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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN TACOMA

CHAO CHEN,)	
)	
Plaintiff,)	No. CV17-5769RJB
)	
v.)	
)	
THE GEO GROUP,)	
)	
Defendant.)	
)	
and)	
)	
STATE OF WASHINGTON,)	
)	
Plaintiff,)	
)	
v.)	
)	
THE GEO GROUP, INC.,)	
)	
Defendants.)	

MOTION HEARING

August 2, 2018

BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES:

For the Plaintiff:

**Andrew Free
LAW OFFICE OF R. ANDREW FREE
Adam J Berger
Jamal Whitehead
SCHROETER GOLDMARK & BENDER**

For the Defendants:

**Mark Emery
NORTON ROSE FULBRIGHT
Joan Mell
III BRANCHES LAW**

09:28:53AM 1 MS. MELL: Good morning, your Honor.

09:28:56AM 2 THE COURT: This is further in Nwauzor versus
09:29:04AM 3 GEO, No. 17-5769, and comes on for oral argument on three
09:29:09AM 4 pending motions.

09:29:14AM 5 Ms. Mell and Mr. Emery are here for the defendants.
09:29:18AM 6 Let's see, Mr. Free, Mr. Whitehead, and Mr. Berger are
09:29:26AM 7 here for plaintiffs.

09:29:28AM 8 A couple of housekeeping matters first. Mr. Chen was
09:29:40AM 9 dismissed as a plaintiff in the case. He is still on the
09:29:45AM 10 record as a defendant in the counterclaim. Is that
09:29:54AM 11 intentional or should he be dismissed from the case?

09:29:59AM 12 MS. MELL: Your Honor, GEO's position --

09:30:02AM 13 THE COURT: Wait a minute. You need to speak
09:30:04AM 14 right into the mic.

09:30:06AM 15 MS. MELL: GEO's position is that Mr. Chen should
09:30:10AM 16 remain as a counterdefendant.

09:30:13AM 17 THE COURT: Okay. That's not the subject of
09:30:20AM 18 today's issues, I just wanted to raise the issue because
09:30:25AM 19 it wasn't clear to staff.

09:30:27AM 20 There have been a couple of late matters filed,
09:30:41AM 21 including a letter from ICE, and then the other one a
09:30:49AM 22 declaration from a Tae Johnson, the last being filed just
09:31:00AM 23 this morning. Have those things been served on counsel?
09:31:07AM 24 Do you have those?

09:31:11AM 25 MR. FREE: We do, your Honor.

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09:31:14AM 1 THE COURT: I have read -- I had the week off
09:31:20AM 2 last week, almost. I spent part of that week sitting on a
09:31:26AM 3 deck out on Hood Canal reading stuff, including everything
09:31:34AM 4 filed on these three motions. And then I have reviewed
09:31:43AM 5 since then a good deal of what is in the files. That's a
09:31:50AM 6 lot of reading. This case is way too paper heavy at this
09:32:03AM 7 point.

09:32:05AM 8 Be that as it may, I have read a lot. We have
09:32:10AM 9 discussed it and worked on it in chambers, as well. I set
09:32:16AM 10 this oral argument to give you the opportunity to tell me
09:32:21AM 11 whatever you think is appropriate to say or to argue on
09:32:29AM 12 the issues raised by these three motions. I would ask
09:32:35AM 13 that you limit your comments to 20 minutes a side.

09:32:47AM 14 In the order of filing, the plaintiffs' motions are
09:32:55AM 15 older than the defendants' motion for class certification,
09:33:01AM 16 so I assume you go first.

09:33:23AM 17 MR. WHITEHEAD: Yes, your Honor. I am sorry.
09:33:26AM 18 I'm unclear as to the order.

09:33:29AM 19 THE COURT: You need to speak into the mic. You
09:33:32AM 20 will break your back if you lean over. Just remain seated
09:33:36AM 21 and tell me what's on your mind.

09:33:38AM 22 MR. WHITEHEAD: I just want to make sure that I
09:33:39AM 23 am clear as to the order. Are you asking for plaintiffs
09:33:42AM 24 to argue their class certification motion?

09:33:44AM 25 THE COURT: They made the motion first. They can

09:33:49AM 1 argue -- They're all three motions. Anybody can argue
09:33:56AM 2 within the time limits whatever you want to argue about
09:33:58AM 3 those three motions. I am mindful that plaintiffs' motion
09:34:05AM 4 and the defendants' motion regarding class certification
09:34:09AM 5 are on the same subject.

09:34:11AM 6 MR. WHITEHEAD: Then, your Honor, we will go
09:34:13AM 7 first.

09:34:14AM 8 MS. MELL: No. He said --

09:34:15AM 9 THE COURT: You won't go first, because they
09:34:18AM 10 filed first, the motion to deny class certification.

09:34:23AM 11 MR. WHITEHEAD: All right. Thank you, your
09:34:25AM 12 Honor.

09:34:26AM 13 MR. EMERY: Good morning, your Honor. My name is
09:34:29AM 14 Mark Emery of the GEO Group. I would ask if the court
09:34:37AM 15 would reserve five minutes for rebuttal.

09:34:39AM 16 THE COURT: The time is yours. Keep track of it
09:34:41AM 17 yourself.

09:34:42AM 18 MR. EMERY: Your Honor, this is the first
09:34:44AM 19 opportunity I have had to speak with you on these cases.
09:34:47AM 20 I am counsel for the GEO Group in all of the detainee work
09:34:53AM 21 cases that are currently pending right now, in Colorado,
09:34:56AM 22 both the cases before your Honor, and in California, as
09:34:58AM 23 well. So I am very aware of the importance of the issues
09:35:01AM 24 that are sitting before the court today, and the fact that
09:35:04AM 25 we put a lot of paper in front of you.

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09:35:07AM 1 The issues I would like to cover are, first of all,
09:35:13AM 2 the immunity issue, Yearsley immunity. I will probably
09:35:18AM 3 spend most of my time on that.

09:35:20AM 4 I would like to say a few things further about the
09:35:23AM 5 issue of employment, the nature of the employment in
09:35:24AM 6 question. I will say I have reviewed the past hearing
09:35:29AM 7 transcripts and read very carefully your Honor's questions
09:35:32AM 8 that you put forward.

09:35:33AM 9 And I also recognize the importance of the class
09:35:35AM 10 certification issue, because you are the first court to
09:35:38AM 11 consider whether a minimum wage claim would be certified
09:35:41AM 12 for a class. The Menocal case is older, but that, in
09:35:47AM 13 fact, was dismissed in that case.

09:35:47AM 14 To begin with the Yearsley immunity: The federal
09:35:54AM 15 government delegates authority to contractors to carry out
09:35:57AM 16 a number of its different missions, including federal
09:36:01AM 17 immigration detention. The Yearsley doctrine provides
09:36:07AM 18 that when the government authorizes a contractor to take
09:36:11AM 19 certain actions, it directs the contractor, and that
09:36:14AM 20 authorization is valid, the contractor is entitled to
09:36:20AM 21 immunity.

09:36:21AM 22 What we are talking about here is the Voluntary Work
09:36:24AM 23 Program. What is distinctive about this case is that the
09:36:29AM 24 only claim is a minimum wage claim. The plaintiffs are
09:36:34AM 25 essentially alleging that we are liable under the

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09:36:39AM 1 Washington Minimum Wage Act for doing exactly what the
09:36:43AM 2 government has told us to do.

09:36:45AM 3 Now, I want to get into the details of that
09:36:48AM 4 authorization and try to make it as clear to you as I can
09:36:53AM 5 why we think we have that authorization and are cloaked in
09:36:58AM 6 immunity.

09:36:58AM 7 One sort of very preliminary remark: When you read
09:37:01AM 8 the nature of the pleadings in this case and the
09:37:03AM 9 arguments, the plaintiffs have gone forward as if they are
09:37:07AM 10 sort of exposing some deep secret that GEO has at the
09:37:13AM 11 Northwest Detention Center, in the way it runs its
09:37:17AM 12 program, the truth could not be further apart.

09:37:20AM 13 What we do is straight up according to the policies
09:37:26AM 14 that ICE put forward in the terms of our contract. We
09:37:29AM 15 operate the Voluntary Work Program in broad daylight. I
09:37:36AM 16 would like to begin with a brief discussion of those
09:37:38AM 17 standards.

09:37:39AM 18 If you don't mind, I will put a couple of things up.
09:37:42AM 19 These are all materials that are in the record. So we
09:37:50AM 20 begin with Section 5.8 of the Voluntary Work Program.
09:37:54AM 21 This is from ICE's national standards.

09:37:56AM 22 The first thing I would point to here is No. 1, where
09:37:59AM 23 it outlines three different kinds of facilities. ICE
09:38:02AM 24 operates three different kinds of facilities: An SPC,
09:38:06AM 25 which ICE runs directly, and two different kinds of

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09:38:09AM 1 contract facilities, CDFs and IGSA. The one that is at
09:38:13AM 2 issue is a CDF. The same policies apply at all of these
09:38:19AM 3 different facilities.

09:38:20AM 4 Second, if you look down at 5.8(1)(b) here, you see
09:38:24AM 5 that this is listed as an expected outcome. Number one,
09:38:30AM 6 "Detainees may have opportunities to work," and so on, as
09:38:37AM 7 described here, within the constraints of what we are
09:38:39AM 8 doing at a detention facility.

09:38:42AM 9 Flipping over to Section 5(a), again, this is
09:38:47AM 10 mandatory language, "Detainees shall be provided the
09:38:51AM 11 opportunity to participate in a Voluntary Work Program."

09:38:57AM 12 Now we move to the relevant portions of the contract.
09:39:07AM 13 This is from Page 82 of the contract. We see that one of
09:39:12AM 14 the directives that ICE gives to GEO is to manage --

09:39:16AM 15 THE COURT: Can you erase those arrows that are
09:39:19AM 16 not --

09:39:22AM 17 MR. EMERY: How do I do that? That is
09:39:26AM 18 distracting. Thank you.

09:39:27AM 19 And I thought it might be worthwhile, very quickly,
09:39:32AM 20 just looking at the particular language of this case. So
09:39:34AM 21 the first sentence, "Detainee labor shall be used in
09:39:38AM 22 accordance with the detainee work plan developed by the
09:39:42AM 23 contractor, and will adhere" --

09:39:43AM 24 THE COURT: Just a minute. You are getting ahead
09:39:45AM 25 of me here. I don't know where you are looking at,

09:39:49AM 1 Page 82. I have a copy of the contract here. All right.

09:39:58AM 2 MR. EMERY: This is Page 82 of the contract.

09:40:03AM 3 "Detainee labor shall be used in accordance with the
09:40:06AM 4 detainee work plan developed by the contractor, and in
09:40:09AM 5 accordance with the ICE PBNDS on the Voluntary Work
09:40:14AM 6 Program," which we just looked at.

09:40:16AM 7 So we are not hiding anything here. ICE tells us
09:40:19AM 8 that detainee labor shall be used. It shall be used in
09:40:23AM 9 accordance with its standards.

09:40:25AM 10 Continuing on, "The detainee work plan must be
09:40:28AM 11 voluntary, and may include work or program arrangements
09:40:32AM 12 for industrial, maintenance, custodial, service, or other
09:40:36AM 13 jobs."

09:40:38AM 14 What I would emphasize there is, we are not just
09:40:41AM 15 talking about detainees cleaning their cells, we are
09:40:46AM 16 talking about a wide range of things that ICE has directed
09:40:49AM 17 us to have detainees do.

09:40:52AM 18 Further, "The detainee work program shall not
09:40:55AM 19 conflict with other requirements of the contract, and must
09:40:57AM 20 comply with all applicable laws and regulations."

09:41:02AM 21 We understand that one of the allegations that the
09:41:06AM 22 plaintiffs make in this case is that this phrase somehow
09:41:09AM 23 encompasses the minimum wage law -- Minimum Wage Act.
09:41:18AM 24 This phrase needs to be read in the context of the
09:41:20AM 25 contract itself. One really need look no further than the

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09:41:24AM 1 very next sentence to understand why detainees aren't
09:41:29AM 2 GEO's employees.

09:41:30AM 3 The next paragraph begins, "Detainees will not be
09:41:34AM 4 used to perform the responsibilities or duties of an
09:41:37AM 5 employer" -- "of the contractor." So the contract
09:41:39AM 6 especially distinguishes between what detainees do, which
09:41:45AM 7 can be a number of different jobs at the facility, and
09:41:47AM 8 what employees do.

09:41:48AM 9 So moving on to the pay term, which I know is a key
09:41:52AM 10 issue that is in dispute here. Going back to the PBNDS,
09:41:58AM 11 I'm sure you are familiar with the language by now,
09:42:01AM 12 Subsection K of 5.8 states, "Compensation is at least \$1
09:42:07AM 13 U.S. per day. The facility shall have an established
09:42:10AM 14 system that ensures the detainees receive the pay owed
09:42:14AM 15 them before being transferred or released."

09:42:17AM 16 The authorization that ICE gives us is to pay at
09:42:19AM 17 least \$1 a day. We pay \$1 a day. This is the exact same
09:42:25AM 18 rate ICE pays at its own facility. This is the same rate
09:42:28AM 19 that's paid in all of the facilities, unless there is some
09:42:32AM 20 other arrangement made.

09:42:33AM 21 You will notice, too, the second sentence here, "The
09:42:36AM 22 facility shall have an established system that ensures
09:42:39AM 23 detainees receive the pay owed them before being
09:42:41AM 24 transferred or released." An important point that I hope
09:42:45AM 25 has come out in the briefing, and should come out in the

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09:42:47AM 1 declarations filed today, and other declarations we filed,
09:42:53AM 2 Mr. Kimble's in particular, is that GEO doesn't pay -- GEO
09:42:59AM 3 doesn't decide what to pay detainees.

09:43:01AM 4 THE COURT: They decided \$1 a day in their
09:43:06AM 5 worker's handbook.

09:43:07AM 6 MR. EMERY: Your Honor, ICE decides that it's \$1
09:43:10AM 7 a day, and we administer that.

09:43:13AM 8 THE COURT: Where does ICE say \$1 a day rather
09:43:19AM 9 than not less than \$1 a day?

09:43:23AM 10 MR. EMERY: We can look to another portion of the
09:43:25AM 11 contract here. Looking at the highlighted portion, this
09:43:35AM 12 is included in the same contract, "Detainee wages for the
09:43:39AM 13 detainee work program, reimbursement for this line item
09:43:42AM 14 via the actual cost of \$1 per day per detainee.
09:43:46AM 15 Contractor shall not exceed the amount shown without prior
09:43:49AM 16 approval by the contracting officer."

09:43:53AM 17 You can see that there are amounts put there. The
09:43:55AM 18 rate --

09:43:56AM 19 THE COURT: That's what you get reimbursed for.
09:44:00AM 20 How does that limit the pay?

09:44:03AM 21 MR. EMERY: That's the amount that ICE pays to
09:44:05AM 22 detainees. GEO's role in the payment --

09:44:10AM 23 THE COURT: You pay more than that in some
09:44:14AM 24 facilities, I understand.

09:44:17AM 25 MR. EMERY: I will address that in a moment. I

09:44:20AM 1 want to be clear what this provision says, which is that
09:44:24AM 2 ICE pays \$1 to detainees.

09:44:27AM 3 The term "reimbursement rate" may be a little bit
09:44:30AM 4 confusing. It is not a matter of ICE deciding to
09:44:35AM 5 reimburse and GEO being able to pay whatever it wants.
09:44:39AM 6 There is a rate that is set. There is an amount that can
09:44:43AM 7 be paid per year. That is the total amount, \$114,975.
09:44:48AM 8 This is what ICE has said, "GEO, you will pay this in a
09:44:52AM 9 year." So essentially a dollar a day, 114,000 of them.
09:44:58AM 10 This is providing 114,900 some daily opportunities --

09:45:03AM 11 THE COURT: What is to prevent you from deciding
09:45:06AM 12 the rate is going to be \$2 per day?

09:45:08AM 13 MR. EMERY: Per this exact provision, we have to
09:45:10AM 14 seek ICE's approval on that.

09:45:13AM 15 THE COURT: Why?

09:45:14AM 16 MR. EMERY: Because it says we shall not exceed
09:45:17AM 17 the amount without the approval of the contracting
09:45:19AM 18 officer. And there are clear --

09:45:24AM 19 THE COURT: Isn't that relative to reimbursement
09:45:31AM 20 rather than what you pay detainees?

09:45:40AM 21 MR. EMERY: I really encourage you to not get
09:45:43AM 22 hung up on the idea of reimbursement. This is ICE paying.
09:45:46AM 23 GEO does not pay the detainees. ICE pays the detainees.
09:45:51AM 24 We facilitate the payment.

09:45:52AM 25 THE COURT: I am curious about that. GEO set the

09:46:03AM 1 \$1 a day in the employee handbook. I guess I fail to see
09:46:19AM 2 why GEO can't pay more if they choose to out of the
09:46:24AM 3 goodness of their heart.

09:46:27AM 4 MR. EMERY: This is why, your Honor: GEO's
09:46:30AM 5 handbook notes a dollar a day, but GEO doesn't set that
09:46:34AM 6 rate. ICE sets that rate. For example, when detainees
09:46:37AM 7 enter the facility they are given a detainee handbook.
09:46:40AM 8 That detainee handbook, the one in 2014, when this class
09:46:44AM 9 action began, said, "Pay will be \$1 per day." That is ICE
09:46:49AM 10 telling every detainee in every facility, whether run by
09:46:53AM 11 ICE or run by us, that pay will be \$1 per day. This is
09:46:56AM 12 the rate that ICE sets.

09:46:58AM 13 As for why GEO wouldn't pay -- couldn't pay more, the
09:47:02AM 14 contract says we shall not exceed that amount without
09:47:05AM 15 ICE's approval.

09:47:07AM 16 There are clear reasons why ICE would want that to
09:47:09AM 17 happen. Your Honor, we are in a long-term contracting
09:47:14AM 18 relationship with ICE. Every dollar that comes from ICE
09:47:17AM 19 appropriations to detainees comes from U.S. taxpayers.
09:47:21AM 20 The government has an interest in knowing what's expended
09:47:25AM 21 on this. It sets limits on it. It is not going to allow
09:47:28AM 22 GEO to go pay higher rates.

09:47:31AM 23 Now, you will find in the declaration that was filed
09:47:34AM 24 this morning --

09:47:35AM 25 THE COURT: Wait a minute. Why would the

09:47:40AM 1 government not allow you to pay a higher rate? They won't
09:47:44AM 2 reimburse you for a higher rate, but why would they say
09:47:47AM 3 you can't pay a higher rate?

09:47:50AM 4 MR. EMERY: Look through this contract, the
09:47:54AM 5 government controls every aspect of what we do at the
09:47:56AM 6 facility. I mean, look at the line item -- You see the
09:48:02AM 7 line item here on the top: "Estimating travel costs,
09:48:07AM 8 including lodging and meals." You will see it has the
09:48:10AM 9 exact same language in there. You might use the same
09:48:13AM 10 logic, "Oh, why would the government care how much we
09:48:16AM 11 spend on lodging and meals?" But that exact same language
09:48:19AM 12 is in there. The amount that is allocated for it under
09:48:22AM 13 the contract shall not be exceeded without ICE's approval.
09:48:28AM 14 ICE wants to control these costs. ICE has an interest in
09:48:32AM 15 controlling these costs.

09:48:35AM 16 You will see in the declaration that was filed this
09:48:40AM 17 morning, which comes directly from ICE, in Paragraph 24,
09:48:46AM 18 explains those provisions, "The NWC contract sets the
09:48:51AM 19 quantity of \$1 reimbursements at 114,975 per option year.
09:48:54AM 20 GEO shall not exceed that quantity without prior approval
09:48:58AM 21 by the contracting officer. This approval can be sought
09:49:01AM 22 by GEO and would be memorialized through a bilateral
09:49:05AM 23 contract modification."

09:49:06AM 24 So the rate could be raised. If ICE decides that
09:49:12AM 25 U.S. taxpayers want to pay \$11 to detainees an hour, it

09:49:16AM 1 will pass through that amount to detainees, we'll make
09:49:19AM 2 sure they get paid that amount, and we go on. But it is
09:49:23AM 3 ICE that funds everything that happens at the detention
09:49:26AM 4 facility. We are a contractor.

09:49:30AM 5 That brings us back to the immunity point. We do all
09:49:34AM 6 of this within the scope of our authorization. If we
09:49:37AM 7 started paying a different amount, it actually would be
09:49:40AM 8 going in a different direction from our authorization. It
09:49:43AM 9 is in our interest to do what ICE directs us to do, which
09:49:46AM 10 ultimately is in conformity with what Congress has
09:49:51AM 11 directed.

09:49:51AM 12 That's the second part of the Yearsley test, whether
09:49:54AM 13 this authorization to run the VWP at the dollar per day
09:49:59AM 14 rate is validly authorized.

09:50:01AM 15 We have given you the text of this. The statute
09:50:04AM 16 bears close care, 1855(d). It is an old statute, but it
09:50:09AM 17 contains all of the language that is necessary to continue
09:50:11AM 18 to direct -- or to infallibly confer authority on ICE to
09:50:17AM 19 have us run the VWP at a dollar per day. It allocates
09:50:23AM 20 money from here and for after.

09:50:24AM 21 It says Congress may from time to time set a rate,
09:50:27AM 22 which it has done in different years. It seems to be an
09:50:31AM 23 item that was sort of stuck in the budget for a long time.
09:50:34AM 24 It no longer does.

09:50:35AM 25 Again, the declaration from ICE that we filed today,

09:50:38AM 1 particularly Paragraph 13, explains that Congress set this
09:50:42AM 2 rate, and that's what their rate continues to be. "Per
09:50:46AM 3 the terms of the contract, as well as authority provided
09:50:48AM 4 above, reimbursement for the Voluntary Work Program is \$1
09:50:53AM 5 per day per detainee."

09:50:54AM 6 The last point I want to make on the Yearsley
09:51:02AM 7 immunity is, by asking whether GEO can pay more on its
09:51:10AM 8 own -- this is really missing the point of what's
09:51:13AM 9 happening here, that this is the administration of a
09:51:17AM 10 government program. The government sets what terms the
09:51:21AM 11 U.S. taxpayers will pay for this.

09:51:23AM 12 Paragraph 19 of the declaration filed today says it
09:51:26AM 13 as clearly as can be said: "NWAC has implemented and
09:51:31AM 14 conforms to the current PBNDS. PBNDS requires that
09:51:36AM 15 detainees receive at least \$1 per day for work performed
09:51:40AM 16 in the VWP." That is exactly what we do. So we act
09:51:43AM 17 within the government's authorization, and therefore we
09:51:46AM 18 are entitled to immunity.

09:51:50AM 19 If your Honor has no other questions on immunity, I
09:51:53AM 20 will move to other issues.

09:51:54AM 21 THE COURT: Okay. Thank you.

09:51:58AM 22 MR. EMERY: A second point --

09:51:59AM 23 THE COURT: If you wanted to save some time --
09:52:05AM 24 Use your time as you choose, I guess.

09:52:13AM 25 MR. EMERY: As I said, your Honor, I did want to

09:52:21AM 1 touch on some of the broader issues of employment class
09:52:24AM 2 certification, but I imagine these are things I can
09:52:28AM 3 address later.

09:52:59AM 4 MR. FREE: Good morning, your Honor. My name is
09:53:09AM 5 Andrew Free, and I am appearing on behalf of the
09:53:12AM 6 plaintiffs in this case, along with my co-counsel Jamal
09:53:15AM 7 Whitehead. And Adam Berger is here with us, as well. I
09:53:19AM 8 am going to address Yearsley immunity, and Mr. Whitehead
09:53:23AM 9 will address the class certification questions in this
09:53:25AM 10 case that are before the court.

09:53:26AM 11 I will pick up with the court's question, which I
09:53:30AM 12 think is the critical one, and that is the difference
09:53:34AM 13 between a reimbursement rate that is set by the federal
09:53:37AM 14 government about how much ICE will pay GEO back for the
09:53:41AM 15 work that is performed by detained immigrants, and a pay
09:53:44AM 16 rate, which is what GEO is saying ICE has authorized it to
09:53:48AM 17 set. So it is the difference between the floor to the
09:53:51AM 18 ceiling.

09:53:51AM 19 We have Docket No. 101-1, 101-2, and 101-3, a
09:53:59AM 20 judicial admission that GEO can and does pay more than a
09:54:02AM 21 dollar at other facilities that it operates with contracts
09:54:05AM 22 with ICE. We've got examples of the invoices that GEO
09:54:09AM 23 sends to ICE documenting the reimbursement rate that ICE
09:54:14AM 24 will pay for, and the GEO billable rate that GEO pays when
09:54:18AM 25 it needs to have a higher rate in order to get detainees

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to do the jobs so that it can function. And we've got an example of a page from a GEO detainee manual at another one of its facilities.

The reason we filed those things is because the statements that have been made in briefing about a uniform national policy of only paying detainees \$1 a day are not factually accurate. Those statements are not true. There are dozens of facilities in this country, including at least three that I know of that are run by GEO, in which the contractor pays more, and the government approves it.

And that's as it should be. Because according to the declaration submitted by ICE today, this morning, that was received by GEO last night at 4:45 -- 4:42, GEO is responsible for designing and implementing the performance-based requirements, including the work program. That is in the contract language, at Page 82, that my friend pointed out to the court.

Throughout this declaration Mr. Johnson makes clear that the contractor is required for coming up with the work plan and determining how it is going to be run.

I can point the court to the paragraphs. I have only had a little bit of time to review it. It says explicitly, "Performance-based contracts do not designate how a contractor is to perform the work, but rather establishes the expected outcomes and results that the

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government expects." That's Paragraph 8.

Throughout this declaration, at Paragraph 9, at Paragraph 12, and Paragraph 13, the language is that of reimbursement. The answer to the question, "Why does it say a dollar as the reimbursement rate," is because it is the reimbursement rate.

The defendant does not address the key other provisions in the contract which require GEO to ascertain on a rolling basis what its legal requirements are, its state/local legal requirements, and comply with the most stringent standard.

In that respect, GEO is much more like the contractor in Campbell-Ewald versus Gomez, where the federal government said you have to make sure that you comply with the notification requirements before you attack somebody. It's like the contractor in Cunningham.

I think Salim is instructive here. In Salim the Eastern District of Washington reviewed claims of derivative sovereign immunity by contractors. It was key that those contractors had a discretionary role in formulating the way that the program worked. That destroyed Yearsley prong 1, which was the authorization. That discretion, that contractual delegation of authority to determine how it works, which we see in this declaration from ICE, the first time we have seen it, the

09:57:20AM 1 first time the court has seen it, that's the way GEO
09:57:24AM 2 operates at the Northwest Detention Center.

09:57:26AM 3 And it begs the question, if GEO can pay two or three
09:57:30AM 4 bucks at the south Texas facility, and the LaSalle
09:57:33AM 5 detention facility, why can't it pay 11 here?

09:57:37AM 6 There is no legal impediment from Congress. That is
09:57:41AM 7 black letter appropriations law. We cited it at Page 13
09:57:45AM 8 of our response. And appropriators will tell you that the
09:57:49AM 9 law is, an appropriations bill is valid for the period of
09:57:54AM 10 the appropriation.

09:57:55AM 11 Now, there is an authorization for payment of
09:57:57AM 12 detainees out of the lump sum allocation of money to DHS
09:58:03AM 13 every year. That is an authorization, okay -- it's the
09:58:05AM 14 authority that Congress has given ICE to pay.

09:58:08AM 15 But the appropriation is two parts. The
09:58:12AM 16 appropriation does not specify a wage rate, and it has not
09:58:17AM 17 since 1978. I think the court grasped that in its prior
09:58:21AM 18 rulings.

09:58:21AM 19 In 1939 the Supreme Court said that the government
09:58:24AM 20 does not become a conduit of its immunity in suits against
09:58:29AM 21 its agents and instrumentalities merely because they do
09:58:32AM 22 its work. That is the proposition that is before this
09:58:37AM 23 court on GEO's motion to dismiss on Yearsley immunity.
09:58:41AM 24 GEO is saying, "Because we have a contract with the
09:58:43AM 25 government, ipso facto, they blessed everything we are

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09:58:46AM 1 doing, they have authorized everything we are doing, and
09:58:48AM 2 that's enough. We are immune." That is simply not the
09:58:51AM 3 law.

09:58:52AM 4 OIG Document 18-67 was released June 26th, 2017.
09:58:58AM 5 That is the Department of Homeland Security's Office of
09:59:02AM 6 Inspector General. It is titled, "ICE's inspections and
09:59:06AM 7 monitoring of detention facilities do not lead to
09:59:09AM 8 sustained compliance or systemic improvements." The fact
09:59:13AM 9 that the contract -- the fact that GEO continues to
09:59:16AM 10 operate the facility does not equal ICE's authorization of
09:59:20AM 11 everything it does there.

09:59:22AM 12 So we think that GEO's motion fails at prong 1. And
09:59:27AM 13 we have discussed why at prong 2, ICE does not have the
09:59:31AM 14 authority to set a rate. And you will look in vain for
09:59:34AM 15 something in this declaration or the prior one that was
09:59:37AM 16 filed by Ms. Valerio -- We found out last night she's
09:59:42AM 17 actually serving as a paid consultant for GEO, and
09:59:45AM 18 submitted the declaration in violation, apparently, of the
09:59:48AM 19 agency's Touhy regulations, and I fear in violation of 41
09:59:52AM 20 U.S.C. 2104(a)(3). You will look in vain for something
09:59:56AM 21 that says, "Here is the delegation from Congress that says
09:59:59AM 22 \$1 a day this year." The last time that happened was in
10:00:02AM 23 1978.

10:00:03AM 24 This is an improper forum. This motion to dismiss is
10:00:07AM 25 an improper forum to resolve these issues. These are fact

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10:00:11AM 1 questions. I would love to depose Mr. Johnson. I would
10:00:14AM 2 love to depose Ms. Valerio. We have not had an
10:00:18AM 3 opportunity to do that yet. Ms. Valerio was subpoenaed,
10:00:21AM 4 and her testimony was replaced by some other ICE
10:00:26AM 5 officials. It was scheduled for Washington, D.C. We
10:00:28AM 6 later found out that the government was going to move to
10:00:30AM 7 quash those subpoenas. GEO issued them, and ICE was going
10:00:33AM 8 to move to quash them. We have not had an opportunity to
10:00:36AM 9 test these propositions through documented fact discovery.
10:00:40AM 10 And we should.

10:00:40AM 11 If you look at the cases on which GEO relies, they
10:00:44AM 12 are resolved on summary judgment, not a motion to dismiss
10:00:48AM 13 pre-depositions, pre-paper discovery.

10:00:50AM 14 An instructive case that we discovered after reading
10:00:53AM 15 GEO's reply is Anchorage versus Integrated Concepts and
10:00:58AM 16 Research, Inc. That is Judge Gleason in the District of
10:01:02AM 17 Alaska.

10:01:02AM 18 THE COURT: I'm sorry, Judge who?

10:01:07AM 19 MR. FREE: Judge Gleason. 1 F. Supp. 3d 1001.
10:01:12AM 20 And we point the court to Page 1012, particularly to Note
10:01:17AM 21 77.

10:01:18AM 22 Because this case is about derivative sovereign
10:01:22AM 23 immunity, we think that the court should at least consider
10:01:26AM 24 what courts have said about the nature of this defense, is
10:01:30AM 25 it a jurisdictional defense, like actual sovereign

10:01:33AM 1 immunity, the immunity of the sovereign, or is it a merits
10:01:37AM 2 defense? Is it a defense to liability? At Note 77 of
10:01:42AM 3 this decision Judge Gleason analyzes that, and concludes
10:01:44AM 4 it is the latter, it is a defense to liability, regardless
10:01:47AM 5 of the nomenclature courts have used.

10:01:50AM 6 Judge Walton in the District of Columbia, In Re Fort
10:01:54AM 7 Totten, 895 F.Supp. 2d 48 at Page 78, also discusses how
10:02:00AM 8 this is not actually a jurisdictional defense; it is
10:02:04AM 9 actually a liability defense.

10:02:05AM 10 And if you read Justice Ginsburg's opinion in
10:02:08AM 11 Campbell-Ewald, the manner in which she disposes of the
10:02:12AM 12 question, which is to take all inferences in a light most
10:02:16AM 13 favored to the plaintiff, and avoid summary disposition,
10:02:19AM 14 that is a summary judgment standard. She cites
10:02:26AM 15 Matsushiba, I believe.

10:02:27AM 16 Again, that would not be the case if it were
10:02:29AM 17 jurisdictional. The plaintiff would have the burden of
10:02:32AM 18 proving jurisdiction, as it does in a 12(b)(1) factual
10:02:35AM 19 attack. So we do not believe this is the proper forum to
10:02:38AM 20 resolve these questions.

10:02:39AM 21 And with that, your Honor, unless you have any
10:02:42AM 22 specific questions about Yearsley, I am going to hand it
10:02:44AM 23 over to Mr. Whitehead to discuss the class certification.

10:02:47AM 24 THE COURT: I might ask you, and the defense may
10:02:56AM 25 wish to respond to this -- if I can find my note. I

10:03:19AM 1 wondered about this in regard to the elements to prove
10:03:24AM 2 Yearsley immunity. The first thing is that the government
10:03:30AM 3 authorized the contractor's actions. Does that mean in
10:03:38AM 4 this setting that the government has to, for Yearsley to
10:03:44AM 5 apply, authorize a dollar a day, or does it mean the
10:03:51AM 6 government has to authorize the contractor to ignore the
10:04:00AM 7 state law?

10:04:01AM 8 MR. FREE: I think it is the latter, your Honor.
10:04:03AM 9 We would point the court to Meyers versus the United
10:04:06AM 10 States. That is a Ninth Circuit case from 1963. The cite
10:04:09AM 11 there is 323 F.2d 580, and it is at Page 583. The Ninth
10:04:18AM 12 Circuit looked at this authority prong and interpreted it
10:04:21AM 13 as, "in conformity with the terms of said contract."

10:04:26AM 14 So, in other words, it said the contractor is immune
10:04:29AM 15 so long as it is in conformity with the terms of the
10:04:32AM 16 contract. And once you fall out of conformity, you have
10:04:37AM 17 exceeded the authorization of the government to pay.

10:04:41AM 18 What we would contend in this case is that GEO is out
10:04:44AM 19 of conformity with the term of the contract that requires
10:04:46AM 20 it to continuously ascertain all applicable state and
10:04:50AM 21 local laws; and that by not applying the most stringent
10:04:54AM 22 law in the event of a conflict, specifically by not paying
10:04:58AM 23 minimum wage, it is acting outside the federal
10:05:00AM 24 government's authorization.

10:05:01AM 25 The court will look in vain for any paragraph in the

10:05:06AM 1 Johnson declaration filed this morning saying that ICE has
10:05:11AM 2 authorized GEO to violate Washington's Minimum Wage Act.
10:05:17AM 3 It is not there.

10:05:18AM 4 If the court has no further questions, we will
10:05:21AM 5 address the class cert.

10:05:35AM 6 MR. WHITEHEAD: Good morning, your Honor. GEO
10:05:47AM 7 relies upon civil immigration detainees participating in
10:05:53AM 8 the Voluntary Work Program to operate the Northwest
10:05:58AM 9 Detention Center on the Tideflats.

10:06:00AM 10 As the court knows, these VWP workers are only
10:06:04AM 11 compensated at the rate of \$1 a day. Looking at the
10:06:07AM 12 economic realities of the situation, we argue that an
10:06:10AM 13 employment relationship exists between GEO and the
10:06:13AM 14 detainee workers at the Northwest Detention Center, and,
10:06:18AM 15 further, that GEO violates the Washington Minimum Wage Act
10:06:22AM 16 by paying these workers sub-minimum wages.

10:06:26AM 17 GEO obviously disagrees with our position. But when
10:06:30AM 18 you look at the overarching questions in this case, they
10:06:35AM 19 are common and predominate over any individualized
10:06:38AM 20 questions. That being the case, the class vehicle is the
10:06:42AM 21 best way, the superior means, by which to resolve the
10:06:46AM 22 rights of hundreds of people, if not more, in one fell
10:06:51AM 23 swoop. So for that reason, we look to certify a class.

10:06:54AM 24 Rather than hustling through every element of
10:06:57AM 25 Rule 23(a) or 23(b) (3), I would like to quickly, in the

10:07:04AM 1 limited time that I have, address the remaining points,
10:07:07AM 2 the first of which is that GEO practically admits that
10:07:10AM 3 common questions abound and predominate.

10:07:13AM 4 We have heard in its first motion to dismiss, in the
10:07:16AM 5 context of the class certification motions, that there is
10:07:20AM 6 a threshold question, the question of whether or not work
10:07:24AM 7 authorization somehow precludes class certification if
10:07:29AM 8 there is a preemption issue. This is a rehash of GEO's
10:07:35AM 9 first motion to dismiss. In other words, they are arguing
10:07:37AM 10 the threshold question is, could an employment
10:07:40AM 11 relationship exist between the parties?

10:07:42AM 12 The court has already answered this question in the
10:07:44AM 13 context of the motion to dismiss, denying that motion.
10:07:47AM 14 And since then, the Central District of California has
10:07:51AM 15 revisited the issue and analyzed and found there is no
10:07:54AM 16 IRCA preemption.

10:07:55AM 17 Setting aside the fact that GEO is wrong on the law,
10:07:58AM 18 in the context of class certification, it simply does not
10:08:02AM 19 matter in the sense that there is an overarching question
10:08:05AM 20 that is common to the class that is capable of a common
10:08:08AM 21 answer. In that way the threshold question they have
10:08:11AM 22 identified supports and undergirds our contention that
10:08:14AM 23 there is a common overarching question that is capable of
10:08:18AM 24 a common answer in this case.

10:08:19AM 25 Not only that, once you get past what they have

10:08:22AM 1 identified as the threshold question of, could an
10:08:25AM 2 employment relationship exist, you then delve into whether
10:08:28AM 3 or not an employment relationship did in fact exist.

10:08:31AM 4 The Washington State Supreme Court has devised an
10:08:35AM 5 economic reality test, which is a multifactorial test that
10:08:39AM 6 looks at the nature of the relationship between the
10:08:41AM 7 parties. So when you are looking at the nature of the
10:08:43AM 8 relationship, you are asking yourself questions, for
10:08:45AM 9 example, who, when, where, what, and why of GEO's
10:08:50AM 10 authority. Who could participate in the volunteer work
10:08:52AM 11 program? Could they direct where and when they worked?
10:08:55AM 12 Did they control the means of the production? In this
10:08:58AM 13 instance, did they give them training? Did they give them
10:09:01AM 14 equipment? Did they set the pay rate of a dollar a day?
10:09:04AM 15 Does GEO rely upon the labor of the detainee workers to
10:09:09AM 16 support its operations? These are overarching questions
10:09:11AM 17 that are capable of a common answer.

10:09:13AM 18 Now, GEO will point to the granular aspects of the
10:09:17AM 19 daily tasks. They will say, "Well, the work that was
10:09:20AM 20 performed by the person that cleaned the kitchen is
10:09:22AM 21 different than the work that was performed by the person
10:09:24AM 22 that cleaned the bathroom."

10:09:25AM 23 They will point to security assessments: "Well, this
10:09:28AM 24 person is high risk, and therefore they are confined to
10:09:30AM 25 their pod," versus, "This person is deemed as a lower

10:09:34AM 1 security risk and has more free-ranging ability throughout
10:09:37AM 2 the facility."

10:09:38AM 3 At the end of the day, those are questions that do
10:09:40AM 4 not impact the scope of GEO's authority or the scope of
10:09:46AM 5 the economic relationship between the parties.

10:09:48AM 6 I mean, the relationship, however broad, however
10:09:51AM 7 narrow, would be the same, irrespective of the tasks that
10:09:55AM 8 are being performed on a daily basis.

10:09:58AM 9 The second point that I want to look at is the fact
10:10:01AM 10 that individual questions about damages do not predominate
10:10:07AM 11 over the common questions regarding liability. The cases
10:10:12AM 12 are legion. We cite them in our brief. Courts find in a
10:10:17AM 13 wage-and-hour context when there is a common scheme, and
10:10:21AM 14 the fact that there is a common question capable of a
10:10:24AM 15 common answer, the fact that there are individualized
10:10:27AM 16 damage inquiries does not somehow defeat class
10:10:30AM 17 certification. That is almost always going to be the case
10:10:32AM 18 in a wage-and-hour case, in that there are going to be
10:10:35AM 19 different damages apportioned to different class members.

10:10:37AM 20 The thing about a wage-and-hour case, of course, as
10:10:39AM 21 the court well knows, those damages lend themselves to
10:10:43AM 22 formulaic calculations. I mean, it is simply a matter of
10:10:46AM 23 math in terms of figuring out what those damages are. So
10:10:49AM 24 it does not necessarily defeat the overarching common
10:10:52AM 25 question with respect to liability.

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10:10:55AM 1 Not only that, as we point out in our briefing,
10:10:59AM 2 representative data may be used, sampling may be used to
10:11:03AM 3 help in the quest to calculate the actual damages.

10:11:06AM 4 The Supreme Court has endorsed this approach. In
10:11:09AM 5 looking at *Tyson Food v. Bouaphakeo*, there is the notion
10:11:13AM 6 that we can look to aggregate damages, meaning GEO's total
10:11:18AM 7 liability, as a matter of math in figuring out what the
10:11:21AM 8 total liability would be and then figuring out the
10:11:23AM 9 proportionate share of damages for individual class
10:11:26AM 10 members.

10:11:26AM 11 The last point that I would like to address is the
10:11:28AM 12 adequacy of the plaintiff, Fernando Aguirre-Urbina. There
10:11:36AM 13 has been a late -- I think it was titled as a supplemental
10:11:39AM 14 authority, that was submitted to the court, regarding his
10:11:42AM 15 medical records, and arguing from those records that he is
10:11:45AM 16 somehow an inadequate class representative.

10:11:48AM 17 I think, first and foremost, GEO has waived these
10:11:51AM 18 sort of arguments in that way, in that they did not
10:11:53AM 19 address it in their motion to deny class certification,
10:11:57AM 20 and did not address it squarely in their opposition to our
10:11:59AM 21 motion to certify. So I think waiver has occurred in that
10:12:02AM 22 way.

10:12:02AM 23 Even if the court were to consider their arguments,
10:12:04AM 24 what was true in the past of Mr. Aguirre-Urbina is
10:12:07AM 25 certainly not true today. We submitted in somewhat of,

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10:12:10AM 1 perhaps, an unusual step of giving the court the entire
10:12:13AM 2 transcript, as well as the video, so that you could see
10:12:15AM 3 for yourself that he withstood seven hours of very pointed
10:12:19AM 4 questions, at times very disdainful questioning, and
10:12:23AM 5 performed admirably. The question of adequacy is one as
10:12:26AM 6 to whether or not there is a conflict between the proposed
10:12:29AM 7 class rep and the class, and whether or not that person
10:12:31AM 8 will help in the prosecution of the case.
10:12:35AM 9 Mr. Aguirre-Urbina has done that ably in this matter.

10:12:38AM 10 Even to the extent -- assuming the court were to find
10:12:43AM 11 somehow that he was inadequate as a class representative,
10:12:46AM 12 well, he is one of two proposed class representatives. So
10:12:49AM 13 that issue alone would not preclude class certification in
10:12:52AM 14 this case.

10:12:53AM 15 In conclusion, what we are dealing with here, and you
10:12:57AM 16 see this in the performance-based national detention
10:13:01AM 17 standards, the contracts, and, frankly, from the argument
10:13:04AM 18 this morning, that we are dealing with a common scheme.
10:13:07AM 19 We are dealing with a common program as it relates to the
10:13:11AM 20 VWP workers which GEO administrates.

10:13:15AM 21 In that way, the class vehicle is well suited to
10:13:20AM 22 resolve the rights of these folks. So in that way, we
10:13:23AM 23 urge the court to certify a class. It would not be the
10:13:27AM 24 first court to do so, in the sense that in the District of
10:13:30AM 25 Colorado there was a class certified of detainee workers

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10:13:33AM 1 which was recently upheld by the Tenth Circuit.

10:13:37AM 2 Unless there are any further questions from the
10:13:38AM 3 court, I would conclude my remarks.

10:13:41AM 4 THE COURT: I may have some. Let's go ahead.
10:13:48AM 5 Defense counsel reserved some time. Excuse me. Did you
10:14:04AM 6 get the citations that counsel referred to as we went
10:14:09AM 7 along? Nathan Nanfelt is one of my law clerks. He is the
10:14:16AM 8 brains of the operation here. I sometimes wonder if
10:14:20AM 9 lawyers realize how much they are arguing to law clerks as
10:14:25AM 10 well as the judge. Anyway, go ahead.

10:14:29AM 11 MR. EMERY: Your Honor, there is a daunting
10:14:32AM 12 number of things to respond to here, but I think the first
10:14:34AM 13 thing -- just one thing to revisit on Yearsley immunity
10:14:39AM 14 is, again, to emphasize ICE pays the same amount at every
10:14:45AM 15 facility. There is no reason to treat us different as a
10:14:48AM 16 contractor. ICE funds the Voluntary Work Program because
10:14:54AM 17 it is its program. It is a national program. If you read
10:14:57AM 18 the declaration filed today, there is an emphasis
10:15:00AM 19 throughout that they want uniformity.

10:15:03AM 20 All of the paper that is put in this case -- They
10:15:06AM 21 come in and produce some, you know, blips here and there,
10:15:12AM 22 something from other cases. Let's talk about this case.
10:15:14AM 23 They have alleged we pay \$1 a day. That's what ICE tells
10:15:18AM 24 us to do. That's what we are authorized to do.

10:15:20AM 25 The second thing is to turn to the issue of

10:15:24AM 1 employment. This is an important moment, because if the
10:15:28AM 2 court allows these claims to go forward, and even
10:15:32AM 3 considers them for class certification, it is turning its
10:15:37AM 4 back on a considerable amount of agency experience and
10:15:42AM 5 history. ICE has been operating detention facilities
10:15:46AM 6 through contractors for decades. No state agency --
10:15:50AM 7 nobody has ever come forward to GEO and suggested that it
10:15:53AM 8 should be paying state-level minimum wages when Congress
10:15:57AM 9 has expressly said what the rate is for payment, and ICE
10:16:01AM 10 controls the money that goes to detainees.

10:16:05AM 11 I would point you in particular to the FLSA opinions,
10:16:09AM 12 that have gone back for decades, that draw a very simple
10:16:13AM 13 distinction: Are detainees entitled to minimum wage under
10:16:19AM 14 the FLSA? No. Why? Because they are not employees.
10:16:22AM 15 They work for purposes of institutional maintenance. They
10:16:25AM 16 are not out seeking a wage to help support themselves.

10:16:27AM 17 When the detainees are in a facility they are
10:16:30AM 18 supported, they have clothing, they have healthcare, they
10:16:33AM 19 have food. They are not the particular wage earner, and
10:16:36AM 20 they are not the recipient of the largess of state minimum
10:16:39AM 21 wage laws.

10:16:40AM 22 There is nothing in our contract that suggests that
10:16:43AM 23 ICE ever intended us to subject -- to have our detention
10:16:48AM 24 facilities and the VWPs run by the various different state
10:16:53AM 25 laws where ICE has facilities.

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This is the same rationale that the --

THE COURT: If that's the case, why is that provision in the contract regarding state and local laws?

MR. EMERY: Because there are a number of state laws that we are required to -- For example, there are different federal laws. The VWP complies with OSHA, with state labor laws. That has been expressed. There is definitely room for that. It doesn't mean that no state laws are relevant.

But on an issue on which Congress has expressly spoken, expressly set a rate, now and hereafter there is no -- there is simply no plausible understanding that ICE intended for state minimum wage laws everywhere it has facilities to set what that rate is.

I mean, if ICE had intended state minimum wages, which are at least 11, \$12 an hour, how does that make sense with the at least \$1 per day provision? Why would ICE have that provision, use that language, if it intended the state minimum wage laws would work at any given state?

There has been talk in the briefing and today about the economic reality test. Your Honor, there is only one economic reality that matters here. If Mr. Nwauzor, Mr. Aguirre, Mr. Chen, and likely just about anybody in their class, had come to GEO while they were detained and asked to become a GEO employee, they would have said, "No

10:18:30AM 1 chance to do so." Why? Because they were forbidden by
10:18:35AM 2 federal law from doing so by their detention status. They
10:18:37AM 3 either had criminal convictions, which would have
10:18:40AM 4 prohibited --

10:18:40AM 5 THE COURT: What if GEO is in fact, under an
10:18:43AM 6 economic reality test, employing these people? The law is
10:18:50AM 7 against the employer from employing people that are not
10:18:53AM 8 employable. It doesn't prevent any illegal immigrant from
10:19:00AM 9 working.

10:19:01AM 10 MR. EMERY: I understand your Honor's position on
10:19:03AM 11 that. What really is the reality --

10:19:05AM 12 THE COURT: It is not my position. It is a
10:19:07AM 13 question.

10:19:07AM 14 MR. EMERY: Okay. I understand the question.
10:19:09AM 15 What is the reality of saying that we treated them like
10:19:12AM 16 employees? We absolutely did not treat them as employees.

10:19:16AM 17 Do you know what our employees need to do to pass a
10:19:19AM 18 background check? Do you know the expectations of them to
10:19:22AM 19 be able to -- Our employees, we can tell them what to do,
10:19:25AM 20 when to show up for work, what to do.

10:19:28AM 21 Think of the typical detainee. ICE tells them when
10:19:31AM 22 to come to the facility, ICE says when they leave, ICE
10:19:35AM 23 says what classification level they can work at, which
10:19:37AM 24 drastically restricts the jobs they work. ICE even
10:19:41AM 25 decides on a shift-by-shift basis who can actually work in

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the program.

This is going back to Page 82 of the contract, where we were before. I would direct you to the very bottom paragraph on this page. It says, "It will be the sole responsibility of ICE to determine whether a detainee will be allowed to perform on voluntary work details and at what classification level." "The sole responsibility of ICE."

Mr. Kimble's declaration explains how this process works. There are kites that are put out, GEO puts together a list which is approved by ICE. ICE can take any single person off this list they want. How on earth is it the economic reality that GEO is the employer of any of these detainees? They are in federal immigration detention. They are in the federal government's custody. The federal government says what is done to them.

The very last thing, quickly, is class certification. Your Honor, the main thing I want to say here is we know so little about these claims. We know so little about them. You saw them rattle off, "Oh, we are going to do a model of this, we are going to do a model of that." The first gauntlet that any class member would have to do is to show that they are authorized to work for us when they are at --

THE COURT: Wait a minute. Wait a minute. Why

10:21:05AM 1 do they have to show that they are authorized to work when
10:21:08AM 2 in fact they are working?

10:21:12AM 3 MR. EMERY: They are not. They are voluntarily
10:21:15AM 4 participating in the Voluntary Work Program. GEO knows
10:21:19AM 5 who works for them, because they pass all of our
10:21:21AM 6 employment verification tests. None of these detainees
10:21:25AM 7 did. They performed work as the government said that they
10:21:27AM 8 could volunteer to do for a pay rate the government said
10:21:31AM 9 they could do.

10:21:32AM 10 If there is going to be a class, it is going to have
10:21:35AM 11 to be a class of people who actually were authorized to be
10:21:38AM 12 our employees. None of these folks were. None of the
10:21:40AM 13 named plaintiffs so far have met that. And they haven't
10:21:45AM 14 pointed to a single class member --

10:21:57AM 15 THE COURT: There are examples all over the
10:21:59AM 16 country of illegal immigrants who get work. And because
10:22:10AM 17 they are illegal, their employers pay them less than
10:22:15AM 18 minimum wage, because they think they can't complain.
10:22:22AM 19 There are instances where -- we see cases where people in
10:22:31AM 20 fact come into the country and are effectively enslaved
10:22:37AM 21 and required to work without pay. The Minimum Wage Act is
10:22:44AM 22 designed to protect the workers from being abused by
10:22:52AM 23 employers. Employers are the ones that are restricted
10:22:59AM 24 from hiring people that aren't qualified to work in the
10:23:03AM 25 country. But the workers are not so limited.

10:23:13AM 1 I guess what I'm leading up to is this: Isn't this
10:23:17AM 2 all a jury question? You guys asked for a jury, to my
10:23:21AM 3 great relief. Isn't it a jury question as to what the
10:23:27AM 4 employment relationship, if any, was, and how these
10:23:36AM 5 various contract provisions and legal provisions should be
10:23:41AM 6 applied?

10:23:44AM 7 MR. EMERY: It absolutely is not. Your Honor, I
10:23:46AM 8 appreciate the concern. I recognize that that is the
10:23:49AM 9 objective of a lot of state minimum wage laws. The folks
10:23:54AM 10 in the unfortunate position you are talking about are not
10:23:57AM 11 supported with food, and clothing, and healthcare, and
10:24:00AM 12 medical care at U.S. taxpayer expense.

10:24:04AM 13 THE COURT: Some of them get various benefits
10:24:06AM 14 from their employers.

10:24:08AM 15 MR. EMERY: They may. The Salas case is actually
10:24:12AM 16 quite a good case on this point, your Honor. Salas says
10:24:15AM 17 you may have to pay back -- an employer might have to pay
10:24:20AM 18 backpay if they sort of willfully ignore the detention
10:24:23AM 19 status of the detainee and employ them. Once it is
10:24:27AM 20 determined that they are unlawfully working, there is no
10:24:30AM 21 more obligation to pay backpay.

10:24:33AM 22 We know from the day they step into our facility they
10:24:36AM 23 are not employees. There is no work authorization, and
10:24:39AM 24 therefore no state minimum wage laws are going to apply.

10:24:44AM 25 We are in a different universe here. The detainees

10:24:49AM 1 aren't here because they are being exploited. The
10:24:51AM 2 detainees are here because they are in the federal
10:24:54AM 3 government's custody. If that's what the root issue is,
10:24:57AM 4 there is a complaint about their custody itself, and the
10:25:00AM 5 fact that they are in a federal detention facility, this
10:25:03AM 6 is entirely the wrong case. That's an action that should
10:25:06AM 7 be brought directly against the U.S. government, and not
10:25:08AM 8 its federal contractor. It is another reason why Yearsley
10:25:16AM 9 applies to us.

10:25:17AM 10 THE COURT: Thank you. Let me see if I have any
10:25:19AM 11 other questions I want to put to you. I had a list of
10:25:24AM 12 things.

10:25:32AM 13 MR. EMERY: Should I sit down or stay up?

10:25:35AM 14 THE COURT: Suit yourself, as long as you speak
10:25:39AM 15 into the mic when you talk to me. I guess the only
10:26:38AM 16 question I have is the process for authoring policies
10:26:53AM 17 listed in the detainee handbook. Can somebody fill me in
10:27:05AM 18 on that, what the process is?

10:27:08AM 19 MS. MELL: Your Honor, the position of GEO is
10:27:11AM 20 that the oversight on the PBNDS standards by Congress
10:27:18AM 21 requiring routine updates as to its implementation of
10:27:24AM 22 PBNDS standards have set a Congressional level of
10:27:28AM 23 authority to enforce those regulations.

10:27:31AM 24 THE COURT: I think you misunderstand my
10:27:34AM 25 question. I am talking about the process for preparing

10:27:40AM 1 the detainee handbook and the policies that are in the
10:27:46AM 2 handbook.

10:27:46AM 3 MS. MELL: From GEO's perspective?

10:27:49AM 4 THE COURT: No. No. Not from somebody's
10:27:52AM 5 perspective. What is the process?

10:27:54AM 6 MS. MELL: I am asking whether you are inquiring
10:27:56AM 7 of the PBNDS standards or GEO's standards?

10:28:01AM 8 THE COURT: You see, let me explain what I am
10:28:05AM 9 talking about. We have all this reference to not less
10:28:10AM 10 than a dollar a day, and then in the handbook it says \$1 a
10:28:16AM 11 day. It is not not less than. It says \$1 a day is what
10:28:19AM 12 they will be paid. My question is, what is the process to
10:28:25AM 13 get from the standards and the contract over to the policy
10:28:34AM 14 as stated in the handbook?

10:28:36AM 15 MS. MELL: Your Honor, there are two separate
10:28:38AM 16 handbooks. I just want to be clear. When the detainee
10:28:41AM 17 comes into the facility, they get the ICE national
10:28:45AM 18 detention standard detainee handbook. That says for those
10:28:49AM 19 detainees who have been participating within the requisite
10:28:54AM 20 period that we are talking about here shall receive \$1 a
10:28:57AM 21 day.

10:28:58AM 22 GEO, the detention facility, promulgates a second
10:29:02AM 23 detainee handbook that mirrors what is in the ICE
10:29:09AM 24 handbook. They just duplicate it. And then those are
10:29:13AM 25 both available in dual languages and disseminated to the

10:29:17AM 1 detainees at the facility.

10:29:19AM 2 So in terms of how it happens, GEO relies on the
10:29:23AM 3 detainee handbook that is provided by ICE.

10:29:29AM 4 MR. FREE: Paragraph 8 of the ICE declaration
10:29:31AM 5 filed this morning essentially says, on Page 3 of the
10:29:43AM 6 declaration, that the performance-based contracts, like
10:29:48AM 7 the one at Tideflats, don't designate how a contractor
10:29:52AM 8 performs the work, i.e., from the facility, but rather
10:29:55AM 9 establishes the expected outcomes and the results.

10:29:58AM 10 The national detainee handbook has never gone through
10:30:01AM 11 any sort of Congressional oversight. It is not
10:30:06AM 12 incorporated into the contract. The PBNDS is incorporated
10:30:11AM 13 into the contract, that says at least \$1 a day. The
10:30:14AM 14 national detainee handbook, to the extent it says "shall,"
10:30:17AM 15 is in conflict. But ICE says it's GEO. If you look at
10:30:21AM 16 the contract, the contractor -- the very first line of the
10:30:24AM 17 Voluntary Work Program section, the contractor is to
10:30:31AM 18 develop the work plan.

10:30:33AM 19 MS. MELL: Your Honor, I just want to point out
10:30:35AM 20 on this specific issue that ICE actually approves the
10:30:38AM 21 Northwest Detention Center's version of its detainee
10:30:41AM 22 handbook. It is reflected on the exhibit itself.

10:30:44AM 23 THE COURT: Okay. Thank you. As I indicated, we
10:30:49AM 24 have already done a lot of work on this. With all these
10:30:59AM 25 issues raised, as I indicated, it is partly a question of

10:31:04AM 1 what is the law that I should apply now and what are jury
10:31:15AM 2 questions that come later. That's part of the analysis we
10:31:21AM 3 have to deal with, I think, in coming to conclusions on
10:31:24AM 4 these motions.

10:31:27AM 5 I also wanted to say I am aware on the motion to
10:31:34AM 6 deny -- on the motion to dismiss the amended complaint
10:31:43AM 7 there are some issues that are revisited from the original
10:31:46AM 8 motion to dismiss. We have revisited those, even though
10:31:53AM 9 there is a question raised about whether they are properly
10:31:57AM 10 before the court. I felt I ought to look at them anew
10:32:02AM 11 anyway, which we have done. So that will be reflected in
10:32:08AM 12 the order we will issue.

10:32:10AM 13 Thank you very much. A lot of the same old, same old
10:32:20AM 14 stuff going on here. We will try and do an appropriate
10:32:26AM 15 analysis.

10:32:26AM 16 Do you have something further, Ms. Mell?

10:32:28AM 17 MS. MELL: Your Honor, I just was concerned that
10:32:31AM 18 there was at least some oral presentation by the
10:32:33AM 19 opposition as to the Tracey Valerio declaration. And it
10:32:37AM 20 is GEO's position that ICE has not instructed us to
10:32:39AM 21 withdraw the declaration, that the Touhy issue in play is
10:32:44AM 22 the application of 5 CFR 2635.805, which says that experts
10:32:51AM 23 like Tracey Valerio can testify as long as they are not
10:32:57AM 24 testifying in a case where it is a party. To the extent
10:33:01AM 25 we need to brief it --

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THE COURT: Ms. Mell, I read her declaration, and saw who she is and where she came from, and the contents of her declaration. I didn't think it made a whole lot of difference in anything. The same thing is true of the later ICE declaration, it just didn't add a lot to the issues I have to decide.

MS. MELL: Thank you, your Honor.

THE COURT: What you do about it, whose fault that was, who turned ICE on about that is not my concern.

MS. MELL: Thank you, your Honor.

THE COURT: Okay. Thank you.

(Proceedings adjourned.)

