SUPREME COURT OF LOUISIANA

No. 2021-KP-01893

STATE OF LOUISIANA, *Applicant*,

v.

REGINALD REDDICK, *Respondent.*

On Supervisory and/or Remedial Writs of the Denial by the Court of Appeal, Fourth Circuit,
Case No. 2021-K-0589,
From the Ruling by the Twenty-Fifth Judicial District Court,
Parish of Plaquemines, Docket No. 93-03922-B,
The Hon. Michael D. Clement, Judge Presiding.

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT-DEFENDANT REGINALD REDDICK

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I. INTRODUCTION

In open defiance of the egalitarian mandate of the Thirteenth Amendment and Reconstruction, Louisiana perpetuated vestiges of its ante-bellum slave system through an array of coordinated criminal laws and practices that, taken together, ensured the continued subjugation and exploitation of Black Louisianans. The 1898 post-Reconstruction non-unanimous jury law was an essential component of this racially repressive system, as it sought to "ensure that African-American juror service would be meaningless." *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1394 (2020) (quotation omitted). As *amicus curiae* the Center for Constitutional Rights describes, the non-unanimous jury system violates the broad egalitarian pronouncements of the Thirteenth Amendment, which was enacted to eliminate not just physical human bondage, but all ingenious mechanisms designed to perpetuate the racial caste system in Louisiana, including all "badges and incidents" of slavery. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Because the Thirteenth Amendment's mandate was by design and intention meant to immediately and fully liberate Black persons, it is necessarily retrospective. Accordingly, the Amendment's prohibition on non-unanimous jury verdicts renders the 1898 provision invalid at the time it was written, and protects Black Louisianans today who remained imprisoned for life pursuant to its racially repressive design.

II. THE THIRTEENTH AMENDMENT WAS DESIGNED AND ADOPTED TO ERADICATE FORMS OF RACIAL OPPRESSION

The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The Amendment was intended to prohibit all forms of involuntary labor, not solely to abolish

chattel slavery. *See Pollock v. Williams,* 322 U.S. 4, 17–18 (1944) (the "undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States"); *see also* CONG. GLOBE, 38TH CONG., 1ST SESS. 2962 (1864) (statement of Rep. Holman) ("Mere exemption from servitude is a miserable idea of freedom.").

Transforming the 18th Century conception of negative rights enshrined in the 1787 Constitution, the Reconstruction Amendments conceived an affirmative grant of positive rights. Drafters of the Amendment described the goal of the Amendment in broad terms: to "see that [Emancipation] is wholly done" because "[s]lavery must be abolished not in form only, but in substance." CONG. GLOBE, 39TH CONG., 1ST SESS. 91 (1865) (statement of Sen. Sumner); *see* CONG. GLOBE, 38TH CONG., 2D SESS. 155 (1865) (statement of Rep. Davis) (to "make every race free and equal before the law . . . every vestige of African slavery [must be removed] from the American Republic."). The Thirteenth Amendment was drafted to "obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it." CONG. GLOBE, 38TH CONG. 1ST SESS. 1324 (1864) (statement of Sen. Wilson).

The Thirteenth Amendment's vision of freedom included freedom from racially repressive criminal laws and procedures: during the drafting of the Thirteenth Amendment, Pennsylvania Congressman William Kelley raised the concern that slavery made it impossible for a Black defendant to "find an unprejudiced judge and an impartial jury to vindicate their innocence when falsely accused." CONG. GLOBE, 38TH CONG., 2D SESS. 289 (1865). It has been understood since Reconstruction that racialized barriers to representation in the criminal justice system replicate

precisely the kinds of badges or incidents of slavery outlawed by the Thirteenth Amendment. CONG. GLOBE, 39TH CONG., 1ST SESS. 589 (1866) (statement of Rep. Donnelly) ("let the courts of justice be opened to him.").

A. Louisiana's Non-Unanimous Jury Provisions Formed Part of a Broad System of Criminal Laws and Practices Designed to Subjugate Black Citizens, in Contravention of the Thirteenth Amendment's Anti-Caste Mandate.

In 1880, as part of its post-Reconstruction resistance and retrenchment, Louisiana abandoned its practice of requiring unanimous criminal jury verdicts, and enacted a statute permitting a criminal conviction based on 9 out of 12 jury votes.[1] In 1898, Louisiana called a constitutional convention to, among other goals, codify the statute permanently in its constitution.[2] This purpose of this convention, as described by the Chairman of the convention's Judiciary Committee, Judge Thomas Semmes, was to "establish the supremacy of the white race."[3] The *Times-Democrat* affirmed that the convention was designed "to secure white supremacy for all time in Louisiana."[4]

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[1] Angela A. Allen-Bell, *How the Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV. 585, 588 (2016).

[2] *Id*.

[3] Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374-75 (2012). As part of the post-Reconstruction White Supremacist fever, the same constitutional convention enacted the "Grandfather Clause," which established exceptions to educational and property requirements imposed upon voter registration for all those who could prove that they or a male ancestor were entitled to vote prior to January 1, 1868. RICHARD L. ENGSTROM ET AL., LOUISIANA IN QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 105 (Chandler Davidson & Bernard Grofman, eds., 1994). This disenfranchisement led to a nearly 96% reduction in the number of Black voters on the registration rolls, from 130,334 in 1896 to 5,320 in 1900. Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 303 (2000).

[4] George E. Cunningham, *Constitutional Disenfranchisement of the Negro in Louisiana, 1898*, 29 NEGRO HIST. BULL. 147, 147 (1966).

The enactment of non-unanimous juries would promote Black subjugation in at least two related ways. First, it would limit the meaningful participation of Black citizens on juries, particularly in cases involving Black defendants, as their votes could be overruled by white majorities. Second, the policy would ensure the conviction of a greater proportion of Black Americans that were put on trial. White Louisianans expressed widespread fear that if Black men served on unanimous juries, Black defendants "would simply not be convicted because of the African American presence in the jury box."[5] Additionally, one popular newspaper lamented that "if a negro be on trial for any crime, [a Black juror] becomes at once his earnest champion, and a hung jury is the usual result."[6]

Louisiana's non-unanimous jury system sat within a broader project to perpetuate the subjugation of Black people through the criminal laws and counteract the promise of Reconstruction. Though Louisiana ratified the Thirteenth Amendment in February 1865, the state legislature issued a statement saying that the Amendment did not allow the U.S. Congress to regulate the political status or civil relations of former slaves and otherwise rejected the Amendment's recognition that "all men are created equal."[7] The State's imposition of racially subordinating criminal laws was both in service to white supremacist ideology and a desperate attempt to hold on to the profound economic exploitation that Black labor could provide.

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5 Smith & Sarma, 72 LA. L. REV. at 375-76.

6 *Id*. at 375, quoting *Future of the Freedman,* DAILY PICAYUNE, Aug. 31, 1873, at 5.

7 Jennifer Mason McAward, *McCulloch and the Thirteenth Amendment*, 112 COLUM. L. REV. 1769, 1786-87 (2012).

In the absence of enslaved people's labor, the state's economy was at risk of collapse,[8] and without the institution of slavery, there was no longer a formal mechanism for maintaining racial hierarchy and "preventing 'amalgamation' with a group of people considered intrinsically inferior and vile."[9] Thus, southern states, including Louisiana, "innovated ways to continue to reap many of the economic and labor market benefits of chattel slavery by enacting a network of criminal and penal statutes" to reestablish the rigid racial hierarchy and continue to exploit Black Americans for labor.[10]

Louisiana's enactment of "Black Codes" was especially draconian—and explicit. One Louisiana politician explained that the Black Codes were aimed at "getting things back as near to slavery as possible" by tightly controlling Black Americans' labor and restricting their movements.[11] The 1865 Codes included several laws specifically designed to force Black citizens to continue laboring on plantations without external intrusion, such as prohibitions on carrying a firearm on a plantation without the owner's permission, on trespassing on plantations, and on recruitment of laborers away from the places where they worked.[12] The Black Codes also amended the crime of vagrancy—a broad law to allow the arrest of anyone impoverished without a job—to

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[8] An 1862 analysis of Louisiana tax records found that "one-half of the entire wealth of Louisiana consist[ed] of slaves" at the time of the Civil War. *The Elements of Southern Wealth: Valuation of Real and Personal Estate in Louisiana*, N.Y. TIMES (Aug. 2, 1862), https://www.nytimes.com/1862/08/02/archives/the-elements-of-southern-wealth-valuation-of-real-and-personal.html.

[9] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 27 (2012).

[10] Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1606 (2015).

[11] Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U.L. REV. 869, 902 (2012).

[12] Germaine A. Reed, *Race Legislation in Louisiana, 1864-1920*, 6 LA. HIST. 379, 380 (1965).

be punishable by forced labor for up to twelve months.[13] Later additions to the Codes criminalized actions like "disobedience" which was defined to include "impudence," "swearing," and "indecent language."[14] Systemic manipulation of the criminal system furthered the racist goals of the 1865 Black Codes and the later substantive additions to the criminal laws. Sentences were handed down by "provincial judges, local mayors, and justices of the peace—often men in the employ of white business owners who relied on the forced labor produced by the judgments."[15] Dockets and trial records were not consistently maintained, and the treasuries of Southern states benefited from the revenues that neo-slavery produced.[16]

Louisiana paired a criminal justice system that targeted Black Americans for arrest and incarceration with a state-endorsement of prison labor. The state adopted convict-lease programs after the Civil War, maintaining the programs for decades to exploit the labor of incarcerated people for monetary gain. Under this system, the state could re-enslave African Americans by leasing out incarcerated people to work in labor-intensive industries, such as plantations, railroads, coalmines, or brickyards.[17] The convict-lease system clearly "mimicked slavery because there were a large number of Africans working for the benefit of wealthy Southerners for free."[18] As a result of the new Black Codes, the Louisiana State Penitentiary changed "from a predominantly

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13 William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 47 (1976).

14 David F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 603 (1998).

15 DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 7 (2008).

16 *Id*. at 7-8.

17 *Id*. at 44-46, 74, 343-346, 350, 351.

18 Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 687 (2015).

white institution to one that was majority black" and prison work shifted from "industrial to agricultural labor."[19] In the post-Civil War period, Louisiana's incarcerated population grew from 297 people in 1869, 71% of whom were Black, to 1090 in 1893, 83% of whom were Black males.[20]

From 1870 to 1901, the entire incarcerated population of Louisiana was leased to a single person, Samuel Lawrence James, a former Confederate major, who transformed Angola Plantation into a plantation prison labor camp for the State's prisoners. At Angola, where Mr. Reddick as well as the Center for Constitutional Rights' clients are incarcerated, people slept in the old slave quarters, worked from sunrise to sunset picking cotton in the fields, and were often subleased at night to work on railroad and levee construction.[21] During James's "quarter century of dominance," Louisiana's convict-lease program was a "profit-based system that provided additional revenue to the state," while serving as a "racial system that provided something resembling slavery for a crop of prisoners who were overwhelmingly black."[22] In other words, Louisiana's criminal justice system forced incarcerated Black Louisianans to live and work on plantations against their will and at risk of death for decades after the Civil War.[23] The profit

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19 THOMAS AIELLO, JIM CROW'S LAST STAND: NON-UNANIMOUS CRIMINAL JURY VERDICTS IN LOUISIANA 10 (2019).

20 Nathan Cardon, *"Less than Mayhem": Louisiana's Convict Lease, 1865-1901*, 58 LA. HIST. 417, 421-22 (2017).

21 Aiello, *supra* note 19 at 13.

22 *Id.* at 11-12.

23 The convict-lease system enabled the continued control and exploitation of Black labor by white Southerners, and the ease with which new Black convicts could be produced by a rigged and racist criminal justice system contributed to the system's extreme brutality. Between 1894 and 1901, "an estimated 10% of convicts incarcerated in Louisiana died." Armstrong, 35 SEATTLE U.L. REV. at 903. Even after the expiration of S.L. James's contract and the official end of convict leasing in Louisiana in 1901, there was little improvement in conditions for those incarcerated in the state. Louisiana purchased Angola from James's estate and made few changes to the penitentiary's management: the previous warden was unchanged, the plantation manager was S.L. James's son, and the chairman of the penitentiary board was the executor of James's estate. *Id.* at 904. In addition, the 1898 state constitutional amendment banning

incentive built into the convict-lease system was so strong that apprehensions and arrests often escalated during times of increased labor needs, and even those who were declared innocent in the courts were often placed in the convict-lease system if they could not pay their court fees.[24]

Louisiana's expansive and racist project of recreating slavery through the criminal justice system relied on the creation of the non-unanimous jury verdict in the state. Specifically, a non-unanimous jury system ensured that Black Louisianans would be convicted in criminal trials even in the absence of hard evidence or substantive trials to prove their guilt. It thus facilitated the reimposition of slave practices that were occurring through the Black Codes, convict leasing, and debt peonage. Indeed, S.L. James, the monopoly holder of Louisiana's convict-lease for more than 30 years, was known to have an "undue influence" on certain legislators, and it was only in 1880, after Louisiana passed its first non-unanimous jury law, that James paid $100,000 to purchase Angola Plantation, confident there would be a steady "supply" of incarcerated laborers that could meet the "demand" of the plantation.[25] Later, during the same 1898 Convention in which a non-unanimous jury provision was codified into the Constitution, Louisiana state established the first-ever state board of control over all correctional institutions, concentrating power over incarcerated labor in the hands of a few unaccountable, wealthy, and white Louisianans.[26] In this way, the introduction of a non-unanimous jury verdict occurred not independently of, but alongside and in partnership with, the rise of Louisiana's exploitative criminal justice system that replicated slavery.

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private convict leasing did not stop the state from continuing to "lease its predominately African-American inmates to private employees for another 15 years." *Id.*

[24] Ellen Terrell, *The Convict Leasing System: Slavery in its Worst Aspects*, LIBRARY OF CONGRESS (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/.

[25] Aiello, *supra* note 19 at 11-12.

[26] Allen-Bell, 67 MERCER L. REV. at 594-96.

B. Vestiges of Louisiana's Post-Reconstruction System of Neo-Slavery Persist.

The relics of Louisiana's racially and economically repressive Black Codes persist in Louisiana's criminal justice system. Today, Louisiana imprisons a higher percentage of residents than any other state in the United States and any other country in the world.[27] The overrepresentation of Black Americans in Louisiana's criminal justice system has remained consistent since the adoption of the Black Codes in 1865, and stark racial disparities in arrests, prosecutions, and convictions continue today.[28] Although African Americans make up only 32% of Louisiana's population, they comprise 66% of the state's prison population.[29]

Today, the penal plantation at Angola still serves as Louisiana's state penitentiary and continues to impose "slavery-like conditions on the incarcerated" people of the state.[30] The 5,300 people incarcerated at Angola, 75% of whom are Black, are paid only a few cents per hour to work the same fields, picking cotton, corn, and more, from the "same land slaves were forced to work 200 years ago."[31] Burl Cain, the current warden of Angola, recently noted that Angola is "like a big plantation in days gone by."[32] In other words, "Angola is, essentially, a place where slavery never ended."[33]

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27 Courtney Harper Turkington, *Louisiana's Addiction to Mass Incarceration by the Numbers*, 63 LOY. L. REV. 557, 558 (2017).

28 *Id.* at 573-74.

29 *Id. at* 574.

30 Armstrong, 35 SEATTLE U.L. REV. at 910.

31 Daniele Selby, *How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended*, INNOCENCE PROJECT (Sep. 17, 2021), https://innocenceproject.org/13th-amendment-slavery-prison-labor-angola-louisiana/.

32 Armstrong, 35 SEATTLE U.L. REV. at 908 (citing THE FARM: 10 DOWN, AT 10:05 (Highest Common Denominator Media Group 2009)).

33 *Selby*, *supra* note 31.

III. LOUISIANA'S NON-UNANIMOUS JURY SYSTEM VIOLATES THIRTEENTH AMENDMENT PROHIBITIONS ON CONTINUING FORMS OF RACIAL SUBJUGATION.

The violent response to the Thirteenth Amendment's ratification by Louisiana and other slaveholding states and the Amendment's promises of racial equality convinced the next set of legislators that the Amendment's promise of freedom required additional legislative enactments in order to give it "practical effect, life, vigor and enforcement," CONG. GLOBE, 39TH CONG., 1ST SESS. 1151 (1866) (statement of Rep. Thayer), in order to liberate freed Blacks from the southern racial caste system and to secure them equality and "practical freedom."[34] Congress passed through its Section 2 powers the Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27-30 (1866), a mere five months after the passing of the Amendment itself. These far-reaching laws were enabled by the broad grant of enforcement authority established in Section 2, a grant that reflects the broad scope of protection afforded in Section 1. CONG. GLOBE, 39TH CONG., 1ST SESS. 2773 (1866) (remarks of Rep. Eliot) ("The power to liberate, which is now confessed, involve[s] the duty to protect . . . No peace will come that will 'stay' until the Government that decreed freedom shall vindicate and enforce its rights by appropriate legislation."). The Act's goal was plain: to guarantee citizens of all races and colors the same basic civil rights as were "enjoyed by white citizens," including the right to make contracts, participate in court proceedings, own property, and enjoy the "full and equal benefit of all laws and proceedings for the security of person and property." Civil Rights Act of 1866, ch. 31, § 1-2, 14 Stat. 27-30.

[34] Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1030 (2002).

As the Supreme Court would later acknowledge, though "the immediate concern was with African slavery, the Amendment was not limited to that," *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911). Instead, it was enacted to end a plenitude of degradations that the slave system perpetrated against all Americans—slaves, free Blacks, and whites. *See United States v. Cannon*, 750 F.3d 492, 498 (5th Cir. 2014) (the Court "stated in dicta that the scope of the Thirteenth Amendment extended beyond abolishing laws or private acts that perpetuated slavery or involuntary servitude in a literal sense" (citing the *Civil Rights Cases*, 109 U.S. at 20)). The Amendment's reach extended beyond a prohibition on chattel slavery, not only to prevent labor exploitation, but also to prohibit any kind of caste system throughout the United States. *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 589 (1866) (statement of Rep. Donnelly) ("[I]t is as plain to my mind as the sun at noonday, that . . . we must break down all walls of caste."). Perhaps the clearest distillation of the Thirteenth Amendment's scope was the pronouncement that the Amendment extends beyond a prohibition on mere slavery and involuntary servitude towards the so-called "badges and incidents of slavery." *The Civil Rights Cases*, 109 U.S. at 20.

A. Louisiana's Non-Unanimous Jury System Constitutes an Impermissible Badge and Incident of Slavery.

In the *Civil Rights Cases*, the Supreme Court officially recognized the that the Thirteenth Amendment reached not only chattel slavery but also "badges and incidents" of slavery. *Id*. The Court included among them both: the "necessary incidents of slavery" for the "[c]ompulsory service of the slave for the benefit of the master" as well as vestiges of the system of slavery such as "disabilit[ies] to hold property [and] to have a standing in court." *Id*. at 22. Following the demise of Jim Crow, the Supreme Court revived the badges and incidents doctrine in 1968 in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Court held that Congress was authorized to pass

42 U.S.C. § 1982—which prohibits race discrimination in the conveyance of property— under its broad Section 2 power to identify and rectify "badges and incidents" of slavery. The Court observed that the Black Codes, designed to restrict fundamental rights to property, "were substitutes for the slave system," and that the exclusion of Blacks from white communities which "herds men into ghettos and makes their ability to buy property to turn on the color of their skin . . . too is a relic of slavery." 392 U.S. at 442-43. In effectively "resurrect[ing] the Thirteenth Amendment from a nearly century-old judicial burial," the *Jones* Court "revived the original purpose of the Thirteenth Amendment, and the Civil Rights Act of 1866."[35]

As one scholar has observed, identifying badges and incidents of slavery are "exercise[s] in historical inquiry." *United States v. Cannon*, 750 F.3d at 501 (quoting Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012)). Though the definition has not always remained constant, "in its most general sense, the term 'badge of slavery' . . . refers to indicators, physical or otherwise, of African–Americans' slave or subordinate status." *Id.* The term later came to include legal restrictions, such as the Black Codes, eventually including the widespread violence and discrimination, disparate enforcement of racially neutral laws, and eventually, Jim Crow laws—that served to brand Black people with an inferior status. *Id.* (quotation omitted). An *incident of slavery*, as that term was used, was any legal right or restriction that necessarily accompanied the institution of slavery. *Id.* Most often, "incident" was used to refer to the aspects of property law that applied to the ownership and transfer of slaves,

[35] Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 2-3 (1995).

but was also used to refer to the civil disabilities imposed on slaves by virtue of their status as property. *Id.*

Chief among the legislative prerogatives were concerns that the historical deprivation of equal access to laws, courts, and systemic jury exclusion would forever brand freedmen as socially inferior and subject to white societal control. In passing the Civil Rights Act of 1866, Congress recognized that the denial of legal process and access to courtroom justice were "inseparable concomitants" of the institution of slavery.[36] It was Senator Wilson during the 39th Congress who remarked in the same breath that the right to buy and sell property free of racial barriers—held to be a badge and incident in *Jones*—was as important as the the right to "sue and be sued" and to testify in court and to have equal access to the "common law." CONG. GLOBE, 39TH CONG., 1ST SESS. 111 (1865) (statement of Sen. Wilson). Other legislators remarked the same. *See, e.g.,* CONG. GLOBE, 38TH CONG. 1ST SESS. 1439 (1864) (judicial bodies had "robbed [Blacks] of the power to appear before impartial tribunals for the redress of any grievances"); CONG. GLOBE, 39TH CONG., 1ST SESS. 42 (1865) (statement of Sen. Sherman) (legislators identified repeal of the slave laws that had prevented black people from testifying or offering evidence against whites in court as among the "inevitable incident[s] to liberty, without which liberty would be but a name"). This specifically included references to the impartiality of juries. Supporters of the new legislation recognized the connection between the 1866 Act's guarantee that Black citizens could testify in court, and the need to ensure that Black jurors could assess that testimony. Senator Edmunds argued that "if it be . . . constitutional to say that there shall be equal rights in respect to calling of

[36] Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 108 (1990) (quoting the *Civil Rights Cases*, 109 U.S. at 25).

witnesses, then it must follow that there must be equal rights in the same degree in respect of the selection of jurors." 3 CONG. REC. 1866 (1875) (statement of Sen. Edmunds).

Systematic exclusion from juries—the crux of the issue in *Reddick*—remains one badge and incident of slavery among many.[37] The Supreme Court recognized as much in *Strauder v. West Virginia*, 100 U.S. 303 (1879).[38] The Court viewed Black citizens' automatic disqualification from jury service as "an assertion of their inferiority." *Id.* at 308. It expounded:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, . . . is *practically a brand upon them*, affixed by the law, an assertion of their inferiority and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. (emphasis added); *see also Jones*, 392 U.S. at 445-47 (Douglas, J. concurring) (arguing that systematic Black exclusion from juries acts as a substantive barrier to justice for Black defendants and victims and, therefore, violates the Thirteenth Amendment's prohibition against the incidents of slavery). Systematic southern exclusion of African American jurors from the jury box relied upon a rationale similar to one previously used to deny them citizenship rights: they were presumed intellectually and morally inferior to render judgments against whites.[39] White juries' inability to

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[37] *See* Colbert, *Challenging the Challenge*, 76 CORNELL L. REV. at 6 ("The Thirteenth Amendment's substantive jury protections stem from the understanding that slavery's incidents included denying legal justice and maintaining inferior citizenship status for African-American people.").

[38] Though the Supreme Court decided *Strauder* on Fourteenth Amendment equal protection grounds, it nevertheless addressed how jury exclusion on racial grounds perpetuated a badge and incident of slavery. The Court held that, by excluding Black jurors, the West Virginia statute violated the Fourteenth Amendment's guarantee of equal protection, specifically the right to "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." 100 U.S. at 308.

[39] Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. at 39 (citing *Dred Scott v. Sanford*, 60 U.S. 393, 404-05 (1857)).

judge accused Black citizens fairly or to vindicate them when injured reinforces the stigma of inferiority dating to slavery; namely, that Black people are not entitled to legal redress when wronged, nor to due process of law when accused.[40]

Louisiana's non-unanimous jury system, enacted as part of the Black Codes, is a clear relic and badge of slavery, designed as it was to caste upon Blacks a stamp of inferiority and subjugate them through a carceral system designed to continue to exploit their labor. It was passed, plainly, "to establish the supremacy of the white race." *Ramos*, 140 S. Ct. at 1394. As it once was, Angola, which is home to over 5,000 incarcerated individuals,[41] has once again perpetuated a "racial system that provided something resembling slavery for a crop of prisoners who were overwhelmingly black."[42] In modern society, a life sentence at Angola is as close to a "civil disabilit[y] imposed on slaves by virtue of their status as property" as one can encounter, and is not only a badge, but an incident of slavery as well.[43] The system deprives Black Louisianans of their full rights of citizenship, not only by branding them as unfit to serve on juries, but by reifying an impermissible caste system.

B. Individuals Convicted by Non-Unanimous Juries are Not "Duly Convicted" Under the Thirteenth Amendment.

The punishment clause of the Thirteenth Amendment bans all forms of slavery and involuntary servitude, with one exception: "except as punishment for crime whereof the party shall

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40 *Id.* at 40.

41 Julie O'Donoghue, *Louisiana moving 602 inmates from Angola to Allen Parish because of staffing shortage,* THE ADVOCATE (Mar. 3, 2022), https://www.theadvocate.com/baton_rouge/news/crime_police/article_6a31c132-9b37-11ec-a5c2-47022eeaddf8.html.

42 Aiello, *supra* note 19 at 11-12.

43 McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. at 575.

have been duly convicted." U.S. CONST. amend. XIII, § 1. In *Ramos*, the Court held the Sixth Amendment's guarantee of a fair trial has always required a unanimous jury verdict to convict a defendant of a serious state law offense. 140 S. Ct. at 1397. Consequently, from the time that the Thirteenth Amendment was adopted, "duly convicted" necessarily had to mean a conviction by a unanimous jury. In addition, while there are few judicial interpretations of this clause, the persuasive interpretation suggests that the phrase "duly convicted" is commensurate with a conviction consistent with due process. It follows, therefore, that the Thirteenth Amendment prohibits criminal processes devoid of fundamental fairness, particularly where that unfairness is deliberately designed to trap Black citizens into carceral punishment.

Although few courts have reached the issue, *Tourscher v. McCullough*, 184 F.3d 236, 241 (3d Cir. 1999), at least two cases have held that unconstitutionally-obtained convictions can violate an incarcerated[44] person's rights under the punishment clause, and that a term of imprisonment falls under the ambit of the clause. In *U.S. ex rel. Caminito v. Murphy*, the Second Circuit held that where police virtually kidnapped a suspect, lied to him, and held him incommunicado to coerce a confession in violation of the Fourteenth Amendment's due process protections, an actionable Thirteenth Amendment claim lied and habeas corpus was warranted. *See* 222 F.2d 698, 700–01 (2d Cir. 1955) ("To jail a man convicted without evidence of guilt is to impose 'involuntary servitude' which, 'except as a punishment for crime,' the Thirteenth Amendment forbids."). In *United States v. Morgan*, a case issued immediately before *Caminito*, the Second Circuit held that where a conviction was obtained without the fundamental right to assistance of counsel

[44] For example, courts treat pretrial detainees as having not yet been "duly convicted." *See McGarry v. Pallito*, 687 F.3d 505, 511 (2d Cir. 2012).

guaranteed by the Sixth Amendment, the defendant's continued imprisonment likewise violated the Thirteenth Amendment. 222 F.2d 673, 674 (2d Cir. 1955) ("since no punishment for crime can be valid unless after a valid trial or a valid plea of guilty."). Although few challenges have been presented on this precise issue since, the Second Circuit plainly recognized the need for the government to obtain a valid, constitutional conviction for a crime before a term of slavery or involuntary servitude is imposed.[45]

Scholars are in accord. *See, e.g.,* Birckhead, 72 WASH. & LEE L. REV. at 1638 ("When these individuals are convicted of a crime or adjudicated delinquent of a juvenile offense, it could be argued that they have not, in fact, been 'duly convicted,' as 'duly' is defined as 'correctly, fairly, legitimately, as required, or rightfully'"); Pope, 94 N.Y.U. L. REV. at 1542-43; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 359 (2005); *see also* 25 PROCEEDINGS OF THE ILL. STATE BAR ASS'N, § 2 at 9 (1901) (Jesse Holdom, then-President of the Illinois Bar, noting, "Slavery and involuntary servitude except for crime, of which the accused must be convicted *by due process of law*, have been abolished by national legislation.").

[45] Save brief discussion from Senator Charles Sumner, no one mentioned the Punishment Clause during the contemporary Congressional debates. James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465, 1475 (2019). The phrase descends from the 1787 Northwest Ordinance, which admitted new non-slaveholding states to the Union. *An Act to Provide for the Government of the Territory Northwest of the River Ohio*, 1 Cong. Ch. 8, 1 Stat. 50-53 (Aug. 7, 1789) (readopting Northwest Ordinance of July 13, 1787); *see* Pope, 94 N.Y.U. L. REV. at 1476 ("It seems more likely, however, that its presence in the Amendment reflected the general prestige of the Northwest Ordinance rather than any particular views about the Punishment Clause."). Although disagreements remain over the interpretation of the whole writ large, the scholarship appears to agree that the specific phrase "duly convicted" is to be read synonymous with "in accordance with due process." *See* Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 90 (2017) ("what material [that exists] consistently treats the phrases as synonymous.").

Rufus Henry and Matthew Allen—two clients of the Center for Constitutional Rights—have been incarcerated at Angola for a combined nearly forty years after they were convicted by an unconstitutional non-unanimous jury system. *See Ramos*, 140 S. Ct. at 1410. Though *Ramos* and *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) are relatively new cases, the Supreme Court has long held that Louisiana must "guarantee[] to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," and any failure to do so "violates even the minimal standards of due process." *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965); *see also Schad v. Arizona*, 501 U.S. 624, 637 (1991) (in prior non-unanimity case applying "a distillate of the concept of due process with its demands for fundamental fairness."). Over 1500 individuals remain imprisoned after receiving non-unanimous convictions.[46] The system has helped institute a carceral state, populated almost exclusively by African Americans, over denied rights which were intended to have been resolved by constitutional amendment in 1865. This system has branded them with a badge of inferiority and has subjugated them to labor away at a neo-plantation for life. Non-unanimous jury verdicts are about more than due process; they are about racism. They were intentionally designed to imprison Black defendants in the criminal justice of a slave state that has inherited or adopted and continues to perpetuate slave jurisprudence. Non-unanimous juries strike at the heart of the racially repressive systems the Thirteenth Amendment was designed to eradicate.

[46] *Legislation Filed to Restore Justice to More Than 1,500 Louisianans Convicted by Non-Unanimous Juries*, PROMISE OF JUSTICE INITIATIVE (Apr. 1, 2021), https://promiseofjustice.org/news/legislation-filed-to-restore-justice-to-more-than-1500-louisianans-convicted-by-non-unanimous-juries.

C. Remedies for Thirteenth Amendment Violations Should be Applied Retroactively.

The Supreme Court recently proclaimed that non-unanimous juries violated the constitutional rights of convicted prisoners, *see Ramos*, 140 S. Ct. at 1408, but declined to classify its holding as a "watershed" rule requiring retroactive application under federal due process principles. *Edwards*, 141 S. Ct. at 1561-62. The Thirteenth Amendment presents a different retroactivity calculus; indeed, its prohibitions are inherently retroactive. As detailed above, the Amendment (and subsequent civil rights legislation passed pursuant to the Amendment) was designed to immediately eliminate all vestiges of slavery and state law mechanisms designed to criminalize and repress Black citizens. It had immediate effect. As such, the 1898 non-unanimous jury provision—part and parcel as it was of a broader repressive system of neo-slavery enforced in Louisiana—violated the Thirteenth Amendment as soon as it was enacted.

This Court should find the provision null and void under the Thirteenth Amendment and rule that all prior, unconstitutional convictions under the provision are vacated.

Respectfully Submitted,
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