

<p>DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202</p>	
<p>RICHARD LILGEROSE and HAROLD MORTIS, on their own behalf and on behalf of those similarly situated, Plaintiffs, v. JARED POLIS, in his official capacity as the Governor of Colorado; DEAN WILLIAMS, in his official capacity as the Executive Director of the Colorado Department of Corrections; and COLORADO DEPARTMENT OF CORRECTIONS, an agency of the State of Colorado; Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">AMICUS BRIEF IN SUPPORT OF PLAINTIFFS</p>	

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amici are non-profit entities that work at the intersection of civil rights and the criminal legal system, often on behalf of incarcerated clients, both in Colorado and across the country.

Amicus Curiae Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have participated in civil rights campaigns related to conditions of confinement, solitary confinement, abuse in jails and prisons, and constitutionally excessive punishments. RSMJC has an interest in vindicating state constitutional protections for incarcerated people, and in ensuring that forced prison labor does not continue unabated where states like Colorado have explicitly banned it.

Amicus Curiae American Civil Liberties Union Foundation of Colorado (“ACLU Foundation of Colorado”), an affiliate of the national ACLU, is a statewide nonprofit membership organization dedicated to safeguarding the civil liberties embodied in the constitutions and laws of Colorado and the United States. Its mission includes a dedication to ensuring that Colorado’s prisons, jails, and other places of detention comply with the U.S. and Colorado Constitutions and an intention to end policies that have given the United States the highest incarceration rate in the world.

Amici have an interest in ensuring that the important decision by Colorado voters to abandon forced prison labor is not thwarted. To this end, *Amici* detail the complex historical backdrop against which Colorado citizens banned forced prison labor in the state constitution. Specifically, *Amici* explain how forced prison labor regimes were facilitated by the punishment exception in the federal Thirteenth Amendment—an amendment Colorado initially copied into its

own constitution—and how Amendment A was designed to eradicate those regimes. For the reasons laid out below, *Amici* support the Plaintiffs in asking this Court to vindicate their newly-secured constitutional rights and deny Defendants’ motion to dismiss.

INTRODUCTION

More than 150 years after the Thirteenth Amendment to the federal constitution abolished chattel slavery, the citizens of Colorado voted in 2018 to finish the job, ending all forms of slavery and involuntary servitude in the state through a constitutional amendment of their own. P.R. Lockhart, *Colorado Passes Amendment A, Voting to Officially Abolish Prison Slavery*, VOX (Nov. 7, 2018, 2:24 PM).¹ Previously, the language in Colorado’s constitution mirrored that contained in the federal constitution: it banned slavery and involuntary servitude *except* as incident to a criminal conviction. *Id.* That is, forced labor remained at least arguably legal when it was exacted from those incarcerated. The inclusion of this punishment exception in the federal constitution and in many state constitutions led to a century and a half of misery in various forms: most immediately, it enabled systems of “convict leasing,” forced labor, and Black Codes to replace slavery and undermine the project of Reconstruction. *See infra*, Part I. Huge swathes of the American economy continued to run on the forced labor of “freedmen,” but this time brutal work was forced on those imprisoned. *Id.*

Although some of the cruelest remnants of convict leasing have been abandoned, present-day regimes of forced prison labor look uncomfortably similar to their antebellum and Reconstruction-era antecedents, and still operate under punishment exceptions that help insulate

¹ <https://www.vox.com/policy-and-politics/2018/11/6/18056408/colorado-election-results-amendment-a-slavery-forced-prison-labor-passes>

them from successful legal challenge. *See infra* Part II. Against this historical backdrop, Colorado voters chose a different path; they got rid of the punishment exception to finally realize the nineteenth-century promise of emancipation for all. As one supporter put it, “our past doesn’t have to be our future.” Lockhart, *Colorado Passes Amendment A*, *supra*. Though Defendants want to turn back the clock, this Court should not endorse such open defiance of the will of the people, and must refuse to allow yet another iteration of forced prison labor to continue unchecked.

I. The Thirteenth Amendment’s Punishment Exception Was Used To Create Vast And Cruel Systems Of Forced Prison Labor.

President Lincoln called the Thirteenth Amendment to the United States Constitution a “King’s cure for all the evils” of slavery. COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. 8 at 255 (Roy M. Basler, ed.). Nonetheless, some of the evils associated with slavery proved persistent, surviving even to the present day. That the Thirteenth Amendment failed to eradicate all vestiges of slavery and forced labor in the United States is in part a product of a punishment exception contained in the Amendment’s very text. Section One of the Thirteenth Amendment to the federal Constitution reads as follows:

“Neither slavery nor involuntary servitude, *except as a punishment for crime* whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

U.S CONST. amend. XIII, § 1 (emphasis added). This provision contains the seeds for the continued use of at least some form of forced labor, which, as a textual matter, is permitted as long as it is imposed as punishment.

Sure enough, almost immediately after the Thirteenth Amendment was ratified, states began to exploit the punishment exception, relying on forced prison labor to replace the labor of formerly enslaved people. *See* Michelle Goodwin, *The Thirteenth Amendment: Modern Slavery*,

Capitalism, and Mass Incarceration, 14 CORNELL L. REV. 899, 933-35 (2019). Supposedly licensed by the punishment exception, former slave states erected horrific institutions like “convict leasing.” *Id.* at 941-45. Under this regime, those incarcerated by the state were “leased” out as workers to private business, being shipped from conviction to the plantations, railroads, or mines on which they would work. DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM CIVIL WAR TO WORLD WAR II* 53-57 (2012). There was virtually no oversight and conditions were brutal. Armed guards and “whipping boss[es]” oversaw this grueling work, ready to torture those who stepped out of line and to kill those who tried to escape. *See* W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 698-99 (1935). During the first two years that Alabama enacted such a system, nearly twenty percent of those “leased” to work died. BLACKMON, *supra*, at 57.

The use of forced prison labor to replace the labor of enslaved people incentivized the creation of “Black Codes,” laws criminalizing broad swathes of benign conduct that were almost exclusively enforced against Black citizens. Goodwin, *supra*, at 936-41. Because states and private industry relied on the low- or no-wage work of those incarcerated, it would not do to let prison populations wane. *Id.* So instead, racist laws and law enforcement ensured that the ranks of this new workforce remained full. Black citizens were arrested under vague “vagrancy” laws, for being unemployed, or without even a pretextual justification—arrested simply for being. *See* BLACKMON, *supra*, at 1-2, 6-7, 53-57. And upon cursory conviction, they were forced immediately to work. *Id.* at 1-2, 6-8. In this way, the desire to exploit forced prison labor fueled Black Codes that kept the incarcerated population high. *See* A.E. Raza, *Legacies of the Racialization of Incarceration: From Convict-Lease to the Prison Industrial Complex*, 11 JIJIS 156, 162-63 (2011).

At the same time, the assurance that more Black men would be rounded up helped keep prison conditions abysmal and deadly. As one observer described the tragic relationship between forced prison labor and Black Codes: “One dies, get another.” MATHEW J. MANCINI, *ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928*, at 3 (1996).

But note, even with an explicit punishment exception, it was not inevitable that the Thirteenth Amendment would be interpreted to allow forced prison labor as such, or these especially cruel manifestations of it. Several ratification-era politicians asserted that the Amendment had clearly not been intended to hamstring itself in this way. *See* Wafa Junaid, *Forced Prison Labor: Punishment For A Crime?*, 116 NW. L. REV. 1099, 1112-13 (2022). Rather, they maintained that the punishment exception was a narrow one, allowing involuntary servitude only as a “direct execution of a sentence imposing a definite penalty according to the law.” *Id.* at 1112 (quoting Cong. Globe, 39th Cong., 2d Sess. 324 (1867)). And they asserted that the exception certainly was not included to allow for “the re-enslavement of Black labor through criminal law.” James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1466, 1478 (2019).

Nonetheless, convict leasing, variants like chain gangs, and other forms of forced prison labor continued on, and those incarcerated did not succeed in challenging forced labor regimes as illegal or unconstitutional. *See* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 398 (2009). The idea that convicted people were “slaves of the State” in “penal servitude” became the legal norm. *Ruffin v. Commonwealth*, 62 Va. 790, 795-75 (1871). And because interpretation, practice, and attitude all calcified in the years after the Thirteenth Amendment’s

ratification, it is still today nearly impossible to challenge forced prison labor in court using the federal Thirteenth Amendment or state analogues that contain a punishment exception. *See* Raghunath, *A Promise the Nation Cannot Keep*, at 417-19.

II. Still Today, Actors Seize On The Punishment Exception To Allow Forced Prison Labor That Harkens Back To The Reconstruction-Era South.

Although the worst aspects of convict-leasing dissipated, forced prison labor more generally has never gone away.² So while “Black Codes” no longer remain on the books, America’s prison population has nonetheless ballooned over the last half-century or so, in no small part thanks to broad criminalization that disproportionately affects Black Americans. *See* James Cullen, *The History of Mass Incarceration*, Brennan Center for Justice (July 20, 2018).³ And those locked up during this new wave of mass incarceration have been forced to work. In 2005, there were more than 1.5 million incarcerated people working jobs. Darius Rafieyan & Cardiff Garcia, *The Uncounted Workforce*, NPR (June 29, 2020).⁴ To put that number in perspective, 600,000 of

² Indeed, in some states, forced prison labor has once again begun to look eerily similar to its post-reconstruction iterations. In Louisiana, for example, predominantly Black prison populations literally work the same fields that those bound up in chattel slavery did a century and a half ago, sometimes under the watch of a guard on horseback. Whitney Benns, *American Slavery, Reinvented*, THE ATLANTIC, Sept. 21, 2015, <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/>. A Sheriff in Alabama sought to implement “twenty-first century chain gangs,” shackling those under his charge together by the ankles to work on county roads. Steve Fraser & Joshua B. Freeman, *21st Century Chain Gangs*, SALON, April 19, 2012, 3:06 PM, https://www.salon.com/2012/04/19/21st_century_chain_gangs/. Despite the passage of a century, these and other forms of forced prison labor remain at least arguably constitutional under current law where state and federal punishment exceptions define the landscape.

³ <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>

⁴ <https://www.wbur.org/npr/884989263/the-uncounted-workforce>

those 1.5 million worked manufacturing jobs, accounting for more than 4% of all manufacturing jobs in the nation at the time. *Id.*

Once again, many states and private businesses have come to exploit this vast source of cheap or free labor. *See* Junaid, *supra*, at 1103-06. A 2020 report found that more than 4,100 corporations rely on prison labor or otherwise profit from incarceration. WORTH RISES, THE PRISON INDUSTRY: MAPPING PRIVATE SECTOR PLAYERS (2020).⁵ Included in those thousands of companies are mainstays of American life spanning multiple industries, like Amazon, Microsoft, Stanley Black and Decker, Barnes & Noble, and Time Warner Cable. *Id.* The public sector likewise relies on prison labor in a number of ways. States and the federal government sell products manufactured by prisoners at a profit. *See* Daniel Moritz-Rabson, 'Prison Slavery': *Inmates Are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018, 5:12 PM).⁶ During the height of the COVID-19 pandemic, more than twenty states turned to prison labor to combat shortages of personal protective equipment and crank out hand sanitizer and face masks. Katie Nixdorf & Kaitlyn Wang, *More than 20 States are Using Prison Labor to Make Hand Sanitizer and Masks While the Coronavirus Spreads Through the Prison System*, BUS. INSIDER (Apr. 14, 2020, 11:15 AM).⁷ And it is not just manufacturing: states use prison labor to fulfill all sorts of essential public functions. In California, some advocated against avenues for release during the pandemic because the state wouldn't have enough firefighters to combat deadly wildfires without prisoners to fill the roles. *See* Thomas Fuller, *Coronavirus Limits California's*

⁵ <https://worthrises.org/theprisonindustry2020>

⁶ <https://www.newsweek.com/prison-slaverywho-benefits-cheap-inmate-labor-1093729>

⁷ <https://www.businessinsider.com/coronavirus-prison-labor-hand-sanitizer-masks2020-4>

Efforts to Fight Fires with Prison Labor, N.Y. TIMES (Aug. 24, 2020).⁸ Perversely, prisoners are also often made to staff prisons themselves, just as the plaintiffs in this case were forced to do. *See* Sytonia Reid, *On Sale Now: Prison Labor*, Green Am.; Am. Compl. At 11-14.

Although eliminating forced labor does not necessarily mean eliminating labor in prisons writ large, it does mean that prisoners cannot continue to be coerced into working. It is no leap to assume that in the forty-seven states that either have a punishment exception to their constitutional anti-slavery provision or rely on the federal ban, many of those working while incarcerated are facing some level of coercion. *See* Human Trafficking Search, *Efforts By States To Eliminate The Exception Allowing Slavery Or Involuntary Servitude As Punishment For A Crime*.⁹ Prison laborers work long hours for no or excessively low wages, sometimes measuring daily earnings only in cents. Bennis, *American Slavery, Reinvented*, *supra*. Federal Prison Industries, a government-owned corporation that employs thousands of federal prisoners, says the hourly wages of those who work under its purview range from 23 cents to just over a dollar. *UNICOR: Program Details*, FED. BUREAU OF PRISONS.¹⁰ In Colorado specifically, prisoners have reported wages as low as 10 cents per hour, or 42 cents per *day*. Brian Maass, *Colorado Inmates Sue Over 'Slave Labor,' Demand Minimum Wage, Paid Vacations, Paid Sick Leave*, CBS DENVER (July 27, 2020 11:59 PM).¹¹ Needless to say, prison laborers do not benefit from the more robust worker protections that those on the outside enjoy. *Id.* Like the plaintiffs in this case, they often toil under

⁸ <https://www.nytimes.com/2020/08/22/us/california-wildfires-prisoners.html>

⁹ <https://humantraffickingsearch.org/efforts-by-states-to-eliminate-the-exception-allowing-slavery-or-involuntary-servitude-as-punishment-for-a-crime/>

¹⁰ https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp

¹¹ <https://denver.cbslocal.com/2020/07/27/slave-labor-prison-lawsuit-minimum-wage/>

the threat of discipline if they “choose” not to work, including solitary confinement and loss of earned time credits. Bennis, *American Slavery, Reinvented, supra.*; Am. Compl. at 8-10; 13-16 (describing how one tool Colorado officials use to coerce work is the threat or implementation of “Restrictive Privilege,” a confinement-status akin to solitary confinement). This is involuntary servitude, it is a descendant of the most brutal forms of forced labor from the nineteenth century, and like its Reconstruction-era ancestors, it is only even arguably legal because of state and federal punishment exceptions.

III. Colorado Voters Explicitly Chose To Eradicate Forced Prison Labor.

Colorado voters passed Amendment A in 2018 against this historical backdrop and present landscape. *Colorado Amendment A, Prohibiting Slavery and Involuntary Servitude, Has Passed*, COLORADO PUBLIC RADIO (Nov. 7, 2018, 2:00 AM).¹² Previously, Colorado’s Constitution had an anti-slavery provision that mirrored the federal Thirteenth Amendment, including its punishment exception. Lockhart, *Colorado Passes Amendment A, supra.*

When Colorado voters amended their Constitution to finally abolish all forms of involuntary servitude, they were specifically targeting forced prison labor as a remaining artifact of slavery. *See id.* Functionally, Amendment A removed the clause from Colorado’s constitution that allowed forced labor if incident to a criminal conviction. *Id.* Proponents of this change emphasized the need to update this provision because all human beings must be treated with dignity, and fundamental human rights bear no exceptions. *See Colorado Amendment A*, COLORADO PUBLIC RADIO, *supra.*

¹² <https://www.cpr.org/2018/11/07/colorado-amendment-a-prohibiting-slavery-and-involuntary-servitude-has-passed/>

The new language in Colorado’s constitution has a clear, literal meaning: no more slavery or involuntary servitude, within prisons or without. Defendants nonetheless defy this clear directive, and ask this Court to nullify the will of Colorado voters by deeming forced prison labor constitutional still. But faithful to the important change just ratified, this Court should enforce the clear meaning and intent behind Amendment A: to abolish slavery and involuntary servitude in their entirety, and in doing so separate Colorado from practices that bear an untenable connection to the history of slavery in the United States.

CONCLUSION

At bottom, Colorado voters chose to take a step forward when they passed Amendment A and this Court should not allow Defendants to drag this State back into the past. This Court should give Amendment A it’s full and intended effect, and deny Defendants’ motion to dismiss.

Respectfully submitted this 21st day of June, 2022.

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