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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**

10 Jeffrey Nielsen and Brian Boudreau on
11 behalf of themselves and all others
12 similarly situated; and Arizona State
13 Conference of the National Association for
the Advancement of Colored People, as an
organization and on behalf of its members,

14 Plaintiffs,

15 v.

16 David Shinn, Director, Arizona
17 Department of Corrections, Rehabilitation
& Reentry, in his official capacity,

18 Defendant.
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Case No. 2:20-cv-01182-PHX-DLR(JZB)

**AMICUS CURIAE BRIEF
OF LAW PROFESSORS AND LAW
STUDENTS FROM ARKANSAS**

INTRODUCTION

The Thirteenth Amendment to the United States Constitution outlawed chattel slavery in the United States following a violent Civil War and a chilling era of slavery conducted primarily in the nation's southern states. In passing this Amendment, Congress included a clause that excepted a certain population from this general prohibition, namely, prisoners. In what has become known as the "punishment clause," Section I of the Thirteenth Amendment states explicitly "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII (emphasis added). Amici here argue that the Thirteenth Amendment intended to end private chattel slavery, full stop; the Thirteenth Amendment's punishment clause was never intended to support, enable or promulgate private, for-profit re-enslavement of American citizens.

Despite this intention of the Thirteenth Amendment to end private for-profit chattel slavery, the punishment clause has regrettably evolved into a loophole that has allowed and continues to allow American prisoners to be re-enslaved by private parties and corporations for money. Southern states in the 1800 and 1900s discovered ways to avoid this prohibition by enacting laws that bastardized the punishment clause, allowing re-enslavement of newly freed Black Americans. This re-enslavement by private profit centers took the form of southern state Black Codes and Convict Leasing. Today, in the 21st century, this private profit center re-enslavement has taken the form of private corporations like CoreCivic, the GEO Group, and others usurping the government function of citizen incarceration and are maximizing profits from the bodies of prisoners and the prison labor that these prisoners engage. Both Black Codes and Convict Leasing violated the Thirteenth Amendment (as evidenced by Congressional prohibitions through later legislation, like the Civil Rights Acts of 1866 and 1875).

Today, this bastardization of the punishment clause continues, through the likes of private, for-profit prison corporations that treat prisoners as commodities and profit from

1 their often-free labor in violation of the Thirteenth Amendment. Private prison
2 corporations violate the Thirteenth Amendment by enslaving prisoners for profits.

3 Amici note here that the Amended Complaint plainly states Thirteenth
4 Amendment claims in the alternative: First, that the prohibition of slavery is absolute; and
5 Second, that private slavery is prohibited. This amicus curiae brief provides historical
6 context for the Court's consideration of primarily the second claim; i.e., that the
7 Thirteenth Amendment prohibits private slavery as punishment for a crime.
8 Notwithstanding this, the state defendant argues in its Response Brief that the punishment
9 clause strips all Thirteenth Amendment rights from prisoners (Doc. 41, p. 7), thereby
10 sanctioning the practice of re-enslavement which sounds in chattel slavery and convict
11 leasing. This reading of the punishment clause however, is not consistent with the
12 historical context in which the Thirteenth Amendment was enacted nor is it coherent
13 when compared to the intent, purpose, tone and prose from which the Thirteenth
14 Amendment language was crafted, as demonstrated below. In fact, events before and
15 after the passage of the Thirteenth Amendment demonstrate that the punishment clause
16 language was understood to allow for public prison labor, *not* for the reintroduction of
17 private slavery, the end of which was the very aim of the abolition amendment.

18 When confronted with two inconsistent interpretations of the punishment clause
19 language, one supported by the state defendant arguing that the punishment clause strips
20 all Thirteenth Amendment protections from prisoners and the other supported by
21 plaintiffs and Amici arguing that the punishment clause was to allow for public prison
22 labor, most likely temporarily, and not for the re-enslavement of freed Black Americans,
23 the interpretation supported by history, intent, logic, and nearly all historians, including
24 legal historians, should prevail. The Courts (and Congress) must recognize this truth and
25 close the punishment clause loophole by staying true to the Thirteenth Amendment's
26 prohibition of private chattel slavery through ending for-profit incarceration.

ARGUMENT

I. The Thirteenth Amendment, through the punishment clause, was never intended to promote, enable or allow private for-profit incarceration.

Legal historians agree that the Thirteenth Amendment to the U.S. Constitution as enacted was inspired by the language from the Northwest Ordinance of 1787 and Thomas Jefferson's vision as outlined in his proposed Land Ordinance of 1784. Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (New York, 2019) 45. Therein, Jefferson imagined an evolving nation where slavery would be barred in all new territories but that included an expectation that involuntary labor could be used as punishment for crimes duly convicted. Thomas Jefferson, William Peden, *Notes on the State of Virginia, ed.* (New York, 1954), 138. Christopher R. Green, "Duly Convicted: The Thirteenth Amendment as Procedural Due Process, *GJLP*, 15 (2017), 80. As a devotee of Enlightenment prison reform, historians agree that Jefferson believed labor was good for character and that hard labor as punishment for crime could serve two functions, deterrence and rehabilitation. Thomas Jefferson, David Konig, *Jefferson's Legal Commonplace Book (Papers of Thomas Jefferson, Second Series)* (2019).

Therefore, the drafters of the Thirteenth Amendment and its punishment clause clearly intended to mimic the tone and purpose of the Northwest Ordinance of 1787 by straightforwardly ending slavery. Cong. Globe, 38th Congress., 1st Session 1488 (1864). Based on Jefferson's original vision of prohibiting slavery as written into his proposed Land Ordinance of 1784, with that language then migrating directly into the Northwest Ordinance of 1787, and such language eventually becoming the exact expression of the Thirteenth Amendment, it is extremely difficult to imagine that the drafters intended for the punishment clause to become a loophole to re-establish private chattel slavery. In truth, it is unfathomable that the original intention of the drafters of the Thirteenth Amendment, whose language was expressly anchored in the Northwest Ordinance and

1 the proposed Land Ordinance, was to tolerate newly freed Black Americans to be
2 imprisoned and then summarily re-enslaved.

3 Further, historical evidence exists that both businessmen of the South and
4 merchants of the North, following the devastation of the Civil War, desperately needed
5 labor to rebuild the burned out South following enactment of the Thirteenth Amendment.
6 Eric Foner, *Reconstruction: America's Unfinished Revolution* (Updated Edition. New
7 York, 2002) 1863-1877. Therefore, a logical assumption at the time of the passage of the
8 Thirteenth Amendment is that the punishment clause could have been included to allow a
9 temporary labor pool to be developed through prisoners, who could then rebuild the
10 broken down and burned-out industries of the South following its defeat in the Civil War.

11 **A. As borrowed from the Northwest Ordinance, the punishment clause of the**
12 **Thirteenth Amendment was intended to serve a rehabilitative purpose.**

13 The drafters of the Thirteenth Amendment borrowed the punishment clause's
14 language from the Northwest Ordinance. "There shall be neither slavery nor involuntary
15 servitude in the said territory, otherwise than in punishment of crimes whereof the party
16 shall have been duly convicted." U.S. Const. amend. XIII; Larry Ceplair, *ed.*, *The Public*
17 *Years of Sarah and Angelina Grinke: Selected Writings* (New York, 1989) 1835-2839,
18 194-95; William Yates, *Rights of Colored Men to Suffrage, Citizenship and Trial by Jury*
19 (Philadelphia, 1838); Manisha Sinha, *The Slave's Cause: A History of Abolition* (New
20 Haven, 2016), 462; *The Constitution of the American Anti-Slavery Society: with the*
21 *Declaration of the National Anti-Slavery Convention at Philadelphia, 1833* (New York,
22 1838), 7.; Martha S. Jones *Birthright Citizens: A History of Race and Rights in*
23 *Antebellum America* (New York, 2018), 1-8. Historians agree that Thomas Jefferson
24 drafted the ordinance's anti-slavery language, intending to end the slave trade. The
25 punishment clause likely emulated his Enlightenment philosophy, with the idea of labor
26 redeeming prisoner's souls. Thomas Jefferson, David Konig, *Jefferson's Legal*
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1 *Commonplace Book (Papers of Thomas Jefferson, Second Series)* (2019). Thomas
 2 Jefferson copied the Northwest Ordinance’s punishment clause language from his then
 3 recently drafted Land Ordinance of 1784. This language likely modeled the Northwest
 4 Ordinance’s punishment clause after similar criminal systems Jefferson would have been
 5 familiar with at the time such as England’s “houses of corrections.” In fact, renowned
 6 Jefferson historians Peter Onuf and Alan Taylor refer to Jefferson’s prisoner exemption
 7 language as “boilerplate.” David R. Upham, “*The Understanding of ‘Neither Slavery Nor*
 8 *Involuntary Servitude Shall Exist, ’ Before the Thirteenth Amendment,*” *GJLP*, 15 (2017),
 9 139; Charles Fairman, *Reconstruction and Reunion*, (1971) 1119; Christopher Green,
 10 “*Duly Convicted,*” *Georgetown Journal of Law & Public Policy*, Vol.15 (2017) 79-80;
 11 CG, 38th Congress, 1st Session, 1325. Francis N. Thorpe, *ed., The Federal and State*
 12 *Constitutions* (Washington, 1909). Further, historians agree Jefferson believed that by
 13 “being forced to work within the institution, the prisoners were trained in a trade,” with
 14 the rehabilitative hope being that upon release, prisoners “would voluntarily flood the
 15 labor market.” Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the*
 16 *State in Historical Perspective* (2012). Thus, historians claim that Jefferson included the
 17 punishment clause language as rehabilitative with the objective to avoid recidivism based
 18 on poverty related crimes. Eric Foner, *The Second Founding: How the Civil War and*
 19 *Reconstruction Remade the Constitution* (New York, 2019) 46-47. Jefferson hoped that
 20 released prisoners would have no need to steal again because they had learned to work in
 21 a trade during their time incarcerated and could prove serviceable members of society
 22 upon release. *Id.* Additionally, Jefferson believed that forced labor would not just help to
 23 rehabilitate criminals, it would also offer an alternative to less humane punishments such
 24 as branding, long term solitary confinement, and execution. Melossi, D., and M. Pavarini.
 25 *The Prison and the Factory: Origins of the penitentiary system.* (London, 1977).
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With the above established, Thomas Jefferson could not have meant for, nor

intended for the possibility that slavery would be extended or perpetuated through the Thirteenth Amendment's punishment clause. Further evidence of this intention is that in Jefferson's publication "Notes on the State of Virginia," he outlined a detailed and gradual plan for eventual emancipation of slaves where those slaves would return to their home countries. William Peden, Thomas Jefferson, *Notes on the State of Virginia*, ed. (New York, 1954). Jefferson, therefore, could not have intended for freed Black Americans to be re-enslaved through a prison regime as at the time of the drafting of the land ordinance of 1784 and the Northwest Ordinance of 1787 Jefferson imagined that white and Black Americans would not peacefully co-exist believing that freed Black slaves would return to Africa and their nations of origin upon abolition of slavery. Brown, Ralph H. "Jefferson's Notes on Virginia." *Geographical Review* 33, no. 3 (1943) 467-73. Thus, Thomas Jefferson in drafting the language that eventually became the Thirteenth Amendment with its attendant punishment clause, never could have intended for private chattel slavery to extend through the clause, as it eventually was extended through Black Codes, Convict Leasing, and later in the advent of 21st century private, for-profit prisons. Balkin, Jack M., and Sanford Levinson. "The Dangerous Thirteenth Amendment." *Columbia L. Rev.*, vol. 112, no. 7, (2012) 1459–1499.

Thomas Jefferson drafted the punishment clause of the Thirteenth Amendment intending for prisons to allow rehabilitative labor; he never intended for slavery to be extended through the clause. Nicholas E. Magnis, *Thomas Jefferson and Slavery: An Analysis of His Racist Thinking as Revealed by His Writings and Political Behavior*. *Journal of Black Studies*, 29(4), 491-509. Additionally, of the four states that abolished slavery through their constitutions before Jefferson composed the Land Ordinance of 1784—Vermont, Pennsylvania, Connecticut, and Rhode Island—no mention was made in any of those states of involuntary labor as a punishment for crime. Eric Foner, *The Second Founding: How the Civil War and Reconstruction Remade the*

1 *Constitution* (New York, 2012) 46. Neither Jefferson, nor the northern states that
 2 outlawed slavery before 1784, intended for slavery to be excepted for prisoners through
 3 the Thirteenth Amendment. Historians agree that Thomas Jefferson when drafting the
 4 language that would become the Thirteenth Amendment's punishment clause fully
 5 intended to abolish chattel slavery completely, and that for prisoners, forced hard labor
 6 could provide strong rehabilitative and deterrent incentives for those imprisoned. *Id.*
 7 Jefferson never intended that the language that would become the punishment clause
 8 would support slavery.
 9

10 **B. Evidence exists that some Southern Legislators and Northern Merchants viewed**
 11 **the punishment clause as a vehicle to enable free labor by using prisoners to assist**
 12 **the South in rebuilding following the Civil War.**

13 Following the Emancipation Proclamation, and shortly following, the Thirteenth
 14 Amendment ending chattel slavery throughout the entire United States, southern
 15 legislators and northern merchants worried incessantly about what they deemed to be two
 16 problems: first, upon what labor supply would the south rely to rebuild itself following
 17 the destruction inflicted during the Civil War; and second, and more importantly to the
 18 southern legislators and municipal leaders, how would they control the newly freed Black
 19 slaves and continue to uphold white supremacy in the face of a very large newly freed
 20 Black population. Christopher R. Adamson. *Punishment after Slavery: Southern State*
 21 *Penal Systems, 1865-1890*, 30 *Social Problems* 5, (1983) 555-569. For southern
 22 legislators, the answer to these two problems, a large and free labor market and the
 23 perpetuation of white supremacy and racial hierarchy, would be solved through the
 24 enactment of Black Codes and then a powerful expansion of the already existing and
 25 brutal Convict Leasing system. *Id.*
 26

27 Evidence exists to support the proposition that the punishment clause of the
 28 Thirteenth Amendment, while never intended to support, enable or uphold private for-

profit chattel slavery, was relied upon by southern lawmakers and northern merchants to use free prison labor as a means of rebuilding the south. *Id.*; Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective* (2012). Southern legislators most likely believed that re-enslavement through the Black Codes and Convict Leasing would enable them to control the large newly freed Black population, but in order to resolve the labor problem, both the south and the north relied upon the punishment clause to imprison many freed Blacks in order to use their labor to rebuild the destroyed south, including working on and rebuilding railroads, mines, fields, and cities. *Id.*; Christopher R. Adamson. *Punishment after Slavery: Southern State Penal Systems, 1865-1890*, 30 *Social Problems* 5, (1983) 555-569. Importantly then, while never intended to support the re-enslavement of newly freed Black slaves, one justification for the punishment clause through the eyes of rebuilding the south, could be that temporary usage of free slave labor as promulgated through the Thirteenth Amendment would be tolerated as the paid labor market was scarce upon conclusion of the Civil War and the prescription of slaves to rebuild would offer a solution needed in the late 1800s by necessity, but is no longer needed nor tolerable today. Christopher R. Adamson. *Punishment after Slavery: Southern State Penal Systems, 1865-1890*, 30 *Social Problems* 5, (1983) 555-569, Genevieve LeBaron, *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*, *The Journal of Labor & Society* (2012).

II. Northern Senators and Representatives' powerful reactions to the South's polluting of the Thirteenth Amendment provides strong evidence that it was never intended to support or allow private for-profit incarceration.

Following the Emancipation Proclamation and enactment of the Thirteenth Amendment, legislators in the south quickly mobilized to control the slave labor pool that had just been freed and to concretize the racial hierarchy of white supremacy and black inferiority. Christopher R. Adamson. *Punishment after Slavery: Southern State Penal*

1 *Systems*, 1865-1890, Vol. 30 *Social Problems* No. 5, (1983) 555-569. Black Codes were
 2 soon adopted throughout the south that criminalized the normal behavior of newly freed
 3 Black Americans who as suddenly free had nowhere to go or live, nothing yet to do, and
 4 no fair paid work prospects. These Black Codes criminalized vagrancy, loitering and
 5 unemployment, among many other minor crimes or simply normal behaviors. Eric
 6 Foner, *Reconstruction: America's Unfinished Revolution, 1863-1977* (Updated Edition,
 7 New York, 2002) 370. Once these never-before-criminalized behaviors were now
 8 characterized as crimes, like being homeless, not finding paid employment, or simply
 9 "hanging out," these laws were mostly only enforced against African American citizens,
 10 and were harshly penalized, often charging free Black Americans with vagrancy and then
 11 sentencing them to hard labor over five or ten years for nothing more than loitering or
 12 failing to produce proof of adequate and paid employment. *Id.* Through the abhorrent
 13 adoption of Black Codes, the south was able to re-establish the racial hierarchy of white
 14 supremacy ensuring that Black Americans existed at the bottom and white Americans
 15 maintained their position at the top. Francis B. Simkins and Robert H. Woody, *South*
 16 *Carolina During Reconstruction* (Chapel Hill, 1932), 48-50.

17 **A. Southern states adopt Black Codes using the Thirteenth Amendment's**
 18 **punishment clause as a loophole, to the horror of Northern legislators, to re-enslave**
 19 **newly freed Black Americans.**

20
 21 To achieve their twin purpose of securing a deep labor pool to rebuild the south
 22 and reaffirming white supremacy, southern legislators adopted punitive and ruthless
 23 Black Codes to control the large populations of newly freed slaves enforcing these laws
 24 only against Black Americans. Blackmon, Douglas A. *One Dies, Get Another: Convict*
 25 *Leasing in the American South* (South Carolina, 1996) 20-41. Once vast swaths of freshly
 26 freed former slaves were arrested for simply existing in the south through the pretextual
 27 crimes of vagrancy, loitering, unemployment, walking beside a railroad, and even talking
 28

1 loudly while in the presence of a white woman, southern legislators were then not only
2 able to re-establish the preexisting racial hierarchy, but through Convict Leasing were
3 able to control a free labor pool to conduct the work that slaves had been formerly forced
4 to perform. Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of*
5 *Black People in America from the Civil War to World War II* (New York, 2008), 7. The
6 pernicious Black Codes, however, did not escape notice of northern legislators who
7 recognized that the very purpose of the Thirteenth Amendment was being circumvented
8 by their legislative brethren in the south.

9
10 In 1867, Iowa Representative John Adam Kasson exclaimed “[I]f states can
11 impose Black Codes with impunity, then I demand to know of what practical value is the
12 Amendment abolishing slavery?” Eric Foner, *The Second Founding* (New York, 2019)
13 49. Representative Kasson recognized that southern legislators were thwarting the
14 Thirteenth Amendment’s true purpose of abolishing slavery by using the punishment
15 clause to re-enslave Black Americans. CG, 39th Congress, 2nd Session, 344-48. Indeed,
16 southern Senators and Representatives were actively searching for loopholes to the
17 Thirteenth Amendment and battling against the original intent of the Thirteenth
18 Amendment drafters. To wit, a Georgia newspaper printed that the very ongoing
19 existence of the south and its prosperity depended on “one single condition—the ability
20 of the planter to command labor.” Eric Foner, *The Second Founding* (New York, 2019)
21 49. This labor control was exacted through the Black Codes. Thereafter, the southern
22 states proved to be successful in reinstituting a “plantation like” system through prison
23 labor slavery. Southern white slaveholders, despite passage of the Thirteenth
24 Amendment, were not ready to let go of the vast wealth extracted through slave labor,
25 and so craftily and nefariously developed a system of Black Codes and Convict Leasing
26 thereby tainting and fouling the purpose and intent of the Thirteenth Amendment. Eric
27 Foner, *Reconstruction, 1863-1877* (Updated Edition, 2002) 519.
28

B. Southern states massively expand Convict Leasing, paving the way for slavery by another name despite the Thirteenth Amendment’ prohibition against slavery.

Enactment of Black Codes were simply the first step in the plan of southern legislators to gain control of the newly freed Black labor pool and to continue the system of white supremacy that pervaded the south prior to the Thirteenth Amendment. The second step was to hugely expand the brutal system of Convict Leasing. Just as slaves were sold to the highest bidder under the just-abolished system of slavery, once the Black Codes enabled the south to imprison significant numbers of newly free-from-slavery Black Americans, thereafter, the states would then auction off to corporations, private parties, and merchants the labor of the recently imprisoned Black freemen, again, to the highest bidder. Joseph Logsdon, Horace White: *Nineteenth Century Liberal* (Westport, Conn., 1971), 263-67. Therefore, despite the clear and unquestionable intention of the Thirteenth Amendment to thoroughly and completely end slavery, southern politicians were able to re-enslave the very Black Americans that had just been freed by creating a loophole through the punishment clause.

Stated another way, by criminalizing free Blacks and imprisoning them on false, fake, trumped up, or minor charges for long periods of time, and then leasing these prisoners to private parties for cash payments, slavery was reinstituted in the south. Black prisoners worked for no pay, due to the punishment clause, as governments extracted large sums of money from private interests for the work of these Black prisoners, and private parties profited from this cheap labor, which often ended in the brutal deaths of these Black prisoners due to abhorrent work conditions. A. Elizabeth Taylor, “*The Origins and Development of the Convict Lease System.*” (1942) 339. When private contractors drove their cheap laborers to death, another numbered convict would be bid out to fill the vacancy. Historians argue that Convict Leasing was more brutal than slavery itself as private contractors had no incentive to keep the prisoners alive,

1 often working their convicted laborers to death. Lichtenstein, A. *Twice the work of free*
 2 *labor: The political economy of convict labor in the New South*. (London, 1996).

3 Northern merchants were also interested in developing this inexpensive labor pool.
 4 Following the Civil War, much industry and investment was needed in the south to
 5 rebuild and northern merchants worried along with southern legislators that the labor pool
 6 would be too shallow to move products and rebuild properly. Genevieve LeBaron,
 7 *Rethinking Prison Labor: Social Discipline and the State in Historical Perspective*.
 8 (2012). Thus, Convict Leasing solved the problem of a depleted labor market, due to the
 9 death of so many southern soldiers who might have provided labor and enabled northern
 10 merchants to profit while simultaneously providing the south with the tool it needed to
 11 reaffirm its racial hierarchy. *Id.*

12 Perhaps blindsided by Black Codes and Convict Leasing, northern legislators were
 13 shocked to see the Thirteenth Amendment circumvented and slavery by another name re-
 14 established in the south.
 15

16 **C. Northern legislators are aghast following successful passage of the Thirteenth**
 17 **Amendment that southern states reconstituted slavery through the punishment**
 18 **clause.**

19 Historians agree that most northern legislators failed to appreciate at the
 20 Thirteenth Amendment's drafting stage, how vehemently the southern legislators would
 21 seek to subvert and circumvent the abolishment of slavery. Timothy S. Huebner, *Liberty*
 22 *and Union: The Civil War Era and American Constitutionalism* (Lawrence, 2016), 323-
 23 47. After all, the south had just lost a war and had suffered enormous consequences
 24 weakening them politically. *Id.* Further, most northern legislators failed to perceive how
 25 the punishment clause in the Thirteenth Amendment might allow an end-around to the
 26 abolishment of slavery. Senator Charles Sumner of Massachusetts seemingly recognized
 27 the potential for mayhem in the punishment clause immediately and therefore proposed
 28

1 that the Thirteenth Amendment include the following language: “all persons are equal
2 before the law, so that no person can hold another as a slave.” Cong. Globe, 38th Cong.,
3 1st Sess. 1482 (1864); *Id. at 521*; *see also Id. at 523*.

4 Sumner’s goal was to make the language as clear and distinct as possible so that
5 no interpretation would allow for the re-enslavement of freed Black Americans in any
6 form. The response to Senator Sumner’s proposed language from his fellow northern
7 legislators was dismissive and cynical, most likely because of Sumner’s bombastic
8 presence and unpopularity amongst his Senate colleagues. Sumner’s language was
9 rejected in favor of the Northwest Ordinance’s prose and the punishment clause was
10 given life which the south used to imperil and destroy the lives of many freed Black
11 slaves. Cong. Globe, 38th Cong., 1st Sess. 1489 (1864); *see also id. at 553*.

12 Not until after the Thirteenth Amendment was adopted and northern political
13 leaders watched with anguish as the south adopted Black Codes and used Convict
14 Leasing to re-enslave freed Black Americans, did the full weight of this decision to adopt
15 the punishment clause come to bear. Historians claim that most northern legislators
16 agreed with Thomas Jefferson’s view that the punishment clause would be used to
17 rehabilitate prisoners and deter some from committing jailable offenses. Eric Foner, *The*
18 *Second Founding: How the Civil War and Reconstruction Remade the Constitution*
19 (2020, New York). Sumner’s view regrettably proved the more accurate.

20 Shortly after the northern legislators recognized that the southern states were
21 corrupting the Thirteenth Amendment, northern members of Congress began confronting
22 southern members for defiling it. Representative Henry Deming of Connecticut was
23 outraged by how he saw the south construing the punishment clause to re-enslave the
24 newly freed Black Americans. Michael Vorenberg, *Final Freedom: The Civil War, the*
25 *Abolition of Slavery, and the Thirteenth Amendment*. (2001)207-210 (statement of Rep.
26 Deming). Representative Deming was disgusted that the southern states “have ratified
27
28

1 [the Thirteenth Amendment] with a construction that it merely abolishes the infamy of
2 buying, selling, and owning human beings; and under the exceptional clause
3 reconstructed selling black men into slavery for petty larceny.” *Id.* (statement of Rep.
4 Deming).

5 In referring to the Black Codes that harshly criminalized petty larceny with long
6 prison sentences, Deming acknowledged that the south was “selling black men into
7 slavery” without remorse. Representative Burton Cook of Illinois condemned southern
8 states enactment of Black Codes and the subsequent leasing of convicts when he
9 referenced the vagrancy laws that captured so many newly freed Blacks and placed them
10 into prison: “laws which, under the pretense of selling these men as vagrants, are
11 calculated and intended to reduce them to slavery again; and laws which provide for
12 selling these men into slavery in punishment of crimes of the slightest magnitude.” Cong.
13 Globe, 39th Cong., 1st Sess. 1123 (1866) (statement of Rep. Cook). Representative Cook
14 continued stating that these laws “reduced the freedom virtually to the condition of
15 slavery and established a system of slavery.” *Id.* at 1124.

16
17 Representative Thaddeus Stevens of Pennsylvania was vehement in his opposition
18 to the south’s use of the punishment clause to re-enslave freed Black slaves and evade the
19 clear intent of the Thirteenth Amendment to abolish slavery: “under the pretense of the
20 punishment clause, they are taking men for . . . assault and battery and selling them into
21 bondage for ninety-nine years.” Cong. Globe, 39th Cong., 1st Sess. 655 (1866) (statement
22 of Rep. Stevens). Representative Stevens believed that the southern states were using the
23 punishment clause as an “excuse” to continue to extricate free labor from Black citizens.
24 *Id.* (statement of Rep. Stevens).

25
26 Thus, northern legislators were unquestionably offended and outraged at the
27 south’s use of Black Codes and Convict Leasing to re-enslave the very individuals that
28 the Thirteenth Amendment had meant to free. That the south was using language within

1 the Thirteenth Amendment to re-enslave the newly freed Black Americans must have
 2 been particularly galling to these northern political leaders. The punishment clause was
 3 never intended to be used for that purpose—the continuation of private chattel slavery.
 4 The reaction of so many northern lawmakers to the south’s abuse of the punishment
 5 clause is very strong evidence that private for-profit slavery was never an intended
 6 interpretation of the Thirteenth Amendment. That this punishment clause loophole had
 7 been created and exploited to re-enslave dozens of thousands of free Black men and
 8 women forced these northern legislators into further action.

9
 10 **D. Congress is forced to pass the Fourteenth and Fifteenth Amendments as well as**
 11 **the Civil Rights Act of 1866 and 1874 to curtail the South’s attempts to re-enslave**
 12 **free Black Americans.**

13 Because the southern states had corrupted the Thirteenth Amendment’s attempt to
 14 fully eradicate slavery throughout the nation, Congress was compelled to act to stamp out
 15 the Black Codes and Convict Leasing regime that had grown into a devastating situation
 16 for many Black Americans freed from slavery. Had the punishment clause been intended
 17 to support private for-profit incarceration, then there would have been no need for
 18 Congressional action and yet we see that Congress acted repeatedly to try to
 19 instrumentalize the freedoms promised in the Thirteenth Amendment. Northern
 20 legislators enacted the Civil Rights Acts of 1866 and 1875. Eric Foner, *Reconstruction,*
 21 *America’s Unfinished Revolution* (Updated Edition, 2002)553-56, 587. Further, the
 22 Fourteenth and Fifteenth Amendments were adopted to further strengthen the voting
 23 rights and equal protection rights of the freed slaves. *Id.* Additional Congressional action
 24 was necessary in the passage of the Enforcement Acts and the Reconstruction Acts. *Id.*
 25 These Congressional actions show that contemporaneous legislators intended to cover
 26 and reverse activity undertaken by the southern states as they patched holes exploited by
 27 those southern actors.
 28

1 DATED: June 24, 2021
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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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