RECORD NO. 20-1100

In The

United States Court Of Appeals

For The Fourth Circuit

GREGORY G. ARMENTO,

Plaintiff – Appellant,

v.

ASHEVILLE BUNCOMBE COMMUNITY CHRISTIAN MINISTRY, INC.,

Defendant – Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF OF AMICUS CURIAE DISABILITY RIGHTS NORTH CAROLINA IN SUPPORT OF APPELLANT GREGORY G. ARMENTO

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
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No. 20-1100 Caption: Gregory Armento, Plaintiff-Appellant v. Asheville Buncombe Community Christian Ministry, Inc., Defendant-Appellee.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights North Carolina

(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☒ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☒NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☒NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Holly Stiles Date: April 27, 2020

Counsel for: Disability Rights North Carolina, *amicus curiae*

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INTEREST OF AMICUS

Disability Rights North Carolina (Disability Rights NC) is the federally mandated Protection and Advocacy organization for people with disabilities in North Carolina. Disability Rights NC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e; 29 U.S.C. § 3004; 42 U.S.C. § 300d-53; 42 U.S.C. § 1320b-21.

Disability Rights NC's interest in this case is twofold. First, the case before the Court involves an individual receiving residential and employment services. Innumerable public and private entities provide residential and employment services to individuals with disabilities. The decision below creates a new mechanism for these entities to deem work performed by people with disabilities as "rehabilitative volunteer work" exempt from wage and hour protections. Such a result would potentially decimate progress made towards wage equality for workers with disabilities.

Second, homeless constituents of Disability Rights NC will be directly impacted by the adverse decision reached by the court below. As a group, homeless individuals experience disabilities including psychiatric disorders, major depression, drug and alcohol dependence, infectious diseases, and traumatic brain injuries at a higher rate than the overall population. Jacob L. Stubbs, *et al.*,

Traumatic brain injury in homeless and marginally housed individuals: a systematic review and meta-analysis (2020), *available at* https://www.thelancet.com/action/showPdf?pii=S2468-2667%2819%2930188-4 (last visited March 23, 2020). Nearly one-quarter (24%) of homeless individuals are persons with disabilities experiencing chronic homelessness. U.S. *Interagency Council on Homelessness, Homelessness In America: Focus on Chronic Homelessness Among People With Disabilities* 2 (2018), *available at* https://www.usich.gov/resources/uploads/asset_library/Homelessness-in-America-Focus-on-chronic.pdf (last visited March 26, 2020.) Among veterans, those with mental health and substance use disabilities are at the greatest risk for becoming homeless. Jack Tsai & Robert A. Rosenheck, *Risk Factors for Homelessness Among US Veterans, 73 Epidemiologic Reviews 1:177-195* (2015), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4521393/ (last visited March 26, 2020).

RULE 29(c)(5) DISCLOSURE

No part of this brief was authored by counsel to either party. Neither party, counsel, nor any other person contributed money intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

INTRODUCTION

The right to enjoy the fruits of one's labor is a fundamental right recognized by the North Carolina Constitution. N.C. Const. art 1, § 1. It guarantees North Carolinians the right to work where they please and earn a livelihood by any lawful calling. *State v. Balance*, 229 N.C. 764, 768-769 (1949)(interpreting N.C. Const. art 1, § 1). *See also Tully v. City of Wilmington*, 370 N.C. 527 (2018); *Roller v. Allen*, 245 N.C. 516 (1957); *State v. Harris*, 216 N.C. 746 (1940); *State v. Warren*, 211 N.C. 75 (1937). In uncompensated labor arrangements, strict application of the "volunteer" labor test outlined in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947), and *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985), is necessary to ensure that uncompensated workers are bona fide volunteers who willfully chose to forgo or donate the fruits of their labor. The decision below erroneously disregarded the "volunteer" labor test and instead created a problematic new exemption from wage and hour protections for "rehabilitative" work.

The word "rehabilitative" is a term with a troubled history. In the twentieth century, labelling work as "rehabilitative" or "therapeutic" made it permissible to pay workers with disabilities no wages or lower wages than other workers doing the same or similar work. If upheld, the decision below threatens progress made towards employment equality for people with disabilities. *Amicus curiae* supports reversal of the decision below.

ARGUMENT

I. CATEGORIZING WORK PERFORMED BY PEOPLE WITH DISABILITIES AS "REHABILITATIVE" IS LEGALLY UNSOUND AND REINFORCES OUTDATED STEREOTYPES ABOUT THE VALUE OF THEIR LABOR.

In reaching its conclusion that Mr. Armento benefitted most from his labor for the Asheville Buncombe Community Christian Ministry (ABCCM) and was not owed a wage, the court below relied on unfounded assertions as to the allegedly "rehabilitative" nature of the work he performed. (*See* J.A. 816-817, 30.) "Rehabilitation" is not an exception to wage and hour protections under the North Carolina Wage and Hour Act (NCWHA). *See* N.C. Gen. Stat. §§ 95-25.2, -25.14. There is no legal or factual support to distinguish work performed by individuals receiving residential and employment services from all other paid work. Creating an exemption to the NCWHA for "rehabilitative" work would incentivize labor exploitation. Reversing the decision below is necessary to ensure people with disabilities are not denied wage and hour protections based on outdated and unsupported assumptions about the value of their labor.

A. There Is No Sound Legal Basis To Distinguish "Rehabilitative" Work From Paid Work.

The court below impermissibly created a new category of wage and hour exemptions in holding that Mr. Armento was not entitled to wages for his "rehabilitative" work at the Veteran's Restoration Quarters (VRQ). The words

"rehabilitative/rehabilitation" do not appear in the statutory language of the NCWHA or the Fair Labor Standards Act (FLSA). *See* N.C. Gen. Stat. §§ 95-25.2, -25.14; 29 U.S.C. §§ 213-14 (both statutes defining "employ" as "to suffer or permit to work" and listing exemptions to definition that do not include rehabilitative/rehabilitation).[1] Reading a new wage and hour exemption into the NCWHA for work deemed "rehabilitative" ignores the plain language of the statute and is at odds with the purpose of the NCWHA to protect workers. N.C. Gen. Stat. § 95-25.25 (instructing courts to construe wage and hour coverage liberally to protect adult and minor workers).

The term "rehabilitative/rehabilitation" and the similar term "therapeutic" have a long and exploitive history in the disability community as these terms were used to demean the work of people with disabilities and to justify paying them no wages or lower wages than other workers doing the same or similar work. In 1938, after the initial passage of the FLSA, the federal Department of Labor (DOL) declared there would be a wage floor for individuals with disabilities employed in settings called "sheltered workshops," but no wage floor for individuals with

[1] A review of Fourth Circuit and North Carolina caselaw reveals that the only prior case in which courts created a wage and hour exemption for "rehabilitative" work was under the FLSA and in the prison labor context. *See, e.g. Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993). Other federal districts have declined to recognize wage and hour exemptions for "rehabilitative" work performed by non-incarcerated residents. *See Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973)(determining that the FLSA applies to patient-workers at hospitals).

disabilities receiving services from charitable groups carrying on "the work of rehabilitation." William G. Whittaker, Congressional Research Service: Treatment of Workers with Disabilities Under Section 14(c) *of the Fair Labor Standards Act* 6 (2007) (*quoting* U.S. Department of Labor, Wage and Hour Division, Press Releases, R Series, October 12, 1938, and November 10, 1938). In 1966, Congress amended the FLSA and incorporated the DOL's policy of "no wage floor" for workers with disabilities engaged in "therapeutic" activities at work activity centers. *Id*. at 8. In 1981, the U.S. Government Accountability Office (GAO) advised Congress that setting wages based on whether the work performed was "therapeutic" was artificial because "therapeutic" denoted lack of productive capacity – a distinction not borne out in practice. *Id*. at 6 (*quoting* U.S. General Accounting Office, Stronger Federal Efforts Needed for Providing Employment Opportunities and Enforcing Labor Standards in Sheltered Workshops, Report to the Congress 10-15 (HRD-81-99, 1981)). The GAO strongly suggested that the practice of labelling work as "therapeutic" enabled large-scale underpayment of earned wages. *Id*. at 21-27. Congress subsequently removed the distinction in the 1986 FLSA amendments. Pub. L. No. 99-486, § 14(c), 100 Stat. 1229, 1229-30.

This case marks the first time the alleged "rehabilitative" nature of work performed was wielded as a sword to narrow the protections of the NCWHA. The decision below does not accord with the state of the law and should not be upheld.

B. There Is No Sound Factual Basis To Conclude Unpaid Work Is Rehabilitative Or To Distinguish "Rehabilitative" Work From Paid Work.

The conclusion that unpaid work is "rehabilitative" for people with disabilities is not supported by current scientific research. *See* Gordon Waddell & A. Kim Burton, Is Work Good for Your Health and Well-Being? 20-21 (2006), *available at* https://www.gov.uk/government/publications/is-work-good-for-your-health-and-well-being (last visited March 12, 2020) (finding there is no scientific evidence to indicate that people with disabilities experience greater physical or mental health benefits from employment than the general population; all such conclusions are based on non-scientific sources, such as practical, social, or ethical considerations, legislation, guidance, and general "consensus"). Scientific research suggests that work and paid employment are generally good for the health and wellbeing of most people, regardless of disability, but also finds it may be detrimental to the health of some. *Id*. at 9, 10, 23. In sum, there is no evidence to support that work is more therapeutic for people with disabilities as a group than it is for nondisabled workers.

Labelling work performed by people with disabilities or other vulnerable populations as "rehabilitative volunteer work" instead relies on inaccurate

generalizations, assumptions, and stereotypes about their labor.[2] As the District Court for the District of Columbia astutely observed:

> The fallacy of the argument that work […] is therapeutic can be seen in extension to its logical extreme, for the work of most people, inside and out of institutions, is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way. Yet that can hardly mean that employers should pay workers less for what they produce for them.

Souder, 367 F. Supp. 808, n.21. Offering unpaid work to an individual with a disability is not a charitable act and does not aid in his or her "rehabilitation." Its actual effect is to illegally deny people with disabilities access to the paid labor market.

C. Labor Relationships Involving Workers With Disabilities Should Be Closely Scrutinized To Guard Against Exploitation.

The disability community benefits from judicial scrutiny of their labor relationships for indications of labor exploitation, particularly in situations where an individual lives in a residential facility for people with disabilities and works for the operator of the facility. As a recent report of the National Council on Disability found, with regard to residential facilities that operate formal, designated employment programs:

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[2] Permitting employers to avoid the payment of wages to people with disabilities by labeling their work "rehabilitative" is also antithetical to the mandate of the Americans with Disabilities Act to end pervasive discrimination against individuals with disabilities in employment. *See* 42 U.S.C. § 12101(a). *See also* Persons with Disabilities Protection Act, N.C. Gen. Stat. § 168A-2 (recognizing that discrimination against people with disabilities denies them the opportunity to engage in remunerative employment).

> [o]stensibly the purpose…is to train…for employment. In reality, however, such programs serve as a means for workers to perform services at reduced labor costs for the very entity that controls their residential placement. In this regard, the entity plays three roles…: employer, employment service provider, and residential treatment provider… [which are] overlapping and often conflicting roles.

National Council on Disability, *National Disability Employment Policy: From the New Deal to the Real Deal: Joining the Industries of the Future* 47 (October 11, 2018), *available at* https://ncd.gov/sites/default/files/Documents/NCD_Deal_Report_508.pdf. Informal labor arrangements are also quite common in residential facilities. During routine monitoring visits, Disability Rights NC observes residents performing yard work, housekeeping, and the like for the facility in exchange for a dollar or similarly small amounts of money.[3] Permitting residential service providers to categorize work performed by their residents, whether performed pursuant to a formal or informal labor relationship, as minimum wage-exempt "rehabilitative" work is ripe for abuse.

[3] Wage exploitation is also a serious problem in the homeless community. For example, recently in California, the Department of Justice accused several church leaders of forcing homeless people to panhandle for room and board. *See e.g.* Emily S. Rueb, *California Church Leaders Lured Homeless Into Forced Labor*, N.Y. Times, Sept. 11, 2019, *available at* https://www.nytimes.com/2019/09/11/us/california-church-homeless-panhandling.html (last visited March 11, 2020). Nationwide, eight percent of homeless youth are trafficked for labor. *Labor and Sex Trafficking Among Homeless Youth*, Loyola University Press (2016), *available at* https://www.covenanthouse.org/sites/default/files/inline-files/Loyola%20Multi-City%20Executive%20Summary%20FINAL.pdf (last visited March 11, 2020).

A notorious example of wage exploitation perpetrated against people with disabilities by their employer and residential services provider was uncovered in 2009 in Iowa. For over thirty years, Henry's Turkey Service employed men with intellectual disabilities and paid them at a rate of $65.00 per month, regardless of the amount of work each man performed. *E.E.O.C. v. Hill Country Farms*, 899 F. Supp. 2d 827, 831 (S.D. Iowa 2012), *affirmed* 564 Fed. Appx. 868 (8th Cir. 2014), *rehearing en banc denied* 2014 U.S. App. LEXIS 13605 (8th Cir. 2014). The company housed the men in "the Bunkhouse," a building deemed unsafe for habitation by the Fire Marshal, and transported them to and from work in company vans. 899 F. Supp. 2d at 830, 833. Henry's Turkey Service claimed it had not financially exploited the men because it had provided them room and board at the Bunkhouse and "in-kind care," which offset the cash wages the men were due. *Id*. at 829. The court rejected the employer's claim for wage credits and found that Henry's Turkey Service had "engaged in unlawful and discriminatory pay practices" as a matter of law and owed the men their full cash wages. *Id*. at 833-834. The exploitation of these men for so many years was made possible by the control Henry's Turkey Service had over the men as their employer and housing provider.

A case pending in the Eastern District of North Carolina reflects another manifestation of these conflicting roles on the part of residential providers. *See*

Presson v. Recovery Connections Cmty., 5:18-cv-0466-BO (E.D.N.C. 2018). Individuals with substance use disabilities claim to have been promised live-in substance abuse treatment but were instead forced to work up to sixteen hours a day for no pay for the benefit of Recovery Connections. *See* Complaint, *Presson v. Recovery Connections Cmty.*, 5:18-cv-0466-BO (E.D.N.C. 2018); *see also* 2019 U.S. Dist. LEXIS 115015 (E.D.N.C. 2019) (granting Plaintiffs' request to conditionally certify the case as a collective action). The operator of the facility asserted no wages are owed because the work performed was "therapeutic" and training for future employment. *See Id*. at ¶ 6.

Residential service providers may have different motivations for deeming work "rehabilitative" or "therapeutic," but no matter the motivation, there is no legal or factual basis to distinguish "rehabilitative" work from paid work. Permitting employers to affix such labels to work performed by people in vulnerable circumstances is contrary to law and paves the way for exploitation. The decision below threatens to reawaken a dead doctrine and puts at risk the wages workers with disabilities and other vulnerable workers currently earn. History must not repeat itself; "rehabilitation" is not a proper basis for denying individuals wage and hour protections.

II. VOLUNTEERISM IS WORK PERFORMED FOR PERSONAL PURPOSE OR PLEASURE WITHOUT PROMISE OR EXPECTATION OF COMPENSATION.

Mr. Armento was not a volunteer because he did not donate his labor freely and without expectation of pay. The NCWHA exempts only "[b]ona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist" from its minimum wage, overtime, and other wage and hour rules. N.C. Gen. Stat. § 95-25.14(a)(5). Individuals who work for religious and nonprofit organizations are not exempt from coverage under the NCWHA unless: a) he or she is not an employee; and b) is demonstrated to be a bona fide volunteer. *Id*. *See, e.g.*, *Tony & Susan Alamo Found.*, 471 U.S. at 296-7 (FLSA contains no express or implied exception for religious or other nonprofit organizations). Mr. Armento was an employee of ABCCM which means he cannot be labeled as a volunteer under the NCWHA. (*See* J.A. 803.)

The fact that that Mr. Armento was an employee should have conclusively established he was not a volunteer and was entitled to minimum wages, and ended the lower court's analysis of his status under the NCWHA. *U.S. Dep't of Labor v. N. Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004)(courts must construe statutes according to the ordinary meaning of terms used). However, in the absence of prior judicial interpretations of the term "bona fide volunteer" under the NCWHA, analogous federal case law can provide helpful guidance for

establishing who is and is not a volunteer. In *Portland Terminal Co.*, the Supreme Court found that work performed "without promise or expectation of compensation" and "solely for [] personal purpose or pleasure" is not subject to the FLSA. 330 U.S. at 152. Subsequently, the Court utilized the criteria outlined in *Portland Terminal Co.* to determine if individuals working for a religious nonprofit organization were volunteers or employees entitled to wages. *See Tony & Susan Alamo Found.*, 471 U.S. 290 (1985). Despite the workers' "vigorous protest" that they "considered themselves volunteers who were working only for religious and evangelical reasons," the Court found that they were employees because they expected and did receive wages in the form of "food, shelter, clothing, transportation and medical benefits." *Id.* at 293-294, 301. The Court refused to relax its analysis of the labor relationship in deference to the ecclesiastical and charitable mission of the Foundation out of concern it would allow employers to coerce "volunteer" labor out of workers and drive down wages. *Id.* at 302.

The facts of the *Alamo Foundation* case are strikingly like this case and further support the application of its reasoning and outcome to this case. The Foundation was a non-profit evangelical church that focused its ministry on disadvantaged members of the community. *Id*. at 292. The Foundation's "associates" (the individuals the Court deemed to be employees) were former "drug addicts, derelicts, or criminals before their conversion and rehabilitation by

the Foundation." *Id*. The associates were "entirely dependent upon the Foundation for long periods" and expected that the Foundation would provide them with "food, shelter, clothing, transportation and medical benefits. *Id*. at 293. Similarly, ABCCM is a non-profit Christian religious organization that operates the VRQ, a facility that cares for homeless veterans "with the goal of making them self-sufficient, drug-free and alcohol-free." (J.A. 795-796.) Homeless veterans residing at the VRQ receive "housing, meals, counseling, a gym, an onsite chaplain, educational assistance, a computer room, a library, laundry facilities, Alcoholics Anonymous meetings, nursing services, psychologist services, case management services, claims assistance, and transportation to the local United States Veteran's Administration (the "VA") medical center." (J.A. 796.) Veterans can receive these benefits for up to twenty-four months and Mr. Armento depended on the benefits offered by the VRQ for all twenty-four months. (J.A. 809.) Like the associates working for the Foundation, Mr. Armento was an employee who expected and received compensation for his work.

If anything, the fact that an employee is alleged to be volunteering at their place of work warrants increased scrutiny of the nature of the work. *Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 427-428 (4th Cir. 2011). The FLSA, unlike the NCWHA, does not exempt employees from the definition of "volunteers." The *Purdham* court was tasked with determining if public school employees could

volunteer without pay for their schools in a capacity different than their normal jobs. The *Purdham* court identified the *Portland Terminal Co.* case and similarly worded FLSA regulations regarding volunteers for government entities as setting the standard for volunteerism and emphasized that the facts must show that the purported volunteer offered to work freely and without pressure or coercion. 637 F.3d at 427. Had the facts in this case not conclusively established that Mr. Armento was an employee who cannot be labeled a bona fide volunteer pursuant to the plain language of the NCWHA, the *Purdham* case confirms that the "volunteer" test would have been the correct test to apply.

Strict application of the *Alamo Foundation* "volunteer" test is necessary to ensure that workers who did not intend or desire to volunteer are not wrongfully denied wages they are rightfully owed. It is particularly important to protect workers in vulnerable positions, as is the case when an individual has a labor relationship with his or her residential services provider.

III. THE LOWER COURT'S CONCLUSION THAT WORKERS RECEIVING RESIDENTIAL AND EMPLOYMENT SERVICES ARE VOLUNTEERS RELIES ON AN INAPT ANALOGY TO PRISON WORKERS AND THE FALLACY OF REHABILITATION.

The fact that Mr. Armento was homeless and received room and board from ABCCM does not dictate the conclusion that he is not owed wages for his labor. The court below erroneously relied solely on the "primary beneficiary" test in determining that Mr. Armento was not entitled to wages, a legal principle that

considers only whether the worker or employer "benefitted" more from the labor arrangement and fails to consider whether uncompensated labor is the product of free will. *See Isaacson v. Penn Community Services*, 450 F.2d 1306, 1309-1311 (4th Cir. 1971)(holding that wartime conscientious objectors were not owed minimum wages when they knowingly agreed to work for less than minimum wage in a position specially created to provide conscientious objectors the means to perform work of national importance).[4] Following the *Isaacson* decision in 1971, the Supreme Court handed down the *Alamo Foundation* decision reiterating the "volunteer" test from *Portland Terminal Co.* as the appropriate standard for distinguishing employees entitled to wage and hour protections from bona fide volunteers. Accordingly, the *Alamo Foundation* "volunteer" test must be applied when determining if an individual is properly classified as a bona fide volunteer.

[4] The "primary beneficiary" test grew out of the unique factual circumstances of *Isaacson* and has limited application to other factual circumstances. The *Isaacson* court, cognizant of the undesirable impact its decision could have on other workers, strongly cautioned that its decision should not be read to countenance the creation of a labor pool available to work at substandard wages. 450 F.2d at 1311. In accordance with the *Isaacson* court's directive, the Fourth Circuit has only cited to the *Isaacson* decision a handful of times in the fifty years since it was handed down, and only once has it applied the "primary beneficiary" test to a labor relationship. *See e.g. Purdham v. Fairfax County Sch. Bd.*, 637 F.3d 421, 429 (citing *Isaacson*); *Benshoff v. City of Va. Beach*. 180 F.3d 136, 141, 146 (4th Cir. 1999) (citing *Isaacson*); *Abril v. Virginia*, 145 F.3d 182, 194 (4th Cir. 1998) (dissent) (citing *Isaacson*); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989) (applying *Isaacson's* "primary beneficiary" test and determining that the employer principally benefitted and had to pay prospective new employees for the required week-long orientation).

The court below erroneously relied on *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993), a case involving prisoner laborers, to support its conclusion that Mr. Armento received most of the benefit from his work and is owed no wages. (*See* J.A. 811, 817-818.) The NCWHA explicitly exempts incarcerated workers from coverage. *See* N.C. Gen. Stat. § 95-25.14(a)(6). Upholding the lower court's decision would impermissibly expand an explicit statutory exemption under the NCWHA to include workers who are not incarcerated or confined against their will.

The *Harker* decision also did not involve application of the "primary beneficiary" test. The *Harker* court determined that the Department of Corrections has a custodial relationship, not an employer-employee relationship with its incarcerated workers, to which the FLSA did not apply. 990 F.2d at 133. As the court explained, incarcerated workplaces "differ[] substantially from the traditional employment paradigm covered by the [FLSA]; incarcerated workers cannot walk of the job or look for other work and the Department of Corrections "wields virtually absolute control over them to a degree simply not found in the free labor situation of employment." *Id.*

The lower court's attempts to analogize the facts of this case to the facts of *Harker* also fails. The finding that ABCCM, like prisons, had only a "rehabilitative and not pecuniary interest" in Mr. Armento's work and that Mr. Armento

"performed work as a means of rehabilitation and job training" like prisoners is premised on stereotypes, assumptions, and the false notion of "rehabilitative" work. (*See* J.A. 816-818, Section I, *supra*.) Prison workers do not possess the same labor rights as unconfined workers,[5] and the contention that Mr. Armento's work was "rehabilitative" does not demonstrate that he willfully relinquished the right to the fruits of his labor, as is required for being a bona fide volunteer.

The "primary beneficiary" test has limited use outside of its unique factual context and worked an injustice when applied to the facts of this case. Comparing Mr. Armento to incarcerated workers relies on strained logic, invites seemingly discriminatory comparisons, and is not sound precedent for expanding wage and hour exemptions into the free labor market. The *Alamo Foundation* "volunteer" test provides the most stringent protections and should be used to distinguish between employees like Mr. Armento and bona fide volunteers. To the extent that the "primary beneficiary" test retains any relevance, it should be utilized only after the court has already determined that the labor was given voluntarily and without expectation of compensation.[6]

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[5] The Fourth Circuit previously found that, while the North Carolina Constitution protects a right to work and earn a livelihood, this right does not "preclude[] North Carolina from confining a person to prison, in accordance with the due process of the law, and thereby denying him the right to work in society and enjoy the fruits of his labor." *O'Bar v. Pinion*, 935 F.2d 74, 85 (4th Cir. 1991).

[6] As the 6th Circuit recently noted, the Supreme Court's "volunteer" test is a necessary, threshold inquiry:

CONCLUSION

People with disabilities have historically been denied the opportunities afforded to nondisabled workers to reap the rewards – the fruits – of their labor. Labelling their work efforts as "rehabilitative" or "therapeutic" kept many outside the mainstream economy. The current state of the law and scientific understanding do not support this false distinction.

North Carolina law states that employees cannot be volunteers. In the absence of judicial opinions further defining who is a "bona fide volunteer" under North Carolina law, *amicus curiae* respectfully urges the Court to adopt the Supreme Court's "volunteer" test outlined in *Alamo Foundation*. Requiring that unpaid volunteer work be for personal purpose or pleasure and freely donated with no promise or expectation of compensation is consistent with free labor principles and provides the most stringent protections against exploitation. The fact that well-

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> [A] volunteer's expectation of compensation is a threshold inquiry that must be satisfied before we assess the economic realities of the working relationship. The Supreme Court held as much in *Portland Terminal Co.* when it defined a volunteer as a "person who, *without promise or expectation of compensation*, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." . . . The *Alamo* Court reiterated this test, making clear that when a religious organization undertakes a commercial endeavor, its workers are only covered under the FLSA if they "engage in those activities in expectation of compensation."

Acosta v. Cathedral Buffet, Inc., 887 F.3d 761, 766 (6th Cir. 2018)(emphasis in original).

meaning entities historically deprived workers with disabilities of wages demonstrates the necessity of adopting the most stringent protections available. The alternative unfairly denies people with disabilities and other vulnerable workers competitive, gainful employment and renders them more susceptible to isolation, dependency, poverty, and abuse. *Amicus curiae* respectfully requests the Court reverse the decision below.

Respectfully submitted this 24th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. of App. P. 27(d)(1) and (2) because:

1. Excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments), this brief contains 4,577 words and does not exceed the 7,650 words allowed for *Amicus* Briefs in support of an Opening Brief.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

This the 24th day of April, 2020.

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