% probability that the motion for a rehearing en banc will be granted. This assessment reflects the serious legal issues at stake but also accounts for the practical considerations that could lead the court to deny the petition.

This memorandum is speculative in nature and should not be considered as legal advice or a guaranteed prediction of the court's behavior.

Respectfully submitted,

[Your Name] [Your Position]