No. 19-2207

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DESMOND NDAMBI; MBAH EMMANUEL ABI; NKEMTOH MOSES AWOMBANG, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

IVAN CHACON; PRUDENCIO RAMIREZ; HONORE OTAYEMA RECINOS; BOKOLE UMBA DIEU,

Plaintiffs,

v.

CORECIVIC, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland,
Hon. Richard D. Bennett

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 26.1, Appellee CoreCivic, Inc. certifies that it has no parent company, and that no publicly held corporation owns 10% or more of its stock.

RESPECTFULLY SUBMITTED this 9th day of January, 2020.

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ISSUE PRESENTED

Did the district court correctly conclude that Plaintiffs—immigration detainees voluntarily participating in a work program while in physical custody—were not "employees" for purposes of the Fair Labor Standards Act and New Mexico Minimum Wage Act?

STATEMENT OF THE CASE

I. Factual Background.

A. The Cibola County Correctional Center.

In October 2016, the United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE"), entered into an Intergovernmental Service Agreement ("IGSA") with Cibola County for the detention and care of immigration detainees at the Cibola County Correctional Center ("Cibola") in Milan, New Mexico. (JA 9, ¶ 19 [Dkt. 1-6 at 5]; JA 113–114 [Dkt. 45-1 at 2–3].) Detainees are detained at Cibola "while their immigration cases are processed … to ensure their presence during the administrative process and, if necessary, to ensure their availability for removal from the United States." (JA 10, ¶ 21 [Dkt. 1-6 at 6]; JA 117 [Dkt. 45-1 at 6].) Under the IGSA, detainees are not permitted to leave Cibola unless discharged by ICE. (JA 142–144 [Dkt. 45-1 at 31–33]; JA 147 [Dkt. 45-1 at 36].) It is a secured facility with "constant unarmed perimeter surveillance" and detainee supervision. (*Id.*)

CoreCivic owns and operates Cibola and, through a service agreement with Cibola County, detains immigration detainees "on behalf of ICE." (JA 9, ¶¶ 17, 19–20 [Dkt. 1-6 at 5]; JA 113 [Dkt. 45-1 at 2]; JA 163 [Dkt. 45-3 at 4].) CoreCivic does not have the right to refuse any detainee that is referred to Cibola by ICE. (JA 141 [Dkt. 45-1 at 30].) CoreCivic must operate Cibola in accordance with the terms of the IGSA, and must provide all detainees "safekeeping, housing, subsistence, medical and other services." (JA 118 [Dkt. 45-1 at 7]; *see also* JA 11 [Dkt. 1-6 at 7]; JA 119 [Dkt. 45-1 at 8].) CoreCivic is also required to provide detention services in accordance with ICE's Performance Based National Detention Standards ("PBNDS"). (JA 119 [Dkt. 45-1 at 8]; JA 141 [Dkt. 45-1 at 30].) If CoreCivic fails to comply with the IGSA or PBNDS, it can be penalized. (JA 132–133 [Dkt. 45-1 at 21–22]; JA 136–137 [Dkt. 45-1 at 25–26].)

B. Cibola's Voluntary Work Program.

Since the 1950s, Congress has authorized "work performed" by "aliens, while held in custody under immigration laws." 8 U.S.C. § 1555(d). It further authorized ICE to pay detainees "allowances" "not in excess of $1 per day" if they work. Department of Justice Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978). Pursuant to that congressional authorization, ICE, through the PBNDS, requires its contract detention facilities, including Cibola, to provide and manage a Voluntary Work Program ("VWP") for detainees. (JA 149 [Dkt. 45-1 at 38]; JA

155–156 [Dkt. 45-2 at 2–3].) The purpose of the VWP is to "reduce" the "negative impact of confinement" "through decreased idleness, improved morale and fewer disciplinary incidents," while also providing detainees "opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of the safety, security and good order of the facility." (JA 155 [Dkt. 45-2 at 2].)

VWP regulations are outlined in "Part 5 – Activities," § 5.8, of the PBNDS. (JA 155–159 [Dkt. 45-2 at 1–6].) *See also* 2011 PBNDS (Revised December 2016), § 5.8, https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf. Under those regulations, a detainee's participation in the VWP is purely voluntary. (JA 156 [Dkt. 45-2 at 3].) However, eligibility to participate is dictated by the detainee's classification, attitude, and behavior (JA 156–157 [Dkt. 45-2 at 3–4]), and ICE ultimately determines "whether a detainee will be allowed to perform on voluntary work details" (JA 149 [Dkt. 45-1 at 38]). Detainees selected to participate in the VWP are expected to report for work on time and perform all tasks diligently and conscientiously; if they fail to do so, or engage in disruptive or threatening behavior, they can be removed from the VWP. (JA 157–158 [Dkt. 45-2 at 4–5].)

A facility may restrict the number of work details a detainee participates in each day, but under no circumstances can a detainee work more than eight hours

per day or 40 hours per week. (JA 157 [Dkt. 45-2 at 4].) Consistent with Congress's authorization, the PBNDS allows contracting detention facilities like Cibola to pay detainees $1.00 per day:

> Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy.
>
> The compensation is at least $1.00 (USD) per day. The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released.

(*Id.*)[1] The failure to comply with VWP regulations can result in a withholding or deduction of up to 10% of a facility's monthly invoice. (JA 136 [Dkt. 45-1 at 25].)

Thus, CoreCivic must maintain a VWP at Cibola and must do so in accordance with the IGSA and PBNDS. Plaintiffs do not dispute that CoreCivic's management of the VWP at Cibola fully complies with both.

[1] The 2008 PBNDS set compensation precisely at "$1.00 per day." *See* 2008 PBNDS, at 4, § 33(III)(K), https://www.ice.gov/doclib/dro/detention-standards/pdf/voluntary_work_program.pdf. The 2011 PBNDS modified the compensation to "at least $1 (USD) per day." *See* 2011 PBNDS, at 385, § 5.8(V)(K), https://www.ice.gov/doclib/detention-standards/2011/voluntary_work_program.pdf. The 2019 PBNDS slightly modified this provision to require "not less than $1.00 per day." *See* 2019 PBNDS, at 177, § 5.6(II)(H), https://www.ice.gov/doclib/detention-standards/2019/5_6.pdf.

II. Procedural History.

A. Plaintiffs' Allegations.

Plaintiffs are former immigration detainees who were detained at Cibola for several months in 2017. (JA 13–16 [Dkt. 1-6 at 9–12].) They allege they participated in the VWP, worked as janitors and in the kitchen or library, and were paid either $1 per day or $15 per week. (*Id.*) On November 14, 2018, they filed a Complaint on behalf of themselves and all others similarly situated, alleging that their compensation violated the Fair Labor Standards Act ("FLSA" or "the Act"), 29 U.S.C. §§ 201, *et seq.*, and the New Mexico Minimum Wage Act ("NMMWA"), N.M. Stat. Ann. §§ 5-4-9, *et seq.*, and unjustly enriched CoreCivic. (JA 23–26 [Dkt. 1-6 at 19–22].) They sought to certify classes consisting of all former and current Cibola detainees who participated in the VWP. (JA 17–23 [Dkt. 1-6 at 13–19].)

B. The District Court's Disposition.

CoreCivic moved to dismiss the Complaint, arguing that neither the FLSA nor the NMMWA applied because Plaintiffs were not CoreCivic "employees" under those statutes. (JA 36–55 [Dkt. 36, 36-1]; JA 90–110 [Dkt. 45].) Rather, they voluntarily participated in a congressionally authorized and contractually required program for immigration detainees in lawful custody. (*Id.*) The district court agreed. Applying the holding in *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993), which held that the FLSA does not apply to inmate-work

programs, and following the Fifth Circuit's decision in *Alvarado Guevara v. Immigration and Naturalization Service*, 902 F.2d 394 (5th Cir. 1990), which held that the FLSA does not apply to immigration detainee work programs, the district court ruled that they were not employees in light of the economic reality of their custodial detention:

> [P]laintiffs cannot be considered "employees" as defined by the FLSA or NMMWA. CoreCivic, under the Intergovernmental Service Agreement, was required to offer a voluntary work program for ICE detainees at Cibola. Plaintiffs were incarcerated detainees in this facility awaiting civil immigration proceedings and engaged in work offered by the Defendant on an entirely voluntary basis through this program. The economic reality of the Plaintiffs' situation is almost identical to a prison inmate and does not share commonality with that of a traditional employer-employee relationship. Accordingly, Plaintiffs were not "employees" of the Defendant during their detention.

(JA 179 [Dkt. 49 at 4].) It further ruled that, because the NMMWA is construed like the FLSA, it did not apply for the same reasons. (JA 178–179 [Dkt. 49 at 3–4].) And because CoreCivic did not violate either minimum wage law, Plaintiffs' derivative unjust enrichment claim failed as well. (JA 180 [Dkt. 49 at 5].)

SUMMARY OF THE ARGUMENT

The district court decisively dismissed Plaintiffs' claims because it was bound by, and properly applied, binding FLSA precedent. Interpreting the FLSA requires a contextual, common-sense approach, and each time this Court has been

confronted with an FLSA claim based on work performed in a custodial-detention setting (twice), it has categorically held that the FLSA does not apply. The economic reality of a custodial relationship is substantially different from the traditional employment relationship, and extending FLSA protections does not further Congress's intent in that context.

This case is materially indistinguishable. All three cases involved voluntary labor performed pursuant to a detention-work program. *Harker v. State Use Industries* involved an inmate-work program; *Matherly v. Andrews* involved a civil-detainee-work program; and this case involves an immigration-detainee-work program. The district court correctly recognized that the economic realities in each of these scenarios is almost identical, and Plaintiffs provide no persuasive reason why this Court should depart from *Harker* or *Matherly*, make an exception for this case, and create a circuit split with the Fifth Circuit. The district court's Order should be affirmed.

ARGUMENT

I. Standard of Review.

This Court reviews *de novo* an order granting a Rule 12 motion to dismiss, *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 317 (4th Cir. 2019), and underlying questions of statutory interpretation, *see Trejo v. Ryman Hosp. Props., Inc.*, 795 F.3d 442, 446 (4th Cir. 2015) (interpreting the

FLSA). In reviewing the district court's order, the Court may take judicial notice of and consider documents that are referenced in the Complaint, as well as information that is publicly available on government websites. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004).

II. The FLSA Does Not Apply to Cibola's Voluntary Work Program.

The FLSA requires every "employer" to pay "each of his employees" the federal minimum wage. *See generally* 29 U.S.C. § 206. The dispositive question in this appeal is whether ICE detainees who participate in a voluntary work program while in custody are "employees" under that Act. They are not. Read in context, Congress did not intend for the FLSA to apply in this setting.[2]

A. Fundamental Principles of Statutory Construction Require a Common-Sense, Contextual Interpretation of the FLSA.

"When interpreting a statute, the goal is always to ascertain and implement the intent of Congress." *Scott v. United States*, 328 F.3d 132, 138 (4th Cir. 2003). The analysis starts by determining "whether the statutory language has a plain and unambiguous meaning." *Id.* The "[p]lainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the

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[2] Plaintiffs misstate CoreCivic's argument. CoreCivic is not seeking, nor did the district court create, an "exemption" to the FLSA. (Brief of Appellants at 10–11.) CoreCivic advanced, and the district court adopted, a sensible interpretation of the word "employee" in this context.

specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S. Ct. 1074, 1081–82 (2015) (plurality opinion) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (alterations in original); *see also Trejo*, 795 F.3d at 446 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)) ("In determining the plain meaning of the text, we must consider the broader context of the statute as a whole, in light of the cardinal rule, that the meaning of statutory language, plain or not, depends on context."). Ambiguity in otherwise "plain" language can also "derive[] from the improbably broad reach" of a statutory term. *Bond v. United States*, 572 U.S. 844, 859 (2014).

The term "employee" is naturally broad. Although the FLSA defines the term "employee," the definition "do[es] little to advance the inquiry." *Harbourt v. PPE Casino Resorts Maryland, LLC*, 820 F.3d 655, 658 (4th Cir. 2016). The definition—"any individual employed by an employer," 29 U.S.C. § 203(e)(1)—is "completely circular and explains nothing." *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992)). The statute goes on to define the terms "employ" and "employer," *see* 29 U.S.C. §§ 203(d), (g), but they too "do little" to shed light on the scope of the FLSA's reach. *Harbourt*, 820 F.3d at 658. The Court has recognized this inherent ambiguity. *See Steelman*, 473 F.3d at 128 (quoting *Rutherford Food Corp. v.*

McComb, 331 U.S. 722, 728 (1947)) ("[T]here is in the Fair Labor Standards Act no definition that solves problems as to the limits of the employer-employee relationship under the Act."); *Benshoff v. City of Virginia Beach*, 180 F.3d 136, 140 (4th Cir. 1999) ("The Act, however, provides little guidance as to what constitutes an employer-employee relationship or "employment" sufficient to trigger its compensation provisions.").

Plaintiffs contend that the FLSA's broad definition of "employee" necessarily requires a boundless interpretation. (Brief of Appellants at 9.) Not so. The Supreme Court has repeatedly instructed that the meaning of a statute "does not always 'turn solely' on the broadest imaginable 'definitions of its component words,'" *Epic Systs. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (quoting *Yates*, 135 S. Ct. at 1081), and that courts should "avoid a boundless interpretation" where, as here, "the context from which the statute arose demonstrates" a much more limited application was intended. *Bond*, 572 U.S. at 866.[3] In fact, the

[3] *See, e.g.*, *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018) (refusing to broadly interpret the phrase "obstruct or impede" in § 7212 of the Internal Revenue Code that would apply to "a person who pays a babysitter $41 per week in cash without withholding taxes," "leaves a large cash tip in a restaurant, fails to keep donation receipts from every charity to which he or she contributes, or fails to provide every record to an accountant"); *McDonnell v. United States*, 136 S. Ct. 2355, 2365, 2367–68 (2016) (refusing to interpret "official act" in the federal bribery statute to include "any activity by a public official," and employing a "more bounded interpretation" in light of "the context in which the words appear"); *Yates*, 135 S. Ct. at 1078–79, 1081, 1087–89 (rejecting an "unrestrained reading" of the term "tangible object" in the Sarbanes-Oxley Act

Supreme Court has recognized that interpretive restraint is necessary when construing the FLSA's definition of "employee": "While the statutory definition is exceedingly broad, it does have its limits." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985) ("*Alamo Foundation*") (internal citation omitted); *accord Harbourt*, 820 F.3d at 658–59. This Court has also recognized that "[t]he scope of these definitions … is not limitless." *Benshoff*, 180 F.3d at 140.

Because of the statute's facial ambiguity, this Court has adopted a "contextual, common-sense approach" to determine whether an individual is an "employee" for purposes of the FLSA:

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that would criminalize tossing a fish, which "no doubt" constituted "an object that is tangible," back into the ocean to avoid federal detection, where the purpose of the statute was to prohibit corporate document-shredding to hide evidence of financial wrongdoing following the Enron scandal); *Bond*, 572 U.S. at 848–49, 856–57, 860, 862, 866 (refusing to interpret the words "chemical weapon" in the Chemical Weapons Convention Implementation Act in a way that "would sweep in everything from the detergent under the kitchen sink to the stain remover in the laundry room" and criminalize the use of a toxic chemical by a jilted wife to assault her husband's paramour); *Loughrin v. United States*, 573 U.S. 351, 362 (2014) (refusing to interpret 18 U.S.C. § 1344(2)—which criminalizes a knowing scheme to obtain property owned by, or in the custody of, a bank "by means of false or fraudulent pretenses"—as "a plenary ban on fraud, contingent only on use of a check (rather than cash)," because such a literal interpretation would "cover every pedestrian swindle happening to involve payment by check, but in no other way affecting financial institutions"); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015) (cautioning that, because "'words extended to the furthest stretch of their indeterminacy[] stop nowhere[,]' [c]ontext … 'may tug in favor of a narrower reading'") (quoting *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995), and *Yates*, 135 S. Ct. at 1083).

> [T]he term "employee" … must be defined in accordance with "economic reality[.]" The cases make clear that the "economic reality" standard calls for pragmatic construction of a concept—employment—that may have seemed at once too commonplace and too nuanced to define. Thus, courts have been exhorted to examine "the circumstances of the whole activity," rather than "isolated factors," or "technical concepts," and they have noted that in the absence of a statutory definition, it is permissible to draw upon "common linguistic intuitions," In short, "We cannot assume that Congress here was referring to work or employment other than as those words are commonly used" when it enacted the language of the FLSA.

Steelman, 473 F.3d at 128–29 (quoting *Alamo Foundation*, 471 U.S. at 301; *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Rutherford*, 331 U.S. at 730; *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992)); *see also Benshoff*, 180 F.3d at 141 ("In making this inquiry, courts remain mindful that '[t]he employer-employee relationship does not lend itself to rigid per se definitions, but depends upon the circumstances of the whole activity.'") (citation omitted).

B. This Court Has Already Held that the FLSA Does Not Apply in the Custodial-Detention Setting.

The Court has employed "this [contextual, common-sense] approach to conclude that prisoners in an inmate labor program should not be treated as employees under the FLSA." *Steelman*, 473 F.3d at 129. In *Harker v. State Use*

Industries, a class of Maryland inmates who voluntarily worked in the prison's graphic print shop argued that they were entitled to the FLSA's minimum wage. 990 F.2d 131, 132 (4th Cir. 1993). The print shop produced "goods and services for sale to government agencies, institutions, and political subdivisions of Maryland, as well as federal institutions and agencies, and those of other states." *Id*. The Court rejected the inmates' argument, like Plaintiffs argue here, that because the statute does not exempt prisoners and the definition of the word "employee" is so broad it requires an overly "broad reading" of that term. *Id*. at 133.

The court focused instead on Congress's intent and concluded, "[W]e see no indication that Congress provided FLSA coverage for inmates engaged in prison labor programs." *Id*. Work performed in a custodial-detention setting, it held, "differs substantially from the traditional employment paradigm covered by the Act." *Id*. Inmates perform the work "not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training." *Id*. Volunteering inmates "also have not made the 'bargained-for exchange of labor' for mutual economic gain that occurs in a true employer-employee relationship." *Id*. (quoting *Vanskike*, 974 F.2d at 809). The court elaborated:

> They do not deal at arms' length; the inmates enroll in [the] programs solely at the prerogative of the DOC, which both initiates the programs and allows the inmates to participate. Because the inmates are involuntarily

> incarcerated, the DOC wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment. Inmates may voluntarily apply for … positions, but they certainly are not free to walk off the job site and look for other work. When a shift ends, inmates do not leave DOC supervision, but rather proceed to the next part of their regimented day.

Id. Finally, extending the FLSA to this context did not further the statute's express goal: to maintain a "standard of living necessary for health, efficiency, and general well-being of workers." *Id*. (quoting 29 U.S.C. § 202(a)). "While incarcerated, inmates have no such needs because the DOC provides them with the food, shelter, and clothing that employees would have to purchase in a true employment situation." *Id*.

In short, the prison and the inmates "do not enjoy the employer-employee relationship contemplated in the Act, but instead have a custodial relationship to which the Act's mandates do not apply." *Id*. at 133. Significantly, the court rejected a "case-by-case application of an 'economic reality' test to determine if inmates are employees," including consideration of whether the facility (1) hires and fires, (2) controls work schedules, (3) determines pay rates, and (4) maintains pay records. *Id*. at 135. Considering such factors "only encourages unnecessary litigation and invites confusion in an area of the law that should be quite clear." *Id*. Instead, it held "categorically that such inmates are not covered by the Act." *Id*. To hold otherwise, it noted, "would result in an unprecedented expansion of FLSA

coverage" and "would dramatically escalate costs and could well force correctional systems to curtail or terminate these programs altogether." *Id.*

The Court concluded by stating that, "[f]or more than fifty years, Congress has operated on the assumption that the FLSA does not apply to inmate labor," and that it would not "judicially impose a new kind of employer-employee framework … under the guise of interpreting the FLSA's scope." *Id.* "If the FLSA's coverage is to extend within prison walls, Congress must say so, not the courts." *Id.*

This Court has also recently addressed an FLSA claim brought by a civil detainee in the custody of the federal Bureau of Prisons ("BOP"). In *Matherly v. Andrews*, the detainee—who was civilly committed as a sexually dangerous person and worked at his facility for just 29 cents per hour—argued that he was entitled to the federal minimum wage as an employee of the BOP. 859 F.3d 264, 270, 278 (4th Cir. 2017). The Court rejected this argument in short order: "This claim runs head first into our FLSA jurisprudence." *Id.* at 278. After applying the *Harker* factors, the court held that the detainee "doesn't qualify as an 'employee' within the meaning of the FLSA." *Id.* There was no indication that the detainee was "working to turn a profit for the BOP"; his employment relationship with the BOP was not "the product of a bargained-for exchange"; and the BOP provides him with "all of his necessities." *Id.* The Supreme Court denied the detainee's petition for writ of certiorari. *See Matherly v. Andrews*, 138 S. Ct. 399 (2017).

This Circuit is not alone in holding that the FLSA does not apply in the custodial-detention setting. Every circuit that has addressed the issue has refused to extend it in that situation. *See Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (inmate labor); *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005) (same); *Gambetta v. Prison Rehab. Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1124 (11th Cir. 1997) (same); *Danneskjold v. Hausrath*, 82 F.3d 37, 43–44 (2d Cir. 1996) (same); *Abdullah v. Myers*, 52 F.3d 324, at *1 (6th Cir. 1995) (same); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994) (same); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (same); *Franks v. Oklahoma State Indus.*, 7 F.3d 971, 973 (10th Cir. 1993) (same); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991) (same); *see also Smith v. Dart*, 803 F.3d 304, 314 (7th Cir. 2015) (pre-trial detainee labor); *Tourscher v. McCullough*, 184 F.3d 236, 243 (3d Cir. 1999) (same); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997) (same); *see also Sanders v. Hayden*, 544 F.3d 812, 814 (7th Cir. 2008) (civil detainee labor); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (same); *Williams v. Coleman*, No. 1:11-CV-01189-GBC PC, 2012 WL 6719483, at *3 (E.D. Cal. Dec. 26, 2012), *aff'd*, 536 F. App'x 694 (9th Cir. 2013) (same).

C. *Harker* and *Matherly* Compel the Conclusion that the FLSA Does Not Apply to Work Performed by Immigration Detainees Pursuant to a Voluntary Work Program.

The context underlying Plaintiffs' claim is materially indistinguishable from the contexts in *Harker* and *Matherly*—all three involve a custodial-detention setting. Applying the *Harker* factors, immigration detainees who participate in the VWP are not "employees" under the FLSA.

Plaintiffs' threshold argument that the *Kerr* factors apply is incorrect. (Brief of Appellants at 13–14, citing *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62 (4th Cir. 2016).) This Court has employed that control test (also known as the "economic reality" test) in the past to determine whether an individual is an employee or an independent contract, or whether a party was a joint employer. *See*, *e.g., Kerr*, 824 F.3d at 82–83 (addressing whether Kuhn was an employer in addition to MUBG); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) (addressing whether plaintiffs were employees or independent contractors). More recently, however, this Court has rejected that test in the FLSA context. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 137 (4th Cir. 2017).

Whatever its continued viability, it does not apply in the custodial-detention setting. Indeed, *Harker* squarely rejected the control test and instead employed a categorical, common-sense approach because custodial relationships "deviated from the traditional understanding of employment in fundamental ways," and it

"refused to shoehorn them into the Act." *Steelman*, 473 F.3d at 129; *Harker*, 990 F.2d at 133; *see also Matherly*, 859 F.3d at 278 (applying the *Harker* test to determine whether a civil detainee was an "employee" under the FLSA). Therefore, the district court properly applied the *Harker* factors.[4]

Plaintiffs also argue that *Harker* should be limited to inmate-labor cases because it "rest[s] on a premise, wholly inapplicable to the present case, that the U.S. Constitution sanctions unpaid prison work and serves both punitive and rehabilitative purposes." (Brief of Appellants at 15.) Because Plaintiffs are "detained civilly rather than pursuant to a criminal conviction," they argue, the "corrective and punitive purpose of incarceration after criminal conviction (with its Constitutionally-protected 'involuntary servitude') has no applicability to the civil detention of immigrants." (*Id.*) But *Harker* did not turn on the *reason for* or the *purpose of* the inmates' incarceration, but rather on the *fact of their custodial detention* and *that* economic reality. *See* 990 F.2d at 133 (inmate and prison "do not enjoy the employer-employee relationship contemplated in the Act, but instead

[4] The genesis of the *Kerr* factors is the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), which the Ninth Circuit has itself refused to extend to inmate-labor cases. *See Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) (holding that the custodial situation raises a more fundamental question: whether the inmate can "'plausibly be said to be 'employed' in the relevant sense at all?'") (citation omitted), *abrogation on other grounds recognized by Walden v. Nevada*, No. 18-15691, 2019 WL 7046964, at *4 n.2 (9th Cir. Oct. 16, 2019).

have a *custodial relationship* to which the Act's mandates do not apply") (emphasis added). Indeed, there is no discussion *at all* of the Thirteenth Amendment, and, in fact, the inmates in *Harker* went "through a voluntary application and interview process to participate" in the prison work program. *Id*. at 132. It was not compelled, corrective, or punitive labor.

Plaintiffs do not address the myriad cases, including *Matherly*, that have applied the logic of *Harker* to labor performed by pre-trial detainees (who have not been convicted of a crime and are not serving a criminal sentence) and civil detainees (who cannot be subjected to conditions that are punitive in nature, *Matherly*, 859 F.3d at 274). The common thread that makes these cases indistinguishable is their custodial-detention setting. *See Smith*, 803 F.3d at 314 ("We cannot see what difference it makes if the incarcerated person is a prisoner, civil detainee, or pretrial detainee. In all cases, the aforementioned principles apply equally."); *Sanders*, 544 F.3d at 814 ("If the words 'confined civilly as a sexually violent person' are substituted for 'imprisoned' in the first sentence and 'secure treatment facility' for 'prison' in the second sentence, the quoted passage applies equally to the present case."); *Villarreal*, 113 F.3d at 206 ("Clearly, pretrial detainees are in a custodial relationship like convicted prisoners."). Plaintiffs were in the same custodial-detention setting at Cibola. Therefore, the *Harker* factors do apply and, like *Harker* and *Matherly*, are satisfied.

1. The VWP is not intended to turn a profit for CoreCivic.

Like the work programs in *Harker* and *Matherly*, the purpose of the VWP is "not to turn profits" for CoreCivic. *Harker*, 990 F.2d at 133. ICE *requires* CoreCivic to have and manage the VWP. (JA 149 [Dkt. 45-1 at 38]; JA 155–156 [Dkt. 45-2 at 2–3].) The express purpose of the VWP is to "reduce" the "negative impact of confinement" "through decreased idleness, improved morale and fewer disciplinary incidents," while also providing detainees "opportunities to work and earn money while confined." (JA 155 [Dkt. 45-2 at 2].) Although the work program in *Harker* incidentally served a rehabilitative purpose, it was not that specific purpose that disqualified it from the FLSA, as Plaintiffs contend. (Brief of Appellants at 16.) The work program lacked the indicia of a "traditional employment paradigm" because the inmates did not work "to turn profits" for the prison. *Harker*, 990 F.2d at 133.

The same is true of immigration detainees participating in the VWP. Their work—even if collaterally beneficial to CoreCivic in certain respects (as Plaintiffs allege)—is designed to serve other salutary purposes expressly endorsed by the federal government.[5] *See id*. at 134 ("Congress recognized here that governments have other uses for the fruits of prison labor besides the unfair maximizing of profits in the marketplace. Such uses could include rehabilitation efforts, such as

[5] Under the IGSA, ICE reimburses CoreCivic "$1 per day" for work performed pursuant to the VWP. (JA 117 [Dkt. 45-1 at 6].)

Maryland's, or even using the savings accrued from prison labor to offset some of the costs of incarceration."); *see also Sanders*, 544 F.3d at 814 (Congress did not intend to impose a minimum wage on civil detention, even if the work was used to "offset some of the costs" of the detention).

2. There is no bargained-for exchange of labor.

Like the inmates in *Harker* and the civil detainees in *Matherly*, Cibola immigration detainees do not deal at arms' length. They are involuntarily detained, and ICE/CoreCivic "wields virtually absolute control over them to a degree simply not found in the free labor situation of true employment." *Harker*, 990 F.2d at 133. Although they may volunteer to participate, the program is only in place because ICE requires it. And those who do participate "certainly are not free to walk off the job site and look for other work." *Id*. When a shift ends, they do not leave CoreCivic's supervision. (JA 142–144 [Dkt. 45-1 at 31–33]; JA 147 [Dkt. 45-1 at 36].)

Plaintiffs argue that their work *is* bargained for because they cannot be compelled to work like inmates and their participation involved "mutual economic gain." (Brief of Appellants at 16–17.) But the inmates in *Harker* were not compelled to work and, like Plaintiffs, they received some compensation, 990 F.2d at 132, and the Court still held that they were not employees. Simply volunteering

to work does not mean that that choice was bargained for, or agreed-upon at arms' length, especially when the compensation is non-negotiable.

3. CoreCivic is required to provide all basic necessities.

The last *Harker* factor is also satisfied. Like *Harker* and *Matherly*, CoreCivic is required to provide detainees "safekeeping, housing, subsistence, medical and other services." (JA 118 [Dkt. 45-1 at 7]; *see also* JA 11 [Dkt. 1-6 at 7]; JA 119 [Dkt. 45-1 at 8].) This includes providing detainees "with nutritious, adequately varied meals, prepared in a sanitary manner," access to a law library and legal materials, and access to telephone services. (JA 151 [Dkt. 45-1 at 40]; JA 153 [Dkt. 45-1 at 42].) *See also* 2011 PBNDS (Revised December 2016), § 4.1 (Food Service), https://www.ice.gov/doclib/detention-standards/2011/4-1.pdf; 2011 PBNDS (Revised December 2016), § 5.6 (Telephone Access), https://www.ice.gov/doclib/detention-standards/2011/5-6.pdf; 2011 PBNDS (Revised December 2016), § 6.3 (Law Libraries and Legal Material), https://www.ice.gov/doclib/detention-standards/2011/6-3.pdf. Thus, the federal minimum wage is not necessary to maintain a "standard of living necessary for health, efficiency, and general well-being of workers," and therefore does not further the FLSA's intended purpose. *Harker*, 990 F.2d at 133 (quoting 29 U.S.C. § 202(a)).

Plaintiffs disagree that the provision of these necessities should deprive workers of FLSA protections, stating: "It is illogical for the FLSA's coverage to

cease wherever the worker's food, shelter, and clothing are provided." (Brief of Appellants at 18–22.) This assertion, however, presupposes that Cibola immigration detainees are employees in the first place. Moreover, *Harker* considered—as one factor—whether compensation for their work in a voluntary program was necessary to ensure their welfare and standard of living, and, because it was not (since the facility was responsible for providing them with food, shelter, and clothing), affording a minimum wage did not further the FLSA's purpose. 990 F.2d at 133. To the extent Plaintiffs object to that proposition, *Harker* is binding.

Alamo Foundation is not inconsistent with this point. (Brief of Appellants at 18–19.) That case did not involve a custodial-detention scenario, but instead involved voluntary work by rehabilitated "drug addicts, derelicts, or criminals" who worked for a religious foundation. 471 U.S. at 292. The "associates" were not paid wages, but instead were provided "food, clothing, shelter, and other benefits." *Id*. Although they did not expect any monetary compensation and worked as part of their ministry, *id*. at 300, the court held that they were still "employees" for purposes of the FLSA because they "expected to receive in-kind benefits—and expected them in exchange for their services," *id*. at 301. Unlike that arrangement, the provision of food, shelter, and clothing to Cibola immigration detainees is not a quid pro quo for their participation. All ICE

detainees at Cibola are entitled to those basic necessities, even if they do not participate in the VWP.

Plaintiffs alternatively argue that their allegations of not *actually receiving* adequate necessities is proof that they need a minimum wage to supplement what they are given by purchasing items from the facility commissary.[6] (Brief of Appellants at 17.) They broadly allege that CoreCivic "often served insufficient amounts of food, at unsafe temperatures, and/or without hygienic food-handling safeguards," and failed to provide "adequate access to telephones and legal materials." (JA 12 [Dkt. 1-6 at 8].) Plaintiffs again have it wrong.

Initially, Plaintiffs grossly overstate the factual basis for these allegations. Plaintiffs cite to a January 2018 report by ICE's Office of Detention Oversight ("ODO Report"), and contend that it finds CoreCivic failed to comply with "31 contractually imposed standards." (Brief of Appellants at 17; JA 12 [Dkt. 1-6 at 8].) But they fail to identify what those standards were or how they relate, if at all, to the adequacy of their food, clothing, and shelter. According to the ODO Report, however, only three standards related to food service, and *none* of those related to the adequacy of the food provided. (JA 172 [Dkt. 45-3 at 11–12].) Moreover, the

[6] The commissary provides only items approved by ICE; any profits must be used solely to benefit detainees or to offset commissary staff salaries; and any balance in the commissary account at the end of the IGSA period goes to the United States, not CoreCivic. (JA 152–153 [Dkt 45-1 at 41–42].)

ODO Report noted that each of the three issues (relating to the temperature of food, an unsupervised food delivery cart, and wearing gloves and hair nets) was immediately corrected. (*Id.*) Further, the ODO Report noted that, among the 15 detainees who were interviewed, "[t]he majority of detainees reported being satisfied with facility services," with only a few exceptions. (JA 166 [Dkt. 45-3 at 7.) As it pertained to food service, five (only a third of the 15 detainees interviewed) claimed that "the food is typically served cold and has a bad taste." (*Id.*) Although the ODO Report noted complaints about hot food that was served warm, it also noted that food was served timely, and "confirmed the cyclical menu has been approved by a registered dietician." (*Id.*)

Regarding legal supplies and phone calls, the ODO Report addresses only telephone signage issues and expired Lexis/Nexis subscriptions, and, in those instances, corrective action was immediately taken for all except one requirement, which was to consistently conduct daily testing of phone equipment. (JA 173–175 [Dkt. 45-3 at 14–16].) It does not support Plaintiffs' allegations that they were denied *access to* phone calls or legal supplies.

Even if Plaintiffs occasionally did not receive an adequate portion of food or were served a cold meal,[7] such allegations do not change the employment dynamic

[7] Plaintiffs provide no authority that access to a telephone or legal materials is necessary to maintain their standard of living.

or compel a federal minimum wage. CoreCivic is contractually *required* to provide "subsistence," including "adequately varied meals." (JA 118 [Dkt. 45-1 at 7]; JA 151 [Dkt. 45-1 at 40].) This is enough under *Harker*'s common-sense approach to conclude that Plaintiffs' participation in the VWP derives from their custodial relationship with ICE and CoreCivic and does not separately create any employment relationship.

Considering alleged inadequacies like these also contravenes this Court's rejection of a "case-by-case" standard and warning that it will "only encourage[] unnecessary litigation and invite[] confusion in an area of the law that should be quite clear." *Harker*, 990 F.2d at 135. If CoreCivic is not complying with the IGSA or the PBNDS, it is subject to penalty. (JA 136 [Dkt. 45-1 at 25].) And if any immigration detainee is denied a basic necessity or subjected to unlawful conditions, he or she must pursue other remedies. To transform the FLSA into a catch-all remedy "would result in an unprecedented expansion of FLSA coverage" and "dramatically escalate costs and could well force [ICE] to curtail or terminate these programs altogether." *Id.* Like it did in *Harker* and *Matherly*, the Court should refrain from doing so in this context as well.

4. The VWP does not threaten fair competition in the market.

Aside from these factors, Plaintiffs argue that the VWP's compensation "displaces non-detained workers from the local community who CoreCivic would

have hired in the absence of [their] work, and who would be entitled to be paid the prevailing wage," and further gives CoreCivic a "competitive advantage" in the market. (Brief of Appellants at 12–13, 20.) These arguments are unavailing.

First, CoreCivic does not have a choice between selecting a detainee and hiring an outside worker from the community. It is *required* to have the VWP and select eligible detainees to perform the tasks. Second, any "market" in this context consists of ICE, CoreCivic, and a handful of other private detention operators. ICE and every contract detention facility is bound by the same regulations and compensation floor.

Furthermore, the secondary purpose of the FLSA is to protect against disruptions of the *National* economy, not a local labor market. *See Sobrinio v. Med. Ctr. Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007) (holding activities that are "purely local in nature … fall all outside the FLSA's protections"). And it is undeniable that Plaintiffs were not participants in the National economy. They were removed from the National economy, in ICE custody, and detained pending the outcome of their immigration proceedings. Thus, their participation in Cibola's VWP did not compete with other employers in the National market. *See*, *e.g.*, *Sanders*, 544 F.3d at 814 (payment of sub-minimum wages to civil detainee presented "no threat of unfair competition to other employers, who must pay the minimum wage to their employees, because the

Treatment Center does not operate in the marketplace and has no business competitors") (quoting *Miller*, 961 F.2d at 9); *see also Harker*, 990 F.2d at 134 ("We are not persuaded that the limited ways in which SUI goods might enter the open market threaten fair competition.").

D. The Fifth Circuit's Decision in *Alvarado Guevara* Is Additional Persuasive Authority to Not Extend Application of the FLSA.

If the Court extends the logic and holdings of *Harker* and *Matherly* to labor performed by immigration detainees pursuant to a VWP, it would not be working from a clean slate. On remarkably similar facts, the Fifth Circuit did so in the immigration-detention context. In *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 395 (5th Cir. 1990), the court held that immigration detainees who participated in the VWP for $1 per day were not covered employees under the FLSA. Just like prisoners, pretrial detainees, and other civil detainees, the court reasoned that immigration detainees were "removed from American industry," under the direct supervision and control of the detention facility, and "not within the group that Congress sought to protect in enacting the FLSA." *Id*. at 395–96.

In reaching this conclusion, the court noted that Congress manifested its intent not to provide federal minimum wages to such immigration detainees in the Immigration and Naturalization Act, 8 U.S.C. § 1555(d), which authorizes "payment of allowances to aliens for work performed while held in custody under the immigration laws," *id*. at 396, and then set that allowance at "a rate not in

excess of $1 per day," *id*. (citing Department of Justice Appropriation Act, Pub. L. No. 95-86, 91 Stat. 426 (1978)). This rate was substantially less than the federal minimum wage of $2.65 per hour in 1978, when the appropriations bill passed. *See* https://www.dol.gov/whd/minwage/chart.htm. Having itself set an allowance for immigration-detainee labor that was far below the federal minimum wage, Congress could not have intended the FLSA's minimum-wage protections to cover labor performed at an immigration detention center under the work program it specifically funded. *See Guevara v. I.N.S.*, 954 F.2d 733 (Fed. Cir. 1992) (unpublished) (holding that, in light of § 1555(d) and the 1978 Appropriation Act, "Congress was not unaware of the situation in which these detainees might find themselves, or of the practice of the INS in asking for volunteers to undertake work projects at the detention centers"); *see generally Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *Battle v. Ledford*, 912 F.3d 708, 717 (4th Cir. 2019) (quoting *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 335 n.4 (4th Cir. 2008)) ("[W]e must 'presume that Congress is aware of the legal context in which it is legislating.'").

Plaintiffs try to belittle *Alvarado Guevara* by characterizing it as a "per curiam opinion with little analysis." (Brief of Appellants at 23.) But the Fifth Circuit explained, in a *unanimous panel opinion*, that it was adopting the district

court's "judgment *and persuasive reasoning*." 902 F.2d at 395 (emphasis added). Plaintiffs try to undermine its persuasive value by citing three district court cases that purportedly "rejected" its holding "in the context of modern for-profit immigration detention." (Brief of Appellants at 24.) None of those cases, however, addressed whether immigration detainees are "employees" under the FLSA; rather, they addressed whether the FLSA preempted California and Washington state minimum wage laws and/or whether immigrations detainees are "employees" for purposes of those states' minimum wage laws, which employ entirely different tests.[8] *See Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS

[8] Plaintiffs do not address the two courts that have relied on *Alvarado Guevara* to hold that immigration detainees are *not* covered employees under their respective state minimum-wage statutes. *See Menocal v. GEO Group., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (dismissing immigration detainees' claim under analogous Colorado minimum-wage statute because the facility provided for their standard of living and well-being); *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass. App. Ct. 1124, *2 (2017) (unpublished) ("We find no reason why Whyte's status as a detainee should result in a different outcome from Federal cases. Federal cases have excluded prison labor performed within the prison, because the primary goals of the FLSA—ensuring a basic standard of living and preventing wage structures from being undermined by unfair competition in the marketplace—do not apply in that context. The rationale of the Federal cases is equally applicable to the Massachusetts wage laws at issue here."). Nor do Plaintiffs address the Department of Justice's opinion that immigration detainees who perform labor at "a detention facility operated by or contracted through" the INS are not in an employment relationship for purposes of the FLSA, but instead are similarly situated to "inmates who perform duties pursuant to prison work programs and receive gratuity for so doing." *See* INS Gen. Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities*, Op. 92-8, 1992 WL 1369347, at *1 (Feb. 26, 1992).

(NLS), 2018 WL 2193644, at *20–25 (S.D. Cal. May 14, 2018); *Chao Chen v. Geo Group, Inc.*, 287 F. Supp. 3d 1158, 1168 (W.D. Wash. 2017); *Washington v. Geo Group, Inc.*, 283 F. Supp. 3d 967, 982 (W.D. Wash. 2017). Plaintiffs have not cited any authority holding that the FLSA applies to labor performed by immigrant detainees as part of the facility's VWP. Instead, Plaintiffs cite inapposite cases involving "undocumented workers" who were employed in the free market. (Brief of Appellants at 10–11.) CoreCivic is not arguing that the FLSA does not apply here because of Plaintiffs' immigrant status.[9] The FLSA does not apply because of the custodial-detention setting in which they performed their labor.[10]

Plaintiffs last argue that times have changed since *Alvarado Guevara*, arguing that immigration detention services are now contracted out to profiting private entities. (Brief of Appellants at 24–26.) Aside from the fact that Plaintiffs

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[9] CoreCivic notes, however, that the IGSA forbids it from "employ[ing]" "illegal or undocumented aliens," and all "employee[s] working on this contract" must have a valid Social Security Card and "successfully pass the DHS Employment Eligibility Verification (E-Verify) program operated by USCIS to establish work authorization." (JA 120 [Dkt. 45-1 at 9]; JA 123 [Dkt. 45-1 at 12].)

[10] In the district court, Plaintiffs cited *Gonzales v. Mayberg*, No. CV-07-6248 CBM (MLG), 2009 WL 2382686, at *4 (C.D. Cal. July 31, 2009), which held that the FLSA applied to labor performed by a person who was civilly committed under California's Sexually Violent Predator Act. But *Gonzalez* applied the control-factors test outlined in *Bonnette*, which the district court (in the Central District of California) was bound to apply. *Id*. This Court is bound by *Harker*. *See Matherly*, 859 F.3d at 278 fn.* (declining to follow *Gonzalez* because *Harker* controlled the inquiry in this Circuit). Nonetheless, the plaintiff in *Gonzalez* was required to use his wages to pay for his own medical care. *Id*. Plaintiffs do not make that allegation here.

admit that CoreCivic operated immigration detention facilities on behalf of ICE *years before* the Fifth Circuit decided *Alvarado Guevara* (*id*. at 25), whether the custodian is a government agency or its private contractor is irrelevant. The VWP is an ICE requirement, and CoreCivic is acting on behalf of and at the direction of ICE. (JA 9, ¶¶ 17, 19–20 [Dkt. 1-6 at 5].) *See Doe v. United States*, 831 F.3d 309, 317 (5th Cir. 2016).

In any event, whether CoreCivic is a private entity or allegedly profited from the VWP makes no difference to the economic reality of the custodial situation in which Plaintiffs worked. Indeed, in agreeing with "those courts holding categorically that [inmates] are not covered by the Act," *Harker* noted that most of them involved work performed for "private, outside employers even though their work was done within a penal facility." 990 F.2d at 135. "Even though the companies receiving the ultimate benefit of the work were engaged in commerce for a profit, these courts held that the inmates did not have to be paid minimum wage." *Id.*; *see also Bennett*, 395 F.3d at 410 ("We cannot see what difference it makes if the prison is private."); *Danneskjold*, 82 F.3d at 43–44 ("We perceive no distinction of legal consequence between those circumstances and the provision of similar services to the prison by a private contractor using prison labor."). What matters is that Plaintiffs were in a *custodial* relationship with CoreCivic. The

Court should join the Fifth Circuit and hold that the FLSA does not apply in this context.

III. The NMMWA Does Not Apply to Cibola's Voluntary Work Program.

Plaintiffs concede that the NMMWA "should be interpreted in accordance with the FLSA." (Brief of Appellants at 9.) *See Garcia v. Am. Furniture Co.*, 689 P.2d 934, 938 (N.M. App. 1984); *see also Padilla v. Am. Fed'n of State, Cty., and Mun. Emps.*, No. 11-1028 JCH/KBM, 2013 WL 12085976, at *9 (D.N.M. March 28, 2013) (finding it unnecessary to address NMMWA claim after finding that the plaintiff was not a covered employee under the FLSA, noting that "both parties agree that the same legal analysis applies in both case"), *aff'd*, 551 F. App'x 941, 944 (10th Cir. 2014) ("We agree with the district court's analysis, and conclude, as a matter of law, that Padilla is not an employee for purposes of the FLSA or NMMWA."). Therefore, they concede that if the Court upholds the district court's ruling that the FLSA does not apply, it should uphold the district court's ruling that the NMMWA does not apply.

Plaintiffs argue that the New Mexico Supreme Court's decision in *Benavidez v. Sierra Blanca Motors*, 922 P.2d 1205 (N.M. 1996), supports their argument that the "economic reality" test applies at least to their NMMWA claim (Brief of Appellants at 22–23), but that case is distinguishable. *Benavidez* involved New Mexico's Worker's Compensation Act, not the FLSA. *Id.* at 1206–07. Plaintiffs

are not seeking workers' compensation benefits, and they deny the existence of an implied-employment contract. (JA 87 [Dkt. 39-1 at 29].) *Benavidez* also did not apply, much less mention, the "economic reality" test. It has no application here.

IV. The District Court Properly Dismissed Plaintiffs' Unjust Enrichment Claim.

Plaintiffs do not dispute that, if the Court affirms the district court's dismissal of their FLSA claim, it should affirm the district court's dismissal of their derivative unjust enrichment claim. (Brief of Appellants at 30.)

CONCLUSION

For these reasons, the district court's Order should be affirmed.

RESPECTFULLY SUBMITTED this 9th day of January, 2020.

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