Nos. 20-2061, 20-2068

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK FOCHTMAN, *et al.*,

Plaintiffs-Appellees,

v.

HENDREN PLASTICS and DARP, INC.,

Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:18-cv-5047-TLB
Hon. Timothy L. Brooks

BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND THE TEXAS PUBLIC POLICY FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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August 24, 2020

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those principles include ending the problems of overcriminalization and wrongful mass incarceration, ensuring due process for all accused persons, promoting equal justice under the law, and promoting diversionary programs and other constructive rehabilitation-focused alternatives to incarceration. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is part of a coalition of organizations that work on criminal justice reform issues. This coalition is part of an emerging political consensus around criminal-justice-reform issues and is on the forefront on these important issues. For example:

[1] Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. This brief is accompanied by a motion for leave to file. Appellants Hendren and DARP have consented to the filing of this brief. Plaintiffs do not consent to the filing of this brief and have indicated that they will oppose its filing.

- AFPF has urged courts to protect the compassionate-release changes in the First Step Act, a landmark federal statute on prison and sentencing reform.[2]
- AFPF is part of a coalition championing reforming the qualified immunity doctrine, which wrongly shields egregious law-enforcement abuses from accountability.[3]
- AFPF opposes mandatory-minimum statutes, like the Armed Career Criminals Act, which can impose draconian sentences for relatively innocuous conduct.[4]
- AFPF and coalition partners advocate for reforms that give second chances to individuals who have paid their debt to society, so they can access a place to live, jobs, loans, voting, education, skills programs, and other necessities.[5]

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[2] *See, e.g.*, Br. of Amici Curiae the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union of Ohio Foundation, Due Process Institute, R Street Institute, and Americans for Prosperity Foundation, *United States v. Jackson*¸ Nos. 19-3623, 19-3711 (6th Cir., filed Apr. 21, 2020).

[3] *See, e.g.*, Br. of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law in Support of Petitioners, *Zadeh v. Robinson*, No. 19- 676, at 2 (U.S. Sup. Ct., filed Dec. 20, 2019).

[4] *See, e.g.*, Br. of Americans for Prosperity Foundation, *Borden v. United States*, No. 19-5410 (U.S. Sup. Ct., filed May 4, 2020).

[5] *See, e.g.*, Josh Kaib, *AFPF to SBA – Remove Unfair Bar to those with Criminal Justice System Contact* (Apr. 23, 2020), https://bit.ly/3f5X6EF; *see also Expanding Justice Throughout America's Justice System*, Stand Together (noting AFPF "is uniting citizens to provide second chances to formerly incarcerated individuals[.]"), https://bit.ly/2ZVVc4P.

- AFPF has been part of an ideologically diverse cross-section of groups to oppose overcriminalization of innocent conduct, recently asking the U.S. Supreme Court to clarify that the Computer Fraud and Abuse Act does not criminalize the day-to-day conduct of millions of unsuspecting Americans.[6]

AFPF has long been concerned about the serious problem of overincarceration of non-violent individuals and strongly supports alternatives to incarceration that provide the opportunity for a second chance, teach important life skills, and provide tools for those who are battling substance-related issues to overcome these challenges and realize their potential to contribute to their communities and society.

AFPF has a particular interest in this case because it believes that access to alternatives to incarceration, such as those provided by drug courts and programs like the DARP Foundation ("DARP"), should be expanded and made available to those unable to pay for rehabilitation programs on their own. Nor should taxpayers be required to bear the burden of funding these programs, particularly where innovative private-sector partnerships and solutions provide a viable alternative pathway.

Particularly against the backdrop of emerging public health challenges, such as COVID-19, it is imperative to make alternatives to incarceration broadly available

[6] *See* Americans for Prosperity Foundation Files Supreme Court Amicus Brief Arguing Computer Hacking Statute Does Not Criminalize Sharing Netflix passwords, Checking Sports at Work (July 8, 2020), https://bit.ly/3jK3y7R.

to qualified non-violent accused persons. This not only serves to reduce already bloated prison populations but also conserves taxpayer resources and helps lower the chances of recidivism.

The Texas Public Policy Foundation ("TPPF") is a 501(c)(3) non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise by educating policymakers and shaping the public policy debate with sound research and outreach.

Right on Crime is the trademarked name of TPPF's national criminal justice reform project. Right on Crime believes a well-functioning criminal justice system enforces order and respect for every person's right to property and supports promoting diversionary programs and other constructive rehabilitation-focused alternatives to incarceration as sound public policy.

SUMMARY OF ARGUMENT

This case illustrates the old line that no good deed goes unpunished. DARP and the drug court sought out Hendren Plastics, Inc.'s ("Hendren") help in funding DARP's no-cost residential recovery program. Hendren, in turn, gave individuals struggling with addiction issues a second chance and constructive full-time work opportunities, paying above minimum wage for their efforts. The drug-court judge apparently did not see any problem with this or express concerns to Hendren.

Hendren tried to do the right thing, taking a chance on individuals who found themselves in a tough spot—and then got sued for it. That is just plain wrong.

What is potentially at stake here, as a practical matter, is the availability of a recovery-focused option to incarceration for individuals of limited means who are battling substance-related issues. Those individuals, like the Plaintiffs here, face criminal charges and, if convicted, a lengthy period of incarceration. But they are also offered the alternative to enter the drug-court system, participate in no-cost recovery programs like DARP, and, upon completion, receive probation.

Importantly, accused persons have the right to reject voluntary participation in the drug-court system and to fully exercise their due process and other constitutional rights. They may hold the State to its burden of proving each element of the charged offense beyond a reasonable doubt. Likewise, those who are alleged to have violated probation and parole may choose to exercise their rights as well, in lieu of participating in the drug court.

But individuals of limited means who find themselves in these circumstances deserve to have the same ability to make a choice to enter the drug-court program as those who can afford private residential treatment programs. It is inequitable to impose ability-to-pay-based barriers to constructive alternatives to prison. Nor should the costs be foisted on the taxpayer. But that is exactly what Plaintiffs seek here. This Court should reject their efforts to deprive countless individuals battling

serious problems—who find themselves in difficult circumstances with limited resources—from the basic dignity of having the opportunity to make this choice.

If it were not for DARP, many program participants likely would have ended up in a prison cell at taxpayer expense. With the program, they learn important life skills, have a roof over their head without bars and meals not served on metal trays, and get the opportunity for rehabilitation.

Providing that choice costs money—money the taxpayers of Arkansas have not appropriated. Instead, participants "pay" for it through work. But there is no windfall for Hendren. After all, Hendren paid more than minimum wage for DARP participants' efforts, which allowed DARP to fund its operations. How is it fair to penalize Hendren for allegedly violating minimum-wage laws when everyone agrees that it paid a rate of *above* minimum wage and, by doing so, made it possible for the Plaintiffs to participate in the DARP recovery program?

Worse, if the district court's decision stands, programs like DARP may no longer be financially viable, which will harm those who need the drug-court alternative to incarceration and "no cost" residential recovery programs. Openminded private-sector companies, like Hendren, will be chilled from participating in these programs because of litigation risks. This concern is not speculative. In response to Plaintiffs' lawsuit, Hendren ended its partnership with DARP. Without private-sector funding, those without means who would otherwise

be eligible for programs like DARP may instead get a one-way ticket to a prison cell and nothing in the way of treatment, job training, or anything beyond what the Arkansas Department of Corrections has to offer.

The lower court decision is not only bad public policy but bad law grounded in misapplication of factually inapposite Supreme Court precedent. The district court below erred by mistakenly ignoring the "economic reality" that the Plaintiffs were the primary beneficiaries of the program, including the work component, as a rehabilitation-focused alternative to prosecution and probable incarceration. They were not "employees" of either DARP or Hendren. The district court erroneously discounted the practical reality that Plaintiffs participated in the drug-court program (and DARP) in lieu of facing imprisonment. More fundamentally, the district court appears to have labored under the misimpression that *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), somehow established a Manichean dichotomy between "volunteers" who perform work and "employees," ignoring the broader tapestry of various non-employment arrangements, such as independent contractors. This mistaken application of that inapposite decision fatally infected the decisions below.

ARGUMENT

I. DRUG COURTS AND PRIVATELY FUNDED RESIDENTIAL RECOVERY PROGRAMS ARE A VIABLE ALTERNATIVE TO INCARCERATION.

Overincarceration of non-violent individuals for relatively minor infractions (including drug-related offenses and other *malum prohibitum* crimes) imposes needless suffering on the accused, collaterally harms their families, damages communities, and undermines the legitimacy of our criminal justice system—all at taxpayer expense. AFPF and TPPF instead support rehabilitation- and recovery-focused alternatives to unnecessary incarceration that provide second chances and a constructive pathway forward, including drug courts and associated court-ordered residential recovery programs. *See also* J.App. 1841–1842 (Dep. Tr. of Judge Thomas Smith (6/6/2019)) (hereinafter "Judge Smith Dep. Tr.") (discussing data showing that drug courts reduce recidivism).

Although accused persons should never be forced to forego the due-process protections offered by the adversarial criminal justice system, *all* eligible non-dangerous individuals qualified to *voluntarily* participate in a drug-court program should have the option to do so, regardless of ability to pay. Nor should the taxpayer be forced to fund these programs when other alternatives are available; after all, *one* of the problems of overincarceration is that it is an expensive use of government resources and taxpayer money.

One alternative to taxpayer-funded programs is privately-funded recovery programs with a work component that either partner with the private sector, as DARP did here with Hendren, or offer their own services for a modest fee.

Participants in these residential recovery programs are generally struggling with substance-abuse issues and many are indigent or suffering from homelessness. They are provided a roof over their head, board, and even clothing at no cost, as well as the dignity, structure, and important life skills obtained through full-time work opportunities, which can turn into full-time employment. Constructive full-time work also facilitates recovery, and participants may receive a stipend.

Participants also benefit from this no-cost option by staying out of prison. In turn, companies like Hendren agree to allow program participants to gain full-time work experience as part of the recovery program, compensating the recovery program for its participants' efforts. In this way, these programs can self-fund their efforts, without any government subsidization.

The primary beneficiaries of this arrangement are, of course, the participants themselves. The secondary beneficiaries include taxpayers and communities. More than 2 million people are currently incarcerated in the United States, many for some form of drug offense.[7] Against this tragic backdrop, recovery-focused alternatives

[7] *See* The Sentencing Project, Fact Sheet: Trends in U.S. Corrections, at 2-3 (updated June 2019), https://bit.ly/3ke6qd5.

to incarceration are key to not only conserving taxpayer resources but, more importantly, providing a constructive pathway forward and a second chance to individuals who are struggling with substance-abuse issues. Indeed, Arkansas "has found that the cost of incarcerating . . . offenders in traditional penitentiaries is skyrocketing, bringing added fiscal pressures on state government, and that some inmates can be effectively punished . . . in a more affordable manner through the use of community correction programs and nontraditional facilities." Ark. Code Ann. §16-98-1201(a) (Repl. 2006).

Drug courts—as an alternative to the traditional adversarial criminal justice system—and court-ordered rehabilitation programs keep people out of prison. *See Laxton v. State*, 256 S.W.3d 518, 520 (Ark. Ct. App. 2007) (explaining drug courts provide defendants with "opportunity to avoid punishment in the criminal-justice system") (citing Ark. Code Ann. § 16-98-201 (Repl. 2006)); *see also* Ark. Code Ann. § 16-98-302(a). For many accused persons, the choice is simple: face prosecution and, if convicted, imprisonment or, alternatively, enter the drug-court system and participate in recovery programs, which may involve a required work component. *See* J.App. 1851–1853 (Judge Smith Dep. Tr.); *see also Laxton*, 256 S.W.3d at 520 (failure to complete drug court program resulted in multi-year prison sentence).

Because in many states there is no state funding for residential drug treatment programs, the high cost of these programs threatens to impose a barrier for many individuals battling substance abuse, who may be indigent and uninsured. *Cf.* DARP Br. 3. Not everyone can afford programs like the Betty Ford Clinic or Passages Malibu. *See also* J.App. 1848 (Judge Smith Dep. Tr.). And it is unfair to those with fewer means to force them to either incur debt or forego the incarceration alternative. This Court should not allow that to happen.

II. PRIVATELY FUNDED RESIDENTIAL RECOVERY PROGRAMS ARE A "WIN, WIN" BENEFITTING ALL STAKEHOLDERS.

This Court should reject Plaintiffs' attempt to suggest that public-policy considerations support imposition of Arkansas Minimum Wage Act ("AMWA") liability here. *See also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[W]e will not presume with petitioners that any result consistent with their account of the statute's overarching goal must be the law[.]"). *Cf.* J.App. 2032 (Mem. and Op. Order Granting Plaintiffs' Summary Judgment Motion and Denying Defendants' Summary Judgment Motions (09/27/19)) ("DARP's position ignores the strong public policy reasons behind the implementation of the AMWA[.]"). The extratextual expansion of AMWA that Plaintiffs seek here not only contorts the public-policy rationale for minimum-wage statutes beyond recognition but threatens to undermine consensus-based efforts to address the problem of overincarceration.

As the district court noted, "[a]t issue in the instant case is not the typical employee/independent contractor distinction, but rather whether an individual should be classified as an employee when he is a resident of a rehabilitative organization for which he provides labor."[8] J.App. 0746 (Mem. Op. and Order (06/27/18)). As the district court observed, "Plaintiffs explain that they were at DARP through court-ordered programs . . . as a condition of probation and in lieu of serving prison time." J.App. 0751 (cleaned up). "The Plaintiffs . . . are individuals who . . . faced criminal charges related to substance abuse. Arkansas drug courts offered them the opportunity to participate in DARP's residential drug and alcohol recovery program in lieu of punishment in the criminal justice system." J.App. 2019 (Mem. and Op. Order Granting Plaintiffs' Summary Judgment Motion and Denying Defendants' Summary Judgment Motions (09/27/19)). Plaintiffs "knew that if they chose to enter DARP but did not complete DARP's program requirements, they would be returned to drug court to face the prospect of prison time." J.App. 2019. In short, the program gave the Plaintiffs an alternative to incarceration.

Moreover, the policy questions here *all* militate against imposition of AMWA liability and underscore why the judgment below should be reversed.

[8] All agree that Hendren's "pay rates exceed what a minimum-wage employee would be paid." J.App. 2030 n.5.

First, non-dangerous individual defendants battling substance-related issues benefit from having the *option* of voluntarily participating in the non-adversarial drug court system and court-ordered residential recovery programs.

Second, there should not be ability-to-pay-based barriers to access to alternatives to incarceration offered through the drug courts. *Cf.* DARP Br. 3.

Third, for eligible drug court participants voluntary participation in the DARP program is preferable to incarceration in a state prison, potentially for a far longer period of time. As the district court observed, "[o]bviously, being subject to the jurisdiction of the state drug courts is not the same as being in prison." J.App. 2033–2034. The DARP program provided drug-court participants with an option that was better than the likely alternative: prison. The district court implicitly recognized incarceration would be a worse outcome. *See* J.App. 2033–2034.

Fourth, full-time work experience—which may not otherwise be available—provides a meaningful benefit to those who are seeking to pull themselves out of substance-related problems. The drug-court judge agreed: "It was Judge Smith's opinion that DARP's work alternative provided its residents a tremendous opportunity to restore structure in their lives, and he also believed that the value of these services exceeded minimum wage earnings." J.App. 2044 n.20; *see* J.App. 1849–1851 (Judge Smith Dep. Tr.). At least two U.S. Courts of Appeals also appear to agree. *See Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996); *Vaughn v.*

Phx. House N.Y., Inc., 957 F.3d 141, 146 (2d Cir. 2020). This Court should follow that approach here.

III. DARP PARTICIPANTS ARE NOT "EMPLOYEES."

A. The Sweep of Minimum Wage Laws is Not Limitless and Subject to Common-Sense Constraints.

The decision below is not only bad public policy but, more importantly, misconstrues and misapplies the law. To prevail on a Fair Labor Standards Act ("FLSA") or AMWA wage claim, a plaintiff must show that he or she was an "employee" of the defendant.[9] 29 U.S.C. §§ 206(a), 207(a). "The definition of employee in the AMWA tracks the FLSA—'any individual employed by an employer.'" *Karlson v. Action Process Serv. & Private Investigation, LLC*, 860 F.3d 1089, 1092 n.3 (8th Cir. 2017) (quoting Ark. Code Ann. § 11-4-203(3)). Plaintiffs here do not meet that definition.

The Supreme Court has broadly stated that "[t]he test of employment under the Act is one of 'economic reality[.]'" *Alamo*, 471 U.S. at 301. But even under the FLSA, "[a]n individual may work for a covered enterprise and nevertheless not be an 'employee.'" *Id.* at 299. And "[t]he definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express

[9] The FLSA defines "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and "employ" as "suffer or permit to work," *id.* § 203(g). The definitions are notoriously unhelpful in determining the Act's sweep. *See Schumann v. Collier Anesthesia*, 803 F.3d 1199, 1207 n.6 (11th Cir. 2015) (collecting cases).

or implied compensation agreement, might work for their own advantage on the premises of another." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

Thus, for example, railroad trainees are not "employees" subject to minimum-wage laws. *Id.* at 153. Nor are volunteers at a church-operated buffet restaurant. *E.g.*, *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 763 (6th Cir. 2018). "[T]o be considered an employee within the meaning of the FLSA, a worker must first expect to receive compensation." *Id.* (citations omitted). So too with respect to independent contractors. *See Rhea Lana, Inc. v. Dep't of Labor*, 925 F.3d 521, 523 (D.C. Cir. 2019) (FLSA does not "protect independent contractors"). Courts have also rejected claims that interns and students are "employees" under the FLSA. *Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016) (student athletes are not "employees"); *Vlad-Berindan v. N.Y.C. Metro. Transp. Auth.*, 779 F. App'x 774, 776–78 (2d Cir. 2019) (unpublished) (intern not "employee").

Likewise, this Court has held "that inmates . . . who are required to work as part of their sentences and perform labor within a correctional facility as part of a state-run prison industries program are not 'employees[.]'" *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *accord Franks v. Okla. State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993); *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324–25 (9th Cir. 1991). Courts have also rejected analogous arguments that pretrial detainees are "employees." *See*,

e.g., *Villarreal v. Woodham*, 113 F.3d 202, 204 (11th Cir. 1997) (holding "pretrial detainees who perform services at the direction of correction officials and for the benefit of the correctional facility are not covered under the FLSA").

So too here with respect to court-ordered DARP participants who, as a practical matter, participated in this rehabilitation-focused program, which includes a work component, *as an alternative to prison*.[10] *See Vaughn*, 957 F.3d 141 (unpaid worker in a rehabilitative program not an "employee" under the FLSA); *see also Williams*, 87 F.3d 1064 (recovering alcoholic who spent six months at an Salvation Army program was not an "employee").

B. The District Court Erred by not Applying the Proper Relevant Legal Standard.

The district court found "[u]nder *Alamo*, the class members in this case were employees." J.App. 2028. In so doing, it appeared to misinterpret *Alamo* to draw a binary distinction between "volunteers" and "employees" subject to minimum-wage laws, requiring an "either-or" analysis.[11]

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[10] This is an issue of first impression in this Circuit. *See also Yan Ming Wang v. Jessy Corp.*, No. 17-5069, 2020 U.S. Dist. LEXIS 116570, at *10 n.5 (D. Minn. July 2, 2020) (noting "the Eighth Circuit has declined to adopt a specific test that courts should use"). Indeed, the district court noted "[m]any of the issues presented to the Court were both difficult and novel[.]" J.App. 2131–2132 (Order on Distribution Plan and Attorneys' Fees and Costs (04/20/20)).

[11] According to the district court, "[t]he dispositive question is whether a worker expects to receive and actually receives in-kind benefits in exchange for work. If so, the worker is not a volunteer but is 'paid' for his labor with, at least, food,

That is reversible error. This is because the mere finding that workers are not "volunteers" under *Alamo* does not mean that they are necessarily "employees." *See Rhea Lana*, 925 F.3d at 527 (Katsas, J., concurring) ("On the facts of this case, it was not arbitrary for the Department of Labor to find that the workers, who expected to and *did receive in-kind compensation, are not volunteers*. In an appropriate case, *I would be open to the argument that workers like Rhea Lana's are not employees for a different reason:* because they are independent contractors.") (emphasis added). As demonstrated above in Section III.A, there are myriad circumstances where an individual who performs work is neither a "volunteer" nor an "employee." As is the case here.

But the DARP participants are not "employees" for an additional reason: they are the primary beneficiaries of the program, including its work requirement. As here, in many circumstances the existence of an employment relationship simply does not lend itself to a precise test. *See Acosta*, 887 F.3d at 766. This holds particularly true as applied to novel, innovative public-private sector partnerships. Accordingly, the district court should have applied the primary-beneficiary test for

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housing, clothing, and transportation." J.App. 2027. Even if DARP participants did receive "in kind" compensation and therefore were not "volunteers" for that reason, it does not follow that they are therefore "employees." The "volunteer" versus "employee" inquiry is a false dichotomy.

whether the participants were "employees" of DARP and Hendren.[12] *Cf. McMaster*, 30 F.3d at 980 (plaintiffs who "have been assigned work within the prison industries for the purposes of training, rehabilitation and reduction of idleness" not employees).

As relevant here, this test considers: "[t]he extent to which the . . . [participant] and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the . . . [participant] is an employee—and vice versa," *Vaughn*, 957 F.3d at 145; "[t]he extent to which the . . . [program's] duration is limited to the period in which the . . . [program] provides the . . . [participant] with beneficial learning," *id.*; and "[t]he extent to which the . . . [participant] and the employer understand that the . . . [program] is conducted without entitlement to a paid job at the conclusion," *id.* at 146. Here, each of these factors militates toward the conclusion DARP participants are *not* employees.

[12] *See Vaughn*, 957 F.3d at 145 ("The primary beneficiary test has three salient features: (1) its focus on what the intern receives in exchange for his work, (2) its flexibility to permit examination of the economic reality of the relationship, and (3) its acknowledgement that the intern-employer relationship is subject to unique considerations in light of the intern's expected educational or vocational benefits that are not necessarily expected with all forms of employment.") (cleaned up). In *Vaughn*, the Second Circuit applied this test to work performed during a court-ordered stay at a residential drug-treatment program as a condition of staying out of prison, finding that the plaintiff was *not* an employee.

C. Proper Application of the Primary-Beneficiary Test shows DARP Participants are not Employees.

First, the extent the program participants, DARP, and Hendren clearly understood there is no expectation of compensation for the participants' work weighs strongly against the conclusion that participants are "employees." *See* Hendren Br. 7–8, 25–26; DARP Br. 3–4; *see also* J.App. 1850–1851 (Judge Smith Dep. Tr.). Indeed, the absence of any bargained-for expectation of compensation here is also independently fatal to Plaintiffs' claims. *See Williams*, 87 F.3d at 1067 ("We hold that Williams was not an 'employee' entitled to a minimum wage under the FLSA. Williams had neither an express nor an implied agreement for compensation with the Salvation Army[.]"). *Cf. Acosta*, 887 F.3d at 766 ("[A] volunteer's expectation of compensation is a threshold inquiry that must be satisfied before we assess the economic realities of the working relationship.").

It is undisputed that "[a]ll [DARP] residents signed a document entitled 'Admission Agreement' upon their entry to DARP that clearly informed them they would not be paid wages for their work at the factory, 'as the money earned goes toward operation of the D.A.R.P. Foundation[.]'" J.App. 2020. "They were also required as a condition of entry into the program to sign forms that disclaimed they were employees under the law." J.App. 2033. "While FLSA rights cannot be waived, this statement indicates that there was no express agreement for

compensation."[13] *Williams*, 87 F.3d at 1067. Nor was there any implied agreement for compensation. To the contrary, Plaintiffs expressly agreed they were suffering from substance-abuse issues and in need of recovery. *See, e.g.*, J.App. 1793, 1925 (executed DARP Foundation Admission Agreements); *see also* Hendren Br. 5–10. *Cf. Williams*, 87 F.3d at 1067 ("Williams indicated on his application for admission, intake interview form, and intake medical report that he suffered from drinking problems and was in need of treatment.").

Second, the limited duration of the DARP program and related work component sharply distinguishes this case from *Alamo*.[14] *See* Hendren Br. 24, 29.

Third, the participants understood that they were not entitled to a job at the end of the program, further militating against finding an employment relationship. *See also* J.App. 1794 (Disclaimer of Employment Relationship); Hendren Br. 26-29.

Fourth, the reality is that the Plaintiffs, and those similarly situated, were the primary beneficiaries of the allegedly unlawful business practices. To begin with, Plaintiffs were afforded an opportunity to avoid incarceration. *See* J.App. 1851–1852 (Judge Smith Dep. Tr.); *Laxton*, 256 S.W.3d at 520. "Arkansas drug courts offered them the opportunity to participate in DARP's residential drug and alcohol

[13] AMWA does not appear to prohibit enforcement of executed waiver of rights. *Compare* 29 U.S.C. § 218c(b)(2), *with* Ark. Code Ann. §§11-4-201, *et seq.*

[14] *See Williams*, 87 F.3d at 1068 ("While six months is longer than the one-week period in *Walling*, the beneficiaries have significantly different needs . . . and six months is not an unreasonable time commitment to treat these needs.").

recovery program in lieu of punishment in the criminal justice system." J.App. 2019. *Cf. Vaughn*, 957 F.3d at 146 ("Vaughn received significant benefits from staying at Phoenix House, in large part because he was permitted to receive rehabilitation treatment there in lieu of a jail sentence[.]") (cleaned up).

DARP's work component, like that of similar recovery programs, also facilitated the recovery process and provided an opportunity to learn important life skills. *See Williams*, 87 F.3d at 1067 ("Williams's work therapy was not performed in exchange for in-kind benefits, but rather was performed to give him a sense of self-worth, accomplishment, and enabled him to overcome his drinking problems and reenter the economic marketplace."). Indeed, in the drug-court judge's view, "DARP's work alternative provided its residents a tremendous opportunity to restore structure in their lives, and he also believed that the value of these services exceeded minimum wage earnings." J.App. 2044 n.20; *see also* J.App. 1849–1850 (Judge Smith Dep. Tr.). *Cf. Vaughn*, 957 F.3d at 146 (participant in court-ordered residential treatment program benefited from "jobs that kept him busy and off drugs"). "Human experience and common sense, which always have a role to play, support the conclusion that idleness and unstructured time can have a negative effect on a defendant's rehabilitation.'" *United States v. Scaife*, No. 12-519, 2015 U.S. Dist. LEXIS 78621, at *28–29 (N.D. Ill. May 20, 2015). *Cf.* J.App. 1854–1856 (Judge Smith Dep. Tr.).

In addition, DARP residents benefited from the availability of a residential recovery program that provided room, board, and even clothing at no cost to the participants. *Cf. Vaughn*, 957 F.3d at 146 (court-ordered residential recovery program primarily benefited participant because he was "provided with food, a place to live, therapy"). This was a significant benefit because the drug court is empowered to order participants to pay, among other things, the costs of residential recovery programs. *See* Ark. Code Ann. § 16-98-304 (cost and fees). And those costs can frequently be substantial.

In short, participants in the court-ordered DARP program benefited from it by staying out of prison. The purpose of DARP's work recovery program was rehabilitative: the "economic reality" is that the relationship was one primarily benefitting the participants, who agreed to participate in the work recovery program to achieve sobriety through hard work. And Hendren was not unduly enriched from the program because it paid DARP more than minimum wage for the hours worked.

Put simply, that is not an "employment" relationship subject to federal and state minimum-wage requirements. Whether DARP participants were "volunteers" at DARP (or, for that matter, while working at Hendren) may well be an interesting question. But it is beside the point. Instead, the dispositive legal question is whether Plaintiffs—who participated in a court-ordered live-in substance-abuse-recovery program with a rehabilitation-focused work requirement *to avoid prison*—were

"employees" of the program or its private-sector partners. Common sense and applicable precedent direct that the answer is a resounding "no."

This conclusion is reinforced by the federal Department of Labor's Field Operations Handbook.[15] *See Dep't of Labor, Wage & Hour Div.*, Field Operations Handbook, available at https://bit.ly/3kfvlxc. Section 10b03(g) explains:

> In the ordinary case, tasks performed as a normal part of a program of treatment, rehabilitation, or vocational training . . . [such as] tasks performed by individuals committed to training schools of a correctional nature, which are required as a part of the correctional program of the institution as a part of the institutional discipline and by reason of their value in providing needed therapy, rehabilitation, or training to help prepare the inmate to become self-sustaining in a lawful occupation after release [do not create an employment relationship under the FLSA].

So too here. The fact that even DOL—which sometimes badly overreads its FLSA authority[16]—has recognized these practical limits on the "employment" relationship under the minimum wage laws underscores the weakness of Plaintiffs' position. It also brings into stark relief the dangerous implications of their liability theory, which appears to lack a limiting principle.

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[15] This Court "treat[s] the DOL Handbook as persuasive authority." *Baouch v. Werner Enters.*, 908 F.3d 1107, 1117 (8th Cir. 2018).

[16] *See, e.g.*, *Acosta*, 887 F.3d at 768–70 (Kethledge, J., concurring) ("[DOL's] argument's premise—namely, that the Labor Act authorizes the Department to regulate the spiritual dialogue between pastor and congregation—assumes a power whose use would violate the Free Exercise Clause of the First Amendment. . . . What is perhaps most troubling about the Department's position in this case, however, is the conceit of unlimited agency power that lies behind it.").

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 5,484 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: August 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2020, I electronically filed the above Brief of Amici Curiae Americans for Prosperity Foundation and the Texas Public Policy Foundation in Support of Defendants-Appellants and Reversal with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: August 24, 2020