

No. 23-1731

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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MICHAEL A. SCOTT, *et al.*,

PLAINTIFFS-APPELLANTS,

v.

BALTIMORE COUNTY, MARYLAND,

DEFENDANT-APPELLEE.

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On Appeal from the United States District Court for the District of Maryland  
CV SAG-21-00034  
Judge Stephanie A. Gallagher

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**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AMERICAN  
CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF  
MARYLAND, AMERICAN CIVIL LIBERTIES UNION OF NORTH  
CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF WEST  
VIRGINIA, AMERICAN CIVIL LIBERTIES UNION OF SOUTH  
CAROLINA, AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA,  
CAUCUS OF AFRICAN AMERICAN LEADERS, MARYLAND CURE  
AND FAMILY SUPPORT NETWORK  
IN SUPPORT OF APPELLANTS AND REVERSAL**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae American Civil Liberties Union, American Civil Liberties Union of Maryland, American Civil Liberties Union of North Carolina, American Civil Liberties Union of South Carolina, American Civil Liberties Union of Virginia, American Civil Liberties Union of West Virginia, Caucus of African American Leaders, Maryland CURE and Family Support Network state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: September 27, 2023

By: /s/ Sonia Kumar

Pursuant to Federal Rule of Appellate Procedure 29 and Fourth Circuit Rule 29(a), the American Civil Liberties Union (“ACLU”), the American Civil Liberties Union of Maryland, the American Civil Liberties Union of North Carolina, the American Civil Liberties Union of West Virginia, the American Civil Liberties Union of South Carolina, the American Civil Liberties Union of Virginia, the Caucus of African American Leaders, Maryland Citizens United for Rehabilitation of Errants, and the Family Support Network respectfully request leave to file the accompanying amici curiae brief in support of the Plaintiffs-Appellants. Appellants consent to this Motion, but Appellee does not.

The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU works to ensure that our nation’s prisons, jails, and detention centers comply with the Constitution and all relevant state and federal statutes. Consistent with that mission, the ACLU established the National Prison Project (“NPP”) in 1972 to protect and promote incarcerated people’s civil and constitutional rights. The NPP has decades of experience in complex prisoners’ rights class action suits and since 1990 has represented incarcerated people in five cases before the U.S. Supreme Court. The ACLU of Maryland, ACLU of North Carolina, ACLU of South Carolina, ACLU of Virginia, and ACLU of West Virginia are state affiliates of the national ACLU.

The Caucus of African American Leaders (“CAAL”) is a membership-based consortium of organizations and individuals, including the NAACP, elected officials, and faith and community leaders, among others. The Caucus seeks to raise awareness about current civil rights issues impacting the Black community, particularly with respect to justice system issues, by engaging in legal advocacy and encouraging the public to engage in local, state, and national elections to impact positive change. In addition to organizing demonstrations, and participating in legal causes such as this, the Caucus hosts monthly meetings to discuss issues affecting the community, and solicits donations for other civil rights organizations.

Maryland Citizens United for Rehabilitation of Errants (“CURE”) is a membership-based organization that includes Marylanders who are currently and formerly incarcerated and their loved ones. It is a state chapter of International CURE, an organization dedicated to reducing crime through reform of the criminal justice system since 1972. Maryland CURE members believe prisons should only be used for those who absolutely must be incarcerated and those who are incarcerated should have all of the resources they need to turn their lives around. Prisons should not be used as warehouses for humanity.

Family Support Network (“FSN”) is a membership and advocacy organization made up of Black people, primarily women, whose loved ones are serving extreme sentences in the Maryland prison system, as well as people who are formerly

incarcerated. FSN advocates for prisons to recognize the humanity of people who are incarcerated and their loved ones, and has advocated on a range of issues such as barriers to visitation, the expenses of communication, abusive commissary practices, health and safety during COVID-19, and second chances for people serving extreme sentences.

This case involves the interpretation and application of the Fair Labor Standards Act (“FLSA”) to incarcerated workers. The ACLU has long advocated for the rights of incarcerated workers. In 2022, in collaboration with the University of Chicago Law School Global Human Rights Clinic, the ACLU released a research report, “Captive Labor: Exploitation of Incarcerated Workers,” documenting the exploitation of incarcerated workers that results in part from their exclusion from federal labor protections like the FLSA.<sup>1</sup> In addition, the ACLU and its state affiliates have regularly appeared before this Court and district courts within the Fourth Circuit in cases considering the rights of incarcerated persons as *amicus curiae*.<sup>2</sup>

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<sup>1</sup> See ACLU & The University of Chicago Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, (2022), [https://www.aclu.org/sites/default/files/field\\_document/2022-06-15-captivelaborresearchreport.pdf](https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf).

<sup>2</sup> See, e.g., *Cano v. S.C. Dep’t of Corr.*, No. 9:22-CV-04247-DCC, 2023 WL 5767678 (D.S.C. Sept. 7, 2023); *Zayre-Brown v. N. Carolina Dep’t of Pub. Safety*, No. 3:22-CV-191-MOC-DCK, 2023 WL 3874035 (W.D.N.C. June 7, 2023); *Williams v. Carvajal*, 63 F.4th 279 (4th Cir. 2023); *Griffin v. Bryant*, 56 F.4th 328,

Specifically, this case addresses the question of whether incarcerated persons assigned to a work detail at a county recycling facility, where they work alongside “free world” employees, are entitled to a minimum wage under the FLSA. This Court’s precedents addressing prison FLSA claims have examined the status of incarcerated persons working *within* the walls of their prison facility and are thus of limited relevance in this different factual context. *See, e.g., Harker v. State Use Indus.*, 990 F.2d 131, 136 (4th Cir. 1993) (considering FLSA claim brought by “inmates working within the prison setting”). This Court should, consistent with the decisions of other circuits, clarify that coverage under the FLSA depends upon a fact-intensive inquiry into the totality of the circumstances regarding the nature of the relationship between the worker and employer, *see, e.g., Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992), and that under these circumstances incarcerated workers should be afforded the FLSA’s basic employment protections, *see, e.g., Burrell v. Staff*, 60 F.4th 25, 43 (3d Cir.), *cert. denied sub nom. Lackawanna Recycling Ctr., Inc. v. Burrell*, 143 S. Ct. 2662 (2023).

*Amici* are uniquely positioned to provide the Court with important background and context for its decision. As civil rights practitioners and advocates who represent incarcerated clients, and as community groups with incarcerated people and family

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330 (4th Cir. 2022) (amicus); *Thorpe v. Clarke*, 37 F.4th 926, 929 (4th Cir. 2022); *Jackson v. Warden of Lee Corr. Inst.*, No. 2:21-CV-108-BHH, 2022 WL 3714600 (D.S.C. Aug. 29, 2022); *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (amicus)

members of incarcerated people as their members, *amici* are well-versed in the conditions incarcerated persons experience on work assignments, the importance to incarcerated workers of the protections the FLSA offers, and the historical and ongoing exploitation of incarcerated workers by employers. The proposed amicus brief therefore provides important and relevant information to inform the resolution of this case. The brief (1) details the historical roots of the modern carceral system in slavery and Jim Crow; (2) explains why providing incarcerated workers with protections under the FLSA is consistent with the Act's text and purpose of protecting the most vulnerable workers; and (3) demonstrates that the facts of this case and the realities of prison life warrant applying the protections of the FLSA under these circumstances. The brief further describes the consequences of the decision below for incarcerated workers who toil in harsh conditions for little pay. *Amici* urges this Court to reverse.

WHEREFORE, proposed *amici curiae* respectfully request that this Court grant this motion for leave to file the attached brief in support of plaintiff-appellants.



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**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

Dated: September 27, 2023

By: /s/ Sonia Kumar  
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Will Tucker, *The Kill Line*, Southern Poverty Law Center (July 26, 2018), <https://www.splcenter.org/news/2018/07/26/kill-line> .....20

*Work Release Program*, Calvert County Maryland, <https://www.calvertcountymd.gov/311/Work-Release-Program> (last visited Sept. 26, 2023) .....31

## STATEMENT OF INTEREST<sup>1</sup>

*Amici* are grassroots prisoners' rights organizations, racial justice advocates, and civil rights organizations with a demonstrated interest in preventing the exploitation of incarcerated workers and advancing racial justice. Among *Amici's* members are Black people who are currently or formerly incarcerated in Maryland correctional facilities and their family members. *Amici* respectfully submit this brief to advise the Court of certain practices relevant to the issues presented in this case. *Amici* are listed in Appendix A.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure Rule 29(c), *amici* certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

## INTRODUCTION

Modern day prison labor descends from the enslavement of Black people. After the Thirteenth Amendment abolished race-based slavery, the criminal legal system was used to replicate its oppressive structural framework, through convict leasing, chain gangs, and forced “public works” projects. Today, Black people are disproportionately represented as incarcerated workers in this Circuit, and in some places represent the majority of such workers. They engage in work within and outside of prison walls, for public and private employers, in often hazardous conditions. They receive little or zero pay, despite having to purchase basic necessities like food and telephone calls with family. The justifications for this system echo the rationales used to justify earlier forms of racial oppression, dehumanizing people by insisting that exploitation illegal in any other context is for their own good.

In this case, people serving jail sentences who were nearing their release worked at a recycling center alongside non-incarcerated workers, for a non-Department of Corrections (“DOC”) employer. The District Court’s holding that they were not “employees” under the Fair Labor Standards Act (“FLSA”) misapplied this Court’s precedent—which has never addressed work conducted in the community and has never categorically excluded incarcerated workers—and is contrary to both the FLSA’s purposes and its plain text, which does not exempt

incarcerated workers. If the decision below is permitted to stand, it is hard to imagine any circumstance in which incarcerated workers would be covered.

This Court should reject inaccurate and dehumanizing assumptions that echo past justifications for forced labor. This Court's FLSA precedents establish that the proper inquiry is fact-specific and informed by the FLSA's purposes and economic reality. The Court should confirm that there is no categorical exclusion of incarcerated workers from FLSA protections and hold that, under the circumstances present here—where incarcerated people are working in the community, alongside other non-incarcerated workers—the FLSA applies.



## ARGUMENT

The decision below misapprehends realities of the modern carceral labor system and misapplies this Court's precedents to, in effect, graft a judicially created categorical exclusion for incarcerated workers onto the FLSA. In assessing the employment status of incarcerated workers, courts should consider how the modern carceral labor system evolved from—and has been justified in similar terms as—slavery and Jim Crow-era “convict leasing.” This Court should clarify that any analysis of an incarcerated worker's FLSA claim must be rooted in specific facts and the actual realities of prison life, not erroneous assumptions or stereotypes. And this Court should make clear that where economic considerations predominate in how incarcerated workers are treated, the FLSA applies. That incarcerated workers generally lack bargaining power and need their earnings to maintain a basic standard of living only underscores why FLSA coverage is appropriate here.

### **I. THE MODERN-DAY CARCERAL LABOR SYSTEM PERPETUATES THE RACIST LEGACY OF SLAVERY AND JIM CROW.**

#### **A. Justifications of forced labor in the carceral system are rooted in slavery's dehumanization of Black workers.**

From this nation's inception, Black people have been subject to a revolving door of barbarous attacks and dehumanizing labor practices, including chattel slavery, the creation of Black codes, lynchings, convict leasing, chain gangs, exclusion from basic employment protections and benefits, and, most recently, mass

incarceration. The modern carceral system and its exploitative labor practices are descendants of this racist history.<sup>2</sup>

After slavery was formally abolished by the Thirteenth Amendment—except for those convicted of crimes and sentenced to labor as punishment—the arrest and incarceration of Black people skyrocketed in southern states. In Maryland, for example, there was an “unprecedented” influx of Black prisoners following emancipation.<sup>3</sup> In North Carolina, by 1878, Black people made up less than one third of the state’s population but 89% of its state penitentiary population.<sup>4</sup> Indeed, the criminal legal system supplanted chattel slavery, protecting white supremacy and perpetuating the exploitation of Black labor for white interests. In response to emancipation and the “threat” posed by freed Black people, states passed new laws and vigorously enforced those already on the books; these “Black Codes” were “essentially intended to criminalize black life” to maintain the existing racial hierarchy.<sup>5</sup>

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<sup>2</sup> See generally Douglas Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008); Tiffany Yang, *Public Profiteering of Prison Labor*, 101 N.C. L. Rev. 313 (2023).

<sup>3</sup> Annual Report of the Select Committee on the Maryland Penitentiary, 6 (1867).

<sup>4</sup> Jesse Steiner & Roy Brown, *The North Carolina Chain Gang: A Study of Convict Road Work* at 15 (1927).

<sup>5</sup> Blackmon, *supra* note 2 at 53.

Most infamously, these codes adopted sweeping definitions of vagrancy, empowering local law enforcement to arrest Black people with little justification. For example, South Carolina deemed anyone lacking “some fixed and known place of abode, and some lawful and respectable employment,” a vagrant subject to criminal punishment such as being hired out “to any owner or lessee of a farm, for the term of labor to which he was sentenced.”<sup>6</sup>

Spurred by “[w]hite southerners’ organized efforts to,” among other things, “terrorize[] black leaders and . . . place blame for the anarchic behavior of whites upon freed slaves,” these codes swept Black people into custody, primarily for petty offenses, and subjected them to hard labor or fines they could not afford.<sup>7</sup> For example, a federal judge surveying one southern county’s court records in 1904 found that in just one month more than 149 people, nearly all Black, had been sentenced to a total of 19 years labor for “crimes no more serious than walking on the grass or spitting on the sidewalk.”<sup>8</sup>

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<sup>6</sup> South Carolina Code XCVI; XCVII, Acts of the General Assembly of State of South Carolina Passed at the Sessions of 1864-1865, [https://www.carolana.com/SC/Legislators/Documents/Acts\\_of\\_the\\_General\\_Assembly\\_of\\_the\\_State\\_of\\_South\\_Carolina\\_1864\\_1865.pdf](https://www.carolana.com/SC/Legislators/Documents/Acts_of_the_General_Assembly_of_the_State_of_South_Carolina_1864_1865.pdf).

<sup>7</sup> Blackmon, *supra* note 2 at 42; *see also id.* at 7 (“By 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites.”)

<sup>8</sup> Daniel Novak, *Wheel of Servitude: Black Forced Labor after Slavery*, 35 (1978).

“After emancipation, black people, once seen as less than fully human ‘slaves,’ were seen as less than fully human ‘criminals.’”<sup>9</sup> Once ensnared in the criminal system, they were treated as State property. Part and parcel of this system was the widespread practice of peonage, in which white men would pay to release from jail Black people convicted of petty crimes and then demand those released work off their debt, trapping them in servitude. “The next step was to assure, by physical restraint, the working out of the debts thus incurred. Finally came the cooperation of justices, constables, and other officials in providing a supply of this forced labor by ‘law.’”<sup>10</sup>

Whether courts were imposing fines that Black people could pay only through servitude or imposing “hard labor” as punishment, the result was the same: unpaid forced labor. In southern states, “reintroducing the forced labor of blacks as a means of funding government services was viewed by whites as an inherently practical method of eliminating the cost of building prisons and returning blacks to their appropriate position in society.”<sup>11</sup> Thus, “[t]he South’s highly evolved system and

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<sup>9</sup> Bryan Stevenson, *Why American Prisons Owe Their Cruelty to Slavery*, The New York Times (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

<sup>10</sup> Carter Godwin Woodson, *The Rural Negro* 73–75 (1930).

<sup>11</sup> Blackmon, *supra* note 2 at 53.

customs of leasing slaves from one farm or factory to the next, bartering for the cost of slaves, and wholesaling and retailing of slaves regenerated itself around convict leasing in the 1870s and 1880s.”<sup>12</sup>

Under the convict leasing system, private companies leased prisoners from the State; private employers had complete control and “subjected [workers] to brutal punishments such as whipping and branding and, in many cases, worked incarcerated people to death.”<sup>13</sup> “In South Carolina, the death rate of convicts leased to the Greenwood and Augusta Railroad averaged 45 percent a year for a period of two years, 1877-1879.”<sup>14</sup>

Over the course of several decades, the convict leasing system gradually lost favor, primarily because it undermined free labor and allowed private companies to profit from the State.<sup>15</sup> Critics argued that people convicted of crimes instead should be put to work on county roads and other public works projects. “[W]hile thousands of state prisoners in Georgia, the Carolinas, and other states were no longer leased

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<sup>12</sup> *Id.* at 8.

<sup>13</sup> ACLU & The University of Chicago Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers*, 25 (2022), <https://www.aclu.org/report/captive-labor-exploitation-incarcerated-workers>.

<sup>14</sup> Novak, *supra* note 7 at 33.

<sup>15</sup> See James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. Rev. 1465, 1525-29 (2019).

to private corporations, they were being forced into an ‘improved’ method of coercing labor and intimidating African Americans—the chain gang.”<sup>16</sup> People were “shackled together with chains wrapped around their ankles, day and night, even while working, sleeping, or eating.”<sup>17</sup> Under the supervision of men armed with pistols and whips, they were forced to “labor in brutal conditions outside of the prison, such as road construction, ditch digging, rock breaking, highway maintenance, and farming.”<sup>18</sup>

Many contemporaneous accounts justified these cruel practices as reasonable, necessary, and somehow benefiting the very people they exploited. For example, an 1867 Maryland Senate report cast slavery as an “advantageous” system that had “lifted [Black people] from a state of barbarism and heathenism to one of civilization and Christianity.”<sup>19</sup> Similar claims were made about Southern peonage, described as “humanitarian in its motive and . . . designed especially to favor Negro offenders.”<sup>20</sup> Perversely, peonage was cast as creating “equal opportunity” for Black

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<sup>16</sup> Blackmon, *supra* note 2 at 352.

<sup>17</sup> *Captive Labor*, *supra* note 13 at 25.

<sup>18</sup> *Id.*

<sup>19</sup> Sen. Rep. of the Comm. on Lab. and Immigr. 3 (1867) (claiming the formerly enslaved needed “honest, faithful work”, not “bewildering and intoxicating . . . social and political equality.”).

<sup>20</sup> Jerome Dowd, *The Negro in American Life* Vol. 10 132 (1926).

people who lacked wealth to “escape a jail sentence.”<sup>21</sup> Even the chain gang was defended as salutary, on the grounds that “prisoners are certainly far better off at work in the open air than they would be idling in a crowded jail.”<sup>22</sup> In these ways, the criminal legal system, shadowed by pervasive threats of racist violence and lynchings, forced tens of thousands of Black people to work without pay following their legal emancipation, often in horrific conditions.<sup>23</sup>

**B. The mass incarceration of Black people, their continued dehumanization, and forced labor reflect the past.**

The legacy of slavery, peonage, convict leasing, and chain gangs persists in today’s prisons and jails, where people of color are disproportionately incarcerated and forced to work for little or no pay.

In Baltimore County, the site of this case, 56% of people at the jail are Black, although the county population is 32% Black.<sup>24</sup> The County has a long, notorious,

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<sup>21</sup> *Id.*

<sup>22</sup> Editorial, *The Chain Gang and Mawkishness*, *The Portsmouth Star* (Jan. 13, 1903).

<sup>23</sup> See, e.g., Lu-in Wang, *The Complexities of ‘Hate’*, 60 *Ohio St. L.J.* 799, 848 (1999) (racist violence “served as a . . . means of labor control”).

<sup>24</sup> Annual Survey of Jails Data Set 2015, Bureau of Justice Statistics; Quickfacts Baltimore County, Maryland, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/baltimorecountymaryland/AGE135222> (last visited Sept. 26, 2023).

and continuing history of racial prejudice, demonstrated most recently by Department of Justice litigation challenging race discrimination within its police force,<sup>25</sup> and litigation successfully challenging discrimination against Black voters in violation of federal law. *See Baltimore County Branch of the NAACP v. Baltimore County, MD*, 2022 WL 657562 (D. Md. Feb. 22, 2022). This record dates back decades, to when County officials prided themselves on doing “everything except stand in the schoolhouse door to preserve [Baltimore County] as a white only enclave.”<sup>26</sup> Indeed, the County was described as a “white noose” around Baltimore City due to its predominantly white population.<sup>27</sup>

But Baltimore County is not unique. In every state of this Circuit, Black people are confined to prisons and jails at more than twice their rate in the general population.<sup>28</sup> In Maryland and South Carolina, prison populations are majority

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<sup>25</sup> *See Justice Department Announces Two Million Dollar Settlement of Race Discrimination Lawsuit Against Baltimore County, Maryland*, U.S. Dept. of Just. (Nov. 4, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-two-million-dollar-settlement-race-discrimination-lawsuit>.

<sup>26</sup> Editorial, *In Search of Vindication*, Baltimore Sun (Aug. 1982).

<sup>27</sup> U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* 34 (1974).

<sup>28</sup> *See, e.g. Incarceration Trends in South Carolina*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-south-carolina.pdf>; *Incarceration Trends in North Carolina*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-north-carolina.pdf>; *Incarceration Trends in Virginia*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf>.



Black: nearly 70% in Maryland (a state that is 30% Black) and 60% in South Carolina (which is 26% Black).<sup>29</sup>

In some places, the link between past and present is palpable. “[P]enal plantations [with] direct roots in the Black chattel slavery of the South [are]... situated on land that was originally the site of slave plantations.”<sup>30</sup> North Carolina, for example, leased prisoners to the Caledonia plantation before purchasing the land to operate a penal farm and prison in 1899. Today, the former plantation is a prison called Roanoke River Correctional Institution. Its disproportionately Black population of incarcerated workers “produce some of the same crops that were grown by enslaved people on the same land.”<sup>31</sup> The best-paid workers make 36 cents an hour.<sup>32</sup>

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[trends-virginia.pdf](#)); *Incarceration Trends in West Virginia*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-west-virginia.pdf>); *Incarceration Trends in Maryland*, Vera Institute of Justice (Dec. 2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-maryland.pdf>).

<sup>29</sup> *Id.* (Maryland, South Carolina).

<sup>30</sup> *Captive Labor*, *supra* note 13 at 34.

<sup>31</sup> *Id.* at 36.

<sup>32</sup> Andrea Kelley et al., *From Plantation to Prison: how oppression led to high rates of disease, death for Black North Carolinians*, N.C. Health News (Feb. 23, 2021), <https://www.northcarolinahealthnews.org/2021/02/23/from-plantation-to-prison-how-oppression-led-to-high-rates-of-disease-death-for-black-north-carolinians/>.



*An officer supervising incarcerated workers at the site of the former Caledonia plantation, now Roanoke River Correctional Institution.<sup>33</sup>*

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<sup>33</sup> *Officer and horse keep watch on prison farm*, N.C. Dept. of Corrections (May 6, 2022), [https://www.doc.state.nc.us/news/2002/releases/CO\\_Warren.htm](https://www.doc.state.nc.us/news/2002/releases/CO_Warren.htm).



*Workers harvest crops at the Roanoke River Correctional Institution, located on the site of the former Caledonia plantation.<sup>34</sup>*

Similarly, the chain gangs of the past evolved into “road work crews” or “road gangs,” which are still widely used today.<sup>35</sup> A 2001 North Carolina Department of Correction press release described prison guards who supervise road work “squads” as follows: “They’re the modern day version of the old chain gang guards, armed men supervising inmates who work outside the prison fences every day. The inmates

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<sup>34</sup> *Captive Labor*, *supra* note 13 at 35.

<sup>35</sup> See, e.g., 2020-2021 Annual Statistical Report, N.C. Dept. of Pub. Safety, at 18 (prison workers on “road squads”), <https://www.ncdps.gov/fy-2020-21-annual-statistical-report/open>; *Litter Crews on VA. Roads Costing More*, Washington Post (Dec. 31, 1989) (tracing contemporary prison road crew paying prisoners cents an hour back to 1906 State Convict Road Force), <https://www.washingtonpost.com/archive/local/1989/12/31/litter-crews-on-va-roads-costing-more/886dc3e9-9960-4fec-b189-09f785c7302b/>.

no longer wear stripes and chains, and they work along the highways not the railroads.”<sup>36</sup>

In other contexts, the link between past and present is less visceral, but no less real: people, disproportionately Black and poor, working for cents—or nothing—in menial or hard labor, with almost no protections against brutal working conditions and sometimes facing grave risk of injury.<sup>37</sup> For example, in addition to contracts with private business, and of particular salience here, correctional systems may contract with other government entities or nonprofits to utilize incarcerated workers’ labor, typically in the community outside of jail or prison grounds.<sup>38</sup> “Incarcerated workers maintain cemeteries, school grounds, fairgrounds, and public parks; do road work; construct buildings; clean government offices; clean up landfills and hazardous spills; undertake forestry work in state-owned forests; and treat sewage.”<sup>39</sup> In a system modeled on slavery, “defined by punishment,” and characterized by “the absence of just compensation, workplace protections, and the

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<sup>36</sup> Press Release, N.C. Dep’t of Correction, Road Squad Officers Supervise Inmates Working Along State Highways (May 1, 2001), [https://www.doc.state.nc.us/news/2001/releases/co\\_garner\\_auman.htm](https://www.doc.state.nc.us/news/2001/releases/co_garner_auman.htm).

<sup>37</sup> *Captive Labor*, *supra* note 13 at 9.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

power to unionize,” incarcerated workers labor for little to no pay and often without any meaningful hope of future employment.<sup>40</sup>

## **II. APPLYING THE FLSA TO INCARCERATED WORKERS WHO PERFORM WORK IN THE COMMUNITY REFLECTS ECONOMIC REALITY AND THE BROAD PURPOSES OF THE FLSA.**

The FLSA is an expansive remedial statute designed to foster competitive wages and “to protect the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers.” *Whiting v. The Johns Hopkins Hosp.*, 416 F. App’x 312, 316 (4th Cir. 2011) (unpublished) (quoting 73 Fed. Reg. 67987 (Nov. 17, 2008)). Accordingly, its “scope must be determined by ‘recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.’” *Steelman v. Hirsch*, 473 F.3d 124, 131 (4th Cir. 2007) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 592 (1944)).

Unfortunately, the FLSA’s scope was curtailed from the outset to entrench racial hierarchy. During congressional deliberations, “influential lawmakers from the South demanded that the Act exclude farmworkers, thereby ensuring that Southern farms could continue paying low wages to their predominantly Black agricultural crews.” *Luna Vanegas v. Signet Builders, Inc.*, 46 F.4th 636, 640 (7th Cir. 2022). As one Congressman argued, providing agricultural workers—who, at

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<sup>40</sup> Yang, *supra* note 2 at 316.

the time, were disproportionately Black—with minimum wage protections would disrupt the southern labor market, where “[t]here has always been a difference in the wage scale of white and colored labor.”<sup>41</sup>

Even against this backdrop, the FLSA’s laundry list of exceptions does not exclude incarcerated workers from its coverage, and “it would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act.” *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984), *holding modified in part by Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996). This Court should not perpetuate the FLSA’s initial racial discrimination by inferring an unenumerated exception that would disproportionately burden Black workers. *See Ayes v. U.S. Dep’t of Veterans Affs.*, 473 F.3d 104, 110–11 (4th Cir. 2006) (applying “[t]he time-honored maxim *expressio unius est exclusio alterius*”).

In concluding that plaintiffs were not “employees” for the purposes of the FLSA—and thus not entitled to minimum wage—the District Court relied upon factors set out in *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) and used in *Harker v. State Use Indus.*, 990 F.2d 131, 132 (4th Cir. 1993). *Scott v. Baltimore*

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<sup>41</sup> Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1374 (1987) (quoting 82 Cong. Rec. 1404 (1937)). The FLSA was later amended to partially—but not fully—rectify some race and gender-based exclusions. *Id.* at 1336–37; *see also* Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 Yale L.J. 616, 638 & n. 101 (2019).



*Cnty.*, No. CV SAG-21-00034, 2023 WL 3932010, at \*11 (D. Md. June 9, 2023). These include (1) whether a work assignment has a rehabilitative or economic purpose, (2) whether there is a bargained-for exchange of labor, and (3) whether coverage furthers the purposes of the FLSA. But neither *Vanskike* nor *Harker* addressed incarcerated workers laboring in the community alongside non-incarcerated workers, making their holdings inapposite here. Regardless, both cases endorse a context-specific “totality of the circumstances” analysis of “the ‘economic reality’ of the working relationship” when assessing FLSA coverage. *Vanskike*, 974 F.2d at 808. To the extent these cases apply, it is because they offer considerations that are often relevant when assessing that “economic reality.”

Here, the District Court’s conclusion that the Plaintiffs were not “employees” for FLSA purposes rests primarily on erroneous assumptions and takes the county’s justifications for the labor program at face value. Under the District Court’s approach, it is hard to see how incarcerated workers would ever be covered by the FLSA, no matter how much their labor resembles “free world” employment, depresses working conditions in the broader economy, and produces profit. Prison officials will always claim that work performed by incarcerated people has some rehabilitative purpose. Incarcerated workers will always be limited in their capacity to bargain over their terms of employment. And the state always has a constitutional obligation to provide some minimal level of necessities. The District Court’s

reasoning produces a categorical exclusion that, if adopted, would perpetuate the ongoing exploitation of disproportionately Black incarcerated workers.

The facts of this case demonstrate that incarcerated workers who labor in the community alongside non-incarcerated workers are “employees” within the meaning of the FLSA, consistent with precedent, the text and purpose of the FLSA, and the realities of the carceral labor system. FLSA coverage would ensure that employers cannot use incarcerated labor to undermine the statute’s purposes and provide vulnerable workers with long-overdue recognition of their essential humanity.

**A. Prison labor is largely driven by employers’ economic imperatives.**

Employers have long attempted to justify their refusal to fairly compensate Black workers by emphasizing the purportedly curative effects of being exploited, as discussed above. But naked assertions that prison labor is “rehabilitative” are irrelevant where, as here, the record evidence reveals that economic considerations dictate how incarcerated workers are utilized.

As recounted below, the defendant’s choice to employ incarcerated workers “reflects [the County’s] economic motive” and its goal of “turn[ing] a profit.” *Scott*, 2023 WL 3932010, at \*12. To that end, the County and DOC “negotiated a ‘quota,’ or minimum number of inmate workers” who would labor at the Materials Recovery Facility (“MRF”), ensuring a steady supply of barely-compensated workers. *Id.*



DOC regularly reassigned incarcerated workers to the MRF to safeguard its “operating efficiency,” even if that meant workers would “miss . . . other job-training opportunities, community-reentry meetings, and important health services.” *Id.* There may be genuinely rehabilitative programs for incarcerated people that integrate work components, but the MRF is not one of them.

DOC’s unsupported claims about the purported rehabilitative function of plaintiffs’ work are especially dubious given the harsh conditions at the MRF, an experience that is all too common. Across the south, incarcerated workers are used to fill dangerous roles in private poultry processing plants, where they have suffered serious injuries including cuts, chemical burns, and musculoskeletal disorders—and on at least one occasion, died.<sup>42</sup> Elsewhere, incarcerated workers have been maimed or killed performing hazardous work in unsafe conditions fighting wildfires, abating asbestos, operating industrial machinery, and picking cotton in fields previously tilled by their enslaved ancestors.<sup>43</sup>

Assigning incarcerated workers to dangerous jobs for long hours, failing to adequately pay and train them, and sometimes withholding appropriate medical

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<sup>42</sup> Will Tucker, *The Kill Line*, Southern Poverty Law Center (July 26, 2018), <https://www.splcenter.org/news/2018/07/26/kill-line>.

<sup>43</sup> See, e.g., *Captive Labor*, *supra* note 13 at 14.

care<sup>44</sup> does not promote rehabilitation. But it does serve the economic interests of employers, whether those employers are private companies or government agencies. Even when legally required to pay incarcerated workers a “prevailing wage,” *see* Crime Control Act of 1990, Pub. L. No. 101-647), employers need not pay for other employee benefits, *see, e.g.*, No Social Security Benefits for Prisoners Act of 2009, Pub. L. No. 111-115, §§ 1-2 (2009). Employers’ bottom-lines benefit in other ways, too. As the owner of one company that hires incarcerated workers explained, “When you work in the free world, you have people call in sick, they have car problems, they have family problems. We don’t have that [in prison].”<sup>45</sup> Of course, incarcerated people also get sick, have family problems, and deal with daunting challenges “free world” workers do not face—but incarcerated workers can often be compelled to work regardless.

Prison labor is big business: Incarcerated workers generate an estimated \$11 billion in goods and services annually.<sup>46</sup> And prison officials are highly attuned to, and make decisions based on, these economic imperatives. For example, in North

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<sup>44</sup> *See id.* at 63.

<sup>45</sup> Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, Prison Legal News (Mar. 15, 2010), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/>.

<sup>46</sup> *Captive Labor*, *supra* note 13 at 6.

Carolina at the beginning of the coronavirus pandemic, prison officials defended sending incarcerated workers into privately-operated poultry plants—even after in-person visitation had been banned at prison facilities—because, in the words of a state Department of Public Safety spokesman, “[t]he Division of Prisons is sensitive to the business needs of participating employers.”<sup>47</sup> Where, as here, evidence indicates that economic considerations motivated an employer’s treatment of incarcerated workers, courts should not credit that employer’s self-serving and unsupported claims about the work’s purported rehabilitative function.

**B. The FLSA was designed to protect workers who, like incarcerated workers, lack bargaining power.**

Compared to “free world” workers, incarcerated workers are limited in their capacity to utilize certain bargaining strategies when negotiating terms with their employers. Prison regulations impose punishing consequences for incarcerated workers who go on strike or encourage others to do so,<sup>48</sup> and states may bar them from joining unions. *See Jones v. N. Carolina Prisoners’ Lab. Union, Inc.*, 433 U.S. 119 (1977). These rules undermine incarcerated workers’ bargaining power, leaving

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<sup>47</sup> Joseph Neff, *North Carolina Prisoners Still Working in Chicken Plants, Despite Coronavirus Fears*, The Marshall Project (Mar. 19, 2020), <https://www.themarshallproject.org/2020/03/19/north-carolina-prisoners-still-working-in-chicken-plants-despite-coronavirus-fears>.

<sup>48</sup> *See, e.g.*, N.C. Dep’t of Pub. Safety: Div. of Adult Corr., *Inmate Discipline* (2012) (making it a Class A disciplinary offense to “participate in” or “incite/encourage others to” participate in a “work stoppage or other group demonstration”).

them extremely vulnerable to exploitation, dangerous work conditions, and unscrupulous labor practices. Rather than reason to deny them “employee” status, these dynamics counsel in favor of FLSA coverage, the “prime purpose” of which was “to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees *who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.*” *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945) (emphasis added).

Yet even within these constraints, incarcerated workers regularly engage in individual and collective action efforts to win improved working conditions. There have been numerous prison strikes over poor working conditions in the past decade, including in 2016, when incarcerated workers “in several states stopped reporting for work to protest their wages.”<sup>49</sup> In 2018, incarcerated workers at North Carolina’s Hyde Correctional Institution protested in support of a strike<sup>50</sup> demanding that “[a]ll persons imprisoned in any place of detention . . . be paid the prevailing wage in their state or territory for their labor.”<sup>51</sup>

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<sup>49</sup> Mitch Smith, *Prison Strike Organizers Aim to Improve Conditions and Pay*, The New York Times (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html>.

<sup>50</sup> *Id.*

<sup>51</sup> Sarah Holder, *The Not-So-Invisible Labor Prisoners Do in Cities*, Bloomberg (Aug. 28, 2018), <https://www.bloomberg.com/news/articles/2018-08-28/behind-the-strike-the-labor-prisoners-provide-cities>.

Moreover, as the record below illustrates, employers who rely on incarcerated workers to achieve economic viability often bargain with those workers to maintain desired staffing levels. Here, DOC conceded that while it had the authority to assign workers to the MRF, “if [incarcerated people] choose not to work it, then we can't make them work it.” *Scott*, No. CV SAG-21-00034, 2023 WL 3932010, at \*13. So, to convince incarcerated people to continue working at the MRF, DOC and the Department of Public Works “proposed a pay increase to \$20 per day, an extension of lunch breaks to 45 minutes, an extension of other breaks to 20 minutes, ‘random food surprises,’ and floor padding to ‘ease the strain of standing for such a long period of time.’” *Id.* This is the very definition of bargaining: Offering increased wages and better working conditions to induce potential employees to agree to work.<sup>52</sup>

**C. Subminimum wages deprive incarcerated workers of earnings they need to maintain a basic standard of living and force their families to make up the difference.**

In determining whether the FLSA protected incarcerated workers, the Court in *Harker* considered its purpose of permitting workers to maintain “a standard of living necessary for health, efficiency, and general well-being[.]” *Harker*, 990 F.2d at 133 (quoting 29 U.S.C. § 202(a)). But the Court wrongly assumed that “the DOC

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<sup>52</sup> See *Bargaining*, The Merriam-Webster’s Dictionary (12th ed. 2022).

provides [incarcerated people] with the food, shelter, and clothing that employees would have to purchase in a true employment situation,” *id.*, and failed to account for the interdependence between people who are incarcerated, their families, and communities.

### **1. Incarceration imposes steep costs on prisoners and families**

Although jails, prisons, and detention centers are constitutionally obligated to provide “adequate food, clothing, shelter, and medical care,” *see Farmer v. Brennan* (1994) 511 U.S. 825, 832 (1994), in reality they regularly compel incarcerated people to pay for such necessities.<sup>53</sup>

Incarcerated people are forced to purchase food, hygiene, and other items to compensate for grossly inadequate provisions.<sup>54</sup> Some prisons spend well under a dollar per meal.<sup>55</sup> Unsanitary food practices are commonplace. People who are

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<sup>53</sup> *See, e.g.,* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, Hastings Race & Poverty L.J. 3, 17–18 (2020).

<sup>54</sup> Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, Prison Policy Initiative (May 2018), <https://www.prisonpolicy.org/reports/commissary.html>; Kanav Kathuria, *Food, Violence, and the Maryland Correctional Food System* 30–34 (2021) (describing persistent hunger in Maryland prisons) <https://static1.squarespace.com/static/5cfbd4669f33530001eeeb1e/t/61399ef0192e0a23dc722380/1631166220937/Food%2C+Violence%2C+and+the+Maryland+Correctional+Food+System+%E2%80%94+Introduction+and+Part+1.pdf>.

incarcerated are “six times more likely to contract a foodborne illness,”<sup>56</sup> and regularly report noxious practices like rotting food or rodent infestations.<sup>57</sup>

The typical meal behind bars is hardly enough to sustain many adults, much less those performing demanding physical labor—for example:

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<sup>55</sup> See, e.g., Va. Dep’t of Corr., *Reduction or Elimination of Costs and Fees Charged to Inmates in State Correctional Facilities* 20 (2022) (73 cents per meal); Kathuria, *supra* note 52 at 25 (80 cents per meal).

<sup>56</sup> Jessica Carns & Sam Weaver, *Two Cups of Broth and Rotting Sandwiches: The Reality of Mealtime in Prisons and Jails*, American Civil Liberties Union (Nov. 23, 2022), <https://www.aclu.org/news/prisoners-rights/the-reality-of-mealtime-in-prisons-and-jails>.

<sup>57</sup> Jacob Smith, *What Prison Food is Really Like Around the United States*, The Daily Meal (Mar. 2, 2023), <https://www.thedailymeal.com/1213267/what-prison-food-is-really-like-around-the-united-states/>; see also State of Md. Bd. of Pub. Works, Meeting on the Emergency Contract for Food Services in Correctional/Detention Facilities in Baltimore City (reporting that incoming food contractor for Baltimore facilities described facilities as “overrun with rats, roaches, mice and birds,” and “witness[ed] meals being prepared under grated ceilings which are covered with rat droppings.”).





*Meal Tray in Maryland Prison*<sup>58</sup>

These conditions force people to turn to the commissary,<sup>59</sup> at great expense, as commissary prices are typically market rate or higher.<sup>60</sup> In this case, a supervisor

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<sup>58</sup> Kathuria, *supra* note 54 at 25.

<sup>59</sup> *See, e.g.,* Kathuria, *supra* note 54 at 36 (estimating people in Maryland prisons “consumed 70% of their daily caloric intake on average from foods purchased through commissary”).

<sup>60</sup> *See, e.g., id.* (powdered milk was nearly \$4 per can, and cereal was \$3.52 for a 20 ounce bag).



at the MRF “admit[ted] to looking the other way while inmates ate food scraps that came down the conveyer belt.” *Scott*, 2023 WL 3932010, at \*14. Inadequate provisions are not limited to food, but also to hygiene items, over-the-counter medicines, cleaning supplies, and the like.<sup>61</sup> In Maryland, the small quantities of soap and hygiene items supplied for people who are indigent do not include supplies like shower shoes (\$3.56), cough drops (\$1.93), denture adhesive (\$3.56), or a sufficient quantity of toothpaste (\$8.14 for a 4oz tube) or feminine hygiene products (\$2.33).<sup>62</sup>

## **2. Prisons and jails charge people to maintain family relationships**

Although correctional administrators acknowledge that frequent contact with family members leads to “decreases in prison misconduct, good order in facilities, stronger parent-child relationships, reduced recidivism, and increased public safety,”<sup>63</sup> jails and prisons force incarcerated people to pay to stay in touch with their

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<sup>61</sup> See, e.g., Raheer, *supra* note 54.

<sup>62</sup> Md. Dep’t of Pub. Safety and Corr. Serv., Annual Report on Operations 38 (2022), [https://dlslibrary.state.md.us/publications/Exec/DPSCS/DOC/COR3-207\(d\)\\_2022.pdf](https://dlslibrary.state.md.us/publications/Exec/DPSCS/DOC/COR3-207(d)_2022.pdf).

<sup>63</sup> See, e.g., Va. Dep’t of Corr., *Reduction or Elimination of Costs and Fees Charged to Inmates in State Correctional Facilities* (2022), <https://rga.lis.virginia.gov/Published/2022/RD500/PDF>; Alex Friedmann, *Lowering Recidivism through Family Communication*, Prison Legal News (Apr. 2014) (collecting studies), [www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/](http://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/).

children, spouses, parents, and other family members.<sup>64</sup> Companies generate \$1.4 billion in revenue annually from phone calls alone—nearly all paid by incarcerated people and their families, who are disproportionately Black.<sup>65</sup>

In these ways, incarcerated people are regularly forced to make impossible choices about which basic need to forego so that another can be met—food or Advil? Toothpaste or more time on the phone with a loved one? And these costs do not account for items like books or educational courses, nor the bills people who are returning to the community will have to pay as soon as they walk out the door: a security deposit and first month's rent, work clothes, food, furniture, a functioning phone.

Far from having their basic needs met, incarcerated workers are forced into the very economic vulnerability that the FLSA was intended to protect against. And the harms of failing to pay incarcerated workers spread far beyond the walls into the

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<sup>64</sup> *Video Visitation*, Washington County Sheriff's Office of Maryland (\$7.50 per 30-minute video call), <https://washcosheriff.com/detention-center/vidvisit-link/> (last visited Sept. 26, 2023); *Appendix Table 3. Phone rates in jails and other facilities, 2021*, Prison Policy Initiative (showing typical North Carolina jail call rates amounting to \$3.15 for a 15 collect minute call), [https://www.prisonpolicy.org/phones/appendices2022\\_3.html](https://www.prisonpolicy.org/phones/appendices2022_3.html) (last visited Sept. 26, 2023).

<sup>65</sup> Rosalie Chan & Belle Lin., *The high cost of phone calls in prisons generates \$1.4 billion a year, disproportionately driving women and people of color into debt*, Business Insider (Jun. 30, 2021), <https://www.businessinsider.com/high-cost-prison-communications-driving-debt-racial-wealth-gap-2021-6>.

larger community. Families spend an estimated \$1.6 billion per year on commissary accounts and \$1.3 billion on phone calls alone.<sup>66</sup> Because Black people are disproportionately incarcerated in this Circuit, such burdens disproportionately impact Black families and communities. In addition to these expenses and coping with the lost income of their incarcerated family member, such families are more likely to have been struggling financially even before their family member was incarcerated.<sup>67</sup>

The FLSA’s purpose of ensuring “a standard of living necessary for health, efficiency, and general well-being” counsels in favor of broader application to people who are incarcerated. As correctional facilities themselves acknowledge, paying incarcerated workers market wages can allow them to provide financial support to their loved ones, pay what they owe, and save money for release.<sup>68</sup>

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<sup>66</sup> Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

<sup>67</sup> See, e.g., *Half of Americans Have Family Members Who Have Been Incarcerated*, Equal Justice Initiative (Dec. 11, 2018) (adults from households earning less than \$25,000 per year 61% more likely to have had an incarcerated family member than those from households earning over \$100,000 per year); Exec. Off. of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System* 5 (2016), (“The probability that a family is in poverty increases by nearly 40 percent while a father is incarcerated.”).

<sup>68</sup> See, e.g., *Work Release Program*, Calvert County Maryland (work release “allows offenders to provide for their families”), <https://www.calvertcountymd.gov/311/Work-Release-Program> (last visited Sept.

**D. The Thirteenth Amendment does not preempt otherwise applicable labor laws like the FLSA.**

Employers of incarcerated workers have sometimes attempted to invoke the Thirteenth Amendment as a sweeping exemption from FLSA coverage. While the Amendment allows the imposition of slavery and involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted[,]”<sup>69</sup> not all labor performed by incarcerated persons falls within this exception. The Amendment’s mere allowance for forced labor as punishment does not categorically preclude or preempt legislation creating labor rights for incarcerated people. *See, e.g., Watson v. Graves*, 909 F.2d 1549, 1554 (5th Cir. 1990) (“[S]tatus as an inmate does not foreclose inquiry into FLSA coverage”).

The Thirteenth Amendment’s purpose was “to free enslaved people” while “permit[ting] continuation of the custom of sentencing people convicted of crimes to hard labor.”<sup>70</sup> The “historical evidence suggests [its framers] . . . did not anticipate

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26, 2023); *Inmate Work Release Program*, Anne Arundel County Maryland (work release “facilitat[es] payment of family support, fines, court costs, taxes and restitution”), <https://www.aacounty.org/detention-facilities/inmate-programs/inmate-work-release-program> (last visited Sept. 26, 2023).

<sup>69</sup> U.S. Const. amend. XIII, § 1.

<sup>70</sup> Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 69 (2019).

criminal punishment would become a mechanism of reenslavement.”<sup>71</sup> Instead, they intended that the Punishment Clause “should [be] read . . . quite narrowly.”<sup>72</sup>

Consistent with this view, federal courts have recognized that incarcerated people may be employees within the meaning of the FLSA. *See, e.g., Burrell v. Staff*, 60 F.4th 25, 42–43 (3d Cir. 2023), *cert. denied sub nom. Lackawanna Recycling Ctr., Inc. v. Burrell*, 143 S. Ct. 2662 (2023) (incarcerated people working offsite stated plausible claim for FLSA coverage); *Watson*, 909 F.2d at 1552 (incarcerated people made to work for private construction company outside prison walls were covered by the FLSA); *Carter*, 735 F.2d at 14 (“[A]n inmate may be entitled under the law to receive the federal minimum wage from an outside employer . . .”).

Given the criminal legal system’s central role in re-enslaving Black Americans following emancipation, the Thirteenth Amendment’s allowance for prison labor should be construed narrowly and with careful attention to the ways that a prison labor force may be exploited for profit. Here, where incarcerated workers toil long hours in dangerous conditions outside prison walls and alongside non-incarcerated workers for low pay, there is no exception to the FLSA’s broad remedial protections.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; *see also* Pope, *supra* note 14 at 1472 (framers intended “the Amendment’s prohibitory clause [to be read] broadly and its exception narrowly”).

## CONCLUSION

This Court should reverse the court below and hold that incarcerated people working in the community are employees covered by the FLSA.

Dated: September 27, 2023

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiffs–Appellants and Reversal complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because it contains 6,353 words and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2019.

Dated: September 27, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2023, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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## APPENDIX A

The **American Civil Liberties Union** (“ACLU”) is a nationwide, non-partisan, non-profit organization dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The ACLU works to fulfill the country’s unrealized promise of justice and freedom for all, including by seeking to ensure that our nation’s prisons, jails, and detention centers comply with the Constitution and state and federal statutes. The **ACLU of Maryland, ACLU of North Carolina, ACLU of South Carolina, ACLU of Virginia, and ACLU of West Virginia** are state affiliates of the national ACLU.

The ACLU and its affiliates have frequently appeared before state and federal courts, including the U.S. Supreme Court, in cases considering the rights of incarcerated persons, both as direct counsel and as amicus curiae. *See, e.g., Griffin v. Bryant*, 56 F.4th 328, 330 (4th Cir. 2022) (amicus); *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015) (amicus); *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (amicus). Because incarcerated persons are extremely vulnerable to exploitative labor practices, the proper resolution of this case is a matter of substantial interest to the ACLU and its members.

The **Caucus of African American Leaders** (“CAAL”) is a membership-based consortium of organizations and individuals, including the NAACP, elected officials, and faith and community leaders, among others. The Caucus seeks to raise

awareness about current civil rights issues impacting the Black community, particularly with respect to justice system issues, by engaging in legal advocacy and encouraging the public to engage in local, state, and national elections to impact positive change. In addition to organizing demonstrations, and participating in legal causes such as this, the Caucus hosts monthly meetings to discuss issues affecting the community, and solicits donations for other civil rights organizations.

**Maryland Citizens United for Rehabilitation of Errants (“CURE”)** is a membership-based organization that includes Marylanders who are currently and formerly incarcerated and their loved ones. It is a state chapter of International CURE, an organization dedicated to reducing crime through reform of the criminal justice system since 1972. Maryland CURE members believe prisons should only be used for those who absolutely must be incarcerated and those who are incarcerated should have all of the resources they need to turn their lives around. Prisons should not be used as warehouses for humanity.

**Family Support Network (“FSN”)** is a membership and advocacy organization made up of Black people, primarily women, whose loved ones are serving extreme sentences in the Maryland prison system, as well as people who are formerly incarcerated. FSN advocates for prisons to recognize the humanity of people who are incarcerated and their loved ones, and has advocated on a range of issues such as barriers to visitation, the expenses of communication, abusive

commissary practices, health and safety during COVID-19, and second chances for people serving extreme sentences.