

**Revised THIRD STAGE OF THE CHATGPT-4 APPEAL EXPERIMENT: Appellate Opinion Submitted for first time and Detailed Summaries and Analysis Provided.**

**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.

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Now I am going to provide you with the actual Opinion entered in this appeal by the Eleventh Circuit for you to provide a complete and very detailed summary of the opinion. Because of its length, I will provide the opinion to you in stages and you should summarize each section as it is provided to you, and then I will provide the next section of the opinion. Ok?

ChatGPT

Certainly, that approach sounds methodical and effective for capturing the nuances of the Eleventh Circuit's opinion in a detailed manner. Please go ahead and provide the first section of the opinion for summarization.

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This is the first part of the opinion, up to and including Section III A. Please make the summary very detailed and complete. Then I will provide the next sections of the Opinion to summarize. "McKay v. Miami-Dade Cty. United States Court of Appeals for the Eleventh Circuit June 9, 2022, Filed No. 20-14044 Reporter 36 F.4th 1128 \*; 2022 U.S. App. LEXIS 15910 \*\*; 29 Fla. L. Weekly Fed. C 1223 BRANDI MCKAY, Plaintiff-Appellant, versus MIAMI-DADE COUNTY, a Municipal Corporation, Defendant-Appellee. Counsel: For BRANDI MCKAY, Plaintiff - Appellant: Robert S. Norell, Robert S. Norell, PA, PLANTATION, FL; James Allen Peterson, Peterson Legal, PA, FORT LAUDERDALE, FL. For MIAMI-DADE COUNTY, a Municipal Corporation, Defendant - Appellee: Leona Nicole McFarlane, Miami-Dade County Attorney's Office, MIAMI, FL. Judges: Before JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges. JORDAN, Circuit Judge, Concurring in Part and Dissenting in Part. Opinion by: TJOFLAT Opinion [\*1131] TJOFLAT, Circuit Judge: Brandi McKay appeals the District Court's summary

judgment denying her claims under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 et seq., for minimum wage and overtime payments. McKay claims that she was an employee of Miami-Dade County while she participated in the County's autopsy forensic photography training program. As we agree with the District Court that McKay was an intern, not an employee, we affirm. I.1 1 Unless otherwise noted, the following facts are undisputed on appeal. McKay applied for Miami-Dade County's Medical Examiner's Forensic Imaging Preceptorship Program ("the Program") in 2016. She first heard of the Program while visiting Barry College to learn about the school's forensic photography degree program. McKay ultimately [\*\*2] elected not to apply to Barry College or any other forensic photography degree program, choosing instead to apply to Miami-Dade County's highly regarded Program and avoid "another four years of school."2 2 McKay graduated from York College of Pennsylvania in 2011 with a bachelor's degree in criminal justice and minors in photography and criminalistics. McKay understood that the Program was free, six-months long, unpaid, and required weekend work. When she applied, McKay had no experience with any of the state-of-the-art equipment used during the Program, other than a Nikon camera. After some delay, McKay officially began her internship on April 15, 2019. For the first two weeks of the Program, McKay completed workbook assignments provided by the Program. During weeks three and four, McKay received training in the morgue and shadowed County staff photographers as they took forensic autopsy photographs. In weeks five through eight, McKay and another intern worked together in the morgue taking autopsy photos, sometimes with staff supervision and sometimes without. After week eight and for the remainder of her time in the Program, McKay and another intern alternated between working weeks in the morgue. On McKay's on-weeks, which included weekends, she took autopsy photographs with little supervision, unless she needed training on equipment [\*\*3] that she had not previously used. On McKay's off-weeks, she completed assignments in the Program office. While the parties dispute the amount of feedback McKay received after week eight, they agree McKay received feedback before week eight and that McKay received no written evaluations of her performance. McKay's participation in the Program ended on September 10, 2019, about a month before her internship was scheduled to end. McKay filed the instant suit against Miami-Dade County on February 12, 2020, seeking minimum wage and overtime payments under the FLSA. McKay claimed she was a county employee and that the County abused the Program to "save[] labor costs." The County responded by arguing that McKay was never a county employee. The parties filed cross-motions for summary judgment on July 17, 2020; as part of these cross-motions, the parties stipulated that McKay's participation in the Program "was not motivated in any part by civic, charitable, or humanitarian reasons" and was instead solely to acquire "training in forensic photography." The District Court determined that McKay was an intern, not an employee, using the primary beneficiary test adopted by the Eleventh Circuit in [\*\*4] Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015), and so denied McKay's motion and granted the County's. McKay timely appealed. II. We review the grant of summary judgment de novo. Hornsby-Culpepper v. Ware, 906 F.3d 1302, 1311 (11th Cir. 2018). Summary judgment is appropriate if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). On summary judgment, we view the evidence and draw all reasonable inferences in the light most favorable to the non-movant. Ware, 906 F.3d at 1311. III. To receive minimum wage and overtime payments under the FLSA, McKay must show that she is an employee within the meaning of the statute. 29 U.S.C. §§ 206(a), 207(a)(1). Unfortunately, the FLSA does not provide much guidance on who exactly is an "employee," defining the term as "any individual employed by an employer." 29 U.S.C. §

203(e)(1). To "employ" is defined as "to suffer or permit to work." § 203(g). "Employer," meanwhile, is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency." § 203(d). While these definitions are frustratingly circular, we have held that they are intended to encompass "the broadest possible delineations of the employer-employee relationship." *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1287 (11th Cir. 2016) (citing *United States v. Rosenwasser*, 323 U.S. 360, 362-63 & n.3, 65 S. Ct. 295, 296-97, 89 L. Ed. 301 & n.3 (1945)). This "broad general definition" thus "strongly suggests that Congress intended an all [\*\*5] encompassing definition of the term 'employee' that would include all workers not specifically excepted." *Patel v. Quality Inn S.*, 846 F.2d 700, 702 (11th Cir. 1988). Miami-Dade County contends that two such exceptions apply to McKay's participation in the Program: the volunteer exception for public agencies found in § 203(e)(4)(A) and the internship exception established by Supreme Court and Eleventh Circuit caselaw. *Schumann*, 803 F.3d at 1208-12 (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-53, 67 S. Ct. 639, 641, 91 L. Ed. 809 (1947)). McKay responds that Congress replaced the internship exception with the volunteer exception for public agencies when it amended the FLSA in 1985, and that McKay was not a volunteer under the statute. In Part A, we discuss the relationship between the caselaw internship exception and the statutory volunteer exception and conclude that both exceptions apply to public agencies. In Part B, we analyze whether McKay was a volunteer or an intern under these exceptions and conclude that she was an intern but not a volunteer. A. To understand why both the caselaw internship exception and the statutory volunteer exception apply to public agencies, we begin by discussing the history and purposes of both exceptions. "Congress enacted the FLSA in 1938 with the goal of 'protecting all covered workers from substandard wages and oppressive working [\*\*6] hours.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 147, 132 S. Ct. 2156, 2162, 183 L. Ed. 2d 153 (2012) (alteration adopted) (quoting *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739, 101 S. Ct. 1437, 1444, 67 L. Ed. 2d 641 (1981)); see also 29 U.S.C § 202(a). While the Supreme Court had previously held that FLSA exceptions "must . . . be narrowly construed" to give effect to the FLSA's "humanitarian and remedial" purposes, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S. Ct. 807, 808, 89 L. Ed. 1095 (1945), the Court has recently rejected that view, opting instead to interpret the FLSA "fair[ly]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142, 200 L. Ed. 2d 433 (2018); *Ramirez v. Statewide Harvesting & Hauling*, 997 F.3d 1356, 1359 (11th Cir. 2021). With the Supreme Court's instruction to give the FLSA a "fair reading" in mind, we turn to the two exceptions under consideration. *Encino Motorcars*, 138 S. Ct. at 1142. The internship exception derives from *Portland Terminal*, a 1947 Supreme Court case concerning whether railroad trainees were employees under the FLSA. 330 U.S. at 149-150, 67 S. Ct. at 640. In *Portland Terminal*, a railroad company offered an unpaid, weeklong training course for prospective yard brakeman. *Id.* at 149, 67 S. Ct. at 640. The railroad required that all prospective yard brakeman complete this training course to be considered for employment. *Id.* Upon satisfactory completion of the training course, trainee brakemen were certified by the railroad and then placed on a list of qualified workers. *Id.* at 150, 67 S. Ct. at 640. To decide whether these trainees were employees, the Supreme Court began by holding that common law definitions of "employer" and "employee" were inapplicable, because the FLSA contained its own broad definitions. *Id.* at 150-51, 67 S. Ct. at 640. Accordingly, the Court [\*\*7] analyzed the statutory definition of "employ," "to suffer or permit to work," and held that it was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Id.* at

152, 67 S. Ct. at 641; see also § 203(g). The Court then analogized the railroad's training course to public and private vocational school programs, holding that the FLSA "was not intended to penalize railroads for providing, free of charge, the same kind of instruction [as a school] at a place and in a manner which would most greatly benefit the trainees." *Portland Terminal*, 330 U.S. at 152-53, 67 S. Ct. at 641. Sixty-eight years later, this Court applied *Portland Terminal* to modern intern-employer relationships and held that interns, students, and other trainees who were the primary beneficiaries of a training or educational program were not employees under the FLSA. *Schumann*, 803 F.3d at 1208-12.3 3 In doing so, we adopted the primary beneficiary test proposed by the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 384 (2d Cir. 2015). The 2015 *Glatt* decision was later vacated and replaced by *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016). The 2016 *Glatt* decision also adopted the primary beneficiary test. *Glatt*, 811 F.3d at 536-37 .While *Schumann* and *Portland Terminal* concerned programs run by private enterprises, neither of these cases explicitly limited the internship exception to private enterprises. See generally *id.* ; see generally *Portland Terminal*, 330 U.S. at 152-53, 67 S. Ct. at 641. Further, the FLSA does not differentiate between public and private work in the definition of "employ." § 203(g). In contrast, the statutory volunteer exception for [\*\*8] public agencies is the result of a twenty-year long debate between Congress and the Supreme Court about how far Congress could and should extend the FLSA to the states. When the FLSA first passed in 1938, Congress excluded both the federal and state governments from the FLSA's definition of "employer." FLSA, Pub. L. No. 75-718, ch. 676, § 3(d), 52 Stat. 1060, 1060 (1938) (codified as amended at § 203(d)) ("Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State."). This changed in 1966, when Congress amended the FLSA to cover state employees who worked in certain hospitals, institutions, schools, and railways. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 830, 831 (1966) (codified as amended at § 203(d)). This extension of FLSA coverage to the states was promptly challenged and reached the Supreme Court two years later in *Maryland v. Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968). The *Wirtz* Court upheld the 1966 extension under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, holding that "[i]f a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." *Wirtz*, 392 U.S. at 197, 88 S. Ct. at 2024. In 1974, Congress once again amended the FLSA. This time, Congress entirely [\*\*9] removed the state exemption from the definition of "employer," choosing instead to specifically include state "public agenc[ies]" as employers in the definition. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58 (1974) (codified at § 203(d)). Consequently, the FLSA was extended to state employees with only a few narrow statutory exceptions. § 203(e)(2). Congress's intent was thwarted, however, when the Supreme Court overruled *Wirtz* two years later in *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855, 96 S. Ct. 2465, 2476, 49 L. Ed. 2d 245 (1976). In *National League*, the Supreme Court held that the 1966 and 1976 amendments to the FLSA were outside of Congress's authority under the Commerce Clause insofar as they "operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." *Nat'l League*, 426 U.S. at 852, 96 S. Ct. at 2474. Relevantly, the *National League* Court's decision was based in part on its concern that the extension of the FLSA to the states would result in "a significant reduction of traditional volunteer assistance which has been in the past drawn on to complement the operation of many local governmental functions."4

4 Justice Brennan noted in his dissent that Department of Labor regulations already exempted fire protection and law enforcement volunteers from the requirements of the FLSA. Nat'l League, 426 U.S. at 874 n.12, 96 S. Ct. at 2485 n.12 (Brennan, J., dissenting) (citing 29 C.F.R. § 553.11 (1975)). Labor regulations also provided a general exception to public and private employees who voluntarily engaged in civic or charitable work. 29 C.F.R. § 785.44 (1985). But as the National League Court pointed out, who exactly qualifies as a volunteer under these regulations would be subject to judicial determination. Nat'l League, 426 U.S. at 850, 96 S. Ct. at 2473-74. And, of course, it was no sure thing that those regulations would have been upheld as a valid interpretation of the FLSA as it then existed. *Id.* at 850-51, 96 S. Ct. at 2474. On February 19, 1985, the Supreme Court changed its mind again, overruling National League and holding that the 1966 and 1974 FLSA amendments were a valid exercise of Congress's power under [\*\*10] the Commerce Clause. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533-34, 557, 105 S. Ct. 1005, 1008-09, 1021, 83 L. Ed. 2d 1016 (1985). According to the *Garcia* Court, state representatives in Congress would ensure "that laws that unduly burden the States will not be promulgated." *Id.* at 556, 105 S. Ct. at 1020. As a result of *Garcia*, the Department of Labor ("DOL") announced on June 14, 1985, that it would begin enforcing the FLSA against the states on October 15, 1985, with liability for wage and overtime payments to be backdated to April 15, 1985, the day *Garcia's* mandate issued. U.S. Dept. of Labor, Labor Department to Start Investigations of State, Local Governments under Federal Wage-Hour Law, USDL 85-249 (June 14, 1985). Congress, meanwhile, began preparing legislation to deal with the sudden, unexpected extension of the FLSA to the states. This legislation resulted in the Fair Labor Standards Amendments of 1985, which included, inter alia,<sup>5 5</sup> The 1985 amendments also added provisions addressing state employee overtime, fire protection and law enforcement, occasional or sporadic state employment, and substitutions, along with removing FLSA liability accrued before April 15, 1986, by state agencies that were exempted from the FLSA under the National Court decision. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, §§ 3(a)-(c), 4(a), 99 Stat. 787, 789-90 (1985). the statutory volunteer exception now codified at § 203(e)(4). Pub. L. No. 99-150, § 4(a), 99 Stat. 787, 790 (1985). Through this legislation, Congress addressed the concerns raised by the National League Court about the impact of the FLSA on state and local volunteerism. Nat'l League, 850-51, 96 S. Ct. at 2473-74; S. Rep. No. 99-159, at 14 (1985) ("The Committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes."). After giving the FLSA a "fair reading," *Encino Motorcars*, 138 S. Ct. at 1142, we conclude that the internship and [\*\*11] volunteer exceptions are both applicable to public agencies. The internship exception derives from the statutory definition of "employ," which the Supreme Court held "was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Portland Terminal*, 330 U.S. at 152, 67 S. Ct. at 641. In other words, someone "whose work serves only his own interest" has not been "suffer[ed] or permit[ed] to work," and thus has not been employed. *Id.* (quoting § 203(g)). As an "employee" under the FLSA is "any individual employed by an employer," § 203(e)(1), the failure of interns and trainees to be "employed" means they cannot be employees within the meaning of the FLSA. And in this circuit, we analyze whether an intern or trainee was "employed" using the primary beneficiary test. *Schumann*, 803 F.3d at 1208-12. The volunteer exception, meanwhile, exempts certain individuals who would otherwise be employees from the FLSA's definition. § 203(e)(1) (noting that the term "employee" excludes individuals who meet certain prescribed exceptions, including the volunteer exception); § 203(e)(4)(A) ("The term

'employee' does not include any individual who volunteers to perform services for a public agency . . ."). [\*\*12] So, the plain meaning of § 203(e)(1) reveals that an employee is an individual who (1) does not meet any of the listed statutory exceptions and (2) is "employed by an employer." Since the volunteer exception is a listed statutory exception while the internship exception is drawn from statutory interpretation of the term "employ," the creation of the volunteer exception did not limit or otherwise affect the applicability of the internship exception. This reading of the statute is further confirmed by the legislative history of the 1985 amendments, which communicated Congress's intent to discharge its "responsibility to ensure that federal legislation does not undermine the states' 'special position' or 'unduly burden the states'" and "to further the principles of cooperative federalism." S. Rep. No. 99-159, at 7 (quoting *Garcia*, 469 U.S. at 547, 556, 105 S. Ct. at 1015, 1020). Congress passed the 1985 amendments to "clarify the application of the [FLSA] to volunteers" in the wake of shifting Supreme Court caselaw, not to exclude the states from then-existing FLSA exceptions. *Id.* at 1. Further, the two exceptions serve distinctly different purposes; the volunteer exception allows public agencies to accept the services of volunteers without having to [\*\*13] treat them as employees, while the generally applicable internship exception allows all employers to provide training and education without having to pay their interns and trainees a wage. McKay's argument that the volunteer exception displaced the internship exception for state public agencies is thus unsupported by the plain text of the FLSA, the legislative history, and the purposes of the two exceptions. Accordingly, Miami-Dade County can challenge the employee-status of McKay either by establishing that a listed statutory exception, such as the volunteer exception, applies to her, or by showing that McKay was an intern under the primary beneficiary test and so was never employed. We begin by analyzing whether McKay was a volunteer."

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Detailed Summary of *McKay v. Miami-Dade Cty.* (Up to Section III A)

Parties and Claims

The case involves Brandi McKay, the Plaintiff-Appellant, who is appealing against Miami-Dade County, the Defendant-Appellee. McKay claims that she was an employee of Miami-Dade County while participating in the County's autopsy forensic photography training program. She argues that she is entitled to minimum wage and overtime payments under the Fair Labor Standards Act of 1938 ("FLSA"). Miami-Dade County contends that McKay was an intern, not an employee.

Factual Background

McKay applied for Miami-Dade County's Medical Examiner's Forensic Imaging Preceptorship Program ("the Program") in 2016. She had a bachelor's degree in criminal justice and minors in photography and criminalistics. The Program was a six-month, unpaid training program that required weekend work. McKay had no prior experience with the specialized equipment used in the Program. She began her internship on April 15, 2019. The Program involved workbook assignments, training in the morgue, and taking autopsy photographs. McKay's participation ended on September 10, 2019, a month before it was scheduled to end.

## Legal Proceedings

McKay filed a lawsuit against Miami-Dade County on February 12, 2020, claiming she was a county employee and that the County used the Program to save labor costs. Both parties filed cross-motions for summary judgment. The District Court applied the primary beneficiary test and concluded that McKay was an intern, not an employee. McKay appealed the decision.

## Legal Standards

The Court reviews the grant of summary judgment *de novo*. Summary judgment is appropriate if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law.

## Issue of Employee Status Under FLSA

To be entitled to minimum wage and overtime payments under the FLSA, McKay must prove she is an "employee" as defined by the statute. The FLSA's definitions of "employ," "employee," and "employer" are broad but circular. The Court has previously held that these definitions are intended to encompass the broadest possible delineations of the employer-employee relationship.

## Exceptions to Employee Status

Miami-Dade County argues that two exceptions apply to McKay: the volunteer exception for public agencies and the internship exception established by case law. McKay argues that she was neither a volunteer nor an intern.

## Relationship Between Internship and Volunteer Exceptions

The Court discusses the history and purposes of both the internship and volunteer exceptions. The internship exception is derived from case law and focuses on whether the individual is the primary beneficiary of the training or educational program. The volunteer exception is statutory and allows public agencies to accept the services of volunteers without having to treat them as employees. Both exceptions apply to public agencies.

## Conclusion of Section III A

The Court concludes that both the internship and volunteer exceptions are applicable to public agencies. The Court finds that the creation of the volunteer exception did not limit or otherwise affect the applicability of the internship exception.

This summary provides a detailed and complete overview of the first part of the opinion, up to and including Section III A. Would you like to proceed with the next sections of the Opinion?



Can you try again to prepare a complete and detailed summary of the original text, and not use the AiPDF plugin? I have shortened the length so that you can do and divide the Section III B section into two parts, and will next submit the first half of section III B. Is that ok? If so I will submit.

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Certainly, dividing Section III B into two parts and then summarizing them individually should work well. Please go ahead and submit the first half of Section III B, and I'll provide a detailed summary. Thank you.

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Here is the first part of Section III. B. for you to prepare a complete and very detailed summary, then I will submit the second part of III B.

"B. i. The FLSA excludes "volunteers" from the definition of "employee," stating that: (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if— (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and [\*\*14] (ii) such services are not the same type of services which the individual is employed to perform for such public agency. § 203(e)(4)(A). The FLSA does not define who "volunteers" are. Instead, the DOL provides the following definition of a "volunteer": An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. 29 C.F.R. § 553.101(a). McKay argues that the DOL's definition of "volunteer" deserves deference under *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, courts are bound to accept agency constructions of statutes so long as the statute is ambiguous and the agency's construction is permissible. *Id.* at 842-43, 104 S. Ct. at 2781-82. As the parties have stipulated that McKay did not participate in the Program for "civic, charitable, or humanitarian reasons," even in part, the DOL definition would exclude McKay from the volunteer exception. Miami-Dade County responds by arguing that the DOL definition is "not supported by existing law." Appellee Br. at 11. Instead, the County urges us to adopt a definition based on "common sense" and



"reasonableness." *Id.* at 10-12. The County suggests that it is unreasonable for an [\*\*15] unpaid, public agency intern to not be a volunteer. *Id.* While the County's brief never directly addressed *Chevron*, the County clarified at oral argument that it believes the statutory meaning of "volunteer" to be unambiguous. Oral Arg. at 20:31-21:31. Based on the County's brief, we infer that the County believes any individual who works for a public agency without payment to be a volunteer under the FLSA. We disagree. Miami-Dade County's proposed definition posits that anyone a public agency chooses not to pay is ipso facto a volunteer. However, this reading ignores a primary purpose of the FLSA, "protect[ing] all covered workers from substandard wages and oppressive working hours." *Christopher*, 567 U.S. at 147, 132 S. Ct. at 2162 (internal quotation marks omitted); see also § 202(a). As detailed above, Congress chose to extend the FLSA to the states after initially exempting them. Further, Congress chose not to withdraw this extension after *Garcia*, instead opting to create a volunteer exception. By applying the FLSA to the states, Congress ensured that state employees would receive a "fair day's pay for a fair day's work." *Barrentine*, 450 U.S. at 739, 101 S. Ct. at 1444 (quoting 81 Cong. Rec. 4983 (1937) (message of President Franklin D. Roosevelt)); see also § 206(a). The County's proposed definition [\*\*16] 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. Further, the Senate committee report recommending the 1985 FLSA amendments explicitly directed the DOL to issue regulations concerning the volunteer exception. S. Rep. No. 99-159, at 14 ("The DOL is directed to issue regulations providing further guidance in this area."). This indicates that Congress considered the term "volunteer" to be ambiguous and left a gap for the DOL to fill. See *United States v. Mead Corp.*, 533 U.S. 218, 227, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001) ("When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." (internal citation omitted) (quoting *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2782)). As "volunteers" cannot refer to anyone who works for a public agency without pay, there must be some limiting principle not expressed in § 203(e)(4)(A). This makes the term ambiguous, and so *Chevron* requires us to defer to the DOL's definition unless it is "arbitrary, capricious, or manifestly contrary [\*\*17] to the statute." 467 U.S. at 844, 104 S. Ct. at 2782. The DOL chose to limit the term "volunteer" to those who serve for "civic, charitable, or humanitarian purposes." § 553.101(a). We cannot say that the DOL's definition, which adopts and expands upon language used in the Senate committee report recommending the 1985 FLSA amendments after considering the matter through formal rulemaking, is unreasonable, or otherwise arbitrary, capricious, or contrary to the purposes of § 203(e)(4)(A). S. Rep. No. 99-159, at 14 ("The committee does not intend to discourage or impede volunteer activities undertaken for humanitarian purposes."). Accordingly, we defer to the DOL's definition of "volunteer" under *Chevron*. See *Brown v. NYC Dep't of Educ.*, 755 F.3d 154, 161 n.4 (2d Cir. 2014) (granting *Chevron* deference to § 553.101(a)); *Purdham v. Fairfax Cnty. Sch. Bd.*, 637 F.3d 421, 428 (4th Cir. 2011) (applying the DOL's definition to interpret § 203(e)(4)(A)); *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528-29 (5th Cir. 2004) (same); *Mendel v. City of Gibraltar*, 727 F.3d 565, 570 (6th Cir. 2013) (recognizing that the DOL's regulation defining volunteers provides "guidance"). We agree with our sister circuits that a "volunteer" under § 553.101(a) need only be motivated in part by "civic, charitable, or humanitarian purposes." *Brown*, 755 F.3d at 161 & n.6; *Purdham*, 637 F.3d at 429; *Cleveland*, 388 F.3d at 528-29. However, the parties have stipulated that McKay "was not motivated in any

part by civic, charitable, or humanitarian reasons." Accepting the parties' stipulation as fact, we hold that McKay was not a volunteer within the meaning of [\*\*18] § 203(e)(4)(A) while she participated in the Program. *United States v. Zayas-Morales*, 685 F.2d 1272, 1278 (11th Cir. 1982) (noting that the "stipulation of facts resolve[] any questions of material fact"). ii. Because McKay does not qualify as a volunteer under the volunteer exception, we now turn to the internship exception.<sup>6 6</sup> McKay argues that Miami-Dade County waived the internship exception in the District Court by stating that "McKay's participation in the [Program] is not subject to the primary beneficiary test applicable to internships with for-profit employers" in the County's motion for summary judgment. Appellant Br. at 28-31. However, in its motion the County then proceeded to analyze McKay's relationship with the County under Schumann's primary beneficiary test and conclude that the County was entitled to summary judgment under the Schumann factors. Further, the County's statement that the primary beneficiary test does not apply was based on a non-binding fact sheet issued by the DOL—in other words, the County was merely bringing the DOL's factsheet to the District Court's attention. So, we conclude that the County did not waive the internship exception. Under the internship exception, an intern learning under an employer is not considered "employed" by the FLSA so long as the intern is the primary beneficiary of the relationship. *Schumann*, 803 F.3d at 1211. To determine who the primary beneficiary of an intern-employer relationship is, we look to seven non-exhaustive factors: 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 [\*\*19] 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 1211-12. Under this test, "no one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee." *Id.* at 1212 (quoting *Glatt*, 791 F.3d at 384 (internal alterations omitted)). "Rather, courts must engage in a 'weighing and balancing of all of the circumstances,' including, where appropriate, other considerations not expressed in the seven factors." *Id.* (quoting *Glatt*, 791 F.3d at 384 (alterations omitted)).<sup>7 7</sup> The dissent argues that McKay was not an intern under Schumann because she did not receive academic credit or obtain a professional certification or licensure from her participation in the Program, and so the Schumann test does not apply. Dissent. Op. at 4-7. Instead, the dissent suggests we use a "totality of the circumstances" test to analyze whether McKay was a "trainee" under Portland Terminal or an employee. *Id.* at 7-12. We disagree with the dissent's proposed test for two reasons. First, McKay did not receive academic credit or professional certification or licensure from her time in the Program only because she used the Program as a substitute for formal education. As McKay stipulated, she chose the Program over Barry College or any other forensic degree program to avoid "another four years of school." She did this because the Program functions as a free six-month vocational school in all but name.

Accordingly, the internship test we apply to other interns seeking educational and professional advancement (and which the dissent would apply to other Program participants receiving academic credit, *id.* at 7 n.4) should apply to her."

## **ChatGPT**

### **Detailed Summary of Section III. B. (First Part)**

#### Definition of "Volunteer" and its Legal Implications

The text begins by discussing the Fair Labor Standards Act (FLSA), which excludes "volunteers" from the definition of "employee." The FLSA itself does not define who qualifies as a "volunteer," but the Department of Labor (DOL) provides a definition. According to the DOL, a volunteer is someone who performs services for a public agency for civic, charitable, or humanitarian reasons without expecting compensation.

#### Chevron Deference

McKay argues that the DOL's definition should be given deference under the Chevron doctrine. According to Chevron, courts must defer to agency interpretations of statutes if the statute is ambiguous and the agency's interpretation is reasonable. Since McKay did not participate in the Program for civic, charitable, or humanitarian reasons, the DOL's definition would exclude her from being considered a volunteer.

#### Miami-Dade County's Counter-Argument

Miami-Dade County counters by saying that the DOL's definition is not supported by existing law. The County proposes a "common sense" definition, suggesting that anyone who works for a public agency without payment should be considered a volunteer. The County believes the term "volunteer" is unambiguous.

#### Court's Rejection of Miami-Dade's Definition

The court disagrees with Miami-Dade County's definition, stating that it undermines the FLSA's primary purpose of protecting workers from substandard wages and oppressive working hours. The court also notes that Congress explicitly directed the DOL to issue regulations concerning the volunteer exception, indicating that the term is ambiguous and subject to Chevron deference.

#### DOL's Definition Upheld

The court concludes that the DOL's definition is neither arbitrary nor capricious and is in line with the FLSA's objectives. Therefore, it defers to the DOL's definition under Chevron.

#### Internship Exception

The text then shifts to discuss the internship exception, which states that an intern is not considered an "employee" under the FLSA if the intern is the primary beneficiary of the relationship. The court lists seven non-exhaustive factors to determine who the primary beneficiary is, emphasizing that no single factor is dispositive.

### Dissent's Argument

A footnote mentions a dissenting opinion that argues McKay was not an intern because she did not receive academic credit or professional certification. The court disagrees, stating that McKay chose the Program as a substitute for formal education.

In summary, the court upholds the DOL's definition of "volunteer" under Chevron deference and moves on to discuss the internship exception, listing the factors to consider in determining the primary beneficiary of an intern-employer relationship.



Here is the remaining part of Section III B of the opinion and then section IV, the holding. Please prepare a complete and very detailed summary of this, and then I will submit the Dissent of Judge Jordan for you to summarize.

"Nor is this the first time we have applied the Schumann test to a learner receiving valuable training without participation in a formal degree program. In the only other case where this Court has analyzed the Schumann factors, we applied them to a son who learned automobile wholesaling by shadowing his father for fifteen months because "the Schumann approach provide[ d] the most applicable guidance for the employment relationship at hand." *Axel v. Fields Motorcars of Fla., Inc.*, 711 F. App'x 942, 945-49 (11th Cir. 2017). Just so here. Second, the Schumann test is a "totality of the circumstances" test, just as the dissent would like us to apply. The factors are non-exhaustive and generally applicable, intended mostly to provide clear signposts by which courts and juries may conduct their analysis. Just because the third and fourth Schumann factors apply only to students does not mean we should "throw the baby out with the bathwater" and deem the test wholly inapplicable. Instead, we should simply deem those specific factors inapplicable. See *id.* at 947 (applying Schumann while noting that the student-related Schumann factors were inapplicable in the non-academic context as "they are tailored to training in the context of a formal academic program"). The dissent admits as much, stating that its "approach is not completely at odds with Schumann and Glatt, both of which take into account all the relevant circumstances." Dissent. Op. at 9 (internal citations omitted). Indeed, the dissent's analysis largely follows the Schumann test's factors, with particular focus on the fifth and six factors. See *id.* at 22-28. Any "comparative benefits" calling the Schumann test a "totality of the circumstances" test may offer, see *id.* at 9, would be far outweighed by the confusion that would inevitably stem from such a free-wheeling, factorless approach. Using the Schumann factors, the

District Court found that McKay was the primary beneficiary of her relationship with the Program and therefore an intern, not an employee. As the parties agree that McKay understood there was [\*\*20] no promise or expectation of compensation for her participation in the Program, the Court found that the first factor weighed in Miami-Dade County's favor. Likewise, the Court found that the second factor weighed "heavily" in the County's favor as McKay's participation in the Program provided her with valuable training similar to what she would have received in a formal forensic degree program. In fact, McKay chose to participate in the Program in lieu of a formal degree program to avoid "another four years of school." The Court also found that the seventh factor weighed in favor of the County, as McKay did not expect a job with the County following her internship. Since McKay chose to participate in the Program instead of pursuing a formal degree, the District Court did not analyze the third and fourth factors, as they were inapplicable to McKay's situation.<sup>8 8</sup> The dissent contends that if the Schumann test applies, we should weigh the third and fourth factors in McKay's favor instead of "zero[ing]" the factors out. Dissent. Op. at 7. But the dissent's approach disregards how the third and fourth factors operate. Boiled down, these two factors address the degree to which an internship is integrated with and accommodates a student intern's education program. Without a formal education program, there is nothing to integrate or accommodate. The factors are simply inapplicable. See *Axel*, 711 F. App'x at 947. For example, consider an internship undertaken to complete professional licensure or certification requirements after the intern's formal educational program has ended. The dissent agrees with us that the employee-status of such an intern would be analyzed under the Schumann test. See Dissent. Op. at 4, 6-9, 15, 22; but see *id.* at 5 n.2. But that intern is no longer a student, so there is no academic program to integrate or accommodate. Does the lack of an academic program in that internship make the intern any more or less likely to actually be an employee? No. The intern in that scenario is still seeking the education and experience necessary to pursue the intern's professional goals—that is, the intern is still "work[ing]" for their own advantage. The Court then found that the fifth factor weighed "very weakly, if at all, in favor of Ms. McKay." While the Program was arguably longer than necessary to train McKay, Schumann stated that "designing an internship is not an exact science" and so the proper test for the fifth factor is "whether the duration of the internship is grossly [\*\*21] excessive in comparison to the period of beneficial learning." 803 F.3d at 1213-14. As the first month of the Program consisted solely of hands-on training and training continued for the remainder of the Program through staff supervision and off-week workbook assignments, the Court found that the Program was not necessarily "grossly excessive." The District Court also found that the sixth factor weighed weakly in favor of McKay. The parties agree that McKay did perform work without staff supervision and worked weekends, but disagree about the extent to which McKay and other interns displaced staff photographers. As the Court had to construe the facts in the light most favorable to McKay on summary judgment, it on the premises of another." *Portland Terminal*, 330 U.S. at 152, 67 S. Ct. at 641. The same is true of McKay's participation in the Program. As McKay put it in her statement of undisputed material facts, "McKay participated in the [Program] with the goal of acquiring training in forensic photography that would help her develop specialized photography skills, and thus enhance her employability. That was her sole motivation for participating in the [Program]." Like the non-student intern completing a requirement for licensure or certification, [\*\*22] McKay participated in the Program to advance her professional goals without pursuing a degree program. So, the third and fourth factors are just as inapplicable to McKay as they are to the intern seeking licensure. found that her participation in the Program did displace staff photographers. However, the Court also noted that

"there is nothing inherently wrong with an employer's benefiting from an internship that also plainly benefits the interns," Schumann, 803 F.3d at 1211, and so concluded that the sixth factor had little weight under these facts. After considering the applicable Schumann factors, the District Court found that the "clear economic reality of the relationship between the County and Ms. McKay" was that McKay's "free internship allowed her to develop skills in forensic photography over a short period of time, imparting a significant benefit to her." Accordingly, the Court concluded that McKay was an intern, not an employee, and so not entitled to minimum wage and overtime payments under the FLSA. We agree with the District Court's analysis. The undisputed facts show that McKay learned forensic photography from a highly regarded county program for free and over a six-month period, thereby gaining considerable [\*\*\*23] experience comparable to a four-year degree. And in participating in the Program, McKay clearly understood that she would not be paid and that she was not entitled to a job with Miami-Dade County following her internship. Additionally, the fifth factor provides little if any support for McKay's position, as the Program's six-month duration was simply not grossly excessive, especially in comparison with a four-year program. McKay gained both valuable practical experience and training from forensic photography professionals and Program assignments throughout the entirety of her participation. Likewise, the County's receipt of some benefit from McKay's internship under the sixth factor does not, standing alone and under these facts, transform the County into the primary beneficiary of its relationship with McKay.<sup>9</sup> The dissent essentially takes issue with our analysis of the fifth and sixth Schumann factors, arguing that a jury could determine that McKay was an employee due to the length of the Program and the benefits McKay provided Miami-Dade County during the Program. See Dissent. Op. at 22-28. Of course, the dissent does not describe its analysis in terms of the Schumann factors because the dissent argues Schumann is only applicable to student "interns," not non-student "trainees." Id. at 4-7; see supra note 7. Had the dissent addressed Schumann, it would have come across the "guidance on applying some of the factors" that Schumann provides. 803 F.3d at 1213. As Schumann explains, the fifth factor—the length of the internship—is not an "exact science," and the question is whether the internship is "grossly excessive in comparison to the period of beneficial learning." Id. at 1213-14. The dissent—which does not address the proper "grossly excessive" standard—contends a jury could find McKay was employed (and her period of beneficial learning ended) after the first month of the Program. Dissent. Op. at 28. In other words, the dissent would create an "exact science" standard for internship programs, in contravention of Schumann's guidance. Such an approach would impose an undue burden on internship programs. Likewise, the dissent does not address Schumann's statement that "the mere fact that an employer obtains a benefit from providing a[n] . . . internship does not mean that the employer is the 'primary beneficiary' of the relationship." 803 F.3d at 1213. While we agree with the dissent that the sixth factor favors McKay on summary judgment, this statement lessens its value, especially when standing alone. As Schumann explained, "no one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee." Id. at 1212 (internal alterations omitted). In other words, the sixth factor alone cannot get McKay past summary judgment, at least on these facts. Therefore, we agree with the District Court that there is no material question of fact about whether McKay was an intern—she was. IV. As McKay was an intern, not an employee, she is not entitled to minimum wage or overtime payments under the FLSA. §§ 206(a), 207(a)(1). Accordingly, we affirm the judgment of the District Court. AFFIRMED."

## ChatGPT

### Detailed Summary of Section III B and Section IV

#### Section III B

1. **Volunteer Exception:** The court first delves into the Fair Labor Standards Act (FLSA) exclusion of "volunteers" from the definition of "employee." The Department of Labor (DOL) defines a "volunteer" as someone who performs services for a public agency for civic, charitable, or humanitarian reasons without expectation of compensation. The court discusses the Chevron deference, which mandates that courts must defer to agency interpretations of statutes if the statute is ambiguous and the agency's interpretation is reasonable.
  - **McKay's Argument:** McKay argues that the DOL's definition should be deferred to under Chevron. Since McKay did not participate in the Program for civic, charitable, or humanitarian reasons, she should not be considered a volunteer.
  - **Miami-Dade County's Argument:** The County argues that the DOL's definition is not supported by existing law and suggests a "common sense" definition. They believe anyone who works for a public agency without payment should be considered a volunteer.
  - **Court's Analysis:** The court rejects the County's definition, stating it undermines the FLSA's primary purpose of protecting workers from substandard wages. The court defers to the DOL's definition under Chevron, aligning with other circuit courts.
2. **Internship Exception:** The court then turns to the "internship exception," which states that an intern is not considered an "employee" under the FLSA if the intern is the primary beneficiary of the relationship. The court lists seven non-exhaustive factors to determine who the primary beneficiary is, known as the Schumann factors.
  - **District Court's Findings:** The District Court found that McKay was the primary beneficiary of her relationship with the Program. It analyzed the Schumann factors and found that most weighed in favor of the County.
  - **Court's Analysis:** The court agrees with the District Court, stating that the "economic reality" shows that McKay benefited significantly from the Program. The court also addresses the dissent's argument for a "totality of the circumstances" test, stating that the Schumann test already encapsulates this approach.

#### Section IV: The Holding

The court concludes that McKay was an intern, not an employee, and therefore is not entitled to minimum wage or overtime payments under the FLSA. The judgment of the District Court is affirmed.

#### Legal and Policy Considerations

1. **Chevron Deference:** The court's application of Chevron deference to the DOL's definition of "volunteer" underscores the judiciary's role in deferring to administrative agencies when statutory language is ambiguous. This is a cornerstone in administrative law and often a subject of legal and ethical debate.
2. **FLSA's Purpose:** The court emphasizes the FLSA's primary purpose to protect workers from substandard wages, thereby highlighting the ethical considerations in labor law.
3. **Internship Programs:** The court's analysis of the "internship exception" under the Schumann factors provides a nuanced understanding of how courts balance the benefits to interns and employers. This has implications for labor policy, particularly in how internship programs are structured.

The court's decision is a complex interplay of statutory interpretation, administrative law, and labor policy, and it serves as an important precedent for future cases involving the FLSA's applicability to volunteers and intern.

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Here is the Dissenting Opinion of Judge Jordan. Due to its length I will have to submit the dissent in multiple parts. Here is the first part. Please prepare a complete and very detailed summary of this part and then I will submit the next.

"Concur by: JORDAN (In Part) Dissent by: JORDAN (In Part) Dissent JORDAN, Circuit [\*\*24] Judge, Concurring in Part and Dissenting in Part: I agree that Ms. McKay is not a volunteer under 29 U.S.C. § 203(e)(4)(A) and 29 C.F.R. § 553.101(a), and join Parts II, III.A, and III.B.i of the court's opinion. But I respectfully dissent from Parts I and III.B.ii. Viewed in the light most favorable to Ms. McKay, the evidence and inferences create a jury question as to whether Ms. McKay comes within the trainee exception to the FLSA set out in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947), for all of the time she worked in Miami-Dade County's Forensic Imaging Preceptorship Program. I Portland Terminal is critical to analyzing Ms. McKay's FLSA claim. I therefore begin by setting out its facts and rationale in detail. A The case involved a claim for wages under the FLSA by prospective yard brakemen who took a seven- to eight-day "course of practical training" provided by a railroad. 330 U.S. at 149. The training was required for permanent employment with the railroad. See *id.* Once accepted for the course, trainees were "turned over to a yard crew for instruction," and "then gradually [were] permitted to do actual work under close scrutiny." *Id.* The trainees' activities "d[id] not displace any of the regular employees, who d[id] most of the work themselves," and who had to "stand immediately by to supervise whatever [\*\*25] the trainees d[id]." *Id.* at 149-50. The trainees' work did "not expedite the company business, but [could], and sometimes d[id], actually impede it and retard it." *Id.* at 150. If the trainees "complete[d] their course of instruction satisfactorily and [were] certified as competent," their names were placed on a list from which the railroad could "draw when their services we[re] needed." *Id.* Unless they completed the



course and were certified as competent, the trainees were not put on the list. See *id.* They received no pay or allowance for the training course, and did not expect any such remuneration. See *id.* Based on these facts, the Supreme Court held that the railroad trainees were not employees under the FLSA. Though "[w]ithout doubt" the FLSA "covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation," the phrase "suffer or permit to work" in the FLSA "was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Id.* at 151-52. There was no indication that Congress intended the FLSA to cover persons "who, without promise or expectation of [\*\*26] compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." *Id.* at 152. The FLSA's language, though broad, could "not be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." *Id.* If the trainees were taking similar courses of instruction at a vocational school, they would not be thought of as employees. See *id.* at 152-53. The FLSA, said the Court, "was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees." *Id.* at 153. Finally, the Court pointed out that "the railroads receive[d] no 'immediate advantage' from any work done by the trainees." *Id.* 1 The Supreme Court came to the same conclusion in *Walling v. Nashville, C. & St. L. Ry.*, 330 U.S. 158, 160, 67 S. Ct. 644, 91 L. Ed. 816 (1947), a companion case to *Portland Terminal* involving persons training to become railroad firemen, brakemen, and switchmen. Before *Portland Terminal*, we had held that trainees of a terminal company who worked alongside a full crew for a training period averaging about a week were not employees under the FLSA. See *Walling v. Jacksonville Terminal Co.*, 148 F.2d 768, 769-71 (5th Cir. 1945). B Internships and externships in the academic setting "provide opportunities for students to observe and learn from real-life experiences at field placements[.]" Lauren K. Knight, *The Free Labor Standards Act? A Look at the Ongoing Discussion Regarding Unpaid Legal Internships and Externships*, 44 *U. Balt. L. Rev.* 21, 27 (2014). Student externs receive academic credit, usually have to complete a classroom or educational [\*\*27] component led by a faculty member, and generally cannot accept compensation. See *id.* Student interns, on the other hand, do not obtain academic credit, generally do not have faculty supervision, and can be paid. See *id.*; Cynthia Anne Baker, *Externships: Teaching, Practice, and the Buildable Hour*, 51 *Ind. L. Rev.* 428, 433 (2018); Nancy M. Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 *Clinical L. Rev.* 115, 120 & n.12 (2012). In *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1211-12 (11th Cir. 2015), we adopted a modified *Portland Terminal* multi-factor test to evaluate FLSA claims by externs and interns. That case involved nursing students in a master's degree program at a for-profit institution who worked at an anesthesia facility to complete the clinical experience required for certified registered nurse anesthetists to become licensed in Florida. And we emphasized several times that our opinion (and the modified *Portland Terminal* test we adopted) was limited to "the modern internship as a requirement for academic credit and professional certification and licensure." *Id.* at 1213. See also *id.* at 1203 ("[W]e now adopt an application of *Portland Terminal*'s 'primary beneficiary' test specifically tailored to account for the unique qualities of the type of internship at issue in this case."); *id.* at 1211 ("Longer-term, intensive modern internships [\*\*28] that are required to obtain academic degrees and professional certification and licensure in a field are just too different from the short training class offered by the railroad in *Portland Terminal* for the

purpose of creating its own labor pool." ). Schumann agreed with and relied on a Second Circuit case, *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016). Importantly, Glatt similarly concerned internships by current or recently-graduated students and its test was likewise confined to that setting.<sup>2 2</sup> According to the majority, we all agree that unpaid recent graduates—just like student interns—are properly analyzed under the Glatt and Schumann test. I think that is a mischaracterization of our discussion of Glatt in Schumann. It is true that Glatt concerned both students and recent graduates and noted that "all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education." 811 F.3d at 537. But Glatt remanded the case to the district court to apply its new six-factor test in the first instance, suggesting that it "may" consider additional "evidence on Glatt's and Footman's formal education." *Id.* at 538. The Second Circuit did not rule, as a matter of law, that the internships of current students and recent graduates are the same. They very well may be, if the FLSA permits a recent graduate to have a short, unpaid stint at a company immediately after graduation in order to obtain necessary work experience. But that is very different from Ms. McKay, whose time working for Miami-Dade County was not very short, lasted far longer than her training, and started about eight years after her graduation from college. See *id.* at 537 ("The approach we adopt . . . reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real world setting. . . . By focusing on the educational aspects of the internship, our approach better reflects the roles of internships in today's economy[.]").<sup>3 3</sup> Schumann cited to the initial Glatt decision, which was later superseded by the version quoted above. See *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015). Two of the non-exclusive factors we laid out in Schumann concern the connection of the internship to the student's academic studies and curriculum. Factor 3 is "the extent to which the internship is tied to the intern's formal education program by integrated [\*\*29] coursework or the receipt of academic credit;" Factor 4 is "the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar." See Schumann, 803 F.3d at 1212. Determining employee status under the FLSA by mere reference to labels used by the parties is not appropriate, see *Eberline v. Douglas J. Holdings, Inc.*, 982 F.3d 1006, 1013 (6th Cir. 2020), but it seems to me important that Ms. McKay is not the academic extern/ intern that Schumann and Glatt were concerned with. First, she graduated from college in 2011, and began the FIPP about eight years later in 2019. See *McKay Dep.*, D.E. 26-1, at 12, 20. Second, there is no indication in the record that the FIPP was in any way related to or connected to any current or future academic ventures or goals. Third, she did not need to complete the FIPP as a condition of securing professional licensure or certification or obtaining employment as a forensic/autopsy photographer. See D.E. 30 at ¶ 6. I would therefore not use the modified Portland Terminal test as set out in Schumann and Glatt here. See generally 1 Ellen C. Kearns et al., *The Fair Labor Standards Act*, Chapter III.C, at 3-39 to 3-51 (ABA Section of Labor and Employment Law 3d ed. 2015 & Cum Supp. 2019) (discussing externs and interns as a separate sub-category of trainees).<sup>4 4</sup> On the other hand, I believe the Schumann/Glatt [\*\*30] test would apply to students who were participating in the FIPP as externs or interns while pursuing their college degrees or fulfilling requirements for professional licensure or certification. Setting out a test is, of course, only a starting point; how a test is applied often matters more than how it is phrased. Even if the Schumann test were a good fit here, I would not apply it in the same way as the court. The court dismisses Factors 3 and 4—quoted above—and says that they are inapplicable because Ms.

McKay is not enrolled in any academic courses related to the FIPP. That does not seem right. If the Schumann test is going to be used outside of its intended academic extern/intern setting then Factors 3 and 4, rather than being zeroed out in a case like this one, need to be weighed in favor of Ms. McKay and point to the applicability of the FLSA. Where there is no academic, licensure, or certification connection whatsoever, the person who is performing work in a long-term training program at some point starts to look more like an employee under the modified Portland Terminal test announced in Schumann. By eliminating Factors 3 and 4, the court improperly stacks the Schumann test against an FLSA trainee like Ms. McKay and in favor of the defendant who is opposing employee classification.

## **ChatGPT**

### **Detailed Summary of the First Part of Judge Jordan's Dissenting Opinion**

#### Agreement and Disagreement with Majority Opinion

Judge Jordan begins by stating that he concurs with certain parts of the court's opinion, specifically regarding Ms. McKay's status as not being a volunteer under the FLSA. However, he dissents from other parts, particularly the court's application of the Schumann test to Ms. McKay's situation. He argues that the evidence could lead a jury to question whether Ms. McKay falls under the trainee exception to the FLSA.

#### Importance of Portland Terminal

Judge Jordan emphasizes the importance of the *Walling v. Portland Terminal Co.* case for understanding Ms. McKay's FLSA claim. He outlines the facts and rationale of Portland Terminal, where the Supreme Court held that railroad trainees were not employees under the FLSA. The Court reasoned that the FLSA was not intended to cover persons who work solely for their own benefit without the expectation of compensation.

#### Academic Context: Internships and Externships

The judge then discusses the academic context of internships and externships, citing scholarly articles. He distinguishes between student externs, who receive academic credit and usually can't accept compensation, and student interns, who do not obtain academic credit and can be paid.

#### Schumann and Glatt: Limited Scope

Judge Jordan points out that the 11th Circuit's Schumann test and the 2nd Circuit's Glatt test were designed specifically for academic externs and interns. He argues that Ms. McKay does not fit this category for several reasons: she graduated eight years before participating in the program, the program was not connected to any academic ventures, and completion of the program was not a condition for professional licensure or employment.

#### Application of Schumann Test

Even if the Schumann test were applicable, Judge Jordan disagrees with the court's application. He criticizes the court for dismissing Factors 3 and 4 of the Schumann test, which relate to the internship's connection to formal education. He argues that these factors should weigh in favor of Ms. McKay, making her more likely to be considered an employee under the FLSA.

## Conclusion

Judge Jordan concludes that by eliminating Factors 3 and 4, the court is unfairly stacking the Schumann test against Ms. McKay, thereby favoring the defendant who opposes employee classification.

This summary captures the nuanced arguments presented by Judge Jordan in his dissenting opinion. The judge's dissent focuses on the inappropriateness of applying the Schumann test to Ms. McKay's situation and critiques the court's application of the test.



Here is the next part of the Dissenting Opinion of Judge Jordan. Please prepare a complete and very detailed summary of this part and then I will submit the next and final part of the dissent.

"II Whether or not we apply Schumann, we should not affirm the grant of summary judgment in favor of Miami-Dade County. On this record, a jury should **[\*\*31]** decide whether Ms. McKay was an employee for purposes of the FLSA during a part of the FIPP. A If Schumann does not govern, what standard should we use? As noted, Ms. McKay's work in the FIPP has no educational component or connection. She participated in the FIPP years after graduating from college to obtain job experience through training. Because Ms. McKay was not an academic extern or intern, and was not participating in the FIPP to obtain licensure or certification, I propose that we simply analyze her status by assessing the totality of the circumstances under Portland Terminal. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30, 67 S. Ct. 1473, 91 L. Ed. 1772 (1947) (citing *Portland Terminal* and addressing whether workers at a slaughterhouse were employees or independent contractors: "We think . . . that the determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity."). That holistic approach focuses on the economic realities of the particular situation. See *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 301, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (1985) ("[T]he test of employment under the Act is one of 'economic reality[.]'"); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) ("It is well-established that the issue of whether an employment relationship exists under the FLSA must be judged by the 'economic realities' of the individual case."); *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974) ("An unbroken **[\*\*32]** line of authority makes it abundantly clear that a determination of whether a worker is an 'employee' within the [FLSA] depends on the underlying economic realities.") (collecting cases). Admittedly, my approach is not completely at odds with

Schumann, 803 F.3d at 1212, and Glatt, 811 F.3d at 537, both of which take into account all of the relevant circumstances. Nevertheless, I think it offers some comparative benefits. Practically, it does not pigeonhole Ms. McKay into an extern/intern category where she does not belong. Cf. Schumann, 803 F.3d at 1212 (noting that "the training in Portland Terminal was so different from a modern internship for academic, certification, and licensure purposes"); Matthew Tripp, *In the Defense of Unpaid Internships: Proposing a Workable Test for Eliminating Illegal Internships*, 63 Drake L. Rev. 341, 353-54 (2015) ("Portland Terminal was a case about trainees, not interns. . . . All in all, applying the trainee test to interns is like forcing a square peg into a round hole."). Linguistically, it is more straightforward because it avoids listing a large number of preset factors while at the same time characterizing them as non-exclusive. See *Nat. Trust Ins. Co. v. Southern Heating and Cooling, Inc.*, 12 F.4th 1278, 1286 (11th Cir. 2021) (explaining that because our list of guideposts for the exercise of discretion under the Declaratory Judgment Act is not exhaustive, not all are required, and none are controlling, [\*\*33] "we essentially employ a totality-of-the-circumstances standard"); *In re Jefferson Cnty., Ala.*, 491 B.R. 277, 297 n.15 (N.D. Ala. 2013) (observing that multi-factor tests "essentially come down to a totality of the circumstances analysis"). The lower federal courts have applied Portland Terminal in a number of cases addressing whether run-of-the-mill trainees (i.e., persons doing work (i) without receiving academic credit and (ii) not for professional licensure and certification) are employees under the FLSA. Those cases, it seems to me, are the most analogous to Ms. McKay's participation in the FIPP.<sup>5</sup> In addition to Schumann and Glatt, there are numerous circuit and district court cases addressing whether students or other persons doing work connected in some way to their academic endeavors or to licensure/certification were employees under the FLSA. I list some of those cases here, but do not discuss them because Ms. McKay's work at the FIPP did not have an educational component or connection and was not done for the purpose of licensure or certification. See, e.g., *Velarde v. GW GJ, Inc.*, 914 F.3d 779, 785-89 (2d Cir. 2019); *Nesbitt v. FCNH, Inc.*, 908 F.3d 643, 645-49 (10th Cir. 2018); *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139, 1147-48 (9th Cir. 2017); *Wang v. Hearst Corp.*, 877 F.3d 69, 71, 73-76 (2d Cir. 2017); *Hollins v. Regency Corp.*, 867 F.3d 830, 836 (7th Cir. 2017); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011); *Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 139-41 (1st Cir. 2002); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1327 (10th Cir. 1981); *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 472-75 (M.D. Tenn. 1979), rev'd on other grounds, 668 F.2d 234 (6th Cir. 1981). There are also some cases addressing whether persons doing work in church- or religious-related activities are employees under the FLSA. I do not discuss them either because they have an element not present here. See, e.g., *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 767 (6th Cir. 2018); *Reich v. Shiloh True Light Church of Christ*, 85 F.3d 616, 1996 WL 228802, at \*1-\*3 (4th Cir. 1996). Cases in which courts have held that trainees were FLSA employees under Portland Terminal include *Wirtz v. Wardlaw*, 339 F.2d 785, 786-87 (4th Cir. 1964) (high school students working 43 hours each week during the summer at an insurance agency for wages of \$12 per week, a sum below minimum wage standards), and *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (snack food distribution trainees who accompanied and assisted experienced routemen during a week-long orientation period). Cases in which courts have held that trainees were not FLSA employees include *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 268-73 (5th Cir. 1982) (flight attendant/reservation sales agent trainees attending training at airline's facility for 40 hours per week for two to five weeks); *Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 416-17 (8th Cir. 1984) (flight attendant trainees attending training at airline's [\*\*34] facility for four weeks);

and *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1025-29 (10th Cir. 1993) (firefighters who had to attend and complete a 10-week training course at the firefighting academy as a condition of employment). See also *Jacksonville Terminal*, 148 F.2d at 769-71 (pre-Portland Terminal case involving trainees of a terminal company who worked alongside full crews for a training period averaging one week). These decisions are of course context- and fact-dependent, but they shed some light on what matters in a case like this one, and I'll return to them later in Part III. B In this circuit, whether or not a person is an employee under the FLSA generally constitutes a question of law. See, e.g., *Schumann*, 803 F.3d at 1207. But that does not mean that fact-finding by a jury is never warranted or permitted. A legal standard can only be applied to a set of facts, and when the facts (and/or inferences) are disputed Rule 56 kicks in. Not surprisingly, we have explained that juries can decide contested factual matters in FLSA disputes. See, e.g., *Watkins v. City of Montgomery, Ala.*, 775 F.3d 1280, 1288 (11th Cir. 2014) ("We acknowledge that the question of whether pay deductions for exempt employees are permissible under the FLSA can present a question of law that falls outside of the providence of the jury. But that is not necessarily the case, and it was not the situation here."). And we have several cases [\*\*35] holding that FLSA issues must be put to the jury when there is conflicting evidence. See, e.g., *Mitchell v. City Ice Co.*, 273 F.2d 560, 562 (5th Cir. 1960) (whether company's sales were "retail sales" for purposes of an FLSA exemption); *Asalde v. First Class Parking Sys. LLC*, 898 F.3d 1136, 1141 (11th Cir. 2018) (whether valet tickets used by company in its commercial parking service were "materials" within the meaning of the FLSA's "handling clause"); *St. Elie v. All Cnty. Env't Serv., Inc.*, 991 F.3d 1197, 1199-1201 (11th Cir. 2021) (whether employee was engaged in interstate commerce for purposes of the FLSA). One such case requiring a jury trial due to material issues of fact concerned a question similar to the one presented here—whether a trainee learning the job of an automobile wholesaler was an employee under the FLSA. See *Axel v. Fields Motorcars of Florida, Inc.*, 711 F. App'x 942, 947-49 (11th Cir. 2017).<sup>6 6</sup> The majority says that we applied the *Schumann* test to a trainee who was not enrolled in any formal education program in *Axel*. Fair enough, but the majority fails to grapple with the reality that *Axel* concluded that a genuine issue of material fact existed as to whether the plaintiff was an employee given the length of his time as a "trainee" and his possible displacement of other employees' work. See 711 F. App'x at 947-48. Rule 56 does not just forbid summary judgment when the material facts are disputed; it also requires a jury trial when the facts are undisputed but the inferences that can be drawn from those facts are contested. "Even where the parties agree on the facts, '[i]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment.'" *Manners v. Cannella*, 891 F.3d 959, 967 (11th Cir. 2018) (citation omitted). Accord *Warrior Tombigbee Transp. Co., Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1296-97 (11th Cir. 1983); *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213-14 (5th Cir. 1969); *Mary Kay Kane*, 10A Fed. Prac. & Proc. Civ. (Wright & Miller) § 2725.2 (4th ed. & April 2022 update). With these principles in mind, I turn to the evidence submitted [\*\*36] by the parties at summary judgment."

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**Detailed Summary of the Dissenting Opinion (Part II)**

## Section II: Summary Judgment Should Not Be Affirmed

Judge Jordan argues that irrespective of whether the court applies the *Schumann* standard, summary judgment in favor of Miami-Dade County should not be affirmed. He contends that a jury should decide Ms. McKay's employment status under the Fair Labor Standards Act (FLSA) during her time in the FIPP.

### Section A: The Appropriate Standard

1. **Alternative to Schumann:** Judge Jordan suggests that if *Schumann* does not apply, the court should use a "totality of the circumstances" approach under *Portland Terminal*. He argues that this approach is more aligned with the economic realities of the situation.
2. **Comparative Benefits:** The judge believes his approach offers advantages over *Schumann* and *Glatt*. It avoids categorizing Ms. McKay as an extern/intern, which she is not. It also avoids the complexity of listing multiple non-exclusive factors, making it more straightforward.
3. **Case Law Support:** He cites various cases that have applied *Portland Terminal* to determine employment status under the FLSA, arguing that these are more analogous to Ms. McKay's situation.

### Section B: The Role of Juries in FLSA Cases

1. **Legal Standard vs. Factual Determination:** Judge Jordan notes that while the question of employment under the FLSA is generally a question of law, it doesn't mean juries can't be involved in fact-finding, especially when facts or inferences are disputed.
2. **Case Law Support for Jury Involvement:** He cites several cases where juries were involved in FLSA disputes due to conflicting evidence or interpretations.
3. **Rule 56:** The judge emphasizes that Rule 56 of the Federal Rules of Civil Procedure not only forbids summary judgment when material facts are disputed but also requires a jury trial when the facts are undisputed but the inferences from those facts are contested.

### Key Takeaways

- Judge Jordan advocates for a "totality of the circumstances" approach under *Portland Terminal* as a more fitting standard for Ms. McKay's case.
- He argues that a jury should be involved in determining Ms. McKay's employment status under the FLSA, especially when there are disputed facts or inferences.

This summary encapsulates the nuanced arguments presented by Judge Jordan in the dissenting opinion's second part. The judge meticulously argues for a different standard and the involvement of a jury, backed by case law and procedural rules.

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Here is the next part of the Dissenting Opinion of Judge Jordan. Please prepare a complete and very detailed summary of this part and then I will submit the last part.

"III The court's summary judgment analysis is flawed. I try to explain why below. A According to the court, certain facts point to Ms. McKay not being an employee of Miami-Dade County while working in the FIPP. First, she understood that there was no promise or expectation of compensation for participation in the FIPP. Second, she chose to participate in the FIPP to obtain valuable training similar to what she would have received in a formal forensic degree program and to avoid another four years of school. Third, the six-month duration of the FIPP was not "grossly excessive." I agree that Ms. McKay's desire to obtain valuable training in lieu of further studies weighs in favor of non-employee status. But the other matters cited by the court are not clear-cut and do not entitle Miami-Dade County to summary judgment. For starters, although Portland Terminal considered the worker's express or implied expectation of compensation, see 330 U.S. at 151-52, the parties' subjective understanding and intent matters little under the FLSA. See, e.g., *Partida*, 492 F.2d at 709 ("Nor does it matter that the parties had no intention of creating an employment relationship, for application of the FLSA does not turn on subjective [\*\*37] intent."). Indeed, the Supreme Court has held that the FLSA can apply even when workers deny that they are covered employees. See *Alamo Foundation*, 471 U.S. at 302 ("If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."). As for the six-month term of the FIPP, the court brushes it off way too easily at summary judgment. The length of the training matters under the FLSA, and we must remember that the training in Portland Terminal lasted only seven to eight days. It is telling that none of the post-Portland Terminal decisions holding that trainees (i.e., not externs or interns doing work for academic credit, licensure, or certification) were not employees have involved a training course of over 10 weeks. See *American Airlines, Inc.*, 686 F.2d at 268-73 (two- to five-week training course for flight attendant and reservation sales agent trainees); *Trans World Airlines*, 726 F.2d at 416-17 (four-week training course for flight attendant trainees); *Parker Fire Protection Dist.*, 992 F.2d at 1025-29 (10-week training course for career firefighters seeking employment). The FIPP was more than double that maximum length of time, and Ms. McKay participated in it for five months. The only [\*\*38] programs that rival that length of time and were not deemed employment relationships under the FLSA were all part of broader rehabilitation initiatives. See, e.g., *Williams v. Strickland*, 87 F.3d 1064, 1066-68 (9th Cir. 1996) (participant in six-month rehabilitation program was not an "employee" entitled to wages under the FLSA for work therapy component of program); *Armento v. Asheville Buncombe Cmty. Christian Ministry, Inc.*, 856 F. App'x 445, 450-56 (4th Cir. 2021) (participant in 24-month residential program for homeless veterans, which required on- or off-site volunteer work as part of job training, was not an "employee" under the FLSA for either his service or job training hours). Furthermore, as explained later, the FIPP "interns" were ready to work as independent autopsy photographers after the first four weeks of training. A jury could find that the FIPP exceeded what was needed to provide training to participants like Ms. McKay and at some point turned into an employment relationship. B The court does not cite or discuss other evidence in the summary judgment record



which, viewed in favor of Ms. McKay, supports her position. This evidence—on its own or together with reasonable inferences—creates an issue of material fact as to whether Ms. McKay was an employee. To put the evidence in its proper context, I first provide some background [\*\*39] facts about the FIPP. The FIPP is a well-known six-month program run by the Forensic Imaging Bureau of the Miami-Dade County Medical Examiner's Office. It has existed for over 20 years, and seems to be the only program of its kind in the country. "Interns" in the FIPP receive training in forensic and studio photography and have and exposure to networking opportunities that will hopefully assist them in obtaining jobs in the field. The Bureau typically has four FIPP "interns" a year, but that varies—sometimes there are more and sometimes there are less—and they typically work from 6:30 a.m. to 3:00 p.m. or 7:30 a.m. to 4:00 p.m. each day. The Bureau tries to limit the number of interns to two at a time (i.e., two for each six-month cycle). Any forensic photographers hired by the Bureau must have completed the FIPP. See D.E. 33 at ¶¶ 2-3; D.E. 38 at ¶ 4; Wolf Dep., D.E. 26-4, at 12, 17, 123; McKay Dep., D.E. 26-1, at 21.7 7 Several years ago, the Bureau hired temporary photographers "to give them an additional year's work of experience, paid working experience so that they could get a job in the field." Wolf Dep., D.E. 26-4, at 16. On average, the Medical Examiner's Office handles about eight autopsies a day. The Bureau has four employees who are forensic photographers. Leonard Wolf, the forensic photographer supervisor, oversees the FIPP; Heidi Nichols, Belmarie Lyons, and Dominique Tomillo serve [\*\*40] as forensic staff photographers. During 2019, when Ms. McKay participated in the FIPP, each of the four Bureau photographers served as the primary autopsy photographer (the photographer who had the primary responsibility for taking photographs on a given day) on one day of the week and as the backup autopsy photographer on a different day of the week. The four photographers were designated as the primary and backup autopsy photographers in rotation on weekends and the following Mondays. See D.E. 30 at ¶¶ 9, 10-13; D.E. 33 at ¶¶ 19-21; Wolf Dep., D.E. 26-4, at 52. Viewing the summary judgment record in her favor, the following evidence precludes summary judgment on whether Ms. McKay was an employee of Miami-Dade County during some portion of the FIPP. ♦ The primary training, supervision, and feedback provided to Ms. McKay during the FIPP lasted only four weeks. During the first two weeks, she completed a binder of workbook assignments, which were evaluated, and during the third and fourth weeks she was trained to take autopsy photographs at the morgue. She initially shadowed a staff photographer and took autopsy photographs behind that photographer. She then took the photographs under [\*\*41] the staff photographer's direction and supervision. But she only received written comments on her work on six days and only received verbal comments occasionally; she was not graded on her work and did not receive any written evaluation of her work because evaluations are only prepared if the "intern" is participating in the FIPP through Barry University. After the first four weeks of training, Ms. McKay was ready to be a primary autopsy photographer, and staff photographers rarely took autopsy photographs. The staff photographers took the photographs in autopsies involving police-involved shootings, as the FIPP "interns" were not allowed to do so. See D.E. 30 at ¶¶ 15-17, 23-24, 32-35; D.E. 33 at ¶ 13; Wolf Dep., D.E. 26-4, at 60-61, 82-83, 125-30. ♦ For the fifth through eighth weeks, Ms. McKay and Jessica Narvaez—the other "intern" in the FIPP—worked independently in the morgue as the primary autopsy photographers. During this time they received no significant new training, instruction, coaching, or advice to improve their performance. And the staff photographers were not in the morgue to supervise their work; they were usually in their offices across the hall, though they sometimes [\*\*42] stopped by the morgue to ask if an "intern" needed any help. Ms. McKay photographed all the autopsies

performed by one doctor, and Ms. Narvaez photographed all the autopsies performed by the other doctor. The two alternated weekends, so that Ms. McKay and Ms. Narvaez each worked two weekends during this period. See D.E. 30 at ¶¶ 18-19, 25-27.8 8 Miami-Dade County asserts that that one of Ms. McKay's predecessors in the FIPP reviewed autopsy photographs with the staff photographers "daily or, if not daily, every other day" after the initial weeks. D.E. 33 at 11, 14. That assertion, as noted in the text, is disputed. See also D.E. 35 at ¶ 14 (explaining the evidentiary basis for the dispute). ♦ Mr. Wolf allowed the FIPP "interns" to work alone on weekends because they had acquired the proper skill set to be the primary autopsy photographer. On weekends when an "intern" was the primary autopsy photographer, a staff photographer came in only if there was an autopsy for a police-involved shooting. In all the weeks that Ms. McKay was the primary autopsy photographer, a staff photographer was present in the morgue just one day. See D.E. 30 at ¶¶ 28-29.9. 9 According to Miami-Dade County, the FIPP "interns" cannot learn everything in two to three weeks, and repetition over the course of six months "locks the skills in." D.E. 33 at ¶ 24. That assertion, as set out in the text, is also disputed. See D.E. 35 at ¶ 24 (explaining the evidentiary basis for the dispute). ♦ After the eighth week Ms. McKay and Ms. Narvaez worked alternating weeks (including weekends) in the morgue as the primary autopsy photographer. When they were not the primary photographer, they worked in the FIPP office and served as the backup photographer. Their backup stints were referred to as "assignment weeks," and on the Monday of these weeks they were given instructions [\*\*43] on topics related to forensic photography. But they were not graded or evaluated on the photos they took for assignments. During the rest of an "assignment week," they received no instruction and were able to do whatever other Bureau-related tasks they wanted as long as they were available as backup. See D.E. 30 at ¶¶ 20-22, 36-37.10. 10 Training in crime scene photography is supposed to take place during the sixth and final month of the FIPP, but Ms. McKay only participated for five months. See Wolf Dep., D.E. 26-4, at 98-99. ♦ Staff photographers usually work eight-hour days and are paid an hourly [\*1151] wage. If they work more than 40 hours in a workweek, they are paid overtime. After her first four weeks in the FIPP, Ms. 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. When an FIPP "intern" works as the primary autopsy photographer on weekends, she is doing the same work as a staff photographer. As a result, the Bureau saves money because it does not need to pay a staff photographer to work overtime. To put this in dollar terms, the Bureau's budget allows for 16 hours of overtime each weekend, and when two FIPP "interns" are available there is less need for any overtime expenditures (staff photographers work weekends one out of six weeks when there are two FIPP [\*\*44] "interns" as opposed to one out of every four weeks when there are none). And when an "intern" works as the primary autopsy photographer during the week, staff photographers are free to do other work. As Ms. Lyons explained, staff photographers would "absolutely" need to work more hours than they currently do if "interns" were not taking autopsy photographs. See D.E. 30 at ¶¶ 41-47, 50-51; Wolf Dep., D.E. 26-4, at 18, 22, 29.11. 11 Miami-Dade County asserts that there is constant evaluation of the FIPP "interns," that its staff photographers—Ms. Lyons, Ms. Tomillo, and Ms. Nichols—spent a lot of time during their workweek supervising the "interns," and that it takes a lot more time to provide the training than would be required if staff photographers did the work themselves. See D.E. 33 at ¶ 25 (having interns causes Ms. Lyons "to have more work, because it requires constant teaching"), ¶ 26 (Ms. Tomillo spends "more than half her workweek working with interns" when there are two of them), ¶ 27 (Ms. Nichols spends "a lot of her time helping the interns rather than doing her own

job"); Wolf Dep., D.E. 26-4, at 126 ("So, this evaluation really happens all the time."), 134 ("[I]t's a lot more work to teach the students than it is to do it ourselves."). Those assertions, given Ms. McKay's contrary evidence, is disputed. See D.E. 35 at ¶¶ 25-27 (explaining the evidentiary bases for the disputes). ♦ Darren Caprara, Miami-Dade County's Director of Operations, testified that FIPP "interns" are treated "much like temporary employees, much like part-time employees." D.E. 30 at ¶ 48. Mr. Caprara explained that the County benefits when the "interns" take autopsy photographs because that frees the staff photographers to do other tasks. See id. at ¶ 49. Mr. Wolf agreed that the "valuable professional experience that [FIPP "interns"] receive consists of providing the same photographic services for the six months that employee photographers would otherwise perform," albeit without compensation. Wolf Dep., D.E. 26-4, at 133. And he acknowledged that the County saved money when FIPP "interns" were working as the primary autopsy photographers. See id. at 134."

## ChatGPT

### Detailed Summary of the Dissenting Opinion (Part III) by Judge Jordan

#### Section A: Critique of the Court's Summary Judgment Analysis

1. **Flaws in the Court's Reasoning:** Judge Jordan criticizes the court's summary judgment analysis, stating that it is flawed. He acknowledges that Ms. McKay's desire for valuable training could weigh in favor of her non-employee status. However, he argues that the other factors cited by the court are not definitive enough to grant summary judgment to Miami-Dade County.
2. **Expectation of Compensation:** The Judge points out that the Fair Labor Standards Act (FLSA) does not rely on subjective intent or expectations regarding compensation. He cites the Supreme Court's decision in *Alamo Foundation*, which warns against exceptions based on voluntary work, as it could be exploited by employers.
3. **Duration of FIPP:** Judge Jordan contends that the court dismisses the six-month duration of the Forensic Imaging Bureau Program (FIPP) too easily. He contrasts this with the *Portland Terminal* case, where the training lasted only 7-8 days. He notes that no post-Portland Terminal decisions have involved training courses exceeding 10 weeks unless they were part of broader rehabilitation initiatives.

#### Section B: Overlooked Evidence Supporting Ms. McKay

1. **Background on FIPP:** The Judge provides context about the FIPP, describing it as a unique, well-known six-month program run by Miami-Dade County's Forensic Imaging Bureau. The program aims to train "interns" in forensic and studio photography.
2. **Limited Training and Supervision:** Judge Jordan highlights that Ms. McKay received primary training, supervision, and feedback only during the first four weeks. After that, she was ready to work as a primary autopsy photographer, and staff photographers rarely took autopsy photographs.

3. **Independence in Morgue:** For weeks 5-8, Ms. McKay and another intern worked independently in the morgue, receiving no significant new training or supervision. Staff photographers were usually in their offices and not in the morgue.
4. **Work Hours and Compensation:** After her first four weeks, Ms. McKay worked 508.75 hours, including 50.75 hours of overtime, without compensation. This, Judge Jordan argues, saved the Bureau money as it did not have to pay staff photographers for overtime.
5. **Testimonies on Employee-like Treatment:** Darren Caprara, Miami-Dade County's Director of Operations, testified that FIPP "interns" are treated much like temporary or part-time employees. Leonard Wolf, the forensic photographer supervisor, also acknowledged that the County saved money when FIPP "interns" worked as primary autopsy photographers.

In summary, Judge Jordan argues that the court's summary judgment is flawed and that there is sufficient evidence to create an issue of material fact regarding Ms. McKay's employee status under the FLSA. He emphasizes that the court has overlooked key evidence and has not adequately considered the implications of the FLSA.



Here is the concluding part of the Dissenting Opinion of Judge Jordan. Please prepare a complete and very detailed summary of this part of his dissent.

"C [\*\*45] As discussed earlier in Part II.A, there was no educational component or connection to Ms. McKay's participation in the FIPP. Nor was Ms. McKay seeking to complete to the FIPP—which was a long six months—to obtain licensure or certification. Assuming that the first four weeks of the FIPP were not covered by the FLSA under Portland Terminal because they involved necessary and appropriate instruction, training, and evaluation, a jury should decide whether Ms. McKay was an employee during the last four months of her participation in the FIPP. Even in the extern/intern context involving academic credit, licensure, and certification, a non-FLSA training regimen can turn into an employment relationship: [\*1152] [T]he proper resolution of a case may not necessarily be an all-or-nothing determination. That is, we can envision a scenario where a portion of the student's efforts constitute a bona fide internship that primarily 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 . . . contingent on the student's . . . 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. A jury could find that this is what happened with Ms. McKay after the first four weeks of the FIPP.<sup>12</sup> 12 Based on my view of the applicable law and the evidence in the record, I do not opine on whether the Sixth Circuit correctly ruled that "when a plaintiff asserts an entitlement to compensation [under the FLSA] 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 portion of the relationship, not to the broader relationship as a whole." Eberline, 982 F.3d at 1014 (2-1 decision). Even if the first four weeks are factored into the analysis, the last four months constituted 80% of Ms. McKay's time in the FIPP. First, there was no real training, supervision, or substantive feedback in the FIPP after the first four weeks. Given that the "interns" were proficient at forensic photography after four weeks (or at the latest eight weeks), they continued to work as autopsy photographers well after the value of their training had subsided. That makes an FIPP "intern" look [\*\*46] more like an employee during the last four to five months of the program. See *Portland Terminal*, 330 U.S. at 152-53 (comparing the railroad trainees to students taking similar courses of instruction at a vocational school). Cf. *Marshall*, 473 F. Supp. at 474-76 (finding that x-ray vocational students working in a hospital practicum were employees in part because the "training . . . was deficient" and the students were "shortchanged educationally").<sup>13</sup> 13 As noted in the initial citation to *Marshall* in footnote 4, the Sixth Circuit reversed the district court's judgment in that case but did so on the separate ground of good faith based on an administrative regulation. See *Marshall*, 668 F.2d at 237-39. But before addressing good faith, the Sixth Circuit "agree[d] that the record support[ed] the general findings of the [district court] that the clinical training program was seriously deficient in supervision, and that the students continued to perform clerical chores long after the educational value of that work was over." *Id.* at 236. The district court's decision in *Marshall* therefore remains persuasive authority. Second, after the first four weeks, the FIPP "interns" were largely working on their own, without supervision, as primary and backup autopsy photographers. That is contrary to one of the important facts in *Portland Terminal*, 330 U.S. at 150, where the trainees were working under the constant supervision of experienced employees. Cf. *McLaughlin*, 877 F.2d at 1210 ("The prospective employees [in the orientation program] were simply helping to service a route, and the instruction they received did not rise to the level that one would receive in a general, vocational course in 'outside salesmanship.' The trainees were taught only specific job functions related to [the employer's] own business."); *Marshall*, 473 F. Supp. at 473 ("[W]ithin a relatively short period of time the trainees became functioning members of the X-ray department, performing all duties required of them in a fashion that displaced [\*\*47] regular employees and under such conditions in which the hospital obtained a substantial economic benefit from their services."). Third, the autopsy photography work independently performed by the FIPP "interns" [\*1153] greatly benefitted Miami-Dade County in two ways: (1) it allowed the Bureau's staff photographers to do other work that they would otherwise need more hours to complete, thereby eliminating (or reducing) the need to hire more employees; and (2) it permitted the County to avoid paying the staff photographers overtime for working on weekends. That reality is also at odds with *Portland Terminal* because the work of the trainees there did not expedite the railroad's business and sometimes impeded it and retarded it. See 330 U.S. at 150. To borrow from the language in *Wirtz*, 339 F.2d at 788, here the County, "no less than [the FIPP "interns"]", benefited from their labors. Their activities served [the County's] interests, and indeed were an essential part of its . . . activities[.]" See also *Schumann*, 803 F.3d at 1213 ("If the railroad [in *Portland Terminal*] had also obtained a direct and immediate financial or competitive advantage from providing a training program that it was going to have to offer for its own business reasons regardless of whether it received a direct advantage, [\*\*48] that could have served as an indication that the railroad Was taking unfair advantage of the situation.").<sup>14</sup> 14 That the FIPP is a unique program in the country cuts both ways on the question of employee status. On one hand, a jury could infer that because there are no comparators it is difficult to say that the FIPP extends beyond what is needed for real-world

training. On the other, a jury could also infer that Miami-Dade County takes advantage of the "interns" because they have nowhere else to go for this type of experience. Fourth, because the Bureau operates the FIPP on a year-round basis (usually with two "interns" for each six-month cycle), it was essentially getting the work of another independent staff photographer for free. Let me explain. If Ms. McKay's 500 or so hours for a four-month period are a fair barometer, each FIPP "intern" would work about 38 hours a week (500 hours ÷ 13 weeks). Given that two "interns" are usually in the FIPP at the same time, that equates to the County getting about 3,800 hours of free forensic photography work a year (38 hours a week x 2 "interns" x 50 weeks). Even if one assumes that the "interns" are not doing any compensable work during the first month of the FIPP, that is still a combined 3,396 hours a year (3,900 - 304 hours [152 hours per "intern"]). The Bureau has just four paid photographers, so the County derived a "substantial economic benefit from the[ ] services" of the FIPP "interns." See Marshall, 473 F. Supp. at 473. If a jury were to award Ms. McKay backpay at Florida's 2019 minimum wage for the 508.75 hours (including 50.75 hours of overtime) that she worked from her fifth [\*\*49] week on as a FIPP "intern," that alone would total \$4,518.70. See D.E. 31 at 17 & n.2. And the overall savings have been significant, as the FIPP has been in existence for over 20 years. That is probably why Mr. Wolf and his colleagues at Miami-Dade County are "always talk[ing]" about whether FIPP "interns" should be paid. Wolf Dep., D.E. 26-4, at 171. The economic realities of the situation, see Alamo Foundation, 471 U.S. at 301, permit a jury to find that after the first month of the FIPP the County is freeloading on unpaid labor to its financial benefit, including the non-payment of overtime. And that makes this case different than those in which trainees have not been deemed FLSA employees under Portland Terminal. See Trans World Airlines, 726 F.2d at 416-17 (agreeing with the district court that "flight attendant trainees were not 'employees' within the meaning of . . . the FLSA because [the airline] received no immediate benefit from their efforts during training"); American Airlines, 686 F.2d at 272 (agreeing with the district court's findings that the "trainees gain the greater benefit from their experience" and that the airline "did not receive immediate benefit from the trainees' activities" because the "trainees are not productive for [the airline] until after their training ends"). [\*\*50] Cf. Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834 (11th Cir. 2013) (case involving student externs: "Even viewing the evidence in the light most favorable to Plaintiffs, [they] caused Defendants' businesses to run less efficiently and caused at least some duplication of effort. Defendants received little if any economic benefit from Plaintiffs' work. Thus, under the 'economic realities' test, Plaintiffs were not 'employees' within the meaning of the FLSA."). IV I would reverse and remand for a jury trial on whether Ms. McKay was an employee of Miami-Dade County under the FLSA during the last four months of her participation in the FIPP."

## **ChatGPT**

### **Detailed Summary of Judge Jordan's Dissenting Opinion (Concluding Part)**

#### Contextual Overview

Judge Jordan's dissenting opinion focuses on the case involving Ms. McKay's participation in the Forensic Imaging Photography Program (FIPP) and whether she should be considered an

"employee" under the Fair Labor Standards Act (FLSA). The judge argues that a jury should decide this matter, particularly for the last four months of her participation in the FIPP.

### Key Points

1. **Partial Employment Relationship:** Judge Jordan cites the case of Schumann, 803 F.3d at 1214-15, to argue that an educational or training relationship can morph into an employment relationship under certain conditions. He suggests that this might have happened to Ms. McKay after the first four weeks in the FIPP.
2. **Lack of Educational Value:** The judge emphasizes that after the first four weeks, the FIPP lacked real training, supervision, or substantive feedback. He argues that the "interns" were proficient enough at forensic photography and were essentially working as employees.
3. **Unsupervised Work:** Contrary to the Portland Terminal case, where trainees were under constant supervision, FIPP "interns" worked largely on their own. This, according to the judge, makes them more like employees.
4. **Economic Benefit to Miami-Dade County:** The judge points out that the work performed by the "interns" significantly benefited the county by freeing up staff photographers and avoiding overtime payments. This is in stark contrast to Portland Terminal, where the trainees' work did not expedite business operations.
5. **Substantial Economic Benefit:** The judge calculates that the county received approximately 3,396 to 3,800 hours of free forensic photography work per year, which he describes as a "substantial economic benefit."
6. **Economic Realities Test:** The judge invokes the "economic realities" test to argue that the county is essentially freeloading on unpaid labor for its financial benefit, including avoiding overtime payments.
7. **Contrast with Other Cases:** The judge distinguishes this case from others where trainees were not considered employees under the FLSA, such as Trans World Airlines and American Airlines cases. In those cases, the employers did not receive an immediate benefit from the trainees' efforts.

### Conclusion

Judge Jordan concludes by stating that he would reverse and remand for a jury trial to decide whether Ms. McKay was an employee under the FLSA during the last four months of her FIPP participation.

### Legal and Ethical Considerations

From a jurisprudential standpoint, the judge's dissent raises critical questions about the ethical implications of unpaid internships that serve the employer's interests more than the intern's educational goals. It challenges the legal boundaries of what constitutes an "employee" under the FLSA and calls for a nuanced, fact-specific inquiry that takes into account the "economic realities" of the situation.



Please analyze the Majority Opinion of Affirmance written Judge TJOFLAT and joined in by Judge JILL PRYOR, and prepare a memorandum of anything in the opinion that may be somewhat surprising or unexpected. Also provide a memorandum with a critical analysis of the majority opinion and any errors that were arguably made. Please include any other comments you may have on the majority opinion.

### ChatGPT

To provide a thorough analysis of the Majority Opinion of Affirmance written by Judge TJOFLAT and joined in by Judge JILL PRYOR, I would need the text of the opinion. Could you please provide the text so that I can proceed with the analysis? Thank you.

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I have already in this chat submitted the text of the lengthy opinion in stages and you have prepared summaries of each stage. Can you use the summaries you just made earlier in this chat chain? Or should I copy and paste them here to remind you? Or what?

### ChatGPT

I apologize for the oversight. I can certainly use the summaries I prepared earlier to analyze the Majority Opinion of Affirmance written by Judge TJOFLAT and joined in by Judge JILL PRYOR. Let's proceed.

### Memorandum on Surprising or Unexpected Elements in the Majority Opinion

1. **Narrow Interpretation of FLSA:** The majority opinion took a rather narrow view of the Fair Labor Standards Act (FLSA), focusing on the "primary beneficiary test" to determine that Ms. McKay was not an employee. This could be surprising given the evolving nature of internships and the potential for exploitation.



2. **Lack of Consideration for Economic Realities:** The majority did not seem to give much weight to the economic realities of the situation, such as the substantial benefit Miami-Dade County received from the unpaid labor.
3. **Dismissal of Dissenting Points:** The majority opinion did not thoroughly address some of the points raised in the dissent, such as the lack of educational components in the FIPP program.

### Memorandum on Critical Analysis of the Majority Opinion

1. **Overreliance on Precedent:** The majority heavily relied on the "primary beneficiary test" from previous cases but did not adequately consider the unique circumstances of this case, such as the lack of an educational component in the FIPP.
2. **Economic Benefit to Employer Overlooked:** The majority failed to consider the economic benefit Miami-Dade County derived from the program, which could have implications for how the FLSA is interpreted in the context of modern internships.
3. **Insufficient Addressing of Dissent:** The majority opinion could be criticized for not sufficiently addressing the dissent's arguments, particularly those related to the lack of educational value and the potential for exploitation in the FIPP program.
4. **Potential for Setting Precedent:** The majority opinion, if left unchallenged, could set a precedent that allows employers to exploit interns under the guise of providing "training," thereby undermining the purpose of the FLSA.

### Additional Comments

The majority opinion raises questions about the evolving nature of labor laws in the context of internships and training programs. It also brings to the forefront the need for a more nuanced understanding of what constitutes an "employee" under the FLSA, especially in cases where the employer derives significant benefits from unpaid labor.

Would you like to explore any of these points in more detail?



Again, using the prior summaries you have made of the length Dissenting Opinion of Judge Jordan, please analyze the Dissenting Opinion and prepare a memorandum of anything in the opinion that may be somewhat surprising or unexpected. Also provide a memorandum with a critical analysis of the dissenting opinion and any errors that were arguably made. Please include any other comments you may have on the dissenting opinion.

## ChatGPT

Certainly, let's delve into the Dissenting Opinion of Judge Jordan.

### Memorandum on Surprising or Unexpected Elements in the Dissenting Opinion

1. **Emphasis on Jury Trial:** One surprising element is Judge Jordan's strong emphasis on the need for a jury trial to determine Ms. McKay's employment status. This is a departure from the majority's approach, which seemed content to make that determination at the judicial level.
2. **Detailed Economic Analysis:** Judge Jordan goes into considerable detail about the economic benefits Miami-Dade County derived from the FIPP program. This focus on "economic realities" is not commonly seen in judicial opinions concerning internships.
3. **Citation of Persuasive Authority:** The dissent cites Marshall, a case that was reversed by the Sixth Circuit, as persuasive authority. This is somewhat unexpected and indicates a willingness to look beyond binding precedent.

### Memorandum on Critical Analysis of the Dissenting Opinion

1. **Potential Overemphasis on Economic Realities:** While the economic realities of the situation are important, one could argue that Judge Jordan places too much emphasis on this aspect, potentially overshadowing other factors like the educational component, or lack thereof, in the FIPP program.
2. **Lack of Clarity on Educational Component:** The dissent criticizes the majority for not considering the lack of an educational component in the FIPP program but does not provide a clear framework for how this should be evaluated.
3. **Reliance on Persuasive Authority:** The dissent's reliance on Marshall, a case that was reversed on appeal, could be seen as a weak point in the argument. While the Sixth Circuit agreed with some aspects of the district court's findings, it ultimately reversed the decision, which could undermine the dissent's position.

### Additional Comments

Judge Jordan's dissent offers a compelling alternative view that focuses on the economic realities and potential for exploitation in modern internships. However, it could be criticized for not providing a more comprehensive framework for evaluating the multiple factors that should be considered in determining employment status under the FLSA.

Would you like to delve deeper into any of these points?