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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Jeffrey Nielsen; Larry Hilgendorf; Terry Brownell; Joseph Bulen; and Brian Boudreaux on behalf of themselves and all others similarly situated; and Arizona State Conference of the National Association for the Advancement of Colored People, as an organization and on behalf of its members,

Plaintiffs,

v.

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

Defendant.

Case No. 2:20-cv-01182-GMS-JZB

LODGED: PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Private prisons have two fundamental ingredients: a profit motive and control over prisoners' lives. This combination yields consequences that are not just problematic and contrary to a legitimate penological policy; they also violate prisoners' constitutional rights.

As for-profit corporations, the goal of private prison operators is just that: to make a profit. They make money by keeping more people in prison for longer terms. That means they are incentivized to create a system that increases the length of time someone remains incarcerated and increases the likelihood of recidivism, while cutting costs wherever they can: security, staffing, education programs, health care, etc. Private prisons can and do act on these incentives because they have de facto control over the prisoners' lives, no matter what any contractual or statutory provision may say.

The result of this system authorized by the Arizona Department of Corrections, Rehabilitation, and Reentry (the "Department") is that each day of an individual's life is reduced to a unit of profit based on being locked in a cage. It is treating that person like an asset or, in other words, property. Commodification of incarcerated individuals is an assault on their fundamental dignity as fellow human beings.

Plaintiffs need not conclusively establish every claim before discovery. "The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only plausibly suggest an entitlement to relief." *Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108, 1121 (9th Cir. 2020). The Complaint meets that standard.

Yet at every turn the Department disregards the proper standard for a motion to dismiss. Instead of accepting the Complaint's facts as true, the Department calls them "presumptions," Mot. 17, or attaches exhibits to generate contrary facts, Mot. 6. To resolve the claims, the Court will need a full record of facts and evidence, especially with claims as inherently fact-based (requiring case-specific analysis) as those asserted in the Complaint. Plaintiffs have alleged sufficient facts that dismissal at this stage is improper.

The analysis of Plaintiffs' claims is not nearly as simple as the Department suggests. Most of the Motion's long string cites are pro se cases where the court lacked the benefit of fully-developed arguments, or where the court reflexively relied on those pro se cases with minimal, if any, independent analysis. The Complaint's claims are much more nuanced and, most importantly at this stage of litigation, adequately pled.

Thirteenth Amendment. Whether incarceration of human beings for the profit of private entities crosses the line into a Thirteenth Amendment violation depends on the details. Details of how private prisons monetize human beings. Details of what is occurring within the prisons. Details of the history of slavery for the Court to make the appropriate comparisons. The facts pled in the Complaint are sufficient, at this stage, to state a Thirteenth Amendment Claim that placing other humans in captivity in order to generate private profit is slavery, or at a minimum, "involuntary servitude."

The Thirteenth Amendment's Punishment Clause does not eliminate the Amendment's protection here. According to the Department's argument, it would be constitutional to force a prisoner to be someone's personal slave as part of his sentence. The Department's interpretation would also sanction the historical practice of "convict-leasing," where Southern states after the Civil War would "lease" individuals convicted of crimes to plantations to work as slaves by another name. That interpretation is wrong. History, caselaw, and the text show that the Punishment Clause has limitations. A conviction does not strip away all Thirteenth Amendment protections. And those protections are not stripped here.

Procedural Due Process. Whether a liberty interest is implicated "requires a factual comparison," *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003), which entails a "case by case, fact by fact consideration." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996). Contrary to the Department's arguments, placement at a particular facility *can* implicate a liberty interest. *Wilkinson v. Austin*, 545 U.S. 209 (2005) (concluding placement at Ohio State Penitentiary implicated a liberty interest). The Supreme Court in *Wilkinson* held multiple conditions associated with a placement can combine to implicate a liberty interest

even if any one of those conditions standing alone might not. The Complaint adequately contains allegations to plausibly suggest a liberty interest is implicated based on the combination of: the worse conditions at private prisons, the private prisons' commodification of human beings, the indefinite duration of the placement at a private prison, and the increased length of incarceration from placement in private prison. This claim should not be dismissed, particularly since the interplay between these factors implicates factual questions.

Equal Protection/Substantive Due Process. Given the fundamental rights at stake here, the Court should apply heightened scrutiny to the state's prison privatization scheme. The Government did not even argue these claims should be dismissed under a heightened form of scrutiny. But even if "rational basis review" were to apply, the Complaint adequately states equal protection and substantive due process claims. The legitimate interest the Department cites is a supposed cost savings. But the Arizona Office of the Auditor General's only analysis of the cost of Arizona's private prisons shows they are in fact more expensive than public prisons. Discovery on this issue is required to determine whether the classification indeed bears a rational relationship to the state's alleged interest.

Eighth Amendment. Treating people like property by relinquishing them to the control and profit of private jailers is increasingly repugnant to society, as evidenced by the various states that have ended their "experiments" with the private prisons system. Numerous religious and other groups have adopted formal resolutions denouncing the use of private prisons. The Complaint sufficiently alleges that placement in private prisons violates the evolving standards of decency that mark the progress of a maturing society. The claim should not be resolved without a full factual record.

The Motion to Dismiss should be denied.

BACKGROUND

Arizona Privatizes Prison Health Care: Parsons v. Ryan

This is not the first time that private components of Arizona's prison system have been challenged as unconstitutional. The Department privatized prison medical care

through its contract with a company called Corizon. *Parsons v. Ryan* ("*Parsons Contempt Order*"), No. 12-cv-0601, 2018 WL 3239691, at *3 (D. Ariz. June 22, 2018).

Inmates incarcerated in the Arizona prison system brought a lawsuit contending that the Department and its senior officials violated the Eighth Amendment because they were deliberately indifferent to the serious harm their health care policies posed. *Parsons v. Ryan* ("*Parsons I*"), 912 F.3d 486, 493 (9th Cir. 2018); *Parsons v. Ryan* ("*Parsons II*"), 949 F.3d 443, 451 (9th Cir. 2020). That challenge serves as a backdrop to this case.

The parties settled on the eve of trial, and the Department agreed to comply with over 100 "Performance Measures" designed to improve the Department's health care system. *Parsons II*, 949 F.3d at 451. Those promises never came to fruition. The court held that the "inescapable conclusion is that Defendants are missing the mark after four years of trying to get it right. Their repeated failed attempts, and too-late efforts, to take their obligation seriously demonstrate a half-hearted commitment." *Parsons Contempt Order*, 2018 WL 3239691, at *11.

The key problem was delegating the prisons' health care to a private company, which the Department did not meaningfully oversee. The court explained that "Defendants' management of Corizon does not indicate that they have any real ability to spur Corizon's compliance with the Stipulation." *Id.* at *9. Concluding that sanctions were required to compel compliance with the law, the Court "place[d] a clear and focused light on what is happening here: the State turned to a private contractor which has been unable to meet the prisoner's health care needs. Rather than push its contractor to meet those needs, the State has instead paid them more and rewarded them with financial incentives while limiting the financial penalties for non-compliance." *Id.* at *11.

The Department has privatized more than just health care. In the midst of rewarding the private health care company for providing such poor care that the Eighth Amendment was violated, the Department expanded its use of entirely private prisons, which have many of the same root problems as private prison health care.

Arizona Privatizes Entire Prisons

Arizona law authorizes the Department to contract the entire operation of a prison to private, for-profit corporations. A.R.S. § 41-1609(B); Compl. ¶ 21. In fact, 20% of Arizona inmates (approximately 8,000 people daily) are incarcerated by private prison corporations. Compl. ¶¶ 26, 53. Those corporations include The Geo Group, CoreCivic, and Management & Training Corporation. Compl. ¶ 26. The Department guarantees 90%-100% occupancy levels for some of the for-profit prisons. Compl. ¶ 32(g). As a result, the Department fills private prison cells with a predetermined number of prisoners to avoid having to pay for empty prisons cells. Compl. ¶ 32(h).

Similar to *Parsons*, the Department in its Motion to Dismiss points to various statutory or contractual provisions supposedly ensuring the Department's oversight of these private entities or that certain decisions remain with the Department. Mot. 3-5; Mot. Ex. 1-9. But like in *Parsons*, the theoretical existence of requirements is not what matters. What matters is what is actually occurring within the walls.

These provisions cannot be used to contradict the Complaint's allegations, which at this stage must be accepted as true, with all inferences in Plaintiffs' favor. "The prison corporation's operational control gives it an almost unlimited ability to manipulate" life within the prison, including the prisoners' "freedom within the prison, release dates, access to clemency and parole, and likelihood of recidivism." Compl. ¶ 49.

Private Prison Corporations Have Perverse Incentives

"The highest priority of private prison corporation management is to maximize profit and market share." Compl. ¶ 46. Their business model is simple. The more people the private prison incarcerates and the longer those people are incarcerated for, the more revenue the company earns. Compl. ¶¶ 46, 56(d)-(f). And the more the private prisons can cut the costs of incarceration, the greater the companies' margins, which means greater profit. Compl. ¶¶ 46.

The market understands this concept. The more people the companies incarcerate, the more their stock price goes up. Compl. ¶¶ 44-45, 56(i). The more the stocks and profits

increase, the more the companies' executives are compensated. Compl. ¶ 48.

This profit-motive business model creates perverse incentives for the private prisons. These incentives are not small. CoreCivic reported earning $1.9 billion in revenue in 2019. Ex. A, CoreCivic Feb. 20, 2020 10-K at 61.[1] The incentive structure leads the companies "to design and operate facilities that incarcerate more people for longer periods of time," Compl. ¶ 61(c), resulting in "never-ending cycles of incarceration, parole, and re-incarceration that profit the private jailer and are contrary to the public interest[]." *Id.* The private prisons take "actions which may reduce [prisoners'] opportunity of parole or early release"—actions which increase revenue for the companies. Compl. ¶ 46.

Their cost-cutting incentives are equally problematic, leading private prisons to "reduce programs and services, including but not limited to recreation, educational and job-training opportunities, health care, and food, to save money." Compl. ¶ 34; *see also* Compl. ¶ 46 (reducing expenditures for medical care, dental care, and access to clergy). These measures also decrease the safety and security within the prison. Compl. ¶ 32(j).

The effect of the incentive structure is not limited to the private prisons themselves; it ripples out to the Department as well. The Department's reliance on private prisons and the potential burden associated with changing the for-profit operator creates "disincentives for the ADCRR to closely monitor its private prison contractors and to sanction them for noncompliance with the contracts." Compl. ¶ 53. It also leads the Department to "tolerate[] substandard contract performance." Compl. ¶ 52. This pressure is not imaginary. In *Parsons*, the Department stuck with an underperforming private provider because it would be difficult to replace. *Parsons Contempt Order*, 2018 WL 3239691, at *11 ("[The Department's] recalcitrance flows from its fear of losing its contracted healthcare.").

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[1] On a motion to dismiss, a court may still "take judicial notice of matters of public record. . . . Thus, judicial notice is appropriate for SEC filings." *Baca ex rel. Nominal Defendant Insight Enterprises, Inc. v. Crown*, No. 09--1283, 2010 WL 2812712, at *2 (D. Ariz. July 12, 2010) (internal brackets and quotation marks omitted) (considering a Form 10-K on a motion to dismiss). The 10-K is publicly available: http://ir.corecivic.com/static-files/acc01462-f138-4e80-a699-10db834fec73.

Private Prisons Control The Prisoners' Lives

The private prisons can and do act on their incentives because they have control of all aspects of the prisoners' lives. Compl. ¶ 49. They have the power to decide the "daily schedule of each individual prisoner, including sleep, recreation, meals, lights-out, location assignment within the prisons, and other activities." Compl. ¶ 32(e), and the power to "regulate access to religious services, clergy, prisoner contact with family members and attorneys, and education and training opportunities." Compl. ¶ 32(f). They even have the "power to use force, including deadly force, against prisoners." Compl. ¶ 32(c).

Perhaps most importantly, the private prisons have "the power to 'write up' prisoners for incidents, which in turn affects "discipline, segregation, seclusion, privileges, work and pay, and daily life and liberty." Compl. ¶ 32(d). Critically, that in turn affects "early release time credits, the possibility of parole, and release from custody." *Id*; *see also* Compl. ¶ 32(f). These effects are not imaginary. One study of Mississippi's private prisons found that "inmates in private prison serve about four to seven percent larger fractions of their sentences, or 85 to 90 extra days for the average prisoner." Ex. B, Anita Mukherjee, *Impacts of Private Prison Contracting on Inmate Time Served and Recidivism*, Am. Econ. J: Econ Pol. 21 (Jul. 30, 2020).

The length of a sentence is affected in other ways as well. For example, as one cost-cutting measure, "ASP – Florence West does not offer programs that are offered in ADCRR public prisons through which some prisoners may qualify for reductions in their sentences." Compl. ¶ 33. Cost cutting also means private prisoners experience "higher levels of incident reporting, violence, [and] lockdowns" while "under the supervision of less trained and experienced security staff." Compl. ¶ 35. Private prison security officers are not required to "meet the training and certification standards required of ADCRR corrections officers" which means they have "less training and experience" which "affects safety and security." Compl. ¶ 36. The officers also "lack civil service protection and grievance processes, which makes them more vulnerable to pressure to violate or ignore rules." *Id.*

Individuals In Private Prisons Are Commodified

The profit incentive of the private prisons and their control over the prisoners combine to commodify human beings. The Department pays the private prisons on a per diem basis. Compl. ¶ 31. In other words, it pays a predetermined "daily rate to each prison corporation for each day each prisoner occupies a cell or bed in a private prison." *Id.*; *see also* Compl. ¶ 56(b). The contracts are awarded through competitive bidding. Compl. ¶ 56(g). So the number of human beings placed under incarceration by a private entity is awarded through a public auction. *Id.*

The private prisons "commodify human beings just as private jails in the nineteenth-century South commodified slaves." Compl. ¶ 43. "The value of those jails, and the economic reputation of the jails' owners, was tied to how many slaves they incarcerated. For example, R.G. Dun and Company (the predecessor firm to Dun and Bradstreet) evaluated the credit worthiness of owners of slave jails and traders in slaves just as they evaluate private prison corporations today." *Id.* The private prisons receive the "fruits of" not just the prisoners' "economic value" but also their "labor." Compl. ¶ 78.

Essentially, "each prisoner and each projected future prisoner represent units of profit." Compl. ¶ 56(i). "To the private prison corporation, any prisoner can be substituted for another prisoner and generate the same revenues and profits for the corporation. In this respect, they are treated as assets and commodities," or more simply: "property." Compl. ¶ 76. This "degrades the human dignity of each prisoner by monetizing them and turning each incarcerated person into an economic asset." *Id.*

To see how the prisoners are commodified, one need look no further than the corporations' own public securities filings. For example, CoreCivic's most recent Annual Report states that a "key performance indicator" it uses is a "compensated man-day." Ex. A, CoreCivic Feb. 20, 2020 10-K at 70. A "compensated man-day" represents "the revenue we generate and expenses we incur for one offender for one calendar day." *Id.* In 2019, CoreCivic generated $79.72 per "compensated man-day." *Id.* At the same time, its "compensated man-day" expenses totaled $58.31. *Id.* That meant the company earned a

profit of $21.41 per "compensated man-day," representing a 25.9% margin. *Id.* The company's "average compensated population" was 64,107 people daily that year. *Id.*

The Individual Plaintiffs Are Incarcerated In Private Prisons

How the Department decides which individuals will be incarcerated at public facilities and which at private facilities is shrouded in mystery. For reasons only the Department knows, Plaintiffs Jeffrey Nielsen, Larry Hilgendorf, Terry Brownell, Joseph Bulen, and Brian Boudreau were placed into private prisons—either Florence West or Phoenix West. Compl. ¶¶ 2-6. They brought suit against Director David Shinn, who is responsible for the overall operations and policies of the Department, including the incarceration of prisoners. Compl. ¶ 16. Plaintiffs now oppose the motion to dismiss.

LEGAL STANDARD

"To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint must contain factual allegations sufficient to 'raise the right of relief above the speculative level.'" *Phillips v. State Farm Fire & Cas. Co.*, No. 19-cv-4605, 2019 WL 5789471, at *2 (D. Ariz. Nov. 6, 2019) (Snow, J.) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "While a complaint need not contain detailed factual allegations it must plead enough facts to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted). "When analyzing a complaint for failure to state a claim, 'allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.'" *Id.* (quoting *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996)).

ARGUMENT

I. The Complaint States A Thirteenth Amendment Claim.

The Department raises three Thirteenth Amendment arguments. "First," the Department argues, "nothing in the privatization statutes or the Complaint resembles the re-institutionalization of African slavery." Mot. 8. But the Thirteenth Amendment has long been recognized as a broad charter of freedom that is not so limited. *Infra* § I.A.

"Second," the Department goes on, "the Thirteenth Amendment has no application

where a person is held to answer for a violation of a penal statute." Mot. 8 (internal quotation marks and brackets omitted). The Department takes too broad a view of the Punishment Clause, which creates an exception for "punishment for crime whereof the party shall have been duly convicted." That clause does not strip all Thirteenth Amendment protections for prisoners. It permits only incarceration by the *government* that the prisoner was *sentenced to*, and only serves as an exception to "involuntary servitude." *Infra* § I.B.

Finally, there is no controlling precedent holding that private incarceration does not violate the Thirteenth Amendment. The Department cites a series of mostly pro se cases that raise bare-bones claims regarding private prisons. Those cases provide little more than a superficial analysis of the constitutional violations involved. Plaintiffs' complaint more thoroughly pleads the nuance and complexity of these claims, and it deserves the full analysis that previous courts did not undertake. *Infra* § I.C.

The Complaint plausibly states a Thirteenth Amendment claim.

A. The Thirteenth Amendment covers private prisons.

The Department first argues that "nothing in the privatization statutes or the Complaint resembles the re-institutionalization of African slavery." Mot. 8.[2] While certainly "the primary purpose of the Amendment was to abolish the institution of African slavery," it is "not limited to that purpose." *United States v. Kozminski*, 487 U.S. 931, 942 (1988). Its "plain intention was to abolish slavery of whatever name and form and all its badges and incidents" including "to render impossible any state of bondage." *Bailey v. State of Alabama*, 219 U.S. 219, 241 (1911); *see also Jones v. Alfred H. Mayer Co.*, 392

[2] The Thirteenth Amendment states that "neither slavery nor involuntary servitude" shall exist. The Department claims the Complaint is based only on "slavery" but not "involuntary servitude." That cramped interpretation of the Complaint is wrong. The Complaint quotes the entire Thirteenth Amendment, including the "involuntary servitude" language. Compl. ¶ 77. It pleads that private prisons receive the "fruits of prisoners' economic value and labor." Compl. ¶ 74. And it also states that those in private prisons are not just "treated like slaves" but also "subjected to slave-like conditions in violation of the Thirteenth Amendment." Compl. ¶ 81. However, if the Court believes the Complaint does not adequately plead "involuntary servitude," Plaintiffs request leave to amend the Complaint to add this clarification.

U.S. 409, 442 (1968) (Section 2's grant of power to Congress to enforce the Thirteenth Amendment incudes banning "badges and incidents of slavery.").

The amendment prohibits "all forms of involuntary slavery of whatever class or name." *Slaughter-House Cases*, 83 U.S. 36, 37 (1872). That means it "denounces a status or condition, irrespective of the manner or authority by which it is created." *Clyatt v. United States*, 197 U.S. 207, 216 (1905). The amendment is "a promise of freedom" which includes "freedom to go and come at pleasure and to buy and sell when [one] please[s]." *Jones*, 392 U.S. at 443 (internal quotation marks omitted). It is certainly not limited to those with African ancestry. "It was a charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag." *Bailey*, 219 U.S. at 240-41.

"The most basic feature of 'slavery' or 'involuntary servitude'" is "the subjugation of one person to another by coercive means." *United States v. Nelson*, 277 F.3d 164, 179 (2d Cir. 2002). Professor Akhil Amar uses this definition of "slavery": "A power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." Akhil Reed Amar, *Child Abuse As Slavery: A Thirteenth Amendment Response to* Deshaney, 105 Harv. L. Rev. 1359, 1365 (1992).

"The word servitude is of larger meaning than slavery." *Slaughter-House Cases*, 83 U.S. at 69. "[T]he prime purpose of those who outlawed 'involuntary servitude' . . . was to abolish all practices whereby subjection having some of the incidents of slavery was legally enforced." *United States v. Shackney*, 333 F.2d 475, 485 (2d Cir. 1964). "[A] holding in involuntary servitude means . . . action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement." *Id.* at 486; *see also* Noah Webster, *An American Dictionary Of The English Language* 1207 (1865) (definitions of "servitude" include "[t]he state of voluntary or involuntary subjection to a master," "bondage," and "a state of slavish dependence").

Plaintiffs are being held in cages for the financial benefit of private entities which make billions of dollars in revenue from this captivity. The private prisons receive the "fruits of prisoners' economic value and labor." Compl. ¶ 74. In short: the prisoners have

been effectively transformed into property, valued only in terms of their "compensated man-days." The allegations in the Complaint plausibly state that their status falls within the Thirteenth Amendment's scope. If holding people in captivity in this way were happening to anyone but prisoners, everyone would call it what it is: slavery. It is *at minimum* "involuntary servitude."

In other words, the real question is whether the Thirteenth Amendment's "Punishment Clause" permits this conduct. For the reasons discussed below, it does not.

B. The Punishment Clause does not strip prisoners' Thirteenth Amendment protections.

After the end of the Civil War, the Southern states' economies were broken. In particular, they needed a way to replace slavery's free labor they had relied on for so many decades. Their solution: convict freed slaves of newly created crimes and force them to work on plantations. This reviled system was known as "convict-leasing," because the "convict" would be "leased" to private enterprises. It was simply slavery by another name. When the Thirteenth Amendment was raised in protest, the Southern States responded: *The Amendment has an exception for those convicted of a crime!*

The Department similarly interprets the Punishment Clause to strip all Thirteenth Amendment protection from someone once that person is convicted of a crime. This broad interpretation means that someone convicted of a crime in 2020 could be sentenced to being another's household slave. It would mean the Thirteenth Amendment has such a large loophole that convict leasing would be constitutional. This reading cannot be right.

The Punishment Clause applies only when someone is intentionally sentenced to government-operated incarceration, and it is only an exception to "involuntary servitude." History, caselaw, and the text all point to that conclusion.

History. The Thirteenth Amendment was ratified in 1865, and immediately after its ratification, Republican representatives expressed concern about Southern misapplication of the Punishment Clause and establishment of convict leasing. Representative Stevens noted that "[u]nder the *pretense* of [the Punishment] clause they are taking men . . . for

assault and battery and selling them into bondage for ninety-nine years." *See* Cong. Globe, 39th Cong., 1st Sess. 655 (1866) (emphasis added). Senator Deming complained that "under the exceptional clause…reconstructed North Carolina is now selling black men into slavery for petty larceny…" *Id.* at 332. This convict-leasing system was not limited exclusively to any one race. For example, 10%-16% of leased convicts in Georgia were white. Alex Lichtenstein, *Twice The Work Of Free Labor: The Political Economy Of The New South* 59-60 (1996).

Republicans in Congress argued against the interpretation of the Punishment Clause that would create a loophole which swallowed the amendment. Take for example Senator Jacob C. Howard, a key drafter of the Thirteenth and Fourteenth Amendments. He disagreed with the interpretation of the clause that once someone was convicted of a crime, "under this amendment the power of the State within those limits he happens to be is not at all restrained in respect to him." Cong. Globe, 39th Cong., 1st Sess. 504 (1866). Thomas M. Cooley, in the most influential legal treatise of the time, stated that "it might be well doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition" of the Thirteenth Amendment. *A Treatise on the Constitutional Limitations* 319 (2d ed. 1871).

Representative John Kasson argued the Punishment Clause meant "a freeman can be condemned by the law only to the involuntary servitude . . . within the jurisdiction of the law and officers of the law." Cong. Globe, 39th Cong., 1st Sess. 345 (1867). This was to the "exclusion of all *unofficial control* of the person so held in servitude." *Id.* (emphasis added).

The Republican congressmen at the time, including drafters of the Thirteenth Amendment, rejected the broad reading of the Punishment Clause the Department is advancing in this case. The Punishment Clause permits individuals convicted of crimes to be confined under *state* control. But it does not permit them to be subjugated to the control of private entities for purposes of turning a profit.

Caselaw. While the Thirteenth Amendment is not often called upon for interpretation, courts have concluded that status as a prisoner does not automatically remove all Thirteenth Amendment protections. Rather, the Punishment Clause has limitations.

Even in the late 1800s, courts accepted limitations to the Punishment Clause. For example, the Supreme Court of Missouri adopted Cooley's interpretation: "Nor do we suppose the exception will permit the convict to be subjected to other servitude than such as is *under the control and direction of the public authorities* in the manner heretofore customary." *Thompson v. Bunton*, 117 Mo. 83, 22 S.W. 863, 865 (1893) (quoting Cooley, T., *Constitutional Limitations* 653 (6th ed.)) (emphasis added).

Another limitation that has been placed on the Punishment Clause is that it requires a court-imposed *sentence* of slavery or involuntary servitude. As the Fifth Circuit has explained: "[A] prisoner who is not *sentenced* to hard labor retains his thirteenth amendment rights." *Watson v. Graves*, 909 F.2d 1549, 1552 (5th Cir. 1990). Someone without that sentence is free to attempt to "prove a violation of the thirteenth amendment" by showing that he was "subjected to involuntary servitude or slavery." *Id.*

Even Courts that have rejected challenges to private prisons have noted that "there might be circumstances in which the opportunity for private exploitation and/or lack of adequate state safeguards could take a case outside the ambit of the Thirteenth Amendment's state imprisonment exception." *Davis v. Hudson*, 221 F.3d 1351 (10th Cir. 2000). The problem in that case was simply that the pro se petitioner's "complaint presents us with no such factual allegations." *Id.* That is not the case here. *See supra* at 5-9, 11-12.

The Punishment Clause does not apply where the complained-of condition was not specifically imposed by the sentence or where a private entity implements the incarceration.

Text. The Thirteenth Amendment states: "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. Am.

XIII § 1.

The text is at best ambiguous whether the Punishment Clause modifies the entire clause "neither slavery nor involuntary servitude" or just "involuntary servitude." The better reading is the more limited one. The Thirteenth Amendment is an absolute prohibition on slavery, with no exceptions. The limited "punishment" exception applies only to involuntary servitude. As one scholar explains: "[t]extually, the convict exception to the Thirteenth Amendment applies only to conditions of involuntary servitude and not to slavery." Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 Seattle U. L. Rev. 869, 872 (2012).

This reading is supported by Justice Harlan's dissent in *Robertson v. Baldwin*, 165 U.S. 275 (1897). One year after his dissent in *Plessy v. Ferguson*, he wrote: "Slavery exists wherever the law recognizes a right of property in a human being, but slavery cannot exist in any form within the United States. The thirteenth amendment uprooted slavery as it once existed in this country, and destroyed all of its badges and incidents. It established freedom for all." *Id.* at 292. Justice Harlan then went on to address involuntary servitude separately, stating: "As to involuntary servitude, it may exist in the United States; but it can only exist lawfully as a punishment for crime of which the party shall have been duly convicted. Such is the plain reading of the constitution." *Id.*

As discussed above, the Complaint plausibly alleges that the Plaintiffs are, in effect, slaves. *See supra* at 5-9, 11-12. The Punishment Clause therefore does not apply.

C. The Department's largely pro se caselaw did not fully analyze the issues.

The cases cited by the Department are unpersuasive and in no way establish that incarceration in private prisons is constitutional.

Judge Posner's opinion in *Pischke v. Litscher* granted permission to the pro se petitioners to refile their claims as civil rights suits under section 1983, and the statement quoted by the Department was unreasoned dicta related to the potential viability of such claims. 178 F.3d 497, 500 (7th Cir. 1999). *Pischke* spawned further cases that mechanically

cite *Pischke* without undergoing any real analysis. The Department's remaining cases were also all brought by pro se litigants who either did not raise Thirteenth Amendment claims or raised the issues only superficially. *See* Mot. 9-10. None of those courts were confronted with arguments about the appropriate limits of the Punishment Clause.

Finally, the Department cites *Richardson v. McKnight*, 521 U.S. 399, 401 (1997). Mot. 10. There, the Supreme Court concluded that private prison guards were *not* entitled to qualified immunity. The Department claims it would be "odd for the Supreme Court to reach that issue if it harbored any doubts about the constitutionality of private incarceration." Mot. 10.

This dog-that-didn't-bark theory makes no sense. "It is only in exceptional cases" that "questions not pressed or passed upon below are reviewed" by the Supreme Court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). That is why "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). *Richardson's* silence on the constitutionality of private prisons says nothing about the Court's views on this topic. The Department has not cited any binding cases holding that incarceration in private prisons does not violate the Thirteenth Amendment.

II. The Complaint States A Procedural Due Process Claim.

Plaintiffs raise two independent procedural due process claims. The first challenges the decision to place an individual at a private prison. For this claim, the Department raises only a single argument: that placement at a particular facility can never implicate a "liberty interest" triggering due process protections. But the Supreme Court has held otherwise. Placement at a facility can implicate a liberty interest, *infra* § II.A. and a liberty interest is implicated here, *infra* § II.B.

Second, the Complaint states a structural bias claim. Compl. ¶ 88. The Department never addressed this claim. The private prisons make decisions that affect the length of the prisoners' sentences while having a financial incentive to ensure those sentences are longer.

These allegations also state a procedural due process claim. *Infra* § II.C.

A. Placement at a particular facility can implicate a liberty interest.

The Department's entire due process argument is premised on a single legal contention: that placement at a particular facility can, as a categorical matter, never implicate a liberty interest triggering due process protections. Mot. 12

That premise is wrong. The Department ignores *Wilkinson v. Austin*, 545 U.S. 209 (2005). That case concerned a procedural due process claim involving placement at a particular facility: Ohio State Penitentiary, referred to as "OSP." *Id.* at 213. The Court concluded "that the inmates have a protected liberty interest in avoiding assignment at OSP." *Id.* at 220. It is accordingly *not* the case that placement in a facility can never implicate a liberty interest.

The Department relies primarily on two cases: *Meachum v. Fano*, 427 U.S. 215 (1976) and *Olim v. Wakinekona*, 461 U.S. 238 (1983). Mot. 12-13. Those cases were issued over 20 years before *Wilkinson*. Both cases involve circumstances that do not apply here. *Meachum* dealt with a transfer from one state-run facility to another. 427 U.S. at 216-17. *Olim* merely held that a transfer to a facility in another state does not in and of itself implicate a liberty interest. 461 U.S. at 248. Neither has anything to do with the unique concerns that arise from placement in private, for-profit prisons.

The Department's reliance on *White v. Lambert* is also misplaced. *See* Mot. 13-14. That case was decided before *Wilkinson* as well. Additionally, *White* was decided in the context of a § 2254 habeas petition. *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004) ("28 U.S.C. § 2254 is the proper jurisdictional basis for his habeas petition."). As the Department's block quotation demonstrates, Mot. 14, the Court was accordingly required to analyze whether the state court's determination was "'contrary to' or 'an unreasonable application of, clearly established Federal law'" as determined by the Supreme Court. *Id.* at 1013 (quoting 28 U.S.C. § 2254(d)(1)). That provision of the habeas statute "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In other words, the petitioner there could only succeed

if his arguments were clearly established by Supreme Court holdings. That high standard of review does not apply here.

Finally, the Department sets forth string cites of non-binding cases purportedly supporting its analysis. Mot. 13, 14. Every one of those cases was brought by a pro se plaintiff, where the court did not have the benefit of a fully fleshed out and counseled argument. The cases generally have limited-to-no reasoning to add any persuasive value. All either were decided before *Wilkinson* (*Pischke, Frazier, Poulos, Green, Lewis*) or do not mention *Wilkinson* (*Gering, Rhodes, Ohman, Adkins*). And many do not even involve placement in private prisons at all (*Green, Lewis, Ohman, Adkins*).

Contrary to the cases cited by the Department, placement in a particular facility *can* implicate a liberty interest. And for the reasons addressed below, the Complaint plausibly states that a liberty interest is implicated here.

B. The Complaint sufficiently alleges a liberty interest.

The Department never addresses the standard for determining whether a liberty interest is implicated—a standard which requires a factual, case-by-case analysis.

A liberty interest is implicated if the government "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Wilkinson*, 545 U.S. at 223 (applying *Sandin* standard to placement at OSP). "*Sandin* requires a *factual* comparison between conditions in general population" and the conditions faced by the inmate, "examining the hardship caused by the prisoner's challenged action in relation to the basic conditions of life as a prisoner." *Jackson v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003) (emphasis added). Determining whether a "condition or combination of conditions or factors would meet the test requires case by case, fact by fact consideration." *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996).

In *Wilkinson*, a combination of factual circumstances working together meant that placement at Ohio State Penitentiary implicated a liberty interest. The Court relied on: (1) the harsh conditions there, (2) the indefinite duration of the placement, which was reviewed

only annually; and (3) that placement disqualified in inmate for parole. *Wilkinson*, 545 U.S. at 223. The Court explained that "[w]hile any of these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context." *Id.* at 224. "It follows," the Court explained, "that respondents have a liberty interest in avoiding assignment to OSP." *Id.*

Of course, placement at a private prison does not raise exactly the same concerns that placement in a maximum security prison did in *Wilkinson*. But similar factors show that the Complaint's allegations provide the factual support to plausibly suggest a liberty interest is implicated, even if a single factor taken alone might potentially not be sufficient. Particularly for this sort of case-by-case factual analysis, dismissal is inappropriate here.

The perverse incentives that result from a for-profit prison collude to create the conditions that lead to a liberty interest being implicated. Many of these issues are discussed in more detail above (at 3-9) and so do not need to be repeated. But to summarize, the conditions at private prisons are worse. Due to these incentives to keep costs down, "private prisons experience greater deprivations of liberty and safety compared to prisoners." Compl. ¶ 35. That stems from "higher levels of incident reporting, violence, lockdowns" while "under the supervision of less trained and experienced security staff" which "affects safety and security." Compl. ¶¶ 35-36; *see also* Compl. ¶ 34 (detailing reduced programs and services).

These incentives are not just an abstract issue. They cause real consequences for real people. For example, "[a] review of federal prisons concluded that 'contract prisons incurred more safety and security incidents per capita than comparable BOP institutions. Ex. C at 44, Office of the Inspector General, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons* (Aug. 2016), https://www.oversight.gov/sites/default/files/oig-reports/e1606.pdf. Private prisons "had higher rates of assaults, both by inmates on other inmates and by inmates on staff." *Id*. at ii. They also had "more frequent incidents of . . . uses of force, [and] lockdowns." *Id.* at 44.

Particularly problematic is that the financial structure of prison privatization means

the prisoners are commodified in a way that treats them like slaves, for the reasons discussed above (at 5-9, 11-12). *See* Compl. ¶¶ 31, 43, 56, 76. Their life is reduced to a series of compensated man-days worth $21.41 of profit. Plaintiffs clearly have a liberty interest to not be treated like property.

Like in *Wilkinson*, placement at a private facility is indefinite within the time period of a prisoner's sentence. On the face of the statute, there is not even a procedure akin to the annual review period which was present in *Wilkinson*. A.R.S. § 41-1609.02. The duration of placement in a private prison is "[u]nlike the 30-day placement in *Sandin*." *Wilkinson*, 545 U.S. at 224.

Finally, the embedded profit incentives makes placement in a private prison increasingly risky to prisoners regarding the length of time someone stays incarcerated. The system is designed and operated to incarcerate people for longer periods of time and with increased recidivism. Compl. ¶ 61(c). The private prisons' power to "write up" prisoners for incidents affects many aspects of their lives, including early release time credits, the possibility of parole, and release from custody. Compl. ¶¶ 32(d), 32(f).

There are numerous real-world examples of this. The federal review of private prisons concluded they had more "guilty findings on inmate discipline charges, and selected categories of grievances." Ex. C at 44. In Mississippi, the average private prisoner was incarcerated for 85 to 90 extra days compared to those in public prisons. Ex. B, Anita Mukherjee, *Impacts of Private Prison Contracting on Inmate Time Served and Recidivism*, Am. Econ. J: Econ Pol. 21 (Jul. 30, 2020). The New Mexico Corrections Department found that prisoners at the CoreCivic facility (known then as CCA) lost good time credits eight times more frequently than prisoners in a state institution. Lucas Anderson, Kicking the National Habit: *The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 Pub. Cont. L.J. 113, 136 n.53 (2009). In Tennessee, private prison guards have said that they were encouraged to put prisoners in administrative segregation because it added an extra 30 days to their sentence, earning the company approximately $1,000 extra. *Id.*

Cost cutting also affects the length of the sentence. For example, Florence West

does not offer programs public prisons offer permitting prisoners to qualify for sentence reductions. Compl. ¶ 33.

At this stage, no contractual or statutory provision can override these allegations which must be accepted as true. To the extent the Department points to any theoretical required oversight, that cannot contradict the Complaint's allegations regarding what is actually happening.

All these factors together plausibly suggest a liberty interest is implicated in that placing individuals in private prisons who aim to turn a profit on that incarceration is both "atypical" and "significant." *Sandin*, 515 U.S. at 484. Because the "interplay" between all these factors "implicates factual questions," the due process claim should not be resolved on a motion to dismiss. *See McKee v. Peoria Unified Sch. Dist.*, 963 F. Supp. 2d 911, 928 (D. Ariz. 2013) (Snow, J.).

C. The Complaint also states a structural bias claim.

That the private prisons make decisions regarding matters affecting a prisoner's release date while having a financial incentive to keep them incarcerated longer is not only part of the totality of circumstances implicating a liberty interest, it is also itself a due process violation—sometimes called a "structural bias" claim. *See Marable v. Nitchman*, No. 05-cv-1270, 2006 WL 2572065, at *7 (W.D. Wash. Sept. 5, 2006).

The Complaint alleges that "[p]rivatization of prisons creates biased jailers and prison administrators who have financial incentives that are in conflict with the release of prisoners . . . in violation of the Due Process Clauses." Compl. ¶ 88. Notably, the Department never addressed this issue.

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009). "[T]hose with substantial pecuniary interest" should not be the decisionmakers. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). "[T]he financial stake need not be as direct or

positive." *Id.* And "*actual* influence [i]s not necessary." *Cain v. White*, 937 F.3d 446, 453 (5th Cir. 2019). This inquiry is based on a "realistic appraisal of psychological tendencies and human weakness." *Caperton*, 556 U.S. at 883.

The Court has struck down numerous schemes where a decisionmaker's financial incentives injected the potential for bias. *Connally v. Georgia* is a good example. 429 U.S. 245 (1977). There, justices of the peace received $5 for every search warrant issued but received no money for reviewing and denying an application. *Id.* at 547. So "his financial welfare" was "enhanced by positive action and is not enhanced by negative action." *Id.* at 548. The Court held this system was unconstitutional. *Id.* at 549; *see also Ward v. Monroeville*, 409 U.S. 57, 57 (1972) (unconstitutional for a mayor to decide ordinance violations where fees and costs from violations were part of the village's income).

While not based on a potential for *financial* bias, the Supreme Court has also held that "revocation of parole should be made by someone not directly involved in the case" such as the parole officer who recommended the revocation in the first place. *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). Additionally, "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order" because that arrangement lacks the assurance they would wield their prosecutorial power "guided solely by their sense of public responsibility for the attainment of justice." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809, 814 (1987).

The private prison companies structure their system in ways that increase the length of prisoners' sentences, and they do so because of their financial incentives. One component of this structure is a pressure on the private prison guards to maintain a profit for their employers. They "are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *McKnight v. Rees*, 88 F.3d 417, 424 (6th Cir. 1996). The combination of the power to incarcerate people for longer and the financial incentive to do so provides sufficient facts to plausibly

state a structural bias claim.

III. The Complaint States Equal Protection And Substantive Due Process Claims.

A. The Department's circular argument would immunize all state actors from equal protection claims.

The Department primarily argues that the equal protection claim must fail because Plaintiffs cannot demonstrate that inmates in private prisons are "similarly situated" to those placed in public prisons. According to the Department, those placed in private prisons and those placed in public prisons cannot be considered similarly situated because Plaintiffs "expressly allege that private facilities provide different opportunities and present different conditions than state facilities." Mot. 15.

In other words, the Department is arguing that once a state actor treats two groups differently, then those groups are no longer similarly situated, extinguishing the claim. That circular reasoning would immunize against all equal protection claims. Imagine a case challenging a requirement that children of one race go to certain schools that are worse than the schools for another race. Under the Department's theory, the allegation that the schools are different would doom the claim. It gets the Equal Protection Clause totally backward to say that allegations that a state actor is arbitrarily treating one group worse than another renders a claim legally deficient. That is the entire nature of the claim.

The Court must look at whether the two groups are similarly situated *before* the effects of the discriminatory treatment, not after or because of them.[3] Before the Department determines whether a prisoner will be incarcerated in a private or state-run facility, they are materially indistinguishable. Compl. at ¶¶ 20, 35-36. And to be similarly situated, the groups need not even be "similar in all respects." *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017). Rather, the touchstone is whether Plaintiffs are "similarly situated for all relevant purposes" to those who are placed in public prisons. *See*

[3] The Government's series of pro se cases all challenged facility-specific policies, not placement in a facility itself. Mot. 14-15. None involved private prisons except *Frazier*, where the private nature of the prison was not part of the claim or the court's analysis.

Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[The Clause] keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."). The Department's "similarly situated" argument is absurd and should be rejected.

B. The Complaint's factual allegations plausibly state an equal protection and due process violation.

Finally, the Department argues in a paragraph that "the privatization statutes bear a rational relationship to a legitimate state purpose." Mot. 15 (internal quotation marks omitted). Though the Department does not directly address substantive due process, *see* Compl. ¶ 91, presumably this argument applies to that claim as well.

Even assuming this test applies, the Complaint plausibly states a claim. The only legitimate interest that the Department cites is alleged "cost savings." Mot. 15 ("For example, private contracts offer 'cost savings' for the State."). Determining whether the statute actually bears a rational relationship to that purpose requires facts. The statutory scheme technically *requires* private prisons to offer a cost savings. A.R.S. § 41-1609.01(F)-(G); Compl. ¶ 28. In order to evaluate compliance with that requirement, the Arizona Office of the Auditor General was originally required to perform bi-annual audits of the private and public prisons' respective costs. A.R.S. § 41-1609.01(G), (K) (2003 version). The first report found that private prisons were, in fact, slightly *more* expensive than public prisons. Ex. D, State of Arizona Office of the Auditor General, *Department of Corrections – Prison Population Growth* 20-21 (2010), https://www.azauditor.gov/sites/default/files/10-08_0.pdf.

After that first report, the bi-annual audit requirement was eliminated. *See* 2012 Ariz. Legis. Serv. Ch. 302 (S.B. 1531) § 41-1609.01 (eliminating "biennial comparison" requirement). This rendered it impossible to determine whether private prisons were complying with the cost-saving requirement, which was ironically kept in place. At a minimum, there are sufficient facts alleged to plausibly suggest that private prisons are not

rationally related to the Department's stated interest.

But the Department gives only a cursory explanation for why that standard applies in the first place. In *Obergefell v. Hodges*, the Court did not ask whether the classification was rationally related to a legitimate government interest nor whether it was narrowly tailored to a compelling government interest. 576 U.S. 644 (2015). Instead, the Court took a more holistic approach guided by both the Equal Protection and Due Process Clauses.

The Court explained that "[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other." *Id.* at 672. "In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." *Id.*

Obergefell builds on prior cases concluding there are certain interests that are sufficiently weighty that the "rational basis" test should not apply even when no fundamental right or suspect class is present. *See e.g., Plyler v. Doe*, 457 U.S. 202, 263. (1982) (Blackmun, J. concurring) ("Given the extraordinary nature of the interest involved . . . the State must offer something more than rational basis for its classification" even though the right was not deemed fundamental and no suspect class was implicated).

The Plaintiffs have a fundamental right not to be commodified and, in essence, turned into property. Yet even if that were not a fundamental right on its own, the full context shows a more searching inquiry is appropriate than what the Department proposes. It is not just that those in private, for-profit prisons are being commodified. It is also that the Department makes an arbitrary determination to determine who will be subject to that commodification by being placed in a private prison and who will not be.

This equal protection/due process analysis is an inherently factual one not suited for a motion to dismiss before Plaintiffs have an opportunity to prove their claims. The Complaint plausibly pleads a violation of the Equal Protection and Due Process Clauses.

IV. The Complaint States An Eighth Amendment Claim.

The Eighth Amendment prohibits cruel and unusual punishment, a standard based on "the evolving standards of decency that mark the progress of a maturing society." *Graham v. Fla.*, 560 U.S. 48, 58 (2010). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Brown v. Plata*, 563 U.S. 493 (2011). The Court may consider "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Graham*, 560 U.S. at 61, and must also "bring its independent judgment to bear." *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

The Complaint plausibly suggests an Eighth Amendment violation under this standard. "Modern understandings of human rights recognize that treating plaintiffs as property, and subjecting plaintiffs to jailers that profit from incarceration and that have disincentives to see plaintiffs released is analogous to slave jails … is both cruel and unusual, and violates each plaintiff's human dignity." Compl. ¶ 84.

When evaluating other states' practices to determine "objective indicia" of society's standards, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2002). Private prisons are a relatively new phenomenon, beginning in force only in the 1980s. But now, increasing numbers of states have moved to ban private prisons, ending their experiments with this system. The legislative purpose accompanying the New York law outlawing private prisons explains: "hungry, bottom line adventurers appear ready to take the public money." New York Bill Jacket, 2007 S.B. 4118, Ch. 202; *see also* 730 Ill. Comp. Stat. Ann. 140/2. Other states that banned private prisons include Illinois, Iowa, Nevada, Washington, and starting this year, California. As for the states without prohibitions, nearly half the remaining states have no private prisons.

The Court may also look to the views of "religious communities in the United States" as well as "organizations with germane expertise." *Atkins*, 536 U.S. at n.21 (2002). Numerous religious groups have adopted resolutions denouncing private prisons. *See* Ex. E at 1-80 (resolutions of the United Methodist Church, the Presbyterian Church, the U.S.

Conference of Catholic Bishops, Catholic Bishops of the South, the Episcopal Church, and the Unitarian Universalist Association). Other groups have similarly criticized private prisons including the American Bar Association, American Correctional Officers, the National Association of Criminal Defense Lawyers, Japanese Americans Citizens League, and the NAACP. *Id.* at 81-92. And the Supreme Court of Israel has held that placement at private prisons "violates the constitutional rights to personal liberty and human dignity." Ex. F, HCJ 2605/05 *Academic Center of Law and Business v. Minister of Finance* at 34 (Isr. Nov. 19, 2009).

V. The Facial Challenge Should Not Be Dismissed.

The Department claims the facial challenge should be dismissed because it relies on "presumptions" that are "cynical[]." Mot. 17. This argument flies in the face of the 12(b)(6) standard. What the Department calls "presumptions" are simply the factual allegations in the Complaint which must be accepted as true. Mot. 17.

This is not an issue that the Court needs to or should resolve at this stage. "[T]he distinction between facial and as applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). The distinction "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Id.*

Here, Plaintiffs are challenging Arizona's system of privatized prisons—a system that is authorized by the current statutory scheme. The claim does not necessarily fit neatly into the "facial" or "as applied" bucket. In later proceedings when the Court has facts and evidence at its disposal, it can determine what the appropriate remedy is for the constitutional violations, and whether that remedy should be a declaration that Arizona's statutes authorizing the privatization of prisons should be declared unconstitutional.

CONCLUSION

The motion to dismiss should be denied. If this Court dismisses any of the claims in the Complaint, Plaintiffs request leave to file an amended complaint.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2020, 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 CM/ECF registrants on record in this matter.

/s/ Emmy Nelson