Case No. S277120

SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, ET AL.,
Petitioner,
vs.

ARMIDA RUELAS, ET AL.,
Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS' ARMIDA RUELAS ET AL.; PROPOSED AMICUS CURIAE BRIEF OF LEGAL AID AT WORK, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA), COMMUNITIES UNITED FOR RESTORATIVE YOUTH JUSTICE (CURYJ), IMPACT FUND, NATIONAL EMPLOYMENT LAW PROJECT (NELP), AND ROOT & REBOUND, IN SUPPORT OF RESPONDENTS' ARMIDA RUELAS ET AL.

Upon Certification Pursuant to California Rules of Court, Rule 8.548, to Decide a Question of Law Presented in a Matter Pending in the United States Court of Appeals for the Ninth Circuit – Case No. 21-16528

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208, I hereby certify that no entity or person has an ownership interest of 10 percent or more in proposed *amicus curiae*. I further certify that I am aware of no person or entity, not already made known to the Justices by the parties or other *amici curiae*, having a financial or other interest in the outcome of the proceedings that the Justices should consider in determining whether to disqualify themselves, as defined in Rule 8.208(e)(2).

Executed on June 1, 2023, in San Francisco, California.

Bradan Litzinger
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Sabina Crocette
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Attorneys for *Amici Curiae*

I. INTRODUCTION

Pursuant to California Rule of Court 8.520(f), Legal Aid at Work, California Employment Lawyers Association (CELA), Communities United for Restorative Youth Justice (CURYJ), Impact Fund, National Employment Law Project (NELP), and Root & Rebound hereby apply for leave to file a brief as *amici curiae* urging this Court to find that the minimum wage and overtime protections of the California Labor Code apply to Respondents, and other pre-trial detainees like them, who have been forced to work while incarcerated without compensation.

II. STATEMENTS OF INTEREST

Amici curiae are organizations that advocate for the employment rights of currently and formerly incarcerated individuals.

Legal Aid at Work

Legal Aid at Work (LAAW) is a San Francisco-based, non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally underrepresented communities. LAAW has appeared numerous times in federal and state courts, both as counsel for plaintiffs and in an *amicus curiae* capacity, and has expertise in the interpretation of California minimum wage and overtime laws, including the California Labor Code sections at issue in this case. Moreover, LAAW represents workers who seek to assert their rights against race-based discrimination and under the California Fair Chance Act. Finally, LAAW advocates for systems and policy change to challenge structural racism and advance the rights of marginalized workers, including currently and formerly incarcerated people.

California Employment Lawyers Association

The California Employment Lawyers Association (CELA) is a membership organization of California attorneys who represent employees in a range of employment cases, including individual, class, and representative actions enforcing California's worker protection laws, such as discrimination and wage-and-hour protections. CELA has a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the vital public policies embodied in California employment laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before the California Supreme Court in employment rights cases, such as *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, *Gentry v. Super. Ct.* (2007) 42 Cal. 4th 443, *Brinker Rest. Corp. v. Super. Ct.* (2012) 53 Cal. 4th 1004, *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal. 4th 348, and *Ayala v. Antelope Valley Newspapers, Inc.*, (2014) 59 Cal. 4th 522, and in cases before the Ninth Circuit.

Communities United for Restorative Youth Justice

CURYJ believes that the State and municipalities can benefit from paying all workers fair compensation for their labor, especially those who are incarcerated.

Impact Fund

The Impact Fund is a non-profit legal foundation that provides funding for impact litigation, offers innovative training and support, and acts as party and *amicus* counsel in impact litigation across the country. The Impact Fund has served as class counsel in a number of

major civil rights class actions, including cases enforcing workers' rights and challenging employment discrimination, wage-and-hour violations, and lack of access for people with disabilities. The Impact Fund has an interest in ensuring that workers, consumers, and other members of underserved communities have access to the courts to enforce critical rights, including the right to a fair wage.

National Employment Law Project

The National Employment Law Project (NELP) is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP's areas of expertise include workplace rights of workers treated as non-employees, and historical exclusions of Black and immigrant workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP has litigated directly and participated as amicus in numerous cases and has provided Congressional testimony addressing the issue of the importance of a robust minimum wage, and on the intended breadth of employment relationships under state and federal wage laws.

Root & Rebound

Root & Rebound (R&R) is a national non-profit organization that started in Oakland. Its mission is to support people navigating reentry and reduce the harms perpetuated by mass incarceration. R&R operates a statewide hotline that provides legal assistance to people in state prison or county jail, on parole or probation, as well as those

facing barriers to reentry in employment, housing, licensing, and family unification. R&R is lead counsel in multiple lawsuits against the Los Angeles Unified School District for its policy of denying employment to individuals with expunged misdemeanor convictions and in a case against the Riverside County Superior Court for its unauthorized public disclosure of certain court records. R&R is also an organizational plaintiff in *Asian Prisoner Support Committee, et al. v. California Department of Corrections and Rehabilitation, et al.* that challenges the CDCR's policy of placing on "potential hold" individuals suspected of non-U.S. citizenship. We have represented, and continue to represent, numerous individuals, mostly of color, who face exploitative labor conditions both while imprisoned and after incarceration due to their criminal history records.

III. PURPOSE OF PROPOSED BRIEF OF *AMICI CURIAE*

The proposed *amicus* brief seeks to assist this Court in four ways:

1. It analyzes the constitutionality of Petitioners' arguments that non-convicted people incarcerated in county jails can be legally forced to work without compensation;
2. It describes the legislative history of California's minimum wage and overtime laws, and explains that these laws were intended to protect vulnerable and disenfranchised California workers like Respondents and other incarcerated people;
3. It summarizes research that shows a definitive link between chattel slavery and modern prison labor as used in California specifically and across the country generally, implicating serious issues of racial and class exploitation; and

4. It demonstrates that prison labor has little to no positive rehabilitative impact or effect on post-incarceration employment prospects.

IV. CONCLUSION

For the foregoing reasons, *Amici curiae* respectfully request that the Court grant *Amici curiae's* application and accept the attached brief for filing and consideration.

Dated: June 1, 2023

Respectfully submitted,

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Molly Lao
Sabina Crocette
LEGAL AID AT WORK

Attorneys for *Amici Curiae*

CERTIFICATE OF COMPLIANCE WITH CAL. RULES OF COURT, RULE 8.520(f)(4)

Amici curiae hereby certify under the provisions of California Rules of Court 8.520(f)(4)(A) that no party or counsel for any party authored the proposed brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. *Amici curiae* further certify under California Rules of Court 8.520(f)(4)(B) that no person or entity other than *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

Executed on June 1, 2023, in San Francisco, California

/s/ Bradan Litzinger
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SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA, ET AL., *Plaintiff and Petitioner,* vs. ARMIDA RUELAS, ET AL., *Defendant and Respondent,*	**No: S277120**

PROPOSED AMICUS CURIAE BRIEF OF LEGAL AID AT WORK, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION (CELA), COMMUNITIES UNITED FOR RESTORATIVE YOUTH JUSTICE (CURYJ), IMPACT FUND, NATIONAL EMPLOYMENT LAW PROJECT (NELP), AND ROOT & REBOUND, IN SUPPORT OF RESPONDENTS' ARMIDA RUELAS ET AL.

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INTRODUCTION

Amici urge the Court to answer "yes" to the certified question before it, and hold that California's minimum wage and overtime laws apply to pre-trial detainees working in county jails. This Court should reject Petitioners' narrow interpretation of the California Labor Code sections in question and, instead, look to the legislative history, which indicates that these sections were enacted to protect the most vulnerable and disenfranchised workers from poor working conditions and exploitation. Respondents and other incarcerated individuals who work with little or no pay in violation of the California Labor Code occupy just such a position: they are vulnerable to exploitation because of the limited power they have as incarcerated people to assert their rights. As such, Respondents are precisely the type of workers that the Labor Code was meant to protect.

Although Petitioners ignore the origins of prison labor and its inherently racialized and racist nature, these origins demand consideration. Modern-day prison labor is an extension and transformation of the enslavement of Black Americans, and an expression of structural and systemic racism. It bears the badges and incidents of slavery because, like slavery, it subjects incarcerated people to horrendous working conditions and exploits their involuntary labor for both private and public gain, with little or no compensation. Mass incarceration significantly and disproportionately impacts Black and Brown people, in the form of higher unemployment, lower wages, and increased stigma after release. Contrary to Petitioners' claims, involvement in prison labor programs fails to meaningfully change these post-release employment and economic outcomes.

This Court should also reject the spurious arguments made by Petitioners about the voluntary nature and purported benefits of the prison labor program at issue in this case. Due to the realities of prison labor, the

act of "volunteering" for the work program has little significance when refusing to work extinguishes access to necessities like outdoor time, food, or family visitation. In reality, incarcerated people have little to no choice—irrespective of whether they are convicted or not—to opt out of working. To do so would come at serious physical, emotional, and economic harm. Moreover, prison labor provides limited rehabilitative impact, and fails to improve the marked racial disparities in post-release unemployment and earnings, which undercuts Petitioners' argument that they provide job training and skill building to Respondents in lieu of a minimum wage. Petitioner Aramark's position in the past to not employ formerly incarcerated individuals further undercuts its claim of the rehabilitative benefits of its prison labor program and shows that this is precisely the type of exploitative behavior from which Labor Code 1194 is meant to protect workers.

For these reasons, this Court should affirmatively answer the certified question and apply the California Labor Code to Respondents.

ARGUMENT

I. The legislature could not have meant to contravene the United States Constitution's explicit prohibitions on slavery by enacting a measure that allowed non-convicted detainees to work with no pay.

The Thirteenth Amendment was enacted to end the moral travesty of the enslavement and exploitation of Black people and their labor in the United States. This case revolves around the punishment clause: "except as a punishment for crime whereof the party shall have been duly convicted." (U.S. Const. amend XIII, § 1.) Petitioners erroneously argue that Respondents are not entitled to wages because they are incarcerated and exempt from Labor Code protections because of this status. This argument is wrong for one simple reason: Respondents have not been duly convicted of any crime. Rather, Respondents were incarcerated in Santa Rita Jail as non-

convicted pretrial detainees.[1] Respondents were not convicted or sentenced for any offenses, and so their involuntary labor is not constitutionally authorized. (*See McGarry v. Pallito* (2d Cir. 2012) 687 F.3d 505, 511.) As such, Petitioners' failure to pay Respondents a minimum wage—or any wages at all—is unlawful even under the Thirteenth Amendment's punishment clause.

This Court should heed the constitutional avoidance canon of statutory construction, which urges the Court to choose the interpretation of the statutes at hand that avoids raising constitutional problems. This canon requires courts to consider not just interpretations that result in outright unconstitutionality, but also "those that would even raise serious questions of constitutionality."[2]

Despite Petitioners' arguments that "[t]he Thirteenth Amendment is neither relevant to nor implicated by the Labor Code claims certified for this Court's consideration," the constitutional question is in fact significant for the disposition of this case. (*See* County of Alameda Opening Brief (COB) 35-36.) The constitutionality of Proposition 139, Penal Code 4019.3, and the prison labor program run by Aramark occupied the District Court in the lower proceedings.[3] The fact the constitutionality of these provisions factors in *both* briefings by Respondents and Petitioners suggests that the question is in fact serious. (Aramark Opening Brief (AOB), 22, 24; COB 35-36; RAB, 12-13, 27).

Finally, the Legislature would not have been likely to contemplate implementing a law that would lead to an unconstitutional effect, such as

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[1] (Respondent's Answering Brief (RAB), 9.)
[2] (Scalia and Garner, Reading Law: The Interpretation of Legal Texts (1st ed. 2012) p. 201.)
[3] *Ruelas v. Cnty. of Alameda* (N.D. Cal. 2021) 519 F.Supp.3d 636, 657-58.

unlawfully forcing non-convicted individuals to labor without a minimum wage or overtime compensation. (*See, e.g., Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087 [216 Cal.Rptr.3d 889, 393 P.3d 375] ("The Legislature does not engage in idle acts, and no part of its enactments should be rendered surplusage if a construction is available that avoids doing so.")

Because Petitioners cannot refute this basic threshold argument, and there is no dispute that Respondents have not been convicted of any crime, the Court must apply the California Labor Code to Respondents.

II. There is a historical through-line from chattel slavery to mass incarceration and prison labor that necessitates the Court taking issues of racism and racial exploitation seriously.

The Thirteenth Amendment abolished slavery in 1856, but the institution left indelible marks on the social and economic structures of American society. Modern day prison labor is one such lasting mark. Just as formerly enslaved people were made to work for the benefit of public and private employers in the immediate aftermath of the Civil War, incarcerated people are forced to work for private companies and the state with little to no compensation today.[4] Scholars, historians, and advocates have researched and outlined the many ways in which modern day prison labor is simply a transformation of slavery. *Amici* urge the Court to take notice of this historical through-line from chattel slavery to prison labor to avoid perpetuating this evil, particularly where California law provides ample support in doing so.

A. Even though the Thirteenth Amendment abolished slavery, Black people continue to be exploited for their

[4] (See Lopez, *Slavery or Rehabilitation? The Debate About Cheap Prison Labor, Explained*, Vox (Sept. 7, 2015), *available at* https://www.vox.com/2015/9/7/9262649/prison-labor-wages) (last visited May 27, 2023).)

labor through other legal and institutional avenues.

After slavery was abolished, White legislators and government officials criminalized the conduct of formerly enslaved Black people and created a number of legal ways to continue to harness and exploit their labor. Mechanisms like convict leasing, chain gangs, and prison labor were implemented immediately after the Civil War to recapture the labor of formerly enslaved people. Over time, these exploitative models morphed into the prison industrial complex that has become a defining factor of racial and economic subjugation in the 20th and 21st centuries. Each of these mechanisms not only exploited the labor of vulnerable populations, but they also entrenched the continued subjugation of Black, Latinx, immigrant, and Native American communities, as well as poor White communities.[5]

1. **Black Codes in the post-war South used criminalization, incarceration, and forced labor to re-establish control over newly-freed Black people and their labor.**

The Black Codes implemented by White legislators in the South were an attempt to recover the lost labor force and exploitative social order that slavery created and maintained, and they did so explicitly through racialized criminalization.[6] The enforcement of Black Codes intentionally and quickly produced a majority Black incarcerated work force, which acted as a "functional replacement for slavery, a human bridge between the old South

[5] (See Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration* (2019) 104 Cornell L. Rev. 899, 952.)

[6] (See Hammad, *Shackled to Economic Appeal: How Prison Labor Facilitates Modern Slavery While Perpetuating Poverty in Black Communities*, 26 Va. J. Soc. Pol'y & L. 65, 67 (2019) (arguing that "the solution for White Southerners seeking to salvage what they could of an exploited labor force and exploitative social order involved turning recently freed slaves into criminals through racialized laws.")

and the New."[7] In addition, the speed with which states implemented codes criminalizing everyday behavior with forced labor and incarceration makes it inescapable that the goal of these codes—and forced labor, in turn—was to replace the formerly enslaved labor force with incarcerated laborers who could similarly be exploited for free labor.[8]

The Black Codes criminalized a wide range of conduct that, for formerly enslaved Black people, made existing in public life a fraught nightmare. The codes criminalized "vagrancy, absence from work, the possession of firearms, insulting gestures or acts, job or familial neglect, reckless spending, and disorderly conduct."[9] Other laws significantly constrained public life for formerly enslaved people. For example, the Georgia Supreme Court described prohibitions on testifying against White citizens, bearing firearms, preaching without a license, and teaching any other "*free* negro" to read or write, and practicing any trade "requiring a knowledge of reading or writing" as "some of the most humiliating incidents" of the degradation of formerly enslaved Black people under the Black Codes.[10] Some states went so far as to enact laws requiring newly freed men and women to secure a home and well-paying job "within twenty days

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[7] (Oshinsky, Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice (1996) at pp. 37, 72; *see also* Lichtenstein, Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South (1995) at pp. 3, 59-60.)

[8] (*See* Hammad, *supra*, note 6 at 69 (arguing that convict leasing "establish[ed] an effective replacement for slavery.")

[9] (Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners* (2012) 100 Cal. L.Rev. 1239, 1296-1301 (citing Blackmon, Slavery by Another Name: the Re-Enslavement of Black Americans from the Civil War to World War II (2008) at pp. 7-9.))

[10] (Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery* (2018) 65 UCLA L.Rev. 426, 444.)

after the passage of [the law]".[11] Given the circumstances of most new freed persons, this was practically impossible.

Punishment for violating these laws often included hard labor for the state or county or indentured servitude to private individuals.[12] Where fines were levied as punishments, Black people paid more than White people, further evidence that these laws were intended to continue the systemic and structural policies of economic and social subjugation of Black people.[13] (*See*, *Withers v. Coyles*, (1860) 36 Ala. 320, 326.) An inability to pay fines led to imprisonment and forced labor. Notably, state and county officials were, as a matter of pattern and practice, empowered to imprison Black people based on "any pretext," while incarceration was only used to punish White people when they committed a "very heinous crime."[14]

This burgeoning carceral system "functioned as an ancillary institution for caste preservation and labor control," which took the place of chattel slavery as the country transitioned from that system to Jim Crow.[15] These connections between slavery and prison labor are not only the theories of scholars and activists: some courts at the time acknowledged the fact as well. In *United States v. Bannister*, the court noted that during the Jim Crow era, "criminal vagrancy laws were enforced, ensuring that African Americans continued to work for the benefit of White employers . . . . Those who were convicted of crimes were forced to work for little or no pay as prisoners—

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[11] (*See* Goodwin, *supra* note 5, at 952 (citing Blaine, Twenty Years of Congress: From Lincoln to Garfield (1884) at pp. 101-02.))
[12] (*See* Goodwin, *supra* note 5; *see also* McPherson, The Political History of the United States of America During the Period of Reconstruction (1875) at pp. 7, 31.)
[13] (*See* Goodwin, *supra* note 5, at 937.)
[14] (*See* Oshinsky, *supra* note 7, at 72.)
[15] (Wacquant, *From Slavery to Mass Incarceration: Rethinking the "Race Question" in the U.S.* (2002) 13 New Left Rev. 41, 53.)

after being leased out by White employers." (*United States v. Bannister* (E.D. N.Y. 2011) 786 F. Supp. 2d 617, 631.) (citing Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008) pp. 7-8.) These trends continue to be sustained and plague the current carceral model, as evidenced by the fact that non-convicted, pretrial detainees are used by the state and private entities as sources of cheap labor.

2. Convict leasing and chain gangs were the forebears of the modern-day prison labor system, and exploited the labor of incarcerated people for both public and private advantage, enshrining racial and socio-economic inequities.

Once states began imprisoning people for violating arbitrary new laws, they began leasing them to private persons until their debts, based on the term of the sentence and fines assessed, were paid. State-run prisons throughout the South contracted with individuals or private corporations, including plantations and coal mines, and passed the responsibility of "overseeing, housing, feeding, and clothing the prisoners" on to the employers.[16] Incarcerated people received no payment, while the state and private contractors that they worked for amassed huge profits.[17]

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[16] (Longley, *What Was Convict Leasing?*, Thoughtco (Nov. 1, 2018), *available at* https://www.thoughtco.com/convict-leasing-4160457) (last visited May 29, 2023).)

[17] (*See* Hammad, *supra* note 6, at 68-69.) For example, convict leasing represented 73 percent of Alabama's annual revenue in 1889, and in Georgia, the state legislature allowed state prisons to lease incarcerated people to private companies for up to twenty years. In one instance, three companies paid $500,000 over twenty years to lease some of the state's prisoners. (Todd, *Convict Lease System*, New GA Encyclopedia (2005), *available at* https://www.georgiaencyclopedia.org/articles/history-archaeology/convict-lease-system (last visited May 26, 2023).)

At the time, supporters of convict leasing argued that the labor sentences allowed Black prisoners to establish discipline, new skills, and an ability to better assimilate "as freemen."[18] These arguments, though false, are eerily similar to those arguments made by supporters of the modern prison labor structure. Indeed, Petitioners argue that the "legitimate purposes" of prison labor include "allowing incarcerated persons to '[l]earn skills which may be used upon their return to free society.'"[19]

Courts have recognized that the forces that gave rise to the leasing of incarcerated people are the same as those that gave rise to the swift implementation of the Black Codes, and the same as those that continue to prop up the present-day prison industrial complex and its use of the free and cheap labor of people who are incarcerated. In 2004, the Washington Supreme Court noted that a convict leasing system became prevalent immediately following the Civil War due to an economic need for cheap labor to replace the labor of enslaved people. (*See Washington Water Jet Workers Ass'n v. Yarbrough* (2004) 151 Wash. 2d 470, 474 [90 P.3d 42].) In Alabama, a federal district court echoed the statement of an Alabama governor who, in 1919, described the state's infamous convict-lease system as "a relic of barbarism…a form of human slavery." (*Austin v. Hopper* (M.D. Ala. 1998) 15 F. Supp. 2d 1210, 1215-16.) The court also noted that modern-day use of chain-gangs in the state's prison systems stemmed from the Reconstruction era need for "a cheap form of labor." (*Ibid.*)

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[18] (Hammad, *supra* note 6, at 69-70; *See also* Lopez, *supra* note 4.)

[19] (AOB, 47 (citing 1990 West's Cal. Legis. Service Prop. 139 § 2(a), (c), (e); *see also* COB, 12 ("Those work programs were designed to reduce inmate idleness, minimize the cost of imprisonment, provide an incentive for good behavior, and provide job training." (internal citations omitted).)

B. California also has a distinct and specific history of exploiting the labor of incarcerated people for both private and public gain.

California itself has a deplorable legacy of commandeering prison labor for both private and public ends, even though it entered the Union as a "free state" in 1850. California's use of prison labor began just one year later through legislation that allowed private "lessees" to run the state's prison system. In exchange for staffing guards and providing minimum care to prisoners, the state granted lessees the right to use prison labor for their own profit with the "privilege of working convicts wherever [they] pleased."[20] This lessee system eventually failed, in part because of multiple reports of cruel treatment of incarcerated by those running the institution.[21] Despite the failure of the lessee system, the state continued to exploit the labor of incarcerated people—including to construct new prisons. And after those same incarcerated workers completed the construction of prisons, the state agreed to provide their free labor to construct a dam and canal for a water and mining company.[22]

Eventually, this so-called "contract system" of prison labor was outlawed, thanks to campaigns by organized labor to eliminate the practice because of its threat to private sector wages.[23] Nonetheless, from the 1890s

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[20] (McAfee, *San Quentin: The Forgotten Issue of California's Political History in the 1850s* (1990) 72 So. Cal. Q. 235, 238.)

[21] (McAfee, *A History of Convict Labor in California* (1990) 72 So. Cal. Q. 19, 20 [hereinafter "McAfee, *A History*"].)

[22] (*Id.*)

[23] (Syroka, *Unshackling the Chain Gang: Circumventing Partisan Arguments to Reduce Recidivism Rates Through Prison Labor*, (2019) 50 U. Toledo L. Rev. 395, 402-03.) It is important to note that the mobilization against prison labor had little to do with the protection of incarcerated people. Rather, labor unions at the time were more concerned with the effect

to 1920s, California used a state-use prison labor system to produce jute bags, to manage and maintain state prisons, and to facilitate the state's expansion into road construction following increased automobile use.[24]

In response to federal laws enacted in the 1930s that significantly restricted the use of prison labor to make private sector goods,[25] California shifted its already large prison labor infrastructure to contribute exclusively to public projects.[26] From the 1930s to 1979, the state used this labor to support state-run agricultural and industrial programs and to fight forest

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that a growing source of cheap or free labor would have on private sector wages. (*Id*.)

[24] (*See* McAfee, *A History*, *supra* note 21, at 22-23, 25-26.) Incarcerated people constructed highways through a mechanism referred to as "road camps," established in remote areas. The road camps were predecessors of the modern day fire camps and were similar in many regards. People laboring in road camps received one day off their sentence for every two worked, and were paid $2.50 per day. These positions were highly coveted in part because they were much safer than work in the prison jute mills, which was known to cause illness and be particularly back-breaking. (*Id.*, at 27-28.)

[25] In 1929 Congress passed the Hawes-Cooper Act, removing the interstate commerce status of prison-made goods, and allowing states to outlaw the sale of prison-made goods in interstate commerce. (Syroka, *supra* note 23 at 404.) In 1935, Congress enacted the Ashurst Sumners Act, which banned interstate transportation of goods produced wholly or partly by incarcerated people. (Ashurst-Sumners Act of 1935, 18 U.S.C. § 1761(a) (2012) ["Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both."])

[26] (McAfee, *A History, supra* note 21, at 28-30.)

fires.[27] And while state and federal laws have since significantly expanded the private use of prison labor, the work programs that provide public benefits to the state have persisted to the present day.[28]

This accounting of the history of prison labor in California shows that this state has *always* relied on the exploitation of incarcerated labor to significant private and public benefit. It also shows that the justifications for the use of prison labor rely on the same exploitative and oppressive principles used to justify the explicitly racist prison labor policies in the past.

C. Modern incarceration reinforces the same economic exploitation and racial subjugation as slavery and its successors.

Incarceration in America has exploded in the last three decades.[29] The Ninth Circuit has noted that the United States leads the world in mass incarceration, and that "we incarcerate our populace at more than twice the rate of Russia, four times that of China, and more than fourteen times that of Japan." (*May v. Shinn* (9th Cir. 2022) 37 F.4th 552, 556 (conc. opn. Of Block, J.) (citing James Kilgore, Understanding Mass Incarceration: A People's Guide to the Key Civil Rights Struggle of Our Time (2015) at p. 11); *see also United States v. Black* (9th Cir. 2014) 750 F.3d 1053, 1057-58 (stating that "in this era of mass incarceration…we already lock up more of

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[27] (*See* Janssen, *When the "Jungle" Met the Forest: Public Work, Civil Defense, and Prison Camps in Postwar California* (2009) J. of Am. Hist., 702, 703.)

[28] (*See* Syroka, *supra* note 23, at 407-08 [describing the progression of changes that created exceptions to federal laws banning the sale of prison-made goods or services and allowing private companies to contract with state prisons for employees].)

[29] (*See, e.g.*, Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Gilmore, *Golden Gulag: Prisons, Crisis, Surplus, and Opposition in Globalizing California* (2007).)

our population than any other nation on Earth.") (dis. opn. of Reinhardt, J.)[30] In California specifically, the state "added more prisoners each year [in the last two decades of the 20th century] than the system added in the average decade between 1950 and 1980," and during the 1980s, the state's prison population grew seven times as much as in the three previous decades combined.[31] This increase was driven by an increase in the number of people who are detained pretrial. Nationwide, 2002 data showed that nearly 30% of people in local jails were not convicted, and that number rose to approximately 65% in 2017, and 80% in 2021.[32] With the explosion of incarcerated populations in California and across the country, the role of prison labor in the private and public economy has increased in similarly dramatic fashion.

Non-legal factors of race and ethnicity influence sentencing decisions and contribute to these disparities.[33] Many scholars argue that "mass incarceration in the United States [is]… a stunningly comprehensive and

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[30] The United States has an incarceration rate that is the highest in the world, at least five to ten times higher than any other democracy. (*See* Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account* (2019) 94 N.Y.U. L.Rev. 1465, 1529-30.)

[31] (Mendoza, *Prison Row: A Topographical History of Carcerality in California* (2019) 66 UCLA L.Rev. 1616, 1623-24.)

[32] (*See* Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2023*, Prison Policy Institute (Mar. 14, 2023), *available at* https://www.prisonpolicy.org/reports/pie2023.html (last visited May 24, 2023).)

[33] (Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process* in Policies, Processes, and Decisions of the Criminal Justice System, (Horney ed., 2000) pp. 427, 481.)

well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow."[34]

Mass incarceration in the United States and California is highly racialized, disproportionately affecting poor people of color, and it is they who are subjected to work programs in disproportionate numbers.[35] Census Bureau data from 1870 to 1980 shows that incarceration rates for Black Americans have been anywhere from three to nine times those of White Americans.[36] Data from the 2010 Census showed that Black people were five times as likely to be incarcerated as White people, and that Latinx people were nearly twice as likely to be incarcerated as Whites.[37] While Black people make up only 13 percent of the U.S. population, they constitute 40

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[34] (Alexander, *supra* note 29, at 9; *see also, e.g.*, Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination* (2004) 57 Stan. L.Rev. 611, 612 ["The incarceration boom of the past three decades, combined with the corresponding collateral consequences stemming from criminal convictions, has ingrained into modern society a minority underclass resembling that of the stratified societal structure present during the Jim Crow era."]; Goodwin, *supra* note 5, at 908 ["[The] preservation of the practice of slavery through its transformation into prison labor means that socially, legislatively, and judicially, we have come only to reject one form of discrimination—antebellum slavery—while distinguishing it from the marginally remunerated and totally unremunerated prison labor that courts legitimate."])

[35] (*See e.g.*, Crutchfield & Weeks, *The Effects of Mass Incarceration on Communities of Color*, 32 Issues Sci. & Tech. (Fall 2015); Alexander, *supra* note 29; Gilmore, *supra* note 29, at 88-91.)

[36] (Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons,* Sentencing Project (Oct. 13, 2021) at p. 9, *available at* https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf (last visited May 29, 2023).)

[37] (*See* Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, Prison Policy Project (May 28, 2014), *available at* https://www.prisonpolicy.org/reports/rates.html (last visited May 21, 2023).)

percent of the incarcerated population nationwide. Racial disparities in California mirror the national statistics: In California state prisons, Black people are incarcerated at a rate nine times higher than White people.[38]

The statistics for pre-trial detention show similar disparities. Nearly 70% of pretrial detainees in 2002 were people of color.[39] Black and Latinx defendants were overrepresented among pretrial detainees compared to White defendants.[40] Black defendants are overrepresented in particular for a number of reasons, including the high cost of money bail and greater rates of poverty in communities of color—which therefore makes paying bail more difficult.[41] In some large urban areas, Black felony defendants are 25% more likely than White defendants to be detained pre-trial.[42] This pre-trial detention rate contributes to the overall disparities between Black, Brown, and White communities because those who are detained pretrial most often receive convictions and sentences of longer prison terms.[43]

The prison labor apparatus has expanded at pace with the rapid increase of the incarcerated population.[44] Two out of three of the 1.2 million people incarcerated in state and federal prisons are assigned to perform work.[45] Similar to the way that the convict leasing system of the 19th century

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[38] (Nellis, *supra* note 36, at 7.)
[39] (Sawyer, *How Race Impacts Who is Detained Pretrial*, Prison Policy Initiative (Oct. 9, 2019), *available at* https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ (last visited May 25, 2023).)
[40] (*Id.*)
[41] (Sawyer & Wagner, *supra* note 32; Nellis, *supra* note 36, at 14.)
[42] (Sawyer, *supra* note 39.)
[43] (*Id*.)
[44] (*See* Hammad, *supra* note 6, at 78.)
[45] (American Civil Liberties Union and University of Chicago Law School Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers* (June 15, 2022), at p. 24 [hereinafter "ACLU & University of

was immensely profitable for private industry and state projects, the modern prison labor industry is a valuable resource for private companies and states. People incarcerated in both state-run and private prisons[46] serve as employees tasked with a wide variety of functions, including "housekeeping work, such as cooking, cleaning, and laundry, or labor outside the prison for government entities or private companies."[47] Well-known and profitable companies like IBM, Boeing, Nordstrom's, Revlon, Macy's, Microsoft, and Dell all profit from practically free prison labor, without any enforcement of labor law mandates and with governmental support.[48]

Goods and services produced by prison labor through the California Prison Industry Authority program in California are sold back to the California Department of Corrections and Rehabilitation, the Department of

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Chicago, *Captive Labor*"] *available at* https://www.aclu.org/report/captive-labor-exploitation-incarcerated-workers) (last visited May 29, 2023).)

[46] In private prisons, people incarcerated in immigration detention facilities are paid sub-minimum wages for work done to maintain the facilities or participate in state-run programs. (*See Owino v. CoreCivic,* (9th Cir. 2022) 60 F.4th 437, 447, denial of rehearing [upholding certification of a class of incarcerated people in private immigration detention facilities were misclassified as "volunteers" rather than "employees" and thus failed to pay them the minimum wage required in California for "employees" in violation of California wage and hour law."]; *Gonzalez v. CoreCivic Inc.* (5th Cir. 2021) 986 F.3d 536, 539 [holding that the TVPA applied to protect labor performed in work programs in a federal immigration detention facility]; *Barrientos v. CoreCivic*, *Inc.* (11th Cir. 2020) 951 F.3d 1269 [holding that TVPA did not include an exemption for contractor's work program, and detainees were entitled to allege that contractor had obtained their labor through illegal, coercive means in violation of the TVPA]; *Menocal v. GEO Grp. Inc.* (D. Colo. 2015) 113 F.Supp.3d 1125.)

[47] (Hammad, *supra* note 6, at 76.)

[48] (Goodwin, *supra* note 5, at 962.)

Motor Vehicles, CalTrans, and other state departments.[49] This saves the state millions of dollars each year, thanks to the fact that incarcerated people are compensated far below the minimum wage.[50] A well-known and particularly egregious example of exploitation of incarcerated labor to achieve massive savings for the state is the Conservation (Fire) Camp Program, which trains and deploys people incarcerated in California prisons as firefighters to fight worsening wildfires year after year. The efforts of California's incarcerated firefighters save the state nearly $100 million each year, but the firefighters are paid only two dollars a day for their dangerous but critical work.[51]

Mass incarceration and pretrial detention as institutions disproportionately affect people of color and Black people in particular. Further, just as the labor of formerly enslaved Black people was used in the decades following the Civil War by private companies and public agencies, government-led endeavors continue to exploit the labor of incarcerated individuals today, to similar ends. The economic exploitation of the labor of incarcerated people has its roots in chattel slavery, and extends that institution's terrible legacy of structural and systemic exploitation for state benefit and private profit. In California and the country at large, the lack of labor law protections for incarcerated people unjustly affords state and private entities the ability to obtain free or unconscionably cheap labor, even from persons who are detained without convictions or sentencing. Allowing

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[49] (*See About*, CalPIA, (Mar. 30, 2022), *available at* https://www.calpia.ca.gov/about/ (last visited May 30, 2023).)
[50] (ACLU & University of Chicago, *Captive Labor*, *supra* note 45, at p. 10.)
[51] (Riggins, *California Bill Gives Hope of Employment to Formerly Incarcerated Firefighters—But Will It Work?*, San Diego Union-Trib. (Sept. 20,2020, 7:50 PM), *available at* https://www.sandiegouniontribune.com/news/public-safety/story/2020-09-20/new-california-bill-ab-2147-raises-hopes-of-employment-for-formerly-incarcerated-firefighters-but-prisoner-reentry-experts-question-effectiveness (last visited May 29, 2023).)

Petitioners to extract labor from Respondents and other non-convicted incarcerated people without compensation would be a continuation of this horrible legacy.

III. California's minimum wage and overtime laws are intended to protect the state's most vulnerable and disenfranchised workers, including people incarcerated in county jails.

The California Labor Code provides broad protections from economic exploitation, harassment, discrimination, and retaliation in the workplace. (*Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 561-562 [229 Cal.Rptr.3d 347, 411 P.3d 528] ("The state's labor laws are to be liberally construed in favor of worker protection.") Through the Labor Code, the Industrial Welfare Commission's (IWC) Wage Orders, and the Department of Labor Standards Enforcement (DLSE), the state enacts protections for all workers, but pays special attention to workers who are most vulnerable to exploitation. (See *Leyva v. Medline Indus. Inc.* (9th Cir. 2013) 716 F.3d 510, 515 ("The California Labor Code protects all workers.")

The first minimum wage law in California was implemented in 1913 to counteract the low wages and poor working conditions that women and children experienced. Similarly, California's overtime laws were passed to reverse a loss of income faced by contingent and part-time workers who occupied a particularly precarious position in the economy, then and now. Both laws emphasize protections for workers who are most vulnerable to exploitation due to their lack of bargaining power and consequent inability to secure reasonable working terms and conditions. When examining the conditions that incarcerated people face both in carceral institutions and after incarceration, it is clear that they are in a similarly precarious position subject to exploitation, without any means to change or improve their situations. The

broad construction and applicability of the minimum wage and overtime laws indicate a legislative intent to apply those laws to Respondents.

A. The legislative history of California's minimum wage and overtime laws shows that the laws targeted the workers most vulnerable to exploitation.

The legislative history of the state's minimum wage and overtime laws shows a clear intention to enact laws to mitigate poor working conditions and allow workers to recover lost wages.[52] California's minimum wage law, like others enacted across the country over 100 years ago, was a result of "widespread public recognition of the low wages, long hours, and poor working conditions under which women and children often labored." (*Martinez v. Combs*, (2010) 49 Cal.4th 35, 53 [109 Cal.Rptr.3d 514, 231 P.3d 259].) In 1912, a report issued by the State Bureau of Labor Statistics on wages, hours, and labor conditions showed that 40% of working women earned less than $9 per week, and found that "many women were living below any normal standard, and … such subnormal living was having a most disastrous effect on the health and morals of the women workers." (*Id.* at pp. 53-54.)

A 1914 constitutional amendment that established a minimum wage set as a matter of state policy that the minimum wage for women and children was necessary to "protect this weakest and most helpless class" of workers and that the minimum wage should be one that "insures for them [] necessary shelter, wholesome food and sufficient clothing." (*Martinez v. Combs, supra,* 49 Cal.4th at p. 54) (citing Ballot Pamp., Gen Elec. (Nov. 3, 1914), argument in favor of Assem. Const. Amend. 90, p. 29.) Since that time, the scope of the state's labor protections has only expanded to become more inclusive.

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[52] Labor Code Section 1194 allows employees to recover their owed minimum wages and overtime when they are paid less than the statutory minimum they are entitled to. (*See* Cal. Lab. Code § 1194(a).)

(*See Martinez v. Combs*, 49 Cal.4th at pp. 52, 55) (explaining that the wage orders propagated by the IWC were expanded to include all employees regardless of sex or gender, and that the IWC and its successor agency the DLSE have a "continuing duty" to "ascertain the wages, hours and labor conditions of all employees in this state.")

Similarly, eight-hour workday and overtime laws have been present in California since the formation of the state. The modern version of the overtime protections can be traced back to the 1910s, around the same time that the state was enacting its first minimum wage law. California was at the forefront of ensuring an eight-hour workday and overtime pay, enacting the first such law well before any federal law existed.[53] A 1999 Assembly Committee Report published when the modern overtime law was reinstated noted that long work hours were also linked to increased rates of accident and injury in the workplace, and that there were potentially negative effects on family stability when parents were overworked.[54]

This history makes plain that "both the Legislature and our courts have accorded to wages special considerations other than merely fixing minimums, and that the purpose in doing so is based on the welfare of the wage earner." (*Kerr's Catering Service v. Dep't of Indus. Rels.* (1962) 57 Cal.2d 319, 330 [19 Cal.Rptr. 492, 369 P.2d 20].) The legislative history behind the state's overtime laws clearly states an intention to avoid significant economic, physical, and familial consequences that befall workers who lack protections of an eight-hour workday. It would therefore be contrary to the legislative intent of these laws to not apply them to

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[53] (Sen. Com. on Industrial Relations, analysis of Assem. Bill No. 60 (1999-2000 Reg. Sess.) as amended May 27, 1999, pp. 11-12.)

[54] (Assem. Com. on Labor and Employment, Rep. on Assem. Bill No. 60 (1999-2000 Reg. Sess.) as amended Mar. 15, 1999, p. 10.)

similarly vulnerable people—incarcerated people—as Petitioners ask this Court to do now.

B. Incarcerated people face heightened risk of disenfranchisement and exploitation because of the economic circumstances they face before and after their incarceration and are therefore the type of vulnerable workers intended to be protected by the California Labor Code.

Incarceration has significant and profound effects on the social, economic, physical, and psychological lives of the people subjected to it. Incarcerated people are disproportionately from low-income communities, and as such already at greater economic disadvantage and risk of exploitation before they are ever incarcerated. Moreover, they are in a particularly vulnerable position to be economically exploited through prison labor programs while incarcerated, in part because they have no right to organize or negotiate for better working conditions and better pay, and limited opportunities to turn down a bad job for a better one.[55] Finally, the well-known difficulties of securing well-paying jobs after incarceration—due to bias, discrimination, and flat-out bans on hiring people with certain convictions—contribute to the economic vulnerability and disenfranchisement of incarcerated people. This vulnerability necessitates their protection by the California Labor Code

The economic and social precarity that affects formerly incarcerated people compounds issues that exist even before they are incarcerated. Incarcerated people had a median annual income that was 41% lower than

[55] (*See* Shemkus, *Beyond Cheap Labor: can Prison Work Programs Benefit Inmates?*, The Guardian, (Dec. 9, 2015, 7:00 AM), *available at* https://www.theguardian.com/sustainable-business/2015/dec/09/prison-work-program-ohsa-whole-foods-inmate-labor-incarceration (last visited May 26, 2023).)

non-incarcerated people of similar ages *before* they were incarcerated.[56] As one study puts it, people in the American prison system "have been shut out of the economy" and lack "a quality education [and] access to good jobs," in addition to the rampant exploitation of their labor while incarcerated with little to no short-term or long-term benefits to the workers.[57] Class and race play an outsized role in the carceral system, making it a system of containment of poor people and poor people of color in particular.[58] Further, the people who are incarcerated overwhelmingly come "from the most precarious fractions of the urban working class" and have had consistent records of underemployment and annual income well below the poverty line.[59]

This dire economic picture worsens after incarceration for any period of time. Individuals who have been incarcerated for any time have significantly lower earning potential after incarceration than the general population.[60] The effects on total earnings for individuals is present even for

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[56] (Rabuy & Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, Prison Policy Initiative (July 9, 2015) *available at* https://www.prisonpolicy.org/reports/income.html (last visited May 29, 2023).)

[57] *Id.*

[58] (See Wacquant, *Class, Race & Hyperincarceration in Revanchist America* (2010) 139 Daedalus 74, 78-79.)

[59] (*Id.* at 79 ["[People incarcerated in America are] drawn overwhelmingly from the most precarious fractions of the urban working class: fewer than half of inmates held a full-time job at the time of arraignment and two-thirds issue from households with an annual income coming to less than *half* the "poverty line…."])

[60] (*See, e.g.*, Wang & Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, Prison Policy Initiative (Feb. 8, 2022) *available at* https://www.prisonpolicy.org/blog/2022/02/08/employment/ (last visited May 22, 2023); Saylor & Gaes, *Training Inmates Through Industrial Work*

those who have been incarcerated for periods as short as a year.[61] Earning disparities track along racial lines: "[Formerly incarcerated Black and Latinx people] have lower total earnings than Whites even after accounting for health, human capital, social background, crime and criminal justice involvement, and job readiness."[62] These racial disparities also carry through to negative effects on access to housing and welfare benefits, mental and physical health and well-being, and education.[63] Moreover, consequences at the individual level lead to broader societal consequences: "[H]igh levels of imprisonment in communities cause high crime rates and neighborhood deterioration, thus fueling greater disparities."[64]

These trends demonstrate clearly that individuals incarcerated in jails and prisons occupy a particularly precarious place in American society both before and after incarceration, and that incarceration—for any period of time—exacerbates, rather than alleviates, the economic, social, educational, and physical disparities present in their communities. All of these factors and disparities make incarcerated people a population that is highly vulnerable to exploitation both inside and outside of carceral institutions. This precarity is even more pronounced during the actual time they are incarcerated.

Participation and Vocational and Apprenticeship Instruction, (1997) 1 Corr. Mgmt. Q. 32, 33.)

[61] (Western & Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration* (2019) 97 Soc. Forces 1517, 1517.)

[62] (*Id*.)

[63] (Blankenship, et al., *Mass Incarceration, Race Inequality, and Health: Expanding Concepts and Assessing Impacts on Well-Being* (2018) 215 Soc. Sci. & Med. 45.)

[64] (Nellis, *supra* note 36, at 4.)

C. The realities of incarceration make it nearly impossible for incarcerated individuals to have an actual choice about whether or not they want to participate in a prison labor program.

Petitioners justify their violations of the California Labor Code by claiming that Respondents receive "significant, non-monetary benefits" from the prison work program, including "sentence-reduction credits and…job training, which would help improve their life prospect upon release" *instead of* their lawfully guaranteed wages. (COB, 11, 22.) Petitioner Aramark also includes "more time outside their cells each day," additional food, and access to special housing as examples of these non-monetary benefits. (AOB, 14.) Petitioners argue that Respondents "choose to participate in the County-Aramark work program" to take advantage of these so-called non-monetary benefits. (COB, 11.) In reality, however, incarcerated people like Respondents have no true choice *not* to participate in the work program.

First, as incarcerated people, the class members are not truly able to consent to the work program. This Court must consider not only the case law that discusses involuntariness in prison labor, but also the nature of the "choice" that Respondents and others like them face. The Ninth Circuit has commented in the prison context that "it is 'difficult to characterize' seemingly voluntary decisions as 'truly the product of free choice,'" particularly when considering the surrounding circumstances. (*See Wood v. Beauclair*, (9th Cir. 2012) 692 F.3d 1041, 1047.) So it is here. Respondents were given a "choice" either to participate in the work program at issue, or be punished with losing access to some of the few necessities they do have. To characterize things such as food and time outside of cells as "benefits," as Petitioners do, rather than as basics for life, is self-serving and disingenuous at the very least.

The ACLU has reported on the nature of exploitation of incarcerated workers, and discussed at length the ways in which prison labor is coercive rather than voluntary. The report finds:

> "Although many incarcerated people apply to work or otherwise seek employment while incarcerated, the labor performed by people incarcerated in the United States is not truly voluntary. Voluntariness implies the right to have a say in what type of work one does and the right to refuse to work at all. Yet 76.7 percent of incarcerated workers surveyed by the Bureau of Justice Statistics reported that they are required to work. Prison systems have developed forms of coercion that strip away most or all choice, forcing incarcerated people to work exploitative jobs that they rarely choose for themselves."[65]

In California specifically, a refusal to accept a work assignment results in the loss of all family visits and phone calls, recreational or entertainment activities, and all personal packages.[66] Moreover, incarcerated people in state prisons are *required* by the Penal Code to work a number of hours specified by the California Department of Corrections and Rehabilitation (CDCR), and they may also be assigned a job in lieu of being enrolled in a rehabilitation program, without their consent. (Cal. Code Regs., tit. 15, § 3040(g).)[67]

If prison labor of the sort that Respondents were subjected to becomes widely accepted in California, even worse forms of punishment could arise. Carceral institutions across the country utilize prison-specific sanctions like solitary confinement to punish incarcerated people for refusing to work or instigating others to refuse work.[68] Incarcerated workers in Alabama report

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[65] (ACLU & University of Chicago, *Captive Labor, supra* note 45, at p. 47.)
[66] (*Id*. at 49.)
[67] (*See also* Sen. Com. on Appropriations, financial summary of Assem. Const. Amend. No. 3 (2021-2022 Reg. Sess.) June 16, 2022, p. 2.)
[68] (ACLU & University of Chicago, *Captive Labor, supra* note 45, at p. 48.)

that they are functionally unable to opt out of work lest they be punished "by having their sentences lengthened and being placed in solitary confinement."[69] This is emblematic of coercion through threats of punishment. Other punishments include threats with being put on "worse jobs or disciplinary action," or loss of "privileges" like family visitation and access to the commissary to buy food and other necessities.[70] Because of the involuntary nature of prison labor and the fact that incarcerated people face intense economic pressures, this Court must find that they are vulnerable to exploitation and occupy a position that merits Labor Code protections.

IV. Contrary to Petitioners' claims, prison labor serves no rehabilitative purpose and fails to assist formerly incarcerated people with finding work post-release.

Petitioners argue that the County-Aramark work program and others like it are not exploitative, but beneficial to Respondents. (*See e.g.*, AOB, 47.) Petitioners also claim that participation in the County-Aramark program contributes to the Respondents' ability to obtain employment after the end of their incarceration. (COB, 22.) Although Petitioners claim that there are benefits from the work program, they have offered no evidence to substantiate that claim. If anything, this claim is reminiscent of similar claims used to justify convict leasing and other successors of slavery in the post-war South. These claims collapse under any scrutiny of the lived experiences of formerly incarcerated people.

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[69] (*See* Vongkiatkajorn, *Inmates are Kicking Off a Nationwide Prison Strike Today*, Mother Jones (Sept. 9, 2016) *available at* https://www.motherjones.com/politics/2016/09/national-prison-strike-inmates/ (last visited May 29, 2023).)

[70] (ACLU & University of Chicago, *Captive Labor*, *supra* note 45, at p. 50.)

A. Incarcerated people face significant barriers to employment after incarceration regardless of an individual's participation in prison labor programs and despite efforts to address these issues.

Dating back to the 1960s and 70s, employers have been hesitant to offer jobs to people who have been arrested or incarcerated.[71] Individuals who are formerly incarcerated face significant discrimination and other barriers to employment because of their conviction histories. People are less likely to look for work after any contact with the carceral system, and those that do look for work do so less effectively.[72] This difficulty is due in part to actual or perceived discrimination by employers during the hiring process. To attempt to address this issue, the Legislature passed the Fair Chance Act in 2018, which made it unlawful for employers to discriminate against individuals with conviction histories.[73] (*See* Cal. Gov. Code, § 12952.) Nonetheless, well-paying and secure post-incarceration employment remains elusive for the vast majority of formerly incarcerated individuals. A survey of San Francisco Bay Area probationers found that 63% of those surveyed had been illegally asked questions about conviction history on application materials, and many others reported unlawful discriminatory actions by employers at the interview stage.[74] Said another way, formerly incarcerated

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[71] (Herring & Smith, *The Limits of Ban-the-Box Legislation*, (2022) Inst. for Rsch. on Lab. & Emp., at p. 6.)

[72] (*Id.*, at p. 3.)

[73] The Fair Chance Act also established a detailed process for employers to follow should they seek to make adverse employment decisions on the basis of conviction history. (*See* Cal. Gov. Code, § 12952.) The California Civil Rights Department has also published detailed regulations to facilitate the implementation of the law and provide additional guidance to employers and applicants alike. (*See* Cal. Code Regs., tit. 2, § 11017.1.)

[74] (Herring & Smith, *supra* note 71, at p. 5) ("Specifically, 43 percent reported that employers performed background checks before interviewing

people experience unlawful discrimination because of their conviction histories in the form of substantive and procedural violations of the Fair Chance Act at every step of the interviewing and hiring process.

Other barriers to employment arise because of the long-standing stigma against formerly incarcerated people. Discrimination and stigma have tangible effects on the ability of formerly incarcerated people to become gainfully employed. Roughly 60% of formerly incarcerated people are jobless at any given moment.[75] This lower employment rate can be attributed to a number of things, including "harsh parole conditions, a lack of social welfare programs, and a tough job market," and discrimination against people with conviction histories, which push formerly incarcerated people into the least desirable jobs available.[76]

Contrary to Petitioners' contentions, *amici* and formerly incarcerated people know quite clearly what many studies show: "Prison does nothing to improve their qualifications as workers."[77] Employment discrimination against formerly incarcerated people persists regardless of whether a prospective employee has participated in a prison work program. While it is true that some in-prison training programs for jobs in construction and similar industries *may* boost employment and wages in some areas, this is not universal and not applicable to most prison work programs.[78] Petitioners

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them; and 53 percent reported that, during their interviews, employers asked them if they had a criminal record.")

[75] (*See, e.g.*, Wang & Bertram, *supra* note 60; Saylor & Gaes, *supra* note 60, at 32, 33).)

[76] (Wang & Bertram, *supra* note 60.)

[77] (*Id.*)

[78] "In-prison training programs for jobs in construction and similar industries may also boost employment and wages in some areas, according to some research, but its not a universal solution, nor does it solve underlying problems of low educational attainment and economic immobility." (*Id.*)

have offered no evidence that the County-Aramark program is such a program. Further, these programs do nothing to address problems of low educational attainment and economic immobility that persist both before and after incarceration for many people.

B. Prison labor jobs have little to no positive effect on the post-release employment prospects of formerly incarcerated individuals.

Petitioners argue that they are not obligated to pay minimum wages to Respondents in part because the work program provides rehabilitative value and post-release employment benefits. This is the same flawed logic that was used in the 1870s to justify prison labor and convict leasing, but this reasoning is just as flawed now as it was then. Petitioners ask the Court to accept the patently false promise that work inside the carceral institution is rehabilitative and reliably leads to suitable work outside the prison walls, without offering any evidence that the County-Aramark program is any different. *Amici* urge the court to reject this antiquated and incorrect logic.

Formerly incarcerated people struggle to obtain employment after being released, regardless of whether they worked in a prison labor program and what job they did. On the one hand, incarcerated people are highly skeptical of the rehabilitative value and skill building ability of prison labor programs. Incarcerated people who worked while in prison or participated in educational programs in prison felt that these programs "had no impact on one's level of optimism" about their post-carceral outcomes.[79]

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[79] The same study found that incarcerated people felt more optimistic about being released if they were enrolled in substance abuse programming. (Visher & O'Connell, *Incarceration and Inmates' Self Perceptions About Returning Home*, (2012) 40 J. Crim. Just. 386, 390-91 ["… if jobs in prison are simply work and not meaningful experiences that may lead to post-prison opportunities, it is reasonable that such activity would not lead to greater optimism about life after release."]

On the other hand, positive effects of prison labor on future employment prospects are rarely seen. Those programs that are successful in improving employment after incarceration are specifically tailored to do so and take the form of vocational programs, which few incarcerated people are allowed to participate in.[80] The Respondents were not part of such a specialized program. Their work in Santa Rita Jail involved only "preparing and packaging food in an industrial kitchen" and "cleaning and sanitizing the kitchen after food preparation was completed."[81] Petitioners may claim that cooking and cleaning provide valuable skills for future employment, but Petitioner Aramark's own past actions demonstrate the how flimsy these arguments are. On Aramark's website, the company claims that it employs incarcerated people and that this work "help[s] rehabilitate" incarcerated people, and that it "reduces recidivism."[82] But according to the ACLU, "Aramark would not hire anyone who had committed a felony in the previous seven years."[83]

To put a finer point on it, even those incarcerated individuals who receive highly specialized training and extensive job experience while incarcerated struggle to get jobs in those same fields once released. California's prison firefighter program is one such example. Fire camp prisoners receive the same level of training and do the same type of work as professional firefighters. However, once they are released, they are generally unable to gain jobs with Cal Fire or other firefighting departments because it requires certification as an Emergency Medical Technician (EMT), and people with felony convictions are automatically disqualified from EMT

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[80] (ACLU & University of Chicago, *Captive Labor*, *supra* note 45, at p. 78.)
[81] (RAB, 8-9.)
[82] (ACLU & University of Chicago, *Captive Labor*, *supra* note 45, at 80.)
[83] (*Id*.)

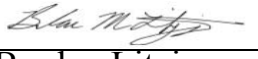
certification.[84] Bias against formerly incarcerated people also plays a role, even for these highly skilled individuals. Union representatives for Cal Fire and state EMT officials question whether formerly incarcerated firefighters are trustworthy enough to respond to emergency calls, even though they had already done this exact type of work while in the prison fire camp program.[85] This suggests that even the most highly skilled formerly incarcerated people will face serious difficulty securing employment in the jobs they used to do while incarcerated, thanks to both formal and informal barriers. Petitioners provide no evidence that participation in the County-Aramark work program would produce any different result.

CONCLUSION

For these reasons, *amici* respectfully submit that this Court should answer the certified question in the affirmative, and find that the California Labor Code applies to non-convicted detainees working in county jails.

Dated: June 1, 2023

Respectfully submitted,



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[84] In 2020, Governor Newsom signed AB 2147 into law, which created an expedited expungement process for formerly incarcerated people who successfully completed the fire camp program, which may lead to more fire camp participants getting jobs as firefighters. (*See* Cal. Pen. Code, § 1203.4b.) However, the expungement process is not automatic, and requires significant expenditures of money and time to complete. Its effects have yet to be quantified.

[85] (Sabalow, *These California Inmates Risked Death to Fight Wildfires. After Prison, They're Left Behind*, Sacramento Bee (July 23, 2020, 9:16 AM), *available at* https://www.sacbee.com/news/california/fires/article244286777.html (last visited May 20, 2023).)

STATEMENT OF COMPLIANCE WITH CAL. RULES OF COURT RULE 8.204(c)(1)

The text in this proposed *Amicus Curiae* brief consists of 9094 words, including footnotes, as counted by the word processing program used to generate this document.

Executed on June 1, 2023 in San Francisco, California.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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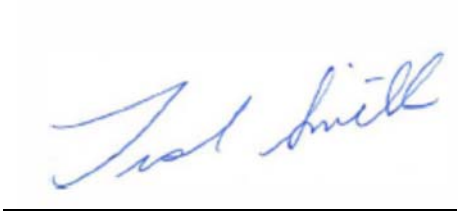

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/1/2023

Date

/s/Bradan Litzinger

Signature

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Legal Aid at Work

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