No. APL – 2014 – 00157

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application of

WALTER E. CARVER,

Petitioner-Respondent,

For a Judgment Pursuant to CPLR Article 78

Index No. 12355/08
Supreme Court
Kings County

-against-

THE STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE and ROBERT MEGNA, Commissioner of the New York State Department of Taxation & Finance, THE NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE AND DAVID A. HANSELL, Commissioner of the New York State Office of Temporary and Disability Assistance, and THE NEW YORK STATE DIVISION OF LOTTERY and GORDON MEDENCIA, Director of the New York State Division of Lottery,

Respondents-Appellants.

BRIEF FOR *AMICI CURIAE*

Dated: July 23, 2015

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National Center for Law and Economic Justice

The National Center for Law and Economic Justice (NCLEJ) formerly known as the Welfare Law Center, exists to protect the legal rights of people with limited financial means, including persons receiving public assistance. It focuses on impact litigation that will establish important principles for the protection of such individuals. It has been involved, as counsel or *amicus curiae*, in most of the significant cases involving the rights of welfare recipients over the 50 years since it was founded in 1965.

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF represents many clients with claims under the federal Fair Labor Standards Act (FLSA). This case raises important questions about the broad scope of protection under FLSA.

Community Voices Heard

Community Voices Heard (CVH), founded in 1994, is a membership organization, working with low income families to improve the opportunities for

low income people in New York City, Westchester, Orange and Duchess Counties and across the state and country. CVH began organizing when TANF was passed and Work Experience Program (WEP) became pervasive. Many of CVH's members do WEP cleaning toilets, subways, and offices. CVH has been working with the Department of Labor and referred WEP worker cases for FLSA protection. This case is very important to follow through on that protection.

Flushing Workers Center

Sparked by the groundswell of worker unrest in Flushing, a group of immigrant workers and youth came together in 2011 to form an organized community response to the deteriorating working conditions in Queens. Flushing Workers Center (FWC) is a multi-ethnic, multi-trade center with the goal of uniting worker from diverse backgrounds to assert their rights at their workplace as well as the community-at-large. FWC is a membership-led space to support workers organizing to improve working and living conditions in Flushing and neighboring Queens communities.

Hunger Action Network of New York State

The Hunger Action Network of New York State, founded in 1982, is a statewide membership organization that combines grassroots organizing at the local level with state level research, education and advocacy to address the root

causes of hunger, including poverty. Hunger Action Network of New York State advocates for fair wages and equity to assure that no one goes hungry.

Legal Aid Society

The Legal Aid Society is the nation's oldest and largest not-for-profit legal services organization and has been providing legal services to low-income New Yorkers for 138 years. In addition to providing direct legal services, The Legal Aid Society advocates for its clients through legislative advocacy, impact litigation, and participation as amicus curiae in significant cases. The Legal Aid Society's Employment Law Unit represents low-wage workers in employment-related matters including claims for unpaid wages. The Unit conducts litigation, outreach, and advocacy efforts on behalf of clients to assist the most vulnerable workers in New York City, among them, workers who are misclassified. And, through its Government Benefits and Housing Practices, The Legal Aid Society represents thousands of public assistance recipients each year, many of whom participate in the Work Experience Program ("WEP").

Make the Road New York

Make the Road New York (MRNY) is a non-profit membership organization with over 17,000 low income members dedicated to promoting equal rights and economic and political opportunity for low-income New Yorkers through community and electoral organizing, leadership development, education, provision

of legal services, and strategic policy advocacy. A significant portion of MRNY's membership are welfare recipients. MRNY's Workplace Justice team is dedicated to assisting low-wage workers enforce their rights under the labor law, and represents hundreds of low-wage workers each year to recover unpaid wages and benefits they were denied by exploitative employers. MRNY has developed expertise in enforcement mechanisms of wage and hour laws and legislative reform to enhance protection for workers under state law. The Fair Labor Standards Act establishes a floor of basic protections designed to apply across the workforce, and should be broadly construed to cover vulnerable workers, including welfare recipients. MRNY is committed to ensuring that state laws do not undermine the critical, minimum workplace rights established by the Fair Labor Standards Act and empowering the agencies charged with enforcing these basic protections.

MFY Legal Services, Inc.

MFY Legal Services, Inc., a nonprofit organization, envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for more than 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and underserved populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. MFY provides advice and

representation to more than 10,000 New Yorkers each year. The Government Benefits Project at MFY assists individuals with legal problems relating to Public Assistance, the Supplemental Nutrition Assistance Program (Food Stamps), Medicaid/Medicare, and Supplemental Security Income/Social Security Disability benefits. MFY's Workplace Justice Project provides advice, counsel and direct representation to hundreds of workers each year facing exploitation, such as unpaid wages and overtime, and employment discrimination.

National Economic and Social Rights Initiative

In partnership with communities, the National Economic and Social Rights Initiative (NESRI) works to build a broad movement for economic & social rights, including health, housing, education and work with dignity. Based on the principle that fundamental human needs create human rights obligations on the part of government and the private sector, NESRI advocates for public policies that guarantee the universal and equitable fulfillment of these rights in the United States.

National Mobilization Against Sweatshops

The National Mobilization Against Sweatshops (NMASS) is a membership workers' organization established in 1996. Its leadership is composed of those hardest-hit by the sweatshop system: immigrants, women, and workers of color. NMASS' mission is to organize working people to stand up to the sweatshop

conditions that workers face and to gain control over their health, time and communities. Uniting immigrants and U.S.-born workers, and bringing them together across industry, immigration status, race, ethnicity, gender and age, NMASS builds the capacity of working people to have a voice in their workplaces and in the communities where they live, and to inject into the policy debate what is important to them and their families thereby compelling policymakers to address their concerns.

National Employment Lawyers Association – New York

The National Employment Lawyers Association (NELA) is a national bar association dedicated to the vindication of individual employees' rights. NELA/NY, incorporated as a bar association under the laws of New York State, is NELA's New York affiliate and has approximately 400 members. NELA/NY's activities and services include continuing legal education and a referral service for employees seeking legal advice and/or representation. Through its various committees, NELA/NY also seeks to promote more effective legal protections for employees. In addition to the daily participation of its members in employment cases, NELA/NY has filed numerous amicus briefs in the New York State Court of Appeals, the Appellate Division and the Second Circuit Court of Appeals in cases presenting important questions of employment law, including wage and hour laws. The aim of this participation has been to cast light not only on the subtleties of the

legal issues presented but also on the practical effects of legal decisions on the lives of working people. Many of our members represent clients whose employers have not paid them even minimum wage, and our members see the hardships that result when employees are not fully compensated for their labor. NELA/NY steadfastly supports the principle that all persons who work are entitled to be paid at least the minimum wage, including recipients of public assistance who are required to perform services in exchange for benefits.

Urban Justice Center

Founded in 1984, the Urban Justice Center is a New York City-based nonprofit organization that provides legal services, advocacy and outreach to the City's most vulnerable residents on issues relating to homelessness, housing, public benefits, mental health, domestic violence and workers' rights, among others. The Urban Justice Center's Community Development Project represents hundreds of workers each year who have suffered violations of the Fair Labor Standards Act, and has an interest in ensuring that the Act is properly interpreted to reflect its broad remedial purposes. In addition, each year, the Urban Justice Center's Safety Net Project provides direct legal services to over two hundred New York City residents receiving public assistance. The Urban Justice Center believes that Mr. Carver and the thousands of other WEP participants are entitled to the same legal protections afforded by the Act as other workers in New York City, and

that anything short of such would constitute state sanctioned discrimination. The proper resolution of this case is therefore a matter of substantial interest to the Urban Justice Center.

Worker Justice Center of New York

The Worker Justice Center of New York pursues justice for those denied human rights with a focus on agricultural and other low- wage workers in upstate New York. Through legal representation, community empowerment and advocacy for institutional change, WJCNY seeks to impact the balance of power between employers and employees to create a more just and dignified workplace for all low-wage workers.

INTRODUCTION

The NCLEJ submits this *amicus curiae* brief on behalf of itself and numerous other *amici* to address an issue that is central to the mission and concerns of all *amici*: whether provisions of New York law that purport to authorize the New York State to seize lottery winnings of a person formerly on public assistance, so as to offset welfare benefits paid to that person, can be used to deprive that person of the right to a minimum wage under section 206 of the Fair Labor Standards Act of 1938. Such seizure is clearly precluded by federal law.

QUESTION PRESENTED

Is an individual who performs work for the City of New York, in exchange for cash public assistance ("public assistance") and food stamps, protected by the federal minimum-wage provisions of section 206 of the Fair Labor Standards Act of 1938?

THE FACTUAL BACKGROUND OF THIS APPEAL

Respondent Walter E. Carver, a sixty-nine-year-old decorated Vietnam War veteran (Appendix [A.] 5 (*Carver v. State*, Sup Ct, Kings County, August 8, 2014, Bernard J. Graham, Index No. 12355/2008, Decision/Order at *3), 63-64 (Carver Petition, exhibit D), received public assistance from the City of New York beginning in 1993 and continuing until March 2000 (A. 39 (Carver Petition, ¶ 11),

81 (Carver Affidavit in Opposition to Respondents' Motion to Dismiss, ¶ 2)).[1] During that time the City of New York ("City") [2] required that he work thirty-five hours a week in the Work Experience Program ("WEP") of the City's Human Resources Administration ("HRA") in order to receive welfare benefits (A. 39 (Carver Petition, ¶12), 41 (Carver Petition, ¶20), 46 (Carver Petition, ¶43)). Mr. Carver was assigned to the mailroom of Coney Island Hospital (the "Hospital"), where he was "told to sort and deliver the mail" (A. 82 (Carver aff in Opposition to Respondents' Motion to Dismiss, ¶ 4)). In 1995 he was reassigned to the Manhattan Terminal of the Staten Island Ferry (the "Ferry Terminal"), where he was "told to sweep [the] floors, throw down salt in the winter and pick up trash." (A. 82 (Carver aff in Opposition to Respondents' Motion to Dismiss, ¶ 7-8))

In return for performing these services for the City, Mr. Carver received $176.00 every two weeks (A. 39 (Carver Petition, ¶ 12), 56-60 (Carver Petition, exhibit A)). Mr. Carver also received food stamps. His cash compensation plus food stamps equaled no more than the minimum wage (A. 40 (Carver Petition, ¶ 13)). If he missed work, his assistance was reduced (A. 39 (Carver Petition, ¶ 12), 102-03 (Guinn aff, ¶5)).

[1] References such as "A39" are to pages of the parties' joint Appendix on this appeal.
[2] As used herein, the term "City" includes the City of New York and its component HRA.

Mr. Carver never received any training in how to perform these jobs, or any vocational training or classes at all during these years (A. 82 (Carver aff in Opposition to Respondents' Motion to Dismiss, ¶¶ 5, 6)). Mr. Carver only received a week of classes on how to write a resume and look for a job at the end of the program (A. 82 (Carver aff in Opposition to Respondents' Motion to Dismiss, ¶ 10)).

In those years section 206 of the federal Fair Labor Standards Act of 1938 (29 USC § 201 *et seq.*), (the "FLSA"), provided that an "employer" must "pay to each of his employees" a minimum wage of $4.25 per hour through September 30, 1996, $4.75 an hour through August 31, 1997, and then $5.15 an hour. Wages of $5.15 per hour would be $9,373.00 a year for a 35-hour week, just above the 2000 federal poverty level of $8,350 for a single person.

In 2000 Mr. Carver was told that "he would have to leave WEP" (A. 82 (Carver aff in Opposition to Respondents' Motion to Dismiss, ¶ 10)) and on March 4, 2000, per Appellants' records (A. 60 (Carver Petition, exhibit A at *5)), his benefits were cut off.

On August 10, 2007, Mr. Carver won $10,000 in the New York State lottery (A. 40 (Carver Petition, ¶ 14)). The New York State Division of Lottery and the New York State Office of Temporary and Disability Assistance ("OTDA") then notified Mr. Carver that $5,000 of his lottery prize would be seized to repay part of

the assistance he had received while working at the Ferry Terminal (A. 61-62 (Carver Petition, exhibit B, at *1)). The OTDA invoked New York Social Services Law § 131-r, which authorizes the State[3] to appropriate half of any lottery prize over $600 to "reimburse [itself] . . . for all . . . public assistance benefits paid to [the prizewinner] during the previous ten years." In this case that ten-year period reaches back to mid-August 1997.

Mr. Carver took an administrative appeal, which was denied (A. 41-42 (Carver Petition, ¶ 17-21), 63-71 (Carver Petition, exhibits D-I)), and filed the underlying Article 78 proceeding in April 2008 (A. 34-65 (Notice of Verified Petition; Carver Petition; Carver Petition, exhibits A-E)). After respondents' CPLR 3211 motion to dismiss was granted (A. 32 (*Carver v. State*, 24 Misc 3d 602, 610 [Sup Ct, Kings County 2009])), he appealed to the Appellate Division for the Second Judicial Department ("Second Department"). The Second Department reversed in part and held that Mr. Carver had stated a valid cause of action under the minimum-wage provisions of the FLSA (A. 11-19 (*Carver v. State*, 87 AD3d 25 [2d Dept 2011])). On remand, the Supreme Court granted his Article 78 petition and directed respondents to return his $5,000 (A. 3-10 (*Carver*, Kings County, August 8, 2014)). Thereafter the parties entered into a stipulation that

[3] The term "State," as used herein, refers to the State of New York and Respondents-Appellants OTDA and the Commissioner of the OTDA. The OTDA is simply an "agency," i.e., a part of, the government of New York State. (*Carver v. State*, 87 AD3d 25, 34 n. 3 [2d Dept 2011]; A18).

provides for Mr. Carver to receive the $5,000, plus a fixed sum for attorneys' fees, unless this Court or some other court rules otherwise (A. 254-60 (*Carver v. State*, Sup Ct, Kings County, February 7, 2014, index No. 12355/08, Stipulation and Order of Contingent Settlement)). The State has thus effectively conceded that if the FLSA applies, it has no right to any of Mr. Carver's lottery winnings.

THE RELEVANT STATUTORY FRAMEWORK

At all times since 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Pub L 104-193, 110 Stat 2105, codified at, *inter alia*, 42 USC § 601 *et seq.*), ("PRWORA"), has operated to impose work requirements upon recipients of public assistance in federally-funded welfare programs. Section 602 (a) requires each state, in order to receive federal money for such programs, to submit a plan showing compliance with federal law, specifically including provisions for persons receiving assistance to "engage in work" or "work activities." Section 607, "Mandatory Work Requirements," specifies minimum participation rates (which increased gradually from 25% in 1997 to 40% in 2000), fixes the minimum number of hours worked per week to constitute participation, and imposes other requirements.

New York State has delegated responsibility for the administration of its public assistance programs to the City and various social services districts (Soc. Serv. Law §§ 61-62). The State reimburses these entities for their expenses in

administering such programs (Soc. Serv. Law §§ 153, 153-a, 153-b, 153-f and 153-k) and State law circumscribes how they shall proceed. Soc. Serv. Law § 333 requires each district to "submit . . . a biennial plan for the provision of education, work, training and supportive services related to the operation of work activity programs," and Soc. Serv. Law § 335-b, subd (1) (a), requires the districts to meet minimum-participation quotas identical to federal law, including the 25% to 40% participation requirement. Soc. Serv. Law § 336-c, subd (1) (b), permits these requirements to be satisfied by "the performance of work for a federal office or agency," a "county, city, village or town or for the state," or a "nonprofit agency or institution." It also provides that the hours a participant "shall be required to work" shall be such that "the amount of assistance payable . . . to such individual [worker] (inclusive of the value of food stamps)" shall be at least equal to "the higher of (a) the federal minimum wage . . . or (b) the state minimum wage," (*id.* § 336-c [2]) thus recognizing that, as a matter of fundamental fairness, workers should be paid at least that minimum amount for their services.

Soc. Serv. Law § 342 provides that "an individual . . . shall be ineligible to receive public assistance if he or she fails to comply" with work requirements by "quit[ting] or reduc[ing] his hours of employment without good cause." (*Id*. § 342 [1], [4]; *see* A. 102-03 (Guinn aff ¶ 4-7)) In the case of a single person without children, benefits would be cut off for ninety days in the case of a second offense

and 150-180 days for further offenses. A person with a spouse and/or children would suffer a reduction of benefits *pro rata*.

Public-assistance workers are entitled to reimbursement for child-care and commuting expenses (Soc. Serv. Law § 332-a) and have the right to receive workers' compensation "on the same basis, but not necessarily at the same benefit level, as" other employees "in the same or similar positions." (Soc. Serv. Law § 336-c [2] [c].)

Though assistance paid to Mr. Carver were allegedly "funded by State and [City] dollars," without federal reimbursement (A. 99 (Schollenberger aff, ¶ 6)), the Social Services Law nonetheless applies.

As noted, New York State has delegated much of the responsibility for administering public assistance programs to the City, and Appellants assert that HRA is the City agency that carries out these functions (A. 103 (Guinn aff, ¶ 7)). According to Appellants, it was HRA that enrolled Mr. Carver in the WEP, assigned him to work in the mailroom at Coney Island Hospital and then as a janitor at the Ferry Terminal, and that ultimately cut off his assistance in 2000 (brief for respondents-appellants, *12-13).

I

The Plain Language of The Fair Labor Standards Act Makes It Clear That WEP Workers Are Covered By Its Minimum Wage Provisions

Section 206 of the FLSA, as it read from August 1996 to May 2007, provided that as of September 1, 1997, "[e]very employer shall pay to each of his employees who in any workweek is engaged in commerce" a minimum wage of "not less than $5.15 an hour." The statute was amended in 1974 to expand the definition of "employer" to include a "public agency," such as a State or "any agency of . . . a political subdivision of a State." (*Id*. § 203 [d] [x].)

The FLSA defines the term "employee" to mean "any individual employed by an employer." (*Id*. § 203 [e] [1].) "In the case of an individual employed by a public agency, [the] term means . . . any individual employed by a State [or a] political subdivision of a State," with noted exceptions (*Id*. § 203 [e] [2] [C]).

Many other federal statutes also define the term "employee" to mean "any individual employed by an employer." The FLSA goes one step further, however, by providing that the term "'[e]mploy' includes to suffer or permit to work." (*Id*. § 203 [g].) The term "suffer" is used here in the sense of "[t]o allow or permit (an act, etc.)." (Black's Law Dictionary 1570 [9th ed 2009]; *accord* Webster's Third New International Dictionary [1993] [Meaning 4a: "not to forbid or hinder; allow, permit"].) The Supreme Court has concluded that persons were "suffer[ed] or

permit[ted]" to work when an alleged employer was "'*affording them the opportunity to work, and paying them for it*.'" (*Goldberg v. Whitaker House Co-op., Inc.*, 366 US 28, 32 [1961] [quoting from dissent below] [emphasis added].)

Without a doubt the statutory term "employ" is defined "expansively," and the "striking breadth" of this definition "stretches the meaning of [the term] 'employee' to cover some parties who might not qualify under a strict application of traditional agency law principles." (*Nationwide Mut. Ins. Co. v. Darden*, 503 US 318, 326 [1992].) *Darden* held that for this reason the term "employee" must be construed more broadly in the FLSA than in the Employee Retirement Income Security Act of 1974. In *Frankel v. Bally, Inc.* (987 F2d 86, 89 [2d Cir 1993]), the Second Circuit likewise observed that "the common law agency test," while arguably appropriate for the Age Discrimination in Employment Act of 1967, was "too restrictive to encompass the broader definition of the employment relationship contained in the [FLSA]." (*See also United States v. City of New York*, 359 F3d 83, 108 [2d Cir 2004, Jacobs, J. dissenting], *cert. denied*, 543 US 1146 [2005] ["*City of NY*"] ["[T]the definition of 'employee' in the FLSA is considerably more inclusive than the common law definition used in Title VII" of the Civil Rights Act of 1964].)

It follows that the FLSA's "definitions . . . [are] comprehensive enough to require its application to many persons and working relationships, which prior to

this Act, were not deemed to fall within an employer-employee category." (*Walling v. Portland Terminal Co.*, 330 US 148, 150 [1947].) "The definition of 'employ' is broad" because "[i]t evidently derives from the [state] child labor statutes," where an expansive definition was essential to protect children. (*Rutherford Food Corp. v. McComb*, 331 US 722, 728 & n. 7 [1947] ["*Rutherford*"].) As the Supreme Court noted in *United States v. Rosenwasser* (323 U.S. 360, 362 [1945]), "a broader or more comprehensive coverage of employees [than that provided by the FLSA] . . . would be difficult to frame."

The cases construing the FLSA have also emphasized that the statute's remedial purposes dictate an expansive reading of its terms. The FLSA was adopted during the Depression to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." (29 USC § 202 [a].) It "was designed to raise substandard wages . . . thereby helping to protect this nation 'from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health.'" (*Rosenwasser*, 323 US at 361, quoting from S. Rep. No. 75-884, at 4 [1938].) Accordingly, "[t]he [Supreme] Court has consistently construed the [FLSA] 'liberally to apply to the furthest reaches consistent with congressional direction,' . . . recognizing that broad coverage is essential to accomplish the goal of outlawing . . . [working] conditions that fall

below minimum standards of decency." (*Tony & Susan Alamo Fdn. v. Sec'y of Labor*, 471 US 290, 296 [1985], quoting from *Mitchell v. Lublin, McGaugy & Assocs.*, 358 US 207, 211 [1959]; *see, e.g.*, *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 [2006] [When a statute "is remedial in nature, it should be liberally construed in favor of" those it was designed to protect].)

In any case, it is not necessary to resort to principles of liberal construction. Here, as in *Rosenwasser*, "[t]he plain words of the statute give an . . . unmistakable answer to the" question before the Court. (*Rosenwasser*, 323 US at 362.). There can be no dispute that the City "suffer[ed]" and "permit[ted]" Mr. Carver to work, indeed required him to work, at the Hospital and then at the Ferry Terminal, in return for cash payments and food stamps. Here, as in *Goldberg*, "it [was HRA] that . . . afford[ed] Mr. Carver] the opportunity to work, and [paid him] for it." (366 US at 32.)

"'In determining the scope of a statute, [a court must] look first to its language,' . . ., giving the 'words used' their 'ordinary meaning.'" (*Moskal v. United States*, 498 US 103, 108 [1990].) (*Accord Sebelius v. Cloer*, 133 S Ct 1886, 1893 [2013], *quoting BP America Prod. Co. v. Burton*, 549 US 84, 91 [2006] [Court must "proceed from the understanding that 'unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning'"]; *DaimlerChrysler*, 7 NY3d at 660 ["The statutory text is the clearest

indicator of legislative intent and courts should construe unambiguous language [in a statute] to give effect to its plain meaning"]; *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583 [1998] [In statutory construction, "resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction."].) Since the facts of this case fall within the plain language of the statute, further analysis is not necessary.

This conclusion is reinforced when section 206 is considered within the overall context of the FLSA. Section 213 (a) of the FLSA carves out ten exceptions to the minimum wage guarantees of section 206, including persons "employed in a bona fide executive, administrative, or professional category," "teacher[s] in elementary or secondary school[s]," "outside salesm[e]n," employees of a seasonal "amusement or recreational establishment, organized camp, or religious or non-profit educational center," fishermen, fish farmers, certain persons employed in fish processing and many categories of agricultural workers. Section 213 (d) exempts newspaper deliverers and makers of evergreen wreaths. Under section 203 (m), waiters and other "tipped employee[s]" are subject to a lower minimum wage. When the FLSA was expanded to cover government employees, additional exemptions were recognized for elected officials, most members of their staffs and those who "volunteer to perform

services" for a state or subdivision thereof. (*Id*. § 203 [e] [2] [C]; [e] [4] [A].) Clearly, Congress has not hesitated to exclude many categories of workers from the FLSA. It could easily have excluded WEP workers as well, but it did not. Hence, the FLSA should be applied to such workers in accordance with a literal construction of its terms.

II

WEP WORKERS ARE PROTECTED BY THE FLSA'S MINIMUM WAGE PROVISIONS UNDER THE SUPREME COURT'S "ECONOMIC REALITY" TEST

Mr. Carver's right to prevail in this case follows not only from the plain meaning of the statutory language, but also from the "economic reality" test adopted by the Supreme Court for FLSA cases, as it applies to the facts before this Court.

The most recent case applying the economic reality test is *Tony & Susan Alamo Fdn. v. Secretary of Labor* (471 US 290 [1985] ["*Alamo*"]). The Alamo Foundation was a not-for-profit organization founded to "establish, conduct and maintain an Evangelistic Church . . . and generally to do those things needful for the promotion of Christian faith, virtue, and charity." It supported itself by operating gas stations, stores and other businesses staffed by "associates." These associates were primarily drug addicts and criminals converted to the Christian faith by the Foundation. Associates "receive[d] no cash salaries, but the

Foundation provide[d] them with food, clothing, shelter, and other benefits." (*Id*. at 292.)

The Supreme Court had no trouble finding that the Foundation's associates were "employees," even though the associates in question objected, insisting they were volunteers engaged in Christian ministry. The Court first noted that "[t]he test of employment is one of 'economic reality'" (*id*. at 301 *quoting Goldberg* [366 US at 33]), then focused on three factors: (1) the associates received compensation, albeit "primarily in the form of benefits rather than cash," a distinction deemed to be "immaterial;" (2) they were "entirely dependent upon the Foundation for long periods, in some cases . . . years," and so must have expected to be paid for their work; and (3) any other result would have undermined the purposes of the FLSA by giving the Foundation a competitive advantage and "exert[ing] . . . downward pressure on wages in competing businesses." (*Id*. at 301, 302.)

The "economic reality" test, as applied in *Alamo,* compels the conclusion that Mr. Carver was an "employee." The Staten Island ferry, where Mr. Carver worked until March 2000, is a commercial business no different than a privately owned ferry service or the gas stations and stores operated by the Foundation in *Alamo*. Mr. Carver's work was no different from the janitorial services performed by salaried City employees at many offices and other locations. Like the associates in *Alamo*, his benefits were "compensation" for his work, even if some

of those benefits were not paid in cash, and he was "entirely dependent" on that compensation for years. Thus Mr. Carver, like the associates in the *Alamo* case, must be deemed an "employee" as that term is broadly defined in the FLSA.

Alamo also establishes that the employer's purposes and objectives are not relevant in determining a worker's status as an "employee." The State's declared goal of preparing WEP workers for gainful employment, like the Foundation's goal of saving sinners, is of no significance under the "economic reality" test.

Goldberg casts additional light on the proper application of the "economic reality" test. The defendant was a cooperative engaged in marketing "knitted, crocheted, and embroidered goods" made by "some 200 members who work[ed] in their homes." (366 US at 29.) Members of the cooperative were not hired, in the sense of being interviewed, vetted, and chosen from a group of job candidates; instead anyone could join by demonstrating sufficient skill in making such goods, paying a fee of $3.00, and accepting the terms of membership. Each member had a vote in managing the cooperative's affairs. (*Id*. at 29-30.)

The cooperative argued that its members were co-owners, and so could not be employees, but the Supreme Court found "nothing inherently inconsistent [in] the coexistence of a proprietary and an employment relationship . . . [and] fail[ed] to see why a member . . . may not also be an employee." (*Id*. at 32.) The Court emphasized that members "manufactur[e] what the organization requires and

receiv[e] the compensation the organization dictates," that members "work in the same way that they would if they had an individual proprietor as their employer" and that "[i]t is the cooperative *that is affording them 'the opportunity to work, and paying them for it.*'" (*Id*. at 32 [quoting from dissent below] [emphasis added].) On this basis, the Court held that, "if the 'economic reality' rather than 'technical concepts' is to be the test . . . [citations omitted], these homeworkers are employees." (*Id*. at 33.) In Mr. Carver's case the State and HRA likewise afforded Mr. Carver the opportunity to work, and they exercised a like degree of control over his work. As a result, Mr. Carver must be deemed an "employee" as well.

The decision in *Rutherford* is also instructive. Defendant Kaiser Packing Co., a meat-packing company, hired "an experienced boner" to "assemble a group of skilled boners" to perform the work of stripping the meat from animal carcasses (331 US at 724). The chief boner was paid per hundred-weight of meat stripped, and his contract gave him "complete control over the other boners, who would be his employees." (*Id*. at 724-25.) This control, however, was not complete in practice as Kaiser's president regularly visited the boning room and pressed the boners to work faster (*Id*. at 726). The boners worked in the same plant as employees of Kaiser, and they equally split the money paid to the chief boner (*Id*. at 725-26). On these facts the Court found that the boners were not independent contractors, but employees of Kaiser, though the company did not hire them or set

their individual pay and had only limited power to fix their hours and supervise their work. Thus the powers to hire and fire, fix each worker's pay and supervise every aspect of his or her performance are plainly not essential to an employer-employee relationship.

These controlling decisions of the Supreme Court fix the framework within which this case must be decided. They reflect certain core concerns: Are the alleged "employees" engaged in activities that resemble what employees do in a commercial business? Are they compensated for those activities, in cash or in kind? Are they dependent on that compensation? Do their putative employers exercise a degree of control over how they perform those activities? Here, the answers to these questions are yes, yes, yes and yes, and so the FLSA applies, as a matter of economic reality, under binding Supreme Court precedent.

III

THE COURT BELOW CORRECTLY REASONED THAT WEP WORKERS ARE "EMPLOYEES"

The Second Department, in concluding that the FLSA applied to Mr. Carver, relied heavily on *United States v. City of New York* (359 F3d 83 [2004] ["*City of NY*"].) That case "held that welfare recipients . . . who are obligated to participate in New York City's WEP program, are 'employees' within the meaning of Title VII of the Civil Rights Act of 1964." (*Carver,* 87 AD3d at 31, *citing City of NY* at 86.) *City of NY* reached that result based on a "functional commonsense

assessment" that is virtually the same as the Supreme Court's "economic reality" test (359 F3d at 92) (emphasis added):

> "The plaintiffs allege that they received cash payments and food stamps in return for their work for the city. Those payments equaled the minimum wage times the number of hours . . . worked. A plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her. Thus, each plaintiff had to work in order to receive . . . [full minimum-wage benefits]. *A functional commonsense assessment of the plaintiffs' alleged relationship with the city* results in the conclusion that they were employees."

The Second Department's decision follows *a fortiori* from the result reached in *City of NY*. The FLSA defines an "employee" in the same way as Title VII, as an "individual employed by an employer," (*Carver*, 87 AD3d at 29), but the FLSA, by defining "employ" to "include[e] to suffer or permit to work," gives the term "employee" even greater "breadth." (*Darden*, 503 US at 326.) As noted in *Elwell v. Weiss* (No. 03-CV-6121, 2007 WL 2994308, at *4 [WD NY Sep. 29, 2006]) "[t]he Second Circuit's analysis [of] . . . New York's WEP program [in *City of NY*] is every bit as applicable and compelling" with respect to the FLSA.

The Second Department also referred to the four-factor test of *Herman v. RSR Sec. Servs. Ltd.* (172 F3d 132, 139 [2d Cir 1999]), but that test has only been used in joint-employer cases, and has now been rejected as "unduly narrow" and incompatible "with the 'suffer or permit' language" of the FLSA (*Zheng v. Liberty Apparel Co.*, 355 F3d 61, 69 [2d Cir 2003]). In any event, Mr. Carver's characterization as an employee is also satisfied by the *Herman* test. The first

Herman factor is "the power to hire and fire the employees." HRA essentially hired Mr. Carver by offering him the opportunity to work as a janitor, at a specific level of compensation, which he accepted by reporting for work. This is, as a matter of economic reality, exactly what happens in every hiring situation. To get this job, Mr. Carver had to go through a typical hiring process that included providing extensive personal information, being fingerprinted, and taking a drug test (18 NYCRR § 351.2). HRA also had some discretion in offering him this position, since only 25% to 40% all public assistance recipients had to be engaged in "work activities" at that time (Soc. Serv. Law § 335-b [1] [a]).

HRA could also fire Mr. Carver, as it did when it terminated his position at the Hospital after two years and his job at the Ferry Terminal in 2000.[4] It could also cut his assistance for up to 180 days if he "qui[t] or reduce[d] his hours," or otherwise did not comply with applicable regulations (Soc. Serv. Law § 342).

The power to hire and fire is not an indispensable element of an employer-employee relationship. In *Rutherford* the meat-processing company was held to be a joint employer even though the supervising boner had the sole power to hire and

[4] While HRA may not have had the unfettered freedom to hire and fire, neither do private employers. Most union contracts, for example, sharply restrict the right to fire union members, but they are still "employees." (*See also* New York City Human Rights Law, NYC Admin. Code § 8-107 [a] ["It shall be an unlawful . . . practice . . . for an employer, . . . because of the actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, to refuse to hire or . . . to discharge . . . or . . . to discriminate against such person"].)

fire. In *Goldberg* the Court treated the right to set wages as the *de facto* equivalent of the power to hire, concluding that because "management fixes the piece rates at which they work" and "can expel them for substandard work or failure to follow the regulations," the cooperative "in other words, can hire and fire the homeworkers." (366 US at 33.) In *Alamo* the question of whether the associates were hired or just volunteered was not even considered, and in other cases it has not been mentioned as a significant factor (*See, e.g.*, *Zheng*, 355 F3d at 69; *Brock v. Superior Care, Inc.*, 840 F2d 1054, 1058-59 [2d Cir 1988]).

The other *Herman* factors are present here as well: HRA "(2) supervised and controlled employee work schedules [and] conditions of employment, (3) determined the rate and method of employment, and (4) maintained employment records." (172 F3d at 139.) As the State itself acknowledges, "[HRA] assigns individuals to work experience and other work activities and records information regarding work activity participation in the participant's case file" (A. 103 (Guinn aff, ¶ 7)). Additionally, HRA "determin[es] the scope of [his or her] particular . . . assignment, the functions and activities he [or she] perform[s] and the training and skills development he [or she] receive[s]" (A. 103 (Guinn aff, ¶ 8)). Thus regardless of what factors are deemed pertinent, the result is the same: Mr. Carver was an "employee."

IV

CONGRESS HAS RATIFIED THE UNITED STATES DEPARTMENT OF LABOR'S DETERMINATION THAT PUBLIC ASSISTANCE WORKERS ARE "EMPLOYEES" WITHIN THE MEANING OF THE FLSA

What clinched the case for the lower Court, quite properly, was the fact that the United States Department of Labor ("DOL"), "the [federal] agency charged with enforcing the FLSA" (*Carver*, 87 AD3d at 33) had "determined that '"[WEP] participants . . . would be covered by the [FLSA], which sets hour and wage standards"' (*id*. at 32) and its determination was then ratified by Congress.

In 1997, the year after PRWORA became law, the DOL issued a guidance letter entitled, "How Workplace Laws Apply to Welfare Recipients." (Daily Lab. Report 103, at E-3 [May 29, 1997].) The DOL Guidance undertook to spell out, in question-and-answer format, what federal worker-protection laws applied to public- assistance workers. The first question and answer stated (emphasis added):

> "Employment Laws
>
> 1. Do federal employment laws apply to welfare recipients participating in work activities under the new welfare law [the PRWORA] in the same manner they apply to other workers?
>
> *Yes. Federal employment laws, such as the Fair Labor Standards Act (FLSA)*, the Occupational Safety and Health Act (OSHA), Unemployment Insurance (UI), and anti-discrimination laws *apply to welfare recipients as they apply to other workers*. The new welfare law does not exempt welfare recipients from these laws."

The FLSA, as noted above, charges the DOL with the duty of administering and interpreting the FLSA, and so the DOL's interpretation of the FLSA is "entitled to considerable weight in construing the Act." (*Alamo*, 471 US at 297.)[5]

Moreover, Congress unambiguously ratified the DOL's position as to WEP workers when it adopted the Balanced Budget Act of 1997. The first version approved by the House, H.R. 2015, would have overturned the DOL Guidance by providing in sections 5004 and 9004 that public assistance is not "compensation for work performed." H.R. 2015 was passed (143 Cong Rec H4606 [daily ed. June 25, 1997]) over the protests of several Representatives who objected that "[u]nder the bill before us today, welfare recipients who are forced to go to work in public service agencies . . . will not be protected under . . . the Fair Labor Standards Act." (Remarks of Patsy Mink, 143 Cong Rec at H4575).

The Senate's version of H.R. 2015, passed the same day, replaced all of its provisions with the provisions of S. 947, which did not try to deny WEP workers the protections of the FLSA (*Id*. at S6144-45). When these competing proposals came before a joint Conference Committee, the House instructed its conferees, by a vote of 414 to 14, to "reject the provisions contained in sections 5004 and 9004

[5] The FLSA provides for the creation of a Wages and Hours Division within the DOL, under the direction of an Administrator appointed by the President, to take responsibility for ensuring compliance with the FLSA. It authorizes the Secretary of Labor to enforce the FLSA's provisions in court and to issue regulations and orders in various circumstances. The DOL has issued over 600 pages of regulations construing the FLSA (*See* 29 CFR Parts 510-80, 775-94).

of the bill, as passed by the House." (*Id*. at H5031 [text of motion]; Roll No. 257, *id*. at H5039 [vote] [daily ed. July 10, 1997].) Representative Clay explained that the intent was to instruct "the conferees that [WEP] recipients are worthy of the same dignity and equal protection afforded other workers." (*Id*. at H5036.) Accordingly, the final version of the law, passed by both houses of Congress and signed into law on August 5, 1997, as the Balanced Budget Act of 1997, Pub. Law 105-33, no longer contained the provision that would have stripped welfare beneficiaries of their rights under the FLSA.

The Conference Report (HR Rep No. 105-217, at 934 [1997] [emphasis added]) leaves no doubt that Congress made a considered and deliberate decision to accept the DOL Guidance as a definitive statement of the law:

> "*Workfare Rules for Community Service and Work Experience Programs*
>
> *Current Law*
>
> States may establish work experience and community service programs in which TANF recipients may be required to work as a condition of receiving their grant. These programs are often called "workfare." *The Department of Labor has held that workfare participants may be considered "employees" and thus would be covered by the Fair Labor Standards Act (FLSA)*, which sets wage and hour standards . . . .
>
> House Bill
>
> Work experience and community service programs are designed to improve the employability of participants through actual work experience or training . . . . Participants engaged in work experience and community service programs are not entitled to a

salary or work or training expenses and are not entitled to any other compensation for work performed.

Senate Amendment

No provision.

Conference Agreement

The conference agreement follows the Senate amendment (no provision)."

Thus Congress, with full awareness of the DOL Guideline, chose to endorse the DOL's interpretation of the FLSA by squarely rejecting an attempt to reverse it. This case is like *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC* (478 US 421 [1986]) where Congress, in amending Title VII, rejected two attempts to reverse executive interpretations of the law. In these circumstances the Court concluded that "'executive, judicial and congressional action subsequent to the passage of [the statute] *conclusively established*'" that the executive branch's interpretation of the law was correct (*Id*. at 470 [quoting *Regents of Univ. of California v. Bakke*, 438 US 265, 353 n 28 [1978] [emphasis added].) Congress expressly accepted the DOL Guideline as "Current Law" and rejected an effort to change that law, so its deliberate choice is equally "conclusiv[e]." (*See North Haven Bd. of Educ. v. Bell*, 456 US 512, 529 [1982] ["[D]eletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact'"]; *United States v. Rutherford*, 442 US 544, 554 n 10 [1979] ["[O]nce an agency's statutory construction has been 'fully

brought to the attention of the public and the Congress,' and the latter has not sought to overturn that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned"].)

V

APPELLANTS' ARGUMENTS RELY ON FACTORS AND CONSIDERATIONS THAT ARE NOT DISPOSITIVE

The State's position does not give sufficient weight to the FLSA's plain terms or properly apply the Supreme Court's "economic reality" test.

The State contends that WEP workers are not "employees" because the fundamental purpose of the "State's work-activity requirement" is not to get work done, but "to help public-assistance recipients 'develop basic skills needed to enter the private sector work force.'" (Appellants' Brief at 20, quoting from Governor's Approval Mem., reprinted in Bill Jacket for Ch. 81, at 11 [1995].) The employer's ultimate objectives, however, are not factored into the "economic reality" test. In *Alamo*, for example, the Foundation argued that its use of associates was "infused with a religious purpose" of "providing [them] rehabilitation" and that its "businesses function as 'churches in disguise' . . . for preaching and spreading the gospel," (471 US at 298-99) but the Court gave no weight to this argument.

The State also urges that WEP workers cannot be employees because their assistance depends on "economic need," measured by "specific household expenses," and on "household size," rather than on the type of work done, the

workers' skill, or other factors (Appellants' Brief at 21). There is no reason, however, why the formula used to set a worker's pay should affect whether he or she is an "employee." If a company chose to pay workers with children, *e.g.*, more than other employees, the others would still be "employees" entitled to a minimum wage. Indeed, many companies do exactly that by providing subsidized family health insurance, paid pregnancy leave, and college scholarships for children, *etc.* that effectively give parents significantly better benefits than single workers.

In the *Alamo* case associates were compensated entirely in kind, with "food, clothing, shelter, and [medical and] other benefits," (471 US at 292) so their compensation had to be based entirely on need, but the Supreme Court had no trouble finding that they were "employees," noting that "[t]hese benefits are . . . [merely] wages in another form" and "[t]he Act defines 'wage' [in section 203(m)] as including board, food, lodging and similar benefits." (*Id*. at 301 and n 23.) What mattered was that, like Mr. Carver, the associates "must have expected to receive in-kind benefits in exchange for services," and were entirely dependent on such benefits, often for long periods of time (471 US at 301).

The State also argues that WEP workers were not employees of HRA because the assistance was beyond HRA's control, having been fixed by statute. Subdivision (2) (b) of Soc. Serv. Law §336-c, however, simply states that "the number of hours a participant . . . shall be required to work . . . *shall not exceed*"

(emphasis added) the number sufficient to provide a minimum wage. The statute does not preclude HRA from paying a higher hourly wage by setting shorter hours. HRA may not do this, but that is no different from the many private-sector employers who opt to pay the minimum.

In addition, the FLSA recognizes that an employee can have more than one person or entity as an "employer." In *Rutherford*, the Court found that Kaiser, the meat-processing company, was jointly responsible as an employer of the boners, even though the company had delegated to the chief boner the right to hire and fire the other boners, set their individual wages and supervise their work. The Court relied on evidence that Kaiser determined the total amount paid to the boners as a group and controlled some aspects of their employment (331 US at 724-28, 731). Likewise in this case the State qualifies as a joint employer of WEP workers because of the control it retains over their pay and other aspects of the program. Indeed, the trial Court concluded that "it is OTDA and New York State who would be considered [the] employer." (A. 9 (*Carver*, Kings County, August 8, 2014, at *7)) (*See, e.g., Barfield v. New York City Health & Hosp. Corp.*, 537 F3d 132 [2d Cir 2008] [Hospital and employment agency were joint employers of nurse]; *Antenor v. D & S Farms*, 88 F3d 925 [11th Cir 1996] [Farm owners who exercised some control over farmworkers were joint employers with labor subcontractor].)

The State also suggests that Mr. Carver worked only twenty-one hours a week, not thirty-five, and so must have been receiving training the rest of the time, but the point of this argument is unclear. Even if Mr. Carver only worked part-time, he was still entitled to be paid a minimum wage. Moreover, there is nothing in the record to support this theory. Mr. Carver's verified petition and affidavit establish that he "worked at least thirty-five . . . hours a week" for seven years (A. 46 (Carver Petition, ¶ 43)) and "was never given any vocational training" or "any classes" (A. 82 (Carver aff, ¶ 5, 6, 8, 9)) until his work assignments ended. The State offered no evidence as to Mr. Carver's hours worked or the value of food stamps he received. The trial Court ruled that, because the State could have gotten such information from HRA, either "voluntarily or . . . [by] subpoena[]," (A. 9 (*Carver*, Kings County, August 8, 2014, at *7)) "Respondents [had had the] . . . opportunity to furnish evidence that would contradict Mr. Carver's claim" but had failed to do so (A. 10 (*Carver*, Kings County, August 8, 2014, at *8). This appeal should accordingly be decided on only the record below.

The State asserts that two provisions of PRWORA (42 USC § 608 [c], [d]) support its position, but neither section precludes a finding that WEP workers are "employees." Section 608 (d) states that "[t]he following provisions of law shall apply to any activity or program which receives funds provided under this part: (1) the Age Discrimination Act of 1975 . . .[;] (2) Section 504 of the Rehabilitation

Act of 1973 . . .[;] (3) the Americans with Disabilities Act of 1990 [; and] (4) Title VI of the Civil Rights Act of 1964." The State contends that the failure to mention the FLSA proves that it is inapplicable, but this argument is belied by the title of section 608 (d), which is "Nondiscrimination provisions." As the Second Circuit found in the *City of NY* case (359 F3d at 98) this section was never meant as an all-inclusive compendium of every federal statute that protects WEP workers, but only as a guide to those "that forbid *discrimination* in programs or activities receiving federal assistance" (emphasis added).

Section 608 (c) states that "[a] penalty imposed by a State against the family of an individual by reason of the failure of the individual to comply with a requirement under the State program funded under this part shall not be construed to be a reduction in any wage paid to the individual." The key to understanding this section, though, is to focus on what it does *not* say. Congress could have said that WEP workers' benefits are *never* wages, but it did not. Section 608 (c) just deals with the narrow situation where members of a WEP worker's "family" are penalized by losing benefits because of what the WEP worker does. Indeed, this section is only there because Congress *did* intend the FLSA to apply to WEP workers, and so had to override its minimum-wage guarantees in this limited situation (*See City of NY*, 359 F3d at 96 ["Section 608(c) does not say that

plaintiffs' benefits are not wages, and . . . only makes sense if the opposite is true"].)

The State also relies on language in state laws and regulations and the City's Employment Process Manual, such as a state regulation stating that "the monetary grant . . . [for] participating in work-experience activities is not 'a wage for the performance of such activities.' 18 N.Y.C.R.R. § 385.9(a)(4)" (Appellants' Brief at 24). Such state-law provisions, however, cannot override the FLSA. "Under the Supremacy Clause of the United States Constitution, federal laws 'shall be the Supreme Law of the Land' (U.S. Const., art. VI, cl. 2) and Congress is vested with authority to supersede state statutory or regulatory law [citation omitted]." (*State ex rel. Grupp v. DHL Exp. (USA), Inc.*, 19 NY3d 278, 283 [2012].) To the extent that provisions of the SSL, state regulations, or City manuals come into "irreconcilable conflict" with governing provisions of the FLSA, they are preempted and must be disregarded (*People v. Applied Card Sys., Inc.*, 11 NY3d 105, 113 [2008]).

HRA may also not practice income-tax withholding, but employers who dispute that their workers are "employees" often do not withhold, and this proves nothing (*See, e.g., Helmer v. Brandano,* 875 F2d 318 [9th Cir 1989] ["Plaintiff was an employee for purposes of the FLSA" although defendant "was not withholding"]; *Brock*, 840 F2d at 1057-58, 1059, 1061 [Nurses for whom taxes

were not withheld were "employees"]; *Zheng*, 355 F3d at 70 n 7 [Boners in *Rutherford* were employees although no taxes were withheld]).

Defendants also contend that the right of WEP workers to workers' compensation benefits "has little if any significance" (Reply Br. at 6) because New York's Workers Compensation Law ("WCL") applies to volunteers as well as employees, but this argument overlooks the limited circumstances in which volunteers are covered. Under subdivision 1 of WCL § 3, Group 16, a department of the State, with proper written approval, can "accept . . . the services of a volunteer worker," who will then be "deemed to be an employee" for purposes of the WCL. The State has taken advantage of this option by extending coverage "to all volunteer workers donating their services to the state." (9 NYCRR § 141.0.)[6] Mr. Carver, though, was no volunteer. He worked because he had to, for cash and other assistance. Workers compensation coverage applies basically to employees, plus those volunteers formally "deemed to be" employees, and as Mr. Carver was not a volunteer, he was necessarily covered in his capacity as an employee.

In addition, the cases cited by the State reflect that New York courts have long recognized that both WEP and volunteer labor have monetary value, and this value must be considered when determining an injured worker's compensation

[6] Group 17 authorizes coverage of a few additional categories of municipal volunteers, mostly those involved in potentially hazardous activities such as civil defense workers, auxiliary police and firefighters, and members of rescue squads.

benefits (*Maiceo v. City of Yonkers*, 263 AD 914 [3rd Dept], *aff'd*, 288 NY 689 [1942]; *Gianvecchio v. NYS Newark State School*, 19 AD2d 760, 761 [3rd Dept 1963]). In New York, the value of an injured volunteer's work—"whose earnings were zero"—is measured "'by the wages of those similarly employed . . . by the employer . . . or by other similar institutions'" when determining workers' compensation benefits (*Gast v. Ozanam Hall of Queens*, 259 AD2d 862, 862-63 [3rd Dept 1999], citing *Gianvecchio*, 19 AD2d at 761). Similarly, in this case, the Second Department ruled that the value of Mr. Carver's work at the Ferry Terminal ("whose earnings were zero") should be measured by the federal minimum wage rate (*Carver*, 87 AD3d at 33). This decision should be upheld.[7]

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[7] The other cases cited by the State have little relevance to the issues on this appeal. The State cites *Brown v. New York City Dep't of Educ.* (755 F3d 154 [2d Cir 2014]), but it concerned a volunteer school mentor who later sought minimum wages and overtime for his efforts. The FLSA has a specific exclusion for individuals who volunteer their services to public agencies (29 USC § 203 [e] [4] [A]) where the volunteer is motivated by "civic, charitable, or humanitarian reasons." (29 CFR § 553.101 [a].) This exclusion has no application to Carver's situation. *Hofricter v. North Shore Cmty. Hosp.* (279 AD 649, 650 [2nd Dept 2000]) concerned whether a volunteer nurse was covered by worker's compensation, precluding a common-law claim, when she fell in the hospital parking lot during her lunch break. *Corp v. State* (257 AD2d 742, 743 [3rd Dept 1999]) involved a volunteer injured at the Empire State Games and who sought common law damages "because she was unaware of the availability of workers' compensation benefits and . . . did not complete a volunteer registration form." In *Goodarzi v. City of New York* (217 AD2d 683, 684-85 [2d Dept 1995]), the Court simply held that an injured volunteer who had "signed an agreement to pursue Workers' Compensation benefits" but then abandoned his workers' compensation claim could not also sue for common-law damages.

The State contends that that the exclusion of WEP workers from the protection of the FLSA would not cause "the type of harm that Congress sought to prevent when it enacted" the statute (Reply Brief at 20), but this misreads the congressional intent. "The principal congressional purpose in enacting the [FLSA] was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being or workers.'" (*Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 US 728, 739 [1981], *quoting from* 29 USC § 201 [a].) It follows that the statute was adopted to protect workers, not businesses injured by low-wage competitors.

In any case, the State's argument that it derives no "competitive advantage" from WEP workers (Reply Brief at 21) is cast into doubt by the facts. In April 1998 (during the time period involved in this case) the City had over 34,000 WEP workers (*See* Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, NY Times, Apr. 13, 1998, at A1). According to the Times, it was "clear that many [WEP] participants have taken the place of city workers[,] . . . doing much of the work once performed by departed city employees, [and] in many instances, . . . doing the same work as current ones." (*Id.*) For example, from 1994 to 1998, the City Parks Department's regular maintenance staff fell

40%, with "[t]he void . . . filled by more than 6,000 workfare participants, who rake leaves, pick up trash and do other tasks." (*Id.*)

State law does bar the use of WEP workers if that would "result in the displacement of any currently employed worker." (Soc. Serv. Law § 336-c [2] [e].) The FLSA, however, is concerned with economic reality, not with what is supposed to happen. It would be practically impossible for the City to employ 34,000 public assistance recipients, in work that "serves a useful public purpose," (*id.* at § 336-c [2] [d]) without eliminating many better-paying jobs. Somebody must have delivered the mail and swept the Ferry Terminal before Mr. Carver arrived. To the extent that low-paid WEP workers cause more unemployment, moreover, that "would be likely to exert a general downward pressure on wages in competing businesses," (*Alamo*, 471 US at 302) a problem the FLSA was intended to address.

It also seems significant that Soc. Serv. Law § 336 allows WEP workers to be placed in "unsubsidized employment," "subsidized private sector employment [and] . . . public sector employment," as well as "work experience" programs (*see also* A. 160 (affirmation of respondents-appellants' counsel at 2)). What is the difference between the first three options, which are explicitly described as "employment," and the fourth, which is called "work experience?" It appears to be merely one of terminology, not economic reality.

Indeed, while the State considers the roles of WEP workers and employees to be fundamentally incompatible, there is no logical basis for this view. In *City of NY*, the Court rejected as an "artificial dichotomy" the notion that "one must be either a welfare recipient or an employee and cannot be both." (359 F3d at 94.) (*See also Brock*, 840 F2d at 1059 ["[A]n employer's self-serving label [for] workers . . . is not controlling"].) Similar dual roles co-exist in many contexts. In *Goldberg*, where the cooperative members were also co-owners, the Court found "nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship," (366 US at 32) or between being a shareholder and corporate employee. One can be both a religious volunteer and an employee (*Alamo*, 471 US at 302), a volunteer firefighter and an employee (*Mendel v. City of Gibralter*, 727 F3d 565 [6th Cir 2013]), or a prisoner and an employee (*Carter v. Dutchess Community College*, 735 F2d 8, 14 [2d Cir 1978] [Inmate was teaching assistant for class offered in prison]). Recognizing that workers may function in more than one capacity lets the focus remain on the economic reality of each situation without giving undue weight to titles or terminology.

VI

THE *BRUKHMAN* AND *JOHNS* CASES RELIED ON BY THE STATE ARE NOT DISPOSITIVE

The State relies heavily on *Brukhman v. Giuliani* (94 NY2d 387 [2000]) but that case involved New York's prevailing-wage law, not the minimum-wage provisions of the FLSA, and so is not controlling here.

The *Brukhman* case involved article I, section 17 of the New York Constitution, which provides that "[n]o laborer, worker or mechanic, *in the employ of a contractor or subcontractor engaged in the performance of any public work . . .* shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the [relevant] locality" (emphasis added). The Court held that section 17 did not cover WEP workers because (1) the City agencies and other places where plaintiffs worked "are not 'contractors or subcontractors'" and (2) the term "public work" applies solely to construction projects (*id*. at 393). The Court narrowly restricted its holding. (*Id*. at 397 ["Notably, however, we decide no more than is before us and leave other facets and potential challenges to the statutory reform measure for some other day and another case, should one be undertaken."])

In the context of its narrow holding, the Court discussed the term "employ" in the constitutional phrase, "in the employ of a contractor or subcontractor," but that term is not defined in section 17. The term "employ" is defined in FLSA § 203 (g), by contrast, to "include[e] to suffer or permit to work." The Supreme

Court has held that this definition gives the term "employee" a much broader scope in the FLSA than in other contexts, to include many persons "who might not qualify as [employees] under" other statutes. (*Darden*, 503 US at 326; *see Rosenwasser*, 323 US at 362 ["[A] broader or more comprehensive coverage of employees . . . would be difficult to frame."].) The term "employee" in the FLSA is also subject to the Supreme Court's "economic reality" test, which does not apply to section 17, and Congress has accepted a DOL finding that the FLSA applies to WEP workers. In these circumstances *Brukhman* is not controlling, or even apposite.

Johns v. Stewart (57 F3d 1544, 1550 [10th Cir 1995]) which is also relied on by the State, dealt with two Utah state programs that provided "temporary cash assistance" to persons who had applied for federal Supplemental Security Income ("SSI"). The Utah programs required beneficiaries to "participat[e] in a broad range of adult education, short-term skills training, community work and job search activities," (*id*.), not just work. Utah settled with the plaintiffs prior to the appeal (*id*. at 1551 and n 13) and the Court also held that the State could recover under a separate provision of federal law (42 USC § 1383 [g] [3]; *id*. at 1556) that related to "interim assistance," so its remarks concerning the FLSA were *dictum*.

The *Johns* case was decided before PRWORA became law in 1996, so the Court did not have the benefit of the DOL's view that workfare was covered by the

FLSA and was not bound by Congress' ratification of the DOL's position. The *Johns* Court also refused to read "literally" the FLSA's broad definition of "employ" (*id*. at 1557) even though two pages earlier it had cited *Perrin v. United States* (444 US 37, 42 [1979]) for the "'fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary meaning.'" (*Id*. at 1555.) *Johns* has also been distinguished on other grounds as well. (*See Carver*, 87 AD3d at 32, citing *City of NY*, 359 F3d at 94.)

Johns also focused on relatively unimportant factors, as opposed to those that are central to the Supreme Court's economic reality test. The *Johns* Court noted, for example, that plaintiffs "apply for public assistance, not for a state job," (*id*.) but what counts is that, like any employee, they apply for an opportunity to work, are paid for their work and are dependent on that pay, often for a long time. *Johns* deemed it significant that recipients of temporary assistance "receive[d] their . . . checks" from a different source than "the state payroll," (*id*. at 1558) but this seems like a technicality. The Court stated that participants in Utah's programs were not entitled to safe working conditions, but under subdivision 2 (a) of Soc. Serv. Law § 336-c, New York WEP workers are protected by "federal and state standards of health, safety and other work conditions." While the *Johns* plaintiffs did "not receive the same . . . job security, career development, . . . , pension rights,

collective bargaining or grievance procedures" as other Utah state workers (*id*. at 1559, quoting from *Klaips v. Bergland*, 715 F2d 477, 483 [10th Cir 1983]), millions of other workers are also denied such advantages, which should not mean that they can also be denied a minimum wage. Participants were not paid "the same salary" as other state employees (*id*.), but if that were a factor, the FLSA would be a nullity. Because *Johns* focused on these factors, rather than the considerations deemed important by the Supreme Court in cases such as *Alamo*, *Goldberg* and *Rutherford*, it cannot serve as a reliable guide in applying the FLSA's provisions to this case.

VII

THIS COURT'S DECISION WILL HAVE RAMIFICATIONS BEYOND THE NARROW CONTEXT OF LOTTERY WINNINGS

While lottery winners are rare, this case decision will have a much broader impact. As the State's Brief points out (at 10-11), Soc. Serv. Law § 131-r is only one of several statutes that empower the State to seize funds from former public-assistance beneficiaries (*See also* Brief for Respondent, at 2-3 and n 2). In fact, the State can seize any sort of "real or personal property" that comes into the hands of a former WEP worker (Soc. Serv. Law § 104). In the *Elwell* case, the State even tried to seize a former WEP worker's federal disability benefits.

This Court's ruling will also establish whether WEP workers are protected by other sections of the FLSA such as its restrictions on child labor (FLSA §§ 203

[l]; 212),[8] and its provisions empowering the Secretary of Labor to enforce workers' rights (*id*. §§ 216; 217). A ruling that WEP workers are or are not FLSA "employees" will also have implications as to whether they qualify as "employees" under other federal statutes such as OSHA, which governs workplace safety.

Conclusion

The plain language of the FLSA and the "economic reality" test endorsed by the Supreme Court both compel the conclusion that WEP workers are "employees" entitled to a federal minimum wage. The ratification by Congress of the DOL's interpretation of the law leads ineluctably to the same result. Regardless of what nomenclature is used to describe them, WEP workers such as Mr. Carver are clearly "employees," as a matter of economic reality, for purposes of the FLSA.

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Respectfully submitted,

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[8] The FLSA's child-labor provisions apply to children under the age of eighteen. Under subdivision (1) (b) of Soc. Serv. Law § 332, children under sixteen cannot be made to participate in WEP work programs.

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