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## NOTE

### PRISON LABOR AND THE FAIR LABOR STANDARDS ACT: RESOLVING THE CIRCUIT SPLIT ON WHETHER INCARCERATED WORKERS ARE ENTITLED TO THE FEDERAL MINIMUM WAGE

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*At any given time, around half the incarcerated population in the United States works full-time. A large majority of incarcerated workers are engaged in “prison housework,” doing laundry, working in the kitchen, or providing janitorial services, etc. A smaller portion of individuals work in prison industries to produce goods and services for both government agencies and private corporations. National estimates for the annual value of prison and jail industrial output come to around \$2 billion. Despite this, the average wage for incarcerated individuals working in state-owned industries is anywhere between \$0.33 to \$1.41 per hour.*

*Mass incarceration and the prison industry have become seamlessly intertwined with America’s racially stratified economy. Wal-Mart, Victoria’s Secret, Boeing, Microsoft, and Starbucks are some of the many major U.S. companies that have partnered with prison industries in the past to profit off of free or underpaid labor. In the absence of clear Supreme Court ruling or guidance from Congress, it remains unclear whether incarcerated workers may be considered “employees” as defined by the Fair Labor Standards Act (“FLSA”) and therefore subject to the federal minimum wage protections. Without any guidance, lower courts have developed a patchwork of conflicting standards and formalistic dichotomies to address the issue of FLSA coverage for incarcerated workers.*

This Note analyzes the circuit split on the question of FLSA coverage and provides recommendations on how the Supreme Court should decide the issue. This Note goes on to advance a new “but-for” test for courts to adopt when deciding which kinds of incarcerated workers should be covered by the FLSA.

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## INTRODUCTION

The California Department of Corrections and Rehabilitation (“CDCR”), in cooperation with the Department of Forestry and Fire Protection (“CAL FIRE”), operates thirty-five “conservation camps” where incarcerated inmate firefighters<sup>1</sup> earn between \$2.90 and \$5.12 per day according to the CDCR.<sup>2</sup> The official website states the primary mission of the conservation camps is to “support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters.”<sup>3</sup> These incarcerated individuals who work as “volunteers,” earn \$1 an hour when fighting on an active fire line.<sup>4</sup> According to CAL FIRE’s 2018–2019 annual report, incarcerated firefighters made up approximately 27% of the state’s total firefighting personnel.<sup>5</sup> According to a report by CAL FIRE, the conservation camps, which date back to World War II, save California taxpayers around \$100 million per annum.<sup>6</sup> In New York, at the height of the COVID-19 pandemic lockdowns, Governor Cuomo announced that incarcerated workers would begin producing New York State’s own brand of hand sanitizers.<sup>7</sup> The production was overseen by Corcraft, a state-owned corporation run by the state Department of Corrections and Community Supervision (“DOCCS”).

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<sup>1</sup> *Conservation (Fire) Camps*, CAL. DEPT. OF CORR. & REHAB., <https://www.cdcr.ca.gov/facility-locator/conservation-camps> [https://perma.cc/L9BY-X575] (last visited Feb. 11, 2022) (“The primary mission of the Conservation Camp Program is to support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters.”).

<sup>2</sup> Nicole Goodkind, *Prisoners Are Fighting California’s Wildfires on the Front Lines, But Getting Little in Return*, FORTUNE (Nov. 1, 2019, 12:03 PM), <https://fortune.com/2019/11/01/california-prisoners-fighting-wildfires/> [https://perma.cc/YH2F-8E63].

<sup>3</sup> CAL. DEPT. OF CORR. & REHAB., *supra* note 1.

<sup>4</sup> Christie Thompson, *Formerly Incarcerated Firefighters Are Still Fighting California’s Wildfires*, SLATE (Sept. 2, 2020, 6:00 AM), <https://slate.com/news-and-politics/2020/09/formerly-incarcerated-firefighters-california-wildfires.html> [https://perma.cc/45SK-7YX5] (“Before the pandemic, thousands of the state’s wildfire crews came from state prisons—incarcerated people make around \$1 an hour containing fires, clearing brush, and doing other dangerous labor.”).

<sup>5</sup> *Cal Fire at a Glance*, CAL. DEPT. OF FORESTRY AND FIRE PROT. (Sep. 2018), <https://web.archive.org/web/20200329195608/https://www.fire.ca.gov/media/4922/glance.pdf> [https://perma.cc/8KD2-H83D].

<sup>6</sup> Matt Clarke, *California’s Firefighting Prisoners in Short Supply*, PRISON LEGAL NEWS (Jan. 8, 2020) <https://www.prisonlegalnews.org/news/2020/jan/8/californias-firefighting-prisoners-short-supply> [https://perma.cc/AWF6-86D5] (“This underpaying of thousands of prisoners employed at fire camps – who constitute about a third of the state’s wildfire fighters – saves California an estimated \$100 million a year.”); *see also* Jaime Lower, *What Does California Owe Its Incarcerated Firefighters?*, THE ATLANTIC (July 27, 2021), <https://www.theatlantic.com/politics/archive/2021/07/california-inmate-firefighters/619567/> [https://perma.cc/MP8C-UXGR] (“Alisha Tapia . . . was incarcerated in Puerta la Cruz, an all-female fire camp north of San Diego. . . . She’d already worked two fire seasons in collaboration with the California Department of Forestry and Fire Protection in the middle of an extreme drought.”).

<sup>7</sup> Christopher Robbins, *New York State’s New Hand Sanitizer Is Made By Prisoners Paid An Average 65 Cents An Hour*, GOTHAMIST (Mar. 9, 2020), <https://gothamist.com/news/new-york-states-new-hand-sanitizer-made-prisoners-paid-average-65-cents-hour> [https://perma.cc/GQZ5-DGHA] (“Corcraft is the brand name for the Division of Correctional Industries, a state-owned company operated by the state Department of Corrections and Community Supervision (DOCCS), which runs New York’s prisons. Around 2,100 people incarcerated by New York state work for Corcraft.”).

Despite generating between \$30–40 million in annual revenues<sup>8</sup>, inmates working for Corcraft earned an average of 0.65 cents per hour and as little as 0.16 cents per hour.<sup>9</sup>

The United States, despite making up only 5% of the world's population, accounts for 25% of the world's prison population.<sup>10</sup> In 2014, the U.S. had a total prison population of about 1.6 million<sup>11</sup>, not including those held in jails or under surveillance while on probation or parole.<sup>12</sup> Approximately 870,000 of those incarcerated worked full-time.<sup>13</sup> A large majority of these workers were engaged in “institutional maintenance,” working, for example, in the kitchen, doing laundry, and providing janitorial services.<sup>14</sup> A smaller portion of these inmates, between 75–80,000, worked in prison industries to produce goods and services for both government agencies and private corporations.<sup>15</sup> In other words, incarcerated individuals are made not only to work for and sustain the very institutions that keep them locked up but also for large private corporations for little to no compensation, many of which go on to lobby Congress and local officials for harsher and more punitive sentencing laws and policing.<sup>16</sup>

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<sup>8</sup> FOIL Disclosure: *Despite Millions In Revenue From NYS Agencies – Over \$340 Million Spanning Nine Fiscal Years – Corcraft Continues To Pay Incarcerated New Yorkers Pennies On The Dollar*, THE LEGAL AID SOCIETY 1 (Mar. 12, 2020), <https://legalaidnyc.org/wp-content/uploads/2020/03/03-12-20-FOIL-Disclosure-Corcraft.pdf> [<https://perma.cc/V3KK-XUN4>].

<sup>9</sup> Robbins, *supra* note 7.

<sup>10</sup> 13TH (Kandoo Films 2016).

<sup>11</sup> *Total Correctional Population*, BUREAU JUST. STAT. (May 11, 2021), <https://bjs.ojp.gov/data/key-statistics> [<https://perma.cc/M77R-AMGU>].

<sup>12</sup> In 2019, this number fell slightly to around 1.4 million. See E. Ann Carson, *Prisoners in 2019*, BUREAU JUST. STAT. 1 (Oct. 2020) <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/8H67-D675>] (listing the 2019 total prison population at 1,430,805). When looking at the entire correctional system, a total of about seven million people were under state surveillance in 2020 (combining people incarcerated in prisons and jails and those on parole and probation). See also Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/RT8F-W2JQ>] (“The American criminal justice system holds almost 2.3 million people in 1,833 state prisons, 110 federal prisons, 1,772 juvenile correctional facilities, 3,134 local jails, 218 immigration detention facilities, and 80 Indian Country jails as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.”).

<sup>13</sup> Beth Schwartzapfel, *The Great American Chain Gang*, THE AMERICAN PROSPECT (May 28, 2014) [hereinafter Schwartzapfel, *Chain Gang*], <https://prospect.org/justice/great-american-chain-gang/> [<https://perma.cc/N98H-E2QA>].

<sup>14</sup> *Id.* (“Despite decades’ worth of talk about reform-of giving prisoners the skills and resources they need to build a life after prison-the vast majority of these workers, almost 700,000, still do “institutional maintenance” work. . . . They mop cellblock floors, prepare and serve food in the dining hall, mow the lawns, file papers in the warden’s office, and launder millions of tons of uniforms and bed linens.”).

<sup>15</sup> Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 953 (2016).

<sup>16</sup> A 2021 annual report from CoreCivic (one of the largest corporations in private prisons) claimed an annual revenue of around \$1.8 billion. See CORECIVIC 2021 ANNUAL REPORT 2 (2021), <https://ir.corecivic.com/static-files/d3f1752e-87b8-4256-99ed-f3803c5817f8> [<https://perma.cc/U69W-7M74>] (Revenue in 2021 was \$1,862,616); see also Martha C. White, *Locked-In Profits: The U.S. Prison Industry, By the Numbers*, NBC NEWS (Nov. 2, 2015, 5:28 PM), <https://www.nbcnews.com/business/business-news/locked-in-profits-u-s-prison-industry-numbers-n455976> [<https://perma.cc/L45T-ZFM7>] (CoreCivic and GEO collectively

Mass incarceration and the prison industry have become seamlessly intertwined with America's racially stratified economy, touching upon every aspect of our lives as consumers. Wal-Mart, Victoria's Secret, Boeing, Microsoft, and Starbucks are some of the many major U.S. corporations that have partnered with prison industries to benefit from the lack of labor protections afforded to incarcerated workers.<sup>17</sup> National minimum estimates for the annual value of prison and jail industrial output come to approximately \$2 billion.<sup>18</sup> Despite this, the average wage for prisoners working in state-owned industries is anywhere between \$0.33 to \$1.41 per hour.<sup>19</sup> While these incarcerated workers are full-time workers, they do not receive the same protections and benefits as non-incarcerated workers. In the absence of a clear Supreme Court ruling or guidance from Congress, it remains unclear whether incarcerated workers are covered by the Fair Labor Standards Act ("FLSA"). The FLSA was enacted in 1938 and mandates that employers pay their employees in accordance with the current federal minimum wage standards set by Congress.<sup>20</sup> Both Congress and the Supreme Court have been silent on the question of whether or not incarcerated workers, whether they work for institutions or for private industries, are included within the definition of "employee" under the FLSA, leaving the lower courts to develop a patchwork of conflicting standards and formalistic dichotomies to address the issue of FLSA coverage for prison laborers.

This Note argues that incarcerated workers should qualify as "employees" within the meaning of the FLSA and thus receive minimum wage protections. Part I provides background on prison labor in the U.S. and offers a summary of the six main forms of prison work. The six categories discussed in Part I are (1) non-industry work at the state level (2) work release programs (3) non-industry work at the federal level (4) industry work at the state level (5) industry work at the federal level and (6) the Prison Industry Enhancement Certification Program (PIECP). Part II then discusses the Fair Labor Standards Act and introduces the circuit split. Part III and IV analyzes the circuit split further and provides

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spent \$8.7 million on lobbying efforts between 2010 and 2015); Mathew Clarke, *Study Shows Private Prison Companies Use Influence to Increase Incarceration*, PRISON LEGAL NEWS (Aug. 22, 2016), <https://www.prisonlegalnews.org/news/2016/aug/22/study-shows-private-prison-companies-use-influence-increase-incarceration> [https://perma.cc/4SRK-J83Y] (documenting how Corrections Corporation of America (CCA) and GEO have helped lobby for "truth-in-sentencing" "three-strikes" and "mandatory minimum" laws).

<sup>17</sup> Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2020), <https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned> [https://perma.cc/988V-9QMC] ("In the beginning, small businesses that had trouble hiring or retaining employees due to low wages or fluctuating work schedules solicited partnerships with prison industries. This changed dramatically by the 1990s . . .").

<sup>18</sup> Peter Wagner, *The Prison Index: Section III: The Prison Economy*, PRISON POLICY INITIATIVE (Apr. 2013) (citing JOEL DYER, PERPETUAL PRISONER MACHINE 19 (2000)), <https://www.prisonpolicy.org/prisonindex/prisonlabor.html> [https://perma.cc/HT6D-B29K].

<sup>19</sup> Wendy Sawyer, *How Much Do Incarcerated People Earn In Each State?*, PRISON POLICY INITIATIVE (Apr. 10, 2017), <https://static.prisonpolicy.org/blog/2017/04/10/wages/> [https://perma.cc/3QHZ-9W6Y].

<sup>20</sup> Matthew J. Lang, *The Search for A Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 192 (2002).

recommendations on how the Supreme Court should rule with respect to the sub-issues of congressional intent and certain bright-line rules that the Circuits have adopted. Finally, Part V proposes a new “economic reality” test for the Supreme Court to adopt.

## I. UNPACKING THE SIX FORMS OF PRISON LABOR IN THE U.S.

### A. Non-Industry Work: State Level

A common misconception about the prison industry, or what is often referred to as the “Prison Industrial Complex”<sup>21</sup> is that there are hundreds of thousands of prisoners across the U.S. working for private corporations. However, 700,000 out of 870,000 incarcerated workers in 2014 performed non-industry “prison housework,” working in the kitchen, doing laundry, cleaning, and performing administrative tasks.<sup>22</sup> Non-industrial “housework” performed by prisoners in state facilities constitutes the largest section of prison labor. Additionally, the fact that incarcerated workers are not included in official employment statistics feeds into this public misconception.<sup>23</sup> Data on compensation and employment for inmates by state and federal corrections agencies is not always readily available or even recorded. As a result, the prison industry tends to be misunderstood.

In reality, around 80% of all incarcerated workers held non-industry prison jobs. The remaining 20% worked in private or government-owned prison industries or in work release programs—the example of inmate firefighters in California would fall into this latter category. Work release programs, discussed in greater detail later on, apply to a relatively small percentage of the working prison population—those who are at the end of their sentence or are deemed low-risk and therefore eligible for work-release programs.

The most comprehensive survey of state wage policies available today is a 2017 survey provided by the Prison Policy Initiative.<sup>24</sup> The 2017 survey data has been reproduced in the table below. The data shows that

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<sup>21</sup> Named after the ‘military-industrial complex’ and popularized by scholars such as Angela Davis, the “Prison Industrial Complex” can be defined as the “overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.” See *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> [https://perma.cc/VJ82-67EC] (last visited Feb. 11, 2022).

<sup>22</sup> Schwartzapfel, *Chain Gang*, *supra* note 13; see also Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 870 (2008) (describing “prison housework” as “inmates contribut[ing] directly to prison operations by cooking meals, doing laundry, or cleaning the facilities.”).

<sup>23</sup> Becky Pettit, *The Invisible Population: What the Unemployment Rate Doesn’t Show*, GOOD WORLDWIDE INC. (Oct. 18, 2012), <https://www.good.is/articles/the-invisible-population-what-the-unemployment-rate-doesn-t-show> [https://perma.cc/KKC2-V9BB] (The unemployment rate “doesn’t capture *underemployment*, other forms of labor inactivity, or unpaid labor. It also doesn’t tell us anything about the employment prospects of some groups of the population most economically at-risk.”).

<sup>24</sup> Sawyer, *supra* note 19; see also *State And Federal Prison Wage Policies And Sourcing information*, PRISON POLY INITIATIVE (Apr. 10, 2017), [https://www.prisonpolicy.org/reports/wage\\_policies.html](https://www.prisonpolicy.org/reports/wage_policies.html) [https://perma.cc/Z8GW-LC3F] (detailing “pay scales and wage policies that apply to incarcerated people working in state and federal prisons, along with sourcing information available as of April 10, 2017.”).

national averages for state wages for non-industry work range from \$0.14 to \$0.63 per hour. In five states—Alabama, Arkansas, Florida, Georgia, and Texas—non-industry jobs are unpaid.

<b>State Wages for Non-Industry Work (\$00.00)</b>					
	Lowest	Highest		Lowest	Highest
<b>Alabama</b>	0	0	<b>Montana</b>	0.16	1.25
<b>Alaska</b>	0.3	1.25	<b>Nebraska</b>	0.16	1.08
<b>Arizona</b>	0.15	0.5	<b>Nevada</b>	n/a	n/a
<b>Arkansas</b>	0	0	<b>New Hampshire</b>	0.25	1.5
<b>California</b>	0.08	0.37	<b>New Jersey</b>	0.26	2
<b>Colorado</b>	0.13	0.38	<b>New Mexico</b>	0.1	1
<b>Connecticut</b>	0.13	1	<b>New York</b>	0.1	0.33
<b>Delaware</b>	n/a	n/a	<b>North Carolina</b>	0.05	0.38
<b>Florida</b>	0	0.32	<b>North Dakota</b>	0.19	0.88
<b>Georgia</b>	0	0	<b>Ohio</b>	0.1	0.17
<b>Hawaii</b>	0.25	0.25	<b>Oklahoma</b>	0.05	0.54
<b>Idaho</b>	0.1	0.9	<b>Oregon</b>	0.05	0.47
<b>Illinois</b>	0.09	0.89	<b>Pennsylvania</b>	0.19	1
<b>Indiana</b>	0.12	0.25	<b>Rhode Island</b>	0.29	0.86
<b>Iowa</b>	0.27	0.68	<b>South Carolina</b>	0	0
<b>Kansas</b>	0.09	0.16	<b>South Dakota</b>	0.25	0.38
<b>Kentucky</b>	0.13	0.33	<b>Tennessee</b>	0.17	0.75
<b>Louisiana</b>	0.04	1	<b>Texas</b>	0	0
<b>Maine</b>	n/a	n/a	<b>Utah</b>	0.4	n/a
<b>Maryland</b>	0.15	0.46	<b>Vermont</b>	0.25	0.4

<b>Massachusetts</b>	0.14	1	<b>Virginia</b>	0.27	0.45
<b>Michigan</b>	0.14	0.56	<b>Washington</b>	n/a	0.36
<b>Minnesota</b>	0.25	2	<b>West Virginia</b>	0.04	0.58
<b>Mississippi</b>	0	n/a	<b>Wisconsin</b>	0.09	0.42
<b>Missouri</b>	0.05	n/a	<b>Wyoming</b>	0.35	1

On top of the lack of meaningful compensation, many states retain “hard labor” statutes mandating that prisoners in state correctional facilities work.<sup>25</sup> In these states, if an inmate refuses to work, they risk having their sentences lengthened or being placed in solitary confinement.<sup>26</sup> For example, in Texas—responsible for overseeing the largest state prison population in the U.S.<sup>27</sup>—inmates who refuse to work are punished and placed in “special cell restriction,” where inmates remain in the cell for twenty-four hours a day.<sup>28</sup> Even in states where mandatory work requirements are not imposed upon prison populations, inmates are strongly encouraged to work and may receive “earned time” credits for labor performed while incarcerated, allowing them to cut down their sentences.<sup>29</sup> When forgoing work means forgoing the opportunity to reduce

<sup>25</sup> See N.C. GEN. STAT. § 148-26(a) (2020) (“It is declared to be the public policy of the State of North Carolina that all able-bodied prison inmates shall be required to perform diligently all work assignments provided for them. The failure of any inmate to perform such a work assignment may result in disciplinary action.”); see also *Frequently Asked Questions*, TEXAS DEPT. OF CRIMINAL JUST., <https://www.tdcj.texas.gov/faq/cid.html> [<https://perma.cc/VYT4-PS8U>] (last visited Jan. 20, 2022) (“Inmates who continue to refuse to work lose their privileges and are placed in ‘special cell restriction.’”); WASH. REV. CODE § 72.64.030 (2022) (“Every prisoner in a state correctional facility shall be required to work in such manner as may be prescribed by the secretary . . .”).

<sup>26</sup> Kanyakrit Vongkiatkajornsep, *Inmates Are Kicking Off a Nationwide Prison Strike Today*, MOTHER JONES (Sept. 9, 2016), <https://www.motherjones.com/politics/2016/09/national-prison-strike-inmates/> [<https://perma.cc/22GQ-V5CY>] (“Nor can prisoners opt out of working, says Paul Wright, an editor at Prison Legal News. ‘Typically prisoners are required to work, and if they refuse to work, they can be punished by having their sentences lengthened and being placed in solitary confinement,’ Wright says.”).

<sup>27</sup> *Texas 2019*, NAT’L INST. OF CORR. (2019), <https://nicic.gov/state-statistics/2019/texas-2019> [<https://perma.cc/5ZUH-QYGH>] (Texas holds the record for the largest state prison population in the U.S., surpassing California with a total of 158,429 people who were incarcerated at the end of 2019.).

<sup>28</sup> *Frequently Asked Questions*, TEXAS DEPT. OF CRIM. JUST., <https://www.tdcj.texas.gov/faq/cid.html> [<https://perma.cc/XZ4X-8632>] (last visited Jan. 20, 2022).

<sup>29</sup> ALISON LAWRENCE, CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS, NATIONAL CONFERENCE OF STATE LEGISLATURES 1 (July 2009), <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13084> [<https://perma.cc/74L3-TMUL>]; see also *Earned and Good Time Policies: Comparing Maximum Reductions Available*, PRISON FELLOWSHIP, [https://www.prisonfellowship.org/wp-content/uploads/2021/07/PrisonReformRedemptionActCampaignComparisonChart\\_f.pdf](https://www.prisonfellowship.org/wp-content/uploads/2021/07/PrisonReformRedemptionActCampaignComparisonChart_f.pdf) [<https://perma.cc/8U6M-FDY7>] (last visited Feb. 2, 2022) (comparing maximum sentence reductions available across states and in federal prison through earned and good time policies).



the time one spends in prison, the choice to work is often only a choice on paper.

Prisoners performing “housework” for state and federal facilities across the U.S. allows the department of corrections to save billions of dollars on annual salaries that would otherwise have to be paid out to hired cooks, janitors, prison law library staff members, and so on. As articulated by the Prison Policy Initiative, “[f]orcing people to work for low or no pay and no benefits allows prisons to shift the costs of incarceration to incarcerated people — hiding the true cost of running prisons from most Americans.”<sup>30</sup> The ingenuity of the this model of forced and free prison labor is that corrections departments and the Federal Bureau of Prisons can market prison labor to the public as serving a rehabilitative function for the benefit of the inmate and society at large. In this way, forced unpaid labor is re-packaged as a social good. However, the pitch that prison labor serves a rehabilitative function and provides meaningful vocational training for the benefit of inmate is easily exposed as a façade when one looks at the reality of the type of labor performed by prisoners, and *who* it is performed for.

#### B. Non-Industry Work: Work-Release Programs

Outside of housework, cheap or free prison labor is routinely relied upon to close budget gaps for state and local municipal governments who find themselves short on funds to provide ordinary municipal services to inhabitants. This work is assigned to prisoners who are deemed low-risk as part of work-release programs. According to the Florida Department of Corrections, inmate worker squads provided 5.8 million hours of labor, and saved the state around \$46 million in taxpayer money in the 2011–2012 budget year by performing work that includes road cleaning, ground and building maintenance, construction projects, and cleaning forests.<sup>31</sup> In California, the Conservation Fire Camps help save the state around \$100 million taxpayer dollars a year.<sup>32</sup> In New Jersey, prisoners help cushion government budgets by clearing deer carcasses and litter from highways. In Georgia, inmates work in municipal graveyards.<sup>33</sup> Going back to the inmate firefighters in California, when World War II depleted a large proportion of the labor force that was used by CAL FIRE, the state turned to incarcerated workers and established the Conservation Camp program.<sup>34</sup> By replacing government workers with inmate laborers, the state can save on salaries and still provide these required services. In the face of budget cuts, or economic downturn, inmate laborers have historically become a crutch for local policymakers to fall back on.

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<sup>30</sup> Sawyer & Wagner, *supra* note 12.

<sup>31</sup> Willie Howard, *Inmates Saving Money For Palm Beach County Cities*, THE PALM BEACH POST (Nov. 30, 2013), <https://www.palmbeachpost.com/story/news/crime/2013/12/01/inmates-saving-money-for-palm/7255655007/> [<https://perma.cc/J8B4-7RBQ>].

<sup>32</sup> Clarke, *supra* note 6.

<sup>33</sup> Robbie Brown & Kim Severson, *Enlisting Prison Labor to Close Budget Gaps*, N.Y. TIMES (Feb. 24, 2011), <https://www.nytimes.com/2011/02/25/us/25inmates.html> [<https://perma.cc/C3LU-62A4>].

<sup>34</sup> CAL. DEPT. OF CORR. & REHAB., *supra* note 1.

### C. Non-Industry Work: Federal Level

At the federal level, inmates are required to work unless they provide a valid medical excuse.<sup>35</sup> Similar to state prisons, inmates in federal prisons may work either for the institution or for prison industries. Assignments to jobs are determined by institutional needs. Institution work assignments may include employment in food services, warehouse work, plumping, paint work, or groundskeeping. Inmates performing this non-industry “housekeeping” work earn \$.12 to \$.40 per hour of “satisfactory work performed.”

### D. Industry Work: State Level

Every state has its own separate prison industries program which engages state prisoners in a variety of work, ranging from manufacturing license plates to animal husbandry. These goods and services are then sold for profit to city, state, or federal agencies, and other private or public institutions. Prison industries are operated by state-owned corporations which function as an arm of the state’s corrections department. In Louisiana, inmates work in garment factories under Louisiana’s Prison Enterprises (PE).<sup>36</sup> In Tennessee, Tennessee Rehabilitative Initiative in Correction (TRICOR) operates a beef cattle farm and a row crop farm in two state prison facilities. In Texas, Texas Correctional Industries (TCI) oversees the production of graphic products, detergents, furniture, and textile and steel products.<sup>37</sup>

At TCI in Texas, one of the largest state prison industries in the country, incarcerated workers produced over \$70 million in products in the 2020 fiscal year.<sup>38</sup> Those workers did not receive any wages from TCI for their labor. While TCI claims that these jobs provide inmates with marketable job skills, some critics of the industry have argued otherwise.<sup>39</sup>

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<sup>35</sup> *Work Programs*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/work\\_programs.jsp](https://www.bop.gov/inmates/custody_and_care/work_programs.jsp) [<https://perma.cc/T7HB-4Y8C>] (last visited Feb. 5, 2022) [hereinafter *Work Programs*] (“Sentenced inmates are required to work if they are medically able.”).

<sup>36</sup> David Reutter, *Prison Officials Praise Industry Programs Despite Downsides*, PRISON LEGAL NEWS (June 6, 2014), <https://www.prisonlegalnews.org/news/2014/jun/6/prison-officials-praise-industry-programs-despite-downsides/> [<https://perma.cc/2MXN-A9XW>] (“Louisiana’s Prison Enterprises, which operates a garment factory and other programs, reported a \$1.27 million net profit in fiscal year 2012 on gross revenue of \$17.9 million.”); see also *Our Products*, PRISON ENTERPRISES, <http://www.prisonenterprises.org/our-products> [<https://perma.cc/ZF7H-ZMHB>] (last visited Feb. 11, 2022) (listing various products PE makes, including garments).

<sup>37</sup> *About Us*, TEXAS CORR. INDUS., <https://tci.tdcj.texas.gov/info/about/default.aspx> [<https://perma.cc/KEK2-ZWXP>] (last visited Feb. 11, 2022) (“TCI manufactures goods and provides services for sale, on a for-profit basis, to city, county, state and federal agencies, public schools, public and private institutions of higher education, public hospitals and political subdivisions.”).

<sup>38</sup> TEXAS DEPT. OF CRIM. JUST., ANNUAL REVIEW FY2020 60 (2020) [hereinafter *Texas Annual Review FY 2020*], [https://www.tdcj.texas.gov/documents/Annual\\_Review\\_2020.pdf](https://www.tdcj.texas.gov/documents/Annual_Review_2020.pdf) [<https://perma.cc/9BC8-JU2J>] (“Sales for the . . . facilities . . . were \$72.3 million for the fiscal year.”).

<sup>39</sup> *Texas Correctional Industries: Providing Useful Work Skills or Slave Labor?*, PRISON LEGAL NEWS (Aug. 7, 2014), <https://www.prisonlegalnews.org/news/2014/aug/7/texas-correctional-industries-providing-useful-work-skills-or-slave-labor> [<https://perma.cc/EQ5K-3KA5>] (“Critics claim that many of the job skills learned by prisoners in TCI industry programs will be virtually useless after they’re released because they involve outdated

They point out that the job skills picked up by inmates at TCI are not transferable to jobs outside of prison because the work entails the use of outdated techniques or work in industries that are not as prevalent in the outside world.<sup>40</sup> As one example, Texas only has a small number of detergent plants and license plate factories remaining in the state.<sup>41</sup> Comprehensive data from the 2017 PPI survey on wages for state prison industries is reproduced below.<sup>42</sup>

<b>Stage Wages for State-Owned Industries (\$00.00)</b>					
	Lowest	Highest		Lowest	Highest
<b>Alabama</b>	0.25	0.75	<b>Montana</b>	n/a	n/a
<b>Alaska</b>	0.65	4.90	<b>Nebraska</b>	0.38	1.08
<b>Arizona</b>	0.20	0.80	<b>Nevada</b>	0.25	5.15
<b>Arkansas</b>	0	0	<b>New Hampshire</b>	0.50	1.50
<b>California</b>	0.30	0.95	<b>New Jersey</b>	0.38	2.00
<b>Colorado</b>	n/a	n/a	<b>New Mexico</b>	0.30	1.10
<b>Connecticut</b>	0.30	1.50	<b>New York</b>	Average 0.62	
<b>Delaware</b>	0.25	2.00	<b>North Carolina</b>	0.05	0.38
<b>Florida</b>	0.20	0.55	<b>North Dakota</b>	0.45	1.69
<b>Georgia</b>	0	0	<b>Ohio</b>	0.21	1.23
<b>Hawaii</b>	0.50	2.50	<b>Oklahoma</b>	0.00	0.43
<b>Idaho</b>	n/a	n/a	<b>Oregon</b>	0.05	0.47
<b>Illinois</b>	0.30	2.25	<b>Pennsylvania</b>	0.19	0.42
<b>Indiana</b>	n/a	n/a	<b>Rhode Island</b>	n/a	n/a
<b>Iowa</b>	0.58	0.87	<b>South Carolina</b>	0.35	1.80
<b>Kansas</b>	0.25	3.00	<b>South Dakota</b>	0.25	0.25

techniques or industries that are scarce in Texas. For example, there are relatively few soap and detergent plants or flag manufacturers in the state. Or license plate factories.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> PRISON POL’Y INITIATIVE, *supra* note 24.

<b>Kentucky</b>	n/a	n/a	<b>Tennessee</b>	n/a	n/a
<b>Louisiana</b>	n/a	0.40	<b>Texas</b>	0	0
<b>Maine</b>	0.58	3.50	<b>Utah</b>	0.60	1.75
<b>Maryland</b>	0.20	0.82	<b>Vermont</b>	0.25	1.25
<b>Massachusetts</b>	n/a	n/a	<b>Virginia</b>	0.55	0.80
<b>Michigan</b>	n/a	n/a	<b>Washington</b>	0.70	2.70
<b>Minnesota</b>	0.50	2.00	<b>West Virginia</b>	n/a	n/a
<b>Mississippi</b>	0.20	1.30	<b>Wisconsin</b>	0.79	1.41
<b>Missouri</b>	0.30	1.25	<b>Wyoming</b>	0.50	1.20

The table above shows that on average, incarcerated people working for state-owned businesses earn between \$0.33 and \$1.41 per hour. This is around double what incarcerated workers performing regular prison housework make. However, merely 6% of incarcerated workers in state prisons earn this higher wage, which itself is a trivial amount compared to the federal minimum wage.<sup>43</sup>

#### E. Industry Work: Federal Prison Industries (“FPI” or UNICOR)

Under the federal prison system, prison industries are operated under Federal Prison Industries, Inc. (“FPI”). FPI, also known as UNICOR, is a corporation that is owned by the United States government and was established in 1934.<sup>44</sup> The creation of Federal Prison Industries in 1934 launched the modern era of using prison labor for private industry<sup>45</sup> at a time when private business did not previously have access to the prisoner workforce.<sup>46</sup> UNICOR’s stated mission is to “protect society, reduce crime, aid in the security of the nation’s prisons and decrease taxpayer burden by assisting inmates with developing vital skills necessary for successful reentry into society” and “reduce undesirable inmate idleness by providing a full-time work program for inmate populations.”<sup>47</sup> UNICOR oversees all

<sup>43</sup> *Id.*

<sup>44</sup> Fink, *supra* note 15, at 961.

<sup>45</sup> Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y.U. REV. L. & SOC. CHANGE 1, 14 (2019) (“The modern era of prison labor for private industry began in 1934, with the creation of the Federal Prison Industries (‘FPI’), also known as UNICOR.”).

<sup>46</sup> John Dewar Gleissner, *How to Create American Manufacturing Jobs*, 9 TENN. J.L. & POLY 166, 171 (2013) (“Private prison industries came to a screeching halt at the time of the Great Depression. The Hawes-Cooper Act of 1929, ‘[a]n Act to divest goods, wares and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases,’ took away the interstate commerce status of prison-made goods, allowing states to bar them from sale....Many states prohibited the sale of those goods.”).

<sup>47</sup> FISCAL YEAR 2021 ANNUAL MANAGEMENT REPORT, FEDERAL PRISON INDUS. 6 (2021), [https://www.unicor.gov/publications/reports/FY2021\\_AnnualMgmtReport.pdf](https://www.unicor.gov/publications/reports/FY2021_AnnualMgmtReport.pdf) [<https://perma.cc/UN6A-UQ6E>].

prison industries for the Federal Bureau of Prisons. UNICOR's annual report for fiscal year 2021 states that it "provides employment and training for inmates in the Federal Prison System while remaining self-sufficient through the sale of its products and services primarily to other federal departments, agencies, and bureaus."<sup>48</sup>

In 2021, UNICOR operated seven business segments: Agribusiness, Clothing,

Textiles, Electronics, Fleet, Office Furniture, Recycling, and Services. The company operated at sixty-three factories and two farms located across fifty-one prison facilities. UNICOR's top customers include other federal departments and agencies such as the Department of Defense (DOD), The Department of Homeland Security (DHS), and the Department of Justice (DOJ).<sup>49</sup> Total sales for the 2021 fiscal year amounted to \$404.1 million. In order to accomplish this, UNICOR employed a total of 16,315 inmates who were compensated between \$0.23 to \$1.15 per hour.<sup>50</sup> After making a fraction of minimum wage, inmates were then required to contribute half of their earnings towards court-ordered fines, victim restitution, incarceration fees, child support, or any other monetary judgments.<sup>51</sup>

#### F. Industry Work: Prison Industry Enhancement Certification Program (PIECP)

The sixth and final category of prison labor involves incarcerated individuals who are employed by private corporations via the Prison Industry Enhancement Certification Program (PIECP)<sup>52</sup>. PIECP is the sole medium through which private companies may receive permission to contract with prisons to access their inmate workforce. Though PIECP projects account for only a small fraction of the total inmate laborer population (at the end of 2020, PIECP projects employed 5,000 inmates),

<sup>48</sup> In UNICOR's annual report, as well as in the inmate handbook provided by the Federal Bureau of Prisons, inmate workers are consistently referred to as "employees." Despite the use of this terminology in the federal handbook, inmates who work for federal prisons are nonetheless not considered "employees" for the purposes of the Fair Labor Standards Act. *Id.* at I-1.

<sup>49</sup> UNICOR primarily sells its products to the federal government, so as to avoid unfair competition with private-sector companies. *Id.* ("Federal Prison Industries, Inc. (FPI) provides employment and training for inmates in the Federal Prison System while remaining self-sufficient through the sale of its products and services primarily to other federal departments, agencies, and bureaus."); see also Beth Schwartzapfel, *Modern-Day Slavery in America's Prison Workforce*, PRISON LEGAL NEWS (Sep. 9, 2014) [hereinafter Schwartzapfel, *Modern-Day Slavery*], <https://www.prisonlegalnews.org/news/2014/sep/19/modern-day-slavery-americas-prison-workforce> [https://perma.cc/PAN5-6H3N] ("UNICOR – sells products exclusively to the federal government, with the aim of minimizing competition with private-sector companies.").

<sup>50</sup> INMATE ADMISSION & ORIENTATION HANDBOOK, DEPT. OF JUST. & FED. BUREAU OF PRISONS 5 (2014) [https://www.bop.gov/locations/institutions/gre/GRE\\_fpc\\_aohandbook.pdf](https://www.bop.gov/locations/institutions/gre/GRE_fpc_aohandbook.pdf) [https://perma.cc/CB65-6APL].

<sup>51</sup> *Unicor Program Details*, FED. BUREAU OF PRISONS, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp) [https://perma.cc/3B9U-N5DV] (last visited Feb. 10, 2022) [hereinafter *Unicor Program Details*] ("The Inmate Financial Responsibility Program (IFRP) ensures that inmates who have financial obligations contribute 50% of their earnings.").

<sup>52</sup> *About PIECP*, NAT'L CORR. INDUS. ASS'N, <https://www.nationalcia.org/about-piecp> [https://perma.cc/R2QA-JRV8].

these job arrangements often garner the greatest media attention.<sup>53</sup> Victoria's Secret, Amazon, Wholefoods, and other private companies that used prison labor via PIECP have all drawn public scrutiny for their business practices.<sup>54</sup>

As a general rule, the Ashurst-Sumners Act, codified as 18 U.S.C. §1761(a), makes it unlawful to transport in interstate commerce, goods, wares, or merchandise produced by prison labor.<sup>55</sup> However, the Prison Industry Enhancement Certification Program, which was created by Congress in 1979<sup>56</sup> and codified under 18 U.S.C. §1761(c)(1), is an exception to the Act.<sup>57</sup> §1761(c)(1) provides that the Ashurst-Sumners Act will not apply to goods produced by inmates participating in "prison work pilot projects designated by the Director of the Bureau of Justice Assistance."<sup>58</sup> In other words, PIECP exempts certified departments of corrections from normal restrictions on the sale of offender-made goods in interstate commerce.<sup>59</sup>

Up to fifty jurisdictions around the country may be certified under PIECP. As of December 2020, forty-three states are certified to participate in the program.<sup>60</sup> Once states are certified, private industries can establish joint ventures with state departments of corrections to produce goods. In order to obtain certification, states have to satisfy certain criteria, including: workers have to be paid the prevailing wage (the Department of Labor defines prevailing wage as "the average wage paid to similarly employed workers in a specific occupation in the area of intended

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<sup>53</sup> For a full list of private companies that were contracted through PIECP in 2020, see PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM CERTIFICATION & COSTS ACCOUNTING CENTER LISTING, NAT'L CORR. INDUS. ASS'N (2020) [hereinafter *PIECP End of Quarter Statistics 2020*] [https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e\\_8d3b0797c98b469c831c436f5db359b4.pdf](https://df1d6e07-2d3a-49dd-bb43-170ddf635f64.usrfiles.com/ugd/df1d6e_8d3b0797c98b469c831c436f5db359b4.pdf) [<https://perma.cc/NN6R-FFTX>].

<sup>54</sup> See Emily Yahr, *Yes, Prisoners Used to Sew Lingerie for Victoria's Secret — Just Like in 'Orange is the New Black' Season 3*, WASHPOST (June 17, 2015), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2015/06/17/yes-prisoners-used-to-sew-lingerie-for-victorias-secret-just-like-in-orange-is-the-new-black-season-3> [<https://perma.cc/SR65-BA4A>] ("In 1995, the National Institute of Justice released a study that confirmed garment manufacturer Third Generation contracted sewing work in the early '90s to a prison through a deal with South Carolina Correctional Industries. Victoria's Secret, along with other companies, wound up buying the apparel through Third Generation — that were actually made by inmates at the Leath Correctional Facility in Greenwood.").

<sup>55</sup> Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified at 18 U.S.C. §1761(a)) ("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.").

<sup>56</sup> NAT'L CORR. INDUS. ASS'N, *supra* note 52.

<sup>57</sup> 18 U.S.C. §1761(c) (1) ("In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners wh1) are participating in—one of not more than 50 prison work pilot projects designated by the Director of the Bureau of Justice Assistance").

<sup>58</sup> *Id.*

<sup>59</sup> NAT'L CORR. INDUS. ASS'N, *supra* note 52.

<sup>60</sup> *PIECP End of Quarter Statistics 2020*, *supra* note 53.

employment,”<sup>61</sup> ” which is often higher than the federal minimum wage), inmate participation should be voluntary, the program should not result in the displacement of civilian workers employed in the community, and the state has to consult with local labor unions and private industry.<sup>62</sup> Congress created these provisions in order to protect free-world workers and avoid unfair market competition.<sup>63</sup> Despite these mandatory requirements under PIECP, many of these rules have been violated or ignored by prisons and corporations across the country.<sup>64</sup>

For example, only prisoners employed in production work are entitled to minimum or prevailing wages.<sup>65</sup> Some companies, driven by profit-motivated incentives, have evaded paying wages by classifying jobs as “service” rather than “production.”<sup>66</sup> One such example is the PIE program at the South Central Correctional Facility in Tennessee.<sup>67</sup> Prisoners working in the program produced T-shirts for corporate customers such as Taco Bell. While the prisoners who printed the shirts were classified as production workers and earned the minimum wage, those who packaged the shirts were classified as service workers and received \$0.50 per hour.<sup>68</sup> In addition to PIE minimum wage policies, evasion of other policies is also rampant, such as the requirement to consult with local labor organizations prior to setting up shop.<sup>69</sup> Private companies have routinely shirked their responsibilities and requirements under PIECP undetected. This shirking of PIECP requirements is easy to do because compliance with PIECP is overseen by the National Correctional

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<sup>61</sup> *Prevailing Wage Information And Resources*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/eta/foreign-labor/wages> [<https://perma.cc/B3V5-RV2D>] (last visited November 23, 2022).

<sup>62</sup> For a full list of certification criteria, see PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM, BUREAU OF JUST. ASSISTANCE 5 (2018), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief\\_2018.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf) [<https://perma.cc/8HGP-M7PS>].

<sup>63</sup> See Sloan, *supra* note 17 (“The reasoning behind these stipulations, . . . was to allow competition between prison industries and private sector manufacturers. . . . By making the requirements mandatory, Congress believed they could ensure that prison industries were competitive with free-world businesses without giving either an unfair advantage.”).

<sup>64</sup> *Id.* (“There have been many examples of profiteering at the expense of regulatory compliance – such as with the current meltdown on Wall Street, the Enron and WorldCom scandals, and ponzi schemes like that of Bernie Madoff (which brought down the JEHT Foundation, a major funder of criminal justice programs).”).

<sup>65</sup> *Id.* (“Further, prisoners who participate in PIE programs are only entitled to receive minimum or prevailing wages if they are engaged in production work.”).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* (“In 2006, Texas Correctional Industries partnered with a private company in a prison industry program that manufactured flatbed trailers at the Michael Unit in Tennessee Colony. The private sector PIECP partner was Direct Trailer and Equipment Company (DTEC), owned by a former Texas prison employee. The Texas Private Sector Prison Industries Oversight Authority had failed to contact local organized labor groups prior to authorizing the operation. They also failed to contact Lufkin Industries or Bright Coop – Texas-based companies that manufactured the same type of trailers as DTEC . . . . Texas lawmakers, concerned over the loss of jobs . . . quickly got involved. They discovered that failures by the state’s Private Sector Prison Industries Oversight Authority had led to unfair competition – including prisoners being paid minimum wage with no employee benefits, and DTEC being allowed to lease the industry facility at the Michael Unit for \$1.00 a year.”)

Industries Association (NCIA).<sup>70</sup> This is significant because the NCIA is headed by the very same people that run the PIECP programs. Members of the NCIA mainly consist of administrators and employees of state prison industry programs and the corresponding private companies. NCIA members therefore have no incentive to hold their own companies and industries accountable.<sup>71</sup>

Due to the lack of meaningful oversight by the NCIA, companies move to evade the PIECP requirements. Moreover, under federal law, up to 80 percent paychecks of PIE employees may be deducted for room and board, taxes, family support, and victims' funds.<sup>72</sup> NCIA found that employees kept only 20% of their wages.<sup>73</sup> As put into words by Paul Wright—founder of Prison Legal News and formerly incarcerated individual—“So while businesses get rent-free space, prisoners are paying for their 'room and board.’”<sup>74</sup> Despite these downfalls and even after accounting for deductions, PIECP offers some of the highest-paying jobs available to inmates and tend to be highly coveted. Yet only a small percentage of incarcerated workers actually benefit: PIECP workers form less than 1% of the working prison population.<sup>75</sup>

An interesting point to note is that PIE programs are heavily opposed by labor groups as well, in addition to social justice advocates and carceral abolitionists. Unpaid or forced prison labor in general has historically been resisted and disliked by labor unions due to concerns over unfair competition.<sup>76</sup> These concerns are not unfounded. PIECP programs have indeed caused real-world job losses. One example is that of Talon Industries in Washington state, which specializes in water jet technologies.<sup>77</sup> In 1999, the company was forced to lay off twenty-three employees and went out of business due to competition from Microjet—a contractor that

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<sup>70</sup> *Id.* (The Bureau of Justice Assistance (BJA) outsourced the management of PIECP programs to the NCIA in 1995).

<sup>71</sup> *Id.* (“The association’s board of directors is almost exclusively composed of prison industry officials . . . . NCIA includes the very PIECP participants that it is charged with monitoring; in effect, it is overseeing itself”).

<sup>72</sup> 18 U.S.C § 1761(c)(2) (“[S]uch wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows . . . .”); see also *Texas Annual Review FY 2020*, *supra* note 38 (By way of example, during the 2020 Fiscal Year in Texas correctional facilities, PIE participants earned “\$730,830 and contributed \$79,741 in federal taxes, \$73,084 to crime victims’ compensation, \$5,515 to restitution, \$73,962 for family support, and \$358,900 to room and board.”).

<sup>73</sup> Beth Schwartzapfel, *Your Valentine, Made in Prison*, INT’L LAB. RTS. F. (Feb. 12, 2009) [hereinafter Schwartzapfel, *Prison Valentine*], <https://laborrights.org/in-the-news/your-valentine-made-prison> [<https://perma.cc/3E72-H82A>] (“The National Correctional Industries Association, the nonprofit organization that certifies PIE programs, found that participants kept only about 20 percent of their wages in the past two quarters.”).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (“The waiting list for work at Joint Venture is up to 200 people long.”).

<sup>76</sup> See AM. FED’N OF LAB. AND CONG. OF INDUS. ORG., *The Exploitation of Prison Labor* (May 8, 1997), <https://aflcio.org/about/leadership/statements/exploitation-prison-labor> [<https://perma.cc/3CZP-DFFE>] (announcing the ACL-CIO’s opposition to “the widespread use of prison labor throughout the public and private sectors in the United States in unfair competition with free labor.”).

<sup>77</sup> Sloan, *supra* note 17 (“Also in Washington state, Talon Industries, a company that used water jet technology, was forced out of business in 1999 and had to lay off 23 employees due to competition from MicroJet, a private sector PIECP partner at the Monroe Corrections Center.”).



produced airplane parts for Boeing—which operated a PIECP program at the Monroe Corrections Center.<sup>78</sup>

## II. THE CIRCUIT SPLIT ON PRISON LABOR AND THE FAIR LABOR STANDARDS ACT

Having reviewed the six main forms of prison labor in the U.S. in Part I, Part II will now discuss the Fair Labor Standards Act in detail and discuss how the various circuit courts have come out in deciding whether or not incarcerated workers may be entitled to the federal minimum wage.

### A. Background on the Fair Labor Standards Act

The Fair Labor Standards Act establishes minimum wage, maximum hours prior to overtime pay, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.<sup>79</sup> Today, the federal minimum wage is set at \$7.25, and the maximum hours of work, at regular pay, are capped at forty.<sup>80</sup> The FLSA also provides that in cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher of the two.<sup>81</sup>

Congress enacted the FLSA near the end of the Great Depression in 1938 with the stated purpose of eliminating “as rapidly as practicable” the existence “in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>82</sup> Congress found that these labor conditions burdened the free flow and goods in commerce, resulted in unfair competition, and led to labor disputes and strikes which further obstructed the free flow of goods in commerce.

The minimum wage mandate and overtime provisions of the FLSA are afforded to those workers who count as “employees” as defined by the statute.<sup>83</sup> Since its passage, the Act has undergone various amendments, where Congress has broadened the coverage of the FLSA to those employees who were not previously included. The largest expansion of FLSA coverage occurred in 1974, when Congress expanded the FLSA to cover all state and local government employees.<sup>84</sup> Congress has also passed amendments that exempt certain classes of employees from coverage, such

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<sup>78</sup> *Id.*

<sup>79</sup> See U.S. DEP’T OF LAB., *Wages and Fair Labor Standards Act*, <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/U7AC-NAPP>] (last visited May 30, 2023).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 29 U.S.C. § 202(a) (2000).

<sup>83</sup> See 29 U.S.C. § 203(e) (2000) (statutory definition of “employee”); see also 29 U.S.C. § 206 (2000) (minimum wage provision).

<sup>84</sup> See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 59–60 (codified as 29 U.S.C. § 203). The amendment was initially found unconstitutional by the Supreme Court in *Int’l League of Cities v. Usery*, 426 U.S. 833 (1976) which was later overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545–557 (1985) (ruling that states are not immune from minimum wage and overtime requirements of the Fair Labor Standards Act because there was nothing in those requirements that infringed upon state sovereignty or violated any constitutional provision).

as school teachers, full-time students, or part-time babysitters.<sup>85</sup> Prison laborers, however, are not mentioned anywhere in the full text of the FLSA. In no subsequent amendment has Congress addressed incarcerated workers, either exempting or extending them coverage.<sup>86</sup> Furthermore, in no other significant employment statute are prisoners explicitly excluded from the definition of “employee.”<sup>87</sup>

The Supreme Court has declined the opportunity to rule on the matter, leaving the various circuit courts free to conflict with one another over the legal standards to be used. No court has yet gone as far to rule that prisoners are *per se* excluded from the category of “employee” within the meaning of the FLSA. Instead, the circuit courts have applied rather arbitrary dichotomies, varying interpretations of congressional intent, and diverging tests aimed at ascertaining the “economic reality” of the inmate to decide the issue of coverage on a case-by-case basis. The following sections will provide an overview of the existing circuit court decisions and an analysis of the various axes along which the issue of coverage versus non-coverage has been decided.

#### B. Introducing the Circuit Split: The Rise of the Bonnette Factors

The FLSA defines the term “employee” as “any individual employed by an employer.”<sup>88</sup> To “employ” is defined as “to suffer or permit to work.”<sup>89</sup> “Employer” means “any person acting directly or indirectly in the interest of an employer in relation to an employee . . . .”<sup>90</sup> Unsurprisingly, the circuit court decisions, which will be discussed below, exhibit ambiguity and confusion due to the little interpretive guidance these definitions provide. In *Goldberg v. Whitaker House Co-op., Inc.*, the Supreme Court clarified that the test for employment rests on the “economic reality” of the employment relationship for the purposes of the FLSA.<sup>91</sup> The Court has further stated that this “economic reality” test should be applied, “with the totality of the circumstances of the economic reality in mind.”<sup>92</sup>

In 1983, the Ninth Circuit formulated its own “economic reality” test in *Bonnette v. California Health & Welfare Agency*.<sup>93</sup> *Bonnette* identified the following factors: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the

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<sup>85</sup> See 29 U.S.C. § 213(a) (2002) (exempting school teachers, outdoor salesmen, part-time babysitters); see also 29 U.S.C. § 214(a) (2002) (exempting “learners, apprentices, messengers”).

<sup>86</sup> Lang, *supra* note 20, at 194 (“Not surprisingly, the generic nature of these definitions has rendered them unhelpful to courts looking for guidance in determining whether prisoner workers are ‘employees’ [under FLSA].”).

<sup>87</sup> Zatz, *supra* note 22, at 875 (“Shifting focus from control to exclusions would accomplish little, however, because neither the FLSA nor any other major employment statute specifically excludes prisoners from the ‘employee’ category.”).

<sup>88</sup> 29 U.S.C. § 203(e)(1) (2000).

<sup>89</sup> 29 U.S.C. § 203(g) (2000).

<sup>90</sup> 29 U.S.C. § 203(d) (2000).

<sup>91</sup> *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (“[T]he ‘economic reality’ rather than ‘technical conce[pts]’ is to be the test of employment”) (citations omitted).

<sup>92</sup> Lang, *supra* note 20 at 197 (characterizing *Goldberg*, 366 U.S. at 33 and *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 722 (1947)).

<sup>93</sup> *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

rate and method of payment, and (4) maintained employment records.”<sup>94</sup> Additionally, the determination of whether an employer-employee relationship exists does not depend on “isolated factors but rather upon the circumstances of the whole activity.”<sup>95</sup> Shortly after *Bonnette* was decided, other circuits adopted these factors as well.

In 1983, the Second Circuit marked a turning point in the history of FLSA claims brought by prisoners when it decided *Carter v. Dutchess Community College*.<sup>96</sup> By applying the *Bonnette* factor test, *Carter* became the first federal case to be decided in favor of the inmate worker. Louis Carter was an incarcerated individual at Fishkill Correctional Facility in New York. While at FCF, he was selected to work for Dutchess Community College (DCC), which offered college-level courses to inmates at Fishkill. DCC hired Carter to work as a teaching assistant and conduct twenty classes which were all held within the prison compound. For this work, Carter was compensated at \$1.20/hour. Carter filed suit, complaining that he was not compensated the federal minimum wage (at the time \$3.10), in violation of the FLSA.<sup>97</sup> The district court granted summary judgment to the defendants, finding that no employment relationship existed between the inmate and the DCC (a private entity) because “ultimate control” over the inmates rested with the prison and not DCC.<sup>98</sup> The Second Circuit Court of Appeals reversed and remanded the ruling, stating that “the practical effect of the district court’s decision is an absolute preclusion of FLSA coverage for prisoners.”<sup>99</sup> The Second Circuit rejected the argument that in order to find an employer-employee relationship, the employing entity must have “ultimate control” over the worker, and found this framework to be inconsistent with Supreme Court precedent.<sup>100</sup> Instead, the Second Circuit held that a fact-intensive and case-by-case inquiry into the economic reality was necessary.<sup>101</sup> In its application of the *Bonnette* factors, the court stated that DCC may have exercised a sufficient number

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<sup>94</sup> *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (citing *Bonnette*, 704 F.2d 1465 at 1470).

<sup>95</sup> See *Bonnette*, 704 F.2d at 1469 (quoting *McComb*, 331 U.S. at 730).

<sup>96</sup> See *Carter*, 735 F.2d at 12.

<sup>97</sup> *Id.* at 10.

<sup>98</sup> *Id.* at 12 (The District Court’s distinction between “qualified control” and “ultimate control” followed prior case law); see *Alexander v. Sara, Inc.*, 559 F. Supp. 42, 44 (M.D.La. 1983), *aff’d*, 721 F.2d 149, 149 (5th Cir. 1983) (holding that incarcerated individuals are not within the coverage of the Fair Labor Standards Act); see also *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 786—787 (E.D. Mich. 1971) (holding that incarcerated individuals were not employees within the meaning of federal or state minimum wage laws); see also *Huntley v. Gunn Furniture Co.*, 79 F. Supp. 110, 116 (W.D. Mich. 1948) (ruling that incarcerated plaintiffs failed to show that they qualified as employees under the definition of the Fair Labor Standards Act).

<sup>99</sup> *Carter*, 735 F.2d, at 12.

<sup>100</sup> *Id.* at 12—13 (In its opinion, the 2nd Circuit found this argument to run “counter to the breadth of the statute and to the Congressional intent.” (citing *Falk v. Brennan*, 414 U.S. 190 (1973) (finding that a real estate management partnership, for the purposes of the minimum wage mandate of the FLSA, was an employer of maintenance workers since it hired and supervised the workers and thus exercised substantial control over the workers, even though these workers were at all times considered employees of the owners of the apartment buildings)).

<sup>101</sup> *Carter*, 735 F.2d, at 13.

of employer prerogatives over the inmate worker to warrant FLSA coverage and overturned the district court's grant of summary judgment.<sup>102</sup>

Importantly, in its opinion, the Second Circuit also noted that the category of prisoners is not included in the "extensive" list of workers who are expressly exempted from FLSA coverage.<sup>103</sup> The court took this as an indication that Congress had not intended to automatically exclude prison laborers from coverage. The opinion stated "[i]t would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act."<sup>104</sup> The court in *Carter* was among the first to promulgate this "workers not exempted" justification for extending coverage to prison laborers.

This position was supported by the Eleventh Circuit in *Patel v. Quality Inn South*, where the court argued that the framework of the FLSA "strongly suggests that Congress intended an all-encompassing definition of the term 'employee' that would include all workers not specifically excepted."<sup>105</sup> The Supreme Court also supported this notion in *Powell v. U.S. Cartridge Co.*, where it stated that the specificity of the exemptions laid out in the FLSA "strengthens the implication that employees not thus exempted...remain within the Act."<sup>106</sup>

The Fifth Circuit also followed *Carter* in its decision in *Watson v. Graves* when it held that inmates who were not sentenced to hard labor and were working for a private construction business as part of a work release program were "employees" of that business for the purposes of the FLSA and entitled to minimum wage.<sup>107</sup> While the Second Circuit simply remanded the case for further proceedings, the Fifth Circuit went a step further and rendered a decision on the ultimate issue, becoming the first circuit to extend FLSA coverage to prisoners.<sup>108</sup>

The Fifth Circuit, while purporting to use the four factor *Bonnette* test, decided the case by considering additional factors like unfair competition and seemed to follow a totality-of-the-circumstances approach.<sup>109</sup> In coming to its conclusion, the court noted that the private company had "*de facto*" power over hiring and firing and controlled the inmate's work schedules.<sup>110</sup> However, the prison technically set the pay

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<sup>102</sup> *Id.* at 15 ("DCC made the initial proposal to 'employ' workers; suggested a wage as to which there was 'no legal impediment'; developed eligibility criteria...was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account.").

<sup>103</sup> *Id.* at 13 (citing 29 U.S.C. § 213 (1982)).

<sup>104</sup> *Id.*; see also *Id.* at 12 (The Second Circuit added that "[t]he statute is a remedial one, written in the broadest possible terms so that the minimum wage provisions would have the widest possible impact in the national economy.").

<sup>105</sup> *Patel v. Quality Inn South*, 846 F.2d 700, 702 (C.A.11 (Ala.), 1988)

<sup>106</sup> *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950).

<sup>107</sup> *Watson v. Graves*, 909 F.2d 1549, 1550 (5th Cir. 1990).

<sup>108</sup> *Lang*, *supra* note 20, at 200.

<sup>109</sup> See e.g. *Danneskjold v. Hausrath*, 82 F.3d 37, 41 (2d Cir. 1996) (explaining the 5th Circuit's divergence from the 4 factor test); see also *Zatz*, *supra* note 22, at 874 ("[Watson] emphasized the economic significance of inmate labor to the contractor and the local construction industry by virtue of the la'or's competitive impact").

<sup>110</sup> See *Watson*, 909 F.2d at 1555.

rate for inmates, and neither the private company nor the prison maintained any employment records. Furthermore, the Warden of the prison could technically overrule hiring decisions. The court held that these facts “do not preclude application of the FLSA...when we analyze the economic realities of the Inmate’s employment in light of the policies behind FLSA.”<sup>111</sup> Diverging from the Second Circuit, the court in *Watson* went beyond the four factor test and held that the inmate workers gave the employer an economic advantage and that by evading minimum wage requirements, the company was unfairly competing with other construction contractors in the area.<sup>112</sup> In support of its decision, the court stated, “we must also look to the substantive realities of the relationship, not to mere forms or labels ascribed to the laborer by those who would avoid coverage.”<sup>113</sup> Additionally, the Fifth Circuit Court has also found persuasive the supporting argument that prisoners are not expressly exempted from coverage under the FLSA.<sup>114</sup>

### C. Introducing the Circuit Split: The Fall of the Bonnette Factors

After the decisions *Carter* and *Watson*, Circuit courts began to roll back their use of the *Bonnette* test in the context of prison laborer FLSA claims—perhaps in response to, or in fear of, how favorable the factor test was turning out to be towards inmate workers.<sup>115</sup> The first blow came in 1991 when the Ninth Circuit decided *Gilbreath v. Cutter Biological, Inc.*<sup>116</sup> In *Gilbreath*, with facts similar to those of *Watson*, inmate workers brought suit against both Arizona Correctional Enterprises (ARCOR), a part of Arizona Department of Corrections, and Cutter, a private corporation that ran a plasma treatment center on-site at the prison in order to recover minimum wage. The court found that prisoners working within the prison for the private plasma treatment center were not “employees” within the meaning of the FLSA. In doing so, *Gilbreath* refused to apply the *Bonnette* factors. Instead, the court hinged its decision on the proposition that neither the DOC nor Cutter, individually or jointly, met the statutory definition of an employer as per the Act. *Gilbreath* also focused on the fact that “[t]he inmate assistants were not on a work release program, did not work off premises and were not free not to work,”<sup>117</sup> and that there was no evidence that the State defendants had a pecuniary rather than a

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* (“Jarreau incurred no expense for overtime, unemployment insurance, social security, worker’s compensation insurance, or other employee benefit plans because he had no ‘employees.’”).

<sup>113</sup> *Id.* at 1554.

<sup>114</sup> *Id.* (“Furthermore, the category of prison inmate is not one of the groups Congress expressly excluded from coverage by FLSA. For the court to exempt an entire class of workers on the basis of a technical label could upset the desired equilibrium in the work place.”) (internal citation omitted).

<sup>115</sup> After *Carter* and *Watson*, the Ninth Circuit decided *Hale v. Arizona*, 967 F.2d 1356 (9th Cir. 1992) [hereinafter *Hale (I)*], wherein the Circuit Court applied the *Bonnette* factors and extended FLSA coverage to prisoners who were working for the state to make produce goods in the prison that would be sold outside of the prison. *Hale v. Arizona* had the potential to be a landmark ruling however it was later reversed en banc upon a re-hearing. See *Hale v. State of Arizona*, 993 F.2d 1387 (9th Cir. 1993) [hereinafter *Hale (II)*].

<sup>116</sup> *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991).

<sup>117</sup> *Id.* at 1331; see also ARIZ. REV. STAT. ANN § 31-251(a) (2018) (Under Arizona State law, prisoners are required to “engage in hard labor for not less than forty hours per week.”).

penological interest in the inmates' labor.<sup>118</sup> This section of reasoning suggests that the Ninth Circuit was placing greater weight on whether the labor was performed on or off the prison premises, and whether or not the inmates were subject to mandatory labor requirements.

After *Gilbreath*, the Seventh Circuit decided *Vanskike v. Peters*, and held that a prisoner performing prison housework (such as working in the kitchen or as a janitor) was not entitled to minimum wage under the FLSA.<sup>119</sup> The *Vanskike* opinion greatly undermined efforts to extend FLSA protections to incarcerated workers.<sup>120</sup> Daniel Vanskike, an inmate at the Stateville Correctional Center in Illinois, filed a *pro se* complaint alleging that he performed "forced labor," including kitchen and janitorial work while incarcerated, and the Department of Corrections failed to compensate him minimum wage. In coming to its conclusion, the Seventh Circuit declined to apply *Bonnette's* four-factor standard. In its reasoning the court stated that, if literally applied to Vanskike's situation, all four *Bonnette* factors may be satisfied by the DOC.<sup>121</sup> However, the "*Bonnette* factors fail to capture the true nature of the relationship for . . . they presuppose a free labor situation."<sup>122</sup>

The Seventh Circuit reasoned that the DOC's "control" over Vanskike stemmed from his incarceration itself, rather than any bargained-for exchange of labor for consideration. While the *Bonnette* factors focus on the degree of control the employer exercises over the employed, "the problematic point is that there is *too much* control to classify the [prison-inmate] relationship as one of employment."<sup>123</sup> Rather than using any criteria for employment, or judicially appraisable factors, the Seventh Circuit in remarkably circular logic focused only on Vanskike's status as an inmate. The court, in its footnotes, went on to reject the argument that workers not specifically exempt come within the scope of the Act, because this argument "assumes that prisoners plainly come within the meaning of the term 'employees.'"<sup>124</sup> In doing so, it disagreed with the Second and Fifth Circuit's prior interpretation of congressional intent.

*Vanskike* proved to be a seminal case within the field of prisoner FLSA litigation. Virtually all decisions afterwards ruled against inmate workers, often relying on the Seventh Circuit opinion. Many of these courts have refused to apply the "economic reality" test or rejected application of the *Bonnette* factors.<sup>125</sup>

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<sup>118</sup> *Gilbreath*, 931 F.2d at 1331.

<sup>119</sup> *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992) ("We do not question the conclusions of *Carter, Watson* and [*Hale (I)*] that prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners. We must nevertheless reject Vanskike's contention that he is an 'employee' for purposes of the FLSA...").

<sup>120</sup> *Id.* at 806.

<sup>121</sup> *Id.* at 809.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 810.

<sup>124</sup> *Vanskike*, 974 F.2 at 807 n.2.

<sup>125</sup> See *Gambetta v. Prison Rehab. Indus. & Diversified Enter., Inc.*, 112 F.3d 1119, 1224 (11th Cir. 1997) (holding that inmates working for state prison industries are not covered by the FLSA); see also *Franks v. Okla. State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993) (affirming dismissal of prisoner's FLSA claim because "the economic reality test was not

One such case that was decided post-*Vanskike* was the 1993 case of *Hale v. State of Arizona*.<sup>126</sup> In a rehearing en banc, the Ninth Circuit ruled that prisoners who were working for state prison industries (in this case, ARCOR Enterprises, an arm of the Arizona Department of Corrections) and were required to work under state law were not employees of the prison for the purposes of the FLSA. The Ninth Circuit rejected the *Bonnette* factors test, which, the court itself had created. The opinion stated “regardless of how the *Bonnette* factors balance, we join the Seventh Circuit in holding that they are not a useful framework in the case of prisoners who work for a prison-structured program because they have to.”<sup>127</sup> The court held that the *Bonnette* factors assumed a free labor situation which did not apply to the prisoner context, and that the relationship between the prison and prison laborer is penological rather than pecuniary.<sup>128</sup>

As illustrated above, even within the same circuit, the existing opinions are inconsistent on whether to apply the *Bonnette* “economic reality” test, when to apply it, and how to apply it.<sup>129</sup> The result has been an arbitrary patchwork of federal caselaw on an issue that affects civil and constitutional rights of around 1.4 million American citizens currently held in state and federal prisons.

In deciding whether or not to apply the *Bonnette* factor test, the cases discussed above have considered a variety of factors and bright-line rules. Put into broad categories, the Circuit Courts have looked at congressional intent by looking to both the stated purpose of the FLSA and the Ashurst-Sumners Act, whether the labor was voluntary or compelled, and whether the work was done inside or outside the prison walls. Part III will discuss these cases in further detail and argue that congressional

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intended to apply to work performed in the prison by a prison inmate.”); *McMaster v. Minn.*, 30 F.3d 976, 980 (8<sup>th</sup> Cir. 1994) (“plaintiffs, who are required to work as part of their sentences and perform labor within a correctional facility as part of a state-run prison industries program are not ‘employees’ of the state or prison within the meaning of the Fair Labor Standards Act.”); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5<sup>th</sup> Cir. 1996) (“We find that the ‘economic reality’ test, which is cast as a ‘control’ question designed to identify the responsible employer in a free-world work environment, is unserviceable, and consequently inapplicable, in the jailer-inmate context.”); *Danneskjold*, 82 F.3d at 41 (finding that prison labor that produces goods or services for institutional needs of prison is not subject to FLSA and rejecting use of the *Bonnette* factors in the prison labor context); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4<sup>th</sup> Cir. 1993) (ruling that the Fair Labor Standards Act does not apply to prison inmates performing work at a prison workshop within the penal facility as part of rehabilitative program); *Loving v. Johnson*, 455 F.3d 562, 563 (5<sup>th</sup> Cir. 2006) (in the case of an inmate working in the prison laundry, held a prisoner doing work in or for the prison is not an “employee” under the FLSA); *Bennett v. Frank*, 395 F.3d 409, 410 (7<sup>th</sup> Cir. 2005) (holding that minimum wage provision of FLSA did not apply to inmates of private prison).

<sup>126</sup> See generally *Hale (II)* at 1393 (The question the court approached is “whether inmates working for a prison, in a program structured by the prison pursuant to state law requiring prisoners to work at hard labor, are ‘employees’ of the prison within the meaning of the FLSA.”).

<sup>127</sup> *Id.* at 1394.

<sup>128</sup> *Id.* at 1394–1395.

<sup>129</sup> This is in part due to the numerous categories of prison labor which were discussed in Part I of this paper. Not every Circuit Court has had the chance to consider all six categories of prison work.

intent points in favor of extending coverage to inmate workers. Part III will also argue that distinctions such as voluntary vs. compelled and inside vs. outside constitute arbitrary and formalistic dichotomies that should be abandoned by the Supreme Court in resolving this split. Finally, Part IV will propose a new “economic reality” test for the Court to adopt in the prison labor context.

### III. HOW THE SUPREME COURT SHOULD INTERPRET CONGRESSIONAL INTENT

#### A. Congressional Intent & The Purpose of the FLSA

In order to determine congressional intent, the Circuit Courts have gone back to the stated purpose of the FLSA. In particular, courts have interpreted the following two goals to be the main purposes of the Act: (1) The “maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” and (2) eliminating “unfair method[s] of competition in commerce.”<sup>130</sup> The following paragraphs will discuss these goals in turn and argue that these two stated purposes of the FLSA should lead the Supreme Court to take a stance on the circuit split in favor of incarcerated workers. This section will then introduce a third goal which has so far been overlooked— that of preventing labor strikes— and argue that this purpose too points in favor of extending FLSA coverage to incarcerated workers.

##### 1. Goal 1: Ensure Minimum Standards of Living

With respect to the first goal, the Circuit Courts that have addressed the argument have all found it inapplicable to the prison worker context. The living standards argument—which the Second Circuit rejected in *Carter*—contends that the FLSA does not apply to prisoners because their living conditions are determined by state policy and thus “have no need for bargaining strength since their right to work in the first place is a matter of legislative grace.”<sup>131</sup> For example, the Ninth Circuit in *Hale (II)*, the opinion stated “we agree with Arizona that the problem of substandard living conditions, which is the primary concern of the FLSA, does not apply to prisoners, for whom clothing, shelter, and food are provided by the prison.”<sup>132</sup> Similarly the Seventh Circuit in *Vanskike*, wrote “the payment of minimum wage for a prisoner’s work in prison would not further the policy of ensuring a ‘minimum standard of living’ and that “[p]risoners’ basic needs are met in prison, irrespective of their ability to pay.”<sup>133</sup>

The Supreme Court must recognize that this argument is incomplete because it presumes that incarcerated individuals will not

<sup>130</sup> 29 U.S.C. § 202(a) (2000).

<sup>131</sup> *Carter*, 735 F.2d at 13 (Though the court recognized the “surface appeal of this logic,” it explicitly rejected it, finding that it was not dispositive.).

<sup>132</sup> *Hale (II)* at 1396.

<sup>133</sup> *Vanskike*, 974 F.2d at 810; *see also* *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5<sup>th</sup> Cir. 1983) (holding that the labor of inmates sentenced to hard labor belongs to the institution, so there is no need to protect “the standard of living and general well-being of the worker in American industry”); *Miller v. Dukakis*, 961 F.2d 7, 9 (1<sup>st</sup> Cir. 1992) (holding that “prisoners, are cared for (and their standard of living is determined, within constitutional limits) by the state.”).



someday reenter the labor force. According to a 2020 report published by the Brennan Center for Justice,<sup>134</sup> formerly incarcerated individuals earn approximately \$6,700 annually, while their similarly situated peers earn approximately \$13,800.<sup>135</sup> At the time of the report, there were an estimated 7.7 million formerly incarcerated individuals alive in the U.S. The report calculated that when applying the “average earnings penalty,” formerly incarcerated individuals lose out on around \$55.2 billion annually.<sup>136</sup> Upon release, formerly incarcerated people struggle to achieve “minimum standards of living” due to institutional barriers to employment, housing, and government benefits.<sup>137</sup> Coupled with the existing data on the positive correlation between poverty and crime,<sup>138</sup> incarceration only leads to further impoverishment which significantly reduces the chances of successful reintegration and increasing the chances of ending back up in prison, once again using taxpayer money to incarcerate the same offenders.

A second important consideration is that contrary to the Seventh Circuit’s position in *Vanskike*, the basic needs of inmate workers are often *not* met in prison and *do* depend on their ability to pay. Wages earned by inmate workers are generally placed in inmate trust funds or go directly to their commissary accounts.<sup>139</sup> Inmates across states rely on these funds to purchase basic requirements such as food, clothing, medicine, and hygiene products from the commissary that are not otherwise adequately provided by the prison. In a 2018 report on commissaries, the Prison Policy Initiative noted that commissaries “present yet another opportunity for prisons to shift the costs of incarceration to incarcerated people and their families, often enriching private companies in the process.”<sup>140</sup> By examining data from commissaries in Illinois, Washington, and Massachusetts, the report

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<sup>134</sup> TERRY-ANN CRAIGIE ET AL., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY (2020) <https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal> [https://perma.cc/MZ46-PYTU].

<sup>135</sup> *Id.* at 14.

<sup>136</sup> *Id.* at 15; *see also id.* at 6 (“These earnings losses worsen economic disparities between Black, Latino, and white communities. White people who have a prison record see their earnings trend upwards, while formerly imprisoned Black and Latino people experience a relatively flat earnings trajectory. Because Black and Latino people are also overrepresented in the criminal justice system, these economic effects are concentrated in their communities and exacerbate the racial wealth gap.”).

<sup>137</sup> *See id.* at 4 (“This report demonstrates that more people than previously believed have been caught up in the system, and it quantifies the enormous financial loss they sustain as a result; those who spend time in prison miss out on more than half the future income they might otherwise have earned.”); *see also id.* at 13 (“As explored in more detail below, some jobs require occupational licenses, and thousands of rules limit access to licenses for people with a criminal record. . . . According to one 2018 survey, 95 percent of employers conduct some form of background check on job candidates. . . . [A]pplicants with a criminal record are around 50 percent less likely to receive a call-back interview, depriving them of even the chance to explain their history.”).

<sup>138</sup> Bernadette Rabuy & Daniel Kopf, *Prisons Of Poverty: Uncovering The Pre-Incarceration Incomes Of The Imprisoned*, PRISON POLY INITIATIVE (July 9, 2015) <https://www.prisonpolicy.org/reports/income.html> [https://perma.cc/A9YH-Y7VX] (“[I]n 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.”).

<sup>139</sup> *See* Stephen Rahe, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POLY INITIATIVE (May 2018) <https://www.prisonpolicy.org/reports/commissary.html> [https://perma.cc/WG5Q-E8YP].

<sup>140</sup> *Id.*

found that food and hygiene products made up the bulk of purchases by inmates.<sup>141</sup>

Lastly, providing or withholding minimum wage from incarcerated workers directly impacts the standards of living of free-world citizens and workers alike. Incarcerated workers are not completely cut off from their families and communities. One of the biggest impacts of incarceration on families is the loss of financial support. When more than one in four black men—including fathers—are estimated to be incarcerated at least once over their lifetime<sup>142</sup>, the effects of incarceration tear through families<sup>143</sup>, and whole communities. Poverty is thus allowed to spread laterally as community members lose the ability to support one another, dampening economic wellbeing overall for societies far beyond the prison walls.

## 2. Goal 2: Eliminating Unfair Competition

Circuits have been more divided on whether concerns of “unfair competition” as outlined in the FLSA are applicable to prisoners. The *Vanskike* court recognized that “it cannot be denied . . . the unfair competition rationale, broadly conceived, triggers some concerns in the context of prison labor.”<sup>144</sup> The court noted, perceptively, that the unfair competition rationale would extend beyond the production of goods and to services such as janitorial or kitchen work, “For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job . . . .”<sup>145</sup> The court feared that taken to its logical conclusion, this approach to the FLSA’s second purpose would require that all prisoners be paid minimum wages for *any* work done in prison. This result, it concluded, could not have been contemplated by Congress.<sup>146</sup> In contrast, in *Carter*, the court determined that minimum wage protections were important to

<sup>141</sup> *Id.* (“In FY 2016, people in Massachusetts prisons purchased over 245,000 bars of soap, at a total cost of \$215,057. That means individuals paid an average of \$22 each for soap that year, even though DOC policy supposedly entitles them to one free bar of soap per week. Or to take a different example: the commissary sold 139 tubes of antifungal cream.”). Moreover, prison commissaries often sell goods for far higher prices than they would be sold for in the outside world. *See* Cao, *supra* note 45, at 20–21 (stating that “[p]rison vendor companies provide exorbitantly priced goods and services to prisons, including basic food items like cereal and canned soup sold for five times its free world retail price.”).

<sup>142</sup> *See* THOMAS P. BONCZAR & ALLEN J. BECK, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, BUREAU OF JUST. STAT. 3 (Mar. 1997) <https://bjs.ojp.gov/content/pub/pdf/Llgsfp.pdf> [<https://perma.cc/G4RG-352X>] (“An estimated 28.5% of black men, 16.0% of Hispanic men, and 4.4% of white men are expected to serve a State or Federal prison sentence. In general, women have lower lifetime chances of incarceration than men; however, black women (3.6%) have nearly the same chance as white men (4.4%) of serving time in prison . . . .”).

<sup>143</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN, BUREAU OF JUST. STAT. (Aug. 1, 2009) <https://static.prisonpolicy.org/scans/bjs/pptmc.pdf> [<https://perma.cc/N8MR-EX3R>] (“Parents held in the nation’s prisons—52% of state inmates and 63% of federal inmates—reported having an estimated 1,706,600 minor children, accounting for 2.3% of the U.S. resident population under age 18.”).

<sup>144</sup> *Vanskike*, 974 F.2d at 812.

<sup>145</sup> *Id.* at 811.

<sup>146</sup> *See id.* (The court argued that this proposition was improper because Congress had already passed the Ashurst-Sumners Act for the purposes of regulating unfair competition in the prison context. If this proposition was accepted, it would render the FLSA superfluous).

eliminate unfair competition, among employers as well as workers looking for jobs, “we believe that courts should refrain from exempting a whole class of workers, based on technical labels, from the coverage of the FLSA, because such action would have the potential for upsetting the desired equilibrium in the workplace.”<sup>147</sup> In the absence of Congressional or Supreme Court guidance, courts are also unclear on what exactly the FLSA is preventing unfair competition *of*; whether it refers to unfair competition in the product market or in the job market, with some courts only considering one over the other.<sup>148</sup> Yet still, some courts have rejected the “unfair competition” rationale entirely.<sup>149</sup>

The Supreme Court should interpret the “unfair competition” rationale in favor of extending coverage to prison workers in a manner similar to the Fifth Circuit in *Watson* and the Second Circuit in *Carter*. The holdings in *Carter* and *Watson*, however, were narrowly limited to those inmate workers in certain work-release programs. Subsequent Circuit Court opinions that have denied coverage and rejected the “unfair competition” rationale have done so by distinguishing the situation of the inmate-plaintiff from those in *Carter* and *Watson*.<sup>150</sup> However, even where prisoners are working for industries, whether publicly or privately owned, the risk of unfair competition does not disappear. If inmates were not producing license plates for state or federal prison industries, these same public corporations would employ free-world laborers. Indeed the Seventh Circuit recognized this logic, “Assuming... that [Vanskike] works to manufacture license plates, then the state (as producer) has an advantage over other potential producers of license plates in the economy, because it is able to produce that item at low cost.”<sup>151</sup> The Seventh Circuit went on to acknowledge that this rationale would even extend to prison housework, “[f]or every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job...”<sup>152</sup> The result that this rationale extends to all sectors of prison labor is not a slippery slope as the court in *Vanskike*

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<sup>147</sup> *Carter*, 735 F.2d at 13; *see also Watson*, 909 F.2d at 1555 (emphasis added) (“[C]onstruction contractors in the area could not compete with Jarreau’s prices because they had to pay at *least* minimum wage for even unskilled labor, not to mention all of the above listed overhead costs avoided by Jarreau. It takes little imagination to recognize that job opportunities for non-inmate workers in the area was severely distorted by the availability of twenty dollar per day workers from the parish jail . . .”).

<sup>148</sup> *Hale (II)* at 1396 (“Even though ‘unfair competition,’ broadly conceived, encompasses both product and labor markets, the effect in the labor market is what prompted congressional concern with unfair competition in the FLSA.”); *but see Watson*, 909 F.2d at 1554 (arguing that “[t]he Act was drafted . . . to eliminate unfair competition among employers competing for business in the market and among workers looking for jobs”).

<sup>149</sup> *Miller*, 961 F.2d at 9 (“payment of sub-minimum wages . . . presents no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the Treatment Center does not operate in the marketplace and has no business competitors.”); *Cf. Gilbreath*, 931 F.2d at 1326 (rejecting the unfair competition argument on the grounds that the main purpose of prison labor is vocational training rather than profit).

<sup>150</sup> *Vanskike*, 974 F.2d at 8108 (“*Carter* and *Watson* involved situations quite different from the one here. In both cases the prisoners performed work for private, outside employers.”).

<sup>151</sup> *Id.* at 811.

<sup>152</sup> *Id.*

suggests. Rather, it's an accurate reflection of the economic reality faced by outside corporations and workers.

It is difficult to deny that prisoners are still part of the national economy when the value of prison industrial output alone is estimated to be at least \$2 billion.<sup>153</sup> In the past few years, congress members have expressed concerns over the unfair competition posed by UNICOR.<sup>154</sup> Small businesses and other privately owned corporations have struggled to compete with UNICOR for government contracts, and have been forced to close plants or lay off workers.<sup>155</sup> While private companies pay minimum wage, provide medical insurance, 401(k) plans, as well vacation days, UNICOR, as well as state prison industries, do not have to pay out any of these.<sup>156</sup> Further, while some courts<sup>157</sup> have tried to argue that prison labor primarily serves a rehabilitative and vocational purpose rather than a pecuniary one, state and federal prison industries that are shielded from private competition, have no incentives to use state-of-the-art manufacturing or production technologies. As a result, prisoners employed in these programs do not gain modern job training that would allow them to obtain employment upon release.<sup>158</sup>

As another indicator of congressional intent, in wake of the Act's passage, the House explained in a report, "[n]o employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wages ... higher than those applicable to his competitors. No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."<sup>159</sup> After considering this report, Judge Nelson in his dissent in *Gilbreath v.*

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<sup>153</sup> Wagner, *supra* note 18 ("Minimum estimate of annual value of prison and jail industrial output: \$2 billion").

<sup>154</sup> Derek Gilna, *Businesses, Members of Congress Not Happy with UNICOR*, PRISON LEGAL NEWS (Mar. 15, 2014), <https://www.prisonlegalnews.org/news/2014/mar/15/businesses-members-of-congress-not-happy-with-unicor> [<https://perma.cc/LM6D-C9L3>] ("UNICOR has become not only a job training program but a manufacturing behemoth that employs some 12,300 prisoners and made approximately \$606 million in gross revenue in fiscal year 2012. . . . Indeed, several companies have lost federal contracts due to competition from UNICOR, resulting in job losses among freeworld workers."); *see also* H.R.2098, 113<sup>th</sup> Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/2098> [<https://perma.cc/BF6Z-5RLR>] (Congress introduced H.R. 2098, Federal Prison Industries Competition in Contracting Act of 2013, which would require UNICOR's board of directors to "not later than September 30, 2014, increase the maximum wage rate for inmates performing work for or through Federal Prison Industries to an amount equal to 50 percent of the minimum wage," and "not later than September 30, 2019, increase such maximum wage rate to an amount equal to such minimum wage.").

<sup>155</sup> Gilna, *supra* note 154 ("American Apparel has to compete head-to-head with UNICOR on almost all of its contracts with the federal government, and the company said unfair competition from low-paid prisoner labor forced it to close a plant in May 2012 and lay off 175 workers.").

<sup>156</sup> *Id.*

<sup>157</sup> *Gilbreath*, 931 F.2d at 1332.

<sup>158</sup> Gilna, *supra* note 154 ("Manufacturing in America has changed over the decades but UNICOR does not use state-of-the-art manufacturing techniques because it has no need or motivation to do so – even though this means prisoners employed in UNICOR programs don't receive modern job training that will help them obtain post-release employment.").

<sup>159</sup> *Gilbreath*, 931 F.2d at 1332 (Nelson, J., dissenting) (citing H.R. Rep. No. 2182, 75<sup>th</sup> Cong., 3d Sess. 6–7 (1938)).

*Cutter Biological, Inc.* correctly concluded that “Congress intended the FLSA to have the widest possible impact in the national economy...[t]his national purpose is subverted when a court permits one company within an industry to avoid the strictures of the Act.”<sup>160</sup> Taking into account the record of real-world factory shutdowns and layoffs due to anti-competitive behavior by prison industries, the existing caselaw, as well as evidence of Congress’s intent in passing the Act, the Supreme Court should find that the “unfair competition” rationale of the FLSA necessarily applies to the prison labor context, and encompasses both the product and labor market.

### 3. A third overlooked Goal: The Prevention of Labor Strikes

The relevant portion of the FLSA reads that one of its aims is to eliminate “the existence...of labor conditions detrimental to the maintenance of the minimum standard of living” which lead to “labor disputes burdening and obstructing commerce and the free flow of goods in commerce.”<sup>161</sup> No circuit court has yet addressed the congressional concern over “labor disputes,” however, such concerns are equally relevant to prison workers and free-world workers alike.

Only a few years ago on September 9<sup>th</sup>, 2016, the U.S. experienced the largest prison strike in history.<sup>162</sup> As many as 50,000<sup>163</sup> prisoners across twenty-four states staged a coordinated strike and refused to show up for work on the 45<sup>th</sup> anniversary of the infamous Attica Uprising in New York.<sup>164</sup> Demands generally focused on “fair pay for their work, humane living conditions, and better access to education and rehabilitation programs.”<sup>165</sup> The national strike included not only workers’ strikes, but

<sup>160</sup> *Id.* at 1334.

<sup>161</sup> 29 U.S.C.A § 202(a)(4) (West).

<sup>162</sup> Beth Schwartzapfel, *A Primer on the Nationwide Prisoners’ Strike*, THE MARSHALL PROJECT (Sep. 27, 2016) [hereinafter Schwartzapfel, *Prisoners’ Strike*], <https://www.themarshallproject.org/2016/09/27/a-primer-on-the-nationwide-prisoners-strike> [<https://perma.cc/3W4Q-9K2L>] (“According to strike organizers, more than 24,000 inmates in at least 12 states did not show up for work that day, and protests are ongoing in a handful of places.”); see also *2016 Prison Strike Call To Action*, INCARCERATED WORKERS ORG. COMM. (Jan. 11, 2017) <https://incarceratedworkers.org/resources/2016-prison-strike-call-action> [<https://perma.cc/3TT2-4WPD>] (“On September 9<sup>th</sup> of 1971 prisoners took over and shut down Attica, New York State’s most notorious prison. On September 9<sup>th</sup> of 2016, we will begin an action to shut down prisons all across this country. We will not only demand the end to prison slavery, we will end it ourselves by ceasing to be slaves.”).

<sup>163</sup> Max Blau & Emanuella Grinberg, *Why US Inmates Launched a Nationwide Strike*, CNN (Oct. 31, 2016), <https://www.cnn.com/2016/10/30/us/us-prisoner-strike/index.html> [<https://perma.cc/2329-B7YW>].

<sup>164</sup> *Id.*; see also History.com Editors, *Uprising at Attica Prison Begins*, HISTORY (July 21, 2010), <https://www.history.com/this-day-in-history/riot-at-attica-prison> [<https://perma.cc/W4NM-823E>] (The Attica Prison Uprising, also known as the Attica Prison Massacre, refers to the events of September 9, 1971, where around 1,200 prisoners seized control of the maximum-security Attica Correctional Facility near Buffalo, New York and held thirty-nine prison guards and employees hostage. When “negotiations stalled, state police and prison officers launched a disastrous raid on September 13, in which 10 hostages and 29 inmates were killed in an indiscriminate hail of gunfire. Eighty-nine others were seriously injured.”).

<sup>165</sup> Schwartzapfel, *Prisoners’ Strike*, *supra* note 162; see also INCARCERATED WORKERS ORG. COMM., *supra* note 162.

also boycotts of prison commissaries and other paid services, peaceful demonstrations, and hunger strikes.<sup>166</sup>

Two years later, prisoners organized a second nationwide strike. The 2018 prison strike started on August 21<sup>st</sup> and ended on September 9<sup>th</sup> and consisted of work stoppages and hunger strikes. The strike was partially in response to prison riot at the Lee Correctional Institution that occurred in April of that year wherein seven inmates were killed.<sup>167</sup> The strike was organized by Jailhouse Lawyers Speak and the Incarcerated Workers Organizing Committee (IWOC).<sup>168</sup> On the official IWOC website, the second demand out of a list of ten calls for “[a]n immediate end to prison slavery,” and states “[a]ll persons imprisoned in any place of detention under United States jurisdiction must be paid the prevailing wage in their state or territory for their labor.”<sup>169</sup> As Amani Sawai, a spokesperson for Jailhouse Lawyers Speak, explained, “The main leverage that an inmate has is their own body...[I]f they choose not to go to work and just sit in in the main area or the eating area, and all the prisoners choose to sit there and not go to the kitchen for lunchtime or dinnertime, if they choose not to clean or do the yardwork, this is the leverage that they have. Prisons cannot run without prisoners’ work.”<sup>170</sup> Nationwide work stoppages, boycotts, and hunger strikes in prison and prison industries are a clear burden and obstruction to the free flow of commerce, bringing these events plainly within the scope of the kinds of labor disputes the FLSA was intended to address. Thus far, no federal court opinion considering FLSA

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<sup>166</sup> Schwartzapfel, *Prisoners’ Strike*, *supra* note 162 (“In one facility in Michigan, several hundred inmates staged a peaceful protest march in the yard, but after the march ended and the protesters returned to their units, chaos broke out, with several units being vandalized. In South Carolina, some inmates are organizing to stop paying the prison for goods and services like commissary items and phone calls. There were also reports of hunger strikes in several facilities.”); *see also* Alice Speri, *Prisoners In Multiple States Call For Strikes To Protest Forced Labor*, THE INTERCEPT (April 4, 2016), <https://theintercept.com/2016/04/04/prisoners-in-multiple-states-call-for-strikes-to-protest-forced-labor/> [<https://perma.cc/T8JY-DTT7>] (“Beginning on April 4, 2016, all inmates around Texas will stop all labor in order to get the attention from politicians and Texas’s community alike.”).

<sup>167</sup> German Lopez, *America’s Prisoners Are Going on Strike in At Least 17 States*, VOX, Aug. 22, 2018, <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018> [<https://perma.cc/QP5S-Q96T>] (“In total, seven inmates were killed and at least 17 were seriously injured, according to the Associated Press. An inmate told the AP that bodies were ‘literally stacked on top of each other,’ claiming that prison guards did little to stop the violence between inmates.”).

<sup>168</sup> *Id.*

<sup>169</sup> *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., <https://incarceratedworkers.org/campaigns/prison-strike-2018> [<https://perma.cc/7VAA-TZLV>].

<sup>170</sup> Lopez, *supra* note 167; *see also* Brooke Fryer, *US Inmates Sent to Solitary Confinement Over ‘Prison Slavery’ Strike*, NITV, Sep. 5, 2018, <https://www.sbs.com.au/nitv/nitv-news/article/2018/09/05/us-inmates-sent-solitary-confinement-over-prison-slavery-strike> [<https://perma.cc/YQU4-L934>] (“Inmates across the United States have been sent to solitary confinement for participating in organizing a nationwide prison strike.”); Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, THE GUARDIAN (Aug. 31, 2018), <https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation> [<https://perma.cc/Q45C-8GFB>] (“It is claimed that inmates – especially those seen as organizers – have been subject to solitary confinement, revocation of communication privileges and long-distance transfers, in attempts to weaken the effects of work stoppages and to chill dissent.”).

protections for prison laborers has had the benefit of reflecting upon these two massive nationwide strikes which have occurred within a two-year span of each other. Any further adjudication on the matter by the federal courts and the Supreme Court must consider these events and find the third goal of preventing labor disputes on par with the other two primary purposes of the FLSA.

#### B. Congressional Intent & The Ashurst-Sumners Act

A seemingly compelling argument that courts have made to reject claims of unfair competition involve readings of the Ashurst-Sumners Act<sup>171</sup> in conjunction with the FLSA.<sup>172</sup> The Ashurst-Sumners Act of 1935 was passed three years prior to the FLSA. The Ashurst-Sumners Act made it unlawful to knowingly transport in interstate or foreign commerce goods made by prison labor, subject to limited exceptions for agricultural commodities, parts for the repair of farm machinery, or products manufactured for government use.<sup>173</sup> In *Vanskike*, the Seventh Circuit held that “[t]he second purpose of the FLSA coincides with the single purpose of the Ashurst–Sumners Act—preventing unfair competition—and the latter statute, by its exception for goods used by government, belies the notion that any and all uses of prison labor by the government unduly obstruct fair competition.”<sup>174</sup> Subsequent opinions by the Ninth and Fourth Circuits in *Hale (II)* and *Harker v. State Use Industries* (4th Cir. 1993) have employed the same reasoning.<sup>175</sup> Even assuming that this logic is sound, it would only exempt a small subset of prison labor from the FLSA—those prisoners working in state and federal prison industries.<sup>176</sup> Additionally, the existence of a legal carve-out for government use does not mean that the government practice of using prison made goods does *in actuality* pose the same risks of unfair competitions as private usage of prison labor. As the court in *Vanskike* opined, Congress may have allowed this “governmental advantage” as a means of partially recuperating the costs of incarceration to the state.<sup>177</sup> In any case, providing minimum wage protections would not eliminate this governmental advantage, as state and federal prison industries would still be ensured a constant source of labor, and would not be held responsible for other benefits such as paid vacation days or 401(k) plans and so on, that would have to be extended to free-

<sup>171</sup> Ashurst-Sumners Act, Pub. L. No. 74-215, 49 Stat. 494 (1935) (codified as amended at 18 U.S.C. §§ 1761-1762).

<sup>172</sup> Lang, *supra* note 20 at 197.

<sup>173</sup> 18 U.S.C. § 1761(b) (“This chapter shall not apply to agricultural commodities or parts for the repair of farm machinery, nor to commodities manufactured in a Federal, District of Columbia, or State institution for use by the Federal Government, or by the District of Columbia, or by any State or Political subdivision of a State or not-for-profit organizations.”).

<sup>174</sup> *Vanskike*, 974 F.2d at 811.

<sup>175</sup> *Hale (II)* at 1394; *Harker*, 990 F.2d at 134 (“Under Harker’s interpretation, Congress would have passed the FLSA knowing that it made Ashurst-Sumners superfluous. What need would there be to criminalize the transport of prison-made goods if they did not enjoy the unfair economic advantage of being produced by cheap (non-FLSA) labor?”).

<sup>176</sup> Part I.D, I.E., and I.F of this paper provides an in-depth view of prison industry work at the state and federal levels. The Act says nothing about prison “housework” which constitutes the majority of prison labor, nor does it address work-release programs. A carveout is made for private prison industries operating under PIES on the condition that workers are compensated with prevailing wages.

<sup>177</sup> *Vanskike* 974 F.2d at 811–812.

world workers. Lastly, the temporal context of the Ashurst-Sumners Act is relevant to deciphering congressional intent. At the time of its passage in 1935, the total prison population was around 144,180.<sup>178</sup> By 2020, this number has increased by a factor of nine to around 1.2 million.<sup>179</sup> In comparison the total American labor force in 1936 was 53.7 million.<sup>180</sup> Before the start of the COVID-19 pandemic, this number had reached a peak of 164.4 million persons in February 2020, representing an increase of three times.<sup>181</sup> As the data illustrates, prison laborers today represent a far greater fraction of the total U.S. labor force than they did at the time of the Act's passage. In other words, a significantly greater fraction of working adults today—likely far greater than Congress could have contemplated in 1935—are left outside the reaches of the FLSA and are subject to otherwise illegal employment conditions and compensation schemes, resulting in widespread consequences for both the product and labor markets.

#### IV. THE SUPREME COURT MUST REJECT THE USAGE OF BRIGHT-LINE RULES

##### A. Bright Line Rules: Voluntary vs. Compelled Labor

In resolving the circuit split, the Supreme Court must abandon voluntariness as a factor in deciding the issue of FLSA coverage to prisoners. The idea that coverage should hinge on whether or not the inmate labor was “voluntary” or “compelled” was influentially articulated by the Seventh Circuit in *Vanskike*. In its opinion, the court found backing for this distinction in the loophole<sup>182</sup> of the 13th Amendment, “Indeed, the Thirteenth Amendment's specific exclusion of prisoner labor supports the idea that a prisoner performing required work for the prison is actually engaged in involuntary servitude, not employment.”<sup>183</sup> In *Gilbreath*, the Ninth Circuit similarly ruled “it is highly implausible that Congress intended the FLSA's minimum wage protection be extended to felons serving time in prison. This is a category of persons . . . whose civil rights are subject to suspension and whose work in prison could be accurately characterized in an economic sense as involuntary servitude.”<sup>184</sup> Later, in *Hale (II)*, the Ninth Circuit again reiterated “Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. Because the

<sup>178</sup> PATRICK A. LANGAN ET AL., HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS YEAREND 1925–86 6 (May 1998), <https://www.ojp.gov/pdffiles1/Digitization/111098NCJRS.pdf> [<https://perma.cc/M7AY-MUHJ>].

<sup>179</sup> See BUREAU JUST. STAT., *supra* note 11.

<sup>180</sup> STANLEY LEBERG ET. AL, LABOR FORCE, EMPLOYMENT, AND UNEMPLOYMENT, 1929–39: ESTIMATING METHODS, U.S. BUREAU OF LAB. STAT. 51 (JULY 1948), <https://www.bls.gov/opub/mlr/1948/article/pdf/labor-force-employment-and-unemployment-1929-39-estimating-methods.pdf> [<https://perma.cc/6NWS-UAAT>].

<sup>181</sup> *Civilian Labor Force Level [CLF16OV]*, FRED, FEDERAL RESERVE BANK OF ST. LOUIS <https://fred.stlouisfed.org/series/CLF16OV> [<https://perma.cc/9YGP-E93P>] (last accessed June 10, 2023).

<sup>182</sup> U.S. CONST. amend. XIII, § 1 (Section 1 of the Thirteenth Amendment provides “[n]either slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

<sup>183</sup> *Vanskike*, 974 F.2d at 809.

<sup>184</sup> *Gilbreath*, 931 F.2d at 1324.



plaintiffs in *Hale (II)* were compelled to perform hard labor under Arizona law, they were not comparable to free-world employees.<sup>185</sup> The Fourth Circuit decided *Harker v. State Use Industries* based on similar logic, “[b]ecause the inmates are involuntarily incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment.”<sup>186</sup> In *Henthorn v. Department of Navy*, the D.C. Circuit Court of Appeals also signed on to the dichotomy, explaining, “In cases such as *Watson* and *Carter* where the prisoner is voluntarily selling his labor in exchange for a wage paid by an employer other than the prison itself, the Fair Labor Standards Act may apply...however, in cases such as *Hale* and *Vanskike*, in which the prisoner is legally compelled to part with his labor as part of a penological work assignment...the prisoner may not state a claim under the FLSA, for he is truly an involuntary servant to whom *no* compensation is actually owed.”<sup>187</sup>

Notably, the FLSA does not explicitly require any degree of voluntariness or agency that the worker must possess in order to qualify as an employee. The agency of the worker does not have any bearing on the prevalence of risks for unfair competition or substandard living conditions – in other words, this factor does not hold any consequences for commerce or the economy. Following the logic in *Henthorn* would result in disparities in the application of the FLSA from state to state, depending on whether states have mandatory hard labor laws. Where prisoners are commonly transferred between facilities across state lines, this arbitrary deprivation of employee protections is even more apparent. Inmates in different jurisdictions could be performing the same exact labor and working the same hours, however, because in one state a conviction carries an additional sentence of hard labor, one inmate would get minimum wage protections under federal law and the other would not. Creating such a distinction thus allows states to evade federal law by implementing their own hard labor statutes. This results in an encroachment on Congress’s power and produces clear-cut dilemmas of vertical federalism. For these reasons, the voluntary vs. compelled distinction that many circuit courts have adopted or endorsed must be rejected by the Supreme Court.

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<sup>185</sup> *Hale (II)* at 1394 (internal quotations omitted) (“Under Arizona law, the state has the authority to require that each able-bodied prisoner . . . engage in hard labor for not less than forty hours per week”).

<sup>186</sup> *Harker*, 990 F.2d at 133; *see also* *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (“We hold that a prerequisite to finding that an inmate has ‘employee’ status under the FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor”); *Watson*, 909 F.2d at 1556 (“By stark contrast, *Watson* and *Thrash* were not required to work as a part of their respective sentences. Therefore, their labor did not “belong” to the Livingston Parish Jail and was not legitimately at the disposal of the Sheriff or the Warden.”); *Cf. Carter*, 735 F.2d at 15 (2d Cir. 1984) (“While perhaps not the full panoply of an employer’s prerogatives, this may be sufficient to warrant FLSA coverage. . . . We hold only that *Carter* has demonstrated genuine issues regarding material facts as to whether he is covered by the FLSA, and we emphatically hold that the fact that he is a prison inmate does not foreclose his being considered an employee for purposes of the minimum wage provisions of the FLSA”).

<sup>187</sup> *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994).

## B. Bright Line Rules: Inside vs. Outside of Prison Walls

Most circuits have found that whether the labor was performed outside or inside the prison to be a deciding factor in the issue of coverage. The inside vs. outside distinction has two meanings: (1) whether the work was physically located inside or outside the prison walls and (2) whether the work was done for outside or inside employers. In a majority of the cases where prison laborers were found not to be “employees” under the FLSA, the prisoners worked for prison authorities within the prison compound.<sup>188</sup> Where courts *have* found prison laborers to be covered by the FLSA, the workers were employed outside the prison for private employers.<sup>189</sup> For example, in *Carter* the Second Circuit limited its holding to “outside employers.”<sup>190</sup> In *Gilbreath v. Cutter Biological, Inc.*, the Ninth Circuit rigidly held that even if inmates were working for a private employer, if the physical location of the work was within the prison, the FLSA would not apply.<sup>191</sup>

The only court to reject the inside vs. outside dichotomy was the D.C. Circuit in *Henthorn v. Department of Navy*. In the opinion, the D.C. Circuit noted that either type of inside vs. outside distinction “raises some difficult questions.”<sup>192</sup> The court went on to ask rhetorically,

[S]hould a prisoner working for a private employer who sets up shop within the prison compound not be paid minimum wage because he does not leave the prison grounds to do his work, while a prisoner performing the same work for the same employer but in a facility outside the prison should receive FLSA protection? . . . In the same manner, should a prisoner working in a privately-run bookstore outside the prison be paid the minimum wage, but not an inmate working outside the prison in a public library?<sup>193</sup>

Though the court eventually decided against the inmate-plaintiff, *Henthorn* accurately highlighted the formalistic nature of such a dichotomy. The dichotomy sheds no light on the substance of the employer-employee relationship or the actual work being carried out. The Supreme Court should find, as in *Henthorn*, that such a distinction provides no

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<sup>188</sup> *Id.* at 685 (“Cases that have held that prisoner-laborers were not ‘employees’ under the FLSA have generally involved inmates working for prison authorities or for private employers within the prison compound.”).

<sup>189</sup> *Id.* (“[C]ases in which courts have found that the FLSA does govern inmate labor have involved prisoners working outside the prison for private employers.”); *see also Carter*, 735 F.2d at 13–14 (prisoner working as a teaching assistant at a community college that paid his wages directly to him could be an ‘employee’ under FLSA).

<sup>190</sup> *Carter*, 735 F.2d at 14–15.

<sup>191</sup> *Gilbreath*, 931 F.2d at 1325–31 (holding that inmates employed at a private plasma center located within the prison were not protected by the FLSA); *see also Danneskjold*, 82 F.3d at 39 (The Second Circuit also modified *Carter* in a subsequent holding and rejected the inside vs. outside as well as voluntary vs. compelled distinction within the context of “services” by holding that “the FLSA does not apply to prison inmates in circumstances in which their labor provides services to the prison, whether or not the work is voluntary, whether it is performed inside or outside the prison, and whether or not a private contractor is involved.”).

<sup>192</sup> *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 685 (D.C. Cir. 1994).

<sup>193</sup> *Id.* at 685–686.

adequate basis for deciding the question of FLSA coverage. In lieu of these various dichotomies that the Circuit Courts have fashioned, the following section will propose a new “Economic Reality” test for the Court to adopt in the prison laborer context.

#### V. A NEW “ECONOMIC REALITY” TEST: A “BUT-FOR” TEST

As established in the preceding sections, the FLSA’s stated purposes, preventing unfair competition, ensuring minimum standards of living, and preventing labor strikes apply to all categories of prison labor that were outlined in Part I. After establishing as a general principle that incarcerated workers *do* come within the scope of the FLSA, the next step is to determine a method to evaluate which work satisfies the test for employment for the purposes of FLSA’s minimum wage provisions. As Part IV showed, the bright-line rules that the Circuit Courts have resorted to thus far have been proven to be formalistic and unhelpful and must be replaced with a new test.

Based on the premise that the stated goals of the FLSA apply with equal force to prison laborers and free-world workers, a straightforward and simple test the Supreme Court should adopt is whether, in connection with the labor performed, an incarcerated worker would be considered an “employee” under the FLSA *but for* their inmate status. In other words, if a certain kind of employment would be protected by the FLSA in the free world, it should also be protected within the prison system. By using this approach that is based on an anti-discrimination framework between incarcerated and non-incarcerated workers, the Supreme Court need not provide any further rulings on what specific test for “employment” the lower courts are to adopt. Circuits that have adopted the *Bonnette* factors may continue using those factors while other Circuits that rely on other common law definitions for “employee” may use those. Where the FLSA does not exempt prisoners as a class nor has Congress ever referred to them in subsequent changes to the Act, the main goal is to prevent any discriminatory application of the Act between inmates and non-inmates. Under this test, it may still be validly found that certain inmates do not qualify as employees. For example, in *Danneskjold v. Hausrath* (2d Cir. 1996),<sup>194</sup> Danneskjold worked for a college consortium as a clerk-tutor where he assisted and tutored student inmates and assisted professors with academic matters and corrected papers. The Second Circuit found that Danneskjold did not qualify as an “employee.” Where in the non-prison context, teachers and graduate teaching assistants are exempt from the FLSA,<sup>195</sup> under the new *but for* test, Danneskjold may likewise be found to not qualify as an employee under the Act. This test provides uniformity and is a simple solution as it incorporates the test for “employee” that courts have already been accustomed to using in the non-prison context. Furthermore, it ensures that incarcerated workers are not punished for

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<sup>194</sup> *Danneskjold*, 82 F.3d at 40.

<sup>195</sup> See *Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB. (2019), <https://www.dol.gov/agencies/whd/fact-sheets/17s-overtime-educational-institutions> [<https://perma.cc/68L3-EZ8C>].

incarceration itself by being further denigrated to the status of involuntary servitudes.

#### CONCLUSION

While the U.S. prison system is a government institution that is used to regulate crime, it is also a network of facilities across the country that harbors a hidden and unpaid labor force. It comprises hundreds and thousands of full-time incarcerated workers who, at minimum, produce \$2 billion worth of industrial output while receiving anywhere from zero to a few dollars an hour.

Our prison system relies on incarcerated workers to fund itself by assigning individuals to “prison housework” and by forcing workers to contribute a portion of their earnings to room and board. Corporations that are focused on increasing their bottom-line try to save on labor costs by replacing free world workers with incarcerated workers. Even city and state governments, especially in the face of labor shortages and budget cuts, have routinely used incarcerated workers to provide municipal services, once again, without the benefit of minimum wage and other employee protections that are otherwise guaranteed to workers by the FLSA.

Historically, incarcerated workers have not been covered by the FLSA. Since its enactment in 1938, both Congress and the Supreme Court has been silent on whether incarcerated workers are included within the definition of “employee” under the FLSA. Furthermore, the Circuit Courts have failed to agree upon any concrete test to determine the FLSA coverage for incarcerated workers. Instead, they have developed conflicting standards and formalistic distinctions. The result has been the creation of a system that ensures a constant influx of individuals who may be subjected to involuntary servitude.

The Supreme Court must resolve the discrepancies between the Circuit Courts and rule in favor of extending the FLSA’s minimum wage provisions to prison laborers. Rather than adopting any distinct factor test for determining employment in the prison context, the Supreme Court should simply adopt the *but-for* discussed above in order to minimize discrimination between free-world and prison laborers, thus effectively eliminating the lingering existence today of involuntary servitude for the punishment of a crime.

Short of amending our constitution and abolishing the Thirteenth Amendment, finding a way to incorporate prisoners into an existing federal framework for labor protections is the most expedient way to push back against the exploitation of incarcerated workers. Entitling incarcerated workers to minimum wage protections under the FLSA would make the entire institution of prison labor far less profitable for private or publicly owned corporate entities that profit from the prison industry. Corporations form a strong and powerful constituency that has for decades, lobbied for harsher punishment and sentencing schemes that have exacerbated the problem of mass incarceration, over policing, and overcrowding in prisons. Offering FLSA coverage to incarcerated workers would prevent state governments and the federal government from using prisoners to perform

“housework” in order to offset the costs of a financially unsustainable penal framework. The significance, therefore, of affording inmates protection under the FLSA, is to eliminate several of the financial incentives that exist to continuously funnel and keep individuals—who disproportionately come from minority communities—through the criminal legal system.

At present, the judiciary is better equipped to resolve this issue than is the legislature.<sup>196</sup> One may argue that Congress could pass additional legislation to broaden the reach of the FLSA to cover incarcerated workers. However, in line with the analysis in this Note, there is no need for the FLSA to be revised. It has been nearly a century since Congress first passed the FLSA. To date, in no subsequent amendment has Congress explicitly exempted prisoners from coverage, despite many opportunities to do so. Furthermore, in no other significant employment statute are prisoners explicitly excluded from the definition of “employee.” The congressional intent behind and language of the FLSA are sufficiently clear—they have simply been misinterpreted by the Circuit Courts. The Supreme Court must now step in to correct the confusion amongst the lower courts and rule that the language and congressional intent behind the FLSA point towards extending coverage to incarcerated workers.

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<sup>196</sup> See Brakkton Booker, *Democrats Push 'Abolition Amendment' To Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), <https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution> [<https://perma.cc/G8V2-MNE7>]. In 2020, Congress made recent efforts to amend the 13th Amendment to eliminate the loophole that permits the continued existence of involuntary servitude. A joint resolution, called the “Abolition Amendment” was introduced by Democrats in the House and Senate to remove the punishment clause from the 13th Amendment. No Republican however in either chamber signed on to the measure, and there have been no significant efforts to reintroduce this resolution in subsequent sessions of Congress till date. Given the political polarization of the current era, Congress is unlikely to pass such a resolution in the foreseeable future. Any workarounds to the 13th Amendment must therefore come from the judiciary.