No. 24-____

IN THE

Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND,

Petitioner,

—v.—

MICHAEL A. SCOTT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.,* guarantees a minimum and overtime wage to covered "employees."

The question presented is:

Whether inmates working in furtherance of public works projects for the government charged with their custody and care may qualify as "employees" under the FLSA.

PARTIES TO THE PROCEEDINGS

Petitioner (defendant-appellee in the court of appeals) is Baltimore County, Maryland.

Respondents (plaintiffs-appellants in the court of appeals) are Michael A. Scott, Lawrence Anderson, Rudolph Armstrong, Matthew Bahr, Dakota Barnard, Matthew Berman, Tony Black, Gregory Blair, Shawn Brooks, Brandon Buckmaster, Landon Butler, Matthew Carson, Kevin Cooper, Davaughn Crosby, Joseph Dawson, Adam Dulaj, Donnell Foster, Jr., Mark Gantt, Christopher Hackley, Jason Hadel, Aszmar Hines, Tavist James, Aaron Kessler, Richard Lewis, Kenneth Luckey Jr., Gregory Malicki, Mark Mariner, Lamar Martin, Joe McDaniels, Rashad Mills, Dustin Mohr, William Morome, Kenneth Nierwienski, Jr., Jeremy Ogas, Yusuf Osiruphu-El, Espinal Osvaldo, James Peace, Edward Pendergast, Deshawn Penha, Clinton Reagan, Maurice Richardson, Perry Senior, Aaron Silwonuk, Harold Snyder, Raynard Stancil, Vincent Stone, Chris Velte, Damien Waters, Michael Wells, Jeffrey Welshons, Saiquon White, and Thomas Williams.

RELATED PROCEEDINGS

United States Court of Appeals (4th Cir.):

Scott, et al. v. Baltimore County, Maryland, No. 23-1731 (May 8, 2024)

United States District Court (D. Md.):

Scott, et al. v. Baltimore County, Maryland, No. 1:21-cv-00034-SAG (June 9, 2023)

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In the Supreme Court of the United States

BALTIMORE COUNTY, MARYLAND, PETITIONER

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MICHAEL A. SCOTT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Baltimore County, Maryland ("Baltimore County"), by and through undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-28a) is reported at 101 F.4th 336. The opinion of the district court (Pet.App.29a-71a) is not published in the Federal Supplement, but is available at 2023 WL 3932010.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2024. A petition for rehearing en banc was denied on June 6, 2024. Pet.App.72a-74a. On August 27, 2024, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including Sunday, November 3, 2024. This Petition for a Writ of Certiorari was filed on Monday, November 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 202(a) provides:

The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

29 U.S.C. § 203(d) provides:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does

not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(e)(1) provides:

Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

STATEMENT

This case offers an ideal vehicle for this Court to address an important question of coverage for inmate labor under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, that has remained undecided by this Court since the FLSA's passage in 1938. Specifically, at issue here is whether the FLSA requires payment of a minimum and overtime wage to the numerous inmates working on public works projects outside of prison walls.

In the decision below, the Fourth Circuit announced a new legal standard for application of the FLSA to inmate workers. The Fourth Circuit's decision is the only reported decision from *any* circuit to hold that inmates working for the *exclusive* benefit of the government charged with their custody and care may qualify as employees under the FLSA. The Fourth Circuit's new legal standard drastically expands the reach of the FLSA by treating inmate labor for a non-correctional arm of the government—here a local department of public works—as no different than work for an outside business like McDonald's. In doing so, the court of appeals ignored the many ways in which an inmate's labor for the government charged with their custody and care is

distinguishable from the traditional employment paradigm addressed by the FLSA.

If left undisturbed, the Fourth Circuit's holding will transform the relationship between the government and countless inmates from custodian/ detainee to employer/employee. This will in turn create millions of dollars in retroactive liability for jurisdictions already saddled with the significant costs of incarceration, and will curtail or eliminate inmate work programs that benefit both inmates and the public. This Court's intervention is therefore necessary to avoid an unprecedented and unwarranted extension of the FLSA to the custodial setting.

A. The Inmate Work Detail

The executive branch of the Baltimore County government is comprised of several agencies (referred to as "departments") that report up to a single County Administrative Officer. Pet.App.30a,102a. Baltimore County's Department of Corrections ("DOC") operates the Baltimore County Detention Center ("BCDC"), which houses inmates convicted of crimes in Baltimore County, Maryland. Pet.App.30a.

1. The DOC runs a Community Corrections Program, intended to reduce recidivism by providing work programs and resources to prepare inmates for reentry into the community. Pet.App.31a. The Community Corrections Program administers and oversees both work *release* and work *detail* programs. Pet.App.31a. Inmates on work *release* are permitted to leave BCDC during the workday without the supervision of correctional officers to work for private employers in the community. Pet.App.31a. The DOC also administers several work *detail* programs, where

inmates work on various projects for Baltimore County and remain under the supervision of correctional officers throughout the workday. Pet.App.31a. The DOC retains the discretion to assign an inmate to a work detail, although inmates can request to work on a particular detail and the DOC attempts to accommodate inmate preferences where feasible. Pet.App.14a,62a-65a. Inmates face the potential of a disciplinary infraction at BCDC for refusal to work altogether. Pet.App.62a.

2. Up until the onset of the COVID-19 pandemic, the DOC administered an inmate work detail at a Baltimore County recycling center outside of BCDC. Pet.App.20a. As part of the work detail, inmates were transported to and from the recycling center on a bus and remained under the supervision of the DOC correctional officers while sorting recyclables throughout their workday. Pet.App.77a. The recycling center where inmates worked as part of the work detail was operated by Baltimore County's Department of Public Works ("DPW"), a sister government agency to the DOC. Pet.App.30a. Staff affiliated with the DPW typically trained and instructed inmates on aspects of the sorting work they performed, while the DOC correctional officers remained present throughout the day to address any security concerns. Pet.App.77a-78a. Inmates were confined to specific areas of the recycling center and were not permitted to leave or walk away. Pet.App.78a-79a. Inmates also remained subject to BCDC's Code of Inmate Offenses throughout their workday, and could be removed from the work detail for any violation of this code. Pet.App.78a.

Inmates were paid $20 per day for their work, and also earned a reduction of their sentences in exchange for their labor, referred to as "industrial

credits." Pet.App.34a. Pay for participation in the work detail, the number of inmates assigned to the detail, and work schedules were decided by, or approved by, Baltimore County's Chief Administrative Officer, with input from the DOC and the DPW. Pet.App.102a-104a.

Baltimore County sold at auction the baled recyclables that were sorted by inmates. Pet.App.34a. Baltimore County sold the bales to the highest bidder and never sought to undercut or undersell other sellers. Pet.App.19a,32a. The proceeds from the sale of baled recyclables were deposited into Baltimore County's general fund, and as a result, reduced the tax burden of Baltimore County residents. Pet.App.110a-111a. Moneys deposited into Baltimore County's general fund were used to pay for a variety of government services, including community improvements, government buildings, public schools, fire and police departments, and the upkeep of streets, highways, and waterways. Pet.App.11a. The revenue from the sale of baled recyclables also paid for the operations of the DOC and BCDC, "including… the provision of food, water, clothing, healthcare and housing to inmates… housed at BCDC." Pet.App.111a. These funds helped offset some of the approximately $40,000 per year expended by Baltimore County per inmate for necessities like room and board, food, and healthcare. Pet.App.105a.

B. The Present Controversy

1. Respondent Michael Scott ("Scott") filed suit in the United Sates District Court for the District of Maryland, claiming that he and similarly situated current and former inmates were "employees" of Baltimore County under the FLSA and analogous

Maryland state wage and hour law while participating in the recycling center work detail. Pet.App.29a. The district court had jurisdiction over Scott's FLSA claims under 28 U.S.C. § 1331, and supplemental jurisdiction over Scott's state law claims under 28 U.S.C. § 1367(a).[1] At the conclusion of discovery, Baltimore County moved for summary judgment, arguing that Respondents were not "employees" covered by the FLSA as a matter of law. Pet.App.29a.

2. On June 9, 2023, the district court issued a memorandum opinion granting Baltimore County's motion for summary judgment. Pet.App.29a-71a. Guided by the Fourth Circuit's decision in *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993), the district court analyzed whether the work at the recycling center fit within the "traditional employment paradigm" covered by the FLSA based on three (3) considerations: (1) the rehabilitative or "non-pecuniary" motives of the work program, (2) whether there was a "bargained for exchange of labor" akin to a traditional employer-employee relationship, and (3) whether the express legislative purposes of the FLSA would be furthered by application to Respondents.[2] Pet.App.55a.

The district court first observed that inmate labor is often performed for reasons that are atypical of a

[1] Scott's federal FLSA claims were conditionally certified as a collective action under 29 U.S.C. § 216(b), and his state law claims were conditionally certified as a class action under Fed. R. Civ. Proc. 23. Pet.App.6a.

[2] The district court determined that all of Scott's claims "rise or fall on the success of [his] FLSA claim[,]" as the state and federal claims were "so closely linked[.]" Pet.App.38a (citations omitted).

usual employment relationship, such as rehabilitation and job training. Pet.App.45a. The district court therefore emphasized documentation and testimony from the DOC officials supporting rehabilitative or non-pecuniary purposes of the work detail, including the discipline, structure and work skills provided to Respondents, and the fact that Respondents received "industrial credits" that reduced their sentences in exchange for their work. Pet.App.56a. The district court recognized that the work detail also generated revenue for Baltimore County via the sale of recyclables sorted by Respondents, but noted that this "'does not eliminate the non-pecuniary goals' of the rehabilitative work program." Pet.App.60a-61a.

The district court then analyzed "whether there was a bargained-for exchange of labor" that occurs in a true employer-employee relationship. Pet.App.62a. Given the DOC's custody and control over Respondents during the work detail—including its complete discretion to decide whether they can participate in the detail at all—the district court "view[ed] this factor as weighing against the application of the FLSA." Pet.App.65a. The district court observed:

> [the] DOC wields virtually absolute control over [Respondents] to a degree simply not found in the free labor situation of true employment. [Respondents] may voluntarily apply for [work detail] positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, [Respondents] do not leave the DOC supervision, but rather proceed to the next part of their regimented day. [The parties] do not enjoy the employer-employee relationship contemplated in [the FLSA], but

> instead have a custodial relationship to which the [FLSA's] mandates do not apply.

Pet.App.64a-65a (quoting *Harker*, 990 F.2d at 133) (alterations added).

Finally, the district court turned to whether the underlying purposes of the FLSA—correcting labor conditions that are "detrimental to the maintenance of the minimum standard of living" of workers, and the prevention of "unfair competition in commerce from the use of underpaid labor"—would be furthered by the application of the statute to Respondents. Pet.App.65a,67a (quoting 29 U.S.C. § 202(a)). Concerning the "minimum standard of living," the district court observed that Respondents were "entitled to the provision of food, shelter, medicine and other necessities" during their incarceration and therefore did not need a minimum wage or overtime to maintain their standard of living. Pet.App.65a-67a.

Concerning the latter concern for unfair competition, the district court concluded that the work detail at the recycling center was distinguishable from "cases involving work for private, third-party entities [which] often find an unfair competitive advantage." Pet.App.68a (citations omitted). The district court recognized that "any economic advantage attained by [the] DPW through the work detail program flowed up to [Baltimore] County, and in turn, financed BCDC and its inmates." Pet.App.69a. Thus, the economic benefit to Baltimore County did not merit application of the FLSA, as "[a] governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity[.]"

Pet.App.69a (quoting *Vanskike v. Peters*, 974 F.2d 806, 811-12 (7th Cir. 1992)).

Based on the above considerations, the district court concluded that Respondents were not "employees" as a matter of law, and granted Baltimore County's Motion for Summary Judgment. Pet.App.70a.

3. On appeal, the Fourth Circuit reversed the district court and remanded for further proceedings. Pet.App.4a. While the Fourth Circuit considered the same principles announced in *Harker*, the Fourth Circuit's analysis of these principles was distorted by the Fourth Circuit's treatment of the DPW as an outside, private employer. Pet.App.13a,15a,22a-24a.

In addressing whether there was a "bargained-for exchange" between Respondents and Baltimore County, the Fourth Circuit did not question the district court's conclusion that Respondents were subject to "virtually absolute control" by the DOC. Pet.App.14a. Yet, the Fourth Circuit focused on the relationship between Respondents and the DPW *alone*, rather than the relationship between Respondents and the DOC (which, in reality, is the relationship between Respondents and Baltimore County). Pet.App.15a. According to the Fourth Circuit, when viewed from this perspective, "this case look more like the typical [FLSA] case, where the question is whether the putative employer exercised '*enough*'—rather than too much—control" over the working relationship. Pet.App.15a (citing *Vanskike*, 974 F.2d at 810) (emphasis in original). The Fourth Circuit thereafter pointed to examples of how the DPW exercised control over common employer prerogatives, including assigning Respondents their

workstations and keeping attendance records. Pet.App.15a.

The Fourth Circuit even likened the DPW to an outside, private employer like McDonald's, where inmates are permitted to work without supervision as part of Baltimore County's work release program. Pet.App.16a. The Fourth Circuit observed that the FLSA applied to such work release inmates even though the DOC also controlled them and limited their freedom while outside of the detention center by restricting their mode of travel to their work release job, and limiting the hours they were permitted to be outside of the detention center. Pet.App.16a. The Fourth Circuit therefore determined that the proper focus of attention was on the DPW, and on whether the DPW "exercised the kind of control typical to an employment relationship." Pet.App.15a. In short, the Fourth Circuit treated and analyzed the DPW and the DOC as *separate legal entities,* instead of focusing on Respondents' relationship with Baltimore County as a whole.

In analyzing whether the legislative aims of the FLSA were furthered by the application of the FLSA to Respondents, the Fourth Circuit recognized that the statute's "overriding purpose" of allowing workers to maintain a "minimum standard of living" was not implicated because Respondents were provided all of their necessities of daily living free of charge at Baltimore County's expense. Pet.App.17a. However, the Fourth Circuit found that the FLSA's additional purpose of preventing unfair competition with free workers and private businesses favored application of the FLSA because the work Respondents performed was done at an "offsite location" away from the detention center. Pet.App.18a-21a. The Fourth Circuit opined that private waste management

businesses could be disadvantaged by Baltimore County's recycling operations because Baltimore County could "provide recycling services more cheaply than private providers[,]" and that the use of inmates at the recycling center could disadvantage workers in the free market, by "[keeping] other workers from getting these jobs" at a minimum wage. Pet.App.19a-20a.

With regard to whether Baltimore County had a non-pecuniary interest in the work performed by Respondents, the Fourth Circuit acknowledged evidence that the DOC administered the work detail in furtherance of its rehabilitative motives, no different than those cases where courts have declined to extend FLSA coverage to inmate workers. Pet.App.21a. However, because the Fourth Circuit treated the DPW like an outside employer, it held that the proper focus under the FLSA should be on whether the DPW—as opposed to Baltimore County at large or the DOC—was primarily concerned with rehabilitation in using inmates at the recycling center. Pet.App.26a-27a.

4. Accordingly, the Fourth Circuit concluded that the district court had incorrectly framed the relevant legal standard for determining inmate coverage under the FLSA, and remanded the case back to the district court to reassess the facts and "conduct the required analysis" while focusing on the DPW as Respondents' putative employer. Pet.App.27a.

REASONS FOR GRANTING THE PETITION

Prior to the Fourth Circuit's decision, circuit caselaw recognized inmate coverage under the FLSA only in extraordinary circumstances, such as inmate work for outside, private employers. *See Carter v.*

Dutchess Cmty. Coll., 735 F.2d 8 (2d Cir. 1984) (work for a community college); *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) (work for a private construction company); *Burrell v. Staff*, 60 F.4th 25 (3d Cir. 2023) (work for a private recycling contractor). However, the Fourth Circuit deviated from this established principle by treating work performed for an arm of the very government charged with an inmate's custody and care as an outside, private employer. As such, the Fourth Circuit emphasized that inmate labor performed outside of prison grounds could result in unfair competition with private businesses and free workers.

As set forth below, the Fourth Circuit ignored the notable ways in which working for one's custodian—whether for a local department of public works or department of corrections—deviates from "the usual path of an employee." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). Moreover, the Fourth Circuit's concerns with unfair competition are hardly unique to off-site prison labor and have already been addressed by Congress via separate legislation, i.e., the Ashurst-Summers Act.

If left undisturbed, the Fourth Circuit's decision will reclassify countless inmates working on public works projects as employees. This will result in millions of dollars in retroactive liability for many jurisdictions, which will respond by ceasing work details benefiting both inmates and the public good. This Court's intervention is therefore necessary to clarify the important issue of the FLSA's application to inmates working for the government charged with their custody and care.

A. The Fourth Circuit Drastically Expanded the Reach of the FLSA

1. Congress enacted the FLSA in 1938 to "protect all covered workers from substandard wages and oppressive working hours," and "'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.'" *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)). The FLSA achieves these aims by guaranteeing covered "employees" a minimum wage, and overtime pay "for work over 40 hours a week[.]" *Helix Energy Sols. Grp., Inc. v. Hewitt*, 598 U.S. 39, 44 (2023); 29 U.S.C. §§ 206, 207. The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), and an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," 29 U.S.C. § 203(d), which does little to "solve[] problems as to the limits of the employer-employee relationship under the" FLSA. *Rutherford Food Corp.*, 331 U.S. at 728.

This Court has held that the "economic realities" will determine whether an employment relationship between the parties exists. *See id.* at 729; *Goldberg v. Whitaker House Co-op, Inc.*, 366 U.S. 28, 31 (1961). For example, this Court held that the FLSA does not apply to work performed as part of an unpaid course of training provided to railroad workers, reasoning that the FLSA does not apply to those who work "for their own advantage," or to receive "instruction" that "would most greatly benefit… trainees." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-53 (1947). Conversely, this Court affirmed a lower court judgment that the FLSA applies to religious

"volunteers" who worked with the expectation of receiving "in-kind" compensation, such as food, clothing and shelter. *Tony & Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 301 (1985).

2. This Court has never decided whether, and under what circumstances, inmates or those in custody may qualify as "employees" under the FLSA. However, the circuits that have addressed the "economic realities" of a custodial relationship generally involve two scenarios.

3. In cases involving inmate work for a private employer unrelated to the inmates' custodian, the Second, Fifth and Third Circuits have held that the economic realities of the relationship may support "employee" status under the FLSA. *See Carter*, 735 F.2d 8; *Watson*, 909 F.2d 1549; *Burrell*, 60 F.4th 25.

In *Carter v. Dutchess Cmty. Coll.*, the Second Circuit analyzed whether an inmate who worked as a teaching assistant for a community college that offered courses to inmates was covered by the FLSA. 735 F.2d at 10. The Second Circuit judged the economic realities by using a multi-factor joint employment test adopted by the Ninth Circuit in *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), to determine whether the community college had exercised various prerogatives of a typical employer and was therefore liable for failure to pay a minimum wage and overtime. *Carter*, 735 F.2d at 12. The *Bonnette* test focused on whether the putative joint 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 rate and method of payment, and (4) maintained employment records.'" *Id.* at 12 (quoting *Bonnette*, 704 F.2d at 1470). The court of

appeals in *Carter* found that there was a material factual dispute regarding whether these factors were satisfied, and held that "an inmate may be entitled under the law to receive the federal minimum wage from an outside employer, depending on how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent." *Id.* at 14.

The Fifth Circuit thereafter held in *Watson v. Graves* that inmates who were loaned to a private construction company and paid $20 per day were employees of the construction company for purposes of the FLSA. 909 F.2d at 1556. The Fifth Circuit found that the construction company exercised the prerogatives of an employer, including determining which inmates could work, setting their work schedule, and supervising them throughout the workday without any involvement of prison officials. *Id.* at 1554-55. The Fifth Circuit further found that construction contractors in the area were disadvantaged in their ability to compete with the construction company because they had to pay a minimum wage to their employees. *Id.* at 1555.

More recently, in *Burrell v. Staff*, the Third Circuit analyzed whether inmates who sorted trash and recyclables at a recycling facility owned by a county government, but operated by a *private company*, were covered by the FLSA. 60 F.4th at 48. On appeal from the trial court's order granting the defendants' motions to dismiss, the Third Circuit analyzed whether the plaintiffs had sufficiently alleged an employment relationship with the county government, the county's solid waste authority, and the private operator of the recycling facility. Like *Carter* and *Watson*, the court applied a joint employment analysis focused on whether the defendants exercised

typical employer prerogatives, but also found notable that the recycling center had been outsourced to a private operator that competed with other local and regional recycling facilities. *Id.* at 46. In holding that the plaintiffs had adequately alleged an employment relationship with the county, the solid waste authority, and the private operator, the Third Circuit emphasized that "the [private operator] got an unfair advantage in the form of nearly free labor" that was not available to its competitors. *Id.* at 47-48.

4. On the other hand, inmates working exclusively for their custodian were excluded from the FLSA's coverage prior to the Fourth Circuit's decision. These decisions applied a holistic analysis of the relationship between the parties, first adopted by the Seventh Circuit in *Vanskike v. Peters*, 974 F.2d 806.

In *Vanskike*, the Seventh Circuit ruled that the multi-factor joint employment analysis used in other cases was only appropriate where "prisoners performed work for private, outside employers." *Id.* at 808. The Seventh Circuit reasoned that the joint employment factors "fail to capture the true nature of the [custodial] relationship for essentially they presuppose a free labor situation." *Id.* at 809. Thus, the Seventh Circuit refused to apply the joint employer factors to an inmate who performed various tasks within a prison operated by the Illinois Department of Corrections. *Id.* at 806. The Seventh Circuit instead looked to the inmate's relationship with the department of corrections, which the Seventh Circuit found stemmed from "incarceration itself," unlike the "free labor situation" addressed by the FLSA. *Id.* at 809. In light of this relationship, the Seventh Circuit noted that the department of corrections assigned inmates to work in an effort to

further their rehabilitation and to off-set the costs of incarceration, rather than to further its pecuniary interests. *Id.* The Seventh Circuit also recognized that the department of corrections exercised "*too much*" control over inmates on a day-to-day basis for the relationship to be a "bargained-for exchange of labor for consideration" like in a true employment relationship. *Id.* at 809-10 (emphasis in original). The Seventh Circuit concluded that the legislative purpose of the FLSA—allowing workers to maintain a minimum standard of living and avoiding unfair competition—was not implicated where an inmate works for his custodian. *Id.* at 810 (citing 29 U.S.C. § 202(a)). The Seventh Circuit reasoned that, since "prisoners' basic needs are met in prison," they do not require a minimum wage to maintain a standard of living. *Id.* The Seventh Circuit further acknowledged that Congress had passed separate legislation, the Ashurst-Sumners Act, to regulate the sale of prison-made goods and address any concerns of unfair competition with private businesses. *Id.* at 811-12.

Following the *Vanskike* decision, nearly all circuits—including the Fourth Circuit in *Harker*—adopted this reasoning in finding that the FLSA does not cover inmates working for their custodian.[3] *See Bennett v.*

[3] *See, e.g.*, *Danneskjold v. Hausrath,* 82 F.3d 37, 42 (2d Cir. 1996); *Villareal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997). Only the D.C. Circuit stood alone with its own two-factor test for inmate coverage, asking simply (1) whether the work is voluntary, and (2) whether an outside employer pays the inmate. *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994); *Nicastro v. Reno*, 84 F.3d 1446, 1447 (D.C. Cir. 1996) ("To qualify, a prisoner must have 'freely contracted with a non-prison employer to sell his labor.'"). In *Hale v. Arizona*, the Ninth Circuit applied the joint employment test from *Bonnette*, and held that inmates were "entitled to receive a minimum wage for their work" for Arizona Correctional Industries. 967

Frank, 395 F.3d 409, 410 (7th Cir. 2005) (noting that cases applying the joint employment analysis ruled only that "the FLSA applies to prisoners working for private companies under work-release programs.").

5. Here, the Fourth Circuit's decision drastically expands the FLSA to custodial relationships by treating work for a non-correctional agency of an inmate's government custodian like work for an outside, private employer. If the court of appeals' decision is left undisturbed, inmate labor on public works projects will necessarily generate a triable issue of fact on whether a particular arm of the government is exercising typical prerogatives of an employer, seeking to rehabilitate inmates as its primary purpose, or disadvantaging private businesses and free workers.

B. The Fourth Circuit's Decision is Wrong

The Fourth Circuit's decision neglects to analyze whether Respondents' work "follow[ed] the usual path of an employee," *Rutherford Food Corp.*, 331 U.S. at 729, and instead improperly highlights arbitrary distinctions and "technical labels" about the particular government agencies involved in the detail and the location of the work. *See Goldberg*, 366 U.S. at 33 ("'[E]conomic reality' rather than 'technical concepts' is to be the test of employment[.]"). Specifically, the Fourth Circuit justified its unprecedented extension of the FLSA to the custodial context by highlighting the involvement of Baltimore

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F.2d 1356, 1359, 1364 (9th Cir. 1992). However, in an en banc opinion, the Ninth Circuit reversed that decision, and determined that the inmates were not employees, applying the holistic analysis from *Vanskike*. *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993).

County's DPW in the work detail, and incredibly analogizing this local government agency to a private work release employer. The Fourth Circuit further reasoned that the legislative aims of the FLSA in avoiding unfair competition were implicated by the work detail simply because the work was performed outside of prison walls. However, the relationship between an inmate and a government agency like the DPW is drastically different from the free labor relationship between an inmate and a private business.[4] Moreover, the evils of unfair competition remedied by the FLSA are unaffected by the arbitrary distinction of whether inmates are laboring inside or outside prison walls.

1. *The Fourth Circuit's narrow focus on the DPW ignores the economic realities of labor performed for a government custodian*

a. The FLSA presupposes a "bargained-for exchange of labor for mutual economic gain[.]" *Steelman v. Hirsch*, 473 F.3d 124, 130 (4th Cir. 2007) (quoting *Harker*, 990 F.2d at 133). This Court has held that the very purpose of the FLSA is to aid the Nation's lowest paid workers "who lacked *sufficient* bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Sav. Bank v.*

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[4] This is also clear error under the facts of this case, as the custodial relationship between inmates participating in off-site work details and Baltimore County is established as a matter of Maryland law. *See* MD. CODE ANN., CORR. SERVS. §§ 11-102(a)(1), 11-201(b)(1)-(2) (authorizing Baltimore County to establish a local correctional facility, and charging the presiding official of said facility with the "safekeeping, care, and feeding of inmates in the custody of [the] local correctional facility, including an inmate who is working on the public highways or going to and from that work[.]").

O'Neil, 324 U.S. 697, 707 n.18 (1945) (emphasis added) (citations omitted). Thus, the FLSA has been limited to those circumstances where a worker negotiates to sell their labor in exchange for remuneration or benefits needed to maintain a standard of living, and the putative employer pays for the labor to further its pecuniary or profit-making interests. *See Tony & Susan Alamo Found.*, 471 U.S. at 301. Conversely, where labor is provided for reasons unrelated to a worker's subsistence—such as training or education—this Court has deemed the work to be beyond the purview of the FLSA. *See Walling*, 330 U.S. at 153.

b. The fundamental underpinnings of the FLSA are drastically impacted by whether an inmate is working for their custodian (as in a work detail), or working for a private employer like McDonald's (as in work release). In a work release program, an inmate is permitted to leave the correctional facility unaccompanied and work for a private employer, which often was the inmate's employer prior to being incarcerated.[5] In this scenario, the government custodian is nothing more than "a mere intermediary between the prisoner and his private employer[.]" *Reimonenq v. Foti*, 72 F.3d 472, 476 (5th Cir. 1996). As such, despite the "near total control" exercised by the government custodian, work release inmates deal at arm's length with their work release employers; the relationship with a work release employer is formed in the same manner as any other worker in the free market.

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[5] *See, e.g., Tapley v. Veal* 182 Ga. App. 880 (1987) (an inmate "was able to keep his job under a work-release program").

However, where an inmate works for an arm of their government custodian as part of a work detail, any working relationship exists only because of their status as inmates, not employees. *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991). The nature of this relationship in turn impacts an inmate's ability to bargain over basic components of their work. In fact, work for a custodian, as opposed to a private employer, is controlled to such a degree that it can be compelled without violation of the Thirteenth Amendment's prohibition on involuntary servitude. *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991); *cf. Anderson v. Morgan*, 898 F.2d 144 (4th Cir. 1990) ("forcing an inmate to perform work that inures solely to an individual's private benefit, as opposed to the public benefit, is not as plainly allowed under the Thirteenth Amendment's exception for work imposed as punishment for crime.").[6] If inmates are given the choice of whether or not to participate in a work detail—whether inside the prison or otherwise—they enjoy that prerogative solely at the discretion of their government custodian.

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[6] Moreover, inmates working for McDonald's and other work release employers leave the "custodial context" altogether, such as the inmates in *Watson*, who were deemed "employees" of a private construction business. 909 F.2d at 1554 (noting that inmates were not "supervised by any prison official," but "were supervised by the [the private construction business] and no one else during the entire time the inmates were away from the jail.") (alterations added). Yet, Respondents here were undeniably subject to all of the hallmarks of a custodial relationship while at the recycling center, including, *inter alia*, the inability to "walk off" the jobsite, supervision by correctional officers, confinement to designated areas of the recycling center, and headcounts, searches or "frisks" by correctional officers throughout the workday. Pet.App.75a-80a.

c. Where an inmate performs work for their custodian, there are also non-pecuniary and non-economic interests of both parties to the working relationship which are distinct from work for an outside, private employer. Most notably, inmates do not have to work for their custodian to maintain a standard of living; the Constitution demands that their custodian provide for their well-being while in custody. *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 373 (4th Cir. 2021). Indeed, in this case, Respondents were motivated to work at the recycling center to earn "industrial credits" or time off of their sentences—a common non-pecuniary benefit of working for one's custodian as part of a work detail.[7]

Moreover, unlike a private employer, an inmate's custodian is commonly motivated to create a work program to "offset some of the cost of keeping [inmates]" or a desire "to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside." *Bennett*, 395 F.3d at 410. Here, again, Baltimore County intended that the work at the recycling center would provide job skills and training to inmates *and* off-set

[7] *See, e.g.*, DEL. CODE ANN. TIT. 11, § 4381 (inmates have the opportunity to reduce their sentences "by good time credit" by participating in work programs); MD. CODE ANN., CORR. SERVS. § 3-701, *et seq.* (same); MASS. GEN. LAWS ANN. CH. 127, § 129D (same); TEX. GOV'T CODE ANN. § 498.003 (same); *State Approaches to Sentence Credits: Earned and Good Time Laws*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/state-approaches-to-sentence-credits-earned-and-good-time-laws (June 17, 2024) ("[A]t least 42 states" provide inmates with opportunities "to reduce the length of their incarceration" by participating in various activities, including work programs).

the costs of incarceration by generating revenue for its general fund. In fact, the recyclables sorted by inmates were sold by Baltimore County to offset the cost of many taxpayer funded government services, *including the upkeep of BCDC and the food, lodging and healthcare provided to the inmates housed there*. Pet.App.110a-111a. These goals clearly distinguish working for one's custodian from the "the usual path of an employee" working to generate profits for their employer. *Rutherford Food Corp.*, 331 U.S. at 729. Yet, the Fourth Circuit failed to consider these important "circumstances of the whole activity," and instead narrowly focused on whether one arm of Respondents' custodian—the DPW—was primarily concerned with inmate rehabilitation. *Id.* at 730.

d. The Fourth Circuit justified its narrow focus on the DPW because inmates on work release are covered by the FLSA, even though the DOC also controls such inmates and allows them to work for private employers to further rehabilitative interests. Pet.App.22a. Given that the DOC's rehabilitative motives and control are not attributed to McDonald's or other work release employers to preclude application of the FLSA, the Fourth Circuit reasoned that the DOC and the DPW must be distinct. Pet.App.22a. Yet, the Fourth Circuit's analogy to private work release again overlooks the notable distinctions between the relationship of two arms of the government and the relationship of a governmental agency and a private employer.

While Baltimore County's DOC is a "mere intermediary" between an inmate and his work release employer, *Reimonenq*, 72 F.3d at 476, the DOC and the DPW are sister government agencies. Pet.App.101a-102a. Consequently, like nearly all forms of government administration, agencies like a

department of corrections and department of public works are under common control of an executive, and are required to coordinate to achieve common government objectives.[8] Here, the County Administrative Officer with authority over both the DPW and the DOC in this case intended that the work detail would generate revenue for Baltimore County's general fund *and* serve rehabilitative aims, i.e., improving work habits and creating a pathway to post-incarceration employment. Pet.App.106a-107a. Even further, any pecuniary aims of Baltimore County and its DPW directly benefited the DOC by paying for the upkeep of inmates, entirely unlike a private employer's interests in generating profits. Thus, limiting the court's analysis to the rehabilitative aims of a single arm of the government only excludes crucial evidence of the unique aims of a government work detail, serving a multitude of governmental objectives.

2. *The location of labor performed for an inmate's custodian does not implicate the legislative aims of the FLSA*

a. In passing the FLSA, Congress sought to correct "labor conditions detrimental to the maintenance of the minimum standard of living" and avoid "unfair… competition in commerce." 29 U.S.C. § 202(a). Since the standard of living for an inmate is constitutionally provided by his custodian irrespective of whether he works, the Fourth Circuit analyzed the

[8] *See* U.S. Gov't Accountability Off., GAO-23-105520, Government Performance Management: Leading Practices to Enhance Interagency Collaboration and Address Crosscutting Challenges (2023) (discussing common methods of interagency collaboration to achieve federal government objectives).

FLSA's concerns of unfair competition by arbitrarily distinguishing between inmate work performed inside and outside prison walls.[9] However, this inside/outside distinction—unlike the difference between a governmental use of inmate labor and a low-wage advantage by an outside, private employer—cannot dictate whether the legislative aims of the FLSA require payment of a minimum wage and overtime.

b. As an initial matter, concerns with unfair competition are hardly unique to inmate labor performed outside of prison walls. Rather, the same unfair competition concerns apply to "anything [that inmates] do *in prison* that can be considered work." *Vanskike*, 974 F.2d at 811 (emphasis added). "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." *Id.* (emphasis removed). Thus, there is an array of private businesses and contractors that could be hired to perform the same services that inmates commonly perform within the prison compound.[10]

c. Further, any concern for unfair competition from inmate labor was addressed by Congress in 1935—three years prior to passage of the FLSA—with the passage of the Ashurst-Sumners Act. *Harker*, 990 F.2d at 134 (citing 18 U.S.C. §§ 1761-62). The Ashurst-Sumners Act, with narrow exceptions

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[9] *Villarreal*, 113 F.3d at 207 ("The purpose of the FLSA is to protect the standard of living and general well-being of the American worker. Because the correctional facility meets Villarreal's needs, his 'standard of living' is protected.").

[10] *See, e.g.*, *Sutton v. City of Philadelphia*, 21 F. Supp. 3d 474, 478 (E.D. Pa. 2014) ("Aramark is the food provider for the [Philadelphia Prison System] and is tasked with preparing meals[.]").

for governmental use of prison-made goods, "prevents the shipment of prisoner-made goods in interstate commerce" precisely to avoid "the problem of unfair competition based on cheap labor." *McMaster v. State of Minn.*, 30 F.3d 976, 980 (8th Cir. 1994).

The very existence of the Ashurst-Sumners Act suggests that the FLSA was not intended to combat unfair competition by a government custodian's use of inmate labor. Indeed, Congress is presumed to be knowledgeable about existing laws pertinent to later-enacted legislation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Further, this Court "approach[es] federal statutes touching on the same topic with a 'strong presumption' they can coexist harmoniously" and does not lightly determine that "one statute 'displaces' a second." *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 63 (2024) (citations omitted). Yet, application of the FLSA to inmate labor because of unfair competition would render the Ashurst-Sumners Act "unnecessary." *McMaster*, 30 F.3d at 980. This is because the Ashurst-Sumners Act assumes that inmate labor will not be paid a minimum wage. *Danneskjold*, 83 F.3d at 42. Otherwise, there would be no need to regulate the transportation of goods "manufactured, produced, or mined, wholly or in part by convicts or prisoners[.]" 18 U.S.C. § 1761(a).

While the Fourth Circuit commented that the recyclables sold by Baltimore County were not "prisoner-made goods" regulated by the Ashurst-Sumners Act, Pet.App.21a, that does not open the door for the courts to "fill in the gaps" and apply the FLSA in light of public policy concerns already specifically addressed by Congress. *See, e.g.*, *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) ("To supply omissions" to effect an enlargement of a

statute "transcends the judicial function"); *Rotkiske v. Klemm*, 589 U.S. 8, 14 (2019) ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'"). In fact, several circuits have held that the very existence of the Ashurst-Sumners Act precludes application of the FLSA to service work, although not specifically regulated by the Ashurst-Sumners Act. *See, e.g., Danneskjold*, 82 F.3d at 42 (work as a tutor); *McMaster*, 30 F.3d at 978 ("data entry and telemarketing services"); *Vanskike*, 974 F.2d at 812 ("service work").

Further, the Ashurst-Sumners Act "exempts commodities manufactured for use by federal, state and local governments" from its coverage, indicating that Congress "drew the line" by "precluding a wide range of inmate-labor competition while permitting *governments* to use the fruits of such labor." *Vanskike*, 974 F.2d at 811 (emphasis added). "This balance makes sense[,]" as:

> [a] governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity: while the latter amounts to an unfair windfall, the former may be seen as simply paying the costs of public goods—including the costs of incarceration[.]

Id. at 811-12. Stated differently, Congress has determined via the Ashurst-Sumners Act that a government advantage from inmate labor is "outside the boundaries of the targeted evil." *Id.* at 811. The Fourth Circuit's failure to properly harmonize the FLSA and the Ashurst-Sumners Act is clear error.

d. Here, the governmental benefit from inmate labor is easily contrasted with the "targeted evil" of a benefit to a private, third party, as was addressed in the Third Circuit's decision in *Burrell*. 60 F.4th at 47. There, the Third Circuit applied the FLSA precisely because detainee labor at a recycling center benefited a private, third-party corporation operating the recycling center, which "got an unfair advantage in the form of nearly free labor funneled from its business partner, the [c]ounty[.]" *Id.* Here, as in all cases where inmates work for their government custodian (either inside or outside the prison), there was no such "unfair advantage" and no private "business partner." Further, any pecuniary benefits from inmate labor reverberated only to Baltimore County, which is hardly "unfair" considering Baltimore County was also saddled with the burden of inmate upkeep, unlike the private market participant in *Burrell*.

C. The Fourth Circuit's Decision Will Have a Significant Impact on Inmate Work Details

1. The Fourth Circuit's decision has notable implications for the ability of governments to utilize inmate labor—particularly in off-site public works details previously understood to be beyond the purview of the FLSA. At the end of 2022, there were over one million inmates in federal and state prisons (and even more in local correctional facilities), with a majority performing work while incarcerated.[11]

[11] U.S. DEP'T OF JUSTICE, CORR. POPULATIONS IN THE UNITED STATES, 2022 – STATISTICAL TABLES 5; *What Are Prison Work Programs and How Common Are They?*, USAFACTS (Sept. 22, 2022), https://usafacts.org/articles/what-are-prison-work-programs-and-how-common-are-they/.

Moreover, in 2019, 44% of public prisons assigned inmates to public work programs outside the prison.[12]

Examples of these off-site work details across the Nation include the common practice of inmate road crews,[13] maintenance and landscaping on public grounds and buildings,[14] habitat restoration, litter and debris removal, and combatting wildfires, amongst others.[15] Like the recycling center work detail here, inmates participating in these work programs are often directed, trained or supervised (either in part or in whole) by non-correctional agencies charged with public works initiatives.[16]

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[12] U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2019 – STATISTICAL TABLES 3, 13.

[13] *See, e.g.,* MD. CODE ANN., CORR. SERVS. §§ 9-503(a), 9-504(a), and 9-512(a); *see also* N.C. GEN. STAT. ANN. § 148-26(b) ("[N]o prisoner working on the public roads under the provisions of this section shall be paid more than one dollar ($1.00) per day from funds provided by the Department of Transportation to the Division of Prisons[.]").

[14] NORTH CAROLINA DEP'T OF ADULT CORR., *Construction Apprenticeship Program (CAP)* (last visited November 3, 2024), https://www.dac.nc.gov/divisions-and-sections/support-services/construction-apprenticeship-program-cap; LARAMIE COUNTY SHERIFF'S OFFICE, *Sheriff Kozak Creates Inmate Community Work Crew Program* (last visited November 3, 2024), https://www.laramiecountywy.gov/files/sharedassets/public/v/1/sheriff/documents/5-20-24-inmate-work-crew-program.pdf.

[15] *See, e.g.*, WASHINGTON STATE DEP'T OF CORR., *Policy 700.400* (June 14, 2024), https://www.doc.wa.gov/information/policies/files/700400.pdf; WASHINGTON STATE DEP'T OF CORR., *Work Crews* (last visited Aug. 11, 2024), https://www.doc.wa.gov/corrections/programs/work-crews.htm.

[16] The Maryland Code contemplates that inmates on road crews may "work under the direction of a county road representative[,]" but "under competent guard" provided by a

Moreover, like the recycling center work detail here, these inmate work programs have been designed with the understanding, backed by empirical evidence, that prison work programs reduce recidivism and further rehabilitative aims.[17]

2. However, the Fourth Circuit's recent decision, if left undisturbed, will create an employment relationship between the government and countless inmates working on public works projects. To be

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"local correctional facility." MD. CODE ANN., CORR. SERVS. § 9-503(b) and (d). North Carolina similarly allows "[m]inimum custody inmates [to] work under the direction of Department of Transportation employees." NORTH CAROLINA DEP'T OF CORR., *North Carolina Inmates at Work* (last visited August 11, 2024), https://www.doc.state.nc.us/work/workover.htm. The State of Florida has also authorized its Department of Corrections to "enter into agreements for the use of prisoners in public works" with counties, municipalities, and "[a]ny State agency or institution[,]" amongst other government entities. FLA. ADMIN. CODE. r. 33-601.202(1). Such agreements may provide for "supervis[ion] by persons other than Department of Corrections employees[,]" in which case "inmates [are] expected to carry out instructions as given" by such non-correctional supervisors. FLA. ADMIN. CODE. r. 33-601.202(7)).

[17] U.S. DEP'T OF JUSTICE, PRISON REFORM: REDUCING RECIDIVISM BY STRENGTHENING THE FEDERAL BUREAU OF PRISONS (last updated Nov. 29, 2023); *see also* Kerry L. Pyle, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 174-75 (1997) (noting that working while incarcerated lowers recidivism rates which, in turn, "exemplifies prison employments' rehabilitative effect…"); Jonathan M. Cowen, *One Nation's "Gulag" is Another Nation's "Factory Within A Fence": Prison-Labor in the People's Republic of China and the United States of America*, 12 UCLA PAC. BASIN L.J. 190, 222-23 (1993) (explaining that "[r]ehabilitative objectives are probably the single greatest motivating factor for the practice of prison-labor in the U.S." and that rehabilitation takes the form of "impart[ing] proper work habits and [] teach[ing] specific work skills to prison-laborers.").

sure, the Fourth Circuit's reasoning on the control and rehabilitative interests of the DPW and the location of inmate labor applies with equal force to nearly all inmate work on public works projects. First, in each of the examples provided above, a non-correctional agency—such as a department of public works or transportation—is directing or "controlling" the work performed by inmates in some fashion. According to the Fourth Circuit, this alone is "typical" of an employment relationship. Pet.App.15a. Second, use of inmates on any of the projects described above would create the same risk of unfair competition recognized by the Fourth Circuit, as the work is performed outside of prison walls, and would be performed by private contractors and/or workers paid a minimum wage if not for the availability of inmates.

Lastly, in order to avoid an employment relationship, the Fourth Circuit would require that the non-correctional agency utilizing inmate workers be primarily concerned with inmate rehabilitation. This view, again, ignores the realities of the custodial relationship between a local government and the inmates who are in its custody and care. Further, a non-correctional agency will seldom be able to demonstrate a "primary purpose" of inmate rehabilitation to avoid a triable issue of fact, even though the agency may be working in conjunction with a local government department of corrections who is primarily focused on such aims, *or* the non-correctional agency is carrying out the directives of a local governmental official who is motivated by *multiple* reasons for using inmate labor. For example, a local government official may be motivated to use inmate labor to provide a

government service to the public, to offset the costs of incarceration, and to benefit inmates upon their release. Thus, while public works agencies exist to maintain public roadways, preserve natural resources, process waste and recyclables and perform other public works functions, these aims do not inform the "circumstances of the whole activity" regarding an inmate work detail. *Rutherford Food Corp.*, 331 U.S. at 730.

3. While the Fourth Circuit's decision emphasizes that "[w]e do not hold every incarcerated person who works outside the four walls of their prison is covered by the [FLSA]," it does not provide any basis to distinguish most off-site public works details from the recycling center work detail administered by Baltimore County. Pet.App.28a. In fact, it is hard to imagine how inmates can contribute to any public works project or interest without potentially triggering the FLSA under the Fourth Circuit's reasoning. This, in turn, severely impacts the ability of all jurisdictions to off-set the significant costs of incarceration via inmate labor, which was previously distinguished from the "unfair maximizing of profits in the marketplace." *Harker*, 990 F.2d at 134.

4. Without this Court's intervention, the Fourth Circuit's decision will impose millions of dollars in retroactive liability for unpaid wages and liquidated damages on numerous jurisdictions which proceeded with the understanding that the FLSA applies only to "prisoners working for private companies under work-release programs." *Bennett*, 395 F.3d at 410; 29 U.S.C. § 216(b) (setting forth the private remedies available for FLSA violations). Governments will surely seek to avoid this potential exposure going forward, and may decide to stop operating off-site work details altogether. The Fourth Circuit's

decision will therefore decrease the number of meaningful rehabilitative work opportunities and encourage correctional officials to "warehouse" inmates within a detention facility, thereby contributing to the ills of idleness combatted by inmate work programs. This Court's intervention is warranted to avoid such an impact, and to clarify this important issue of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 4, 2024

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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1731

MICHAEL A. SCOTT; RUDOLPH ARMSTRONG; AARON KESSLER; MARK MARINER; LAMAR MARTIN; JEFFREY MATTHEW WELSHONS; DESHAWN PENHA; AARON SILWONUK; ADAM DULAJ; ASZMAR HINES; GREGORY MALICKI; JASON HADEL; MICHAEL WELLS; VINCENT STONE; TONY BLACK; DONNELL FOSTER, JR.; KENNETH NIERWIENSKI, JR.; CHRISTOPHER HACKLEY; EDWARD PENDERGAST; SAIQUON WHITE; JOE MCDANIELS; ESPINAL OSVALDO; YUSEF OSIRUPHU-EL; TAVIST JAMES; DAKOTA BARNARD; MAURICE RICHARDSON; SHAWN BROOKS; RAYNARD STANCIL; JAMES PEACE; CLINTON REAGAN; MATTHEW BAHR; RICHARD LEWIS; KENNETH LUCKEY, JR.; PERRY SENIOR; LAWRENCE ANDERSON; MARK GANTT; RASHAD MILLS; LANDON BUTLER; JEREMY OGAS; GREGORY BLAIR; DAVAUGHN CROSBY; CHRIS VELTE; MATTHEW CARSON; HAROLD SNYDER; BRANDON BUCKMASTER; WILLIAM MOROME; THOMAS WILLIAMS; JOSEPH DAWSON; KEVIN COOPER; DAMIEN WATERS; MATTHEW BERMAN; DUSTIN MOHR,

Plaintiffs – Appellants,

—v.—

BALTIMORE COUNTY, MARYLAND,

Defendant – Appellee.

PUBLIC JUSTICE CENTER; LEGAL AID JUSTICE CENTER; MOUNTAIN STATE JUSTICE; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA; AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA; CAUCUS OF AFRICAN AMERICAN LEADERS; MARYLAND CITIZENS UNITED FOR REHABILITATION OF ERRANTS; FAMILY SUPPORT NETWORK,

Amici Supporting Appellant.

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION,

Amicus Supporting Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Stephanie A. Gallagher, District Judge. (1:21-cv-00034-SAG)

Argued: March 19, 2024 Decided: May 8, 2024

Before DIAZ, Chief Judge, and HARRIS and HEYTENS, Circuit Judges.

Vacated and remanded by published opinion. Judge Heytens wrote the opinion, which Chief Judge Diaz and Judge Harris joined.

ARGUED: Howard Benjamin Hoffman, HOFFMAN EMPLOYMENT LAW, LLC, Rockville, Maryland, for Appellants. Jeffrey Thomas Johnson, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Baltimore, Maryland, for Appellee. **ON BRIEF:** Jordan Song En Liew, HOFFMAN EMPLOYMENT LAW, LLC, Rockville, Maryland, for Appellants. Kraig B. Long, NELSON MULLINS RILEY & SCARBOROUGH, LLP, Baltimore, Maryland, for Appellee. Monisha Cherayil, Lucy Zhou, PUBLIC JUSTICE CENTER, Baltimore, Maryland, for Amici Public Justice Center, Legal Aid Justice Center, Mountain State Justice, and National Employment Lawyers Association. Kristi Graunke, Samuel J. Davis, AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, Raleigh, North Carolina; Sonia Kumar, Deborah A. Jeon, AMERICAN CIVIL LIBERTIES UNION OF MARYLAND, Baltimore, Maryland; Jennifer Wedekind, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, Washington, D.C.; Aubrey Sparks, Nicholas Ward, AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA, Charleston, West

Virginia, for Amici American Civil Liberties Union, American Civil Liberties Union of Maryland, American Civil Liberties Union of North Carolina, American Civil Liberties Union of West Virginia, American Civil Liberties Union of South Carolina, American Civil Liberties Union of Virginia, Caucus of African American Leaders, Maryland Cure and Family Support Network. Steven M. Klepper, Christopher C. Jeffries, B. Summer Hughes Niazy, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for Amicus International Municipal Lawyers Association.

TOBY HEYTENS, Circuit Judge:

Until 2020, Baltimore County sent incarcerated people from its detention center to work at a facility where the County sorts its recycling. Some of those workers sued the County, alleging violations of the Fair Labor Standards Act and two Maryland statutes. The district court granted summary judgment against the workers, concluding no reasonable adjudicator could view the facts in a way that would make them "employees" under the Act. We vacate the district court's decision and remand for further proceedings.

Courts—including this one—are generally skeptical of Fair Labor Standards Act claims brought by incarcerated workers. But there is no categorical rule that such workers cannot be covered by the Act when they work outside their detention facility's walls and for someone other than their immediate detainer. Having clarified the nature of the required analysis, we remand for a fresh look at the facts under those standards.

I.

A.

Baltimore County operates its own recycling center. The Department of Public Works (DPW) oversees the facility, where residential recycling from throughout the County is sorted. After being separated from non-recyclable waste, recyclable materials are further sorted into bales of "scrap metal, cardboard, mixed paper," "tin," "aluminum," and "four types" of plastic. JA 617. The bales are then sold at auction to "commercial purchasers." JA 479.

During the period at issue, materials were sorted by two types of workers. The first were temporary workers provided by a staffing agency. Those workers were "paid not less than the statutory minimum wage, as well as overtime compensation for hours worked in excess of forty . . . hours per week." JA 919. The second group of workers—the ones whose status is at issue—came from the Baltimore County Detention Center's community corrections program.

The community corrections unit oversees two related programs: work release and work detail. Detainees participating in work release "are assigned to employment that they had prior to incarceration" or that they secured "through workforce development job sources." JA 706. By contrast, the workers involved here were participating in work detail. In work detail, detainees worked for various other arms of the County, including the County's animal shelter, the County-run Chamber of Commerce, and the County recycling center. Detainees assigned to the recycling center mostly spent their time sorting recycled materials. But unlike the temporary

workers, the incarcerated workers were paid $20 per day despite regularly working nine-to-ten-hour shifts.

B.

Plaintiff Michael Scott worked at the recycling center while serving a short sentence at the detention center. In 2021, Scott filed suit "on behalf of himself and others similarly situated," arguing he was owed "unpaid statutory minimum wages and overtime compensation" for his work, as well as "liquidated and statutory damages." JA 40. The complaint asserts Scott's work at the detention center was covered by the Fair Labor Standards Act and analogous Maryland wage and hour laws.

The district court conditionally certified a collective action to litigate the federal claims and two classes to litigate the state-law claims. After discovery, Scott and the County filed motions for summary judgment.

The district court granted the County's motion for summary judgment and dismissed Scott's suit. The court concluded that Scott's claims all "fail[ed] as a matter of law" because neither he nor the people he represented were "employees" under the Act or its state law equivalents. JA 1839.

II.

"Before addressing . . . whether summary judgment was appropriate[,] . . . we must first clarify what facts were properly before the district court." *Motor Club of Am. Ins. v. Hanifi*, 145 F.3d 170, 174 (4th Cir. 1998). In the district court, Scott objected to various pieces of evidence the County relied on when seeking summary judgment. The district court rejected each challenge, and Scott renews a handful of them here.

Reviewing each ruling for an abuse of discretion, see *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997), we see no reversible error.

A.

Scott first asserts the district court relied on "inadmissible lay testimony" when concluding the County operated the work detail program for rehabilitative goals. Scott Br. 52. Scott admits the County submitted affidavits to that effect. But he argues such testimony could not be considered because none of the affiants were "experts in a sociological or psychiatric field" and none conducted or reviewed "any studies or surveys to empirically substantiate the claim" that working at the recycling center reduced recidivism. *Id.*

Scott's arguments fail to convince. Lay witnesses may offer opinion testimony so long as it is "rationally based on the[ir] . . . perception," "helpful to . . . determining a fact in issue," and "not based on scientific, technical, or other specialized knowledge." Fed. R. Evid. 701. Each official whose affidavit Scott challenges worked for the County and had personal knowledge about the recycling center work detail. From this firsthand experience—and without relying on "scientific, technical, or other specialized knowledge," Fed. R. Evid. 701(c)—the affiants could testify about the County's intentions when assigning incarcerated people to work at the recycling center. Those intentions were also, as we explain further in Section III(B)(3), very much at issue. Cf. *Mutual Life Ins. of N.Y. v. Hillmon*, 145 U.S. 285, 294–95 (1892) (evidence of one's intentions "tend[s]" "to show" one carried out those intentions).

B.

Scott next objects to the district court's reliance on two letters from community corrections personnel recommending detainees who had previously worked at the recycling center for work release. The County argued those letters were evidence "the work detail program [was] a steppingstone to the work release program," and the district court relied on them for that purpose. JA 1828–29. Scott challenges this ruling, insisting the letters do not qualify as "evidence of" the County's "routine practice" and thus could not be admitted under Federal Rule of Evidence 406. Scott Br. 52–53.

As the district court correctly recognized, however, the County did not need to rely on Rule 406 to admit the letters. That Rule—and its limits—apply only when evidence is offered "to prove that on a particular occasion [a] person or organization acted in accordance with" their "habit or routine practice." Fed. R. Evid. 406. But that is not why the letters were offered. Instead, they were used to support the claim that the recycling center work detail had a rehabilitative purpose during the relevant period by showing an allegedly rehabilitative outcome for some recycling center workers during that time. See Fed. R. Evid. 401 (evidence is relevant if "it has any tendency to make a fact more or less probable"). And because the evidence was relevant for that purpose, there is no need to consider whether it also would have been relevant for the purpose addressed by Rule 406. See *Huddleston v. United States*, 485 U.S. 681, 687 (1988) ("Rules 404 through 412 . . . [g]enerally . . . do not flatly prohibit the introduction of . . . evidence but instead limit the purpose for which it may be introduced.").

C.

Scott briefly gestures at two more evidentiary challenges we consider forfeited. First, Scott spends one-half of one sentence asserting that a witness the County designated to testify on its behalf under Federal Rule of Civil Procedure 30(b)(6) did so "based on hearsay." Scott Br. 53. Second, Scott asserts—without explanation—that the district court "allowed the introduction of inadmissible evidence" about whether incarcerated workers made a voluntary choice to work at the recycling center. Scott Br. 54.

Neither effort is enough to create an issue for this Court's review. A party seeking to overturn a district court's judgment must do more than list a series of asserted errors or "take[] a passing shot at" a given issue. *Grayson O Co. v. Agadir Int'l, LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (quotation marks removed). Nor can Scott's reference to the evidentiary objections he made in the district court save him—attempting to "adopt[ ] by reference" arguments made in the district court is a "practice that has been consistently and roundly condemned by the Courts of Appeals." *Cray Commc'ns, Inc. v. Novatel Comput. Sys., Inc.*, 33 F.3d 390, 396 n.6 (4th Cir. 1994). Because Scott "failed to develop" these arguments in his opening brief, we will not consider them. *United States v. Robertson*, 68 F.4th 855, 860 n.1 (4th Cir. 2023).

III.

Having "define[d] the relevant pool of evidence," we can now "div[e] into the" merits of the district court's summary judgment decision. *United States v. Gallagher*, 90 F.4th 182, 189 (4th Cir. 2024). "As always, we review the district court's summary

judgment ruling de novo, applying the same legal standards as that court." *Harriman v. Associated Indus. Ins.*, 91 F.4th 724, 728 (4th Cir. 2024).

A.

The Fair Labor Standards Act requires "a minimum wage and overtime pay for all covered employees." *McFeeley v. Jackson St. Ent., LLC*, 825 F.3d 235, 240 (4th Cir. 2016). This appeal comes down to a single question: Were Scott and other members of the work detail at the recycling center "employees" under the Act?

We begin, as always, with the statutory text. Unfortunately, the Act's "circular definition" of employee—"any individual employed by an employer," 29 U.S.C. § 203(e)(1)—is singularly "unhelpful" when deciding who qualifies for protection. *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 372 (4th Cir. 2021) (quotation marks removed). Lacking better guidance, courts have "look[ed] to the economic realities of the relationship between the worker and the putative employer" in deciding whether a particular worker is a covered employee. *McFeeley*, 825 F.3d at 241 (quotation marks removed). This approach considers the "totality of the circumstances" and is meant to "allow[] for flexible application to the myriad different working relationships that exist in the national economy." *Id.*

Courts have been skeptical of Fair Labor Standards Act claims brought by incarcerated workers, and ours is no exception. In *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993), this Court refused to apply the Act to "work performed at a prison workshop located within the penal facility." *Id.* at 132. In *Matherly v. Andrews*, 859 F.3d 264 (4th Cir. 2017),

the Court cited "[t]he *Harker* factors" in concluding that a plaintiff who was civilly detained as a sexually dangerous person was not entitled to the federal minimal wage for his "job at FCI Butner." *Id.* at 270, 278. And in *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369 (4th. Cir. 2021), the Court relied on *Harker* in rejecting a Fair Labor Standards Act claim brought by immigration detainees for work done "as janitors and in the library and kitchen" at the detention center. *Id.* at 370.

As the district court noted, however, this Court "has yet to analyze" whether the Act applies to "off-site inmate work." JA 1826. And that is exactly what we have here. The recycling center was not "behind prison walls." *Harker*, 990 F.2d at 135. Equally important—it was neither a "prison-operated industry," nor did the recycling center exist to serve "the prison itself." *Id.* This situation thus falls outside *Harker*'s "categorical[]" rule that "work done by inmates behind prison walls for any type of prison-operated industry or for the prison itself" is not covered by the Act. *Id.*

Indeed, the County acknowledges that *some* incarcerated workers fall within the Act's coverage. Recall that detainees participating in work release also leave the County's detention center to perform jobs, before returning to the detention center at the end of the workday. Some workers go to McDonald's, for example. The County agrees those work release participants are "employees," and that McDonald's must pay them the minimum wage and overtime as due under the Act. That concession reflects the commonsense proposition that the "free-world employer[s]" of "work release" participants must "pay [the] minimum wage and otherwise comply with the" Act. *Reimonenq v. Foti*, 72 F.3d 472, 476 (5th Cir.

1996). It also matches *Harker*'s recognition that "extraordinary circumstances" can trigger Fair Labor Standards Act "coverage of inmate labor," 990 F.2d at 135, and our sister circuits' repeated "rejection of a rule that a prisoner's labor is at all times and in all circumstances exempt from the" Act, *Danneskjold v. Hausrath*, 82 F.3d 37, 40 (2d Cir. 1996).[1]

At the same time, we reject Scott's assertion that *Harker*'s entire approach is inapplicable because *Harker* "was never intended to be applied to incarcerated labor performed outside of a prison." Scott Br. 27 (emphasis removed). *Harker* considered the same kind of question we must answer now: Is a worker whose freedom is significantly curtailed and whose relationship to the national economy is different from the typical worker an "employee" under the Fair Labor Standards Act? As this Court did in *Ndambi*, we follow "the principles of *Harker*" in answering the question before us. 990 F.3d at 373.

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[1] Accord *Burrell v. Staff*, 60 F.4th 25, 48 (3d Cir. 2023) (incarcerated workers "sufficiently allege that . . . they were employees"); *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) ("We have held that prisoners not sentenced to hard labor, who worked outside the jail for a private firm, were FLSA employees of the private firm."); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (adopting categorical rule akin to this Court's rule in *Harker* without "question[ing] the conclusion[] . . . that prisoners are not categorically excluded from FLSA's coverage simply because they are prisoners"); *Hale v. Arizona*, 993 F.2d 1387, 1389 (9th Cir. 1993) (en banc) ("While we do not believe that prisoners are categorically excluded from the FLSA, we hold that the inmates in this case [are not covered]."); *Henthorn v. Department of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) ("[W]here an inmate participates in a non-obligatory work release program in which he is paid by an outside employer, he may be able to state a claim under the FLSA[.]").

B.

Under *Harker*, we consider three "factors" in deciding whether a particular detained worker is covered by the Act. *Matherly*, 859 F.3d at 278. Although *Harker* and *Matherly* discussed the factors in a different order, we arrange them as we do here because it allows us to begin with what looks like our previous cases before turning to what looks different. We start by asking whether the relationship between the workers and their putative employer had the hallmarks of "a true employer-employee relationship." *Harker*, 990 F.2d at 133. We next consider whether the purposes of the Fair Labor Standards Act call for its application. See *id.* at 133–34. Finally, we reach what turns out to be the critical question here: whether the putative employer had "a rehabilitative, rather than pecuniary, interest in" Scott's and his fellow plaintiffs' labor. *Id.* at 133; accord *Matherly*, 859 F.3d at 278 (similar).

1.

This Court has concluded that detainees who "have [the] opportunity" to work "solely at the prerogative of the custodian" "do not deal at arms' length" with their putative employer like the typical worker in the national economy. *Ndambi*, 990 F.3d at 372 (quotation marks removed). Such workers, the Court has explained, "have not made the bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship" and the custodian "wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment." *Harker*, 990 F.2d at 133.

We begin with an important consideration favoring the County. Scott offers a series of reasons why he and his fellow detainees were dealing at arms' length when choosing to work at the recycling center, insisting the work "was optional and voluntary" and noting that the County had to increase pay to motivate incarcerated workers to join the recycling center detail. Scott Br. 11. In *Ndambi*, however, this Court rejected an analogous argument by immigration detainees working in a "voluntary work program." 990 F.3d at 370. "As [the] name suggests," that "program [was] voluntary." *Id.* But because the workers participated "solely at the prerogative of [their] custodian," the Court concluded this factor cut against application of the Act. *Id.* at 372 (quotation marks removed).

True, unlike in *Harker*, *Matherly*, and *Ndambi*, Scott and his fellow workers were not working inside the detention facility or for a "prison-operated industry." *Harker*, 990 F.2d at 135. Perhaps this consideration is not as weighty here, then, as it was in those cases. At the same time, however, Scott and his fellow detainees could only work at the recycling center if approved to do so by Department of Corrections (DOC) staff.

That does not, however, end our inquiry. In contrasting the situation before it with a "true employer-employee relationship," *Harker* emphasized the "virtually absolute control" the state prison exercised over the plaintiffs while they were working in the prison-operated print shop. 990 F.2d at 133. This observation reflects a recurring concern when detainees claim to be employees of their "detainer"—that the detainer exercises "*too much* control" to be understood as a mere employer. *Ndambi*, 990 F.3d at 372 (quotation marks removed).

Here, by contrast, Scott alleges that someone other than his detainer employed him. As explained more fully below, Scott does not claim he worked at the place he was detained or for a business run by his detainer. Instead, Scott asserts he worked at the recycling center, which was run by DPW. See Part III(B)(3), *infra*. And that, in turn, starts to make this case look more like the typical Fair Labor Standards Act case, where the question is whether the putative employer exercised "*enough*"—rather than too much—control. *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992).

At least when viewed in the light most favorable to the non-moving parties, the evidence suggests that the recycling center exercised the kind of control typical to an employment relationship. Although officers from the detention center were present during work detail shifts, it was recycling center staff—"not . . . [corrections] officer[s]" (JA 975–76)—who assigned the incarcerated workers' workstations, set the work schedule, provided safety and work equipment, and kept attendance records. Such facts are consistent with the level of control exercised by a typical employer. See, *e.g.*, *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 150–51 (4th Cir. 2017) (worker more likely to be employee where putative employer is "daily supervis[or]" and "provide[s] all of the materials, supplies, tools, and equipment" used in work). The County argues that corrections officers also had some supervisory role over work detail participants. But at this stage we must accept Scott's characterization of "unarmed, retired" corrections officers who "spent their time feeding birds as opposed to supervising inmates during bathroom breaks." Scott Br. 41.

A comparison between detainees on work release (who the County admits are employees) and those on work detail (who it insists are not) also confirms this factor does not cleanly favor the County. When a work release participant's shift ends at McDonald's, that person is "not free to walk off the job site and look for other work," nor do they "leave DOC supervision." *Harker*, 990 F.2d at 133. Instead, work release participants are "only allowed to be out of the facility for 12 hours a day" (JA 317), must "travel from [the detention center] to [their] work site and back again by the shortest route and in the least amount of time" (JA 1734), cannot "leave [their] place of employment without permission from designated [corrections] staff " (*id.*), and cannot "change or resign from [their] employment" without "permission from" DOC (*id.*). If DOC's exercise of so much control over detainees who are on work release does not bring such workers outside the Act, it must be because the proper focus of attention is the control exerted by the putative employer. For work release participants, that is a business like McDonald's. For Scott and those he represents, it was DPW. See Part III(B)(3).

To sum up: Because Scott needed DOC's approval to work at the recycling center, he did not bargain at arms' length with his putative employer under this Court's precedent. At the same time, however, there are—at minimum—genuine disputes of material fact that bear on whether Scott's putative employer exercised so much control as to prevent Scott from qualifying as an employee. Especially where "no single factor is dispositive," *McFeeley*, 825 F.3d at 241, this factor alone is not enough to win this case for the County.

2.

We next ask whether the purposes of the Act call for covering workers like Scott. See *Matherly*, 859 F.3d at 278; *Harker*, 990 F.2d at 133–34. Here too, our analysis points in both directions, but this time it tends to favor Scott.

The Fair Labor Standards Act's overriding purpose is to ensure "the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); see *Harker*, 990 F.2d at 133 (quoting this provision). Scott insists that purpose is implicated here because he and his fellow incarcerated workers needed the Act's protection. As one of Scott's amici notes, "[i]ncarcerated people are forced to purchase food, hygiene, and other items to compensate for grossly inadequate provisions" and must also pay "to maintain family relationships." ACLU Amicus Br. 24–28.

That may well be true, but this Court's precedent forecloses such a theory for why the Act should apply here. Indeed, *Ndambi* rejected an almost identical argument, holding that "any potential inadequacy of conditions is not appropriately remedied by applying the FLSA wholesale to detainees." *Ndambi*, 990 F.3d at 373. If the purposes of the Act call for its application here, it cannot be to benefit Scott and those he represents.

But the Act aims to protect the "general well-being of " *all* workers—not just those seeking coverage in a particular case. 29 U.S.C. § 202(a). It does so by, among other things, "preventing unfair competition in commerce," which happens when employers who "pay the minimum wage" are forced to compete against those who do not. *Harker*, 990 F.2d at 134;

see 29 U.S.C. § 202(a)(3). Such competition creates "a general downward pressure on wages" and explains why the Act's strictures must "be applied even to those [workers] who would decline its protections." *Tony & Susan Alamo Found. v. Secretary of Lab.*, 471 U.S. 290, 302 (1985). A worker who would happily labor for free because she is independently wealthy or has the world's best boss cannot opt out of the Act if economic realities reveal she is a covered employee. And this fact, in turn, confirms the Act is concerned not only with the individual workers claiming coverage (here, Scott and those he represents) but also with the effect that the work they do has on other workers and businesses.

Those concerns are directly implicated here, and they set this case apart from those this Court has already considered. As noted previously, the Court's past cases all involved work done by detained people inside their detention facility. See *Harker*, 990 F.2d at 132; *Matherly*, 859 F.3d at 270; *Ndambi*, 990 F.3d at 370. This case, in contrast, involves work done at an offsite location where detained and non-detained workers both worked. That distinction makes a difference.

For one thing, the fact that this work was done outside the prison walls impacts the risk of unfair competition to other businesses. The nature of work done inside a prison constrains its potential impact. Usually, "[t]he opportunity" to do that work "is open only to prisoners." *Danneskjold*, 82 F.3d at 43. Not only is the labor pool limited, but a business seeking to make goods in or provide services from inside a prison must conduct the enterprise within the constraints inherent to the carceral environment. See, *e.g.*, *Sandin v. Conner*, 515 U.S. 472, 484–86 (1995) (describing the "significant amount[] of

'lockdown time'" in prison as an "ordinary incident[] of prison life"). Those realities limit the extent to which output from work done inside prisons can affect commerce outside of prisons.

Not so when you run your operation in the free world but import cheap labor from a prison. As County officials acknowledged, there were "third part[ies] like [W]aste [M]anagement"—a private corporation that does not use incarcerated labor—who "had contracts with many jurisdictions" to provide the same kind of services the County was providing for itself at the recycling center. JA 588. Indeed, the County operated the recycling center "so [it would not] have to go to Waste Management." JA 643. And it could make that choice because it was cheaper for the County to run the recycling center itself than it would have been to use Waste Management. The fact that the County also sorted recycling for two other counties and was trying to secure business from four more only confirms the potential competitive unfairness to private providers.

The County's responses to this point are unpersuasive. For example, the County insists there is no evidence it "sought to 'undersell' private recyclers in selling recycled material." County Br. 49. But even assuming that is true, the County's artificially low labor costs meant it could provide recycling *services* more cheaply than private providers, making it more difficult for private providers to secure business they otherwise might have won. Nor does it help the County's case to argue that operating a recycling center is a "recognized government function." County Br. 49. State and local governments do all sorts of things that might otherwise be "left in private hands" and the Supreme Court long ago jettisoned the view that they are

immune from the Fair Labor Standards Act when performing government functions. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546–47 (1985). Instead, the Act applies to "virtually all state and local-government employees." *Id.* at 533.

That brings us to the second reason it matters that this work was done outside the detention facility's walls: It also increased the risk of "unfair competition" for free workers. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984). To be sure, some jobs done inside prisons by incarcerated workers would otherwise be filled by non-incarcerated workers. See, *e.g.*, *Ndambi*, 990 F.3d at 374 (noting that possibility in relation to janitorial, kitchen, library, and barbershop work). But for reasons that echo those discussed above, the possibility of unfair competition is greater—and the Act's overriding purpose more clearly implicated—when incarcerated workers fill jobs outside a detention facility.

That risk was realized here, too. The record contains evidence that the County sought to "get rid of the temp workers" at the recycling center—thereby eliminating what would have been at least minimum wage paying jobs—and thus "decrease costs" by getting "more consistent inmate[] numbers" to do the work instead. JA 927. Perhaps the best proof that the use of incarcerated workers kept other workers from getting these jobs is that after the County stopped using incarcerated workers at the onset of the COVID-19 pandemic (and this lawsuit), it hired more

temporary workers for the recycling center and paid them the minimum wage.[2]

3.

We arrive now at the last *Harker* factor—whether the "[i]nmates perform work . . . to turn profits for their supposed employer" or instead "as a means of rehabilitation and job training." *Harker*, 990 F.2d at 133; accord *Matherly*, 859 F.3d at 278 (framing the factor in the same way).

We are confronted immediately with a dispute about who Scott's "supposed employer" is and thus whose "interest" in Scott's labor matters. *Harker*, 990 F.2d at 133. The County insists that, legally speaking, there is no such thing as DPW or DOC and thus we must consider the interests of Scott's "custodian"—the County as a whole. County Br. 29, 33. The district court appears to have adopted this view, relying heavily on DOC's goals in sending incarcerated workers to the recycling center in concluding that the Act did not apply. In contrast,

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[2] *Harker* also reasoned that the purposes of the Act did not warrant its application "to work done by inmates behind prison walls for any type of prison-operated industry" because another federal statute—the Ashurst-Sumners Act—"dealt more specifically" with the unfair competition risks posed by "prison-made goods." *Harker*, 990 F.2d at 134–35. Perhaps recognizing that we are not dealing with "prison-made goods," the County's brief barely mentions this aspect of *Harker,* relegating it to a brief reference in a single footnote. See County Br. 46 n.12. One other possible reason for the County's reluctance to emphasize Ashurst-Sumners: if that law applied to the sort of work being done here, the County may have spent years violating it by selling bundles of recycled material produced using incarcerated labor.

Scott asserts that it is DPW's interests in using inmate labor that matter here.

We conclude Scott has the better argument. *First*, Scott's proposed approach is most consistent with *Harker*. In *Harker*, this Court asked whether State Use Industries—an "organization [within the Maryland Department of Corrections] created by the Maryland legislature to meet the rehabilitative needs of inmates"—"ha[d] a rehabilitative, rather than pecuniary, interest in [the plaintiff 's] labors." 990 F.2d at 132–33. The Court did not ask whether the facility detaining the plaintiff (or the State of Maryland writ large, of which the facility and prison operated industry were both a part) had such an interest. See *id*. That, in turn, suggests that the relevant question is why DPW was using inmate labor, not why DOC was allowing it to happen.

Second, treating DPW's interests as the relevant ones fits best with the "uncontroversial" fact that inmates on "work release" are employed by their private employers, not the County. County Br. 28. The County asserts, and the district court concluded, that Scott's claims fail because DOC (or the County via DOC) had a rehabilitative purpose in sending the incarcerated workers to the recycling center. But if that argument is right, it is hard to see why people on work release are covered by the Act. DOC does not allow work release participants to go to McDonald's to make McDonald's more profitable; it does so to "prepare the inmates for reentry into the community." JA 705. If DOC's rehabilitative aim was enough to evade coverage under the Act, work release participants at McDonald's would seemingly not be covered, either.

Third, the County's response—that the McDonald's example involves a "third-party employer" but this situation does not, County Br. 28—merely assumes the County is right that the only thing that matters is what legal entity Scott had to name as the defendant in his complaint. That assumption improperly elevates form over substance. "[E]conomic reality rather than technical concepts is to be the test of employment." *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (quotation marks removed).

The Department of Labor's implementing regulations address a similar issue and demonstrate the flaw in the County's argument. One way an employee can show entitlement to a minimum wage is to prove they are "employed in an *enterprise* engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206(a) (emphasis added). The Department's regulations make clear that an "enterprise is not necessarily coextensive with the entire business activities of an employer" and that "a single employer may operate more than one enterprise." 29 C.F.R. § 779.203; see 29 C.F.R. § 779.204(c) ("In some cases one employer may operate several separate enterprises."). We need not and do not decide whether DPW is a separate enterprise from DOC or any other part of the Baltimore County government. We simply point out that the Act's coverage does not turn on the formal legal label affixed to the putative employer.

Finally, the County's "the County is the County is the County" argument offers no persuasive way to distinguish a recent and closely analogous case from the Third Circuit. In *Burrell v. Staff*, 60 F.4th 25 (3d Cir. 2023), that court held civil detainees sent to sort trash at a recycling center had sufficiently alleged they were employees under the Act. See *id.* at 31, 48.

The recycling center was run as a "joint public-private venture" by a municipal authority and the "private corporation" to whom the government had "outsource[d]" its recycling operation. *Id.* at 31 (second and third quotes), 45 (first quote).

The County insists that the presence of a "private business[]" in *Burrell* distinguishes it from this case, County Br. 29, but we do not see how we could reject Scott's claim while leaving open the possibility that claims like those in *Burrell* might succeed. For one thing, the County ignores the "public" part of the "public-private venture" in *Burrell*—the court noted the government entity may have been setting the detainees' pay and was receiving an "economic benefit" insofar as it reduced the labor costs the government would have had to otherwise pay. 60 F.4th at 45–46. And even more striking, *Burrell* held the government entity *itself* might be liable as a joint employer. See *id.* at 46.

To be sure, *Burrell* is not quite on all fours, and we would have to follow this Court's precedent even if it required us to reach a result that conflicted with *Burrell*. See *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) ("[O]ne panel cannot overrule another."). But we try to avoid creating circuit splits, and the County identifies no persuasive way to distinguish *Burrell*.

Having determined it is DPW's interest in Scott's employment that matters, we turn to a second legal question: To what extent must DPW have been motivated by rehabilitative aims (rather than economic goals) in deciding to use incarcerated workers? Though it resists saying so directly, the County repeatedly suggests that *any* quantum of genuine rehabilitative purpose takes Scott and his

fellow detained workers outside the Fair Labor Standards Act. The district court appears to have adopted that view, stating that even though the "[u]ncontroverted evidence" showed the work release program "served both economic and rehabilitative purposes," it was enough that there was "*some* rehabilitative purpose of the work detail program." JA 1831 (emphasis added). In contrast, Scott argues the appropriate inquiry considers the "primary" purpose during the relevant period. Scott Br. 38.

Here too, we agree with Scott. To begin, none of this Court's previous decisions about detainee labor address this question. In *Matherly*, the Court noted that "there [was] *no* indication that [the plaintiff] [was] working to turn a profit for" his putative employer. 859 F.3d at 278 (emphasis added). And in *Harker*, the Court stated the Act did not apply because the prisoners "perform[ed] work . . . *not* to turn profits for their supposed employer, *but rather* as a means of rehabilitation and job training." 990 F.2d at 133 (emphasis added). The County would have us rewrite that sentence to say that the Act does not apply *even when* inmates "perform work . . . *to* turn profits for their supposed employer, [*so long as they also do so*] as a means of rehabilitation and job training." Whatever the merits of that rule, it would be an extension of *Harker*, not a mere application of its holding.

True, *Ndambi* holds that the fact that a putative employer is making money—or even is a profit-seeking entity—does not automatically trigger coverage under the Act. See 990 F.3d at 374. But the question here is not why the recycling center exists (which would be the analogous question to the one the Court considered in *Ndambi*): it is why the recycling center was using incarcerated labor and whether any degree of rehabilitative purpose is enough to avoid coverage.

And, like *Harker* and *Matherly*, *Ndambi* does not purport to answer that question.

Fortunately, other Fair Labor Standards Act cases have considered the multiple-purposes question. For example, courts have long needed to distinguish between employees and trainees, employees and volunteers, and employees and interns—all situations where the putative employer might have more than one interest at play. To be clear, we do not import the law governing those separate relationships into the prison context wholesale, and we emphasize that here, as elsewhere, we must examine "the particular working relationship, the particular workplace, and the particular industry." *McFeeley*, 825 F.3d at 241. But what is noteworthy is that, in each context, courts apply a "principal" or "primary" purpose analysis. *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1310 (4th Cir. 1971) (first quote) (volunteers); *Harbourt v. PPE Casino Resorts Md., LLC*, 820 F.3d 655, 659 (4th Cir. 2016) (second quote) (trainees); see also *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016) (interns). We think the same approach is the right one here.

Finally, we emphasize that the time frame that matters is that for which Scott seeks to recover back pay. The record suggests DPW began using incarcerated workers decades in the past, but why it made that choice long ago is not the relevant question. Instead, the question here is whether it had a sufficiently rehabilitative purpose "throughout the relevant period." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 140 (2d Cir. 1999).

To once again sum up: The question under this *Harker* factor is whether DPW's principal or primary purpose for using incarcerated workers at the

recycling center during the time frame at issue was for "rehabilitation and job training." *Harker*, 990 F.2d at 133. If the answer is no, this factor cuts strongly in Scott's favor.

C.

The district court, of course, did not have before it our analysis of these issues when it considered the County's motion for summary judgment. For that reason, it is understandable that the court's framing of the relevant legal standards differed from those set out in this opinion in various important respects. True, the de novo standard of review means we could apply those standards ourselves to decide whether to affirm the district court's grant of summary judgment to the County. See *Pendleton v. Jividen*, 96 F.4th 652, 658 (4th Cir. 2024). But "we remain mindful that we are a court of review, not of first view" (*id.* (quotation marks removed)), and we think it better to follow our usual practice of allowing the district court to conduct the required analysis in the first instance. Such an approach seems especially appropriate here given the inherently fact-intensive nature of the relevant inquiry. To be sure, the "*ultimate* conclusion" about whether a given worker is an employee under the Act presents "a legal question." *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (emphasis added). But many of the subsidiary questions that guide that analysis are, unsurprisingly, "factual question[s]." *Tony & Susan Alamo Found.*, 471 U.S. at 299. So while we do not foreclose the possibility of renewed summary judgment proceedings on remand, we emphasize that any factual disputes—including those bearing on the degree of control exercised at the recycling center and DPW's primary purpose in using

incarcerated workers—must be viewed in the light most favorable to the non-moving party.

*   *   *

Congress may well not have had workers like Scott in mind when it enacted the Fair Labor Standards Act. "But . . . it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundown Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). And "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Pennsylvania Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998) (quotation marks removed). These observations ring especially true for this statute—one "whose striking breadth" courts have long recognized. *Nationwide Mut. Ins. v. Darden*, 503 U.S. 318, 326 (1992).

We reiterate this Court's previous holdings that "work done by inmates behind prison walls for any type of prison-operated industry or for the prison itself" is "categorically" outside the Fair Labor Standards Act. *Harker*, 990 F.2d at 135. We do not hold every incarcerated person who works outside the four walls of their prison is covered by the Act, nor do we hold that every incarcerated person doing a job outside the prison walls that could be done by a free worker at a higher wage is covered. We do not even hold that Scott and those he represents are covered by the Act. Instead, we hold only that the district court applied the wrong legal standards in granting summary judgment to the County here and remand for further proceedings.

The judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Case No.: SAG-21-00034

MICHAEL A. SCOTT, *et al.*,

Plaintiffs,

—v.—

BALTIMORE COUNTY, MARYLAND,

Defendant.

MEMORANDUM OPINION

Plaintiff Michael Scott and other Class Members—all current or former inmates at the Baltimore County Detention Center ("BCDC")—brought this class action against Defendant Baltimore County ("the County"). ECF 1. Plaintiffs allege the County violated the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA" or "the Act") and its state-law equivalent, by failing to pay them minimum wage and overtime when they worked off-site during their incarceration as work detail employees at the Baltimore County Department of Public Works's recycling facility. *Id.*

Following discovery, the County filed a motion for summary judgment. ECF 169. Plaintiffs responded and filed a cross-motion for summary judgment. ECF

175. The County replied and opposed, respectively. ECF 180. With the permission of the Court, ECF 181, both parties filed amended oppositions and replies. ECF 183; ECF 185. Plaintiffs then filed a reply to Defendant's opposition to Plaintiffs' cross-motion. ECF 190. The County filed a surreply, ECF 193, and Plaintiffs responded, ECF 194. The Court has reviewed the motion and all of the related briefing and has determined that no hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2021). For the reasons that follow, the County's motion for summary judgment, ECF 169, will be GRANTED, and the Plaintiffs' cross-motion for summary judgment, ECF 175, will be DENIED.

I. BACKGROUND

Defendant Baltimore County's Executive Branch is comprised of multiple agencies, including the Department of Corrections ("DOC") and the Department of Public Works ("DPW"). *See* ECF 175-3 at 16[1] (Deposition of former Baltimore County Administrative Officer Frederick Homan). DOC oversees the Baltimore County Detention Center ("BCDC"), where Plaintiffs served or are serving sentences as inmates. DPW operates the County's Material Recovery Facility ("MRF"), a recycling facility where Plaintiffs helped process collected recycled material by standing along conveyor belts and sorting trash from recyclable material. *See* ECF 175-1 at 30 (Deposition of John Jones, MRF Facility Manager).

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[1] Cited page numbers refer to the ECF number unless otherwise noted.

According to the Defendant, DOC runs a Community Corrections Program that seeks to reduce the recidivism of inmates by providing work programs and resources to prepare inmates for reentry into the community. *See* ECF 169-3 at 8 (Deposition of Gail Watts, former manager of the program). The Community Corrections Program oversees work "release" opportunities, which enable inmates to work for private employers without DOC supervision if permitted by the sentencing court. *See* ECF 169-17 at 4 (Deposition of Audra Parish, Supervisor of the Community Corrections Program). The Community Corrections Program also operates a work "detail" program, which assigns supervised work assignments to inmates. *See* ECF 169-3 at 8–9. Work detail assignments have included assisting the County's animal shelter, loading shipments at the prison, maintaining the BCDC front lobby, setting up for events hosted by the Baltimore County Chamber of Commerce, and—relevant to this case—sorting recycled material at the County's recycling facility. *See* ECF 169-4 at 10 (Deposition of Justin Halligan, Community Corrections Program supervisor).

MRF first shifted to single-stream recycling in 2013 to encourage recycling by the County's residents. *See* ECF 169-10 at 7 (Deposition of Michael Beichler, DPW Chief of Solid Waste). Based on the record, operations of the facility generally went as follows. First, contractors collected recycled material from around the County, transported the material to the facility, and dumped the materials into an open bay/floor exposed to outside weather conditions. ECF 175-1 at 30–32. From there, County DPW employees transported the materials onto conveyor belts. *Id.* Both humans and machines sorted the recyclables, removing trash and separating the remaining

recyclables into their respective materials (*e.g.*, paper, aluminum). *Id.* at 34; *see also* ECF 175-6 at 20–23 (Deposition of Anthony Robinson, former MRF shift supervisor). Once sorted, the recycled material was gathered into a bale, which the County later sold to the highest bidder. ECF 175-1 at 35, 55.

Although the parties dispute specifics regarding the inmates' work experiences, Plaintiffs generally stood at the conveyor belts picking out trash from the recycled material brought into the facility. From the record it appears that work detail inmates worked approximately nine-to-ten hours a day (including breaks), and worked closer to eleven-to-twelve hours a day during the holiday season, when DPW anticipated an increase in recycling. *See* ECF 175-1 at 94–95, 102– 03, 106; ECF 175-6 at 27–28; *see also* ECF 175-28 at 16 (email from DOC supervisor to DPW noting "we are prepared to increase the number of inmate workers at MES to a minimum of 30 per day, working 10 hours six days a week."). DPW requested from DOC the additional work hours from the inmates during the busier holiday season, which DOC typically accommodated. *See* ECF 175-1 at 108. Plaintiffs worked alongside temporary employees hired by DPW to perform the same job for fewer hours, in exchange for minimum wage. ECF 175-55 ¶ 8.

The recycling facility was open-air, causing especially cold working conditions in the winter. ECF 175-6 at 82. Inmates changed into street clothes for their work detail; however, they had to provide their own clothes from family and friends. ECF 175-55 ¶ 6 (Decl. of Pl. Scott). Keeping warm was a challenge, and DOC at times failed to provide sufficient clothing. ECF 175-39 at 3 (Community Corrections Supervisor, Audra Parrish, suggesting a clothing

drive to collect clothing for the MRF work detail inmates "because the supply is diminishing and the sizes are limited," and providing the anecdote that "a pair of female dress pants was issued to one of the [MRF] workers so he could go out to [MRF] the next day."). Plaintiff Scott describes that inmates sometimes grabbed coats and other discarded clothing that came through on the conveyor belt to better protect themselves from the cold conditions. ECF 175-55 ¶ 6.

It is unclear from the record the degree of actual supervision exercised by DOC over its work detail inmates at the MRF. Mr. Dias, a DOC correctional officer, reports that DOC supervised inmates at all times during the workday, and he conducted head counts of the inmates every 20–30 minutes while circulating throughout the work area to check for security issues or misconduct. ECF 169-26 ¶¶ 21–22. In contrast, Plaintiff Scott reports "extremely limited" interaction with the correctional officers, because they would "generally sit in the office and/or break room at the MRF while the other inmates and I were working at the recycling facility." ECF 175-55 ¶ 10. Plaintiff Scott further notes, "The correctional officers were not consistently present or supervising the inmates at the MRF. It would have been very easy to just walk-off. There were no check-points, and anybody could (and frequently did) just drive into the MRF. I was amazed by the lack of security." *Id.* Although the parties dispute the degree of supervision, they agree that DOC and DPW could remove inmates from the work detail at the recycling center for poor performance, bad behavior, or some other infraction. ECF 175-55 ¶ 4; ECF 169-26 ¶ 24.

Inmates ate their breakfasts at BCDC before leaving early in the morning for their recycling shifts,

and they received dinner when they returned from their shifts. ECF 169-25 at 6–7 (Deposition of Pl. Scott); ECF 175-55 ¶ 15. Mr. Dias reports that DOC provided inmates with a bagged lunch from the BCDC kitchen for the workday. ECF 169-26 ¶ 13. According to Plaintiff Scott, this bagged lunch typically consisted of bologna sandwiches that the inmates called "sweaty betty[s]," ECF 175-55 ¶ 11; ECF 175-6 at 137, which were at times missing from their bags, ECF 175-41 at 5 (email from DOC supervisor Ms. Parish noting complaints from inmates). Inmates complained that these small, bagged lunches were insufficient sustenance for the long workdays. ECF 175-14 at 46 (Deposition of Philip Pokorny, former supervisor of the Community Corrections Program). Mr. Robinson, a former County shift supervisor at the recycling facility, recalls looking the other way while inmates ate food that came down the conveyor belt. ECF 175-6 at 138–39. Food motivated the inmates, and DPW rewarded the inmates with pizza or sub lunches when they met their recycle bale quotas. ECF 175-41 at 5 (email from DOC supervisor Ms. Parish noting that DPW Operations Manager Mr. Bruce "will order food just to help motivate the workers, especially since it is cold out."); *see also* ECF 175-1 at 96–97.

Ultimately, Plaintiffs received $20 per day for their labor, along with some opportunities for bonuses and industrial credits to reduce their remaining time served. ECF 169-10 at 9; ECF 169-23 at5 (Deposition of Eric Brooks, DOC manager). The MRF work detail was the highest paying assignment, given the inmates' general disinterest in working at the facility and the County's interest in using inmate labor to staff the sorting positions. ECF 175-3 at 45–46 (Baltimore County Administrative Officer noting,

"Fewer still were interested in working at the recycling facility so the stipend was higher at the recycling facility," *id.* at 43).

In January 2021, Plaintiff Scott, on behalf of himself and other Class Members, brought this case against the County for its alleged violation of federal and state employment laws. ECF 1. Specifically, Plaintiffs assert that the County willfully violated the FLSA by failing to pay minimum wage (Count I) and overtime (Count II), willfully violated the Maryland Wage and Hour Law ("MWHL") by failing to pay minimum wage (Count III) and overtime (Count IV), and willfully violated the Maryland Wage Payment and Collection Law ("MWPCL") (Count V), which requires an employer to timely pay an employee all wages owed. *See* Md. Code Ann., Labor & Empl. Art. ("LE") §§ 3-502(a)(ii), 3-505(a).

Defendant moved for summary judgment, ECF 169, arguing that Plaintiffs could not be "employees" under the FLSA. In the alternative, Defendant asserted that even if Plaintiffs are "employees" under the FLSA, there is no evidence of any willful violation of the federal and state employment laws. In Plaintiffs' cross-motion for summary judgment, they argue that the economic reality of their working relationship is one of employment, and therefore the FLSA applies. ECF 183 at 51–53. In the alternative, Plaintiffs request this Court grant summary judgment for the Plaintiffs who were recommended for work release but kept on the work detail program, *id.* at 54, or grant summary judgment against Defendant's claim that the work was involuntary, *id.* at 54– 55.

II. LEGAL STANDARD

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the burden of showing that there is no genuine dispute of material fact. *See Casey v. Geek Squad Subsidiary Best Buy Stores, L.P.*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). If the moving party establishes that there is no evidence to support the non-moving party's case, the burden then shifts to the non-moving party to proffer specific facts to show a genuine issue exists for trial. *Id.* The non-moving party must provide enough admissible evidence to "carry the burden of proof in [its] claim at trial." *Id.* at 349 (quoting *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315–16 (4th Cir. 1993)). The mere existence of a scintilla of evidence in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find in its favor. *Id.* at 348 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Moreover, a genuine issue of material fact cannot rest on "mere speculation, or building one inference upon another." *Id.* at 349 (quoting *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D. Md. 1999)).

Additionally, summary judgment shall be warranted if the non-moving party fails to provide evidence that establishes an essential element of the case. *Id.* at 352. The non-moving party "must produce competent evidence on each element of [its] claim." *Id.* at 348–49 (quoting *Miskin*, 107 F. Supp. 2d at

671). If the non-moving party fails to do so, "there can be no genuine issue as to any material fact," because the failure to prove an essential element of the case "necessarily renders all other facts immaterial." *Id.* at 352 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Coleman v. United States*, 369 F. App'x 459, 461 (4th Cir. 2010) (unpublished)). In ruling on a motion for summary judgment, a court must view all the facts, including reasonable inferences to be drawn from them, "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. DISCUSSION

A. Applicable Law

Although Plaintiffs have brought this suit pursuant to the FLSA, MWHL, and MWPCL, Plaintiffs may only seek recovery under one theory of liability. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980); *see also Re: Butler et al. v. PP&G, Inc., et al.*, No. CV 20-3084-JRR, 2023 WL 3580374, at *4 (D. Md. May 22, 2023). "[T]he MWHL and the MWPCL are wage enforcement laws, with the MWHL aiming 'to protect Maryland workers by providing a minimum wage standard[,]' and the MWPCL requiring 'an employer to pay its employees regularly while employed, and in full at the termination of employment.' " *Re: Butler et al.*, 2023 WL 3580374, at *4 (internal citations omitted). Both the MWHL and the FLSA have similar purposes and almost identical definitions of "employer," and the MWHL contains internal references to the FLSA. *Watkins v. Brown*,

173 F. Supp. 2d 409, 416 (D. Md. 2001). Thus, the MWHL is "the state's equivalent of the FLSA." *Id.*

Importantly, all of Plaintiffs' claims rise or fall on the success of their FLSA claim. If Plaintiffs are not employees under the FLSA, then they are not employees under the MWHL. *See McFeeley v. Jackson St. Ent., LLC*, 47 F. Supp. 3d 260, 267 n.6 (D. Md. 2014), aff'd, 825 F.3d 235 (4th Cir. 2016) ("The requirements under the MWHL are so closely linked to the FLSA that 'plaintiffs' claim under the MWHL stands or falls on the success of their claim under the FLSA.'" (citing *Turner v. Human Genome Sci., Inc.*, 292 F. Supp. 2d 738, 744 (D. Md. 2003)). Similarly, if Plaintiffs are not entitled to unpaid wages, then they cannot claim the wages were improperly withheld under the MWPCL. *See Chavez v. Besie's Corp.*, No. GJH-14-1338, 2014 WL 5298032, at *4 (D. Md. Oct. 10, 2014) ("[A] violation of the MWPCL depends entirely on violation of another law, either the MWHL or the FLSA, which set wage rates."). Thus, this Court analyzes Plaintiffs' claims under the FLSA.

B. Summary of the FLSA's Applicability to Inmate Labor

At heart, the question is whether Plaintiffs' work conducted outside the prison's walls constitutes employment under the FLSA. The Fourth Circuit has categorically excluded work conducted within a prison from the FLSA's purview; however, it has yet to directly opine on a case involving work conducted off-site. *See Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993) (inmate claiming entitlement to minimum wage for work performed in workshop within the Maryland Correctional Institution);

Matherly v. Andrews, 859 F.3d 264, 268 (4th Cir. 2017) (inmate seeking minimum wage for work performed at the Federal Correctional Institution); *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369 (4th Cir. 2021) (former civil immigration detainees bringing claim for minimum wage for janitorial work performed in the Cibola County Correctional Center while their immigration cases were processed). Other courts, such as the Third Circuit Court of Appeals, have reached different outcomes when confronted with prisoners working outside the prison's walls for employers other than the prison. *See Burrell v. Staff*, 60 F.4th 25, 44 (3d Cir. 2023) ("Plaintiffs' work, however, was not the sort of 'intra-prison work' for which inmates are categorically 'not entitled to minimum wages under the FLSA.'") (citing and distinguishing *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir. 1999)). Given the Fourth Circuit has yet to directly address this issue, this Court first reviews how other circuit courts have approached the legal question before proceeding to consider Plaintiffs' specific factual circumstances. *See Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) ("Although the underlying facts are reviewed under the clearly erroneous standard, the legal effect of those facts—whether appellants are employers within the meaning of the FLSA—is a question of law.").

The FLSA requires an "employer" to pay an "employee" no less than the federal minimum wage. 29 U.S.C. § 206(a). Unhelpfully, the Act circularly defines "employee" as "any individual employed by an employer." 29 U.S.C. § 203(e)(1); *see also Ndambi*, 990 F.3d at 372 (quoting *Harker*, 990 F.2d at 133). The Act further defines "employer" as "any person acting . . . in the interests of an employer in relation

to an employee," and defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(d), (g). The Act exempts a long list of positions from the definition of "employee," ranging from a "casual" babysitter to a "seaman" on a non-American vessel. *Id.* § 213; *see also Ndambi*, 990 F.3d at 372. Additionally, "[t]here are some excepted classes of employees, § 203(e)(2), (3), (4), but prisoners are not among them." *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005).

Most circuit courts have weighed, in some context, whether inmates can qualify as "employees" under the Act. On the one hand, courts have noted that the statute includes a long list of excepted positions and classes of employees, without expressly excluding prisoners. *See Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984) ("Congress has set forth an extensive list of workers who are exempted expressly from the FLSA coverage. The category of prisoners is not on that list. It would be an encroachment upon the legislative prerogative for a court to hold that a class of unlisted workers is excluded from the Act."); *see also Powell v. United States Cartridge Co.*, 339 U.S. 497, 517 (1950) ("[S]pecificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act."). Likewise, the Supreme Court instructed courts to expansively construe the terms "employee" and "employer" under the FLSA. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). On the other hand, "[p]eople are not imprisoned for the purpose of enabling them to earn a living." *Bennett*, 395 F.3d at 410. As explained by the Seventh Circuit, "[t]he reason the FLSA contains no express exception for prisoners is probably that the idea was too outlandish to occur to anyone when the legislation was under consideration by Congress." *Id.*

Generally, courts have considered the legislative history of the Act and have concluded that, despite the lack of an express exception, the "FLSA's protections do not extend to the custodial context generally." *Ndambi*, 990 F.3d at 373; *id.* at 373–74 (collecting cases from each circuit). As a result, courts analyze each case independently to determine whether the specific facts amount to employment under the FLSA.

Some circuits—including the Fourth Circuit—categorically exclude inmate work performed *inside* the prison's walls. *See Tourscher v. McCullough*, 184 F.3d 236, 238 (3d Cir. 1999) (holding that both pre-trial and convicted inmates are "not entitled to minimum wages under the FLSA" for "intra-prison work"); *Harker v. State Use Indus.*, 990 F.2d 131, 136 (4th Cir. 1993) ("If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts."); *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (holding "that a prisoner doing work in or for the prison is not an 'employee' under the FLSA"). In contrast, other circuits—such as the Second and D.C. Circuits—ignore this inside/outside distinction. *See, e.g.*, *Danneskjold v. Hausrath*, 82 F.3d 37, 44 (2d Cir. 1996) ("[W]e also believe that whether the labor is performed inside or outside the physical walls of the institution is irrelevant"); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 685–86 (D.C. Cir. 1994) ("Neither the inside/outside nor the public/private distinction alone provides an adequate answer to which prisoner work situations should be covered by the FLSA.").

For inmate work not categorically excluded, courts analyze the economic relationship between the inmate and the alleged employer; however, circuit courts have differed in what factors to consider.

i. *Bonnette*'s Four-Factor Economic Reality Test

Some courts originally applied the traditional four-factor economic reality test developed by the Ninth Circuit Court of Appeals in *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). The *Bonnette* case did not involve prison labor, but rather sought to understand whether the state was a joint employer of persons providing domestic in-home care to disabled public assistance recipients. *Id.* In *Bonnette*, the Ninth Circuit recognized that "[t]he determination of whether an employer-employee relationship exists does not depend on 'isolated factors but rather upon the circumstances of the whole activity[,]'" *id.* at 1469 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)), and that "[t]he touchstone is 'economic reality.'" *Id.* (citing *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961)). To determine whether the state was a joint employer, the Ninth Circuit considered, in part, the four factors typically considered in joint-employer cases. Specifically, it inquired into "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 rate and method of payment, and (4) maintained employment records."

The *Bonnette* factors first appeared in the prison context in the Second Circuit. In the early 1980s, there were "sparse prior decisions" on the issue of whether the FLSA applied to inmates. *See Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983). The Second Circuit Court of Appeals heard a case involving an inmate hired by Dutchess Community

College to act as a teaching assistant in conjunction with courses offered by the College to inmates. *See Carter*, 735 F.2d at 10. The district court had granted summary judgment, concluding there could be no employee-employer relationship under the FLSA between the inmate and the College when the prison held "ultimate control." *Id.* at 12. On appeal, the Second Circuit reversed, approving of the district court's consideration of control but noting that "[a] full inquiry into the true economic reality is necessary." *Id.* at 14. The Second Circuit cited *Bonnette* as the relevant case for determining the "economic reality" of the working relationship. *Id.* at 12.

Six years later, the *Bonnette* factors next appeared in the Fifth Circuit in a case involving an "egregious" abuse of prison labor.[2] *Watson v. Graves*, 909 F.2d 1549, 1550 (5th Cir. 1990). In *Watson*, inmates served life sentences in a parish jail for commission of non-violent crimes. *Id.* at 1551. The sheriff and warden of the jail developed a work-release program that permitted the inmates to work outside the jail for the sheriff's daughter and son-in-law to assist their construction business at a rate of $20 per day. *Id.* The sheriff's relatives fully relied on the work-release program to provide labor for their construction business. *Id.* To determine whether the inmates were employees under the FLSA, the Fifth Circuit applied

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[2] The Fifth Circuit wrote: "Up to now this court believed, apparently naively, that in the last decade of the twentieth century scenarios such as the one now before us no longer occurred in county or parish jails of the rural south except in the imaginations of movie or television script writers. The egregious nature of this misanthropic situation in the instant case, however, disabuses us of that innocent misconception." *Watson*, 909 F.2d at 1550.

the *Bonnette* factors to assess the economic reality of the inmates' situation. *Id.* at 1553–54 ("We also agree that in order to determine the true 'economic reality' of the Inmates' employee status, we must apply the [*Bonnette*] four factors of the economic realities test to the facts in the instant case in light of the policies behind FLSA," *id.* at 1554). After application of the *Bonnette* factors, the Fifth Circuit concluded that the inmates were employees of the construction business for the purposes of the FLSA coverage. *Id.* at 1556.

Watson proved to be the high-water mark of *Bonnette*'s application in the prison labor context. Two years after *Watson*, the Seventh Circuit addressed a *pro se* complaint from an inmate seeking minimum wage for his work within the prison (*e.g.*, working as a janitor or kitchen worker for the prison). *See Vanskike v. Peters*, 974 F.2d 806, 806 (7th Cir. 1992). Like other courts, the Seventh Circuit recognized that an inmate's "employee" status depended on the totality of the circumstances and required an examination of the "economic reality" of the working relationship. *Id.* at 808. However, the Seventh Circuit explicitly questioned and rejected the applicability of *Bonnette* to its case. The Seventh Circuit wrote:

> As noted earlier, several other courts have applied the four-factor *Bonnette* standard in determining the status of prisoners who work. We think, however, that that standard is not the most helpful guide in the situation presented here. The *Bonnette* factors, with their emphasis on control over the terms and structure of the employment relationship, are particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an "employer" and the question is which one.

> . . . In those cases the question is essentially whether there is enough control over the individual to classify him as an employee. But here we are coming at the definition of "employee" from the opposite direction: there is obviously enough control over the prisoner; the problematic point is that there is too much control to classify the relationship as one of employment. The *Bonnette* factors thus primarily shed light on just one boundary of the definition of "employee," and we are concerned with a different boundary. Prisoners are essentially taken out of the national economy upon incarceration. When they are assigned work within the prison for purposes of training and rehabilitation, they have not contracted with the government to become its employees. Rather, they are working as part of their sentences of incarceration.

Id. at 809–10. Thus, the *Vanskike* court refused to apply the *Bonnette* factors and instead took a more holistic view of the economic reality of the inmate's circumstances.

The Seventh Circuit's rejection of *Bonnette* proved to be persuasive. The Ninth Circuit, which had applied the *Bonnette* factors just two months prior to the *Vanskike* decision, reheard the case *en banc* and expressly rejected the *Bonnette* factors in light of the Seventh Circuit's decision. *Compare Hale v. State of Ariz.*, 967 F.2d 1356, 1366 (9th Cir. 1992) ("We therefore proceed to a case-by-case application of the *Bonnette* factors."), *with Hale v. State of Ariz.*, 993 F.2d 1387, 1394 (9th Cir. 1993) ("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.") (citing *Vanskike*, 974 F.2d 806). In *Hale*, Arizona law required prisoners to work not less than forty hours per week. *Id.* at 1390. The Ninth Circuit concluded this "hard-time obligation" and the "totality of the circumstances does not bespeak an employer-employee relationship as contemplated by the FLSA." *Id.* at 1395.

Four years later, the two circuits that had first employed the *Bonnette* factors—the Second and Fifth Circuits—likewise rejected their applicability in intra-prison work cases. *See Danneskjold v. Hausrath*, 82 F.3d 37, 41 (2d Cir. 1996) ("In the prison context, however, application of *Bonnette* leads to a radical result. Literally applied, the *Bonnette* factors would render all prison labor, including involuntary labor inside the penal institution, such as in a prison laundry, subject to minimum wage laws.") ("We believe that the caselaw described above has essentially read *Bonnette*, but not necessarily the economic reality test, out of the determination of whether a particular prisoner's labor is subject to the FLSA, *id.* at 43"); *Reimonenq v. Foti*, 72 F.3d 472, 475 (5th Cir. 1996) ("We find that the [*Bonnette*] 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."). Other circuit courts followed suit for similar reasons. *See, e.g.*, *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (rejecting the *Bonnette* four-factor test in cases where "the prisoner is legally compelled to part with his labor as part of a penological work assignment"); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997) ("[We]

adopt the reasoning articulated by the Seventh Circuit in *Vanskike*, 974 F.2d at 809–12, in rejecting the *Bonnette* four factor standard in the prison context."); *cf. Franks v. Oklahoma State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993) (rejecting application of an economic reality test).

ii. *Vanskike* Factors

Without the *Bonnette* framework, courts have taken a more holistic, largely considering whether the relationship between inmates and their alleged employers is the type of relationship likely contemplated by Congress to fall under the FLSA. On the whole, courts consider the (1) purpose of the inmate's work program, (2) the bargained-for nature of the working relationship, and (3) the purposes of the FLSA.

In *Vanskike*, having rejected the *Bonnette* factors, the Seventh Circuit was first to lay out and consider these new factors. To begin, the Seventh Circuit considered the underlying purpose of the inmate's work program, noting that the Illinois legislature's goal in authorizing prisoner work assignments was to "equip such persons with marketable skills, promote habits of work and responsibility and contribute to the expense of the employment program and the committed person's cost of incarceration." *Vanskike*, 974 F.2d at 809. The Seventh Circuit emphasized that the petitioner's working relationship did "not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself." *Id.* The Seventh Circuit also analyzed the FLSA's two underlying purposes: (1) the correction of labor conditions detrimental to the minimum standard of living, and (2) the

prevention of unfair competition in commerce from the use of underpaid labor. *Id.* (citing 29 U.S.C. § 202(a)). The Seventh Circuit found that applying the FLSA's protections "would not further the policy of ensuring a 'minimum standard of living,' because a prisoner's minimum standard of living is established by state policy[.]" *Id.* Similarly, it concluded that application of the FLSA would not further the statute's second goal because Congress had already addressed the problem of unfair competition by regulating prison-made goods through the Ashurst-Sumners Act. *Id.* at 811–12 (citing 18 U.S.C. §§ 1761–62) ("The Ashurst-Sumners Act . . . penalizes the knowing transportation of prison-made goods in commerce and was specifically intended to combat unfair competition."). Consequently, the Seventh Circuit affirmed the district court's grant of summary judgment against the inmate.

A year after *Vanskike*, the Fourth Circuit addressed the inmate-work question for the first time in *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993), and largely adopted *Vanskike*'s analysis. In *Harker*, an inmate at the Maryland Correctional Institution at Jessup worked at the graphic print shop run by State Use Industries of Maryland ("SUI"), an organization within the Maryland Division of Corrections created by the Maryland legislature to meet the rehabilitative needs of inmates. *Id.* at 132. SUI did not generate a profit and could only sell its products on the open market in very limited circumstances. *Id.* The Fourth Circuit concluded that the FLSA did not apply to "inmates engage[d] in prison labor programs like the one in this case." *Id.* at 133. In reaching this outcome, the Fourth Circuit first considered the purpose of the work program. *Id.* The Fourth Circuit noted that

"[i]nmates perform work for SUI not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training." *Id.* Next, the Fourth Circuit cited *Vanskike*, noting that the inmates had "not made the 'bargained-for exchange of labor' for mutual economic gain that occurs in a true employer-employee relationship" but rather had a "custodial relationship." *Id.* Finally, the Fourth Circuit, like the Seventh Circuit in *Vanskike*, considered the two primary purposes of the FLSA. It similarly found that application of the FLSA to the inmates in *Harker* would not promote the standard of living necessary for health, efficiency, and general wellbeing because the prison met such needs. *Id.* It likewise made the same arguments about the Ashurst-Sumners Act, concluding the passage of the Ashurst-Sumners Act indicated that Congress did not intend the FLSA to apply to inmates such as Harker. *Id.* at 134. Thus, it concluded that Harker's situation did not amount to the "extraordinary circumstances necessary to trigger FLSA." *Id.* at 135, 136.

The majority of circuit courts to address this issue in depth have since adopted this more holistic analysis from *Vanskike*. *See Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (rejecting application of the FLSA to "sexually dangerous persons" who work at the institution because it would not further the FLSA's purposes); *Danneskjold*, 82 F.3d 37, 44 (2d Cir. 1996) (rejecting the FLSA application where an inmate worked as a clerk-tutor for an association of colleges, assisting and tutoring student inmates, because his work "served only the institutional purpose of the prisoner rehabilitation," *id.* at 44); *Reimonenq*, 72 F.3d 472, 476–77 (5th Cir. 1996) (embracing the "categorical rule that prison custodians are not 'employers' of inmates in work

release programs" because the purpose of the work program is to prepare inmates for release and it would not serve the purposes of the FLSA); *Abdullah v. Myers*, 52 F.3d 324 (6th Cir. 1995) (unpublished decision) (rejecting prisoner's FLSA claim "because the prison has a rehabilitative rather than a pecuniary interest in encouraging inmates to work, because the relationship is not an employment relationship but a custodial one, and because the purposes of the [FLSA] are not implicated in this situation."); *Gamble v. Minnesota State-Operated Servs.*, 32 F.4th 666, 670 (8th Cir. 2022) (concluding that sexually dangerous civil detainees are not state employees when they work for the prison's work program because there is no bargained-for exchange of labor, it would not further the purposes of the statute, and the work program does not generate a profit); *Burleson v. State of Cal.*, 83 F.3d 311, 314 (9th Cir. 1996) (denying the FLSA applicability to California's work requirement statute because "the 'economic reality' of plaintiffs' relationship to the [work program] is penological."); *Villarreal v. Woodham*, 113 F.3d 202 (11th Cir. 1997) (refusing to apply the FLSA to pretrial detainees providing translation services to the sheriff without pay because it would not serve the FLSA's purposes and the translation services were for the benefit of the prison) ("By so holding, our sister circuits have adopted a broader approach to situations involving the FLSA and prisoners. This approach focuses on the economic reality of the situation as a whole. We agree with this approach and adopt the reasoning articulated by the Seventh Circuit in *Vanskike*, 974 F.2d at 809–12, in rejecting the *Bonnette* four factor standard in the prison context," *id.* at 206).

Relatively recently, the Fourth Circuit restated what it referred to as the "*Harker* factors" when wrestling with the application of the FLSA to persons civilly committed as sexually dangerous, and then again when considering application of the FLSA to immigrant detainees. *See Matherly*, 859 F.3d at 278 ("We based [the *Harker*] decision on three considerations: (1) the inmates work 'not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training'; (2) there is no 'bargained-for exchange of labor for mutual economic gain that occurs in a true employer-employee relationship'; and (3) the FLSA's purpose[.]"); *see also Ndambi*, 990 F.3d at 372–74. In both cases, the Fourth Circuit refused to expand the scope of the FLSA to such custodial detentions. On the whole, it is clear that the factors laid out in *Vanskike* govern and seek to understand the economic reality of an inmate's working relationship.

iii. D.C. Circuit's Two-Factor Test

The D.C. Circuit stands apart with its own two-factor test, asking simply whether (1) the work is voluntary, and (2) whether an outside employer pays the inmate. *Henthorn*, 29 F.3d at 682; *see also Nicastro v. Reno*, 84 F.3d 1446, 1447 (D.C. Cir. 1996) ("To qualify, a prisoner must have 'freely contracted with a non-prison employer to sell his labor.'"). Other circuits have been reluctant to adopt this two-factored test. *E.g.*, *Burrell*, 60 F.4th at 45 ("the *Henthorn* test's muddled application to this case proves it too narrow and rigid to serve the FLSA's purposes.").

iv. *Burrell* and Modern Revival of *Bonnette*

The *Bonnette* factors have found a recent revival in the Third Circuit, albeit under a different name. In a case with some factual similarity to the present case, the Third Circuit heard a case involving plaintiffs held in civil contempt and sentenced to incarceration for not paying child support. *See Burrell v. Staff*, 60 F.4th 25, 31 (3d Cir. 2023). The *Burrell* plaintiffs challenged Lackawanna County's policy of conditioning their access to regularly paid work-release programs (such that they could pay off their child support debt and secure their freedom) on first working for half of their sentences sorting through trash at the Lackawanna County's recycling center for five dollars per day. *Id.* Of note, Lackawanna County did not operate the recycling center itself, but rather, outsourced its operation to a private corporation. *Id.* Under an operating agreement between the government and the corporation, the County's Solid Waste Management Authority retained the first $60,000 in revenue. *Id.* at 38. Any profits beyond that were shared between the municipal authority and the private corporation. *Id.* The municipal authority further agreed it would use its best efforts to provide the recycling center with a steady number of inmates necessary to run operations. *Id.* at 39.

The district court initially granted the defendants' motion to dismiss, applying the D.C. Circuit's two-factored test and concluding that no employment relationship could exist given the involuntary nature of the work. *See Burrell v. Lackawanna Recycling Ctr., Inc.*, No. 3:14-CV-1891, 2021 WL 3476140, at *21 (M.D. Pa. Aug. 6, 2021). On appeal, the Third

Circuit first acknowledged that it had previously categorically excluded intra-prison work, but that it had not yet considered a scenario involving off-site work done for the benefit of a public-private partnership, such as this one between the County and the recycling center. *Burrell*, 60 F.4th at 44. After review of relevant cases, the Third Circuit adopted the joint-employer test from one of its previous cases, *In re Enter. Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 683 F.3d 462, 468 (3d Cir. 2012), which had adopted the *Bonnette* factors for joint-employment analysis. *Id.* In *Burrell*, the Third Circuit concluded that "[a]pplication of the *Enterprise* test proves far more useful" and held that these *Enterprise* factors "indicate plaintiffs' joint employment by [Lackawanna] County, its Municipal Authority, and the Corporation." *Id.* at 46. Thus, in effect, the Third Circuit applied the *Bonnette* factors and concluded a joint-employment relationship existed.

From there, the Third Circuit went on to discuss other considerations it deemed "relevant to the economic reality" of plaintiffs' working relationship with Lackawanna County and the recycling center. The Third Circuit noted that Lackawanna County contracted out plaintiffs' work for a joint economic benefit and that the plaintiffs "did the [recycling] facility's integral and necessary grunt work of hand-sorting garbage in lieu of the Corporation employing hourly-paid workers." *Id.* As a result, the plaintiffs' work benefited the recycling center by reducing its need for paid employees and artificially reducing labor costs "through access to a steady supply of sub-market rate labor for which [d]efendants did not provide unemployment and health insurance, worker's compensation, minimum wages, and/or

overtime premiums." *Id.* These considerations mirrored the second purpose of the FLSA – preventing unfair competition.

The Third Circuit next considered the first purpose of the FLSA – ensuring an appropriate standard of living. Here, the Third Circuit recognized that the prison met the plaintiffs' basic needs, but also noted that as civil detainees, they "needed money for a reason that the typical incarcerated person does not: to satisfy their contempt orders and secure their freedom from incarceration." *Id.* at 47. The Third Circuit likewise concluded that "the passage of the Ashurst-Sumners Act of 1935 . . . is [not] reason to preclude from the FLSA protection prisoners who partake in labor outside prison walls and who perform labor that does not benefit the prison." *Id.* The Third Circuit was more persuaded by unfair competition concerns when prisoners work in part for a private company that competed with companies required to pay wages set by the FLSA. *Id.* Ultimately, after considering the purposes of the FLSA and "looking at *all* of those facts," the Third Circuit concluded that plaintiffs had sufficiently alleged they were employees of the County, the Authority, and the Corporation, acting as joint employers. *Id.* at 48.

C. The Present Case

i. Applicable Test for Inmate Employment

As noted, the Fourth Circuit has yet to analyze off-site inmate work under the FLSA. Consequently, the parties disagree about what factors this Court should consider. Defendant argues that the *Vanskike* factors

adopted in *Harker* should govern. *See* ECF 169-1 at 29–36 (asserting that *Harker*'s considerations counsel against application of the FLSA to Plaintiffs); *see also* ECF 193 (arguing that the "joint-employer test utilized in *Burrell* is at-odds with the Fourth Circuit's decisions). In contrast, Plaintiffs suggest that *Vanskike/Harker* is inapposite in cases with inmate work outside of the prison's walls. *See* ECF 183 at 27 ("*Harker* is clearly limited to prison labor occurring *within* a prison. *Harker* does not define the test for inmates loaned to another sister agency who is running a veritable business operation."). Rather, Plaintiffs assert that the decisions of *Watson*, *Carter*, and *Burrell* are more applicable and should govern. *Id.* at 28; *see also* ECF 190 at 8 n.6 (alternatively suggesting that "even if [the D.C. Circuit's test in] *Henthorn* was applied to this case, an employment relationship would still exist between the parties").

Upon review of the case law, this Court believes the *Vanskike* factors, as adopted in *Harker*, govern the question of whether Plaintiffs are "employees" for the purposes of the FLSA. Plainly, inmate work programs—inside or outside the prison—involve a degree of control unlike typical employment relationships. The *Bonnette* factors address a distinct question – whether multiple entities are joint employers of plaintiffs, which was relevant in cases such as in *Carter*, *Watson*, and *Burrell*, but is not relevant here as there is no private third-party employer. The County oversees both DOC and DPW. Thus, this Court reviews Plaintiffs' circumstances in light of (1) the purpose of Plaintiffs' work program, (2) the nature of the working relationship between Plaintiffs and Defendant, and (3) the purposes of the FLSA.

iii. Employment Analysis

Purposes of the Recycling Facility Work Detail Program

Defendant asserts that Plaintiffs' participation in the recycling facility work detail program served a rehabilitative goal and provided job skills to inmates, much like in past cases that have denied the FLSA's protection. ECF 169-1 at 36. Indeed, evidence in the record demonstrates that DOC operated the work detail program for rehabilitative purposes and to provide structure to the inmates' day. DOC staff, including its director, testified that the intent of the Community Corrections Program was to offer programs and services to assist inmates with their reintegration into the community following their release from BCDC. *See, e.g.*, ECF 169-3 at 8 (Director of DOC describing the "main focus" of the work detail program as preparation of inmates for reentry into the community)[3]; ECF 169-17 at 15; ECF

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[3] In Plaintiffs' Amended Memorandum in Opposition to Defendant's Motion for Summary Judgement, Plaintiffs object to various references and evidence used by Defendant in its motion.

See ECF 183 at 48–51. "While a party may support its position on summary judgment by citing to almost any material in the record, the party's reliance on that material may be defeated if 'the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.'" *Whittaker v. Morgan State Univ.*, 524 F. App'x 58, 60 (4th Cir. 2013) (quoting FED. R. CIV. P. 56(C)(2)).

Plaintiffs object to Defendant's witnesses' testimony that there was a rehabilitative purpose to the work detail program as inadmissible lay opinion under Rule 701 of the Federal Rules of Evidence. *See* ECF 183 at 50. Federal Rules of Evidence 701 and 702 draw a "critical distinction" between lay witness and expert witness testimony: under Rule 702, an expert witness "must possess some specialized knowledge or skill or education that is

169-2 at 10. As described by a former DOC correctional captain, the MRF recycling work detail prepared inmates for entering into the community by teaching them the "ability to get up in the morning," "various work ethics," the specific tasks required by work at the recycling facility detail, along with giving the inmates something to do with otherwise idle time. *See* ECF 175-5 at 120–21. DOC staff viewed the work detail program as a steppingstone to the work release program, which enabled inmates to work for private employers outside of the prison. *See* ECF 169-4 at 16[4]

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not in the possession of the jurors." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (quoting KENNETH R. REDDEN & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 225 (1975)); *see* Fed. R. Evid. 702. Rule 701, on the other hand, only allows lay witnesses to express opinions "on the basis of relevant historical or narrative facts that the witness has perceived." *MCI Telecomm. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990) (quoting *Teen-Ed, Inc. v. Kimball In'l, Inc.*, 620 F.2d 399, 403 (3d Cir. 1980)); *see* FED. R. EVID. 701.

Plaintiffs argue that whether certain work is rehabilitative requires an expert opinion, but they offer no citation that suggests such a determination would require expert testimony. Although this Court has previously required expert opinion for DNA evidence involving "scientific complexities and nuances," *see Al-Sabah v. Agbodjogbe*, No. CV SAG-17-730, 2019 WL 6498049, at *3 (D. Md. Dec. 3, 2019), testimony regarding the prison's purpose in designing a work detail program does not require expert opinion. Defendant's witnesses sufficiently demonstrate their familiarity with the work detail program and its effect on its participants, and in this Court's view, their lay testimony is admissible.

[4] Plaintiffs object to evidence supporting the claim that the work detail program served as a steppingstone to the work release program, asserting that the evidence does not demonstrate a pattern of conduct sufficient to be admissible under Rule 406. ECF 183 at 51. However, Defendant does not require Rule 406 to introduce evidence demonstrating the

(DOC informed work detail inmates that they would recommend them for work release if they satisfactorily performed at the recycling facility for a period of thirty days); *see also* ECF 169-1 at 28 n.12 (listing examples of Plaintiffs who were subsequently recommended for the work release program upon successful performance at the recycling facility). There was likewise hope, although it seems to have been infrequent, that experience at the recycling facility could lead to a job upon release from BCDC. ECF 169-5 at 19 (noting transportation often becomes an issue for hiring released inmates); *see also* ECF 169-11 at 15 (testimony suggesting that the recycling facility has subsequently hired "like six" inmates from the work detail program over the course of the program's existence). For these reasons, Defendant asserts that the primary purpose of the program was rehabilitative and consequently no employment relationship existed.

In contrast, Plaintiffs argue that DPW used inmate labor through the work detail program to cut costs and generate greater profits at the recycling facility. ECF 183 at 32. Indeed, the record also demonstrates that the County operated the facility as a business and benefited from using cheaper inmate labor. *See* ECF 175-4 at 96 (Deposition of Mr. Beichler, DPW Bureau Chief) (Q: "Did [Mr. Homan] ever tell you why he wanted inmates to run the MRF?" A: "I don't believe anyone had to tell me. They were being paid $5 a day."); *see also* ECF 175-61 (DPW Bureau of Solid Waste Chief noting that "the bottom line is a business decision that creates economic efficiencies"). The County recorded and analyzed records regarding

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personal observations of DOC staff and the actions taken by them to advance the inmates' work statuses.

the operational cost of the recycling facility. *See, e.g.*, ECF 175-53. The fact that DPW now chooses to hire temporary employees at minimum wage rather than continue working with inmates paid at minimum wage further reflects DPW's economic motive for opting for inmate labor in the past. ECF 175-1 at 49, 72 (DPW now staffs the positions with temporary workers); *see also* ECF 175-73 at 1 (DOC refusing to resume work details for the County outside the prison given the "pending lawsuit" and the limited amount of detainees available to work). Although the County asserts that profit generation was not the goal of updating the recycling facility to single stream and notes that there have been years where the facility operated at a loss, it does acknowledge that it hoped the recycling center could turn a profit. ECF 169-1 at 14; ECF 169-5 at 13; *see also* ECF 175-51 (news report titled, "New Recycling Facility Turns Green into Gold"). Indeed, over the course of seven years (January 2014 – December 2020), the single-stream recycling facility resulted in $41.0 million in revenue, although the County asserts that this number does not account for all costs incurred. ECF 175-59 at 3; ECF 175-3 at 47.

There is also evidence that DPW and DOC negotiated a "quota," or minimum number of inmate workers. *See* ECF 175-29. DOC often struggled to recruit enough inmates to reach this quota given the harsh winter weather working conditions at the facility, rejections of medical clearances, and releases of inmates on parole, among other issues. *Id.* at 9. The Community Corrections Program at times had to reshuffle detail assignments to meet the quota, for example pulling workers from the Animal Shelter to place them at the recycling facility. ECF 175-62 at 1. No evidence suggests that this inmate-labor quota

existed to ensure the maximum number of inmates received the best possible rehabilitative training. In contrast, the evidence reflects DPW's concerns that a lack of inmate labor "severely [a]ffects [MRF's] operating efficiency, and [] costs the county a great deal of money." *See* ECF 175-29 at 12.

Plaintiffs reject Defendant's assertion that the recycling facility work detail provided useful job training and note that there was no formal process for hiring former work detail inmates as employees after their incarceration. The record suggests that only six inmates have subsequently been hired at MRF. Mr. Jones, the facility manager of the recycling facility, did not make job referrals and if any inmate came to him looking for a job down the road, he would direct them to "look on the website" and "just apply for it" when there was a job opening. ECF 175-1 at 102. The record of emails between the two departments provides examples where the long work hours at MRF caused inmates to miss or reschedule other job-training opportunities, community-reentry meetings, and important health services. ECF 175-55 ¶ 18; ECF 175-79 (rescheduling an inmate's dentist appointment "so the inmate could be allowed to report to the [MRF] detail achieving the 30 needed for the detail"); ECF 175-80 (inmate could not attend a Community Reentry Group meeting given his work detail assignment at the recycling facility); *cf.* ECF 175-50 (email noting that inmates had been pulled out of the substance abuse program "in order to provide coverage at the Animal Shelter").

Though the evidence must be viewed in the light most favorable to Plaintiffs, in this Court's view, there is no factual dispute. Uncontroverted evidence shows that the MRF work detail program served both economic and rehabilitative purposes. Despite

Plaintiffs' evidence of the County's economic motivations, the program provided structure to inmates' days, provided inmates with work experience, provided pay (albeit very little) to inmates, and provided other benefits, such as institutional credits for time served—all of which demonstrate a rehabilitative purpose. Thus, even taking Plaintiffs' evidence as true and crediting the County's economic incentives, the uncontroverted record nonetheless reflects some rehabilitative purpose for the work detail program.

As reflected in the case law, the rehabilitative purpose of the work detail program weighs against application of the FLSA in this case, regardless of the additional profit motive. The Fourth Circuit has held that a profit "does not eliminate the non-pecuniary goals" of the rehabilitative work program. *Ndambi*, 990 F.3d at 374. Thus, the "nonemployee-status of detainees is not altered by the private, for-profit nature of the detention facility" *Id. Ndambi*'s logic applies here because one entity—Baltimore County—shares both the rehabilitative and pecuniary goals, much like the prison in *Ndambi*. The fact that the County runs and operates the recycling center, and therefore receives the benefit of the cheaper inmate labor, distinguishes this case from *Burrell*, where a private corporation operated the facility and joined in the profit. *See Burrell*, 60 F.4th at 44 ("Plaintiffs' off-site work [was] not done for the benefit of the jail but rather for the benefit of the public-private partnership"). For this reason, the fact that Defendant, through DOC, has a rehabilitative purpose for its program weighs against application of the FLSA.

Bargained-For Exchange of Labor

The next factor to consider is whether there was a bargained-for exchange of labor between the Plaintiffs and Defendant. Other cases have relied on the involuntariness of the work, examining whether plaintiffs have the ability to walk off the job site or negotiate. *See, e.g.*, *Villarreal*, 113 F.3d at 207 (concluding Plaintiff's relationship was a custodial one given he could not walk off the job site at the end of the day and he performed his services for the benefit of the correctional facility). Courts have often found that cases of forced labor, or "hard-time" obligations, do not constitute employment for this reason. *See, e.g.*, *McMaster v. State of Minn.*, 30 F.3d 976, 980 (8th Cir. 1994) ("The inmates have not volunteered or contracted to work for the State; they are assigned and required to do so."); *Gamble*, 32 F.4th at 670 (concluding there is no "'bargained-for exchange of labor' because the detainees work at the state's discretion").

Here, although DOC's policy suggests that inmates do not have a choice in the matter, *see* ECF 169-21 at 48 ("BCDC Inmate Handbook & Rules," listing "refusal to work" as a Class 3 offense)[5]; *but see* ECF 169-20 at 3 ("Work Assignments for Sentenced inmates *may* be mandatory" (emphasis added)), DOC supervisors acknowledge that they did not force individuals to work who did not want to work. ECF 175-5 at 127–29; ECF 169-17 at 11 (Deposition of Ms.

[5] Plaintiffs object to Defendant's use of the BCDC's Inmate Handbook & Rules to assert that the work detail program was involuntary. *See* ECF 183 at 48–51. Plaintiffs assert that this handbook does not comport with Rule 406 of the Federal Rules of Evidence, which permits evidence of an organization's routine practice. Regardless of whether this handbook falls under the purview of Rule 406, it is clearly admissible as a business or public record. *See* Fed. R. Evid. 803(6)(B), (8). Thus, this Court considers the handbook for the purposes of summary judgment.

Parish noting that inmates "could be assigned to the [MRF] detail but if they choose not to work it, then we can't make them work it.").[6] Further, DOC accounted for inmates' work preferences when determining work detail assignments. ECF 169-20 at 3 (inmates can request a specific assignment via an inmate request form). Plaintiffs' work detail incorporated a greater degree of voluntariness than the "hard time" requirements of other cases.

The more voluntary nature of the work perhaps resulted in a greater degree of bargaining power than usually enjoyed by inmates in work programs.[7] DPW and DOC considered a variety of measures to recruit

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[6] Plaintiffs object to "selected excerpts" of Ms. Parish's deposition as inadmissible under Rule 701 because they are "so self-contradictory and without an adequate basis or foundation." *See* ECF 183 at 49–50, 51. Specifically, Plaintiffs point to the portion of her testimony that refers to the Code of Maryland Regulations ("COMAR") and her testimony regarding BCDC resource fairs for inmates. First, this Court does not rely on Ms. Parish's interpretation of any COMAR regulation in its decision. Second, her testimony regarding the resource fairs simply describes how they took place and does not require an expert opinion. *See* ECF 169-17 at 17–18. She does not offer any expert opinion regarding their success on preventing recidivism. Thus, her testimony would be admissible at trial.

[7] In the alternative, Plaintiffs request that this Court grant summary judgment "against Defendant's claim that the work was involuntary," asserting that "there is no *genuine* dispute that the work was voluntary." ECF 183 at 54 (emphasis in original). Upon review of the record, there is a dispute as to the precise nature of the involuntariness of the work detail given the conflicting policies in the handbook versus DOC staffs' recounts of operations. Further, this Court concludes that Plaintiffs are not employees under FLSA, even taking the voluntariness of Plaintiffs' work detail in the light most favorable to them. Therefore, this Court denies Plaintiffs' alternate grounds for partial summary judgment.

more inmate workers to the recycling facility. For example, an email from a DOC Community Corrections Program supervisor to DPW staff recognized that an approved increase in MRF workers, hours, and workdays would "in all likelihood be perceived negatively by the inmates," and therefore proposed a pay increase to $20 per day, an extension of lunch breaks to 45 minutes, an extension of other breaks to 20 minutes, "random food 'surprises,'" and floor padding to "ease the strain of standing for such a long period of time." ECF 175-29 at 16. Additionally, DPW used pizza/sub lunches as reward and motivation for the inmates reaching their bale quota. ECF 175-41 at 5; *see also* ECF 175-1 at 96–97. Although the parties dispute the degree of supervision by DOC over Plaintiffs throughout the workday, Plaintiffs have adduced enough undisputed facts to show they had more negotiating power than other inmate-labor cases where hard labor constituted a part of the inmates' sentence. *Cf. Hale*, 993 F.2d at 1389 (acknowledging that prisoners are not categorically excluded from the FLSA, but refusing to extend the statute's protections to inmates sentenced to "hard labor").

Nonetheless, the Fourth Circuit has been skeptical of inmates' negotiating power. In *Ndambi*, the Fourth Circuit decided that "the mere voluntariness of participating in a work program or the transfer of money between a detainee and detainer does not manufacture a bargained-for exchange of labor." *Ndambi*, 990 F.3d at 372. Thus, although Plaintiffs "may choose whether or not to participate in a voluntary work program, they have that opportunity solely at the prerogative of the custodian." *Id.* The Fourth Circuit noted that "DOC wields virtually absolute control over [the inmates] to a degree simply

not found in the free labor situation of true employment. Inmates may voluntarily apply for [work detail] positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day. [The parties] do not enjoy the employer-employee relationship contemplated in [FLSA], but instead have a custodial relationship to which the Act's mandates do not apply." *Harker*, 990 F.2d at 133. Thus, although this case presents more facts than *Harker* or *Ndambi* to suggest some bargaining power between the parties, the Fourth Circuit's strong language against the recognition of any inmate argaining power necessitates that this Court view this factor as weighing against the application of the FLSA.

Two Purposes of the FLSA

The first purpose of the FLSA is to correct labor conditions that are "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); *see also Vanskike*, 974 F.2d at 810. Courts have generally recognized that providing minimum wage to inmates fails to further this particular purpose because "unlike workers in a free labor market who use their wages to maintain their 'standard of living' and 'general well-being,' . . . detainees in a custodial institution are entitled to the provision of food, shelter, medicine, and other necessities." *Ndambi*, 990 F.3d at 373; *see also Vanskike*, 974 F.2d at 810 ("Prisoners' basic needs are met in prison, irrespective of their ability to pay. Requiring the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a "minimum standard of living," because

a prisoner's minimum standard of living is established by state policy; it is not substantially affected by wages received by the prisoner.").

Plaintiffs assert that Defendant did not meet their basic needs and that they needed the wages from their work detail to purchase necessities such as toiletries and warmer clothing to wear in the open-air recycling facility in the middle of the winter. *See* ECF 175-55 (Decl. Pl. Scott) at 4 ("The Detention Center did not provide basic necessities to inmates working at the MRF. For example, when an inmate began earning money at the MRF and had a small amount of money in his account, the Detention Center would stop providing toiletries, *i.e.*, soap, shampoo, toothpaste, deodorant, etc."). The inmates filed multiple complaints about insufficient food and excessive hours. A former County shift supervisor at the recycling facility admits to looking the other way while inmates ate food scraps that came down the conveyor belt. Plaintiffs also report taking discarded clothing from the conveyor belt to wrap around their bodies to keep warm in the winter months.

Other courts have rejected similar FLSA arguments regarding poor living conditions, concluding that the FLSA is not the appropriate tool to remedy a prison's failures to meet the basic needs of its inmates. For example, in *Smith v. Dart*, 803 F.3d 304 (7th Cir. 2015), the Seventh Circuit acknowledged that the plaintiff had stated a claim for inadequate food and contaminated water. *Id.* at 314. However, the Seventh Circuit concluded that this did not entitle him to minimum wage under the FLSA. The Seventh Circuit explained: "It is the jail's constitutional obligation to provide Smith with his basic needs, including adequate food and drinkable water. When the jail fails to do so, it is that failure

that must be remedied (the Constitution demands it); it does not entitle him to receive minimum wage under the FLSA." *Id.* On this point, *Burrell* is distinguishable. There, plaintiffs were incarcerated solely because they could not pay child support. The Third Circuit noted that plaintiffs "needed money for a reason that the typical incarcerated person does not: to satisfy their contempt orders and secure their freedom from incarceration. Thus, while courts may conclude that typical prisoners do not need a minimum wage because they are fed and housed by the state, plaintiffs here had a concrete, important financial objective that they contend was the reason they worked at the Center." *Burrell*, 60 F.4th at 47.

On the whole, Congress did not intend the FLSA to serve as a legal backstop to ensure prisoners' quality living conditions, and Plaintiffs do not present any atypical reason for needing income, as in *Burrell*. Thus, the application of the FLSA to Plaintiffs does not serve the statutory purpose of ensuring a minimum standard of living.

The second purpose of the FLSA is to prevent unfair competition in commerce from the use of underpaid labor. *See* 29 U.S.C. § 202(a); *see also Vanskike*, 974 F.2d at 810. Generally, cases involving inmates working for the prison itself, or for a prison-run state-industries program, do not find an unfair competitive advantage or an employer-employee relationship under the FLSA. *See, e.g.*, *Villarreal*, 113 F.3d at 206 (noting that cases that have denied the FLSA's application "generally have involved inmates working for prison authorities or for private employers *within* the prison compound"); *Gamble*, 32 F.4th at 672 (holding there is no unfair-competition received by the Minnesota State Industries because it does not provide goods or services to private entities);

Miller, 961 F.2d at 9 (plaintiffs incarcerated and working for sub-minimum wages at a treatment center "presents no threat of unfair competition . . . because the Treatment Center does not operate in the marketplace and has no business competitors").

In contrast, cases involving inmate work for private, third-party entities often find an unfair competitive advantage. *See, e.g.*, *Burrell*, 60 F.4th at 48 (noting "the stark differences between work done for the prison's benefit and outside work done at least partially to benefit a private corporation"); *Gamble*, 32 F.4th at 671 ("[P]rison labor might implicate unfair-competition concerns when prisoners are paid below minimum wage to work for 'a company that was not providing services to the prison and that competed with companies required to pay wages set by the FLSA.'") (quoting *Danneskjold*, 82 F.3d at 44); *Watson*, 909 F.2d at 1555 (noting the "grossly unfair competition" where a private construction business operated purely with inmates paid $20 per day and had to pay no overtime, no unemployment insurance, social security, worker's compensation insurance, or other employee benefit plans); *Carter*, 735 F.2d at 13 (noting that payment of minimum wage to inmates by a community college employer "results in the elimination of unfair competition, not only among employers, but also among workers looking for jobs").

The present case finds itself in the middle of these two categories. Although the recycling center was not run by a private, third-party corporation, it also was not run by the prison itself, or a program associated with the prison (such as a state use industries program). Rather, it is run by another department within the County's executive branch of government.

This Court concludes that this case more closely resembles work programs operated by or for the prison. For one, any economic advantage attained by DPW through the work detail program flowed up to the County, and in turn, financed BCDC and its inmates. ECF 169-1 at 48; *see also* ECF 175-3 at 47 (deposition of Mr. Homan that the profits of the recycling facility enter the "general fund dollars," which in part fund DOC); ECF 169-15 ¶ 16. Granted, the record is unclear about the precise flow of revenue and the benefit that BCDC specifically received. *See* ECF 169-15 ¶ 19 (Declaration of Mr. Carpenter, the County's Chief of Budget Administration, noting that the general funds pay for a variety of government services, including community improvements, government buildings, public schools, fire and police departments, and the upkeep of streets, highways, and waterways in the County). However, the fact that the economic benefits remain within the County and are not transmitted, in whole or in part, to a private third party distinguishes this case from *Burrell* and other cases concerned about unfair competitive advantage. As explained by the Seventh Circuit, "A governmental advantage from the use of prisoner labor is not the same as a similar low-wage advantage on the part of a private entity: while the latter amounts to an unfair windfall, the former may be seen as simply paying the costs of public goods—including the costs of incarceration." *Vanskike*, 974 F.2d at 811–12. Thus, the County's economic advantage in the market similarly does not merit application of the FLSA. Taken together, the relevant factors do not counsel application of the FLSA to Plaintiffs' case.[8] As the

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[8] In the alternative, Plaintiffs request this Court grant summary judgment "as to liability in favor of at least those

Fourth Circuit has emphasized, "If Congress wishes to apply the FLSA to custodial detentions, it is certainly free to do so. But the corollary is that courts are not." *Ndambi*, 990 F.3d at 375.

Given Plaintiffs are not "employees," Plaintiffs' claims under the FLSA, the MWHL, and the MWPCL fail as a matter of law.

IV. CONCLUSION

For the reasons stated above, the County's motion for summary judgment, ECF 169, will be GRANTED, and the Plaintiffs' cross-motion for summary judgment, ECF 175, will be DENIED.

Plaintiffs who were recommended for work release." ECF 183 at 53–54. Plaintiffs assert that the County denied them earned work release opportunities, arguing that inmates "were used as pawns by Defendant in order to maintain their inmate worker quota at the MRF." *Id.*at 54. Defendant disputes this characterization, suggesting that as a general practice the Community Corrections Program prioritized work release over work detail assignments, and that work release approved inmates were assigned to the MRF work detail only if they did not have an outside job. ECF 185 at 58. A review of the record affirms that there is a dispute of fact on this point. *See* ECF 175-31 at 105 (Deposition of Mr. Halligan, Community Corrections Program supervisor) ("Q: My question is do you know whether inmates who were recommended for private work release who were recommended by the judge for private work release were denied that opportunity by Corrections because Corrections had to provide a certain number of inmates to work at the MRF? A: No, they would not be denied based on that.... even if the numbers were down at the [MRF] and there was somebody that had outside employment, then we would pull that person off of outside employment to have them work."). Therefore, even if this Court had not concluded that inmates did not constitute employees for FLSA purposes, it would deny Plaintiffs' alternative argument for summary judgment.

A separate Order follows.

Dated: June 9, 2023

/s/ Stephanie A. Gallagher
Stephanie A. Gallagher
United States District Judge

Appendix C

FILED: June 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1731
(1:21-cv-00034-SAG)

MICHAEL A. SCOTT; RUDOLPH ARMSTRONG; AARON KESSLER; MARK MARINER; LAMAR MARTIN; JEFFREY MATTHEW WELSHONS; DESHAWN PENHA; AARON SILWONUK; ADAM DULAJ; ASZMAR HINES; GREGORY MALICKI; JASON HADEL; MICHAEL WELLS; VINCENT STONE; TONY BLACK; DONNELL FOSTER, JR.; KENNETH NIERWIENSKI, JR.; CHRISTOPHER HACKLEY; EDWARD PENDERGAST; SAIQUON WHITE; JOE MCDANIELS; ESPINAL OSVALDO; YUSEF OSIRUPHU-EL; TAVIST JAMES; DAKOTA BARNARD; MAURICE RICHARDSON; SHAWN BROOKS; RAYNARD STANCIL; JAMES PEACE; CLINTON REAGAN; MATTHEW BAHR; RICHARD LEWIS; KENNETH LUCKEY, JR.; PERRY SENIOR; LAWRENCE ANDERSON; MARK GANTT; RASHAD MILLS; LANDON BUTLER; JEREMY OGAS; GREGORY BLAIR; DAVAUGHN CROSBY; CHRIS VELTE; MATTHEW CARSON; HAROLD SNYDER; BRANDON BUCKMASTER; WILLIAM MOROME; THOMAS WILLIAMS; JOSEPH DAWSON; KEVIN COOPER; DAMIEN WATERS; MATTHEW BERMAN; DUSTIN MOHR

Plaintiffs – Appellants

—v.—

BALTIMORE COUNTY, MARYLAND

Defendant – Appellee

PUBLIC JUSTICE CENTER; LEGAL AID JUSTICE CENTER; MOUNTAIN STATE JUSTICE; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA; AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA; CAUCUS OF AFRICAN AMERICAN LEADERS; MARYLAND CITIZENS UNITED FOR REHABILITATION OF ERRANTS; FAMILY SUPPORT NETWORK

Amici Supporting Appellant

INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Amicus Supporting Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (Northern Division)

Civil Action No.: 1:21-cv-00034-SAG

MICHAEL A. SCOTT, *et al.*,

Plaintiffs,

—v.—

BALTIMORE COUNTY, MARYLAND,

Defendant.

DECLARATION OF MICHAEL DAIS

I, Michael Dais, do hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am over eighteen (18) years of age, competent to testify and have personal knowledge of the matters set forth herein.

2. I am a current Correctional Officer Assistant and former Correctional Officer employed by Baltimore County, MD.

3. I was responsible for supervising inmates incarcerated at the Baltimore County Detention Center ("BCDC") while working at the Materials Recovery Facility work detail (referred to as the

"CAF" or "CAF detail") for approximately four years up until April of 2020.

4. I was one of two Correctional Officers who were present with the inmates at all times while in transit to and from the CAF, and during the workday at the CAF.

5. The Policy Directive of the Baltimore County Department of Corrections ("DOC") attached hereto as **Exhibit A** truly and accurately describes the procedure and practice for supervising and transporting inmates assigned to the CAF detail from January 1, 2018 through April of 2020.

6. When I was assigned to supervise and transport inmates assigned to the CAF detail, I would generally arrive to BCDC at 5 a.m.

7. Upon arrive at BCDC, I would report to the Community Corrections Housing Unit and obtain a roster with pictures of all inmates assigned to the CAF detail from one of the Correctional Officers in the housing unit.

8. After receipt of this roster, I would proceed to the common area of the housing unit where the inmates were present and wearing their civilian clothes.

9. I, or the other Correctional Officer (hereinafter "Correctional Officers"), would then perform a preliminary headcount to verify that the inmates assigned to the CAF detail were present.

10. Inmates were then instructed to obtain any additional outerwear from the lockers assigned to the inmates in the Community Corrections Housing Unit (which was only necessary during the colder months

when inmates would bring coats and other outerwear to the CAF).

11. After this initial headcount, Correctional Officers would go outside and perform a search of the school bus used to transport inmates to and from the CAF to ensure that no contraband was present on the bus.

12. Correctional Officers would then escort all inmates assigned to the CAF on to the bus, and instruct them to remain seated throughout the entire ride to the CAF.

13. Correctional Officers would then make sure that all inmates had a bagged lunch from the BCDC kitchen to eat on their lunch break at the CAF.

14. Once all of the inmates were present on the bus, Correctional Officers would perform a head count to ensure that all inmates were accounted for and present.

15. Correctional Officers would then radio back to BCDC to advise that all inmates were present and accounted for.

16. Once the school bus anived at the CAF, Correctional Officers would instruct all inmates to exit the bus and perform an additional headcount of the inmates outside.

17. Correctional Officers would then perform a search of the break room at the CAF to ensure that there was no contraband present.

18. Correctional Officers would then instruct inmates to enter the break room.

19. Inmates would then receive their work instructions - or training and orientation if new to the

detail -from the one of the staff members assigned to the Department of Public Works ("DPW").

20. Inmates would also receive all necessary safety equipment, including safety goggles, reflective vests, hard hats and safety gloves while in the break room.

21. Inmates who worked at the CAF were supervised by Correctional Officers at all times during the workday at the CAF.

22. My practice was to conduct periodic head counts of the inmates every 20-30 minutes, while circulating throughout the work area to make sure that there were no security issues or misconduct by the inmates.

23. Inmates remained subject to all BCDC rules while present at the CAF and any conduct listed in the BCDC Code of Inmate Offenses (referred to as an "offense in custody") was prohibited.

24. Any inmate committing an offense in custody either at the CAF or at BCDC would be removed from the CAF detail pending a disciplinary hearing, and would be prohibited from working for a period of time if found guilty of the disciplinary infraction.

25. If an inmate committed an offense in custody while present at the CAF, Correctional Officers would radio back to BCDC and ask for transport to rehlm the inmate to BCDC early.

26. Inmates at the CAF were instructed not to leave their workstation unJess they had permission from one of the Correctional Officers.

27. Inmates were required to obtain approval from one of the Correctional Officers to leave their workstation to use the restroom, were escorted to and from the restroom by a Correctional Officer and were

subject to a frisk search both before and after using the restroom.

28. During breaks, inmates were advised that they were only permitted in the breakroom and the restroom at the CAF, and were not permitted to be present anywhere else.

29. Inmates were instructed that they were not to leave their work area or the break room under any circumstances, and the Correctional Officers would alert both the jail and the police if an inmate left this area.

30. At the conclusion of the workday at the CAF, a bell would sound to signify the end of the workday.

31. At this time, inmates were directed to return to the break room, deposit all safety equipment in a cabinet, and wait for the bus to return and transport them back to BCDC.

32. Before boarding the bus, the Correctional Officers would perform a head count of the inmates, frisk search all inmates, and then instruct them to board the bus.

33. Correctional officers would perform a second head count of inmates once present on the bus, and radio back to BCDC to advise that the inmates were in transit.

34. Once back at BCDC, inmates were strip searched and required to undergo a breath alcohol screening.

35. Inmates were then required to enter the changing area of the housing unit and change back into their BCDC jumpsuits.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct

/s/ Michael Dais	10-14-22
Michael Dais	Date

EXHIBIT A
TO DECLARATION OF MICHAEL DAIS

BALTIMORE COUNTY, MARYLAND
DEPARTMENT OF CORRECTIONS

[LOGO] Department of Corrections Directive		
	Chapter:	5 Programs
	Section:	5.2 Community Corrections
	Title:	5.2.06 Central Acceptance Facility Detail
	Effective:	September 19, 2017
	Authority:	Gail Watts Deputy Director
	Approved	Deborah J. Richardson Director

I. REFERENCE:

A. MCCS, ADC .01H
B. Annotated Code Of Maryland, Correctional Services, Title 11, Subtitle 1, §11-102 (a), Title 11, Subtitle 7, §11-705 and §11-726; Title 11, Subtitle 8, §11-803, Title 11, Subtitle 9, §11-902 and §11-904
C. Baltimore County Code, Article 3, Title 2, Subtitle 3, §3-2-301, §3-2-302, §3-2-303; Article 3, Title 8, §3-8-101 (c) (g), §3-8-104

II. POLICY:

To provide for public safety, the Department monitors and supervises inmate workers

assigned to the Central Acceptance Facility (CAF) detail.

III. PROCEDURE:

A. General

1. Inmate Summary Reports shall be maintained in a binder in the CAF production line office for all inmate workers assigned to the detail.
2. The CAF Escort Officers will be provided with a logbook in which to enter all pertinent information regarding the operation of the detail. When the logbook is full, it shall be returned to the facility and forwarded to the Administrative Captain.
3. The CAF Escort Officers and inmate workers shall participate in fire drills conducted by the CAF Supervisor/ Employees to include evacuation of the building, reporting to a designated assembly point, verifying the presence of all evacuees and any safety briefing conducted in conjunction with the fire drill.
4. The department maintains first aid kits to be used at the GAF.
   a. One first aid kit shall be kept in the production line office at the CAF and the other first aid kit, containing the same items. shall be kept in the Medical Treatment Nurse's Station MT207 as a backup in the event the primary first aid kit is taken out of service.
   b. The first aid kits shall remain sealed when not in use.

c. If items in the first aid kit at the CAF are needed, the seal shall be broken to obtain the needed items.

d. In the event the seal is broken, the CAF Escort Officer shall complete a General Information Report upon return to the Detention Center

e. Whenever the first aid kit seal is broken, and also on the designated First Aid Kit Monthly Inventory date, the CAF Escort Officer shall return the kit to the Detention Center at the conclusion of the CAF Detail for the day, and forward the kit to the Medical to be inspected, inventoried, restocked and resealed.

f. The replacement kit from the Medical Treatment Nurse's Station MT207 shall be taken to the Work Release Entrance to be returned to the CAF with the detail the following day.

g. The medical employee restocking the returned kit shall record the number on the new seal, then place the sealed kit in the Medical Treatment Nurse's Station MT207.

B. Preparation

1. During First Tour, Kenilworth dietary staff shall:

a. Contact the Work Release Entrance Officer to obtain the number of bag lunches needed for CAF inmate workers.

b. Ensure the proper number of lunches are prepared and delivered to the CAF inmate worker housing unit(s).

2. On First Tour, the CAF inmate worker Housing Unit Officer(s) shall:
    a. Ensure the CAF inmate workers are awakened and prepared to leave for work on time.
    b. Ensure CAF inmate workers have received medication
    c. Notify the Zone Supervisor if any CAF inmate worker claims there is a medical reason they cannot work
    d. Notify the Zone Supervisor if any CAF inmate worker claims there is a non-medical reason they cannot work (lack of proper footwear, clothing, etc.)
3. The Zone Supervisor shall ensure that the maximum number of inmate workers participate in the detail by addressing any issues that may prevent a worker from attending.
4. The Work Release Entrance Officer shall:
    a. Contact the CAF worker housing unit(s) to verify the number of inmate workers going out that day.
    b. Contact the CAF supervisor one hour prior to departure, advising of the number of inmate workers so that transportation arrangements can be finalized. (Bus or van, number of trips needed, etc.)
5. The CAF Escort Officers shall:
    a. Obtain radios and the CAF Detail cell phone from the Bosley Shift Supervisor.
    b. Obtain Inmate Summary Reports to be added to the binder for any newly assigned inmate workers.

   c. Upon arrival of the CAF transport vehicle(s), conduct a search of the vehicle(s) to detect contraband, damage, graffiti, cleanliness, etc.

C. Releasing CAF Inmates
   1. Housing Unit Officers releasing CAF workers shall:
      a. Verify the inmate's employment schedule in JMS using the Offender Employment Screen and check for any hold alerts
      b. Sign the inmate out to the Work Release Entrance in JMS
      c. Ensure each inmate has a properly affixed wristband
      d. Not allow inmates to take any unauthorized items out of the housing unit
      e. Permit inmates to take one commissary food item for consumption during the AF detail.
      f. Contact the Floor Officer to escort the Work Release inmate to the Work Release Entrance
   2. The Work Release Entrance Officer shall:
      a. Document the inmate's arrival from the Housing Unit in JMS
      b. Verify the inmate's employment schedule JMS using the Offender Employment Screen and check for any hold alerts
      c. Sign the inmate out to the work detail at the designated time and enter the return time in the Offender Employment Screen

   d. Allow the inmates to enter the locker room and exit the facility
3. A CAF Escort Officer shall:
   a. Stand by the XWR302 door to ensure all CAF inmate workers exit the facility as a group and directly board the CAF transport vehicle(s).
   b. Board the CAF transport vehicle after verifying all inmate workers are aboard.
   c. Verify the count of inmate workers and radio the Bosley Shift Supervisor advising of the departure time and number of inmates.

D. Arrival at Worksite
1. Upon arrival the CAF Escort Officers shall:
   a. Direct all inmate workers to exit the transport vehicle and assemble in the designated staging area (outside the entrance to the breakroom)
   b. Verify the count of inmate workers and radio the Bosley Shift Supervisor advising of the arrival time and number of inmates.
   c. Conduct a preliminary security inspection of the breakroom prior to allowing inmate workers to enter.
   d. Direct all inmate workers to enter the breakroom to obtain safety equipment and work assignments from the CAF supervisor.
   e. Ensure all inmate workers sign the *CAF Detail Sign-in/Sign-out Sheet.*
   f. Instruct the inmate workers to store their lunches in the refrigerator.

   g. Conduct a preliminary security inspection of the perimeter and production line areas.
2. The CAF supervisor shall:
   a. Provide the CAF Escort Officer with the *CAF Detail Sign-in/Sign-out Sheet.*
   b. Ensure all CAF employees working with inmate workers have read, understood and signed the *Employee Contact with Inmates* directive form.
   c. Ensure all inmate workers have read, understood and signed the *Detail Worker Safety Orientation and Training Checklist*.
   d. Provide CAF Escort Officers with a list of workstation assignments for the inmate workers.
   e. Ensure all inmate workers receive necessary safety equipment to include: orange hard hat, safety goggles, safety gloves, arm protectors (if the inmate worker is wearing short sleeves) and reflective yellow safety vest.
   f. Instruct inmate workers which route to use to access their assigned workstation.
3. The CAF Escort Officers will escort the inmate workers to the production line and advise that they are not to leave their assigned workstation without their permission and escort.

E. Monitoring During Work
   1. The CAF Escort Officers shall:
      a. Both remain with the inmate workers unless one is escorting inmates to and from the restroom/breakroom,

conducting a perimeter check or standing by with inmates temporarily in another location.

b. Position themselves so that they can continuously monitor all inmate workers on the production line.
c. Maintain a roving patrol, ensuring inmate workers remain at their assigned workstation.
d. Perform hourly random counts and spot checks, verifying the presence of all inmate workers.
e. Perform random perimeter checks to ensure no unauthorized persons are present and no contraband has been left.
f. Notify the CAF Supervisor/Employee if inmates require direction or assistance with work problems.
g. Document pertinent information in the logbook located in the production line office.
h. Take immediate action to address safety or security violations.

2. The CAF Supervisor/Employee shall:
   a. Control all equipment or machinery being used by inmate workers.
   b. Issue, monitor, collect and provide proper instruction for any hand tools used by inmate workers.
   c. Monitor the work being done by inmate workers on the production line.
   d. Provide direction or assistance as needed

e. Utilize the video monitoring station in the CAF Conference Room to observe activity as needed.
f. Notify the CAF Escort Officers of safety or security violations they observe

3. CAF Escort Officer shall ensure inmate workers do not:
    a. Interact with anyone other than the CAF Escort Officers and CAF Supervisors/Employees assigned to work directly with them.
    b. Fraternize with CAF employees assigned to other areas of the facility, cleaning staff, drivers, contractors, visitors etc.
    c. Consume food or beverages while on the production line. (Provided beverages may be consumed at the production line juice/water coolers, but may not be taken back to the workstation.)
    d. Keep any items from the production fine, or place any items in a location other than the designated bins, receptacles or chutes.
    e. Touch any machinery equipment or tools not specifically authorized and issued by the CAF Supervisor/ Employees.

F. Breaks
    1. Inmates are permitted to visit the juice/ water cooler adjacent to their workstation as needed without requiring permission from a CAF Escort Officer.

2. Inmates needing to use the restroom shall signal to or approach a CAF Escort Officer to obtain permission.
3. When an inmate worker is given permission to use the restroom, the Escort Officer shall:
    a. Coordinate with the other escort officer to ensure the production line remains under supervision while the inmate worker is escorted to the restroom.
    b. Conduct a frisk search to include removal of shoes/boots.
    c. Obtain the restroom key from the production line office.
    d. Escort the inmate to the portable restroom, unlock the padlock and conduct a security check prior to allowing the inmate to enter.
    e. Stand outside the restroom until the inmate worker exits.
    f. Lock the restroom door using the padlock.
    g. Conduct a frisk search prior to escorting the inmate back to the production line.
4. When one CAF Escort officer is supervising the inmate workers in the breakroom alone and an inmate requests to use the restroom, the officer shall position themselves at the door between the breakroom and portable restrooms to maintain observation of both areas.
5. When one CAF Escort Officer is supervising the inmate workers on the production line alone and an inmate worker requests to use the restroom, the

officer shall frisk search, the inmate, escort them to the edge of the production line area and maintain visual contact during movement to the restroom area, where the other officer will meet the inmate.

6. Group Lunch/Rest Breaks
   a. If all inmate workers will be taking a break simultaneously, both CAF Escort Officers shall escort all inmate workers as a group to the breakroom when the CAF employees shut down the production line.
   b. If the inmate workers will relieve one another for break while the production line keeps running, one CAF Escort Officer shall escort the inmate workers receiving a break to the breakroom while the other CAF Escort Officer remains on the production line supervising the inmate workers not receiving a break at that time.
7. Production Line Shutdown
   a. When the production line is shut down for a short period of time (5 minutes or less), all inmate workers shall remain at their workstations while the CAF Escort Officers maintain continual observation.
   b. When the production line is shut down for longer periods of time (more than 5 minutes), but is expected to resume operation prior to the end of the work day, the CAF Escort Officers shall escort all inmates to the breakroom.

c. When the production line shuts down and the CAF employees inform that it will not resume operation prior to the end of the workday, the CAF Escort Officers shall notify the Bosley Shift Supervisor and return the inmate workers to the Detention Center.

G. CAF Escort Officer Shift Change

1. CAF Escorting Officers leaving the Detention Center to relieve the on-duty officers shall sign out a radio to take with them if the vehicle they are using is not already equipped with a radio.
2. When the relieving CAF Escort Officers arrive, one of the on-duty officers will meet with them, advising of the current count and location of inmate workers and any other pertinent information while the other on-duty officer continues to monitor the inmate workers.
3. The CAF Escort Officers being relieved and those coming on duty shall exchange radios and document shift change in the CAF logbook.
4. The returning CAF Escort Officers shall bring back the portable radio signed out by the relieving officers.

H. Completion of Work

1. At the completion of the workday the CAF Supervisor/Employee shall stop the production line and contact the transport vehicle drivers to prepare to return the inmate workers to the facility.
2. The CAF Escort Officers shall:
   a. Escort all inmate workers to the breakroom.

b. Direct the inmate workers to store all issued safety equipment.
c. Direct the inmate workers to discard trash and any remaining food.
d. Direct the inmate workers to the staging area.
e. Ensure all inmates sign the *CAF Detail Sign-in/Sign-out Sheet*
f. Not permit the inmate workers to bring any food, beverage, commissary items, or items obtained while at the CAF onto the transport vehicle.
g. Frisk search the inmate workers before allowing them to board the transport vehicle.
h. Board the CAF transport vehicle after verifying all inmate workers are aboard.
i. Conduct a count to verify the presence of all inmate workers.
j. Radio the Work Release Entrance and Bosley Shift Supervisor advising of the departure time and number of inmates.

I. Return to Facility
1. In the event an inmate worker is being returned from the CAF early due to illness/injury, rule violation, detainer, appointment, etc. the CAF Escort Officer shall contact the Shift Supervisor to advise of the early return and the reason so the appropriate number of transportation officers may be assigned.
2. If the inmate worker is aware of their early return, the CAF Escort Officer shall:

   a. Directly supervise the inmate worker in the production line office until the arrival of the transporting officer(s).
   b. Handcuff the inmate worker if the reason for return is due to rule violation or detainer.
3. If the inmate worker is unaware of their early return they may be permitted to remain at their workstation on the production line until the arrival of the transportation officer(s).
4. Upon return to the facility, the inmate worker shall be directly escorted into the work release entrance and remain under continual supervision until entering the secure portion of the facility.
5. When an inmate worker is returned due to illness. injury or involvement in a situation in which they may have been harmed, the Zone Supervisor shall ensure the inmate is promptly evaluated by a QHCP.
6. When the entire CAF inmate worker detail is returned to the Detention Center, the CAF Escort Officers shall:
   a. Ensure all inmate workers exit the transport vehicle and directly enter the Work Release Entrance Locker Room.
   b. Stand by the XWR302 door to prevent any inmate workers from exiting the locker room.
   c. Verify the count of inmate workers and radio the Bosley Shift Supervisor advising of the arrival time and number of inmates.

d. Forward the *CAF Detail Sign-in/Sign-out Sheet* to Community Corrections.
e. Return radios and the CAF Detail cell phone to the Bosley Shift Supervisor.

7. The Work Release Entrance Officer shall:
   a. Instruct each returning inmate to enter one of the strip search rooms
   b. Strip search the inmate and document the search on Search Verification and Breath Alcohol Screening Form #194
   c. Collect urinalysis if required
   d. Instruct the inmate to pass through the metal detector, and scan the inmate
   e. Conduct a breath alcohol screening and document results on Form #194
   f. Sign the inmate in from the work detail in the Offender Employment Screen
   g. Sign the inmate out to the Work Release Housing Unit in JMS
   h. Contact the Floor Officer to escort the inmate workers back to the CAF Detail Housing Unit(s).

J. Emergency Situations
   1. In all emergency situations, the CAF Escort Officers shall:
      a. Maintain their own safety while protecting the safety of the inmate workers, CAF employees and others who may be involved.
      b. Coordinate efforts between themselves to allow one to address the emergency while the other continues to monitor the remaining inmate workers, unless the emergency is severe enough to require they work together to address it.

c. When necessary, contact 911 using the CAF Detail cell phone or CAF telephone. The facility address and phone number to provide to emergency responders is (Central Acceptance Facility, 10275 Beaver Dam Road, Cockeysville, MD – 410-564-3689).
d. Advise 911 that a police officer will have to be dispatched to escort the ambulance if an inmate worker is transported to the hospital.
e. Be sure to record the names, badge numbers, precinct, fire station of emergency responders: the time 911 was contacted and the arrival and departure times of emergency responders; and the destination if someone is transported to the hospital.
f. Provide emergency responders with the Inmate Summary Report kept in the binder in the production line office.
g. Notify the Shift Supervisor and CAF Supervisor/Employees as soon as possible, advising of the details of the emergency.
h. Complete written reports as soon as possible upon return to the Detention Center.

2. Medical Emergency – Upon discovery or notification of a medical emergency, the CAF Escort Officers shall:
   a. Report to the scene and render first aid if safe to do so.
   b. Contact 911 if the scene is not safe or the medical emergency requires treatment beyond first aid.

   c. Request a CAF Supervisor/Employee meet emergency responders and direct them to the location of the medical emergency.
   d. If rendering first aid, continue to do so, unless the scene becomes unsafe, until emergency responders take over
   e. Provide all pertinent information to emergency responders.
   f. If it was not necessary to contact 911 but the inmate worker is unable to continue working, contact the Shift Supervisor to arrange transportation back to the detention center
3. Fire – Upon discovery or notification of a fire the CAF Escort Officers shall:
   a. Notify the CAF Supervisor/Employees of the fire.
   b. Not engage in or permit the inmate workers to engage in efforts to put out the fire.
   c. Direct inmate workers to evacuate the building using the nearest safe emergency exit and to report to the designated assembly point
   d. Provide assistance to anyone unable to evacuate the building on their own.
   e. Report to the designated assembly point and conduct a count to ensure the presence of all inmate workers.
   f. Inform Emergency Responders and CAF Supervisor/Employees of the number of any unaccounted for inmate workers and their last known location.

4. Fight – Upon discovery or notification of a fight, the CAF Escort Officers shall:
    a. Call for the other CAF Escort Officer to respond.
    b. Order the inmate workers involved to cease fighting.
    c. Order inmate workers not involved to remain at their workstations and not interfere.
    d. When the other officer arrives separate the inmate workers and apply handcuffs.
    e. Continue ordering the inmate workers to cease fighting and contact 911 requesting police assistance if the situation cannot be controlled.
5. Walk-Off – In the event an inmate worker is unaccounted for, the CAF Escort Officers shall:
    a. Notify the Shift Supervisor of the walk-off.
    b. Call the Police Communications non-emergency telephone number and request an officer to complete a criminal report.
    c. Inform the responding Police Officer of the details associated with the walk off and obtain the cc# of the Police Officer's report.
6. Wild Animal – In the event a wild animal is encountered, the CAF Escort Officers shall:
    a. Not engage in or permit the inmate workers to engage in any attempt to handle, capture or contain the animal.

   b. Instruct the inmate workers to move away from the animal or place a barrier between themselves and the animal.
   c. Notify the CAF Supervisor/Employee of the situation and allow them to resolve it
7. Transport Vehicle Accident – In the event of an accident involving the Transport Vehicle, the CAF Escort Officers shall:
   a. Instruct the vehicle occupants to remain in the vehicle if safe to do so.
   b. Evacuate the vehicle occupants to a safe location if it is not safe to remain in the vehicle.
   c. Render first aid to any injured persons if safe to do so.
   d. Inform emergency responders of all pertinent information,
8. Vehicle Breakdown/Severe Traffic Delay – in the event of a vehicle breakdown or severe traffic delay the CAF Escort Officers shall:
   a. Contact the Shift Supervisor to advise of the delay.
   b. In the event of a vehicle breakdown, coordinate with the CAF Supervisor/ Employees and Shift Supervisor alternate transportation arrangements using CAF or Department vehicles.
   c. Ensure all inmate workers remain in the vehicle, or transfer in a safe, orderly manner to another vehicle.
   d. Contact the Shift Supervisor to advise when travel has resumed.

Appendix E

In The Matter Of:

MICHAEL A. SCOTT, et al. v.
BALTIMORE COUNTY, MARYLAND

DEPOSITION OF FREDERICK HOMAN

January 7, 2022

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Transcript pages 15 through 17

you agree with that compliment?

A. You can't ask me to comment on that one.

Q. Well, I'm going to -- you don't disagree that you had a strong work ethic with the County, correct?

A. No. I think that's accurate.

Q. Okay. There's also been assessments that you were deeply involved in issues in various areas with respect to Baltimore County. Would that be correct?

A. That was part of the job, yes.

Q. That's part of the job. I want to ask you does the Baltimore County is made up of separate agencies, isn't it?

A. Yes, it is.

Q. Those agencies are distinct, are they not?

A. Well, when you say -- would you clarify what you mean by that because there's a lot of interagency cooperation that goes on at the various departments. So I'm not quite sure what you mean by that. If you're talking about separate budgetary programs, yes, that's the case.

Q. You mentioned interagency cooperation. Did I hear that correctly?

A. Yes.

Q. Okay. Interagency cooperation, is that ever reduced in any kind of writing, like memorandums of understanding between one agency and another?

A. Offhand the only thing that pops to mind right now is a memorandum -- formal memorandum of understanding was between Recreation and Parks

and Board of Education, which is a state agency obviously in Baltimore County. But I can't -- offhand I can't think of other memorandums.

Q. So it's not common for agencies to sort of memorialize in writing cooperation between each other?

A. Well, if you think about the fact that the agencies are -- if you separate out the Board of Education and the community colleges, the libraries, the courts, the State's Attorney, things that have state connections but are funded primarily by Baltimore County, if you take them out the other departments, the Public Works, the Environmental Protection, the Recreation and Parks, they report directly through to the County Administrative Officer and the County Executive. It would be hard to imagine what would require a memorandum for them to cooperate internally.

Q. Okay. I have used the term "distinct" earlier. You questioned me about that. Let me circle back to that. When I say distinct, there are agency heads, correct?

A. That's correct.

Q. Like, for example, there's a

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Q. I'm sorry. Did you say they both began after?

A. After I became Administrative Officer. So that dates it right there so that would be back to 2006, 2007.

Q. And do you know what individual or individuals would have been involved in the decision to use inmate labor at the Material Recovery Facility?

A. I guess you would have to clarify that. I mean, I obviously would have been involved. I would assume I would have had to had blessed that.

Q. Okay.

A. So the conversations that would have taken place would have involved the director of Public Works. When MES was involved, it would have involved MES and it would have involved the director of the Department of Corrections.

Q. And do you recall whether inmates

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Recreation and Highways.

Q. To go back to my question though, do you know if there was any -- well, let me ask you did you ever consult with any lawyers for Baltimore County to determine whether it was lawful to use inmate labor at the Material Recovery Facility?

A. I can't recall if that took place.

Q. Do you know if the Baltimore County Department of Law was involved at all in any respect with respect to the use of inmate labor at the Material Recovery Facility?

A. I don't recall, no, but nor do I recall the same issue -- if you were asking me this question about Animal Services, I don't recall any conversation with the Department in that regard.

Q. Okay. Do you recall who set the rate of pay for the Material Recovery Facility's inmate labor?

A. That actually again, both -- I have to include Animal Services here from my perspective as I talk about it. Both at Animal Services and at the recycling facility, the recommendations came from the

Department of Corrections based upon the feedback that they were getting from the inmates who were eligible to do that work.

Q. So Corrections was making recommendations regarding pay based upon what they were hearing from inmates' willingness to work at those facilities?

A. Right. That's right.

Q. And that information was then I suppose brought to the attention of different individuals for budget purposes; is that correct?

A. Well, it was brought to my attention. I ultimately had to approve the recommendations that were being made and I did, just like I would have approved when inmates were provided with any equipment, whether it was coats or whether it was food at the sites.

And quite frankly, the same is true with setting up posts for correctional officers. Obviously we didn't have a post for correctional -- before inmates began to work at Animal Services, we didn't have a post for a correctional officer or officers to be at Animal Services so that post was created with overtime.

The same thing would be true with the recycling facility. We didn't have a post for a correctional officer there until we had inmates there. So that would be created. Of course, that would be a recommendation that would come naturally from the Department of Corrections and I would have to approve.

Q. You mentioned posts for

Transcript pages 161 through 164

Animal Services. And as she got feedback, it indicated that fewer people were interested in going there, she would suggest that we bump up the stipend as a result. I mean, a supply and demand type of thing.

Q. But you knew that the inmates were not receiving -- inmates that were working in the work detail through Baltimore County were not paid minimum wage?

A. That's correct. I knew that.

Q. And yet you also understood that minimum wage has to be paid to employees, correct?

A. Yes.

Q. So why didn't Baltimore County pay inmates minimum wage?

MR HOFFMAN: Objection.

Q. Well, sir, as I mentioned before, if you take a look at where I believe the Corrections budget is now or even a few years ago where it was, the cost per inmates using average daily population is $40,000 a year, right, which includes obviously room and board based upon a decision in court. It includes their healthcare, which we're obligated to by the law. It just never occurred to me and would have occurred to me that that was something that would have been demanded by law that we pay people who are being supported by the public are then in turn also paid minimum wage on top of that.

MR. LONG: Okay. I don't have any further questions, Mr. Homan. Thank you very much. I appreciate your time.

THE WITNESS: Thank you, sir.

MR HOFFMAN: A few in redirect.

EXAMINATION

BY MR. HOFFMAN:

Q. Mr. Homan, you mentioned that one of the goals was to increase employment for these inmates or to offer them employment; is that correct?

A. Well, it gave more inmates an opportunity to get access to funds for the commissary account, but clearly at both the recycling facility and Animal Services we were hoping to give individuals an opportunity to seek a career path. In the recycling facility, we were hoping it was going to come through Baltimore County. At Animal Services, our expectations were it could either come through Baltimore County or the private sector. It worked out there with the private sector and the recycling facility didn't just work out, and that had to do mostly with the transportation, inability for individuals who were recently released to find a way to the facility.

Q. And you have mentioned two people got an offer of employment and they could not become or they could not continue their work because they were without transportation, correct?

A. Transportation was the issue, yes.

Q. Okay. What efforts did Baltimore County make generally to hire inmate labor, inmates who had worked at the Material Recovery Facility?

A. I don't understand the question.

Q. Do you know what efforts Baltimore County made generally to hire inmates who had previously worked at the Material Recovery Facility?

A. At the Recovery Facility, right, they were there. We actually had the ability for them to interact. Otherwise, right, they would have had an opportunity to apply just like anybody else would have had an opportunity to apply at any position that was open in Baltimore County, any labor position that they wanted to. The fact that they were at the recycling facility meant that they could be in contact right there

Appendix F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (Northern Division)

Civil Action No.: 1:21-cv-00034-SAG

MICHAEL A. SCOTT, *et al.*,

Plaintiffs,

—v.—

BALTIMORE COUNTY, MD,

Defendant.

DECLARATION OF MATTHEW CARPENTER

I, Matthew Carpenter, do hereby declare, pursuant to 28 U.S.C. § 1746, as follows:

1. I am over eighteen (18) years of age, competent to testify and have personal knowledge of the matters set forth herein.

2. I am the current Chief of Budget Administration and former Budget Analyst employed by Baltimore County, MD ("the County").

3. Prior to taking on my current role on January 25, 2020, my responsibilities as a Budget Analyst included responsibility over budgetary matters for the County's Department of Public Works ("DPW").

4. As a result of my work as the Chief of Budget Administration and former Budget Analyst, I have personal knowledge of the budget and operations of the County's Materials Recovery Facility ("MRF"), the revenue from the sale of recyclables, and the County's general fund.

5. Although the County generates revenue from the sale of recyclables, it did not decide to build the single stream recycling facility at the MRF and sell recyclables processed there with the goal of generating a profit.

6. Rather, the County intended to create a positive impact on the environment by making recycling easier for County residents, as well as to provide tax-saving benefits for its residents by reducing the amount (and associated cost) of materials being put in the County's landfill, diverting solid waste from regular garbage collection, and saving non-renewable resources.

7. Since fiscal year 2019 (July 1, 2018 to June 30, 2019), the County has tracked expenses of operating the MRF – such as the cost of wages/salaries for labor performed at the MRF, repairs and maintenance of equipment, and fuel for vehicles and heavy machinery – under the budget line-item number "7605."

8. However, there are additional expenses -like electricity and utilities, debt service, administrative support (legal, accounting etc.), and fringe benefits for County employees – that are not tracked under the 7605 line-item, and rather subsumed within other budgets that cover Countywide operations.

9. As a result, the County has never tracked all of the expenses associated with operating the MRF.

10. Relatedly, the County does not track the full costs of operating the MRF against the revenue generated from the sale of recyclables.

11. The partial expenses associated with the operation of the MRF – tracked under the 7605 line-item – for fiscal years 2019 through 2021 are reflected in the attached **Exhibit 1**.

12. Fiscal year 2019 was the first year that the County tracked any expenses associated with the MRF using the 7605 budget number.

13. The revenue generated from the sale of recycled materials in fiscal years 2017 through 2021 are reflected in the attached **Exhibit 2**.

14. Comparison of the revenue versus partial expenses in **Exhibits 1 and 2** during fiscal years 2019 through 2021 yield the following results:

Fiscal Year	**Revenue**	**Expenses Tracked Under 7605 Budget**	**Difference**
2019	$4,380,153	$4,572,291	($192,138)
2020	$3,173,680	$4,136,820	($963,140)
2021	$7,016,469	$4,495,898	$2,520,571

15. As reflected in **Exhibit 2**, the County has often generated far less revenue than expected from the sale of recycled materials, and has often operated the MRF at a net loss if simply considering revenue generated versus the partial costs of operating the facility.

16. All of the revenue generated from the sale of recycled materials processed at the MRF are deposited into the County's general fund.

17. Revenues from the sale of recyclables make up a very small portion of the total funds deposited into the County's general fund each fiscal year. In fact, single stream revenues make up less than .05% of the County's General Fund Revenues in each of the fiscal years noted above.

18. The largest source of revenue coming into the County's general fund is tax dollars paid by County residents and businesses.

19. The County's general fund is used to pay for almost all of the government functions performed by the County, including, but not limited to, community improvements; repair, maintenance, and construction of government buildings; funding of public schools and fire/police departments; and the upkeep of streets, highways, public parks, and waterways in the County.

20. The general fund is also used to fund the County's Department of Corrections ("DOC"), and pay for operations of the Baltimore County Detention Center ("BCDC"), including, but not limited to, the wages of correctional officers employed by the County, and the provision of food, water, clothing, healthcare and housing to inmates and detainees housed at BCDC.

21. Consequently, money generated from the sale of recyclables has tax-saving benefits to County residents by generating revenue for the County's general fund which would otherwise be obtained through tax assessments.

22. The County seeks to maintain a balanced budget, meaning that it does not plan for revenues coming into the general fund to exceed expenditures, or that expenditures will exceed revenues.

23. All exhibits to this declaration are true and accurate copies of what they purport to be and are business records of the County, meaning the records were made at or near the time of the events recorded by persons with knowledge of the County's operations, the records are kept in the course of a regularly conducted activity of the County, and making the records was a regular practice of that activity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Matthew Carpenter	10-14-22
Matthew Carpenter	Date

EXHIBIT 1 TO DECLARATION OF MATTHEW CARPENTER

Revenue Budget Summary

Browse Clear

BFY : 2017, 2018, 2019
Fund : 001
Department : 806
Unit :
Revenue : 7123
Detail :

BFY	Fund	Department	Unit	Revenue	Current Budget	Total Revenue	Unrecognized
✓ 2017	001	806		7123	$6,007,500.00	$6,412,024.57	($404,524.57)
2018	001	806		7123	$8,505,279.00	$6,972,268.45	$1,533,010.55
2019	001	806		7123	$6,155,000,00	$4,380,152.54	$1,774,847.46
2020	001	806		7123	$5,130,000.00	$3,173,685.92	$1,956,314.08
2021	001	806		7123	$6,205,000.00	$7,016,469.31	($4,411,469.31)

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BFY	Fund	Department	Unit	Revenue	Current Budget	Total Revenue	Unrecognized
✓ 2017	001	806		7123	$6,007,500.00	$6,412,024.57	($404,524.57)

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Budget Inquiry Page

EXHIBIT 2 TO DECLARATION OF MATTHEW CARPENTER

Budget Structure 80 Level 2 ESUM

Browse Clear

BFY : 2019, 2020, 2021
Fund : 001
Department : 070
Appr Unit :
Unit : 7605
Object :
Detail :

BFY	Fund	Depart-ment	Appr Unit	Unit	Object	Current Budget	Pre-Encumbered	Encumbered	Actual Expenses	Un-obligated
✓ 2019	001	070		7605		$4,630,489.00	$0.00	$0.00	$4,572,290.60	$58,198.
2020	001	070		7605		$4,620,769.00	$0.00	$0.00	$4,136,819.87	$483,949.
2021	001	070		7605		$4,751,857.00	$0.00	$0.00	$4,495,897.74	$255,959.

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BFY	Fund	Depart-ment	Appr Unit	Unit	Object	Current Budget	Pre-Encumbered	Encumbered	Actual Expenses	Un-obligated
✓ 2019	001	070		7605		$4,630,489.00	$0.00	$0.00	$4,572,290.60	$58,198.

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