

The Honorable Robert J. Bryan

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UGOCHUKWU GOODLUCK  
NWAUZOR, FERNANDO AGUIRRE-  
URBINA, individually and on behalf of all  
those similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC., a Florida  
corporation,

Defendant.

No. 3:17-cv-05769-RJB

**PLAINTIFFS' OPPOSITION TO  
GEO'S MOTION FOR  
SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR:  
APRIL 1, 2020

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 Everything old is new again, as GEO’s summary judgment motion pushes legal  
3 arguments this Court has previously rejected. Now that discovery has closed and the record is  
4 complete, the time is ripe for the Court to rule definitively on those issues raised by GEO and  
5 Plaintiffs in their cross-motions for summary judgment. To that end, Plaintiffs request that  
6 the Court enter findings of fact pursuant to Rule 56(g) on those issues not genuinely in  
7 dispute, treating those facts as established in the case. Streamlining the case in this way will  
8 narrow the scope of issues for trial, promote judicial efficiency, and avoid juror confusion.

9 **II. RELEVANT BACKGROUND**

10 **A. Factual Background of the Work Program at NWDC.**

11 This is a class-action wage-and-hour lawsuit under the Washington Minimum Wage  
12 Act (MWA), RCW § 49.46 *et seq.* Plaintiffs discuss the specifics of GEO’s detainee work  
13 program at length in their cross-motion for summary judgment and incorporate those facts by  
14 reference here. *See* Dkt. 221 (Pltfs.’ Mot. for Summ. J.). What follows is an overview of those  
15 facts about which there are no genuine disputes when it comes to the worker program:

- 16 1. GEO owns and operates the Northwest ICE Processing Center (formerly known as the  
17 Northwest Detention Center). Dkt. 223-18 (Whitehead Decl., Ex. R (T. Johnson Decl.))  
18 at ¶¶ 7-8.
- 19 2. GEO contracts with U.S. Immigration and Customs Enforcement (ICE) to provide  
20 “detention management services including the facility, detention officers, management  
21 personnel, supervision, manpower, training certifications, licenses ... equipment, and  
22 supplies” for detainees awaiting resolution of immigration matters. Dkt. 223-2  
23 (Whitehead Decl., Ex. B (ICE Contract)) at 45.

- 1 3. NWDC presently has the capacity to hold 1,575 men and women. *Id.* at 2, 42.
- 2 4. Detention at NWDC is not penal or criminal in nature. *See* Dkt. 258 (Stipulation) at 3.
- 3 5. Under GEO’s contract with ICE, GEO must “develop” and “manage” a detainee work  
4 program. Dkt. 223-2 (Whitehead Decl., Ex. B (ICE Contract)) at 82.
- 5 6. The contract further provides that the “detainee work plan must be voluntary, and may  
6 include work or program assignments for industrial, maintenance, custodial service or  
7 other jobs... Detainees shall not be used to perform the responsibilities or duties of an  
8 employee of [GEO].” *Id.* at 82.
- 9 7. In developing and managing the detainee work program, GEO must “comply with all  
10 applicable laws and regulations.” *Id.* Other parts of the contract amplify this  
11 requirement, instructing GEO at least twice more that it must comply with all  
12 applicable federal, state, and local laws and standards. *Id.*; Dkt. 223-13 (Whitehead  
13 Decl., Ex. M (2011 PBNDS § 5.8 - VWP)) at § 5.8.II.5-6.
- 14 8. The contract requires GEO to comply with ICE’s national detention standards and “all  
15 applicable state, and local laws and standards. [And] [s]hould a conflict exist between  
16 these standards, the most stringent shall apply.” Dkt. 223-2 (Whitehead Decl., Ex. B  
17 (ICE Contract)) at 52.
- 18 9. Job assignments for detainee workers generally include kitchen and laundry workers,  
19 barbers, and various janitorial roles. Detainee workers request to take part in the  
20 program, and GEO’s classification department then assigns workers to specific work  
21 details. GEO requires no pre-existing skill for detainee workers to take part in the  
22 program, and workers do not have an opportunity to earn more (or less) depending on  
23 their skill, experience or initiative. GEO supervises the workers as they perform their  
24

1 various jobs, and ICE is not involved in the direct supervision of work. GEO provides  
2 all equipment and training necessary for detainee workers to do their jobs. GEO can  
3 and does terminate detainee workers for poor job performance.<sup>1</sup>

4 10. ICE’s national detention standards require GEO to pay detainee workers “at least \$1.00  
5 (USD) per day.” Dkt. 223-13 (Whitehead Decl., Ex. M (2011 PBNDS § 5.8 - VWP))  
6 at 407; Dkt. 223-14 (Whitehead Decl., Ex. N (2019 PBNDS § 5.8 – VWP)) at 177.

7 11. GEO has the option to pay more than \$1 per day to detainee workers and does so in  
8 some circumstances at NWDC and its other facilities. Dkt. 223-21 (Whitehead Decl.,  
9 Ex. U (GEO’s RFA Resp.)) at RFA Nos. 56 and 67; Dkt. 223-3 (Whitehead Decl., Ex.  
10 C (GEO 30(b)(6) Dep.)) at 95:2-96:15.

11 12. ICE and GEO internal documents show that ICE does not prohibit GEO from paying  
12 detainee workers more than \$1 per day. Dkt. 223-15 (Whitehead Decl., Ex. O  
13 (Classification Memo)); Dkt. 223-16 (Whitehead Decl., Ex. P (Aug. 27, 2014, Email,  
14 Howard to McHatton, *et al.*)).

15 13. GEO’s 30(b)(6) designee testified that GEO derives its understanding of how much it  
16 must pay detainee workers from its contract with ICE and ICE’s national detention  
17 standards. Dkt. 223-3 (Whitehead Decl., Ex. C (GEO 30(b)(6) Dep.)) at 92:2-23.

18 14. Detainee workers use money from the worker program to buy commissary goods, pay  
19 for phone calls, and attorneys, among other things. Dkt. 223-18 (Whitehead Decl., Ex.  
20 R (T. Johnson Decl.)) at ¶ 11; *see* Declaration of Jamal Whitehead in Support of

21  
22  
23 <sup>1</sup> The ins-and-outs of the work performed, and GEO’s control over and reliance upon the detainees’ labor, are not  
24 the subject of this motion, but these details are discussed at length in Plaintiffs’ summary judgment motion.

1 Plaintiffs' Opposition to GEO's Summary Judgment Motion ("Whitehead Opp.  
2 Decl."), Ex. 5 (Nwauzor Dep. at 94-96, 137-138).

3 15. ICE reimburses GEO at the rate of \$1 per day per detainee worker. GEO may not  
4 submit an invoice to ICE for a higher reimbursement rate without first seeking approval  
5 from ICE. Dkt. 223-2 (Whitehead Decl., Ex. B (ICE Contract)) at 5 ("Detainee  
6 Volunteer Wages for the Detainee Work Program. Reimbursement for this line item  
7 will be at the actual cost of \$1.00 per day per detainee. Contactor shall not exceed the  
8 amount shown without prior approval by the Contracting Officer."). GEO can request  
9 an Equitable Adjustment from ICE for operating the detainee work program. *See* Dkt.  
10 223-34 (Whitehead Decl., Ex. HH (GEO's Equitable Adjustment Request to ICE)).

11 16. GEO's Work Program serves no treatment, training, or other rehabilitative purpose for  
12 those who participate in it. *See* Dkt. 223-13 (Whitehead Decl., Ex. M (2011 PBNDS §  
13 5.8 - VWP)) at § 5.8.II (Expected Outcomes).

14 17. GEO cannot provide, and detainee workers cannot receive, any benefit other than \$1  
15 per day for participating in the Work Program at NWDC. (Whitehead Opp. Decl., Ex.  
16 7 (2011 PBNDS § 4.1 - Food Service) at § 4.1. II.13 ("Food shall never be used as a  
17 reward or punishment"); Dkt. 223-13 (Whitehead Decl., Ex. M (2011 PBNDS § 5.8 -  
18 VWP)) at 5.8.V.K (Compensation) ("Detainees shall receive monetary compensation  
19 for work completed in accordance with the facility's standard policy. The  
20 compensation is at least \$1.00 (USD) per day.").

21 **B. Factual Background About Other Work Programs for Civilly Confined**  
22 **People in the State of Washington.**

23 18. No operator of any civil detention or commitment space in Washington State operates  
24 a work program for detained individuals that includes among its stated purposes the

1 enhancement of essential facility operations. Whitehead Opp. Decl., Ex. 4 (Murphy  
2 Dep.) at 20:9-24 (listing range of skills work programs are intended to build) and 24:1-  
3 7 (“We don’t have work programs that are designed to support the facility.”).

4 19. Work programs in state-operated civil commitment centers and hospitals operate as  
5 part of an individualized, case-manager-approved treatment or rehabilitation plan, or a  
6 vocational training plan, for the benefit of detained individuals. *Id.* at 32:9-17;  
7 Whitehead Opp. Decl., Ex. 3 (Holt Dep.) at 18:4-20, 28:11-24, 44:15-17; Whitehead  
8 Opp. Decl., Ex. 7 (Wells Dep.) at 10:25-11:12; Whitehead Opp. Decl. Ex. 1 (Eagle  
9 Dep.) at 51:20-52:12.

10 20. The State of Washington has never allowed a for-profit contractor to operate a work  
11 program inside the state that pays civilly confined individuals less than the Minimum  
12 Wage. Whitehead Opp. Decl., Ex. 2 (Eisen Dep.) at 10:25-11:1-10; 18:22-25.

13 21. The Washington State Department of Corrections (DOC) does not contract with any  
14 private corporation for the use of detainee labor. *Id.* at 21:1-10.

15 22. In Washington’s civil confinement facilities, the hours a patient works depend on the  
16 condition and needs of the individual worker. Whitehead Opp. Decl., Ex. 3 (Holt Dep.)  
17 at 11:9-15.

18  
19 **C. Relevant Procedural History.**

20 Plaintiffs filed this action on September 26, 2017. Dkt. 1. GEO moved to dismiss the  
21 Complaint soon after, arguing among other things that the MWA excludes from coverage any  
22 “resident, inmate, or patient of a state, county, or municipal correctional, detention” facility.  
23 Dkt. 8 (Motion) at 17-23. The Court denied GEO’s motion and held as follows:

24

1 Beginning with the statute itself, it is plain that the definition excepts  
2 residents of “state ... detention” facilities, not federal facilities. The  
3 Northwest Detention Center is a federal detention facility and thus does not  
fall under the exception. This conclusion is reinforced by Washington law  
narrowly construing exceptions in favor of the employee.

4 Dkt. 28 (Order, Dec. 6, 2017) at 13-14 (citations omitted).

5 GEO filed yet another motion to dismiss, arguing this time that GEO enjoys derivative  
6 sovereign immunity from suit as a government contractor. Dkt. 91 (Motion) at 11-20. The  
7 Court denied the motion without prejudice. Dkt. 113 (Order, Aug. 6, 2018) at 2. Likewise, in  
8 *Washington v. The GEO Group, Inc.*, the Court denied GEO’s motion to dismiss on derivative  
9 sovereign immunity grounds:

10 GEO’s motion for summary judgment, based on derivative sovereign  
11 immunity should be denied. GEO has not shown that it was directed to pay  
12 participants in the VWP only a \$1 for the relevant period. GEO has not  
13 shown that it had “no discretion in the design process and completely  
14 followed government specifications.” The State points out that GEO has, in  
the past, paid workers more than a \$1 a day and has the ability to, and has  
requested, changes to the contracts, including modifications to be  
reimbursed more than was originally agreed upon. GEO’s motion to for  
summary judgment based on derivative sovereign immunity should be  
denied.

15 Dkt. 288 at 9, *Washington v. The GEO Group, Inc.*, No. 3:17-cv-05806-RJB (W.D. Wash. Aug  
16 6, 2019).

17 Finally, GEO moved for summary judgment against the State of Washington, asserting  
18 that intergovernmental immunity barred Washington’s claims. Dkt. 149 in *Washington v.*  
19 *GEO*. The Court denied GEO’s motion, concluding that the MWA “does not discriminate  
20 against the Federal Government” because it “is neutral on its face.” *Id.*, Dkt. 162. Recently,  
21 however, the Court revisited the subject, to clarify that “The doctrine of intergovernmental  
22 immunity has not been shown, on the motion for summary judgment, to shield Defendant from  
23 application of the Minimum Wage Act.” *Id.*, Dkt. 322 in *Washington v. GEO*.

24

1 **III. LEGAL ARGUMENT**

2 **A. Standard of Review.**

3 The parties have filed cross-motions for summary judgment and agree on one thing:  
4 there are no genuine issues of material fact and the Court can decide the outcome of this case  
5 as a matter of law. *See* Fed. R. Evid. 56(c). Here, the record taken as a whole could not lead a  
6 rational jury to find in GEO’s favor on its motion, and thus, its motion must be denied. *See*  
7 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

8 On denying summary judgment, the Court has discretion to enter an order identifying  
9 those facts that are not genuinely in dispute and treating them as established in the case—i.e.,  
10 effectively entering summary adjudication as to those facts. Fed. R. Civ. P. 56(g). This rule  
11 allows courts to “salvage some of the judicial effort” that went into the court’s denial of the  
12 motion for summary judgement; and (2) to “streamline the litigation process by narrowing the  
13 triable issues.” *D’Iorio v. Winebow, Inc.*, 68 F. Supp. 3d 334, 356 (E.D.N.Y. 2014).

14 The record before the Court is complete on the matters addressed below, and the time  
15 is ripe to identify those issues not fairly in dispute and boil this case down to size.

16 **B. Neither the Residential Nor “Government-Owned Facility” Exemptions  
17 Apply to GEO.**

18 Washington has a “long and proud history of being a pioneer in the protection of  
19 employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582, 586 (Wash. 2000). The  
20 Minimum Wage Act was enacted to “establish[ ] a minimum standard for wages, hours, and  
21 working conditions of *all employees in this state, unless exempted herefrom....*” Wash. Sess.  
22 Laws, Ch. 294, § 12 (1959) (emphasis added). The MWA states in pertinent part that an  
23 “employee” is “any individual employed by an employer...” RCW 49.46.010(3). “An  
24 ‘[e]mployer’ is any individual or entity ‘acting directly or indirectly in the interest of an

1 employer in relation to an employee.” *Anfinson v. FedEx Ground Package Sys.*, 281 P.3d 289,  
2 297 (Wash. 2012) (quoting RCW 49.46.010(4)). And “[e]mploy’ includes to permit work.”  
3 *Id.* (quoting RCW 49.46.010(2)). The Washington Supreme Court has held that “[t]aken  
4 together, these statutes establish that, under the MWA, an employee includes any individual  
5 permitted to work by an employer. *This is a broad definition.*” *Id.* (emphasis added). And the  
6 Act, as remedial legislation, is to be construed broadly in favor of coverage. *Id.* at 299.

7 Exemptions from the MWA, however, are narrowly construed and applied only to  
8 situations that are “plainly and unmistakably consistent with the terms and spirit of the  
9 legislation.” *Id.* (internal quotations omitted); *see Tift v. Prof'l Nursing Servs., Inc.*, 886 P.2d  
10 1158, 1161 (Wash. Ct. App. 1995) (“Exclusions pertaining to MWA coverage should be  
11 construed strictly in favor of the employees so as not to defeat the broad objectives for which  
12 the act was passed.”). “[T]he employer bears the burden of proving this ‘exempt’ status.”  
13 *Drinkwitz*, 996 P.2d at 587.

14 Here, GEO argues in favor of two exemptions, but the Court has already found one to  
15 be inapposite and the other is not only inapplicable, but untimely.

16 **1. GEO has not previously asserted the “Residential Exemption” and**  
17 **has therefore waived it as an affirmative defense.**

18 For the first time in the two-and-a-half year history of this litigation, GEO argues that  
19 Plaintiffs and members of the class are excluded from coverage under the “residential  
20 exemption” to the MWA. Mot. at 6-9. As a threshold matter, GEO has waived any claim to the  
21 exemption. This is because, to lay claim to the exemption, it must have been pleaded as an  
22 “affirmative defense.” *See David v. Bankers Life & Cas. Co.*, C14-766RSL, 2018 WL  
23 3105985, at \*4 (W.D. Wash. June 25, 2018) (analyzing MWA exemptions pleaded as  
24 affirmative defenses); *Mitchell v. Pemco Mut. Ins. Co.*, 142 P.3d 623, 625 (Wash. Ct. App.

1 2006) (same); *Bostain v. Food Express, Inc.*, 111 P.3d 906, 909 (2005), *rev'd on other grounds*,  
 2 *Bostain v. Food Exp., Inc.*, 153 P.3d 846 (2007) (same); *see also Corning Glass Works v.*  
 3 *Brennan*, 417 U.S. 188, 196-97 (1974) (“[T]he application of an exemption under the Fair  
 4 Labor Standards Act is a matter of affirmative defense on which the employer has the burden  
 5 of proof.”); *see also Drinkwitz*, 996 P.2d at 586 (MWA and FLSA may be read *in pari materia*).

6 GEO’s failure to raise the defense until now constitutes waiver. Fed. R. Civ. P. 8(c),  
 7 12(b), 12(g); *Magana v. Com. of the N. Mariana Islands*, 107 F.3d 1436, 1445 (9th Cir. 1997)  
 8 (exemption under FLSA is an “affirmative defense that must be pleaded and proved by the  
 9 defendant,” and “district court erred by allowing the Defendant to raise the [waived] defense  
 10 in a motion for summary judgment without first determining whether the delay caused  
 11 prejudice to [the plaintiff].”); *see also Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d  
 12 820, 825 (9th Cir. 2011) (California overtime exemption is an affirmative defense that must be  
 13 pled by the employer); *Helton v. Factor 5, Inc.*, 26 F. Supp. 3d 913, 920-21 (N.D. Cal. 2014)  
 14 (prohibiting defendants’ FLSA exemption defense due to delay in raising it and prejudice to  
 15 plaintiffs who had no opportunity to conduct discovery on the issue).

16 Permitting GEO to raise the defense now—near the time of trial and months after the  
 17 discovery cutoff—will prejudice Plaintiffs because there is insufficient time to respond prior  
 18 to trial, take discovery on the issue, or file briefing with the Court. Because GEO has not given  
 19 Plaintiffs fair notice of its defense, the Court should consider it waived.

20 **2. The “Residential Exemption” is inapplicable because Plaintiffs’ job**  
 21 **duties do not require them to sleep or reside at NWDC.**

22 Even on the merits, GEO’s claim to the residential exemption fails. The Court’s inquiry  
 23 stops and starts with the plain language of the exemption:

24 “Employee” ... shall not include:

1 ...

2 (j) Any individual *whose duties require* that he or she reside or sleep at the  
3 place of his or her employment or who otherwise spends a substantial  
4 portion of his or her work time subject to call, and not engaged in the  
5 performance of active duties.

6 RCW 49.46.010(3)(j) (emphasis added); *see Lake v. Woodcreek Homeowners Ass’n*, 243 P.3d  
7 1283, 1288 (Wash. 2010) (“If the statute is unambiguous after a review of the plain meaning,  
8 the court’s inquiry is at an end.”).

9 GEO argues the exception is met simply “because detainees at the NWDC reside (and  
10 sleep) at the NWDC,” Mot. at 9, but GEO’s reading ignores an unmistakable and critical  
11 qualifier: the individual’s job duties must require that he or she reside at his or her place of  
12 employment. In other words, the exemption is met only where the employee’s job duties  
13 require them to sleep onsite. Lest there be any doubt about the plain-language—and common  
14 sense—reading of the residential exemption, the Washington State Department of Labor and  
15 Industries offers the following policy guidance:

16 Employees whose job duties require them to reside at the place of  
17 employment are exempt from both the minimum wage and overtime  
18 requirements. *Merely residing or sleeping at the place of employment does  
19 not exempt individuals from the Minimum Wage Act.* In order for individuals  
20 to be exempt, *their duties* must require that they sleep or reside at the place  
21 of their employment.

22 Washington Department of Labor & Industries, Minimum Wage Act Applicability, ES.A.1  
23 (Jul. 15, 2014) at 6(j), p. 5, available at <https://lni.wa.gov/workers-rights/docs/esal.pdf> (last  
24 visited on Mar. 16, 2020) (emphasis in original and added).

25 GEO counters this with a cribbed analysis of the Washington Supreme Court’s decision  
26 in *Berrocal v. Fernandez*, 121 P.3d 82 (Wash. 2005). In *Berrocal*, the court decided whether  
27 two shepherders were entitled to overtime or exempt from the MWA under the residential

1 exemption. At issue was a different modifying phrase within the exemption (i.e., “not engaged  
2 in the performance of active duties”) and its effect on the exemption as a whole. *Id.* at 85-86.  
3 At no point did the *Berrocal* court address the qualifier at issue here (i.e., “whose duties require  
4 that he or she reside or sleep at the place of his or her employment”). And contrary to GEO’s  
5 suggestion, the court did not hold that an employee residing or sleeping at his place of  
6 employment—standing alone—was enough to satisfy the exemption. To hold otherwise would  
7 create another category of excluded worker from the MWA, and no Washington court has so  
8 held.

9 This is likely because it is so obvious when the requirement is met (or not). For  
10 example, in *Berrocal*, the shepherders’ labor contracts required them to reside on site and “be  
11 available 24 hours per day, 7 days per week” because their duties included “feeding the sheep,  
12 attending to sheep that are injured or sick, and guarding the sheep from predatory animals,”  
13 requiring them to be available “at all hours of the day and night.” *Id.* at 588-89.

14 Similarly, in *Strain v. W. Travel, Inc.*, 70 P.3d 158, 160 (Wash. Ct. App. 2003)—  
15 another case cited by GEO—the residential exemption operated to exclude the plaintiff, a  
16 cruise ship customer service representative, from coverage. The plaintiff’s job duties included  
17 “attend[ing] to passenger needs, assist[ing] with meal service, and ensur[ing] vessel  
18 preparation,” which necessarily required him to “to sleep on board during cruises.” *Id.* at 253.

19 This Court has addressed the “residential exemption” on at least one occasion, holding  
20 that the exemption applied because the plaintiffs were undisputedly “*required to sleep*” at work  
21 because of their job duties. *Park v. Choe*, C06-5456RJB, 2007 WL 2677135, at \*6 (W.D.  
22 Wash. Sept. 10, 2007) (emphasis added). In *Park*, the plaintiffs worked as caregivers at an  
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1 adult family home, and their duties involved washing, bathing, feeding, and caring for residents  
2 around the clock, which required them to live on premises. *Id.*

3 Here, unlike the plaintiffs in *Berrocal*, *Strain*, and *Park*, whose job duties required them  
4 to sleep at their places of employment, the jobs performed by Plaintiffs and members of the  
5 class *did not* require them to spend the night at NWDC. Indeed, cooking, cleaning, laundry,  
6 and working in the barbershop are not 24/7 affairs requiring workers to live on site. And as the  
7 State of Washington argues in its separate action against GEO, all of the jobs performed by  
8 detainee workers could have been performed by Tacoma residents living outside the facility.  
9 Plaintiffs and members of the class came to “reside” at NWDC only by virtue of their uncertain  
10 immigration status and the circumstances of their civil detention, not because their labor was  
11 needed on-demand to maintain the facility.<sup>2</sup>

12 **3. The Court previously ruled that the State-Owned Facility**  
13 **exemption did not apply to GEO, and there has been no change in**  
14 **circumstances warranting the Court to reverse course.**

15 Next, GEO argues that Plaintiffs are excepted from employee status as “resident[s],  
16 inmate[s], or patient[s] of a state, county, or municipal correctional, detention, treatment or  
17 rehabilitative institution.” Mot. at 9. As an initial matter, the Court has already considered and  
18 rejected this argument on at least three occasions. Dkt. 28 at 13-14 (“Beginning with the statute  
19 itself, it is plain that the definition excepts residents of ‘state ... detention’ facilities, not federal  
20 facilities. The Northwest Detention Center is a federal detention facility and thus does not fall  
21 under the exception.”); Dkt. 29 at 17 in *Washington v. GEO*; Dkt. 162 at 6 in *Washington v.*

22  
23 <sup>2</sup> GEO’s preferred reading of the statute would create a perverse incentive for employers (e.g., warehouse  
24 operators, hotels, etc.) to “require” their employees to sleep on site, thus skirting the MWA’s requirements and  
creating modern-day versions of the old “company towns.”

1 GEO (“importantly, this exclusion does not extend to residents, inmates or patients of private  
2 entities....”).

3 GEO fails to address the Court’s previous rulings, much less argue that the Court’s  
4 earlier decisions were clearly erroneous. Under the law of the case doctrine, “a court is  
5 generally precluded from reconsidering an issue that has already been decided by the same  
6 court, or a higher court in the identical case.” *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.  
7 1993).

8 The Court should not reverse itself on GEO’s faulty arguments.<sup>3</sup> GEO argues for an  
9 expansive definition of “state” to include federally run facilities, but “[w]here a statute  
10 specifically designates the things or classes of things upon which it operates, an inference arises  
11 in law that all things or classes of things omitted from it were intentionally omitted by the  
12 legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude  
13 implication.” *Wash. Natural Gas Co. v. Public Util. Dist. No. 1*, 459 P.2d 633, 636 (Wash.  
14 1969). Moreover, reading “state” broadly to include any government-owned facility, as GEO  
15 urges, would violate another basic rule of statutory construction by rendering the terms “county  
16 or municipal” in the statute mere surplusage. But even if the Court read the term “state”  
17 broadly, the exception still would not apply because GEO is a privately owned and run facility.  
18 Contorting the plain language of the exemption to include privately-held, for-profit  
19 corporations like GEO, effectively creates a new exemption under the MWA and would be  
20 antithetical to basic canons of statutory construction.

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23 <sup>3</sup> GEO grossly misstates the holding from *Calhoun v. Washington*, 193 P.3d 188 (Wash. App. Ct. 2008), as GEO  
24 neglects to explain that the civil detainees in question resided in a State of Washington owned and run facility,  
unlike Plaintiffs here, who resided at a privately-owned facility—the NWDC.

1 GEO argues the state-owned facility exemption is a matter of perspective: “the  
2 definition of ‘employee’ describes certain individuals who are exempt from the definition of  
3 employee—not certain types of entities that are not considered employers.” Mot. at 11. But  
4 this legal sleight of hand negates the function of the preposition linking the individual to the  
5 type of facility (i.e., “resident ... *of* a state ... institution.”). Thus, the exemption does not apply  
6 to just any resident, inmate, or patient. Nor does it apply to any state-owned facility. Rather,  
7 taken as a whole, as it must be read, the exemption applies to residents *of* a state-owned facility.  
8 Because the plain terms of the exemption are not met, GEO’s motion must be denied.

9 **C. GEO Advances the Same Intergovernmental Immunity Arguments this**  
10 **Court Previously Rejected, Offering the Court Nothing New to Consider.**

11 Twice now this Court has rejected calls to dismiss MWA claims against GEO based on  
12 intergovernmental immunity, finding most recently that “[t]he doctrine ... has not been shown,  
13 on the motion for summary judgment [before the Court at the time], to shield [GEO] from  
14 application of the Minimum Wage Act.” Dkt. 162 at 9 and Dkt. 322 at 2 in *Washington v.*  
15 *GEO*. There has been no intervening change in law since the Court’s previous order, and the  
16 fact discovery that has occurred since reveals how different GEO’s operations are from  
17 similarly situated private contractors in Washington. The Court should once again resist GEO’s  
18 call to commit reversible error and enter findings of fact precluding further argument and  
19 wasted time at trial on an issue not reasonably in dispute.

20 **1. The MWA does not directly regulate the Federal Government.**

21 This time around, GEO argues for immunity by ignoring the basics and nuances of the  
22 intergovernmental immunity doctrine. At bottom, the doctrine holds that a “state regulation is  
23 invalid *only* if it regulates the United States directly or discriminates against the Federal  
24 Government or those with whom it deals.” *North Dakota v. United States*, 495 U.S. 423, 434-

1 35 (1990) (emphasis added). The Supreme Court takes a “functional approach” to claims of  
2 intergovernmental immunity that “accomodate[s] the full range of each sovereign’s legislative  
3 authority.” *Id.* at 434-35. Under this approach, a state law may impose burdens on the federal  
4 government without raising constitutional concerns so long as it regulates federal suppliers or  
5 contractors in a non-discriminatory manner. *Id.* This is because any such burdens “are but  
6 normal incidents of the organization within the same territory of two governments.” *Id.* at 435  
7 (internal citations omitted).

8 So when GEO argues that “the federal government (and GEO) will face both an  
9 economic and administrative burden” if the MWA is applied to the detainee worker program,  
10 it fails to establish the type of direct regulation or interference required to trigger immunity.  
11 Mot. at 19-20. Indeed, *North Dakota* makes plain that a state law *does not* run afoul of  
12 intergovernmental immunity merely because a generally applicable state regulation “make[s]  
13 it more costly for the Government to do its business.” 495 U.S. at 434. The Supreme Court  
14 “decisively rejected” arguments like GEO’s more than a half-century ago, deeming the notion  
15 “thoroughly repudiated.” *Id.* Likewise, the Supreme Court explained that a law does not  
16 implicate intergovernmental immunity where it “is imposed on some basis unrelated to the  
17 object’s status as a [federal] Government contractor” and is “imposed equally on other  
18 similarly situated constituents of the State.” *Id.* at 438.

19 Thus, proper analysis considers whether the terms of the challenged state law are a  
20 “direct and intrusive regulation by the State of the Federal Government.” *Blackburn v. United*  
21 *States*, 100 F.3d 1426, 1435 (9th Cir. 1996). And as it relates to the MWA, this Court has  
22 already answered this query in the negative:  
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1 The state minimum wage arguably relates indirectly to federal government  
2 activities—the Federal Government and its contractors may employ persons  
3 within the State of Washington—but the MWA does not regulate the  
Federal Government directly, and, in fact, imposes no duty on the Federal  
Government itself.

4 Dkt. 162 at 7 in *Washington v. GEO* (citations omitted).

5 Even so, GEO persists with readily distinguishable case law in its quest for immunity.  
6 For example, GEO returns to *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014), but this  
7 Court previously distinguished its holding from the case at bar. Dkt. 162 at 7 in *Washington v.*  
8 *GEO*. GEO fails to acknowledge, never mind argue against, the Court’s previous analysis.  
9 GEO also turns to *Blackburn*, for cover, but it is equally inapposite. In *Blackburn*, the plaintiff  
10 sued the United States, claiming that the National Park Service failed to provide more specific  
11 warnings against diving off a bridge in Yosemite National Park. 100 F.3d at 1428-29. The  
12 plaintiff argued in relevant part that the California Resort Act subjected the federal government  
13 to suit because it failed to place warning signs and safety ropes in compliance with the Act. *Id.*  
14 at 1435. The court dismissed the plaintiff’s claim on intergovernmental immunity grounds,  
15 among other reasons, because the state law purported to regulate the Federal Government’s  
16 operations on Federal Government property. *Id.* But here, the MWA regulates neither a federal  
17 actor nor facility in GEO and the NWDC.

18 Because the MWA does not directly regulate the federal government’s conduct, the  
19 doctrine of intergovernmental immunity does not apply.

20 **2. The MWA does not discriminate against the Federal Government.**

21 When a state law is alleged to operate discriminatorily, courts apply intergovernmental  
22 immunity with “restraint,” meaning that “[t]he nondiscrimination analysis should not ‘look to  
23 the most narrow provision addressing the Government or those with whom it deals’” because  
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1 even “[a] State provision that appears to treat the Government differently on the most specific  
2 level of the analysis may, in its broader regulatory context, not be discriminatory.” *In re Nat’l*  
3 *Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 903-04 (N.D. Cal. 2007) (quoting  
4 *North Dakota*, 495 U.S. at 438). “Applying these principles, the [Supreme] Court has required  
5 that regulations be imposed equally on all similarly situated constituents of a state and not  
6 based on a constituent’s status as a government contractor or supplier.” *Id.* at 903 (citing *United*  
7 *States v. County of Fresno*, 429 U.S. 452, 462-64 (1977)).

8 a. *The proper comparator for GEO is a similarly situated private*  
9 *contractor.*

10 As a threshold matter, proper comparison requires a proper comparator. GEO argues  
11 “the WMWA discriminates against the federal government (and its contractors), by providing  
12 exceptions to the definition of ‘employee’ for state detainees, but not federal detainees,” thus,  
13 setting out a comparison between state and federal detainees. Mot. at 19-20. But this ignores  
14 the key distinction that animates this dispute: GEO is a contractor operating a privately-owned  
15 facility. Under these circumstances, the proper comparator for GEO is not the State of  
16 Washington, but rather a similarly situated private contractor doing business with the State.

17 The case law GEO cites to argue otherwise is unavailing. First, in *Dawson v. Steager*,  
18 139 S.Ct. 698 (2019), West Virginia exempted certain state law enforcement employees from  
19 taxes on their pensions, but taxed the benefits for a similarly situated federal law enforcement  
20 retiree. *Id.* at 703-04. There were no significant differences between the job responsibilities of  
21 the federal retiree and those of the tax-exempt state retirees, but the state’s treatment differed  
22 depending on the source of the benefits. *Id.* Under the circumstances, the Supreme Court had  
23 “little difficulty” concluding that West Virginia’s law unlawfully discriminated against  
24 similarly situated federal retirees. *Id.* Nowhere in *Dawson*, however, did the Supreme Court

1 suggest that the proper comparison was between a privately-employed retiree and the state  
2 government itself.<sup>4</sup>

3 Likewise, GEO's reliance on *United States v. California*, 921 F.3d 865 (9th Cir. 2019),  
4 is also misplaced. There, the Ninth Circuit analyzed intergovernmental immunity challenges  
5 to three separate California statutes. *Id.* at 872-73. The court rejected the United States' claims  
6 of immunity on all three statutes, with the lone exception of a single subsection in one statute,  
7 and even then, only to the extent that it "d[id] not merely replicate" the generally applicable  
8 inspection requirements for all detention facilities. *Id.* at 883. The only intergovernmental  
9 immunity issue existed where that subsection imposed unique, heightened, and specialized  
10 requirements on "federal operations—and only federal operations." *Id.* at 882-83.

11 GEO makes one final attempt to muddy the waters on this point by reading the MWA  
12 definitions for "employee" and "employer" in isolation to argue the MWA does not cover  
13 individuals in the custody of the State or federal government. Mot. at 21. But why should these  
14 terms be read in a vacuum? GEO does not say, but its suggestion is at odds with the Washington  
15 Supreme Court's commandment that MWA definitions be "taken together" as a whole to  
16 determine whether an employment relationship exists. *Anfinson*, 281 P.3d at 297; *see also John*  
17 *Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (When  
18 examining the language of a "governing statute, [courts are] guided not by a single sentence or  
19 member of a sentence, but look[ing] to the provisions of the whole law, and to its object and  
20 policy."). And unless an express statutory exemption applies, the MWA's terms read together

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23 <sup>4</sup> GEO also discusses *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 817 (1989), but like *Dawson*, the Supreme  
24 Court held in *Davis* that a state law violated principles of intergovernmental tax immunity by favoring retired  
state and local government employees over federal employees. This underscores that the proper comparison is  
between individuals dealing with state and individuals who deal with the federal government.

1 hold that private employers across the state are subject to Washington’s minimum wage laws.  
2 See RCW 49.46.010(3)(a)-(p) (enumerating limited exceptions to minimum wage  
3 requirements); *Dep’t of Labor & Indus. v. Lanier Brugh*, 147 P.3d 588, 592-95 (Wash. 2006)  
4 (applying Washington’s minimum wage laws to federal contractor).

5 b. *The MWA treats private-contract facilities the same regardless*  
6 *of where the underlying contract lies.*

7 The MWA does not discriminate against the federal government or GEO because it  
8 imposes equal burdens upon privately run detention facilities whether the underlying contract  
9 lies with the State of Washington or the federal government. See *Washington v. United States*,  
10 460 U.S. 536, 544-45 (1983) (A “[s]tate does not discriminate against the Federal Government  
11 and those with whom it deals unless it treats someone else better than it treats them.”). As this  
12 Court previously found, the plain language of the MWA singles-out neither the federal  
13 government nor contractors like GEO for less preferential treatment:

14 At its core, and by design, the MWA protects employees and prospective  
15 employees in Washington generally, placing private firms that contract with  
16 the Federal Government on equal footing with all other private entities. The  
17 MWA expressly excludes as employees, “[a]ny resident, inmate, or patient  
18 of a state, county, or municipal correctional, detention, treatment or  
19 rehabilitative institution,” but, importantly, this exclusion does not extend  
20 to residents, inmates or patients of private entities, which, again, remain on  
21 equal footing. If the word “federal” was added to the subsection (3)(k)  
22 exception (e.g., “state, county, municipal or federal . . . institution”), the  
23 MWA exception still would not apply to residents of a private institution,  
24 like the NWDC. It therefore cannot be said that the MWA “meddl[es] with  
federal government activities indirectly by singling out for regulation those  
who deal with the government.”

Dkt. 162 at 6 in *Washington v. GEO* (citations omitted).

21 The Court’s inquiry must stop here because intergovernmental immunity focuses on  
22 the specific terms of the challenged state law and not whether there is in fact perfect compliance  
23 with the law. See, e.g., *North Dakota*, 495 U.S. at 435 (courts must examine “the entire  
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1 regulatory system” for discrimination and not focus on particular claims “in isolation”);  
2 *California*, 921 F.3d at 872-73 (analyzing what requirements legal provisions imposed upon  
3 facilities holding immigration detainees and other facilities); *United States Postal Serv. v.*  
4 *Berkeley*, C 16-04815-WHA, 2018 WL 2188853, at \*4 (N.D. Cal. May 14, 2018) (rejecting  
5 United States’ reliance on fact that Postal Service was only entity currently affected by neutral  
6 ordinance as basis for asserting that ordinance was discriminatory, calling such a “sweeping  
7 theory” unsupported and explaining that under that theory, “it would be virtually impossible  
8 to impose any regulation—no matter how objective or sincerely neutral—on a group of  
9 constituents that happened to include the federal government or those with whom it deals”); *In*  
10 *re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 904 (rejecting attempt to  
11 focus on the individual investigation as “treat[ing] the Government differently” because “the  
12 regulatory regime as whole treats any unauthorized disclosure the same”).

13 So even assuming *arguendo* that GEO established Washington state contractors pay  
14 detainee workers subminimum wages, it has succeeded only in showing that other private  
15 entities, like GEO, have violated the plain terms of the MWA.

16 c. *Washington maintains no private contracts in the state that*  
17 *provide for the payment of subminimum wages.*

18 Although the Court need not reach the question to dispose of GEO’s intergovernmental  
19 immunity claim, GEO has identified no other private contractor that owns and operates a  
20 facility within Washington where the residents work for subminimum wages (i.e., a proper  
21 comparator). Instead, GEO analogizes to the Special Commitment Center (“SCC”) and the  
22 Pierce County Jail. Mot at 5. But both facilities are government-owned placing them squarely  
23 within the express terms of an MWA exemption. *See* RCW 49.46.010(3)(k). GEO mentions in  
24 passing that certain services at government institutions are provided by private companies,

1 such as food services. But none of the private companies GEO references own and operate a  
2 detention facility in Washington, like GEO does. Thus, they are not proper comparators either.

3 GEO even refers to a contract it held for a time with the State of Washington, but it  
4 glosses over many of the details. Mot. at 4-5. Washington contracted with GEO between  
5 approximately May 2015 and August 2018 to house criminal offenders *out of state* on an as-  
6 needed basis if the State's facilities were full. Whitehead Opp. Decl., Ex. 2 (Eisen Dep.) at  
7 6:11-15, 10:25-11:6, 16:3-7, 17:5-10, 17:25-18:25). The state never housed anyone at a GEO  
8 facility and the contract expired. *Id.* In fact, the last time Washington held an individual for  
9 detention or incarceration at a facility run by a private contractor was in 2009. *Id.*

10 Based on the foregoing, the Court should rule as a matter of law that intergovernmental  
11 immunity does not apply to GEO. Moreover, now that discovery is complete and GEO has  
12 failed to identify an appropriate comparator or any evidence to suggest the State of Washington  
13 uses private contractors for detention services, let alone that it allows such contractors to pay  
14 subminimum wages, the Court should enter findings of fact that GEO's operations at the  
15 NWDC are treated no differently than any other private detention facility in Washington.

16 **D. Derivative Sovereign Immunity Does Not Bar Plaintiffs' Claims.**

17 This Court previously held that derivative sovereign immunity does not bar Plaintiffs'  
18 claims, and since the Court's order issued, GEO has adduced no new facts demonstrating  
19 otherwise. "Government contractors obtain certain immunity in connection with work which  
20 they do pursuant to their contractual undertakings with the United States," but immunity is not  
21 absolute and will not attach where a contractor's discretionary actions creates the contested  
22 issue. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016); *Cabalce v. Thomas E.*  
23 *Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (derivative sovereign immunity  
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1 is limited to cases in which a contractor “had no discretion in the design process and completely  
2 followed government specifications.”).

3 GEO’s claim to derivative sovereign immunity is premised entirely on its contract with  
4 ICE and the PBNDS. Mot. at 23. While ICE requires GEO to operate a worker program, ICE  
5 does not dictate the types of jobs detainee workers must be assigned. *See generally* Dkt. 223-  
6 13 (Whitehead Decl., Ex. M (2011 PBNDS § 5.8 - VWP)). ICE did not direct GEO to use  
7 detainee workers to perform labor critical to the NWDC’s operations. *Id.* Moreover, ICE did  
8 not instruct GEO to pay detainee workers only \$1 per day for their labor. *See* Dkt. 223-18  
9 (Whitehead Decl., Ex. R (T. Johnson Decl.)) at ¶¶ 8, 12, 13 (affirming that the GEO-ICE  
10 contract “do[es] not designate *how* a contractor is to perform the work” but rather establishes  
11 expected outcomes, that GEO maintains discretion in developing and implementing the VWP,  
12 and that “detainees who participate in the VWP shall receive no less than \$1 per day for their  
13 participation”) (emphasis in original). Instead, ICE instructs GEO to comply with  
14 Washington’s labor laws—including the MWA. *See* Dkt. 223-2 (Whitehead Decl., Ex. B (ICE  
15 Contract)) at 48 and 86. These facts are all fatal to GEO’s derivative sovereign immunity claim  
16 because they lay bare that GEO’s discretionary actions have given rise to this suit.

17 GEO’s arguments about *Cunningham v. Gen. Dynamics Information Tech., Inc.*, 888  
18 F.3d 640 (4th Cir. 2018), do not persuade otherwise. In *Cunningham*, the plaintiff claimed  
19 *Yearsley* immunity did not apply because the government contractor violated the Telephone  
20 Consumer Protection Act (TCPA), as well as a contract provision requiring it to “follow  
21 applicable laws.” *Id.* at 647. The Fourth Circuit contrasted this situation with the government  
22 contractor’s actions in *Campbell-Ewald*. *Id.* at 648 (citing 136 S. Ct. at 667). Both cases  
23 involve suits under the TCPA against private contractors who contacted individuals on behalf  
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1 of federal government agencies using a list of names the government provided. In  
2 *Cunningham*, the agency did not direct the contractor to obtain consent from individuals in  
3 compliance with the TCPA. 888 F.3d at 647. In *Campbell-Ewald*, on the other hand, the  
4 contract expressly provided that TCPA compliance was the contractor's responsibility, and the  
5 agency's approval of lists containing the recipients depended on the contractor first  
6 investigating and obtaining their consent. *Id.* at 647-48 (citing 136 S. Ct. at 673-74). The  
7 contractor in *Cunningham* enjoyed derivative sovereign immunity, while the contractor in  
8 *Campbell-Ewald* did not.

9 GEO's predicament is unlike that of either contractor. In both *Cunningham* and  
10 *Campbell-Ewald*, the government instructed the contractor to contact individuals, a task that  
11 ultimately triggered TCPA claims. Here, the federal government has not set, authorized, or  
12 approved a specific rate of pay for GEO to compensate detained immigrants at the NWDC,  
13 except that GEO must pay them *at least* \$1 per day. The specific performance authorization  
14 and instructions the federal government provided in both TCPA cases are thus absent from  
15 GEO's contract.

16 Finally, GEO relies upon a provision in the ICE Contract that bars GEO from utilizing  
17 detainee labor to complete duties meant to be performed by GEO employees to argue that  
18 detainee workers cannot possibly be employees for purposes of Washington's MWA. Mot. at  
19 21. But the facts of the case show that GEO is violating that prohibition. As GEO itself admits,  
20 GEO uses detainee workers to complete its own contractual duties. *Compare* Dkt. 223-2  
21 (Whitehead Decl., Ex. B (ICE Contract)) at 57-58, 83 (listing GEO's responsibilities as  
22 ensuring the facility is "clean and vermin/pest free"; laundering, changing, and distributing  
23 linens; and preparing meals), *with* Dkt. 223-21 (Whitehead Decl., Ex. U (GEO's RFA Resp.))

1 at RFA Nos. 23-44 (confirming the VWP jobs available at the NWDC include cleaning  
2 common areas, doing laundry, and preparing food). To the extent GEO argues that *no* detainee  
3 can work lawfully at the NWDC because ICE permits GEO to employ only U.S. citizens and  
4 persons “lawfully admitted,” GEO provides no evidence that all detainees would be  
5 disqualified. To the contrary, not every detainee is “illegal or undocumented.” *Cf* Dkt. 223-2  
6 (Whitehead Decl., Ex. B (ICE Contract)) at 7. Detainees are held at the NWDC pending a  
7 determination on their immigration status and may be authorized to work notwithstanding  
8 detention.<sup>5</sup> *See* 8 U.S.C. § 1226(a) (authorizing detention “pending decision on whether the  
9 alien” is removable).

10 The Court has given GEO ample opportunity to develop evidence establishing its  
11 derivative sovereign immunity claim, but all of the evidence discovered to date shows that  
12 GEO’s discretionary choices act as a bar to immunity. The Court should confirm as a matter  
13 of law that derivative sovereign immunity does not apply, and exclude argument and hearsay  
14 evidence at trial related to ICE’s “intent” or directives to GEO. Such argument and evidence  
15 are likely to confuse the issue and mislead the jury and risk wasting an extraordinary amount  
16 of time conducting a trial within a trial about the meaning of the ICE Contract.

#### 17 IV. CONCLUSION

18 For the foregoing reasons, Plaintiffs respectfully request that the Court deny GEO’s  
19 summary judgment motion, and enter findings of fact and conclusions of law to streamline  
20 what will otherwise become a lengthy and unwieldy trial.

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<sup>5</sup> At trial, Plaintiffs expect to introduce expert testimony from Christopher Strawn about the work authorization  
24 eligibility of detained persons generally at NWDC.

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RESPECTFULLY SUBMITTED this 27th day of March, 2020.

SCHROETER GOLDMARK & BENDER

*s/ Jamal Whitehead*

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2020, I electronically filed the foregoing, together with its supporting pleadings and attachments thereto, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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