The Roof Is on Fire: Dangers to the Volunteer Emergency Services After *Mendel v. City of Gibraltar*

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"[W]hen the experts panic, they call the fire department."

-Harvey Eisner, FDNY[1]

I. INTRODUCTION

The idea of the emergency responder is deeply rooted in American culture.[2] As shown in the prevalence of emergency responders in popular culture, the American cultural consciousness of emergency responders runs so deep that it has been called a modern re-cast of a classical archetype, typifying the "American Hero."[3] But what is not well known is that just over 800,000 (70%) of the more than 1.1 million firefighters[4] and 49% of the 826,111 credentialed emergency medical responders at the EMT-Basic level are volunteers.[5]

These volunteers are critical to our communities. However, recent court decisions threaten the stability of the volunteer fire departments that they work for. In *Mendel v. City of Gibraltar*, the Sixth Circuit Court of Appeals held that because volunteer firefighters were paid an

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1. Harvey Eisner, *Editorial: The Smoke is Clearing . . .*, FIREHOUSE (June 1, 2002), http://www.firehouse.com/news/10545325/editorial-the-smoke-is-clearing.

2. *See generally* SUSAN J. ELLIS & KATHERINE H. CAMPBELL, BY THE PEOPLE: A HISTORY OF AMERICANS AS VOLUNTEERS (1st ed. 1978).

3. SUSAN FALUDI, THE TERROR DREAM: FEAR AND FANTASY IN POST-911 AMERICA 84–89 (2007).

4. HYLTON J.G. HAYNES & GARY P. STEIN, NAT'L FIRE PROT. ASS'N, U.S. FIRE DEPARTMENT PROFILE – 2015, at 5 (2017), https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics/Fire-service/osfdprofile.pdf.

5. GREG MEARS ET AL., FED. INTERAGENCY COMM. FOR EMERGENCY MED. SERVS., 2011 NATIONAL EMS ASSESSMENT 89, 106 (2012), https://www.ems.gov/pdf/2011/National_EMS_Assessment_Final_Draft_12202011.pdf.

hourly wage while responding to emergencies, they were not "volunteers" under the Fair Labor Standards Act (the "FLSA") and thus potentially owed wages for time spent in furtherance of their department.[6] The few cases involving volunteer emergency responders since *Mendel* have cited to it favorably,[7] leading many observers to caution that providing benefits to volunteer emergency responders could re-classify them as employees, triggering fears of potential liability for volunteer departments across America.[8]

This is a dangerous precedent. Volunteerism rates in the emergency services have dropped steadily, with the number of volunteer firefighters per 100,000 Americans declining 28% from 1984 to 2003.[9] In response, departments around the country have proposed or provided more incentives to gain and retain volunteer responders, such as tax breaks,[10] reduced utility bills,[11] and retirement fund contributions,[12] along with tax credits and online classes.[13] The more these benefits increase, the more a position as a volunteer responder looks like standard employment to courts interpreting the FLSA. And the effect of transforming a volunteer

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6. Mendel v. City of Gibraltar, 727 F.3d 565, 572 (6th Cir. 2013).

7. *See* Martinez v. Ehrenberg Fire Dist., No. CV-14-00299-PHX-DGC, 2015 U.S. Dist. LEXIS 73832, at *1 (D. Ariz. June 8, 2015); Borough of Emmaus v. Pa. Labor Relations Bd., 156 A.3d 384, 392 (Pa. Commw. Ct. 2017).

8. *See, e.g.*, STACY E. CRABTREE, HEYL, ROYSTER, VOELKER & ALLEN, LIABILITY OF GOVERNMENT AGENCIES TO VOLUNTEERS FOR WAGES AND INJURIES B-5 (2015), http://www.heylroyster.com/_data/files/Seminar%202015/Heyl%20Royster%20Fall%202015%20Claims%20Handling%20Seminar%20Materials%20-%20Section%20B.pdf; Phyllis Katz, *Caution: Payments to Volunteers Can Lead to Trouble*, VA. LOCALITY L. (Jan. 15, 2014), http://valocalitylaw.com/2014/01/15/caution-payments-to-volunteers-can-lead-to-trouble/; *Certain Volunteers May Be Employees Under the Fair Labor Standards Act and Family Medical Leave Act*, MIKA MEYERS PLC (Dec. 10, 2013), https://www.mikameyers.com/news/article/certain-volunteers-may-be-employees-under-the-fair-labor-standards-act-and-family-medical-leave-act.

9. SUSAN A. CHAPMAN ET AL., EMS WORKFORCE FOR THE 21ST CENTURY: A NATIONAL ASSESSMENT 60 (2008), https://www.ems.gov/pdf/research/Studies-and-Reports/National_Workforce_Assessment.pdf.

10. John Rather, *Emergency Workers Will Get Tax Breaks*, N.Y. TIMES (Sept. 29, 2002), http://www.nytimes.com/2002/09/29/nyregion/emergency-workers-will-get-tax- breaks.html?mcubz=3.

11. H.B. 698, 201st Gen. Assemb., Reg. Sess. (Pa. 2017), http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=H&billTyp=B&billNbr=0698&pn=0749; *see also* Greg Barton, *Measure Help Pay Basic Utilities for Volunteer Fire Companies*, WDAC (Mar. 6, 2017), https://www.wdac.com/2017/03/06/measure-help-pay-basic-utilities-for-volunteer-fire-companies/.

12. *Incentives for Volunteers*, ROCKWALL FIRE DEP'T, http://www.rockwall.com/documents/fire/VolunteerIncentives.pdf (last visited Apr. 7, 2018).

13. Tyler Langan, *Low Pay Creates 'Revolving Door' for Firefighters in Lake Country*, J. SENTINEL, http://www.jsonline.com/story/communities/lake-country/news/2017/08/29/low-pay-creates-revolving-door-firefighters-lake-country/581102001/ (last visited Apr. 7, 2018).

department to a full-time department can cause significant increases in property taxes. One study of New York counties found that on average, transitioning away from a volunteer department would require raising property taxes by 26.5%, with some communities requiring property tax increases of over 70%.[14]

This need not be the case. Because the fundamental purpose of volunteer emergency services is to provide critical care to their community members and not to make a living, courts have misinterpreted various provisions of the FLSA to apply to volunteer emergency services technicians. To remedy these misinterpretations, courts should recognize the congressional intent of the FLSA exceptions to public agency volunteers and follow the Department of Labor's (the "DOL") guidance on how to classify these workers. Specifically, courts should adopt the DOL's recommended standard that workers are not receiving significant remuneration if they receive less than 20% of the pay of their full-time counterparts. Courts should also apply this 20% test to the annual wage of the worker instead of engaging in an hourly wage analysis.

Section II of this Comment will discuss the history and development of the volunteer emergency services. Section III will discuss the history and development of the Fair Labor Standards Act, as well as various judicially created tests used to interpret and apply the FLSA to volunteers. Section IV will overview *Mendel v. City of Gibraltar* and its potential impact on volunteer services, and Section V will present the proper test courts should use to make the analysis of whether these workers are "employees" under the FLSA.

II. HISTORY AND EVOLUTION OF THE EMERGENCY SERVICES

The history of volunteer emergency services is fundamental to understanding why courts like the one in *Mendel* misunderstand the nature of this American tradition. Volunteer emergency responders—both firefighters and emergency medical services technicians—make up most of the emergency responders in the United States.[15] These services provide the same quality of care as full-time responders and do so for a

14. FIREMEN'S ASS'N OF THE STATE OF N.Y., TAX SAVINGS AND ECONOMIC VALUE OF VOLUNTEER FIREFIGHTERS IN NEW YORK 3 (2015) [N.Y. REPORT], http://www.fasny.com/pdfs/VFEconomicImpactStudy.pdf.

15. *See supra* notes 4–5 and accompanying text.

fraction of the cost—and they've provided these services for as long as these services have existed.[16]

A. History of Firefighting

The history of volunteer emergency services is the history of all emergency services. The first emergency services in America were volunteer firefighting companies.[17] In 1648, after a major fire swept through the city, Governor Peter Stuyvesant of New Amsterdam (now the state of New York) appointed four men to act as volunteer fire wardens, whose job was to inspect chimneys for signs of neglect.[18] He also appointed citizens to the "Rattle Watch," or volunteer teams that patrolled the streets at night carrying large wooden rattles, spinning the rattles if a fire was seen.[19] If a rattle was spun, the community knew to form "bucket brigades," or lines of people from a source of water to the fire to expedite the process of getting buckets of water to the fire.[20]

The first municipal fire departments in America were also volunteer departments. In 1678, Boston appointed thirteen men and constructed a fire engine—a wooden sled with a hand-powered pump—to respond to fires throughout the city.[21] These men were only paid per call to service, and kept other careers.[22] However, in 1711 a massive fire swept through the town, destroying over 100 buildings.[23]

The answer to addressing the growing risk of fire outbreaks in colonial America without inflating taxes was increased volunteerism. The Union Fire Company was founded in 1736 in Philadelphia by Benjamin Franklin,[24] and set out written procedures for fire responses, included mandatory training regimens, and standardized gear, and

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16. *See infra* notes 35–43 and accompanying text.

17. DENNIS SMITH, DENNIS SMITH'S HISTORY OF FIREFIGHTING IN AMERICA: 300 YEARS OF COURAGE 11–12 (1978).

18. Craig Collins, *The Heritage and Evolution of America's Volunteer Fire Service*, *in* NATIONAL VOLUNTEER FIRE COUNCIL, A PROUD TRADITION: 275 YEARS OF THE AMERICAN VOLUNTEER FIRE SERVICE 10 (Chuck Oldham et al. eds., 2012), https://www.nvfc.org/wp-content/uploads/2015/10/Anniversary_Publication.pdf.

19. *Id.*

20. *Id.*

21. *Id.* at 10–11.

22. *Id.* at 11–12.

23. *Id.* at 11.

24. JOYCE CHAPLIN, THE FIRST SCIENTIFIC AMERICAN: BENJAMIN FRANKLIN AND THE PURSUIT OF GENIUS 81 (2007).

equipment use.[25] This volunteer organization was so successful that its model was widely copied and replicated.[26] Because of the success of volunteer departments, full-time fire departments did not exist in America until 1853.[27]

Even today, volunteer firefighting is the norm. Just over 70% of all registered fire departments are volunteer departments.[28] Of the nearly 30,000 fire departments across America, only 2,651 do not use volunteer firefighters.[29] Ninety-five percent of volunteer firefighters work in communities with a population smaller than 25,000.[30]

This makes protecting the practice of volunteer firefighting critical. Any legal changes in how these organizations are classified or regulated has a phenomenal nationwide impact: over half of Americans live in communities with less than 25,000 residents.[31] Volunteer firefighting rates are down across the nation, resulting in a 171% increase in local firefighting costs since 1980, adjusted for inflation.[32] Additionally, these smaller communities have seen an increase in poverty since 2008,[33] likely resulting in a lower tax base for many communities. Any changes that would remove volunteer firefighting services would need to be replaced with paid services—so any such changes would further stress these already strained small-community budgets.[34]

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25. *See* Benjamin Franklin, *Articles of the Union Fire Company, 7 December 1736*, *in* 2 THE PAPERS OF BENJAMIN FRANKLIN, JANUARY 1, 1735, THROUGH DECEMBER 31, 1744, at 150–54 (Leonard W. Labaree ed., 1961), *reprinted*, NAT'L ARCHIVES: FOUNDERS ONLINE (Feb. 1, 2018), http://founders.archives.gov/documents/Franklin/01-02-02-0024.

26. Jessica Choppin Roney, *"Ready to Act in Defiance of Government": Colonial Philadelphia Voluntary Culture and the Defense Association of 1747-1748*, 8 EARLY AM. STUD. 358, 365 (2010) (discussing the fire companies modeled after the Union Fire Company).

27. *See* H.R. Res. 1419, 111th Cong. (2010) (celebrating the 100th anniversary of the Ohio Fire Chiefs' Association and commending the Association on its century of service to the State of Ohio).

28. *National Fire Department Registry Quick Facts*, U.S. FIRE ADMIN. [hereinafter *National Fire Registry*], https://apps.usfa.fema.gov/registry/summary (last updated Apr. 11, 2018).

29. HAYNES & STEIN, *supra* note 4, at 22.

30. *Id.* at 3.

31. Wendell Cox, *America is More Small Town than We Think*, NEW GEOGRAPHY (Sept. 10, 2008), http://www.newgeography.com/content/00242-america-more-small-town-we-think.

32. JOHN R. HALL, JR., NAT'L FIRE PROT. ASS'N, THE TOTAL COST OF FIRE IN THE UNITED STATES 30 (2012), https://www.nfpa.org/-/media/Files/News-and-Research/Fire-statistics/Economic-impact/ostotalcost.pdf.

33. *Poverty Overview*, U.S. DEP'T OF AGRIC. (Oct. 25, 2017), https://www.ers.usda.gov/topics/rural-economy-population/rural-poverty-well-being/poverty-overview.aspx.

34. *See* N.Y. REPORT, *supra* note 14, at 1–3.

B. History of the Emergency Medical Services

The emergency medical services also began as volunteer endeavors. The first recognized American ambulance service began during the Revolutionary War.[35] Responding to battlefield injuries, George Washington tasked his Hospital Department Director General to organize "flying hospitals" to accompany the colonial army.[36] These "flying hospitals" utilized horse-drawn wagons and carriages to collect injured soldiers and provide emergency care while the soldiers were transported to a nearby triage center.[37] This early form framework for ambulance services became the norm for the American military forces during the Civil War, but was not utilized in any civilian hospitals.[38]

Commercial Hospital was the first civilian ambulance service—and it was also largely volunteer.[39] Founded in Cincinnati in 1820, Commercial Hospital established its first general ambulance services for the public in 1865. Commercial Hospital's ambulance service responded to medical emergencies across the city, with ambulance drivers earning far below the amount needed to support themselves by that job alone: roughly $5,000 a year in 2018 dollars.[40]

A few years later, Edward Dalton, a former United States army surgeon, founded an ambulance service at Bellevue Hospital in New York.[41] Bellevue Hospital employed horse-drawn carriages with a moveable floor that could be used to receive and remove patients.[42] More importantly, the staff responding on these vehicles in some cases merely consisted of interns.[43]

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35. VINCENT D. ROBBINS, A HISTORY OF EMERGENCY MEDICAL SERVICES & MEDICAL TRANSPORTATION SYSTEMS IN AMERICA 8–9 (2005), https://www.monoc.org/bod/docs/history%20american%20ems-mts.pdf.

36. *Id.* at 9–10.

37. *Id.*

38. *Id.* at 10–17.

39. *Id.* at 17.

40. *Id*. at 17 n.*li* (noting that the records indicate one driver in 1866 earned $360 annually); see also *U.S. Inflation Rate, 1866-2018 ($360)*, IN2013DOLLARS.COM, http://www.in2013dollars.com/1866-dollars-in-2018?amount=360 (last visited Apr. 8, 2018) (estimating $360 in 1866 to equal $5,392.27 in 2018).

41. Morton Galdston, *Ambulance Notes of a Bellevue Hospital Intern: May 1938*, 76 J. URB. HEALTH 509, 510–11 (1999), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3456689/pdf/11524_2006_Article_BF02351507.pdf.

42. *Id.*

43. *Id.*

Hospital-run volunteer services such as these sprang up across the United States in the late 19th century, but there was no singular understanding of how agencies should respond to medical emergencies in the field.[44] That would happen in 1966, when the "White Paper" was published.[45]

The emergency medical services are still largely volunteer. Of all emergency medical services professionals with EMT-Basic training in the United States, 49% are volunteer.[46] One study by the National Highway Traffic Safety Administration found that 75% of the geography of America could be classified as "rural," or far outside of urban zones—and in those rural areas, 74% of the residents relied on volunteer emergency medical services.[47] And these agencies are already fraught with staffing issues: some areas in 2008 reported their volunteer agencies were only fully staffed approximately 50% of the time.[48] So any changes in the law that would negatively impact these volunteer emergency medical services would further strain agencies struggling to maintain the staffing necessary to respond to medical emergencies across 75% of the United States.

C. History of the "White Paper"

In 1966, the National Academy of Sciences published a report on preventable death in the United States.[49] The report, titled "Accidental Death and Disability: The Neglected Disease of Modern Society," later became known as the "White Paper."[50] In it, the researchers found that more Americans had died in car accidents than in the Korean War.[51] Most critically, it found that due to the lack professional standards in

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44. KATHERINE BARKLEY, THE AMBULANCE: THE STORY OF EMERGENCY TRANSPORTATION OF SICK AND WOUNDED THROUGH THE CENTURIES 10–16 (1978).

45. *See infra* Section II.C.

46. MEARS ET AL., *supra* note 5, at 106.

47. CHAPMAN ET AL., *supra* note 9, at 21, 45.

48. VICTORIA A. FREEMAN ET AL., ISSUES IN STAFFING EMERGENCY MEDICAL SERVICES: RESULTS FROM A NATIONAL SURVEY OF LOCAL RURAL AND URBAN EMS DIRECTORS, RURAL HEALTH RES. & POL'Y CTRS. 10 (2008), http://www.shepscenter.unc.edu/rural/pubs/report/FR93.pdf.

49. NAT'L ACAD. OF SCIS. ET AL., ACCIDENTAL DEATH AND DISABILITY: THE NEGLECTED DISEASE OF MODERN SOCIETY (1966) [hereinafter WHITE PAPER], https://www.nap.edu/read/9978/chapter/1.

50. *Id.* at 8; *see also* Dennis Edgerly, *Birth of EMS: The History of the Paramedic*, J. EMERGENCY MED. SERVS. (Oct. 8, 2013) [hereinafter Edgerly], http://www.jems.com/articles/print/volume-38/issue-10/features/birth-ems-history-paramedic.html.

51. WHITE PAPER, *supra* note 49, at 8.

prehospital care, "if seriously wounded . . . chances of survival would be better in the zone of combat than on the average city street."[52] Ultimately, this report recommended the standardization of emergency medical training for "rescue squad personnel, policemen, firemen, and ambulance attendants."[53] This report criticized the lack of standards in all emergency response fields—including both full-time and volunteer agencies.[54]

The recommendations of this paper led to the first nationally recognized curriculum for emergency medical care providers.[55] Eight years later, the recommendations of the "White Paper" were formalized by the EMS Systems Act in 1973.[56] This Act required communities to meet the national standards in prehospital care before receiving federal funds for those emergency organizations.[57] Due to this Act—and the financial incentives within—by the close of the 1970s, each state was compliant with the Act, and emergency medical services in America had broadly adopted these national standards.[58]

These standards are important today because they apply to both full-time and volunteer emergency responders, and to the same degree. That is to say, the national standards are not elevated for full-time responders, nor are they lessened for volunteers. And volunteers are essential: in many areas, especially rural communities, there are simply no other viable alternatives available.[59] So the value of emergency medical services is the same whether the provider is full-time or volunteer—the only difference is the cost to the community.

D. The Emergency Services Today

Volunteerism in the emergency services, and the high value it provides to its communities, is still the norm in modern emergency

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52. *Id*. at 12.

53. *Id.* at 13.

54. *Id.* at 20.

55. Edgerly, *supra* note 50.

56. Emergency Medical Services Systems Act of 1973, Pub. L. No. 93-154, 87 Stat. 594 (1973).

57. *Id.*

58. MARIA HEWITT, RURAL EMERGENCY MEDICAL SERVICES 56–58 (1989), https://www.princeton.edu/~ota/disk1/1989/8928/8928.PDF.

59. *See generally* D.G. PATTERSON ET AL., RURAL HEALTH RESEARCH & POL'Y CTRS., PREHOSPITAL EMERGENCY MEDICAL SERVICES PERSONNEL IN RURAL AREAS: RESULTS FROM A SURVEY IN NINE STATES (2015), http://depts.washington.edu/uwrhrc/uploads/RHRC_FR149_Patterson.pdf.

services. As noted above, a little more than 70% of fire departments are entirely volunteer-based.[60] Also, 49% of all emergency medical technicians with EMT-Basic training are volunteer, and one-third of all states depend on volunteer EMS for medical response and transport.[61] These services are critical to America's economic infrastructure: the value of this volunteered time amounts to $139.8 billion dollars per year.[62]

The value of this volunteered time in the emergency services is tremendous. The current cost of fires in the United States—$328.7 billion—would be significantly increased if the $139.8 billion dollars' worth of volunteer time were realized.[63] This $139.8 billion dollars also represents 3.4% of the total 2017 federal budget,[64] and if those wages were paid, it would cost more than the federal Departments of Education ($68.2 billion), Homeland Security ($41.3 billion), and Interior ($13.2 billion), and the Environmental Protection Agency ($8.2 billion) spent in 2017 combined.[65]

Because of this tremendous value, courts and legislatures should take care not to damage the volunteer emergency services without justification. Particularly, courts and legislatures should not interpret or create laws that would undermine this fundamental American institution. Congress understood this importance when it created the FLSA and has continued to understand it when amending the FLSA's provisions.

III. HISTORY AND APPLICATION OF THE FLSA

The history and evolution of the FLSA shows the respect and deference that Congress has given to volunteer emergency responders. This evolution also shows how Congress has attempted to draft and enact

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60. *National Fire Registry*, *supra* note 28.

61. MEARS, *supra* note 5, at 36; *EMS System Demographics*, DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. 5 (June 2014), https://www.ems.gov/pdf/National_EMS_Assessment_Demographics_2011.pdf.

62. HALL, *supra* note 32, at 29.

63. *Id.* at i, iii, 19.

64. This 3.4% represents $139.8 billion of the $4.1 trillion of the federal budget. *Budget*, CONG. BUDGET OFF., https://www.cbo.gov/topics/budget (last visited Apr. 3, 2018).

65. Consolidated Appropriations Act of 2017, H.R. 244, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/244/text; *see also America First: A Budget Blueprint to Make America Great Again*, OFF. BUDGET & MGMT. 50 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf (tracking the amendments that changed these initial budget outlays, thus providing the total amount budgeted on record in 2017).

statutes that would not unduly damage the volunteer emergency services. In interpreting these statutes, courts have created tests determining whom the FLSA applies to. Specifically, the *Mendel* court appears to employ two of these tests: the threshold-remuneration test and the economic realities test.

A. History of the FLSA

During the early twentieth century, "several states attempted to pass minimum wage laws."[66] However, two Supreme Court decisions rejected those attempts, declaring that such legislation violated due process.[67] These *Lochner*-era cases were poorly received, prompting the Supreme Court to reverse itself shortly thereafter in *West Coast Hotel Co. v. Parrish*.[68] In *Parrish*, the Supreme Court determined minimum wage laws were indeed compatible with due process of law.[69] This decision, combined with the Great Depression, prompted Congress to look for legislative avenues to develop a minimum wage.[70] In 1937, President Roosevelt proposed and championed the Fair Labor Standards Act, urging Congress to "help those who toil in factory and on farm" secure "a fair day's pay for a fair day's work."[71] The FLSA was passed in 1938.[72]

Thus, the FLSA's primary purpose was to address the issues of employer abuse due to the economic conditions of the day, such as low

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66. Kelly Jordan, Note, *FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy*, 78 CORNELL L. REV. 302, 309 (1993); *see also* ROBERT N. COVINGTON & ALVIN L. GOLDMAN, LEGISLATION PROTECTING THE INDIVIDUAL EMPLOYEE 176–77 (1982).

67. *See* Morehead v. New York, 298 U.S. 587, 618 (1936) (rejecting New York's minimum wage law); Adkins v. Children's Hosp., 261 U.S. 525, 545, 562 (1923) (rejecting the District of Columbia's minimum wage law), *overruled in part by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

68. 300 U.S. 379, 397 (1937).

69. *Id.* at 399.

70. RONNIE STEINBERG, WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA 109–15 (1982).

71. Franklin D. Roosevelt, *Message to Congress on Establishing Minimum Wages and Maximum Hours, May 24, 1937*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=15405 (last visited Apr. 9, 2018); *see also* Joseph V. Lane, Jr., *Is the Fair Labor Standards Act Fairly Construed?*, 13 FORDHAM L. REV. 60, 65 (1944) (discussing Roosevelt's message and congressional intent in enacting the FLSA).

72. 29 U.S.C. § 201 (2012). For a brief overview of the FLSA's history and scope, see also Michael Jilka, *For Whom Does the Clock Tick: Public Employers' Liability for Overtime Compensation Under Federal Law*, J. KAN. B. ASS'N, June–July 1994, at 34, 35.

wages, unpaid overtime, and long working hours.[73] Congress recognized this principal purpose by stating in its policy declaration that "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" burdened the market.[74] Congress intended for the Act to be "the most comprehensive and pervasive federal statute in this area."[75] The FLSA originally only applied to an entity when two conditions were met: (1) the person working was an employee as defined by the act; and (2) the business was engaged in commerce.[76]

Because of the Act's focus on commerce, the initial version of the FLSA did not cover governmental bodies.[77] However, in 1974, the FLSA was amended to cover nearly all government employees at all levels, including state and municipal employees.[78] This 1974 amendment has sordid history at the Supreme Court. Initially it was declared unconstitutional in *National League of Cities v. Usery* for violating the Commerce Clause by regulating state and municipal employers.[79] However, it was later revalidated after the Supreme Court effectively overruled *Usery* by instituting the "traditional governmental functions" test in *Garcia v. San Antonio Metropolitan Transit Authority*.[80] The holding in *Garcia* applied the Commerce Clause far more broadly than it had before, reaching state actors.[81] This new test allowed the FLSA to again apply to states and their political subdivisions, the Court reasoned, because the political process protected the states against excesses in congressional exercise of power.[82]

The *Garcia* decision prompted more congressional changes to the FLSA. Congress added § 203(e)(4)(A) of the FLSA in direct response to *Garcia.*[83] This section exempts volunteers at public agencies from being classified as "employees" under the FLSA as long as they are, at most,

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73. Jilka, *supra* note 72, at 35.

74. 29 U.S.C. § 202(a).

75. JOSEPH E. KALET, PRIMER ON WAGE & HOUR LAWS v (1990); *see also* Jordan, *supra* note 66, at 311.

76. *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985); *see also* Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1393 (4th Cir. 1990).

77. Jilka, *supra* note 72, at 35.

78. *Id.*

79. 426 U.S. 833, 854–55 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

80. *Id.*; *Garcia*, 469 U.S. at 548.

81. *Garcia*, 469 U.S. at 554–57.

82. *Id.* at 555.

83. H.R. REP. NO. 99-331, at 8 (1985) (citing *Garcia*, 469 U.S. 528).

paid only a "nominal fee" for work they are not otherwise employed by the agency to do.[84] After some investigation, the House Committee on Education and Labor found that public agencies were dependent on volunteer labor, so Congress amended the FLSA in 1986 to protect local governmental actors' abilities to use unpaid volunteers.[85]

Because of the 1986 amendment, Congress does currently exempt some public employees from the FLSA. Full-time firefighters and police officers are exempted under § 207(k) of the FLSA, which provides special rules for public agencies that hire "any employee in fire protection activities or any employee in law enforcement activities."[86] This covers other employees involved in emergency services, such as paramedics, rescue workers, and hazardous material technicians.[87]

But the basic definitions of "volunteer" and "employee" under the FLSA are, however, far from ideal. The FLSA defines "employee" as "any individual employed by an employer."[88] This is further explained by the Act's definition of "employ" as "includ[ing] to suffer or permit to work."[89] While this "magnificent circularity"[90] appears to cover virtually everyone performing any kind of work, the Supreme Court noted that the FLSA "was obviously not intended to stamp all persons as employees."[91]

While the FLSA does not define "volunteer," the DOL has attempted to provide instructive regulations. Department regulation 29 C.F.R. § 553.101(a) defines a volunteer as "[a]n individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."[92] Volunteers may, however, "be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers."[93] An important restriction on

84. 29 U.S.C. § 203(e)(4)(A) (2012).
85. H.R. REP. NO. 99-331, at 16 (1985).
86. 29 U.S.C. § 207(k) (2012).
87. 29 U.S.C. § 203(y) (2012).
88. *Id.* § 203(e)(1).
89. *Id.* § 203(g).
90. Broussard v. L.H. Bossier, Inc., 789 F.2d 1158, 1160 (5th Cir. 1986) (per curiam).
91. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); *see also* Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1367 n.18 (2011) (noting that this quote is particularly persuasive as it was penned by Justice Hugo Black, who was the principal author of the FLSA while a U.S. Senator).
92. 29 C.F.R. § 553.101(a) (2017).
93. 29 C.F.R. § 553.106(a) (2017).

these payments is that they "must not be tied to productivity,"[94] and a "key factor" in deciding whether payments are tied to productivity is whether the fee varies as the volunteer spends more time in the activity.[95]

B. Application of the FLSA

When a FLSA claim is made, a court "first examines whether the alleged employer [or business] is subject to the Act."[96] This occurs regardless of what test, if any, the court chooses to apply to its analysis.[97] Next, the court looks at the employer or business's workers "to determine if they are 'employees' under the Act."[98] It does not matter if the individual has been labelled an employee or not;[99] common law definitions also do not matter.[100]

Due to the circular and vague definitions of "volunteer" and "employee" in the FLSA,[101] courts have been left to find or create their own definitions and tests to determine who is a volunteer and who is an employee.

There are two main tests used by courts to make this determination: the threshold-remuneration test and the economic realities test. However, neither of these judicially created tests properly answers the question of whether a volunteer emergency responder is an employee under the FLSA. Luckily, neither of them is needed to do the job in this context: the FLSA and its regulatory guidance have given plain definitions for a volunteer in the emergency services. Under the plain meaning of those statutes, volunteer emergency services workers are not employees under the FLSA in all but in the most extreme circumstances.

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94. *Id.* § 553.106(e).

95. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Aug. 7, 2006), https://www.dol.gov/whd/opinion/FLSA/2006/2006_08_07_28_FLSA.htm.

96. Leda E. Dunn, Note, *"Protection" of Volunteers Under the Federal Employment Law: Discouraging Voluntarism?*, 61 FORDHAM L. REV. 451, 456 (1992); *see also* 29 U.S.C. § 203 (2006).

97. Dunn, *supra* note 96, at 456.

98. *Id.*

99. *Id.* at 456, 456 n.49 (citing McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972)).

100. *Id.* at 456, 456 n.50 (citing Walling v. Portland Terminal Co., 330 U.S. 148, 150 (1947) and NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 128-29 (1944)).

101. *See supra* notes 88–91 and accompanying text.

1. Threshold-Remuneration Test

When determining whether a worker is a volunteer or employee, a majority of federal circuits use the threshold-remuneration test.[102] The threshold-remuneration test is tool designed to determine whether a worker meets the requirements for employee status.[103] Under this test, claimants must show they received substantial compensation before the court will apply the other determining factors as to whether a worker is an employee.[104]

Graves v. Women's Professional Rodeo Association provides an excellent insight into how this test is applied.[105] In *Graves*, Lance Graves brought a suit against the Women's Professional Rodeo Association (WPRA) under Title VII of the Civil Rights Act of 1964[106] because of their women-only membership policy.[107] The WPRA approved and sponsored rodeos, and regulated its members' behavior when attending and competing in these rodeos.[108]

The WPRA argued that the case be dismissed because it did not fall under the purview of Title VII, which requires an organization or company to have fifteen employees before the statute applies, and the WPRA only employed four full-time workers.[109] Graves argued that every WPRA member was an employee.[110] The court consulted Webster's Third New International Dictionary to determine that compensation such as wages or a salary was "central" to the meaning of the words employ, employer, and employee.[111] Thus, because WPRA members received no salary, wages, or other compensation as part of their membership, they were not employees and no further analysis was necessary.[112]

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102. *See* Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 435 (5th Cir. 2013) (adopting the threshold remuneration test and noting that "[t]he Second, Fourth, Eighth, Tenth, and Eleventh Circuits have adopted the threshold-remuneration test").

103. *Id.*

104. *Id.* at 435, 440.

105. 907 F.2d 71 (8th Cir. 1990).

106. For clarification as to why Title VII is an apt comparison to the FLSA, see infra notes 184–85 and accompanying text.

107. *Graves*, 907 F.2d at 71.

108. *Id.* at 72.

109. *Id.*

110. *Id.*

111. *Id.* at 73.

112. *Id.* at 73–74.

The Fourth Circuit also clearly addressed threshold-remuneration in *Haavistola v. Community Fire Company of Rising Sun*.[113] In *Haavistola*, a female volunteer firefighter brought a Title VII action against her fire department.[114] Haavistola was unpaid, and thus her livelihood was not denied due to the alleged discrimination, but she did receive other "benefits" from the Fire Company.[115] Because of this, the lower court determined that a demonstration of remuneration for employment was an appropriate requirement.[116] The Fourth Circuit ultimately reversed the lower court's decision because they found the lower court made an impermissible finding of fact; however, the Fourth Circuit reinforced threshold-remuneration as a useful tool in determining a worker's status as an employee.[117] In total, the Second[118], Fourth[119], Fifth[120], Eighth[121], Tenth[122], and Eleventh[123] Circuits have adopted the threshold-remuneration test.[124]

2. Economic Realities Test

A minority of circuits use the economic realities test. But the DOL and its Wage and Hour Division utilize it, making it pervasive in agency comments on the FLSA. While it may be useful in general determinations of volunteer status, it has very little purpose when applied to emergency services volunteers.

Courts have concluded "the . . . definition of 'employee' under [the] FLSA extends beyond the common law."[125] In its place, courts have created the far more subjective "economic realities" test to determine

113. 6 F.3d 211, 219 (4th Cir. 1993).
114. *Id.* at 213.
115. *Id.* at 213–14, 221.
116. *Id.* at 220–22.
117. *Id.* at 219–22.
118. O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997).
119. *Haavistola*, 6 F.3d at 220–21.
120. Juino v. Livingston Par. Fire Dist. No. 5, 717 F.3d 431, 439 (5th Cir. 2013).
121. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).
122. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998).
123. Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998).
124. Erin Welch, Comment, *Unequal Protection for Equal Work:* Juino v. Livingston Parish Fire District No. 5, 83 U. CIN. L. REV. 317, 320 (2014).
125. Benjamin Burry, Comment, *Testing Economic Reality: FLSA and Title VII Protection for Workfare Participants*, 2009 U. CHI. LEGAL F. 561, 564 (2009); *see also* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (explaining that the FLSA's definition of "employee" covers parties beyond the common-law definition).

whether a worker meets the FLSA definition of employee.[126] This test assesses the entire relationship between the employer and worker, instead of considering isolated factors.[127]

The economic realities test was created because of the focus on the standard of control in the common-law agency test.[128] The Supreme Court first noted the need for the economic reality test in *Bartels v. Birmingham*, where it stated that courts need to recognize that workers are "as a matter of economic reality" dependent upon those who hired them, or that because the worker is dependent on the hiring agent, they require legal recognition as employees.[129] It later adopted the economic realities test in *Tony and Susan Alamo Foundation v. Secretary of Labor*.[130]

In *Tony and Susan Alamo Foundation,* a foundation that provided services to former drug addicts and criminals in exchange for labor protested their classification as employees.[131] The Supreme Court held that these individuals were "entirely dependent upon the Foundation for long periods" of time—in some cases, years—thus an expectation for compensation was reasonable and the workers were employees.[132]

The Ninth Circuit uses the most common example of the economic realities test. In *Bonnette v. California Health & Welfare Agency*, the court set forth the following four basic factors to determine if a worker is an employee under the FLSA: 1) whether the employer "had the power to hire and fire" the worker; 2) whether the employer "determined the rate and method of payment," 3) whether the employer "supervised and controlled [the worker's] schedules or conditions of employment"; and 4) whether the employer "maintained employment records" of the worker's activity.[133] None of these four factors is dispositive; instead, courts are to look at the totality of the circumstances when determining

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126. Burry, *supra* note 125, at 564; *see also* Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1966) (holding that under the "economic reality" test, workers who labored at their homes were employees, despite the company's contrary designation).

127. Rutherford Food Corp. v. McComb, 331 U.S. 722, 730–31 (1947) (evaluating at the circumstances of the labor, instead of isolated factors, to find that meat boners were employees of a slaughtering plant under the FLSA).

128. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 102 (1984).

129. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

130. 471 U.S. 290, 290 (1985).

131. *Id.* at 293, 300–01.

132. *Id.* at 301 (quoting the district court's opinion in the same case).

133. 704 F.2d 1465, 1470 (9th Cir. 1983); *see also* Villarreal v. Woodman, 113 F.3d 202, 205 (11th Cir. 1997) (discussing the history of application of the *Bonnette* factors).

whether the *Bonnette* factors create an employer-employee relationship.[134] Other federal circuits that apply this test have utilized the *Bonnette* factors.[135]

But the DOL has issued different guidelines on how the economic realities test should be applied to the FLSA. The DOL recognized that volunteer status "can only be determined by examining the total amount of payments made . . . in the context of the economic realities of the particular situation."[136] To that end, the DOL promulgated a nonexclusive set of factors to consider in making that assessment:

> Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: [t]he distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.[137]

This regulation has been applied in many courts. In *Purdham v. Fairfax County School Board*, a case relied upon by the *Mendel* court, the Fourth Circuit applied this regulation to find that a school's stipend of roughly $2,100—or $6.05 per hour—paid to a golf instructor was nominal under the FLSA because: 1) it was far less than his hourly salary at his full-time job, 2) he could spend as much or as little time in the role as he wished, and 3) the stipend was fixed.[138] Thus, Purdham was found to be a volunteer under the FLSA, not an employee.[139]

Similarly, in *Brown v. New York City Department of Education*, the Second Circuit applied the DOL's administrative guidance.[140] In doing so, it found that a worker tasked with group conflict resolution was not an employee under the FLSA because the worker received roughly

134. Brock v. Superior Care, Inc., 840 F.2d 1054, 1059 (2d Cir. 1988).
135. *See Bonnette*, 704 F.2d at 1470; *Villarreal*, 113 F.3d at 205.
136. 29 C.F.R. § 553.106(f) (2017).
137. *Id.* at § 553.106(e).
138. 637 F.3d 421, 434 (4th Cir. 2011).
139. *Id.*
140. 755 F.3d 154, 169 (2d Cir. 2014).

$1450 over three years, and that reimbursed meals and subway fees fell within the expenses covered under 29 C.F.R. § 553.106(b).[141]

This regulation has also been applied in the emergency services context as well. In *Harris v. Mecosta County*, the United States District Court for the Western District of Michigan found that Mecosta County's EMS first responders were volunteers under the FLSA.[142] In doing so, the court applied 29 C.F.R. § 553.106, as well as other guidance by the DOL toward public agency volunteers, to find that paying workers $7.50 per hour during emergency responses was nominal.[143] Additionally, because the workers participated voluntarily and did so without the expectation of compensation, they were volunteers under the FLSA.[144]

IV. MENDEL V. CITY OF GIBRALTAR

In *Mendel*, the Sixth Circuit addressed the question of whether volunteer firefighters who receive an hourly wage when responding to calls were "employees" or "volunteers" under both the FLSA and the Family Medical Leave Act (the "FMLA").[145] Paul Mendel, a police dispatcher, was employed by the City of Gibraltar.[146] After being fired, he sued Gibraltar for violating his rights under the FMLA.[147] The district court granted summary judgment to Gibraltar because it did not classify the volunteer firefighters working for the city as "employees," and thus, Gibraltar only employed forty-one employees, less than the requisite fifty employees necessary to bring a claim under the FMLA.[148]

The Sixth Circuit disagreed and reversed the district court, finding the volunteer firefighters to be employees under both the FMLA and the FLSA.[149] The Court noted their holding implicated both of these statutes because under 29 U.S.C. § 2611(3) of the FMLA, the definition of "employee" and "employer" have the same definitions as under the FLSA.[150] Starting from there, the court noted the FLSA's definition of "employee" is "any individual employed by an employer," and "employ"

141. *Id.*
142. No. 1:95-CV-61, 1996 U.S. Dist. LEXIS 1882, at *12 (W.D. Mich. Feb. 6, 1996).
143. *Id.* at *9–10.
144. *Id.*
145. Mendel v. City of Gibraltar, 727 F.3d 565, 567 (6th Cir. 2013).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 572.
150. *Id.* at 569.

is defined as "to suffer or permit to work."[151] Finding little help there, the court noted jurisprudence that found the FLSA was to be construed liberally when determining whether an individual is an "employee."[152]

The court then engaged in an assessment of the volunteer firefighters under the economic realities test.[153] It found the firefighters received substantial compensation for their work: $15 per hour while responding to an emergency.[154] The court found this amount substantial because nearby communities paid their full-time firefighters between $14 and $17 per hour, and the chief of the Gibraltar Fire Department made roughly $19 per hour for work.[155] Thus, because the firefighters were "permitted to work," and because they received substantial compensation, they were "employees" under the FLSA and the FMLA.[156]

But the court recognized there was a catch: Congress's 1986 amendment clarifying that volunteers for a public agency are not to be classified as employees under the FLSA.[157] Because that amendment clarified that volunteers for public agencies may still be considered employees if they receive more than a "nominal fee," the court focused its attention on whether the $15 per hour paid to Gilbraltar's firefighters while responding to emergencies was more than "nominal."[158]

To determine whether these payments were "nominal," the court turned to the DOL's guidance.[159] Of all the guidance the court reviewed, two are of interest: 29 C.F.R. § 553.106(e), which does not preclude payment to volunteers on a "per-call" basis, and 29 C.F.R. § 553.106(f), which states that whether or not a worker keeps his "volunteer" status is to be based upon "the *total* amount of payments made (expenses, benefits, fees) in the context of the economic realities of the particular situation."[160]

This agency guidance is of interest largely because the court, after listing them, ignored them. The court went on to essentially restate that because the volunteer firefighters in Gibraltar were given an hourly fee

151. *Id.* (citing 29 U.S.C. § 203(e)(1) (2012) and 29 U.S.C. § 203(g)).
152. *Id.*
153. *Id.* at 569–70.
154. *Id.* at 567.
155. *Id.* at 567–68.
156. *Id.* at 570.
157. *Id.* (citing 29 U.S.C. § 203(e) (2012)).
158. *Id.*
159. *Id.*
160. *Id.* at 570–71 (emphasis added).

comparable to nearby full-time counterparts, the fee was not "nominal," and thus, the firefighters did not fall under the 1986 amendment and were "employees" under the FLSA.[161]

To bolster its conclusion, the court cited to *Purdham v. Fairfax County School Board*, a case where a school's golf coach was found not to be an employee because his total fee, if converted to an hourly rate, would equal roughly one-quarter of a full-time equivalent.[162] It also cited to *Tony and Susan Alamo Foundation*'s holding "that those who 'work in contemplation of compensation' are 'employees'" under the FLSA, even if those workers consider themselves volunteers.[163] The court then declared, *ipse dixit*, the "inescapable fact" that the firefighters in Gibraltar only worked in "contemplation of compensation."[164]

Of special note is the court's statement in a footnote. One sentence before concluding the opinion, the court stated that the fees the Gibraltar firefighters received were substantial, not nominal, and thus the firefighters were employees under the FLSA.[165] In the footnote following this sentence, the court stated, "We deem it unnecessary on the facts of this case to address the validity of the [DOL's] proposed 'twenty-percent test' for determining whether a given payment constitutes compensation or a nominal fee."[166] With this simple hand-wave, the court ignored a critical piece of guidance from the DOL that could have changed the outcome of the case.

V. ANALYSIS

The *Mendel* court erred when it held the Gibraltar volunteer firefighters were employees under the FLSA. To reach that conclusion, it applied two judicially-created tests to determine if these firefighters were "employees" under the FLSA: the threshold-remuneration test and the economic realities test. Both are ill-suited to determine whether a volunteer in the emergency services is an "employee" under the FLSA. Instead, the court should have looked to the text of the FLSA, the clear congressional intent, and the DOL's guidance on the issue.

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161. *Id.* at 571–72.
162. *Id.* at 571 (citing Purdham v. Fairfax Cty. Sch. Bd., 637 F.3d 421, 433–34 (4th Cir. 2011)).
163. *Id.* (citing Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 306 (1985)).
164. *Id.*
165. *Id.* at 572.
166. *Id.* at 572 n.8.

Alternatively, the *Mendel* court should have given more agency deference to the DOL. If the court had done so, and followed the DOL's recommendation that "nominal" be defined as 20 percent of the pay of a full-time equivalent, it almost certainly would have found the Gibraltar firefighters were not employees under the FLSA.

A. Failings of the Threshold-Remuneration Test

Under the threshold-remuneration test, a litigant making a claim under the FLSA must show they received substantial compensation before the court will apply the other determining factors as to whether a worker is an employee.[167] Specifically, the claimant must show they received "significant remuneration."[168] If the litigant succeeds in making this showing, courts are much more likely to determine the litigant is an "employee" under the FLSA.[169] However, the way this test is currently applied by the courts has resulted in illogical decisions—and in the context of volunteer emergency responders, the application of this test has led to decisions that undermine what it means to be a volunteer.

The definition of "significant remuneration" has become so strained that nearly any benefit meets this threshold.[170] Under a plain reading of "significant remuneration" in context of the threshold-remuneration test, if a volunteer emergency responder is only being paid a stipend and nominal benefits for their labor while responding to an emergency, they should not be classified as an "employee" under the FLSA. But this isn't so.

For example, in *Pietras v. Board of Fire Commissioners*, a probationary firefighter in the Farmingville Fire Department of New York brought a suit for sex discrimination after twice failing to pass an introductory physical agility test.[171] The fire department argued that Pietras was not yet even officially on the department, but was only a

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167. *Id.* at 571.

168. Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999); *see also* Seattle Opera v. NLRB, 292 F.3d 757, 762–65 (D.C. Cir. 2002); Rafi v. Thompson, No. 02-2356 (JR), 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006), *aff'd sub nom.* Rafi v. Sebelius, 377 F. App'x 24 (D.C. Cir. 2010).

169. *See generally Pietras*, 180 F.3d 468; *Seattle Opera*, 292 F.3d 757; *Rafi*, 2006 WL 3091483.

170. *See, e.g.*, *Pietras*, 180 F.3d at 473 (holding that benefits from the state meet the threshold); *Seattle Opera*, 292 F.3d at 763–64 (holding that a modest travel reimbursement is sufficient remuneration); *Rafi*, 2006 WL 3091483, at *1 (suggesting that "a clear pathway to employment" and an "increased opportunity to participate" in a medical training program is sufficient remuneration).

171. *Pietras*, 180 F.3d at 471.

probationary volunteer.[172] The Second Circuit disagreed.[173] Citing to the New York Firefighter's Benefit Law,[174] it noted that Pietras was eligible for both a retirement pension and a disability pension, and these benefits constituted significant remuneration.[175] The court did not expressly note the monetary value of any of these benefits, only that a retirement pension and a disability pension were more significant than a disability pension alone and significant enough to create an employer-employee relationship.[176]

The holding in *Pietras* makes little sense. First, many fire departments offer volunteers retirement and disability benefits.[177] While many of these benefits are potentially paid out by private insurers, in these instances the state normally pays the premiums of these benefits.[178] So, if the standard for "significant remuneration" is the combination of both benefits, the word "volunteer" is no longer accurate when it comes to unpaid emergency responders. Second, Pietras arguably received no benefit from these programs. There is no evidence in the opinion that she cashed out of these programs out for any financial benefit, nor is there any evidence in the opinion that she had planned to purchase retirement or disability coverage but was saved the expense by this benefit.[179] So, the only value she received appears to be the intangible peace-of-mind that she would have these benefits if she ever needed them. As kitsch t-shirts and coffee mugs say: "Peace of mind doesn't pay the bills."[180]

And *Pietras* is not an outlier. In *Seattle Opera v. NLRB*, the Seattle Opera appealed the National Labor Relations Board's ruling that volunteer choristers were employees under the National Labor Relations

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172. *Id.* at 471–72.

173. *Id.* at 475.

174. N.Y. VOL. FIRE. BEN. LAW §§ 5–25 (McKinney 2016).

175. *Pietras*, 180 F.3d at 473.

176. *Id.* at 473 n.6.

177. *See, e.g.*, *Kansas Firefighter Relief Act*, KAN. INS. DEP'T, http://www.ksinsurance.org/otherservices/firefighter-relief-act.php (last visited Apr. 11, 2018); *Statewide Volunteer Firefighter Retirement Plan*, PUB. EMPS. RETIREMENT ASS'N MINN. (Mar. 9, 2018, 7:43 AM), http://www.mnpera.org/index.asp?SEC=D09EE783-90AF-4CE0-B34E-4A85C43E3EFA&Type=B_BASIC; *Retiree Benefits*, TESRS: TEX. EMERGENCY SERVS. RETIREMENT SYS., http://www.tesrs.org/benefit-overview (last visited Apr. 11, 2018).

178. *See generally id*. (detailing, in all the above states, how these funds collect money, and how they pay out benefits to the their firefighter recipients).

179. *Pietras*, 180 F.3d 468.

180. THOMAS D. SHARTS, SHARTSY'S ARTSY SAYINGS 11 (2015).

Act.[181] The choristers received a stipend of $214, compensating for 77 hours of work—or $2.78 per hour.[182] The D.C. Circuit considered this sufficient remuneration, despite their volunteer involvement in the activity.[183] Thus, the court in *Seattle Opera* affirmed the NLRB's determination that the choristers were employees and therefore should have been included in collective bargaining agreements.[184]

This is an absurd result. $2.78 per hour would not be considered sufficient remuneration for employment anywhere in the United States in 2002, the year *Seattle Opera* was decided. And $2.78 per hour was not significant remuneration under federal law, either: the minimum wage at that time was $5.15, or nearly double what the choristers were being paid.[185]

In the context of volunteer emergency responders, application of these cases unequivocally makes them "employees" and not volunteers. While both cases deal with the definition of "employee" under different standards than the FLSA—Title VII and the NLRA, respectively—their interpretation of "significant remuneration" is important. Whether a worker is an employee fulfills the same function under each law: it is a jurisdictional requirement to see if the worker qualifies for the law's protections.[186] Additionally, both laws have definitions of "employee" as vague as the FLSA's.[187] And as all three are federal statutes, comparing threshold-remuneration among them is apt.

Applying these cases to volunteers in the emergency services would effectively eliminate any legal classification of these workers as volunteers. Volunteer emergency responders must receive specialized training and meet the national standards and certifications required for their type of work.[188] Nearly every volunteer department currently provides or pays for training, and this makes sense—why would a department financially burden individuals who want to donate their time

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181. Seattle Opera v. NLRB, 292 F.3d 757, 758 (D.C. Cir. 2002).

182. *Id.* at 773 (Randolph, J., dissenting).

183. *Id.* at 762–65.

184. *Id.*

185. *See* 29 U.S.C. § 206(a)(1) (2006) (amended 2007).

186. *See* Dunn, *supra* note 96, at 459 n.73.

187. *See* 29 U.S.C. § 152(3) (2012) ("The term 'employee' shall include any employee . . . ."); 42 U.S.C. § 2000e(f) (2012) ("The term 'employee' means an individual employed by an employer. . . .").

188. *See generally* NAT'L FIRE PROTECTION ASS'N, NFPA 1001: STANDARD FOR FIRE FIGHTER PROFESSIONAL QUALIFICATIONS (2013), https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=1001.

to their community? A volunteer program requiring an ongoing monetary investment by the volunteer is not likely to be attractive, and as noted above, volunteerism rates in the emergency services are already dropping.[189]

A court finding $2.78 to be significant remuneration under the FLSA speaks directly against the underlying purpose of the Fair Labor Standards Act. A key provision of the FLSA is the establishment a national minimum wage.[190] The FLSA has prescribed a number more than twice as large as $2.78 be that wage.[191] So while it is unlikely an ordinary worker would be satisfied with $2.78 per hour, it is certain that such a wage would be in violation of the FLSA. This is not to say that the national minimum wage should be the bright-line test for significance, but rather, it makes little sense for a court to find a wage lower than the minimum prescribed in the FLSA to still be "significant" under that same statute.

Therefore, the threshold-remuneration test, in its current form, fails to properly address the particulars that surround emergency services volunteers. The test has become so strained that even wages below the national minimum wage are considered "significant"—and since many volunteer emergency responders receive some sort of stipend or reimbursement per call, there is a very real possibility of misclassification of these volunteers under this test.

B. Failings of the Economic Realities Test

The economic realities test was created because, in the common-law agency test, courts used to focus on the standard of control.[192] In light of an evolving workplace, the Supreme Court held that courts need to recognize that workers are "as a matter of economic reality" dependent upon those who hired them.[193] Thus, if workers are dependent upon their employers, they are "employees" as a matter of the economic reality of their relationship.[194]

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189. Andrew Brown & Ian Urbina, *The Disappearing Volunteer Firefighter*, N.Y. TIMES (Aug. 16, 2014), https://www.nytimes.com/2014/08/17/sunday-review/the-disappearing-volunteer-firefighter.html?mcubz=3&_r=0.

190. 29 U.S.C. § 206(a)(1)(C) (2012); *see also Minimum Wage*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., https://www.dol.gov/whd/minimumwage.htm (last visited Apr. 11, 2018).

191. 29 U.S.C. § 206(a)(1)(C) (2012).

192. *See* Dowd, *supra* note 128.

193. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).

194. *Id.*

Generally, when determining if a worker is an "employee" as a matter of economic reality, courts look to the following *Bonnette* factors: 1) whether the employer had the power to hire and fire the worker; 2) whether the employer determined the rate of payment; 3) whether the employer supervised and controlled the worker's schedules or conditions of employment; and 4) whether the employer maintained employment records of the worker's activity.[195]

This version of the economic realities test is a mess of imprecision and "purposelessness."[196] The economic realities test has "degenerated into a disembodied laundry list of factors,"[197] a list of factors that judges check off without looking at the statutory purpose.[198] But this test was originally created to assess the entire relationship between the employer and worker, instead of creating a simple factor check-off sheet.[199]

There is a real danger in applying the check-off sheet version of the economic realities test when evaluating whether volunteer emergency responders are "employees" under the FLSA. Without contextualizing the circumstances and instead merely mechanically checking off factors, the *Bonnette* factors favor classifying volunteer emergency responders as employees.

The first factor deals with whether an employer has the power to hire and fire a worker. It is axiomatic that emergency responders are critical to the mission of an emergency department's responding to emergencies. The relationship between the responder and the department is presumptively "permanent," another factor in the test. In terms of permanency, the standard is whether there is an explicit or implicit understanding of when the working relationship will end.[200] In terms of

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195. Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983); *see also* Villarreal v. Woodman, 113 F.3d 202, 205 (11th Cir. 1997) (discussing the history of application of the *Bonnette* factors).

196. *See* Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 195–97 (1999).

197. *Id.* at 208 (citing Reich v. Priba Corp., 890 F. Supp. 586, 592 (N.D. Tex. 1995)).

198. *Id.* at 208, 211.

199. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 730 (1947) (evaluating the circumstances of the labor, instead of isolated factors, to find that meat boners were employees of a slaughtering plant under the FLSA).

200. Charles J. Muhl, *What is an Employee? The Answer Depends on the Federal Law*, MONTHLY LAB. REV., Jan. 2002, at 3 (available at https://www.bls.gov/opub/mlr/2002/01/art1full.pdf); *see also* U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 1 (2008), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

emergency response, most volunteers intend to work for their department as long as their community has a need—and there is no community without emergencies.

The next factor—whether the employer determined the rate of payment or provided equipment—also strongly favors classifying responders as employees. Personal protective gear is expensive and is almost universally provided by the department,[201] and emergency apparatus like fire engines and ambulances can cost in the millions.[202]

Critically, under the factor of "control," a volunteer department may appear to have a greater amount of control over its responders than most working environments. Most volunteer departments have a quota of emergencies that a volunteer must participate in to maintain "active" status.[203] To respond, an employee must be either at the station or within a response range of just a few minutes—usually less than nine for urban areas and fourteen minutes for rural areas.[204] Volunteer responders must also remain in uniform or have it immediately nearby, must carry a radio or some type of notification device, and are restricted from activities that would alter their cognitive abilities.[205] And as emergencies are inherently unpredictable, a volunteer responder may be on-call for over twenty-four hours at a time.[206] This represents a far greater amount of control than that over a typical nine-to-five worker—a heavy factor in support of employee classification for a judge who chooses not to respect statutory purpose.

Finally, the recordkeeping factor favors classification of these responders as employees as well. All departments are required to keep track of their emergency responses and log them into the National Fire

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201. *See* Lynn M. Boorady et al., *Exploration of Firefighter Turnout Gear: Part 1: Identifying Male Firefighter User Needs*, J. TEXTILE & APPAREL, TECH. & MGMT., Spring 2013, at 1, 2, 9.

202. Christina Tatu, *Municipalities Face Growing Sticker Shock When Replacing Fire Trucks*, MORNING CALL (Oct. 11, 2015, 11:49 PM), http://www.mcall.com/news/local/mc-high-cost-fire-trucks-20151011-story.html.

203. *See* GARY R. URBANOWICZ, BADGES OF THE BRAVEST: A PICTORIAL HISTORY OF FIRE DEPARTMENTS IN NEW YORK CITY 80 (2002).

204. *See NFPA 1720: Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Volunteer Fire Departments, 2010 Edition*, NAT'L FIRE PROTECTION ASS'N, http://www.nfpa.org/Codes-and-Standards/ARCHIVED/Safer-Act-Grant/NFPA-1720 (last visited Apr. 11, 2018).

205. *See* J. CURTIS VARONE, LEGAL CONSIDERATIONS FOR FIRE AND EMERGENCY SERVICES 469–71 (3rd ed. 2014) (quoting Renfro v. City of Emporia, 948 F.2d 1529, 1538 (10th Cir. 1991)).

206. *Id.*; *see also* U.S. DEP'T OF LAB, WAGE & HOUR DIVISION, FACT SHEET #8: LAW ENFORCEMENT AND FIRE PROTECTION EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 2 (2011), https://www.dol.gov/whd/regs/compliance/whdfs8.pdf.

Incident Reporting System.[207] So, as a matter of common and expected practice, emergency response departments keep track and maintain records of the worker's activity.

It appears at least one commentator[208] is correct: judges interpreting the economic realities test on volunteer firefighters have not looked to the statutory purpose of the FLSA. In *Mendel v. City of Gibraltar*, the volunteer firefighter case in this article's introduction, the judges engaged in an assessment of the economic realities of volunteer responders receiving $15 per hour while on a call and no wage while doing other work at the station.[209] After assessing the DOL factors, the court held that, in the context of the economic realities of this particular situation, the wages were compensation under the FLSA because the firefighters "render[ed] services with the promise, expectation, and receipt of substantial compensation."[210] Thus, the responders were entitled to compensation for time spent doing work for the department beyond emergency response.[211]

Even ignoring that the court began with the economic realities test and ended with the threshold-remuneration test, its rationale fundamentally misunderstands the current state of volunteer departments. Many departments either pay a volunteer a stipend per alarm responded to or an hourly amount while working an alarm.[212] None of this is offered as an alternative to a full-time job; rather, it is provided as both an incentive to seek and retain volunteers.[213] In a world where many households are dual-income, paying a stipend or gratuity for time spent on alarms is an excellent way to add value to a role that many would like to be a part of but otherwise lack the economic flexibility to spend time away from home without reimbursement.

The court's decision in *Mendel* also misunderstands "work in contemplation of compensation." The court held that because $15 per hour was substantial compensation, it was "inescapable" that the

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207. *About the National Fire Incident Reporting System*, U.S. FIRE ADMIN. (Feb. 22, 2018), https://www.usfa.fema.gov/data/nfirs/about/.

208. Linder, *supra* note 196, at 195–97.

209. 727 F.3d 565, 567 (6th Cir. 2013).

210. *Id.* at 571.

211. *Id.* at 572.

212. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Sept. 17, 2007), https://www.dol.gov/whd/opinion/FLSANA/2007/2007_09_17_03NA_FLSA.htm.

213. *See generally* Ray Crouch, Sr., *Critical Need for Volunteer Incentive Programs*, U. TENN. INST. PUB. SERV. (May 24, 2017), https://www.mtas.tennessee.edu/knowledgebase/critical-need-volunteer-incentive-programs.

volunteers "work[ed] in contemplation of compensation."[214] To reach this supposedly inescapable conclusion, they cite to *Tony & Susan Alamo Foundation v. Secretary of Labor*.[215] But that case is not a good comparison because the workers in that case were homeless or otherwise at-risk individuals entirely dependent on the Foundation for their basic needs.[216] That is a situation worlds away from *Mendel*. In *Mendel*, there is no indication in the opinion that any volunteer firefighter on that department was dependent on the $15 per hour they received while on an alarm. And not only was Gibraltar's fire department mostly volunteer, but the only paid member was the fire chief, who was compensated $20,000 per year.[217]

And $20,000 per year is nearly an order of magnitude more than any other member of Gibraltar Fire would likely make. Gibraltar, Michigan is a city of 4,200, and has 34 emergency responders in the department.[218] While there are no direct statistics available on the number of emergencies the Gibraltar fire department responded to each year, estimates are that a town with "a population of 10,000 people will generate an average of one emergency [call] per day."[219] So, using that number as a guideline, Gibraltar's population of 4,200 would have generated approximately 155 emergencies per year. At a generous average of two hours per alarm, if a volunteer worked every single emergency in Gibraltar, they would have clocked 310 hours—or, at $15 per hour, $4,650. In fact, while the *Mendel* case was before the district court, the City of Gibraltar put on evidence that the average Form-1099 for volunteer firefighters was $1,500.[220] So, the court's conclusion that Gibraltar emergency responders attended weekly meetings, mandatory trainings, and placed themselves on call at all hours of the day in contemplation of—at most—$4,650 defies logic.

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214. *Mendel*, 727 F.3d at 571.

215. 471 U.S. 290, 300–02, 306 (1985).

216. *Id.* at 292–95; *see supra* notes 130–32 and accompanying text.

217. *Mendel*, 727 F.3d at 567–68.

218. *Fire Department*, CITY OF GIBRALTAR, http://www.cityofgibraltar.net/departments/fire-department (last visited Apr. 11, 2018).

219. Harry Perlstadt & Lola Jean Kozak, *Emergency Medical Services in Small Communities: Volunteer Ambulance Corps*, 2 J. COMM. HEALTH 178, 178 (1977).

220. Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035, 1036 (E.D. Mich. 2012), *rev'd*, 727 F.3d 565 (6th Cir. 2013).

C. The Solution: Text of the FLSA and the DOL's 20-Percent Test

The text of the FLSA, combined with subsequent regulatory guidance from the DOL, gives the best guidance as to how to address whether emergency responders are volunteers. Not only has Congress directly addressed the issue of volunteer emergency responders under the FLSA, but the DOL has also subsequently issued guidance on the issue as well. Together, the two create a clear framework of who is a volunteer in the emergency services, and who isn't.

Congress was aware of the risk of volunteer emergency responders being classified as employees, and addressed that concern by adding explicit language on the subject.[221] In 1986, the FLSA was amended to make clear that workers who volunteer at a public agency are not employees under the FLSA.[222] 29 U.S.C. § 203(e)(4)(A) now reads:

> The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—
>
> (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
>
> (ii) such services are not the same type of services which the individual is employed to perform for such public agency.[223]

The issue that immediately appears is the question of what "expenses, reasonable benefits, or a nominal fee" consists of. Curiously, courts, such as the one in *Pietras*, either were not aware of § 203(e), or found that disability and retirement benefits were unreasonably lavish benefits. However, for a career that consistently ranks in the top ten of most dangerous careers,[224] has a lower average lifespan than that of non-emergency responders,[225] and has a lower average retirement age due to

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221. *Mendel*, 727 F.3d at 570.

222. *Id.*; 29 U.S.C. § 203(e)(4)(A) (2012).

223. *Id.*

224. *See, e.g.*, Tom Anderson, *The Most Dangerous Jobs in America*, CBS NEWS (Aug. 12, 2016, 12:56 PM), https://www.cnbc.com/2016/08/12/the-most-dangerous-jobs-in-america.html#slide=6; Aimee Picchi, *America's 10 Most Dangerous Jobs*, CBS NEWS (Aug. 11, 2016, 4:00 AM), https://www.cbsnews.com/media/americas-10-most-dangerous-jobs/6/.

225. *See* Cindy Clarke & Mark J. Zak, *Fatalities to Law Enforcement Officers and Firefighters, 1992-97*, COMPENSATION & WORKING CONDITIONS, Summer 1999, at 3, 5, 6, https://www.bls.gov/opub/mlr/cwc/fatalities-to-law-enforcement-officers-and-firefighters-1992-97.pdf (discussing that

illness and injury,[226] finding disability and retirement benefits unreasonable is puzzling.

The issue of "reasonable benefits" aside, uncertainty around "nominal fee" has caused the bigger issue. In *Mendel*, as discussed above, the Sixth Circuit found a likely wage of $1,500 to $4,650 per year was significant remuneration, thus classifying the emergency responders as employees and triggering the FLSA.[227] However, the DOL has issued guidance that provides a better framework for analyzing whether the money paid to the Gilbraltar responders was "nominal" under the FLSA.

The DOL issued an opinion letter in 2004 about what a nominal fee is under the FLSA.[228] The DOL explained that Congress set a firm definition for "incidental" in the FLSA by creating a "20-percent test to determine whether something is insubstantial."[229] While that provision dealt specifically with how much of an employee's time was spent driving, the DOL used that definition to apply to wages as well.[230] Thus, when considering whether a volunteer's wages were nominal under the FLSA, the DOL stated that as long as a volunteer was being paid less than 20% of a full-time counterpart, the wages were nominal.[231]

In 2006, the DOL took this definition and applied it to volunteer emergency responders.[232] They reaffirmed their belief that the 20-percent test was the best and most reliable yardstick to determine whether an emergency responder was a volunteer under the FLSA.[233] But they went a step further: noting that there is a specific allowance for emergency responders to be paid per emergency,[234] the DOL stated this 20-percent test, when applied to volunteer emergency responders, should be used to look at their total monetary compensation compared to their

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firefighters have a higher fatality rate than other workers).

226. *See* Michael Wilson, *Past 50, and Still Running into the Flames*, N.Y. TIMES (Aug. 27, 2007), http://www.nytimes.com/2007/08/27/nyregion/27firefighters.html (noting that only 5.5% of F.D.N.Y firefighters continue working past the age of fifty).

227. *See supra* notes 216–19 and accompanying text.

228. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Nov. 10, 2005), https://www.dol.gov/whd/opinion/FLSA/2005/2005_11_10_51_FLSA.pdf.

229. *Id.* (citing 29 U.S.C. § 213(c)(6)(G)).

230. *Id.*

231. *Id.*

232. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Aug. 7, 2006) [hereinafter 2006 Opinion Letter], https://www.dol.gov/whd/opinion/FLSA/2006/2006_08_07_28_FLSA.htm.

233. *Id.*

234. *See* 29 C.F.R. § 553.106(e) (2017).

full-time counterparts, as opposed to compensation per emergency—or presumptively per hour.[235]

This distinction is critical because it resolves the conflict of how to analyze volunteer emergency responders under their various reimbursement programs. As noted in the introduction, an important restriction on payments to general volunteers is that the payments "must not be tied to productivity,"[236] and a key factor in deciding whether payments are tied to productivity is whether the fee varies as the volunteer spends more time in the activity.[237]

This type of consideration is what has caused so many courts difficulty in dealing with volunteer emergency responders. Consider *Mendel*: the court noted the volunteers' wages went up or down based on the number of emergencies; thus, the reimbursement both was tied to productivity and whether the volunteer spent more time in the activity—indicators of employment under § 553.106(e).[238] The court then viewed the wages of time spent specifically in the activity—responding to emergencies—against the area's full-time average, and found them to be similar.[239] Thus, the firefighters were employees, not volunteers,[240] despite making at most $4,650 per year.[241]

But the DOL's 2006 distinction completely changes that analysis. In *Mendel*, the court notes the typical full-time emergency responder in that area were paid between $14 to $17 per hour, or $28,560 to $34,680 annually.[242] Again, under the most generous time allowance per alarm, and were we to even allow that a firefighter in Gibraltar responded to every single emergency in his community in a calendar year, he would make $4,650.[243] When we apply the total-compensation test from the DOL's 2006 opinion, that firefighter's maximum wages represent 13% to

235. 2006 Opinion Letter, *supra* note 232.

236. 29 C.F.R. § 553.106(e).

237. 2006 Opinion Letter, *supra* note 231.

238. Mendel v. City of Gibraltar, 727 F.3d 565, 571 (6th Cir. 2013).

239. *Id.*

240. *Id.*

241. *See supra* notes 217–19 and accompanying text.

242. *Mendel*, 727 F.3d at 568 (these dollar amounts were multiplied by 2,040, the standard "full-time" hours equivalent).

243. *See supra* notes 217–19. Also, for the purposes of this hypothetical, we won't assume Mendel would wait at the fire station every hour of every day to make every alarm. That would obviously change the analysis of whether he was employed considerably; instead, this is only presented to show the most money he could possibly make at his department.

16% of what his full-time replacement would be, which are within the tolerances of the 20-percent test.

Again, this hypothetical was presented in the most favorable terms for Mendel's case: these firefighters were almost certainly paid considerably less than $4,650. As previously discussed, the City of Gibraltar put on evidence that the average Form-1099 for volunteer firefighters was $1,500.[244] Thus, firefighters in Gibraltar would be volunteers under the FLSA, not employees—completely reversing the Sixth Circuit's holding.

This is the better result, both as a matter of statutory interpretation as well as a matter of practicality. As noted in the preamble to § 553.106(e), over 30% of all volunteer responders receive reimbursement per call, and that regulation's provisions were not meant to invalidate that arrangement.[245] So, had the court deferred to the DOL's guidance instead of relegating it to a hand-wave footnote, it would have looked to firefighters in Gibraltar's total compensation instead of their per-call wages.

D. Agency Deference to the DOL's 20-Percent Test

Courts should defer to the DOL's guidance when assessing volunteer status under the FLSA. Scholars have stated that the ability to adjust policies in response to social change is essential to the operation of administrative agencies.[246] Agencies may change their policies and are permitted to revise their interpretations of ambiguous statutes when a confronted with a new or unforeseen issue.[247] The seminal case in setting forth this deference is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[248] In *Chevron*, the Supreme Court addressed how to interpret the Environmental Protection Agency's ("EPA") guidance on the Clean Air Act, and how much authority that guidance was to be given in the face of ambiguities in the statute.[249] Ultimately, the Court found

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244. Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035, 1036 (E.D. Mich. 2012), *rev'd*, 727 F.3d 565 (6th Cir. 2013); *see also supra* note 219 and accompanying text.

245. 2006 Opinion Letter, *supra* note 232; *see also* 29 C.F.R. § 553.106(e) (2017).

246. *See* Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1302 (2002); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 912 (2001).

247. Chevron, Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984); *see also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41–42 (1983).

248. 467 U.S. 837.

249. *Id.* at 840–43.

that the EPA's interpretation of the Clean Air Act was a permissible construction, and because an administrative agency has congressional authority to address statutory ambiguity, the EPA's interpretation was upheld.[250] In doing so, the Court said:

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute . . . . Sometimes the legislative delegation to an agency . . . is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by . . . an agency. . . . [C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer[.][251]

This deference to agency interpretation was later amended by *United States v. Mead*.[252] Under *Mead*, agencies can only apply for "*Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [where] the agency interpretation claiming deference was promulgated in the exercise of that authority."[253] In other words, a court addressing a statutory ambiguity has the choice to determine whether to give an administrative agency's interpretation deference.

This movement away from agency deference has been met with criticism. Some scholars believe *Mead* incentivizes courts to entirely ignore an administrative agency's guidance.[254] Others have noted that the movement away from firm standards in *Mead* has produced "a great deal of confusion and error."[255]

These criticisms are correct. Within the context of the FLSA, courts now regularly ignore the DOL's guidance. Prior to *Mead*, the DOL's guidance saw regular deference in federal court.[256] Today, however, many courts reject the DOL's guidance outright.[257] In fact, in the recent

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250. *Id.* at 842–44.

251. *Id.* at 843–44.

252. 533 U.S. 218 (2001).

253. *Id.* at 218, 226–27.

254. William S. Jordan, III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, Not* Christensen *or* Mead, 54 ADMIN. L. REV. 719, 719–20 (2002); *see also* Adrian Vermeule, Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 357–58 (2003).

255. Vermeule, *supra* note 254, at 355.

256. *See, e.g.*, Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1127–28 (5th Cir. 1983); *see also* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–29 (10th Cir. 1993); Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1006–10 (N.D. Cal. 2010).

257. *See, e.g.*, Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015);

highly publicized case *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit struck down the lower court's deference to the DOL's guidance on what constitutes volunteers under the FLSA.[258]

But dismissing the DOL's guidance on the FLSA is an error. Congress explicitly stated that the question of what defines "nominal" under the FLSA was to be delegated to the DOL in the Committee Reports to the 1986 Amendment to the FLSA.[259] Thus, any court facing ambiguity in the FLSA should look to see if Congress has assigned any agency to handle such ambiguity—here, the DOL. Congress delegated this authority without placing conditions on how the DOL would reach its guidance, so any artificial creation of those conditions is a bald attempt by the courts to make a grab at congressional authority. Even if the Committee Report wasn't deemed an explicit enough delegation of authority, the question should still turn to whether the DOL's interpretation of "nominal" is reasonable and useful in coming to a judicial decision. It is.

The 20% benchmark the DOL suggests to determine the remuneration significance of volunteers is applied to several other areas of the FLSA as well. An employee cannot claim the "tip credit" under the FLSA if they spend more than 20% of their workweek doing labor that is not "tip credit" approved.[260] Employees classified as "domestic service" workers may provide companionship to elderly people and retain their "domestic service" status provided they spend no more than 20% of their workweek providing companionship.[261] An individual who owns more than 20% of a company where he works cannot be classified as an employee under the FLSA, but instead as an exempt executive.[262] An employee who spends more than 20% of his workweek engaged in non-law-enforcement activities cannot be classified as a law enforcement

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Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011).

258. 811 F.3d 528, 535–36 (2d Cir. 2015).

259. H.R. REP. NO. 99-331, at 16 (1985); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Sept. 17, 2007), https://www.dol.gov/whd/opinion/FLSANA/2007/2007_09_17_03NA_FLSA.htm.

260. U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 2 (2018), https://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

261. *Home Care: Domestic Service Final Rule Frequently Asked Questions (FAQs)*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, https://www.dol.gov/whd/homecare/faq.htm (last visited Apr. 11, 2018) (see question 15).

262. U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, FACT SHEET #17B: EXEMPTION FOR EXECUTIVE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) 2 (2008), https://www.dol.gov/whd/overtime/fs17b_executive.pdf.

officer.[263] And as noted above, an individual who spends more than 20% of his workweek driving makes that activity a significant part of his work.[264] So, not only did Congress delegate the authority to the DOL to define "nominal" under the FLSA, but the DOL has applied that definition—the 20-percent test—uniformly.

Applying this test holistically is also reasonable. The management of emergencies is colloquially known in the fire service as "controlled chaos."[265] Within a specific emergency, different responders do very different tasks: in a house fire, one may be providing medical care while another is inside the structure searching for occupants, while another is laying hose from the fire hydrant. If the courts are to engage in a microscopic analysis of compensation per alarm, it opens the door to view in isolation the type of work these firefighters were performing on each emergency and compare it against the wages for identical work. But this misunderstands the reality of how emergency response works: the controlled chaos of a scene means that a responder may be doing any work he is trained to do.

The holistic 20-percent test makes much more sense in the emergency services context. Viewing volunteers' remuneration against their full-time counterparts prevents any court's descent into the controlled chaos that defines emergency response. It more accurately reflects the environment of volunteer emergency responders, where the actual job is responding to the emergencies—and when a volunteer is not running an alarm, they are allowed to return home. Compare that to remaining at the station during the entirety of one's shift, as is common with volunteers' full-time counterparts. It also allows departments across the country to continue with the same remuneration plans they've been using without the fear of triggering liability due to uncertain definitions of the word "nominal"—or at least it will give those departments a bright-line rule to use when evaluating their current remuneration arrangements.

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263. 29 C.F.R. § 553.212(a) (2017).

264. *See supra* notes 229–30 and accompanying text.

265. *See, e.g.*, Jonathan Gallardo, *Controlled Chaos*, GILETTE NEWS REC. (June 9, 2017), http://www.gillettenewsrecord.com/news/local/article_7d71dc20-b1ea-520e-8588-86c34c7719f1.html; Annemarie Mannion, *Firefighters Train in 'Controlled Chaos' to Save Fallen Comrades*, TRIB. LOCAL ELMHURST (Sept. 16, 2011, 3:29 PM), http://www.triblocal.com/elmhurst/2011/09/16/firefighters-train-in-controlled-chaos-to-save-fallen-comrades/index.html; *Types of Fire Ground Shots: The "Work" Shot*, FIREHOUSE (May 2, 2003), http://www.firehouse.com/article/10543230/types-of-fire-ground-shots-the-work-shot.

This holistic 20-percent test, if it had been applied in the wrongly decided cases discussed above, would have produced better results. In *Mendel*, this test would have produced a result in line both with the pay of those volunteer firefighters, and in line with the pay of the community.[266] It would also have provided much more predictable results in *Pietras*.[267] Using this test, the court almost certainly would have classified Pietras as a volunteer because she received no pay for her time, which would have weighed heavily against the court's holding that her retirement and disability benefits were significant. She also was training voluntarily and expected no compensation for her time—and the benefits she did receive were commensurate to the type of work she was involved in.

While this holistic 20-percent test is being proposed here for use in volunteer emergency services, it would solve many inconsistencies in other cases discussed in this comment as well. In *Seattle Opera v. NLRB*, evaluating the workers' $2.78 per hour wage—or roughly $5,700 per year—against the national average[268] for an opera chorister's salary—or $62,000 to $125,000 per year[269]—would have strongly favored classifying those workers as volunteers. If they were public employees, considering their voluntary participation and stipend—which did not vary based on hours worked—there is no doubt they would have been classified as volunteers under the FLSA. So, this test would solve the issue of how a wage in violation of the minimum wage could simultaneously be considered significant remuneration.

E. The DOL's 20-Percent Test Creates Better Public Policy

The volunteer emergency services are critical to America's infrastructure. As noted above, the value they produce by volunteering their time amounts to $139.8 billion per year.[270] This value is critical to America's infrastructure because it represents more than the federal Departments of Education ($68.2 billion), Homeland Security ($41.3 billion), and Interior ($13.2 billion), and the Environmental Protection

266. *See supra* notes 238–44 and accompanying text.

267. *See supra* notes 171–78 and accompanying text.

268. While a regional comparison would be more appropriate, this author could not find data on the regional salaries for opera choristers in Seattle.

269. Rachel L. Swarns, *Asking How Much Opera Singers' Work Is Worth*, N.Y. TIMES (Apr. 20, 2014), https://www.nytimes.com/2014/04/21/nyregion/asking-how-much-an-opera-singers-work-is-worth.html.

270. HALL, *supra* note 32, at 29.

Agency ($8.2 billion) spent in 2016 combined.[271] Considering America was recently given a D+ grade on infrastructure because of lack of funding,[272] having that $139.8 billion actualized because of bad judicial precedent would destroy America's current funding policy toward infrastructure.

And there is a real fear in the emergency services of *Mendel*'s holding becoming accepted law. Emergency services organizations and litigation firms initially expressed dismay over *Mendel* and are cautiously watching the courts to see if any other circuits adopt similar rules about volunteer emergency responders.[273]

This caution is almost certainly chilling new recruitment and retention strategies, and this hesitation could not come at a worse time. The number of volunteer firefighters per 100,000 Americans has declined 28% from 1984 to 2003, with no evidence available that those numbers have increased since then, and these losses were unforeseen by their communities.[274] Instead, these were simply positions where new volunteer firefighters could not be found to replace the outgoing ones—forcing their communities to either pay a full-time replacement or leave the position vacant. Unless a course correction can be made, America is moving toward paying the $139.8 billion in value volunteer emergency responders currently provide.

Mendel exacerbates the problem of low volunteering numbers, and needlessly so. What communities need is a bright-line rule of what they can provide to their potential volunteer responders to incentivize recruitment and retention. And *Mendel* recognizes a solution to that problem—the 20-percent test—but buries it away in a footnote without

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271. *See supra* note 65 and accompanying text.

272. Lauren Thomas & John W. Schoen, *Engineers Give America's Infrastructure a Near Failing Grade*, CNBC (Mar. 9, 2017, 10:00 AM), https://www.cnbc.com/2017/03/09/engineers-give-americas-infrastructure-a-near-failing-grade.html.

273. *See* MEYERS, *supra* note 8; *see also* Barran Leibman LLP, *Volunteer Firefighters Are Employees for Purposes of Federal Law, Sixth Circuit Holds*, LEXISNEXIS LEGAL NEWSROOM LAB. & EMP. L. (Aug. 21, 2013, 8:07 AM), https://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2013/08/21/volunteer-firefighters-are-employees-for-purposes-of-federal-law-sixth-circuit-holds.aspx; STACY E. CRABTREE, LIABILITY TO VOLUNTEERS UNDER THE FAIR LABOR STANDARDS ACT B-5 (2015), http://www.heylroyster.com/_data/files/Seminar%202015/Govt/B-SEC-V5-Final.pdf; Darrell VanDeusen, *Volunteer Firefighters Are "Employees" for FMLA Coverage*, KOLLMAN & SAUCIER, P.A. (Aug. 20, 2013), http://www.kollmanlaw.com/wage-hour/volunteer-firefighters-are-employees-for-fmla-coverage/; Curt Varone, *Compensated Volunteers Ruled Employees Under FLSA and FLMA* [sic], FIRE L. BLOG (Aug. 18, 2013), http://www.firelawblog.com/2013/08/18/compensated-volunteers-ruled-employees-under-flsa-and-flma/.

274. CHAPMAN, *supra* note 9.

explaining why it was inapplicable to the case. But it was applicable to the emergency responders in *Gibraltar*.

And it is applicable to emergency responders across the United States. The 20-percent test is exactly the bright-line rule that volunteer emergency response agencies can understand and rely upon when evaluating their proposed recruitment incentives. This 20-percent test—applied to other DOL guidelines stating courts should evaluate the total payments made[275]—creates a clear framework for these volunteer agencies: do your total financial incentives exceed 20% of what a full-time equivalent would make? If so, you have an "employee" under the FLSA. If not, then you need fear no issue on the grounds of whether your incentives are "nominal."

Such a bright-line rule is important for reasons far more important that money. Every year, emergency medical services respond to over 36 million calls for help.[276] Every year, firefighters respond to over 1.3 million fires and nearly 1.1 million other hazardous events.[277] Without proper staffing, millions of Americans won't get the emergency medical care they need, and hundreds of thousands of homes will burn. And the proper staffing in most of the United States involves volunteer responders.

These volunteer responders deserve better than a judicial decree informing them they only volunteer in contemplation of pay.[278] The agencies they work for deserve better than a decision that limits their ability to incentivize new recruits without defining clear boundaries. And the public deserves better than a judicial decree that has the potential to either raise their taxes or lower the level of care they receive in their hour of need.

In short, America deserves better than the holding in *Mendel v. City of Gibraltar*.

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275. *See* 29 C.F.R. § 553.106(f) (2017).

276. Teresa McCallion, *NASEMSO Survey Provides Snapshot of EMS Industry*, J. EMERGENCY MED. SERVS. (Nov. 15, 2011), http://www.jems.com/articles/2011/11/nasemso-survey-provides-snapshot-ems-ind.html.

277. *See Fire Department Calls*, NAT'L FIRE PROTECTION ASS'N, https://www.nfpa.org/News-and-Research/Fire-statistics-and-reports/Fire-statistics/The-fire-service/Fire-department-calls/Fire-department-calls (last updated June 2017).

278. Mendel v. City of Gibraltar, 727 F.3d 565, 571 (6th Cir. 2013) (". . . the inescapable fact nevertheless remains that they 'work in contemplation of compensation'").

VI. CONCLUSION

Courts should defer to the DOL's guidance when determining what makes a worker a "volunteer" under the FLSA. Specifically, they should follow the DOL's guidance of what constitutes nominal pay and the DOL's recommendation that any pay received be looked at in its totality. These two items of advice, when applied together, create a bright-line rule that is the best of both worlds in the emergency services: it protects against municipalities taking advantage of their emergency responders by giving safeguards that trigger "employee" status under the FLSA, while still ensuring those communities can compensate their volunteers without fear of litigation.

And it is important courts adopt this standard. With volunteerism rates declining and jobs leaving small communities, there is a very real risk that these communities may be forced to employ full-time emergency responders, a financial burden potentially too great for already cash-strapped communities. These small towns and municipalities need to be able to compensate their volunteer responders—responders who are willing to risk their health and safety for their neighbors—without fear of triggering provisions of a federal labor law. Congress understood the importance of exempting these volunteers from the FLSA three decades ago, but somehow that's been lost.

Courts should return to this congressional intent and recognize the special place volunteer emergency services responders have in our communities. Following agency deference and accepting the Department of Labor's guidance is a good start towards that goal.