COMBATING THE ACTOR'S SACRIFICE: HOW TO AMEND FEDERAL LABOR LAW TO INFLUENCE THE LABOR PRACTICES OF THEATERS AND INCENTIVIZE ACTORS TO FIGHT FOR THEIR RIGHTS

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† Senior Notes Editor, Cardozo Law Review. J.D. Candidate (May 2019), Benjamin N. Cardozo School of Law; B.M., Ithaca College, 2014. Thank you to Professor Luke Norris for generously dedicating his time to acting as my Note Advisor and for providing extremely useful guidance and feedback throughout the writing process. To my amazing Notes Editor, Jessica Goudreault, for her patience, kindness, and support. Thank you to my parents, Wendy and Haim, my sister, Ilana, and my Nana, Adrienne Briggin, for steadfastly supporting my decisions to study music, move to New York City to perform, and then abruptly decide to go to law school. I am eternally grateful to you for providing me with the opportunities to follow my dreams, whatever they may be. And, while it may not be clear from the contents of this Note, I am forever grateful for the people I met and the experiences I had in the "theater world"; they taught me invaluable lessons I will always rely on in my future career.

INTRODUCTION

On any given morning in midtown Manhattan around the hours of five to seven in the morning, a passerby may see an unusually long line of twenty to thirty something year olds waiting outside a building with oversized bags in tow and curlers in their hair. The passerby may wonder if they are waiting in line to see a celebrity. Or maybe they are waiting for the huge promotional giveaway of the newest iPhone. Perhaps they are waiting in line to buy tickets for the new hit Broadway show. It is likely that the passerby does not consider that what these young hopefuls are actually waiting in line for is a chance to "be seen" at an audition for an acting role at any variety of theaters across the country, many of which offer them little to no pay.

Actors in this line are on their phones, intently checking the actor's audition reference called "Audition Update." "Audition Update" is a website "by actors, for actors."[1] It provides audition hopefuls with live updates regarding regional auditions, callbacks, and castings.[2] It also has sections titled "B****ing Post" and "Gig&Tell," where actors can provide support and advice about past theater contracts.[3] A frequent uproar on the "Gig&Tell" blog is about lack of wages.[4]

While stage theater jobs come in all shapes and sizes, in most employment contexts, both federal and state minimum wage regulations entitle these actors to at least the minimum wage.[5] Typically, stage actors are contracted to perform in productions at a variety of theaters throughout the year, the performances lasting anywhere from one day to

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1 AUDITION UPDATE, http://www.auditionupdate.com [https://perma.cc/E7CN-PQF7] (last visited Oct. 15, 2018).

2 *Id.*

3 *Id.*

4 Warnings of lack of payment, such as "PLEASE, do not do a contract here, professional actors . . . pay rates have not gone up here in over ten years, while profits most certainly have. If you respect yourself/your mental and physical health, do not audition!" or "pay is abysmal," or, a kinder, "pay is pretty standard here," are the norm. *Gig&Tell: La Comedia Dinner Theatre*, AUDITION UPDATE, http://www.auditionupdate.com/index.php?s=4&v=377 [https://perma.cc/Y6BE-BTKC] (last visited Sept. 10, 2018).

5 *See* discussion *infra* Section II.B.

several months.[6] Work hours are "extensive but irregular,"[7] and schedules often require all day rehearsals[8] and late-night performances.[9] The disparity in the type of stage theater job is mirrored by a vast disparity in pay rates.[10] While Broadway performers make a union-mandated minimum of $1,900 a week[11]—and principal roles often receive a salary bump[12]—actors performing at smaller theaters may only make anywhere from zero to two hundred fifty dollars a week.[13] Actors auditioning for these smaller theaters are warned of the reality of underpayment, yet the majority agree to work for little or no pay, advancing excuses like they are doing the job for exposure or to build their resumes.[14] This phenomenon of actors not enforcing their right to minimum wage under the guise that working for free will eventually further their careers is what this Note refers to as the "Actor's Sacrifice."

Part I of this Note will provide a background of the stage theater industry and the current federal and state labor laws and regulations. Section I.A will introduce the basic structure of the acting world, the differences between union and non-union actors, and the conflict surrounding the recent repealing of the Los Angeles 99-seat Theatre

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6 *See* Bureau of Labor Statistics, *Actors: Occupational Outlook Handbook*, U.S. DEP'T LABOR, https://www.bls.gov/ooh/entertainment-and-sports/actors.htm#tab-2 [https://perma.cc/Q5DX-HNTB] (last modified Apr. 13, 2018).

7 *Id.*

8 *See* Zachary Pincus-Roth, *Ask Playbill.com: Rehearsal Schedule*, PLAYBILL (Dec. 28, 2007), http://www.playbill.com/article/ask-playbillcom-rehearsal-schedule-com-146459 [https://perma.cc/RA88-ZU93].

9 *See* Erin Cronican, *10 Sacrifices an Actor Makes*, BACKSTAGE (Nov. 9, 2012, 11:50 AM), https://www.backstage.com/advice-for-actors/backstage-experts/10-sacrifices-actor-makes [https://perma.cc/H8DV-F264].

10 *See infra* Appendix (depicting compensation rates for a variety of theater venues).

11 *See* Kerry Close, *Hamilton Creator Lin-Manuel Miranda Will Make About 60 Times More than the Rest of the Cast this Year*, TIME: MONEY (June 9, 2016), http://time.com/money/4362742/hamilton-cast-earnings-lin-manuel-miranda [https://perma.cc/H7QT-9UR8].

12 *See id.*; *see also* Brian Lowdermilk, *The Bare Minimum: Breaking Down Broadway Actor Salaries*, NEW MUSICAL THEATRE (Jan. 4, 2016), http://newmusicaltheatre.com/greenroom/2016/01/the-bare-minimum-breaking-down-broadway-actor-salaries [https://perma.cc/P4GP-T7BG] (providing examples of additional salary increases for lead roles, swings, dance captains, and understudies).

13 *See infra* Appendix.

14 *See, e.g.*, Jessica Gelt, *99-Seat Theaters and Actor Pay: The Debate so Far*, L.A. TIMES (Apr. 23, 2015, 11:26 AM), http://www.latimes.com/entertainment/arts/culture/la-et-cm-99-seat-theater-actors-equity-los-angeles-explainer-20150422-htmlstory.html [https://perma.cc/8GSR-4RCZ] ("[Actors] can look to small theaters for work that may not pay well but simply feels good. For others, it's a potential springboard to other roles . . . .").

Waiver. Section I.B will discuss current minimum wage laws, focusing on the provisions of the Fair Labor Standards Act (FLSA).[15] Part II of this Note will analogize the actor's situation in the line with the relevant statutes, regulations, and case law to determine whether theaters are actually breaking minimum wage laws. Part II will also analyze the economic and moral ramifications of fair wage regulations and why it is necessary for the federal and state governments to protect and enforce these standards, regardless of the individual workers' desires.

Part III of this Note will propose a dual action process to work towards solving the issue of the actor's sacrifice and its perpetuation of illegal labor practices and economic stagnation. On a legislative level, the government must take steps to amend current legislation in a way that clarifies the statutory ambiguities for actors in the labor force and provides incentives for theaters to pay actors a fair wage. A second layer of action requires establishing enforcement mechanisms both legislatively and through social bargaining organizations in order to educate actors, strengthen their bargaining power, and provide them with a support vehicle through which they can advocate for their rights. While this labor force is unique in both form and substance, its uniqueness in no way suggests that actors should be left unprotected.

I. BACKGROUND

A. *The Perfect Storm for the Actor's Sacrifice*

1. The Actors' Equity Association

To grasp the extent of the unfair and potentially illegal compensation practices prevalent in theaters across the country and how and why these practices are able to perpetuate, it is first necessary to understand the acting pool and the various "types" of actors auditioning to perform at these theaters. In the theater world, working

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[15] The Note will also briefly discuss state minimum wage regulations. Most actors are covered by the federal regulations, for reasons discussed *infra* Part II. However, states also have the power to enact their own laws and regulations, which generally provide similar, if not greater, minimum wage coverage to employees. *See* discussion *infra* Section I.B.

stage actors fall into two categories: union and non-union.[16] Union actors are members of the Actor's Equity Association (AEA).[17] AEA, the sole union representing actors and stage managers in live theater productions,[18] was founded in 1913 to combat the long history of actor exploitation.[19] Today, AEA negotiates Equity contracts with theaters across the country to establish fair wage agreements, reasonable audition requirements and working conditions, and benefits such as health care and pension plans.[20] Each Equity contract sets forth the responsibilities of the actors and theaters[21]—the least lucrative Equity contract representing the minimum professional standard[22]—and varies depending on the type of role (chorus or principal) and the size of the theater.[23] In consideration for the theater's promise to abide by union regulations, the union promises to provide high caliber, professional performers who have experience in the field and have established themselves as hardworking and talented performers.[24]

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16 Mark D. Meredith, *From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96 COLUM. L. REV. 178 (1996).

17 *Id.* at 178.

18 *About Equity*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/aboutequity [https://perma.cc/7KL9-V66M] (last visited Sept. 10, 2018); *see also Actors' Equity at a Glance*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/aboutequity/equity-at-a-glance.pdf [https://perma.cc/MM2T-JAH5] (last updated Feb. 2018).

19 *History*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/aboutequity/history [https://perma.cc/L53H-ZTBD] (last visited Sept. 10, 2018).

20 *About Equity*, *supra* note 18.

21 *See Responsibilities*, ACTORS' EQUITY ASS'N, http://archive.is/2GWz (last visited Nov. 15, 2018). One major factor of Equity contracts is that union members are forbidden from performing in non-union productions without the union's pre-approval. *Id.* According to AEA, "[w]orking without a contract seriously diminishes Equity's ability to stimulate professional work opportunities, undercuts all other agreements, creates unfair competition, and is ultimately detrimental to the welfare of all the members." *Id.*

21 *See* Meredith, *supra* note 16, at 192.

22 *Id.* at 224.

23 See *infra* Appendix for some examples of Equity contracts. AEA's website also provides links to the various contracts offered for different types of employment, such as the League of Resident Theatres (LORT), Small Professional Theatre (SPT), and New England Area Theatres (NEAT). *See Contracts & Codes,* ACTORS' EQUITY ASS'N, http://www.actorsequity.org/resources/contracts [https://perma.cc/GJ26-SAQD] (last visited Sept. 10, 2018). These contracts take into account the theater's size and box-office gross, and some salaries vary depending on whether the actor is a principal, chorus, understudy, or dance captain. *Id.*; *see, e.g.*, *League of Resident Theatres (LORT)*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/resources/contracts/LORT [https://perma.cc/7S6D-3M72] (last visited Nov. 15, 2018).

24 AEA eligibility requirements are discussed at greater length *infra* Section I.A.3; *see also* Meredith, *supra* note 16, at 224–35 ("To avoid a massive glut of auditioning performers, some

2. The Plight of the Non-Union Actor

Becoming a union member is the goal of many young actors entering the theater business. Union membership not only provides valuable wage benefits,[25] but it is also viewed as achieving the peak of professionalism.[26] One of the most important benefits of union membership is the ability to audition (in actor's lingo, "be seen") for high-end productions whose auditions are only open to AEA members.[27]

However, joining the union is easier said than done. The "simplest way" to join is to book a job at an Equity theater.[28] Following the show's run, the theater will provide the actor with her Equity card.[29] An actor can also join the union by participating in the Equity Membership Candidate Program (EMC), which operates on a points system,[30] or by

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criterion was needed to distinguish those with only marginal professional potential from those with a greater possibility of success. . . . This, in turn, prevented casting directors and producers from the unenviable task of sitting through days of auditions without any guarantee of professional competence.").

25 See *infra* Appendix for disparities in pay between non-union and union contracts.

26 Meredith, *supra* note 16, at 224; *see also* Marc Smith, *Should I Join? Actors' Equity Pros and Cons*, TALKING THEATER (May 30, 2017), https://talkingtheater.com/actors-equity-pros-cons [https://perma.cc/32G9-JPU6] ("[H]olding that union card is a credential that reflects a seriousness of purpose and pride.").

27 *See* Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 7 (2000); *see also* Smith, *supra* note 26.

28 *See* Ruthie Fierberg, *Start 2014 Off Right: The Basics of Joining Actors' Equity Association*, BACKSTAGE (Jan. 2, 2014, 2:00 PM), https://www.backstage.com/news/start-2014-right-basics-joining-actors-equity-association [https://perma.cc/JF5B-7GYQ]; Smith, *supra* note 26; *Join Equity*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/join [https://perma.cc/XP45-FA8W] (last visited Sept. 10, 2018).

29 *Id.* Having an Equity card means the actor has accumulated enough points and is now a union member.

30 *Id.* For details on the Equity Membership Candidate Program (EMC) see *Equity Membership Candidate Program*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/join/emc/emc-one-sheet-2018.pdf [https://perma.cc/ZBX4-P4E9] (last updated Feb. 2018). Significantly, AEA has recently announced a major change to the EMC program: while in the past EMC participants were required to accrue fifty creditable weeks of work, the new program will allow participants to be Equity eligible after completing only twenty-five creditable weeks. *See New Flexibility in the EMC Program*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/news/PR/EMCProgramChanges2017 [https://perma.cc/6YZL-VD8E] (last visited Sept. 10, 2018) ("As a part of the Equity 2020 vision to create a more aggressive, inclusive and responsive Union by the year 2020, Actors' Equity Association announced today a series of rule changes aimed at modernizing the Equity Membership Candidate (EMC) program . . . .").

joining a sister union.[31] However, union auditions are for the most part only open to current union members.[32] For union hopefuls, this union membership requirement presents a "catch-22": to be cast in productions that offer points towards EMC or a full Equity contract, you have to be able to "be seen" at Equity auditions—but to be seen at these auditions, you need to be an Equity member.[33] Booking Equity or EMC contracts require some level of talent, but more often a lot of luck.[34] Those who are not as talented, or maybe just not as lucky, are grouped into the subclass of non-union actors known as the "noneqs."[35] Noneqs are unprotected by union regulations; therefore, non-union theaters are able to avoid the minimum payments mandated by the union and only pay actors a small stipend (or sometimes no stipend at all), regardless of the hours they rehearse or perform (which are often comparable to the hours worked by Equity actors at union-member theaters).[36]

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31 Fierberg, *supra* note 28. While AEA is the only union for stage actors, its sister unions include SAG-AFTRA (Screen Actors Guild), AGMA (American Guild of Musical Artists), AGVA (American Guild of Variety Artists), and GIAA (Guild of Italian-American Actors). *See Join Equity*, *supra* note 28.

32 Chi, *supra* note 27, at 38–39; Meredith, *supra* note 16, at 209; Lizzie Maxwell, *Union vs. Non-Union*, ACTORS REP. (Mar. 1, 2010), http://www.actorsreporter.com/2010/columns/union-vs-non-union [https://perma.cc/9BTN-Z7W6].

33 *See* Meredith, *supra* note 16, at 209 ("Until 1988, Actors' Equity operated as a closed shop—that is, auditions for union productions were open to union members only."). Over the years, and following various settlements and litigation, the National Labor Relations Board cemented Equity's legal ability to maintain this virtually closed door system and establish itself as the "gatekeeper of the theater." *See* Chi, *supra* note 27, at 5–10. This gate only opens to the "union elite." *See* Meredith, *supra* note 16, at 189.

34 For an in-depth discussion on the arbitrariness of union membership and the lack of correlation between talent and membership, see Chi, *supra* note 27 at 68–71. *See also* Stephanie Sellars, *Union vs. Non-Union: Know What You're Getting Into*, MOVIEMAKER MAG. (July 30, 2015), https://www.moviemaker.com/archives/moviemaking/producing/union-vs-non-union-guide-2013 [https://perma.cc/R5XE-BQCP] ("Actors generally are a mixed bag. You can get a terrible union actor or a brilliant non-union actor. When it comes to talent, many directors don't care whether an actor is union or non-union.").

35 There are strategic reasons actors choose not to join the union. Some actors do not want to be prohibited by Equity's rules, such as the provision in the Equity bylaws that only allows union actors to perform under union contracts. *See* Smith, *supra* note 26. Some would rather not pay dues and membership fees. Others perhaps live in areas where there are more non-union theaters and therefore more opportunities for them outside the union. *Id.* However, for the most part, non-union actors are not "choosing" not to join the union—they are simply unable to.

36 *See infra* Appendix. In a recent casting call for "up-and-coming" musical theater singers, compensation was not only listed as "no pay," but there was a tuition requirement of $395-$595

3. Unemployment: The Chicken or the Egg?

The union's closed shop[37] audition eligibility policy is likely fueled by two main interests: (1) maintaining the guise of the union elite and (2) combating unemployment. First, the union itself is solely sustained by the dues and membership fees of its actors,[38] which are paid both as an annual fee and as a percentage of the gross earnings of the actor's contract.[39] The union uses the strict eligibility requirement to guarantee theaters that they will have access to elite artists, which then empowers the union to negotiate higher salaries and receive a larger fee from each actor's earning.[40] Audition eligibility also provides a major incentive for actors to join the union, which again increases the union's funds: if non-union actors had access to every audition, they may be less likely to join to avoid having to pay a portion of their earnings.[41] Second, proponents of unionism and its strict eligibility system believe the union set up is necessary to combat the rampant unemployment in the industry.[42] Mass unemployment in the acting industry is the reality both non-union and

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to perform for one evening. *'PCI's Broadway: Next Generation,' Carnegie Hall Performance*, BACKSTAGE, https://www.backstage.com/casting/pcis-broadway-next-generation-carnegie-hall-performance-83600 [https://perma.cc/K9SJ-5ZT8] (last visited Nov. 16, 2018). In rare instances of generosity, certain theaters are willing to offer stipends to "help defray expenses." *CSC2 2018, 'Macbeth' and 'Richard III'*, BACKSTAGE. https://www.backstage.com/casting/csc2-2018-macbeth-and-richard-iii-189494 [https://perma.cc/VXU3-5YUZ] (last visited Sept. 11, 2018).

37 "In a closed shop, employment is preconditioned on union membership." Meredith, *supra* note 16, at 186

38 *Actors' Equity at a Glance*, *supra* note 18.

39 *See Dues & Fees*, ACTORS' EQUITY ASS'N, http://www.actorsequity.org/join/dues [https://perma.cc/SM42-UWJW] (last visited Sept. 11, 2018).

40 *See, e.g.*, Gordon Cox, *Actors' Equity Membership Ratifies New Contract with National Network of Theaters*, VARIETY (June 24, 2017, 6:47 AM), http://variety.com/2017/legit/news/new-equity-lort-contract-1202477109 [https://perma.cc/9U2X-C5P7] (discussing an increase in wages for LORT theaters and recognizing that "[t]he artistic contributions of the professional actors and stage managers covered in this agreement are a core part of each LORT theater's ability to produce artistically excellent work for our communities.").

41 *See* Smith, *supra* note 26.

42 Meredith, *supra* note 16, at 191–92 ("[P]rofessional theatre is at once susceptible to both a dilution of skills within the industry and a surplus of competent actors entering the business. On the one hand, without restraining the number of auditioners, audition lines become flooded with actors lacking sufficient skills or talent to compete realistically for jobs. This undermines the efficiency and effectiveness of the 'cattle-call' audition process. On the other hand, there is simply not enough union work, even for current members. As a consequence, nonunion theatres, which exist in community, stock, and touring companies throughout the country, present a threat of competition that pervades the professional environment.").

union actors face,[43] and employment statistics reveal that their concerns are often valid.[44]

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[43] *See* PAUL RUSSELL, ACTING— MAKE IT YOUR BUSINESS: HOW TO AVOID MISTAKES AND ACHIEVE SUCCESS AS A WORKING ACTOR (2008); Chi, *supra* note 27; Meredith, *supra* note 16; Brendan McMahon, *Unemployment is a Lifestyle for Actors, and Now Too Many Others*, HUFFPOST, https://www.huffingtonpost.com/brendan-mcmahon/unemployment-is-a-lifesty_b_1183841.html [https://perma.cc/JAJ2-GA8R] (last updated Mar. 5, 2012); Michael Simkins, *When the Going Gets Tough*, GUARDIAN (May 9, 2009, 7:02 AM), https://www.theguardian.com/stage/2009/may/09/tips-surviving-acting-industry [https://perma.cc/X3ZD-95ES]; Bruce Weber, *So Many Acting B.A.'s, So Few Paying Gigs*, N.Y. TIMES (Dec. 7, 2005), http://www.nytimes.com/2005/12/07/arts/so-many-acting-bas-so-few-paying-gigs.html?_r=0.

[44] According to reports released by the United States Bureau of Labor Statistics, actors constantly struggle to find work and often face consecutive periods of unemployment. *See* Bureau of Labor Statistics, *supra* note 6. The AEA Theatrical Season Report from 2015–2016 showed that only 17,834 of the 51,057 union members were employed during the working season, and this 35% only worked an average of 17.1 weeks per year. STEVEN DIPAOLA, ACTORS' EQUITY ASS'N, 2015–2016 THEATRICAL SEASON REPORT: AN ANALYSIS OF EMPLOYMENT, EARNINGS, MEMBERSHIP AND FINANCE 1, 3 (2017), http://www.actorsequity.org/aboutequity/annualstudy/1516Report.pdf [https://perma.cc/BPC7-RD5U]. According to the National Endowment for the Arts' "big picture" research, as of 2014, 2.1 million workers held positions as "primary artists," meaning they worked the most hours in their artistic field, while 271,000 workers held secondary jobs as artists, meaning their primary employment was in another field. Press Release, Nat'l Endowment for the Arts, The National Endowment for the Arts Announces New Research on Arts Employment (Mar. 28, 2014), https://www.arts.gov/news/2014/national-endowment-arts-announces-new-research-arts-employment [https://perma.cc/MA4F-XB76]. While the total percentage of unemployed primary *artists* was 7.1%—an improvement from past years and only a small percentage above the total unemployment rate for all U.S. civilian workers—the unemployment rates for *actors* specifically was a staggering 31.8%, far above any other specific designation of professional artists. *Id.* Dancers and choreographers had the second highest rate of unemployment at 16.7%. *Id.* As of May 2016, the Bureau of Labor Statistics recorded 48,620 actors and 40,110 Musicians and Singers in the labor force. Bureau of Labor Statistics, *Occupational Employment and Wages, May 2016: 27-2011 Actors*, U.S. DEP'T LABOR, https://www.bls.gov/oes/2016/may/oes272011.htm [https://perma.cc/H6VE-UJCC] (last modified Mar. 31, 2017); *see also* Bureau of Labor Statistics, *Occupational Employment and Wages, May 2017: 27-2042 Musicians and Singers*, U.S. DEP'T LABOR, https://www.bls.gov/oes/current/oes272042.htm [https://perma.cc/35KH-QPHC] (last modified Mar. 30, 2018) ("These estimates are calculated with data collected from employers in all industry sectors, all metropolitan and nonmetropolitan areas, and all states and the District of Columbia."). Of these numbers, only 8,550 actors and 2,760 musicians and singers were able to work specifically in the relevant designation of "theater companies and dinner theaters." Bureau of Labor Statistics, *May 2016 National Industry-Specific Occupational Employment and Wage Estimates: NAICS 711110—Theater Companies and Dinner Theaters*, U.S. DEP'T LABOR, https://www.bls.gov/oes/2016/may/naics5_711110.htm [https://perma.cc/9PRN-Y744] (last modified Mar. 31, 2017). It is important to correlate the employment statistics with the desired performing industry. The North American Industry Classification System describes "Theater Companies and Dinner Theaters" as "(1) companies, groups, or theaters primarily engaged in

A major contributing factor to the high unemployment rate among theater actors is that far too many actors are entering the labor force each year but there are not enough productions in which to cast them.[45] As a result, the union uses strict audition eligibility requirements to narrow the pool of artists auditioning for top productions.[46] By disallowing non-union actors from auditioning, the union hopes that when faced with the choice to work non-union jobs with no pay or not work in the industry at all, non-union actors will choose the latter.[47] However, with the continued growth of the non-union acting pool, the question persists whether unemployment can be solved by the strict eligibility plan, or whether the strict eligibility plan actually increases

producing the following live theatrical presentations: musicals; operas; plays; and comedy . . . ." *NAICS Code 711110 Theater Companies and Dinner Theaters*, SICCODE, https://siccode.com/en/naicscodes/711110/theater-companies-and-dinner-theaters-1 [https://perma.cc/XPJ3-YGDY] (last visited Sept. 16, 2018). Specific industries include: Broadway theaters, dinner theaters, musical theater companies or groups, stock companies, summer theaters, repertory companies, and more. *Id.* The Bureau of Labor statistics projects the job outlook for actors in these industries to grow 12% between 2016–2026. Bureau of Labor Statistics, *supra* note 6 (tab 6, "Job Outlook"). However, the handbook specifically states that [a]ctors who work in performing arts companies are expected to see slower job growth than those in film. Many small and medium-size theaters have difficulty getting funding. As a result, the number of performances is expected to decline. Large theaters, with their more stable sources of funding and more well-known plays and musicals, should provide more opportunities. *Id*.

45 *See* McMahon, *supra* note 43; Weber, *supra* note 43.

46 Interestingly, AEA's recent decision to allow EMC candidates into the union with only twenty-five credited weeks represents the opposite approach to the unemployment issue. Current union members fear that the influx of union actors will only worsen their job prospects. *See* Alex Ates, *Equity Announces Major Change to Membership Candidate Program*, BACKSTAGE (Oct. 20, 2017, 1:30 PM), https://www.backstage.com/news/equity-announces-major-change-membership-candidacy-program [https://perma.cc/2GBV-9ASL]. Equity promises that this move to "recruit and expand" will bolster their connections in the theater world and strengthen opportunities for union actors. *Id.* This expansion aligns with Equity's growth plan known as "Equity 2020." *Id.* Equity 2020 plans to be more aggressive about combating unemployment by creating an inclusive and responsive environment for its members. *See* Kate Shindle, *From the President: Aggressive. Inclusive. Responsive: Here's to 2020*, EQUITY NEWS (Actors' Equity Ass'n, New York, N.Y.), Spring 2017, at 4, https://www.actorsequity.org/news/EquityNews/Spring2017/en_02_2017.pdf [https://perma.cc/4QN9-LKTK].

47 *See* Meredith, *supra* note 16, at 192 n.72. Another interesting consideration is that wealthy young actors will be able to continue in the industry without pay, regardless of whether they are granted union membership. For an interesting opinion on the dangers of a "rich kid"/"posh" dominated acting world, see Abid Rahman, *James McAvoy: Dominance of Rich-Kid Actors in the U.K. is "Damaging to Society"*, HOLLYWOOD REP. (Feb. 10, 2015, 12:18 AM), https://www.hollywoodreporter.com/news/james-mcavoy-dominance-rich-kid-772139 [https://perma.cc/NK4B-5PU3].

unemployment. The union seems to underestimate non-union actors who are highly dedicated to their art and creative growth,[48] and—perhaps naively (based on the data)—believe that perseverance in low-paying acting jobs will eventually land them a job on Broadway.[49] Instead of leaving the acting world, they continually choose to accept the low-paying non-union jobs or lower tiered equity jobs to beef up their resumes.[50] Thus, the "Actors' sacrifice" is born: many actors would rather sacrifice their well-being and livelihoods, and perform for little to no pay than not perform at all.[51] This sacrifice is highlighted perfectly in the recent debate surrounding the new 99-seat Theater Agreement in Los Angeles.

4. The "Los[t]" Angeles 99-Seat Theater Agreement

The Los Angeles theater community is known for its large percentage of small, intimate theaters that provide actors with the ability to perform before live audiences, hone their artistic talents, and contribute to the experimental environment of the Los Angeles theater scene.[52] In 1972, an Equity waiver was implemented by AEA specific to

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48 Artists are entrepreneurial in spirit, and are willing to work multiple part-time jobs to sustain themselves instead of shifting into completely different fields. Joanna Woronkowicz, *Do Artists Have a Competitive Edge in the Gig Economy?*, NAT'L ENDOWMENT ARTS (May 12, 2016), https://www.arts.gov/partnerships/creativity-connects/report/do-artists-have-a-competitive-edge-in-the-gig-economy [https://perma.cc/R958-V73Q].

49 *See* Jessica Gelt, *Calling All Actors Willing to Work for (Almost) Free: Theater Companies Hold Auditions for a New 99-Seat World*, L.A. TIMES (May 29, 2017, 3:20 PM), http://www.latimes.com/entertainment/arts/la-et-cm-99-seat-itla-auditions-20170529-story.html [https://perma.cc/9NFA-84UQ] ("Some people just want to hone their craft and want exposure and experience in good productions.") (quoting an actor); *see also* Mike Boehm, *Two Views on the Actors' Equity Wage Hike for L.A.'s Small Theaters*, L.A. TIMES (Apr. 22, 2015, 6:05 PM), http://www.latimes.com/entertainment/arts/la-et-cm-99-seat-theater-reax-20150423-story.html [https://perma.cc/92UP-GGJM] (observing that actors wish to continue offering their time and talent for free for the sake of their art, and with the "added hope" that they will be discovered for bigger, higher-paying roles).

50 *See* Boehm, *supra* note 49.

51 *See* discussion *infra* Sections I.A.4, II.B.

52 Complaint for Damages and Equitable Relief at 1, Asner v. Actors' Equity Ass'n, No. cv-15-08169 (C.D. Cal. Oct. 17, 2015); *see* Michael Paulson, *Actors' Equity Pushes for Minimum Wage, But Not All Members Want It*, N.Y. TIMES (Apr. 19, 2015), https://www.nytimes.com/2015/04/20/theater/actors-equity-pushes-for-a-minimum-wage-but-not-all-its-members-want-it.html?mcubz=0. Many of these small theaters are experimental in nature and provide a "laboratory" for new works that actors argue are essential to the growing process of the theater

Los Angeles's small theaters.[53] The waiver allowed union actors to perform in these theaters by designating them as "volunteers" instead of "employees."[54] This designation also allowed producers to pay them only a small stipend for performances (seven to fifteen dollars) and no wages.[55] AEA hoped that eventually these wage cuts would allow smaller theaters to grow and transition beyond the 99-seat capacity to the umbrella of midsize theaters (who have to pay their actors wages).[56] This no-wage feature remained intact for twenty-five years,[57] until 2014, when AEA conducted surveys that revealed that the majority of members believed the waiver plan benefitted producers over actors and needed changes.[58]

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world. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss Complaint at 1, Asner v. Actors' Equity Ass'n, No. 2:15-cv-08169 (C.D. Aug. 17, 2016); *see also* Steven Leigh Morris, *The Future of L.A. Theater's 99-Seat Plan Could be Decided this Month*, L.A. WEEKLY (Jan. 8, 2015, 6:30 AM), http://www.laweekly.com/arts/the-future-of-la-theaters-99-seat-plan-could-be-decided-this-month-5325309 [https://perma.cc/68XD-BF8J] (stating that Los Angeles theaters are responsible for the most "dynamic, innovative and evocative theater to be found anywhere.").

53 Gelt, *supra* note 14.

54 Memorandum of Points and Authorities in Support of Motion of Defendant Actors' Equity Association to Dismiss the Complaint at 3, Asner v. Actors' Equity Ass'n, No. 15-cv-08169 (C.D. Cal. July 21, 2016). Prior to 1989, in accordance with Equity's rule that union actors were not allowed to perform in non-union shows, many union actors in Los Angeles were not allowed to audition for these productions and felt as though they were missing out on the opportunity to supplement their work between other acting jobs or to contribute to the experimental scene. *See Equity Waiver Theater in Los Angeles*, ACTOR'S LIFE, https://web.archive.org/web/20170812063814/http://www.theactorslife.com/business/equity_waiver_theater_in_los_angeles.html (last visited Nov. 16, 2018).

55 *See Equity Waiver Theater in Los Angeles*, *supra* note 54. At the time, it was a more than welcome change to the Equity rules, and by 1976, when the plan was up for renewal, it seemed as though the waiver had proved itself as a necessary means for growth of the Los Angeles small theater scene. *See* Gelt, *supra* note 14 ("Small theaters were blossoming at an unprecedented rate, and a rich creativity emerged with them. 'The 99-seat Equity Waiver Plan now four years young, has proved its worth and viability in spades . . . It has had the predicted wide-ranging effect of proliferating theatrical activity here and in San Francisco. By turning theaters loose it has forced them to sink or swim. This generated a survival of the fittest which triggered the inevitable sharp rise in the level of artistic achievement.'").

56 *See* Boehm, *supra* note 49.

57 Memorandum of Points and Authorities in Support of Motion of Defendant Actors' Equity Association to Dismiss the Complaint, *supra* note 54, at 5.

58 *Id.* Actors felt as though some theaters included unsafe and unsanitary working conditions and required them to perform undesirable and financially burdensome tasks, such as buying and creating their own costumes, building sets, and sometimes acting as janitors. Gelt, *supra* note 14.

In 2015, changes were proposed to "synthesize and balance member's concerns . . . to more fairly value actors' contributions."[59] At the same time, AEA wanted to ensure that actors would still have the opportunity to perform.[60] The final proposal balanced these concerns through four significant provisions: (1) equity member wages in 99-seat theaters would be increased to at least the minimum hourly wage, including payment for rehearsals and performances; (2) equity members would be permitted to work without wages in productions of fifty seats or fewer for a maximum of sixteen performances per production; (3) equity members would be permitted to work without an equity contract in member-produced productions or membership companies; and (4) a transitional code would be in place to maintain the status quo for more than one year.[61] In AEA's opinion, these provisions were the best possible compromise between the actor's desire to perform and the actor's desire to make at least a partial living through performing.[62]

Despite AEA's attempts at compromise, many actors and producers were extremely unhappy.[63] In April of 2015, 66% of Equity

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59 Memorandum of Points and Authorities in Support of Motion of Defendant Actors' Equity Association to Dismiss the Complaint, *supra* note 54, at 5–6.

60 *Id.*

61 *Id.*

62 *Id.* The first provision satisfied the goal of providing actors payment for their work and for ensuring the theaters' compliance with state and federal minimum wage regulations. *Overview of Minimum Wage*, ACTORS' EQUITY ASS'N, https://web.archive.org/web/20170802043354/http://equityworksla.com/overview-of-minimum-wage (last visited Nov. 16, 2018). The next two provisions worked towards the goal of maintaining the actor's ability to perform at all. *Id.* The final provision worked toward the goal of giving theaters time to prepare for the changes by allowing them to fundraise and adjust their budgets to include actor wages. *Id.*

63 Immediately following the Council's decision, various individuals, including Ed Asner, an actor and the former President of the Screen Actor's Guild, brought suit against the union, claiming breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, breach of the duty of fair representation, and violation of the Labor Management Reporting and Disclosure Act's Equal Rights Guarantee. *See* Complaint for Damages and Equitable Relief, *supra* note 52, at 1. The plaintiffs' main goal was to stop Equity from changing the waiver system. In their opinion, the most "onerous" from the changes was the minimum wage requirement. *Id.* at 2.

> It threatens to destroy the exciting and essential small theatre culture in Los Angeles by imposing burdensome compensation costs that will make it impossible for many small theatres to survive. Many will close altogether. All will have greater difficulty producing original works. Some have already decided to present fewer productions with smaller casts beginning in 2016, and many will turn to the world of non-union actors. Thousands of actors and other creative artists will likely lose access to

members in Los Angeles who returned ballots in a nonbinding referendum voted against a mandatory minimum wage for small theaters.[64] Many actors argued that they weren't performing at these theaters to make a living, but to continue their education and "feed[] their souls."[65] Producers felt that there would be no way to make up potentially more than $40,000 in budget for actors' wages through increased ticket prices because ticket buyers were accustomed to the heavily discounted tickets and wouldn't purchase otherwise.[66] Actors feared that if unable to come up with the money, theaters would close or hire non-union actors, so they would end up without pay *and* without experience—even worse off than their situation under the waiver.[67] Many members did support the new rules,[68] and AEA stood by its decision.[69] It believed that the previous waiver plan only led to

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> important theatrical volunteer acting opportunities which contribute to their creative development, enhance their professional careers, and often lead to recognition by others in the theatrical, television and film industries and then to remunerative acting employment.

Id. at 2–3. The case was ultimately dismissed in favor of Actors' Equity in December of 2016. Order at *3–5, Asner v. Actors' Equity Ass'n, No. cv-15-08169 (C.D. Cal. Dec. 8, 2016) (complaint dismissed for failure to state a claim for relief); *see* David Robb, *Judge Dismisses Ed Asner Suit vs. Actors' Equity; Small L.A. Theaters Must Pay Minimum Wage*, DEADLINE (Dec. 8, 2016, 3:40 PM), http://deadline.com/2016/12/los-angeles-theater-minimum-wage-lawsuit-dismissed-ed-asner-actors-equity-1201867216 [https://perma.cc/5MTX-QGCL].

64 *See* Robb, *supra* note 63; *see also* Paulson, *supra* note 52.

65 Paulson, *supra* note 52.

66 Boehm, *supra* note 49.

67 Gelt, *supra* note 14; Paulson, *supra* note 52.

68 Some understandably feel that it is strange to be doing work without any compensation. *See* Paulson, *supra* note 52; *see also* Carlos Neto, *Should You Ever Work for Free?*, BACKSTAGE (Aug. 2, 2016, 3:00 PM), https://www.backstage.com/advice-for-actors/backstage-experts/should-you-ever-work-free [https://perma.cc/5H9Z-ZLW4] (stating that in deciding whether accepting work for free is undermining the value of an actor's talent, "there needs to be a basic individual sense of self worth that has to start within every artist and will eventually lead to a stronger industry as a whole."). Others note that it is simply not sustainable to work for hours in these productions and maintain another job. *Id.*

69 Equity states that this is "not a radical decision or change," noting that only 14% of the 180 theatres are expected to be affected by the new contract (either because they are fifty seats or less, or because they are considered membership companies, meaning they are formed by union actors). *See Overview of Minimum Wage*, *supra* note 62. Theaters fifty seats or less and membership companies are exempt from the new rule. *See* Memorandum of Points and Authorities in Support of Motion of Defendant Actors' Equity Association to Dismiss the Complaint, *supra* note 54, at 5–6. Equity also notes that there are small theaters across the country that are staying afloat and still paying their union actors more than a stipend. Paulson, *supra* note 52. Importantly, there is no equivalent waiver for comparably sized theaters in New

stagnation in the Los Angeles small theater scene.[70] Equity also relied on its core principal to support its decision: all actors deserve fair pay.[71] Acting is a professional occupation, and its workers should be dignified with a minimum wage.[72] This change was meant to empower actors to stand up for themselves.[73]

The actors' campaign against their own financial sustainability is undoubtedly "an unusual twist" in the continuing debate across the nation regarding wage fairness.[74] To fully understand the sacrifice and whether theaters are actually legally responsible for paying their actors a minimum wage, it is necessary to analyze both state and federal minimum wage regulations in the United States.

B. *Minimum Wage Regulations*

The Fair Labor Standards Act (FLSA) is a federal law that was enacted by Congress in 1938.[75] The Act's main accomplishments included setting minimum wage standards and overtime pay

York or Chicago. *See Equity to L.A. 99-Seat Plaintiffs: The Deal's Off*, AM. THEATRE (June 28, 2016), http://www.americantheatre.org/2016/06/28/equity-to-l-a-99-seat-plaintiffs-the-deals-off [https://perma.cc/9PJN-2F3W]. Opponents of the new rule argue that the innovative theater scene in Los Angeles is unique, and the comparison to other cities is not valuable because they are doing different types of work with different types of actors. Paulson, *supra* note 52. They argue that even if these theaters have large budgets, they are still struggling to stay afloat. *Id.* Equity argues that some of these theaters pay musicians, publicists, and box-office workers, but not actors. *Id.*; *see also* Rebecca Smith, Opinion, *Scuttle the Exploitative 99-Seat Theatre Plan and Pay Actors Minimum Wage*, L.A. TIMES (Mar. 18, 2015, 2:42 PM), http://www.latimes.com/opinion/opinion-la/la-ol-99-seat-theatre-plan-minimum-wage-actors-blowback-20150318-story.html [https://perma.cc/AXN2-ZRRH].

70 *See* Boehm, *supra* note 49. While the amount of small theaters grew, the theaters lacked the will to grow beyond 99-seats, perhaps incentivized by the ability to not pay wages; therefore, one of the original intentions of the waiver, the desire for the theaters to become midsized and eventually pay actors wages, never came to fruition. *Id.*

71 ACTORS' EQUITY ASS'N, https://web.archive.org/web/20170802043312/http://equityworksla.com:80 (last visited Nov. 16, 2018).

72 *See* Gelt, *99-Seat Theaters and Actor Pay*, *supra* note 14; Boehm, *supra* note 49.

73 *See* Boehm, *supra* note 49.

74 Paulson, *supra* note 52.

75 *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LABOR, https://www.dol.gov/oasam/programs/history/flsa1938.htm [https://perma.cc/R2E4-FTMJ] (last visited Nov. 22, 2018); *see also* DANIEL B. ABRAHAMS ET AL., EMPLOYER'S GUIDE TO THE FAIR LABOR STANDARDS ACT ¶ 110 (2018).

requirements.[76] These provisions were meant to serve three purposes: (1) prevent exploitation of vulnerable workers, (2) promote fair competition in interstate commerce, and (3) generate more jobs by spreading work around more employees.[77] The FLSA's efforts to reignite and empower the working class following one of the most socially and economically turbulent times was coined one of "the most far-reaching, far-sighted program for the benefit of workers" ever seen in the United States.[78]

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76 *See* ABRAHAMS, *supra* note 75; Grossman, *supra* note 75.

77 ABRAHAMS, *supra* note 75, at ¶ 112. The statute also sets forth Congress's goals in enacting the FLSA:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.
>
> (b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202 (2018).

78 *Fair Labor Standards Act (1938)*, LIVING NEW DEAL, https://livingnewdeal.org/glossary/fair-labor-standards-act-1938 [https://perma.cc/8PK2-CXAJ] (last visited Nov. 22, 2018) (quoting President Franklin D. Roosevelt). Historically, both state and federal efforts to enact labor reform had been met with strong opposition from unions, employers, and perhaps most surprisingly, the Supreme Court, which, throughout the 1920s and 1930s, became one of the federal government's—and New Deal legislation's—toughest critics when it came to labor laws. *See* Grossman, *supra* note 75; *see also* Hammer v. Dagenhart, 247 U.S. 251 (1918) (finding a federal child labor law unconstitutional on the basis that the Commerce Clause did not give Congress the power to regulate such conditions); Adkins v. Children's Hosp. of the D.C., 261 U.S. 525 (1923) (holding that a federal minimum wage law for women was an unconstitutional infringement on liberty of contract, as protected by the Due Process Clause of the Fifth Amendment); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (holding that a New York State minimum wage law was unconstitutional as a violation of liberty of contract). Following this array of anti-New Deal decisions and President Roosevelt's reelection in 1936, Roosevelt proposed to add six extra judges to the Supreme Court bench in a move historically known as "court packing." Grossman, *supra* note 75. In the "switch in time" that "saved the nine," Justice Owen Roberts upheld a Washington State minimum wage law, overturning the

In the current iteration of the FLSA, to be covered by the minimum wage regulations, a person must be (1) an employee,[79] a seemingly obvious but nonetheless contentious requirement;[80] and (2), individually engaged in commerce or in the production of commerce, or employed in an enterprise engaged in commerce or production of goods.[81] The term "employee" is interpreted broadly in the context of the FLSA,[82] but there are certain classes of workers—such as independent contractors, trainees, and volunteers—who are not covered by the FLSA.[83] Designations as independent contractors tend to be the most hotly debated in the arts world.[84] Typically, independent contractors are separate business entities that control their own work and are evaluated on overall project completion; in essence, they are in business for themselves and not for the employer "contracting" the

Adkins decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Grossman, *supra* note 75. With the issue of the Supreme Court off his back, President Roosevelt felt the time was right to reintroduce a general fair labor standards act. *Id.* In June of 1938, after facing seventy-two proposed amendments, alterations, exemptions, and other efforts to weaken the scope of the bill, the FLSA survived its final proposal and was signed into law to become effective on October 24, 1938. *Id.* The final act provided a minimum wage of twenty-five cents per hour and overtime for all hours worked in excess of forty-four hours a week. ABRAHAMS, *supra* note 75, at ¶ 112.

79 Section 203 of the FLSA defines employee as, "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (2018). Section 203 also defines an "employer" as one "acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." *Id.* § 203(d).

80 This point will be discussed at length *infra*.

81 29 U.S.C. § 206(a) (2018).

82 *See* ABRAHAMS, *supra* note 75, at ¶ 240; *see also* United States v. Rosenwasser, 323 U.S. 360, 361–63 (1945) (stating that the term "employee" is interpreted broadly). Importantly, the term "employee" does not distinguish between temporary, part-time, or full-time employees, and even undocumented workers are covered by the interpretation of "employee." *See* ABRAHAMS, *supra* note 75, at ¶ 240.

83 ABRAHAMS, *supra* note 75, at ¶ 240.

84 *See* David P. Cudnowski, *Actors and Entertainers: Employees, Independent Contractors, or Statutory Employees? A Matter of Form (W-2) Over Substance*, 11 U. MIAMI ENT. & SPORTS L. REV. 143 (1993); *see also* Richard Rasmussen, *Labor Law: Are Creative Artists Independent Contractors or Employees?*, 6 LOY. L.A. ENT. L. REV. 199 (1986); Daniel B. Thompson, *Independent Contractors and the American Theatre*, HOWLROUND THEATRE COMMONS (Nov. 10, 2015), http://howlround.com/independent-contractors-and-the-american-theatre [https://perma.cc/9A99-QW7Y].

work.[85] However, it is often unclear exactly how the performance or business relationship should be categorized. Therefore, different governing bodies have established fact-specific tests that analyze various factors of the working relationship. Under the traditional legal test called the "economic reality test,"[86] federal courts focus on (1) the alleged employer's degree of control exerted over the worker; (2) the worker's potential for generating profit or loss; (3) the extent of the worker's investment in the business; (4) the permanence of the business relationship; and (5) the expertise required to perform the work.[87] The U.S. Department of Labor (DOL) has also followed a similar economic test, adopting many of the above factors and stating that there is no single test that courts must apply and that no single set of factors is exclusive.[88] Both the courts and the DOL look to the totality of the circumstances to determine the type of employment relationship.[89] Some state labor codes take a different approach. For example,

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85 *See* Jean Murray, *What is an Independent Contractor? Benefits and Drawbacks of Being an Independent Contractor*, BALANCE SMALL BUS., https://www.thebalancesmb.com/what-is-an-independent-contractor-398291 [https://perma.cc/QSR6-ZS8S] (last updated Sept. 1, 2018).

86 *See* ABRAHAMS, *supra* note 75, at ¶ 241; *see also* Doty v. Elias, 733 F.2d 720, 722 (10th Cir. 1984) ("In determining whether an individual is an 'employee' within the meaning of the FLSA, we must look to the economic realities of the relationship.").

87 ABRAHAMS, *supra* note 75, at ¶ 241. Courts also use the "right to control" test which focuses on who—the worker or the employer—has more professional and creative say in the working relationship. *Id.* These factors are used to decide whether the individual is economically dependent on the business he is providing services for, or whether he is in business for himself. *Id.*

88 U.S. DEP'T OF LABOR, FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf [https://perma.cc/2FPU-CW7R] [hereinafter FACT SHEET #13] (last updated July 2008). The DOL's standards include: (1) the extent to which the work performed is an integral part of the employer's business; (2) the nature and degree of control by the employer; (3) the consistency and length of the relationship; (4) the worker's skill and initiative; (5) the relative investments in the project by the worker and the employer; and (6) whether the worker's managerial skills affect his opportunity for profit and loss. *Id.* Additionally, the DOL suggests there are certain factors that are immaterial in determining employment status, such as the worker's subjective opinion of the nature of the work, the fact that the worker has signed a contract labeling himself as an independent contractor, or the fact that the worker has incorporated a business. *Id.*; *see also* ABRAHAMS, *supra* note 75 ¶ 241.

89 FACT SHEET #13, *supra* note 88; *see also* ABRAHAMS, *supra* note 75, at ¶ 241. A review of past rulings reveals that there is not complete agreement over the classification of actors and entertainers, and courts continue to analyze designations on a case-by-case basis. *See* Cudnowski, *supra* note 84, at 158. A more complete analysis of prior case law is conducted *infra* Part II.

California's Labor Code section 2750.5 creates a rebuttable presumption that certain workers are employees rather than independent contractors.[90] The code also provides factors that one must satisfactorily prove to successfully rebut the employee presumption.[91] New York, in contrast, includes professional performers in the definitional section of "employee" in its Workers Compensation Law and Unemployment Insurance Law.[92] However, the statutory definition is not included in the New York Wage Law.[93]

Section 206 of the FLSA also requires that the employee is engaged in commerce[94] or is employed in an enterprise engaged in commerce or in the production of goods.[95] Broken down, section 206 creates two different types of coverage: "enterprise coverage" and "individual coverage."[96] Enterprise coverage includes establishments whose annual gross volume of sales made or business done is not less than $500,000, and that employ two or more workers engaged in commerce or in the production of goods for commerce or that handle, sell, or in some way work with goods or materials that are moved through the chain of

90 *See* CAL. LAB. CODE § 2750.5 (West 2018).

91 *Id.* These factors include the individual's right to control and the amount of discretion the individual has, whether the individual is engaged in an independently established business, and whether there is any evidence that the independent contractor classification is "bona fide and not a subterfuge to avoid employee status." *Id.* at (a)–(c).

92 N.Y. WORKERS' COMP. LAW § 2(4) (McKinney 2018); *see also* Harvey S. Mars, *Performing Artists' Entitlement to Compensation Under the N.Y. WCL*, 89 N.Y. ST. B. ASS'N J. 28 (2017).

93 *Compare* the definition of "employee" in N.Y. LAB. LAW § 190(2) (McKinney 2018), *with* the definition of "employment" in N.Y. LAB. LAW § 511(1-a) (McKinney 2018).

94 The FLSA defines commerce as "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b) (2018). What type of employment constitutes sufficient commercial activity within the FLSA has also been extensively litigated. *See* ABRAHAMS, *supra* note 75, at ¶ 222. In several cases, the Supreme Court asked whether the activity was so "directly and vitally" involved in interstate commerce, or whether the work was only providing an "ingredient" of the commercial production. *See* Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 212 (1959); *see also* ABRAHAMS, *supra* note 75, at ¶ 222. Other decisions rested on whether the activity "affected commerce." ABRAHAMS, *supra* note 75, at ¶ 222.

95 29 U.S.C. § 206(a)(5)(b) (2018).

96 U.S. DEP'T OF LABOR, FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/regs/compliance/whdfs14.pdf [https://perma.cc/3T2N-7GV5] (last updated July 2009) [hereinafter FACT SHEET #14]. Enterprise coverage is interpreted broadly in most jurisdictions. *See* Noel P. Tripp, *Eleventh Circuit Clarifies Scope of FLSA Enterprise Coverage*, JACKSON LEWIS (Sept. 10, 2010), https://www.wageandhourlawupdate.com/2010/09/articles/wage2010/09/articles/wage-and-hour/coverage/eleventh-circuit-clarifies-scope-of-flsa-enterprise-coverage [https://perma.cc/AW3R-KUG7].

commerce.[97] Nonprofit organizations are considered enterprises if their gross sales of $500,000 are a result of typical competitive business activity.[98] If an employer meets these requirements, then all of the employees are subject to the FLSA.[99] If the businesses do not meet these requirements, an individual can still be covered under individual coverage if he regularly devotes hours to work involving interstate commerce.[100] Individual coverage requires the business to follow the

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97 29 U.S.C. § 203(s)(1) (2018). In *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), the Court explained that enterprise coverage was meant to broaden FLSA coverage to any employee engaged in interstate commerce.

98 U.S. DEP'T. OF LABOR, GUIDANCE FOR NON-PROFIT ORGANIZATIONS ON PAYING OVERTIME UNDER THE FAIR LABOR STANDARDS ACT 2 (2016), https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf [https://perma.cc/5D48-H2PJ]. In calculating whether nonprofits reach the $500,000 requirement, the Wage and Hour Division only takes into account income made from ordinary commercial activities, like operating a business. *See* U.S. DEP'T. OF LABOR, OVERTIME FINAL RULE AND THE NON-PROFIT SECTOR 1, https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf [https://perma.cc/XQ4M-K5EB]. In the theater context, this always includes ticket sales, bar concessions sales, and merchandise sales. *See* Diep Tran, *Something's Gotta Give: How the New Overtime Rule will Affect Nonprofits*, AM. THEATRE (July 14, 2016), http://www.americantheatre.org/2016/07/14/somethings-gotta-give-how-new-overtime-rules-will-affect-nonprofits [https://perma.cc/92DC-6VST]. Income from grants, membership fees, and donations would not be included in the $500,000 calculation. *Id.*; *see, e.g.*, Smith *supra* note 69 ("[T]he California Division of Labor Standards Enforcement's policy has been that nonprofits that charge for goods or services are operating a 'commercial activity' and must pay minimum wage to their employees.").

99 FACT SHEET #14, *supra* note 96.

100 *See* ABRAHAMS, *supra* note 75, at ¶ 230; *see also* FACT SHEET #14, *supra* note 96. Courts have held that an employee who is engaged in any "significant" measure of interstate commerce on a week to week basis will be covered by FLSA. *See* ABRAHAMS, *supra* note 75, at ¶ 230. The FLSA neither requires that the employee be directly engaged in interstate commerce nor directly employed in the production of a good that ends up in the stream of interstate commerce. Ann K. Wooster, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. FED. 507, § 34 (2004). The question instead is whether the employees are engaging in work "so directly and vitally related to the functioning of an instrumentality of facility of interstate commerce as to be, in practical effect, a part of it, rather than an isolated local activity." *Id.* Case law also reveals that courts have struggled to agree on a specific bright-line rule for what amount of time will constitute significant interaction with interstate commerce. *Id.* In terms of what contact amounts to interstate commerce, courts have held that using the telephone for out of state calls was sufficient. *See* DeArment v. Curtins, Inc., 790 F. Supp. 868 (D. Minn. 1992). Given the fact specific nature of the inquiry, "individual coverage" is analyzed on a case-by-case basis, taking into account the regularity and recurrence of interstate commercial work, regardless of whether the time spent each week is substantial or insubstantial. *See* ABRAHAMS, *supra* note 75, at ¶ 230.

FLSA for that specific employee's wages, even if the businesses would not meet the requirements of enterprise coverage.[101]

If an employee is not covered under federal law, she will most likely be covered under state law.[102] Every state has enacted its own minimum wage requirements that afford the individual equal, if not greater, minimum wage protections than an employee covered under the FLSA.[103] Generally, states either add on to the FLSA regulations and enact even higher minimum requirements, or adopt "safety net" laws that apply only to workers not already covered by FLSA.[104] States also enact their own exemptions to their minimum wage and overtime laws.[105] Certain states set blanket minimum wage amounts, regardless of community type (suburban, urban, or rural) or the number of employees in the business.[106] Others distinguish amounts based on number of employees and specific county or city within the state.[107] When the state or city has a higher minimum wage rate than the federal rate, employer's must pay the higher amount.[108]

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101 ABRAHAMS, *supra* note 75, at ¶ 230.

102 ABRAHAMS, *supra* note 75, at ¶ 150.

103 *Id.* If employees meet coverage requirements for both the FLSA and the state labor laws, employers must pay whichever rate is higher. *Id.* ¶ 1100; *see also Questions and Answers About the Minimum Wage*, U.S. DEP'T LABOR, https://www.dol.gov/whd/minwage/q-a.htm [https://perma.cc/6UMG-38GS] (last visited Nov. 17, 2018) ("Where state law requires a higher minimum wage, the higher standard applies.").

104 ABRAHAMS, *supra* note 75, at ¶ 1100.

105 *Id.* "Many states have fewer exemptions than allowed by the FLSA. Moreover, even where the same exemption exists, the state-law definitions may vary from the federal provisions." *Id.* Instead of explicit exemptions, some states exclude certain types of workers from their definition of "employee." *See, e.g.*, ARK. CODE ANN. § 11-4-203 (2018) (excluding bona fide executive, administrative, or professional workers). Others exclude certain types of "employers" who, for example, make less than a certain gross annual revenue. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-362(C) (2018) (excluding businesses who gross less than $500,000).

106 *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-263 (2018); DEL. CODE ANN. tit. 19, § 902(a) (2018); D.C. CODE § 32-1003(a)(4)–(a)(5) (2018); FLA. CONST. art. X, § 24(c) (2018).

107 *See, e.g.*, CAL. LAB. CODE § 1182.12(b)(1) (West 2018); N.Y. LAB. LAW § 652(1) (Consol. 2018); OR. REV. STAT. § 653.025 (2018). New York even distinguishes the rate based on the specific type of employment establishment, providing a higher minimum wage for fast-food employees. *See* ABRAHAMS, *supra* note 75 ¶ 1100. For a complete state-to-state breakdown of the minimum wage requirements, including exemptions, see *id.* ¶¶ 1100–1110.

108 Alison Doyle, *2018/2019 Federal and State Minimum Wage Rates*, BALANCE CAREERS, https://www.thebalancecareers.com/2017-federal-state-minimum-wage-rates-2061043 [https://perma.cc/H68L-EPSN](last updated Nov. 8, 2018).

1. Exemptions

There are exemptions from the FLSA's minimum wage and overtime requirements for certain employees.[109] Section 213(a)(1) of the FLSA creates a general exemption for employees acting in executive, administrative, or professional capacities.[110] This exemption is broken down further by the DOL into a "creative professional" exemption.[111] To be exempt as a creative professional, the employee must (1) be paid on a "salary basis"[112] at an amount no less than $455 a week[113] and (2) the employee's "primary duty"[114] must be the performance of work that requires "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."[115]

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109 *See* ABRAHAMS, *supra* note 75, at ¶ 300. "Employees who are not covered by the FLSA are outside the act's authority, and no portion of the act applies to them. Exempt employees are still covered by the act but are exempt from certain portions by virtue of their occupations and duties." *Id.*

110 29 U.S.C. § 213 (a)(1) (2018) ("The provisions of sections 206 . . . and 207 of this title shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity . . . .").

111 U.S. DEP'T OF LABOR, FACT SHEET #17A: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17a_overview.pdf [https://perma.cc/5CRQ-T8ZP] [hereinafter FACT SHEET #17A] (last updated July 2008).

112 "Salary basis" means that these employees are not paid by the hour but instead by a predetermined amount that they receive every pay period (weekly, bi-weekly, semimonthly, etc.) ABRAHAMS, *supra* note 75, at ¶ 321. Additionally, this minimum salary calculation must not take into account accommodations received during the employment, such as board or lodging. *Id.* Currently, the minimum salary basis for executive, administrative, and professional employees is calculated based on a standard test.

113 *See* FACT SHEET #17A, *supra* note 111; *see also* ABRAHAMS, *supra* note 75, at ¶ 321.

114 29 C.F.R. § 541.700(a) (2018) defines primary duty as "the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case . . . Factors to consider . . . include . . . the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; [and] the employee's relative freedom from direct supervision . . . ."

115 29 C.F.R. § 541.302(a) (2018). These requirements are in contrast to work environments that require "routine mental, manual, mechanical or physical work." *Id.* The Code of Federal Regulations (CFR) specifies that determinations of one's status as a creative professional must be made on a case-by-case basis, with particular consideration to the extent to which the work depends on imagination and creativity and not intelligence and accuracy. *Id.* § 541.302(c). The CFR also notes that this designation is typically met by actors and musicians. *Id.* The closest examples to stage performers involved in "creative professional" litigation are cases brought by exotic dancers. *See* Henderson v. 1400 Northside Drive, Inc., 110 F. Supp. 3d 1318 (N.D. Ga.

The legislative history of section 213 is not extensive, but it suggests that these exemptions were meant to target specific employment situations where employees already earned salaries well above the minimum wage and where the type of work being performed was difficult to quantify in terms of hours.[116] In these situations, requiring overtime payment based on a forty hour work week seemed impossible and unnecessary.[117] These types of highly advanced and particularized positions could not realistically be divided up and spread amongst multiple employees in order to avoid working over forty hours a week (frustrating one of the original intentions of the FLSA of creating more jobs).[118]

II. THE ISSUE OF AMBIGUITY: ANALYZING THE STAGE ACTOR'S WORK WITHIN THE CONTEXT OF THE FLSA

This Section will address two issues: (1) whether theaters are actually breaking the law when they fail to pay their actors a minimum wage and (2) even if they are breaking the law, if actors do not care and are willing to make the sacrifice, whether the government and the rest of the country should interfere.

To correctly answer the first question, it is important to remember the type of actor that is making the sacrifice. It is not the Brad Pitts and Angelina Jolies of the Hollywood world; nor is it the Idina Menzels and

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2015) (holding that adult dancers were not creative professionals under the exemption because even though their dancing was unscripted, it did not require sufficient creativity and specific dance knowledge was not necessary to perform the job); *see also* Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343 (M.D. Fla. 1997) (holding that the exotic dancing did not meet invention, imagination, or talent, as the dancer copied other performers and did not feel the need to invent her own steps).

116 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38515, 38517 (July 6, 2015), https://www.federalregister.gov/documents/2015/07/06/2015-15464/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and [https://perma.cc/38LM-YRYP]. For example, these exemptions were geared towards executives, like Chief Executive Officers, who had managerial positions and whose work product was not clearly linked to hours worked—unlike factory employees or clerical workers. *See* MINIMUM WAGE STUDY COMM'N, REPORT OF THE MINIMUM WAGE STUDY COMMISSION 235–51 (1981), https://babel.hathitrust.org/cgi/pt?id=uiug.30112005407306;view=1up;seq=257.

117 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38519.

118 *Id.*

Taye Diggss of the Broadway scene, nor even lesser known Broadway success stories like Lindsay Mendez and Derek Klena[119]—although it is likely that they all made the sacrifice when they began their careers. It is also not the person who performs in community theaters after work as a hobby. The types of actors making the perpetual "sacrifice" consider themselves *professionals.* They are often not part of the union, so they book jobs at smaller regional or experimental theaters[120] and commit anywhere from twenty to forty hours per week to rehearsals and performances.[121] Actors working at some of these theaters—often located in small towns away from their home base—are unable to supplement their income from the show by working part-time jobs during their contract. After their show contracts terminate, they return to the city, work two to three part-time jobs, and continue to audition for other regional theaters or perform in small theaters at night.[122] One example of this type of actor is highlighted in the L.A. theater controversy, and it is helpful to keep this actor in mind when analyzing the minimum wage requirements of these employment relationships.[123]

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119 Mendez and Klena are two equity actors who recently became very successful Broadway performers. *See* Michael Gioia, *"One Short Day": A Candid Chat with* Wicked *Co-Stars and Friends Lindsay Mendez, Derek Klena and Katie Rose Clarke*, PLAYBILL (Aug. 2, 2013), http://www.playbill.com/article/one-short-day-a-candid-chat-with-wicked-co-stars-and-friends-lindsay-mendez-derek-klena-and-katie-rose-clarke-com-208178 [https://perma.cc/A8P4-8EHS]. It is important to note that their salaries at the majority of Broadway theaters will be governed by contract negotiations between whichever union they are a member of (most likely the AEA) and The Broadway League, the national trade association for the Broadway industry. *See* BROADWAY LEAGUE, https://www.broadwayleague.com/home [https://perma.cc/CL8Z-APB9] (last visited Nov. 18, 2018); *see also* Press Release, The Broadway League, Actors' Equity Association and The Broadway League Achieve New Contract (July 2, 2017), https://www.broadwayleague.com/press/press-releases/actors-equity-association-and-the-broadway-league-achieve-new [https://perma.cc/KYL7-ADUX] (explaining previous negotiations between AEA and The Broadway League).

120 *See infra* Appendix.

121 *Id.*

122 *See* John Moore, *Theater: Only a Few Make Living from Stage Alone*, DENVER POST, https://www.denverpost.com/2008/07/10/theater-only-a-few-make-living-from-stage-alone [https://perma.cc/CCR4-75L5] (last updated May 7, 2016, 11:38 AM).

123 This group of workers may seem narrow and insignificant, but in fact it represents an entire able-bodied workforce of people who are remaining in stagnant, dead-end performance jobs without opportunity for growth, merely to hone their artistic skills. This point is discussed in detail *infra* Section II.B.

A. *Are Theaters Even Breaking the Law?*

The first step in considering whether an actor will be protected by minimum wage laws, either on a state or federal level, is to analyze the actor's unique situation in accordance with the statutes, regulations, and case law.[124] For actors, it can be challenging to conduct a general analysis because there is a widespread variety of work across the field.[125] As a general matter, it is important to note that neither case law nor the DOL, nor various state labor departments have ever given an explicit answer to whether actors are within the class of employees protected. Instead, they continue to analyze the situation on a case-by-case basis.[126]

Per the text of the FLSA, an actor must first be considered an employee to be covered;[127] however, actors are commonly misclassified as independent contractors so that employers can avoid paying the minimum wage.[128] Employee misclassification is a widespread issue,[129] and currently proposed federal legislation amending the FLSA—the

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124 *See* discussion of FLSA requirements *supra* Section I.B.

125 *See* Casey Mink, *How to Become a Musical Theater Actor*, BACKSTAGE (May 22, 2017, 10:30 AM), https://www.backstage.com/backstage-guides/how-become-musical-theater-actor [https://perma.cc/GK2L-TK7G].

126 *See* Cudnowski, *supra* note 84.

127 29 U.S.C. § 206(a) (2018); *see also* discussion *supra* Section I.B.

128 *See* Mars, *supra* note 92, at 28–29. Federal and state labor departments promulgate rules and practice guides to aid employers in discerning their worker's employment status. California is known for being an "employee-friendly" state. *See Making the Most of California Employee Friendly Laws*, OPTIMUM EMPLOYER SOLUTIONS, https://optimumhr.net/making-the-most-of-california-employee-friendly-laws [https://perma.cc/4E4R-FX6D] (last visited Sept. 16, 2018). For an example of California's interpretations of employee versus independent contractor, see Jeffrey Wertheimer & Brandon Sylvia, *How to Properly Classify Your Workforce as Employers or Independent Contractors*, RUTAN ATT'YS LAW, https://web.archive.org/web/20171114034238/http:/www.rutan.com/files/Publication/488f959e-7780-4622-aef2-a3662757988f/Presentation/PublicationAttachment/ea06c454-417f-485e-b616-aa0ca1605243/Employee%20vs%20%20Independent%20Contractor%20Article%20new%20title.pdf (last visited Nov. 17, 2018). New York, a state known for being the center of the stage theater industry, sets forth similar designations as California. *See* N.Y. DEP'T OF LABOR, GUIDELINES FOR DETERMINING WORKER STATUS PERFORMING ARTISTS 1 (2017), https://www.labor.ny.gov/formsdocs/ui/IA318.17.pdf. In contrast, Arizona, a notoriously employer-friendly state, recently enacted a law making it easier to show that a worker is an independent contractor. *See* Lisa Nagele-Piazza, *Arizona Legislature Responds to Independent-Contractor Debate*, SOC'Y HUM. RESOURCE MGMT. (Aug. 12, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/arizona-independent-contractor-law.aspx [https://perma.cc/3QSB-K3JF].

129 *See* Rozlyn Fulgoni-Britton, *Congress Adds Potential Tool to Address Employee Misclassification*, 20 NO. 7 IND. EMP. L. LETTER 1 (2010).

Payroll Fraud Prevention Act—highlights the need to legislatively address the recurring imbalance in employee-employer relations.[130] Currently, courts retroactively determine whether a classification was valid by considering factors such as: (1) the ability of the theaters to intervene in the actor's work, (2) the ability of employees to set their own rates and schedules, (3) the relationship between compensation/salary and the actor's performance, (4) the type and length of the contract, and (5) the employer's furnishing of lodging and accommodations.[131]

In federal courts, two cases established the precedent for performers' classification as employees or independent contractors. In *Radio City Music Hall Corp. v. United States*, the Second Circuit held that certain actors employed in stage shows were independent contractors, because it found that the producer's actions in organizing the vaudeville type acts only amounted to a limited level of control and intervention.[132] Several years later, the Second Circuit again addressed the issue of employees in the performance context in *Ringling Bros.-Barnum & Bailey Combined Shows v. Higgins*, holding that clowns, featured artists, and specialty actors were employees of the circus corporation.[133] In *Ringling Bros.*, the performers were contracted for entire seasons and maintained a permanent relationship with the employer throughout the contract.[134] Even though each individual act

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130 *See* Payroll Fraud Prevention Act, H.R. 3629, 115th Cong. (2017) (proposing "[t]o amend the Fair Labor Standards Act of 1938 to ensure that employees are not misclassified as non-employees . . . ."). The bill would require employers to clearly define their workers and provide notice to each individual advising them of her classification. *See* Gregory L. Silverman, *Hot Topic: Don't Get Burned by Employee Misclassification*, 18 NO. 11 N.H. EMP. L. LETTER 1 (2014). It would also impose new penalties on employers for improper classifications. *Id.*

131 *See* Cudnowski, *supra* note 84, at 151, 153–54. Unsurprisingly, there are no rulings answering the independent contractor dilemma for this exact type of actor, but the factors used by courts for similar employment situations are helpful in the analysis.

132 135 F.2d 715, 716–18 (2d Cir. 1943). The actors in question were performers of vaudeville type acts, including acrobats, comedy skits, singers, dancer, and jugglers. *Id.* at 717. The stage shows also consisted of an orchestra, glee clubs, and a corps de ballet, which were concededly *employed* by the theater. *Id.* The producer auditioned the various acts, and if he found them "promising," he included them in an open spot in the performance or built a small act around them. *Id.* The producer also decided the order of the acts and would on occasion put a song of his choosing into the performer's repertoire. *Id.*

133 189 F.2d 865, 870 (2d Cir. 1951).

134 *Id.* at 869. Lodging and transportation accommodations were supplied by the circus, and the performers were paid on a predetermined, weekly basis without consideration for the success of the tour. *Id.* at 870.

required a great deal of individuality and artistry, the Second Circuit found that ultimate power of direction and control was in the circus producer's hands, and therefore the actors and performers were *employees* of the circus.[135]

In subsequent cases, courts continued to balance the worker's individual artistry with the employer's level of control to determine whether the worker was an employee or independent contractor.[136] In *Club Hubba Hubba v. U.S.*, the District Court of Hawaii held that club dancers who were given room and board to perform in a special dance group under six month contracts were employees of the nightclub.[137] In *Harrell v. Diamond A Entertainment, Inc.*, the District Court for the Middle District of Florida considered the relative degree of control by the employer and also applied a full "economic reality" analysis, finding that an exotic dancer was in fact an employee and not an independent contractor.[138] In *Harrell*, the court noted that the dancer did not have

135 *Id.* "The performers were an integral part of plaintiff's business of offering entertainment to the public. They were molded into one integrated show . . . It was not a loose collection of individual acts like a vaudeville show. The individuality of the performers was subordinated to the primary purpose of enhancing the reputation of the [circus]." *Id.*

136 *See, e.g.*, Club Hubba Hubba v. United States, 239 F. Supp. 324, 328–29 (D. Haw. 1965); Harrell v. Diamond A Entm't, Inc., 992 F. Supp. 1343, 1348–50 (M.D. Fla. 1997).

137 *Club Hubba Hubba*, 239 F. Supp. at 328–29. The court's ruling focused on the fact that: (1) the dancers were part of the club's main program and not "incidental fillers" like the acts in Radio City, (2) they were given room and board and other protections, (3) the club had a greater degree of control over the entertainers' hours and practicing, and (4) the performers were not able to leave their performance obligations during the time of the contract. *Id.* There were some similarities between the duties of the producers in Radio City and the Club Hubba Hubba managers. *Id.* The *Radio City* court previously held that these similar duties such as furnishing the staging and lighting, fixing the time of rehearsals and numbers of performances per day, and determining the orders of the acts were trivial in determining the producer's level of control. *Id.* In contrast, the *Club Hubba Hubba* court held that these duties were not sufficient on their own to lower the degree of total control, and thus the dancers were considered employees. *Id.* at 329.

138 *Harrell*, 992 F. Supp. at 1353–54. The court began by noting that "[u]nder the FLSA, [the term] employment is defined with 'striking breadth.' *Id.* at 1348 (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992)). The court then reiterated that an employer cannot relieve itself of its FLSA duties merely by giving the worker some level of discretion; instead, in order to meet the status of independent contractor, "[t]he real question is whether the [performer] exerts control over a meaningful part of the business." *Id.* at 1349 (internal quotation marks omitted). Importantly, the court noted that the very nature of any dancer's job is to have some "discretion and flexibility" in her performance, but this is just the nature of the job and is not a strong consideration in the level of control to alter the status to independent contractor. *Id.* In *Harrell*, the dancer was allowed to choose her music and was not trained in any specific manner by the club. *Id.* She was allowed to pick her hairstyles and make-up and

any "meaningful part of the business [such] that she st[ood] as a separate economic entity."[139] Other factors considered were the relative investments made by the dancer and employer, the skill and initiative taken by the dancer, the opportunity for profit and loss,[140] the permanency of the relationship,[141] and to what extent the dancer's performance was an integral part of the business.[142] Each of the factors cut in favor of economic dependence, leading the court to find that the dancer was an employee.[143]

The debate surrounding the independent contractor misclassification remains highly relevant today and has gained recent media attention due to litigation surrounding the National Football League (NFL) cheerleaders.[144] In May 2017, a New York State court in Erie County granted the Buffalo Jills, cheerleaders for the NFL team the Buffalo Bills, partial summary judgment in their lawsuit against Citadel

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was not required to fill out any records of their dances, suggesting that the dancers did have some control over how much money they charged for individual performances. *Id.* The court still held that these factors were not enough. *Id.*

139 *Id.* The club established set ticket fees and did all of the advertising, and the dancers had no control over the volume of customers. *Id.*

140 The court asked who—the club or the dancer—took on the greatest financial risk. *Id.* at 1351–52. The dancers "hustling" for tips mattered little to the overall question of who was responsible for the success of the business—the owners. *Id.*

141 Even though certain performers can be "itinerant," courts tend to place "less emphasis on this factor." *Id.* at 1352. *See, e.g.*, Reich v. Circle C. Invs., Inc., 998 F.2d 324, 328–29 (5th Cir. 1993) (the mere fact that the workers are transitory is "not determinative" because the employees "are not in business for themselves;" balancing other factors can outweigh the lack of permanency).

142 *Harrell*, 992 F. Supp. at 1352.

143 *Id.* at 1353–54. The defendant dance club argued that despite the court's analysis, protecting these dancers under the FLSA would be against the act's purpose of precluding "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers," because the dancer was making enough money to sustain herself through tips. *Id.* at 1357–58 (internal quotation marks omitted). The court found no merit to this argument and strongly emphasized that the FLSA is meant to be read broadly to afford minimum wage and overtime protection, regardless of tips or other sources of income. *Id.*

144 *See* Cecelia Townes, *Why Are NFL and NBA Cheerleaders Barely Earning Minimum Wage?*, ESPNW (May 26, 2017), http://www.espn.com/espnw/voices/article/19454957/why-nfl-nba-cheerleaders-barely-earning-minimum-wage [https://perma.cc/NPW9-5K36]; Scott Gleeson, *Oakland Raiders Cheerleaders Collect on $1.25 Million Class-Action Settlement*, USA TODAY (May 15, 2017, 2:01 PM), https://www.usatoday.com/story/sports/nfl/raiders/2017/05/15/oakland-raiders-cheerleaders-raiderettes-lawsuit-settlement/101714468 [https://perma.cc/KYZ9-9FRA]; Tyler Wilkinson, *Cheerleaders: 'F-L-S-A! The Law Says You Have to Pay!'*, 24 NO. 11 WIS. EMP. L. LETTER 4 (2015).

Broadcasting, the contractor that hired them, finding that the cheerleaders were employees and not independent contractors.[145] The cheerleaders succeeded by alleging that the team exercised basic aspects of employer control over them by requiring them to attend all games, participate in practices and rehearsals, attend meetings, follow a strict handbook, and attend community service events.[146]

Given the prior broad rulings[147] and the heightened skepticism surrounding the independent contractor classification, it is likely that the majority of theater actors performing in theater productions would be considered employees.[148] While many actors travel to theaters for only short time periods and frequently move from job to job, the itinerant nature of the acting job should not be the main factor in

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145 *See* Greg Mersol, *Professional Cheerleader Case Presents Independent Contractor and Joint Employer Lessons*, BAKERHOSTETLER (May 30, 2017), https://www.employmentclassactionreport.com/independent-contractors-2/professional-cheerleader-case-presents-independent-contractor-joint-employer-lessons [https://perma.cc/9NWA-3UX6].

146 *See* Pepper Hamilton LLP, *May 2017 Independent Contractor Misclassification and Compliance News Update*, JDSUPRA (June 12, 2017), https://www.jdsupra.com/legalnews/may-2017-independent-contractor-51719 [https://perma.cc/S75Z-PQWD].

147 For an extensive list of prior rulings, see L. S. Tellier, *Musicians or Other Entertainers as Employees of Establishment in Which They Perform within Meaning of Workmen's Compensation, Social Security, and Unemployment Compensation Acts*, 172 A.L.R. 325 (1948).

148 Given the specific and fact-based nature of the employee-employer analysis, it is of course possible to envision scenarios where an actor would be considered an independent contractor. This analysis is in no way meant to suggest that it could never be the case. However, in most scenarios where actors were found to be independent contractors, the performances were cabaret or vaudeville style, or the actors or musicians had their own "name band." *See, e.g.*, Bartels v. Birmingham, 332 U.S. 126, 132 (1947); Vaughan v. Warner, 157 F.2d 26 (3d Cir. 1946); Nebraska Nat. Hotel Co. v. O'Malley, 63 F. Supp. 26 (Neb. 1945). In contrast, scenarios where performers were found to be employees were more similar to the situations of theater actors. *See, e.g.*, Russell v. Torch Club, 97 A.2d 196 (N.J. Super. Ct. Law Div. 1953) (owner of night club gave singer exact performance schedule and set rate per week. He chose her repertoire and directed how she interacted with the audience. The court found that the singer was an employee); Matter of Affiliate Artists, Inc., 517 N.Y.S.2d 614 (N.Y. App. Div. 1987) (artists spent two to three weeks a year participating in a nonprofit organization that arranged performances at local community organizations. Even though places, times, and specific content of performance were matters left to the local community, residents, and the artists, the court found that the nonprofit organization exercised enough control by requiring the artists to adhere to distinctive types of performances, setting the number of performances, providing lodging, and maintaining the right to terminate the contract if the artist performed in any manner that was not conducive to the best interests of the company.); Matter of Berman v. Barone, 88 N.Y.S.2d 327 (N.Y. App. Div. 1949) (ballet dancer subject to employer supervision and required to follow musical accompaniment was considered employee).

considering employment status.[149] Actors performing in stage theater are largely subject to the control and intervention of the theaters and producers.[150] Theater management is in charge of advertising and ticket sales, and the producers and directors dictate performance and rehearsal schedules and decide the repertoire of the theaters.[151] Directors also control their actors' individual performances by articulating exactly how they want lines delivered and choreographing and staging the entire production, often leaving only a small amount of room for creativity or collaboration on the part of the actor.[152] From an "economic reality" perspective, theaters are almost completely responsible for the profits of the theater and bear the financial risk that their shows will not be successful.[153] If actors are paid at all, they are usually paid a set stipend or salary, regardless of the amount of people in the audience or the success of the show.[154] Additionally, the actor's performance is often the "main attraction" of the theater and an integral part of the theater's business. Given the likelihood that many actors are in fact employees, their frequent misclassification as independent contractors reflects the need for a more concrete, consistent, and widespread solution to the employment debate within the theater community.[155]

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149 *See* sources cited *supra* note 141 and accompanying text.

150 *See The Role of the Producer in Theatre*, LIONHEART THEATRE CO., http://lionhearttheatre.org/the-role-of-the-producer-in-theatre [https://perma.cc/SCQ4-R7GT] (last visited Nov. 18, 2018) ("[A] director is a general and the actors [are] soldiers operating under orders, but the producer decides the initial battle plan and why that battle is happening in the first place."). While actors use their imagination and creativity to project the "essence of the character[s] to the audience," *see* Eric W. Trumbull, *Introduction to Theatre*, N. VA. COMMUNITY C., https://novaonline.nvcc.edu/eli/spd130et/acting.htm [https://perma.cc/88MH-6QXY] (last modified Jan. 4, 2008), their performance choices in portraying the characters are exactly the types of minor aspects of control that are inherent in the very nature of the actor's profession and should not be the main consideration in the actor's "meaningful" control of the business. *See* discussion *supra* note 138. In contrast to the minor control the actor has over his individual performance, the theater exerts much more control over the business.

151 *See The Role of the Producer in Theatre*, *supra* note 150.

152 *What Does a Theatre Director Do?*, STAGEMILK (May 18, 2017), http://www.stagemilk.com/what-does-a-theatre-director-do [https://perma.cc/T2QC-MLD8].

153 *See* discussion *supra* note 139.

154 *See infra* Appendix.

155 Even AEA has suggested that it is time for the government to resolve this ongoing issue. *See Overview of Minimum Wage, supra* note 62 ("Misclassification of employees is a larger discussion, one that primarily takes place between the employers and the state and federal government.").

B. *Why Do We Care?*

It is essential to acknowledge the elephant in the room: if many theaters are illegally failing to pay minimum wage, and actors know this and are willing to work for free, is there any reason for the government to take any action on behalf of the actors? To answer this question, it is important to look beyond the desires and career aspirations of individual actors and towards a general policy perspective.

The enactment of the FLSA in 1938 finally acknowledged the main flaw of allowing a fully deregulated, free market system to control the labor market: this system forced the individual to bargain for his own rights, which strengthened employer power in a highly competitive system and disempowered the working class.[156] Human labor is unlike other commodities: decreasing the price of human labor does not lead to a curtailment of people in the labor force and an increase in demand for labor as it would in the normal supply and demand chain of products.[157] On the contrary, the large labor force remains in existence in the form of unemployment, and as wage rates decline, the demand for labor also declines.[158] The FLSA addresses these issues by affording the workers greater protection and granting them even a small increase in bargaining power with the employer.[159]

The passing of the FLSA also recognized that the federal government has an important role in promoting prosperity,

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156 *See* Otto Nathan, *Favorable Economic Implications of the Fair Labor Standards Act*, 6 L. & CONTEMP. PROBS. 416, 417 (1939) ("But since the employers rather frequently have enjoyed monopolistic or semi-monopolistic positions and protection, unlimited competition on the supply side in the labor market has added to the disadvantages of the working class in bargaining with the entrepreneur.").

157 *Id.*

158 *Id.*

159 *Id.* at 418.

> By curtailing free competition in the labor market to a small degree, the Act merely helps labor to catch up with similar developments in other markets that have occurred long before. By fixing maximum hours and minimum wages, the Act assures the worker a livelihood that, in numerous cases, he otherwise might be unable to secure, as a result of the intricacies of free competition on the supply side and because of his weak position in the labor market. The limitation of free competition on the supply side of the labor market makes it impossible for irresponsible employers, lacking in social consciousness, to take unfair advantage at the expense of the worker.

Id.

opportunity, and equality amongst its citizens, and minimum wage standards help accomplish this goal.[160] It is no mystery that with increased wages and bargaining power comes higher employee morale, health, and living conditions.[161] With higher morale comes greater self-respect.[162] Minimum wage regulations also provide workers with the legal entitlements to advocate for their rights.[163] Both the self-respect and legal empowerment gained through minimum wage regulations are essential for economic growth and for a highly functioning society.[164]

Since its enactment, the biggest critique of minimum wage regulation is that it will actually lead to unemployment and that the positive social and moral implications are not enough to outweigh the potential for unemployment.[165] But many argue that this neo-classical theory has not necessarily proven true,[166] and even if the immediate effect of minimum wage is temporary unemployment, it would not be the worst price to pay in the long term.[167] A minimum wage is not only meant to protect disempowered workers, it is also used for directing

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160 *See* Joyce Ann Konigsburg, *The Economic and Ethical Implications of Living Wages*, 8 RELIGIONS 74 (2017).

161 *Id.*; *see also* William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y.C. L. REV. 139 (1998).

162 *See* Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1571 ("Wages matter to our self-respect. This point is straightforward, even commonsensical . . . '[w]age rates and jobs are not exactly like other prices and quantities. They are much more deeply involved in the way people see themselves, think about their social status, and evaluate whether they are getting a fair shake out of society.'") (quoting Nobel Laureate economist Robert Solow).

163 *Id.*

164 *See* Nathan, *supra* note 156, at 417.

165 *See* Rogers, *supra* note 162, at 1551.

166 Hani Ofek-Ghendler, *Globalization and Social Justice*: *The Right to Minimum Wage*, 3 LAW & ETHICS HUM. RTS. 266, 274–75 (2009).

167 *See* Nathan, *supra* note 156, at 419.

> It is possible that the disappearance of individual businesses may result in transitory unemployment until workers can be absorbed by more productive industries or enterprises. This merely means that society, as a whole, has to assume responsibility for them through relief or unemployment insurance, instead of enjoying the fruit of their work at prices which do not guarantee them a decent livelihood. Both in Great Britain and in the United States, minimum wage legislation in the past has not led to permanent unemployment. Sooner or later the displaced workers will find employment in industries where their work will be more productive and efficient—a permanent gain for the whole economy.

Id.

economic and national goals.[168] To this extent, certain businesses whose productivity is low and are only able to exist under illegal working conditions will be forced to restructure and become more economically efficient, otherwise, they will be forced out of the market.[169] Employers, not employees, therefore must bear the financial risks of economic prosperity.[170] If certain businesses are unable to bear the burden, their market production will be shifted to other more efficient businesses.[171] On the whole, more efficient enterprises that are able to pay their workers the minimum wage will only contribute to economic growth, not diminish it.[172]

The actor argues that she is not contributing to unemployment because she is employed; she is merely choosing to work a variety of part-time jobs so that she can work for free in the theater industry. While she may not technically be unemployed, she is often underemployed.[173] This means that there is a "mismatch" between the

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168 *See* Ofek-Ghendler, *supra* note 166, at 270–71. Ofek-Ghendler's Article suggests that a universal model of the goal of minimum wage could be illustrated in three forms: existential deficiency (narrow model), social welfare (intermediate model), and the comfort model (broad model). *Id.* The narrow model focuses on the individual's physical needs for survival. *Id.* The intermediate model takes the physical needs in consideration in addition to the individual's economic advancement. *Id.* The broadest model includes all the features of the previous models, but adds the needs for comfortable existence. *Id.* Ofek-Ghendler argues that the intermediate model, social welfare, most adequately defines the rights to minimum wage. *Id.* at 272.

169 *See* Nathan, *supra* note 156, at 418.

170 *See* Rogers, *supra* note 162; *see also* Nathan, *supra* note 156, at 420.

171 *See* Nathan, *supra* note 156, at 418.

172 *Id.* at 419.

> Since employers are compelled to comply with the minimum conditions set by law, they will attempt to increase managerial efficiency and to improve the entire organization of their business; they will introduce new machinery which guarantees a more economic use of existing resources. This is especially true in all cases in which some enterprises in a particular industry are more efficient than others and in which the less efficient units were able to compete successfully only by imposing bad working conditions on their workers.

Id. Nathan uses California and England's labor regulations to support this phenomenon. *Id.*

173 In Gillian Lester's article, *Careers and Contingency*, she divides underemployment in two "cells": clearly underemployed, in Cell 3, and possibly underemployed, in Cell 4. Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 88 (1998). She states:

> Workers in Cell 3 are clearly underemployed. Here, there is a discrepancy between the job generally held by workers of given human capital, motivation, and preferences, and the actual (inferior) job the worker holds. The worker who seeks full-time work but can only find a part-time job, the "downsized" worker who has

jobs the actor holds and her human capital, ability, and desire.[174] Underemployment, like unemployment, is repugnant to economic growth and morale,[175] and it is even more repugnant in the actor's case because this underemployment persists for years and years as the actor works her way through dead-end performance job after dead-end performance job.[176] These low-paying, dead-end jobs do little to help improve an individual's economic self-sufficiency and essentially keep the individual tied down at the poverty level.[177] And even though the actor may be choosing to remain in this situation, perhaps an involuntary choice due to the lack of employment in the acting industry, this does not mean she is exempt from the feelings of hopelessness and desperation that many other unemployed and underemployed workers feel.[178]

> been forced to take a job outside of her area of training or expertise in order to avoid unemployment, the full-time temporary worker who has skills, experience, competence, and preferences identical to those of her permanent counterparts but who is classified as temporary and denied benefits—all of these examples might fit into this category. . . . Cell 4 [possibly underemployed] is more difficult to interpret. Here, a worker chooses a job which underexploits her talents, training, and experience relative to other workers of similar ability. From the perspective of maximizing labor market productivity, this poses a problem.

Id. at 88–89. Lester chooses not to consider the "possibly underemployed" as underemployed because she feels that it is the workers prerogative to choose the wrong job. *Id.*

174 *See id.* at 86.

175 *See* Patrick Gillespie, 7 Million Americans Can't Escape 'Dead End' Jobs (Dec. 31, 2014) (unpublished Capstone Project, CUNY Graduate School of Journalism), https://academicworks.cuny.edu/gj_etds/29. Gillespie states that unemployment and underemployment are strongly correlated. *Id.* He states, "the punishing effects of part-time work on Americans are obvious. Beyond struggling finances, periods of unemployment and high rates of poverty, these workers express little confidence in their future. Many must confront an often-heard perception that part-timers are lazy and incompetent." *Id.*

176 A dead-end job is one where there is little or no chance of career development or opportunity for advancement into a higher paid position. *See* Jacquelyn Smith, *20 Signs You're Stuck in a Dead-End Job—And What to do if You Are*, FORBES (Nov. 12, 2013, 12:22 PM), https://www.forbes.com/sites/jacquelynsmith/2013/11/12/20-signs-youre-stuck-in-a-dead-end-job-and-what-to-do-if-you-are/#4f4c9ed85aee [https://perma.cc/9TP8-S3YD].

177 Anna Yee, Nat'l Econ. Dev. & Law Ctr., *Enterprise Zones: Not Perfect, But Full of Potential*, 27 CLEARINGHOUSE REV. 1016, 1020 (1994) ("A low-paying, dead-end job that does not improve an employee's job skills or provide training does little to help a community achieve economic self-sufficiency. The only 'contribution' of a low-paying, dead-end job is to keep someone employed at poverty level.").

178 McMahon, *supra* note 43 ("For many actors, indeed for many artists, the sense that what we have to offer isn't necessary in our society leads to lifestyles dogged by the depression and anxiety . . . .").

III. PROPOSAL

One big hurdle that actors must face if they wish to be paid a fair minimum wage is themselves.[179] Many actors are willing to sacrifice their wages for a chance to work for their art. In this way, they are inherently different from the typical group of workers who protest minimum wage violations.[180] This artistic and philosophical difference between actors and other minimum wage employees should not be furthered as an excuse for why actors choosing to work for free should not be protected by minimum wage laws.[181] Instead, the federal and state governments must recognize the actor's unique situation and take action specifically geared towards improving the theater industry and the Actor's sacrifice.[182]

First, the federal government must address the recurring confusion regarding the classification of actors as employees or independent contractors.[183] Currently, the burden is on actors to prove that they are employees; this forces the weaker party to the bargain to litigate to enforce the right to minimum wage.[184] Rather than rely on case-by-case analyses that use the "right to control" or "economic realities" tests, the best way to combat the interpretive ambiguities and to equalize bargaining power would be to amend the statutory definition of employee under 29 U.S.C. § 203 of the FLSA to add an explicit inclusion of persons engaged in the performing arts.[185] The ideal textual language would closely mirror the definition of an employee in the New York Worker's Compensation Law:

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179 *See* Gelt, *supra* note 14; Boehm, *supra* note 49; Paulson, *supra* note 52.

180 Matthew Sekellick, *Acting in Solidarity: Working for a Living Wage*, HOWLROUND THEATRE COMMONS (Oct. 16, 2015), http://howlround.com/acting-in-solidarity-working-for-a-living-wage [https://perma.cc/N98N-49M7] (comparing the "Fight for 15" movement led by fast food workers to the state of actor's pay).

181 *See id.*; *see also* discussion *supra* Section II.B.

182 The New York state legislature has already recognized its duty in helping performing artists through the amendment of the Worker's Compensation Law, discussed in greater detail *infra* note 186 and accompanying text.

183 *See Overview of Minimum Wage*, *supra* note 62.

184 *See* Mars, *supra* note 92, at 29.

185 For a similar proposal in the context of the Internal Revenue Code provisions, see Cudnowski, *supra* note 84, at 143. *See also* discussion *supra* Section II.A (concluding that the more accurate way to classify actors in these situations is as employees rather than independent contractors).

> "Employee" shall also mean . . . a professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment . . . "Engaged in the performing arts" shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.[186]

Although this statutory definition would undoubtedly provide heightened protections for actors against misclassification, one critique of the statutory definition is that it may be over-inclusive—given the wide variety of performing arts employment, there may be situations where an actor truly would fit the definition of an independent contractor.[187] To account for this possibility, the federal and state legislators could therefore take a route similar to California's Labor Code[188] by providing a rebuttable presumption that performing artists are employees rather than independent contractors. Rebuttable presumptions are frequently used in the context of employment law to "tilt the scales" at least slightly in favor of employees.[189] The rebuttable presumption would remove the initial obstacle for artists of having to prove their status,[190] but would also give employers the opportunity to make good faith classifications for artists who really are independent contractors.[191] Once the ambiguities in classification are remedied, the passage of the Payroll Fraud Prevention Act, which mandates obligatory reporting of worker classification and imposes penalties for

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186 N.Y. WORKER'S COMP. LAW § 2(4) (McKinney 2018). The Worker's Compensation Law was amended in 1986 after a "herculean effort" by advocates who pressured the government to enact more protections for artists. *See* Mars, *supra* note 92. The American Federation of Labor and Congress of Industrial Organizations (ALF-CIO) wrote in support of the amendment, noting that "[t]he entertainment industry in New York is unique and deserving of interest, support, and, where necessary, legislative protection." *Id.*

187 *See, e.g.*, Tellier, *supra* note 147.

188 *See* CAL. LAB. CODE § 2750.5 (West 2018).

189 Thomas A. Robinson, *The Role of Presumptions Within the Workers' Compensation Arena*, LEXISNEXIS LEGAL NEWSROOM (Jan. 21, 2014), https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2014/01/21/the-role-of-presumptions-within-the-workers-compensation-arena.aspx?Redirected=true [https://perma.cc/GA3L-N5AN].

190 *Id.*; *see also* Mars, *supra* note 92, at 29.

191 *See* Mars, *supra* note 92, at 29.

misclassification,[192] will heighten the actor's awareness of her rights and will disincentivize theaters from misclassifying their actors.[193]

This amendment alone significantly improves actor's protections, but given the constant minimum wage enforcement issues, the government should go a step further to create a compromise that takes into account the theater industry's unique economic situation. This step would involve amending the "creative professional" exemption.[194] The reasoning behind the creative professional exemption aligns with the stage acting profession: it is meant to apply to individuals working in a creative endeavor who work a wide range of hours and perform duties that cannot be divided among several workers.[195] The exemption also recognizes that hourly wage calculations are not always the most efficient methods for calculating actors' wages, and it gives the DOL the flexibility to take into account industry-specific factors when setting a minimum salary.[196] However, the current exemption only applies to employees making a minimum salary of $455 per week;[197] therefore, many actors are not exempt because they are making lower wages.

Currently, the test the DOL uses to set the minimum salary applies one standard formula for all executive, administrative, and professional

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192 Payroll Fraud Prevention Act, H.R. 3629, 115th Cong. (2017).

193 *See* Chris Morran, *Bill Aims to Stop Employers from Incorrectly Classifying Employees as Independent Contractors*, CONSUMERIST (July 29, 2015, 2:30 PM), https://consumerist.com/2015/07/29/bill-aims-to-stop-employers-from-incorrectly-classifying-employees-as-independent-contractors [https://perma.cc/VDU3-8XUB] ("The Payroll Fraud Prevention Act of 2015 . . . would amend the [FLSA] to require that workers understand whether they are being classified as an employee . . . and what the implications are for non-employees in terms of benefits, and legal protections generally afforded to employees. Workers would also be made aware of their rights to file grievances about their classification, while employers could face penalties for misclassifying workers . . . .").

194 *See* 29 C.F.R. § 541.302 (2018).

195 *See id.*; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38517.

196 *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38519 ("[T]he type of work exempt employees performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making enforcement of the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.").

197 29 C.F.R. § 541.600 (2018). This salary level is already problematic for actors because it only takes into account those who were salaried employees—meaning those misclassified as volunteers or independent contractors were not included in the average calculation of wages.

employees.[198] This standard test relies on data from actual employee earnings across *all* the various industries—accountants, nurses, engineers, singers, graphic designers, managers, chief executive officers, and directors[199]—and sets the salary level near the lower end of the range of those earnings to accommodate businesses where salaries are generally lower due to geographic or industry-specific reasons.[200] For stage actors, this type of widespread calculation is problematic because it overlooks the unique problems of the acting industry, underemployment, misclassification of actors, and the failure of theaters to pay minimum wage at all.[201] In the past, the DOL used the "long duties" test, which set separate salary levels for executive, administrative, and professional industries, and gave the DOL more flexibility to take into account industry- and geographic-specific factors.[202] Although the DOL abandoned this test due to its "rigorous" nature, a rigorous, fact-based test is necessary for creative professionals specifically, given the artistic and economic differences between them and the other occupations included in exemption.[203] The DOL should use an updated salary calculation to amend the creative professional exemption by lowering the salary level to one that more accurately reflects the average wages across the entire creative industry.[204]

This amendment of the creative professional exemption will help balance the actor's entitlement to fair wages and the theater's ability to operate and produce shows—and abide by the law. For example, if the

198 *Id.*

199 *See* FLSA: EXEMPTION TEST QUESTIONNAIRE, UNIV. S.C., https://www.sc.edu/about/offices_and_divisions/human_resources/docs/flsa_checklist.pdf [https://perma.cc/2B59-NUJP] (last updated Dec. 2016).

200 *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38526.

201 The data used compiles reported salaries. Therefore, actors classified as independent contractors or actors receiving a stipend would not be included in the average salary. *Id.* at 38517.

202 *Id.* at 38529.

203 *Id.* at 38548.

204 Ideally, the DOL should also update the exemption to include a rebuttable presumption that performing artists are creative professionals. Currently, the classification as creative professional is left up to similar factual analyses that the court uses for the independent contractor classification. *See* discussion *supra* note 115. However, for the same reasons discussed in connection with independent contractors, leaving the designation of creative professional to common law determinations on a case-by-case basis is inefficient and inequitable.

salary threshold is lowered to a minimum level of around $250 per week, the theaters can conduct a cost-benefit analysis to determine whether it is more effective to pay their artists the flat salary rate in line with the exemption, or pay hourly and abide by the minimum wage requirements. If the theater sees that certain actors will not accrue $250 worth of hourly work, they can instead pay them on an hourly basis in line with the minimum wage requirements, bearing the risk that they would be required to compensate their overtime hours if actors did end up working more than forty hours. If the theater chooses to pay the flat salary basis, the theater will not need to be concerned about overtime pay during weeks where an actor is in fifty hours of rehearsal. During weeks where the actor is performing perhaps only twenty-five hours per week, she will not need to be concerned that her weekly rate will drastically decrease.

The DOL, on the other hand, proposes consistent *increases* in the standard salary level for the exemption. It argues that as the minimum wage continues to increase, increases in the salary basis are necessary to accurately reflect the salaries in the economy and maintain the demarcation between overtime-protected employees and exempt workers.[205] However, this argument relies on the assumption that employers are abiding by minimum wage regulations and increasing salaries as the minimum wage increases, which is not the case for many stage actors. Therefore, the proposed decrease in the salary level only for creative professionals would not offend the goal of the exemption.

These amendments will unambiguously define stage actors as employees but will also give theaters the flexibility to choose how to pay them.[206] Regardless of the compromise, the persistent countervailing

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205 *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38517. For example, if the salary minimum under the exemption was $250 and the federal minimum wage was $7.25, then a non-exempt employee working forty hours a week was making $290.

206 Proponents of the *Lochner* doctrine will undoubtedly criticize these legislatively enacted changes as an unnecessary abridgment of the freedom of contract. *See* Rachel Harvey, Note, *Labor Law: Challenges to the Living Wage Movement: Obstacles in a Path to Economic Justice*, 14 U. FLA. J.L. & PUB. POL'Y 229 (2003). Setting aside the always continuing philosophical and constitutional debates between freedom of contract supporters and minimum wage advocates, *see* David E. Bernstein, *Freedom of Contract* (Geo. Mason Univ. Sch. of Law, Paper No. 08-51, 2008), https://www.law.gmu.edu/assets/files/publications/working_papers/08-51%20Freedom%20of%20Contract.pdf [https://perma.cc/92HQ-PTKZ], employers here will still have the flexibility and bargaining power to fairly contract with their workers and decide exactly how to define their roles and obligations.

argument advanced by the theater industry is that any effort to force theaters to pay wages will cause theaters to close. However, many theaters already make it a priority to pay their actor's minimum wage and are able to do so and remain in business.[207] Even if some theaters are forced to close and actors become temporarily unemployed or have less opportunities to perform, in the long-term, this may not be the worst thing for the theater industry.[208] For one, theaters who are able to readjust to minimum salary requirements will flourish due to the diminishing competition.[209] Actors who were previously working at small theaters for free may eventually be forced to move on and get full-time jobs, but they will finally maximize their other skills and contribute to the economy.[210] As the pool of arguably less talented actors and theaters that employ them decreases, AEA, with less concern over small theaters employing free labor, will be able to loosen its eligibility requirements and allow for more actors to be protected by the union.[211]

Of course, this proposal would be incomplete without addressing the recurrent issue that theaters may continue to break the law and actors may continue to work for free. The enforcement issue will undoubtedly continue if additional action is not taken on both the side of the government and of the actors. First, the federal and state governments must help actors enforce their rights by policing unfair labor practices and suing theaters for back wages.[212] The government

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207 *See* J. Holtham, *In Small Theatres as in Large Ones, Money Talks—but Are We Listening?*, AM. THEATRE (Oct. 21, 2015), http://www.americantheatre.org/2015/10/21/in-small-theatres-as-in-large-ones-money-talks-but-are-we-listening [https://perma.cc/7TVS-M3NP]. Many theaters understand that actors are the backbone of the industry. *See* Kelundra Smith, *Love or Money: How About Both?*, AMERICAN THEATRE (Jan. 24, 2017), http://www.americantheatre.org/2017/01/24/love-or-money-how-about-both [https://perma.cc/5HCQ-SUYK] ("If you view actors as part-time employees, then your conversation about salaries is different. Theatre without actors is like going to an art museum with no paintings.") (quoting Michael Halberstam, founding artistic director of Writers Theatre in Glencoe, Illinois).

208 *See* discussion *supra* Section II.B.

209 *Id.*

210 *Id.*

211 *See* discussion *supra* Section I.A.3.

212 Currently, the FLSA and many state labor laws can be enforced either by the independent worker or the relevant labor department. *Wage and Hour Division (WHD): Major Laws Administered/Enforced*, U.S. DEP'T LABOR, https://www.dol.gov/whd/regs/statutes/summary.htm [https://perma.cc/WRL8-VT6J] (last visited Nov. 18, 2018); *see also* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT (2009), https://www.mtu.edu/hr/docs/flsa-poster.pdf [https://perma.cc/Z2JU-BR8K] (last

should also enact legislation that will allow them to proactively impose fines and penalties on theaters that chose not to comply with labor standards.

Actors must also come together to enforce their right to fair labor. They must unify through an organized social support group that will advocate for actor's rights by simultaneously pressuring the theaters to *abide* by the law and the DOL to *enforce* the law. While the AEA partially assumes this role for union actors, non-union actors, who are generally much more worse off, need protection as well.[213] A social bargaining association—supported but not managed by the union—would be the ideal mechanism.[214]

A relevant example of a successful social bargaining group can be found in the "Fight for 15" campaign.[215] In 2015 in New York, after surmounting pressure from fast-food workers to increase their wages, Governor Andrew Cuomo exercised his power[216] to impanel a Wage Board to recommend and investigate what adequate wages would be for the industry. The Board—which included members from labor, business, and the general public—held hearings with the active participation of fast-food workers and eventually announced its decision to increase the minimum wage to $15 per hour.[217] A similar social

visited Sept. 27, 2017) ("The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action. Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law . . . .").

213 *See* Sekellick, *supra* note 180. AEA also has too many conflicting interests to juggle and cannot solely focus on what is best for individual actors. *Id.*

214 In Kate Andrias' article, *The New Labor Law*, she defines social bargaining as "bargaining that occurs in the public arena on a sectoral and regional basis—with both old and new forms of worksite representation. It is a more inclusive and political model of labor relations . . . And it has the potential to salvage and secure one of labor law's most fundamental commitments: to help achieve greater economic and political equality in society." Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 8–9 (2016).

215 For a full background on the "Fight for 15" movement, see *id.* at 46–51.

216 "State law empowers the labor commissioner to investigate whether wages paid in a specific industry or job classification are sufficient to provide for the life and health of those workers . . . ." Andrew M. Cuomo, Opinion, *Fast-Food Workers Deserve a Raise*, N.Y. TIMES (May 6, 2015), https://www.nytimes.com/2015/05/07/opinion/andrew-m-cuomo-fast-food-workers-deserve-a-raise.html.

217 *See* Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, HARV. L. & POL'Y REV. ONLINE (2017), http://harvardlpr.com/wp-content/uploads/2018/01/Andrias-Social.pdf [https://perma.cc/2VFV-MNJX].

bargaining group for stage theater would ideally be composed of representatives from the actor's union, employer representatives (theater board members), and union and non-union actors.[218] The representatives would have the authority to evaluate compensation issues and propose amendments and regulations directly to the state and local governments.[219] This type of organization will give actors an active voice in their community and a forum through which they can communicate in conjunction with private theaters and their local governments.[220] Actors have already shown initiative to come together and fight for better pay in movements like "#FairWageOnstage."[221] They must continue to unite and support each other to sustain their art.

CONCLUSION

Minimum wage laws were enacted to increase worker bargaining power and equalize the playing field between employee and employer.[222] Many actors are legally entitled to these protections, yet they sacrifice their rights because they believe the sacrifice is necessary in order to perform.[223] Regardless of the actor's individual desires, this is not a sacrifice the government can allow these workers to make.[224] The actor's situation is unique and requires small but significant modifications to the current labor laws. These legislative modifications will be able to take into account the economic realities of the theater industry and

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218 *Id.*

219 *Id.*

220 Andrias, *supra* note 214, at 53–56. Andrias argues that this type of bargaining represents a "promising strategy for building a more equitable, inclusive, and democratic future" for workers. *Id.* at 13.

221 *See* Michael Paulson & Jennifer Schuessler, *Off Broadway Equity Actors and Stage Managers Win Pay Increase*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/arts/off-broadway-equity-actors-and-stage-managers-win-pay-increase.html?smid=pl-share (discussing the "Fair Wage Onstage" movement and its successful bargaining for better wages); *see also* Diep Tran, *How #FairWageOnstage Made Change Off-Broadway*, AM. THEATRE (Feb. 13, 2017), http://www.americantheatre.org/2017/02/13/how-fairwageonstage-made-change-off-broadway [https://perma.cc/E598-QH5X] ("[A]t the very least #FairWageOnstage has encouraged everyone to *think* about their individual commitments to fair compensation and examine their own company values and beliefs, separate of union requirements . . . .") (quoting Jason Eagan, artistic director of the Off-Broadway house Ars Nova).

222 *See* Nathan, *supra* note 156, at 417.

223 *See* discussion *supra* Section II.A.

224 *See* discussion *supra* Section II.B.

provide a clearer and more reasonable structure of payment. By combating unfair labor practices of theaters that are only able to sustain themselves by not paying their actors, the federal and state governments will also be able to take a big step to combat unemployment in the theater industry.[225] Hand-in-hand with social organizing and government enforcement, the modifications will incentivize actors to know their rights, fight for these rights, and improve their industry and their art.

APPENDIX

Theater & Job Description	Location	Compensation	Hours/Length of Contract	State Minimum Wage	Federal Minimum Wage
The Theater Barn, 2018 Season[226]: nonunion theater, casting all roles for six musicals	New Lebanon, NY	$250/wk	Productions run approximately one month each, rehearsals approximately one month prior	$11.10	$7.25
Queen Esther Productions, Off Broadway[227]: casting a new musical for Off-Broadway	New York, NY	$200 total	Rehearses Feb. 20-28 (12-5 p.m.); runs Mar. 1 (2 p.m.), 4 (8 p.m.), 13 (3 p.m.) and 18 (6 p.m.)	$15.00	$7.25
Axelrod Performing Arts Center[228]: casting for "Newsies the Musical"	Deal, NJ	No less than $1500 for the project	Rehearsals begin May 8, 2018 in NYC (six days a week, 10 a.m. to 6 p.m.); tech rehearsals May 24 through opening. Show plays June 1-18, 2018, for a total of fourteen performances	$8.60	$7.25
Thunder Bay Theatre[229]: casting all roles for fall season	Alpena, MI	$100/wk	Productions run approximately one month each, rehearsals approximately one month prior	$9.25	$7.25
Panic! Productions[230]: casting "Next to Normal"	Thousand Oaks, CA	"This is a non-equity production. There is a small stipend for performers"	One month of rehearsals, Monday to Thursday, 7:00 pm to 10:00 pm; Saturday and Sunday TBA	$11.00	$7.25
Penobscot Theatre Company, 2018-19 Season[231]: Equity contract, casting all roles	Bangor, ME	$425/wk. min. for Equity SPT-5; $679/wk. SPT-9 Contracts.	Productions run approximately one month each, rehearsals one month prior	$9.00	$7.25
BrightSide Theatre[232]: casting "Hairspray," a musical	Downers Grove, IL	"some pay"	Rehearsals begin late April, show runs June 8-24	$8.25	$7.25
"The Lion King"[233]: Rafiki, Broadway Tours	Touring companies	$2034/week min. Equity Production (Disney) Contract	Tours are ongoing	N/A	$7.25

225 *See* discussion *supra* Section II.B.

226 *The Theater Barn, 2018 Season*, BACKSTAGE, https://www.backstage.com/casting/the-theater-barn-2018-season-203798 [https://perma.cc/85KG-VVMY] (last visited Nov. 19, 2018).

227 *'Queen Esther,' Off Broadway*, BACKSTAGE, https://www.backstage.com/casting/queen-esther-off-broadway-204579 [https://perma.cc/D85M-TX5S] (last visited Nov. 19, 2018).

228 *'Newsies the Musical'*, BACKSTAGE, https://www.backstage.com/casting/newsies-the-musical-204870 [https://perma.cc/ZRP3-ALP4] (last visited Nov. 19, 2018).

229 *Thunder Bay Theatre Fall Season*, BACKSTAGE, https://www.backstage.com/casting/thunder-bay-theatre-fall-season-115640 [https://perma.cc/4YDQ-U7GN] (last visited Nov. 19, 2018).

230 '*Next to Normal*', BACKSTAGE, https://www.backstage.com/casting/next-to-normal-208946 [https://perma.cc/ZE65-7R67] (last visited Nov. 19, 2018).

Palos Verdes Performing Arts[234]: "42nd Street"	Palos Verdes, CA	Pays $568/wk (AEA) or $1000 flat fee (non-union). AEA Guest Artist Tier 3 Agreement.	Rehearsals Monday-Thursday, 3-11 pm, Saturdays, 10am-6pm, Sundays 1:30-9:30pm; runs Apr. 27-May 13 for 11 performances	$11.00	$7.25
Music Theater Works[235]: 2018-19 Season	Wilmette, IL	$344/wk. min. Equity LOA to LORT Contract.	Productions run approximately one month each, rehearsals approximately one month prior	$8.25	$7.25
St. Michael's Playhouse[236]: 2018 Season	Colchester, VT	$651/wk. Equity CORST Agreement.	Productions run approximately one month each, rehearsals approximately one month prior	$10.00	$7.25
Hamilton B'way & Angelica Tour[237]	New York, NY	$2034/wk. min. Equity Production (League) Contract	N/A	$15.00	$7.25

231 *Penobscot Theatre Company 2018–19 Season—Local EPA*, BACKSTAGE, https://www.backstage.com/casting/penobscot-theatre-company-2018-19-season-local-epa-208674 [https://perma.cc/C24J-299N] (last visited Nov. 19, 2018).

232 '*Hairspray*', BACKSTAGE, https://www.backstage.com/casting/hairspray-208615 [https://perma.cc/D354-BCC6] (last visited Nov. 19, 2018).

233 '*The Lion King*'*—Rafiki, B'way Tours Dancers*, BACKSTAGE, https://www.backstage.com/casting/the-lion-king-rafiki-bway-tours-dancers-208595 [https://perma.cc/AUT8-N575] (last visited Nov. 19, 2018).

234 *Music Theater Works 2018–19 Season*, BACKSTAGE, https://www.backstage.com/casting/music-theater-works-2018-19-season-207946 [https://perma.cc/M83U-P5R3] (last visited Nov. 19, 2018).

235 *St. Michael's Playhouse 2018 Season*, BACKSTAGE, https://www.backstage.com/casting/st-michaels-playhouse-2018-season-207160 [https://perma.cc/5SHP-MKW8] (last visited Nov. 19, 2018).

236 '*Hamilton,*' *B'way, Angelica Tour*, BACKSTAGE, https://www.backstage.com/casting/hamilton-bway-angelica-tour-208449 [https://perma.cc/3VVD-5ZYL] (last visited Nov. 19, 2018).

237 '*42nd Street*', BACKSTAGE, https://www.backstage.com/casting/42nd-street-208269 [https://perma.cc/4TKN-BE6Q] (last visited Nov. 19, 2018).