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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. JUDGE JESUS G. BERNAL, JUDGE PRESIDING

RAUL NOVOA,)
)
Plaintiff,)
)
vs.) NO. EDCV17-2514-JGB
)
THE GEO GROUP, INC.,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Monday, May 14, 2018

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1 **Los Angeles, California; Monday, May 14, 2018;**

2 **9:30 A.M.**

3 **-oOo-**

4 THE CLERK: Calling Item 3 on the calendar, case
5 number ED CV 17-2514, *Raul Novoa versus the GEO Group, Inc.*
6 Counsel, please state your name for the record.

7 MR. FREE: Good morning, Your Honor. Andrew Free
8 for Mr. Novoa.

9 THE COURT: Good morning.

10 MR. EMERY: Good morning, Your Honor. Mark Emery
11 for the GEO Group.

12 THE COURT: Good morning.

13 So this is -- this case is really interesting, and
14 it presents some novel questions of law which appears to be
15 questions of first impression, at least in this circuit.

16 So I've read the papers, and I guess where I'm
17 stuck on, and where I need a little help from you in
18 deciding is whether or not this wage order that has to do
19 with -- I guess it's Wage Order No. 5, as cited in the
20 supplemental briefing -- pertains to the detainees in a
21 civil context by a private entity that is running an
22 immigration detention facility.

23 So I saw the cases from Colorado in the Fifth
24 Circuit which pretty clearly state that as to detainees --
25 first of all, this *Menocal versus GEO Group*, those pertain

1 to immigration detainees, do they?

2 MR. FREE: Yes, Your Honor.

3 THE COURT: And that court, which is a district
4 court in Colorado, in 2016 determined that, at least under
5 Colorado law, that those detainees were not employees for
6 purposes of Colorado minimum wage law?

7 MR. FREE: That's correct, Your Honor.

8 THE COURT: You have to stand when you speak.

9 How is this case distinguishable from that? Not
10 that I'm bound by that, but I want to know if you think it's
11 distinguishable.

12 MR. FREE: Sure, Your Honor. To begin, the order
13 on which Judge Kane relied in *Menocal* was a Colorado order
14 pertaining to inmates, prison inmates, in the Colorado
15 Department of Corrections system and in Colorado's jails.

16 THE COURT: So you think that decision was wrongly
17 decided?

18 MR. FREE: I do.

19 THE COURT: And because of that distinction, you
20 think there's a distinction to be made between people who
21 are held pursuant to a commission of crimes as opposed to
22 persons who are in civil detention?

23 MR. FREE: Precisely.

24 THE COURT: Why should that distinction be?

25 MR. FREE: There are many reasons, but I'll

1 explain a few. The first is the purpose of detention. In
2 the criminal context, the purpose of detention is
3 punishment; and as such, detainees can be made to work.
4 There's an exemption in the Thirteenth Amendment that
5 covers --

6 THE COURT: Even California does that with state
7 prisoners; correct?

8 MR. FREE: They do. And GEO has pointed to the
9 California wage order and said that that should -- the
10 California exemption to its minimum wage law. The reason
11 that misses the mark is that when we put human beings in
12 civil immigration detention, as opposed to criminal
13 detention -- I'm talking about sentence servers and pretrial
14 detainees -- immigration detainees do not have the same
15 panoply of Constitutional and statutory rights. That is,
16 they do not have right to criminal Gideon counsel. They
17 have to find their own lawyers and pay for them. They don't
18 have a right to a jury trial; they don't have a right to a
19 speedy trial; they don't have a host of rights; and, as a
20 result, there are protections, additional protections for
21 those immigrant detainees under the due process clause.

22 THE COURT: So you're saying because penal
23 detainees have additional Constitutional rights that civil
24 detainees do not have, then they should be considered
25 employees?

1 MR. FREE: No. I'm saying they're distinct. I'm
2 saying that these two detention regimes are distinct. The
3 only reason you can detain a non citizen for civil removal
4 proceedings is if you can show either by statute, or to an
5 immigration judge, that they're a danger to society and
6 they're a flight risk that can't be mitigated.

7 THE COURT: They're distinct. Why does that
8 distinction make a difference?

9 MR. FREE: Because it means that they can't be
10 forced to work. It means that their labor performed for a
11 detention center, and most particularly in this case, for a
12 private company, belongs to them; and *Hale*, the Ninth
13 Circuit case teaches that, as does *Mayberg*, which is cited
14 by another division of this court.

15 When you are a civil immigration detainee, you
16 cannot be made to work with the exception, perhaps -- we
17 don't concede this -- but with the exception perhaps of the
18 four, discrete tasks that are laid out in ICE
19 performance-based National Detention Standard 5.8. These
20 are housekeeping tasks: Stack newspapers, make your bunk
21 bed, keep the wall free and the dividers free of things and
22 clean up the floor of debris.

23 THE COURT: So the defendants make the argument,
24 which is a pretty strong argument, that the wage order at
25 issue contemplates that the services be offered to the

1 general public.

2 Can you think of any other context in which it's a
3 non-penal institution in which services are not generally
4 offered to the public, and where the persons are detained
5 and can't leave, and they're considered employees?

6 MR. FREE: So the sexually predator case is right
7 on point. This is *Mayberg versus Gonzales*. This is a
8 person who has been civilly committed, not criminally
9 committed, and it discusses the fact that because -- even
10 though he's performing those tasks in that facility -- he's
11 not making license plates; he is not working for an Internet
12 marketer; he is doing work within that civil detention
13 context -- and what the Court said, based on binding
14 Ninth Circuit precedent, is that his labor belongs to him.
15 He is working for compensation, and that compensation does
16 not exempt him from FLSA.

17 Now, the question here is not the FLSA, the
18 question here is the California minimum wage law, and we
19 contend that the California minimum wage law is sweeping in
20 its scope, and it does not exclude people unless there are
21 specific exclusions.

22 THE COURT: Which none of the exclusions here
23 apply?

24 MR. FREE: Correct.

25 THE COURT: How do you respond to that sexual

1 predator civil commitment case that the Ninth Circuit has
2 determined to be subject to FLSA?

3 Is there a distinction in your mind between
4 somebody being eligible under the FLSA, as opposed to the
5 California minimum wage law?

6 MR. EMERY: There should be no difference,
7 Your Honor. Really what the issue boils down to is whether
8 any federal detainee in either an ICE facility or our
9 facilities would be eligible to be employed under the --

10 THE COURT: How do you deal with the case that he
11 just cited in which it was determined apparently that a
12 sexually violent predator in civil commitment who is not
13 free to leave can seek the protection of FLSA? How is that
14 factually or legally distinguishable from this case?

15 MR. EMERY: I think that's a very remote
16 precedent, Your Honor. That involves people who are
17 detained for a particular medical reason. I think the work
18 program was structured differently. And the Ninth Circuit
19 precedent that they're relying on, the *Hale* decision, really
20 doesn't get that far. Both *Mayberg* itself was dicta. It
21 was decided on qualified immunity grounds. The *Hale*
22 decision as well. If you want me to talk more about that.
23 I mean that pertains to prisoners. It doesn't -- it doesn't
24 affirmatively hold what they're asking --

25 THE COURT: There's at least one case that they've

1 cited in which there's a context of civil commitment, people
2 not free to leave, services not generally offered to the
3 public; right? Aren't those the requirements that you say
4 that Wage Order 5 needs to meet in order for somebody to be
5 a minimum-wage eligible employee?

6 MR. EMERY: Again, Your Honor, the way that this
7 issue is framed is crucial here. Neither of these --
8 neither Wage Order 5, nor the catch-all order applies
9 because the fundamental issue is whether any federal
10 immigration detainee can be an employee under California
11 state law. The wage order doesn't establish that.

12 THE COURT: Let me stop you there. Why doesn't
13 the wage order establish that? I mean, I'm reading from the
14 wage order. It basically -- it has to be read liberally,
15 obviously. It basically says that -- let me find it here.
16 The public housekeeping industry under Wage Order 5, public
17 housekeeping industry, is broadly defined as "any industry,
18 business, or establishment which provides meals, housing, or
19 maintenance services..."

20 So you meet that language; right? You're an
21 industry that provides housing and meals.

22 MR. EMERY: I don't think we're an industry that
23 provides housing and meals. We perform -- we contract with
24 Immigration and Customs Enforcement.

25 THE COURT: Are you not responsible for providing

1 housing and meals to the detainees? Isn't that your
2 responsibility?

3 MR. EMERY: Detainees are -- detainees are cared
4 for at our facility under guidelines that are set forth by
5 Immigration and Customs Enforcement, detailed guidelines.

6 THE COURT: But you're responsible for providing
7 the housing and the meals?

8 MR. EMERY: We provide housing and -- yes, we
9 provide --

10 THE COURT: And if you didn't, you would be sued
11 for not providing housing and meals. I mean, you can't not
12 provide meals.

13 MR. EMERY: I mean, it's a hypothetical situation,
14 Your Honor. Who would be suing us? We know what are -- we
15 know what the requirements are under -- that ICE sets forth
16 for us.

17 THE COURT: And part of the requirements is to
18 provide meals?

19 MR. EMERY: Yes.

20 THE COURT: It doesn't say anything in the wage
21 order that those services have to be made available or
22 offered to the public?

23 MR. EMERY: But I think, respectfully, Your Honor,
24 I think we're focusing on the wrong things here. If we look
25 under -- we look under 2(p), we see "public housekeeping

1 industry." It means industry, business, and it goes through
2 a number of different hypotheticals. We have catering; we
3 have banquets; we have schools; we have colleges; this is a
4 pretty extensive list here. Nowhere is found federal
5 immigration detainees in the custody of ICE who are a
6 federal contract facility.

7 Now, ICE operates some 20 different detention
8 facilities in California. If the legislature had wanted to
9 reach this, it could have done it. In fact, you're probably
10 well aware of the big lawsuit brought by the United States
11 against the State of California. The legislature has been
12 active in trying to -- in trying to pass legislation that
13 would reach a situation like federal contract facilities.
14 It hasn't done that.

15 To use this public housekeeping order to try to
16 apply it to this situation really would be going too far. I
17 would suggest, Your Honor, that the right place to look and
18 if there's nothing else, I can try to focus on today --

19 THE COURT: Go ahead. You're entitled to your
20 argument. You can make it.

21 MR. EMERY: -- is to emphasize the INS General
22 Counsel opinion that we attached to our opening motion.
23 This motion is absolutely important. It was the INS opinion
24 from 1992, which is really sort of at the dawn of the era of
25 using private contract facilities. It expressly pertains to

1 both ICE facilities and private contract facilities.

2 And what it lays out is the agency's understanding
3 of its own framework. It's Congress that has said when and
4 how much detainees will be paid through an allowance.

5 Congress has never said that state minimum wage law should
6 determine how federal immigration detainees should be paid.

7 Second of all, the specific question that -- I'm
8 talking about Genco 92.8. The specific questions that it
9 raises is whether -- if hypothetically detainees were
10 considered to be employees whether it would violate IRCA.
11 IRCA, as you know, prohibits the hiring of unauthorized
12 aliens. What was the answer? The answer is: They're not
13 employees. Detainees are not employees because they do work
14 for institutional maintenance and not for compensation.
15 They don't participate in the general -- general work force.
16 They are not wage-seeking earners that are in a market
17 economy. This was what the FLSA precedents have said over
18 and over again. This was also persuasive to Judge Kane in
19 the *Menocal* case.

20 So to come back to this, I think the key issue is
21 that detainees at our facilities are not employable. Most
22 of them -- take Mr. Novoa as an example. Mr. Novoa came to
23 our facility from a Los Angeles Sheriff's jail. He was
24 there because of multiple criminal convictions, and he was
25 referred to ICE. When he came to our facility, he was put

1 under a final removal order by an immigration judge. That
2 makes him per se ineligible for unemployment. This is
3 8 C.F.R. 1001.1(p).

4 So even though Mr. Novoa came in with a rare
5 status of a permanent lawful resident, that status was
6 revoked automatically on the basis of his final removal
7 order. So what Mr. Novoa is asking to do here with respect
8 to the minimum wage claim is to ask the Court to go back and
9 retroactively construct an employment relationship --

10 THE COURT: You know the arguments that the
11 plaintiff makes, which is that IRCA addresses the penalties
12 to be levied against the employer, not the employee.

13 So if somebody illegally hires undocumented
14 persons, then those persons are entitled to certain
15 protections. It is the employer who is sanctioned under
16 IRCA for illegally hiring them in the first place. Just
17 because there's penalties assessed against the employers
18 doesn't mean that the protections against the employee
19 disappear.

20 MR. EMERY: First of all, we never hired them.
21 And we never hired Mr. Novoa or any other --

22 THE COURT: But if you're trying to use IRCA, IRCA
23 focuses on the sanctions to be levied against employers, not
24 the employability of undocumented citizens.

25 MR. EMERY: I understand the point you're making,

1 Your Honor, but this also exactly presents what the
2 preemption issue is here. That -- if we're going to pretend
3 and go back like they are employees since 2011, then we have
4 to go all the way on it. If Mr. Novoa or another detainee
5 had come in and said, "Gee, I want you to hire me like you
6 hire all of your other employees," we would have said,
7 "Okay. Show us your employment authorization." There's --
8 nowhere in the complaint in this case is there a single
9 allegation that Mr. Novoa had work authorization; that he
10 ever could have been employed at our facility.

11 THE COURT: But there are allegations in the
12 complaint that he was compelled to work, or else he would be
13 additionally punished. How do you balance those two?

14 MR. EMERY: First of all, no one is compelled to
15 work at our facility. It's a voluntary work program. All
16 of the allegations in this complaint pertain to the
17 voluntary work program, which ICE expressly says is a
18 voluntary program. I understand that there are allegations
19 that go further than that.

20 THE COURT: Those allegations at this point, I
21 must treat as true.

22 MR. EMERY: I would say also, though, that again
23 this raises a preemption point that we -- I can give you the
24 exact provisions from the -- from the ICE policies. It is
25 lawful, it is entirely lawful under ICE policy and ICE does

1 this in their facilities, too, that if a detainee refuses to
2 perform certain housekeeping chores or something of that
3 order, that they can be -- that they can be disciplined.
4 ICE tells us that this is what the policy is. How can we be
5 in a position of simply letting people -- simply letting
6 people work or not work -- right? -- without any kind of
7 adherence to the policies.

8 That said, I do think it's important to keep in
9 mind that the allegations here pertain to a voluntary work
10 program. To the extent that there's an allegation that GEO
11 has taken some improper step, I think this raises all the
12 preemption issues.

13 THE COURT: How do you respond to that?

14 MR. FREE: Your Honor, I'm going to try and track
15 the argument sequentially, just so we can make sure we're
16 dealing with each one. So the first question as to GEO's
17 obligation to provide for meals and housing is set forth by
18 statute. It's a statute that GEO cites. It's at U.S.C.
19 1103(a)11(A) and then (B). And it specifically says that
20 the service, immigration, can contract with state or local
21 Government for the provision and care of people who are in
22 their custody. So that's their statutory requirement.

23 With respect to the INS General Counsel opinion,
24 there's a lot to say here, but I want to confine the
25 analysis to five points. The first is the question that was

1 asked is: Does the work performed in a service facility
2 subject the service itself to the IRCA sanctions? And so
3 the General Counsel -- and that was within the INA. The
4 General Counsel of the INS implementing the Immigration and
5 Nationality Act came to the answer that no, it doesn't. And
6 the first reason -- they analyzed the regulation,
7 8 CFR 274a.1(f) and (1)(g), what's an employer; what's an
8 employee? The first rationale, the detainee performs work
9 for institutional maintenance, not compensation.

10 So, first of all, this General Counsel opinion
11 gets no deference because it happened after litigation, and
12 it was the agency's position taken following litigation.
13 The agency actually cites a January 6, 1992, Court of
14 Federal Claims decision. And this was issued -- the General
15 Counsel opinion was issued in February of 1992. It was the
16 agency's litigation position, so it gets no deference.

17 The second part, though, is that the
18 performance-based national detention standards that my
19 friend was offering to the Court say the first expected
20 outcome of a voluntary work program is that detainees --
21 this is number 1, quote: "Detainees may have opportunities
22 to work and earn money while confined." Well, ninety-two,
23 the General Counsel said that detainee performs work for
24 institutional maintenance, not compensation. So the
25 agency's position is internally inconsistent and has evolved

1 over time.

2 THE COURT: Does it have to do with the nature of
3 the work? So certain maintenance work may be deemed work
4 that should be not compensated and other work may be deemed
5 to be compensated?

6 MR. FREE: It does, Your Honor. And this is
7 another place where I think we trip up and I think are
8 talking past one another.

9 THE COURT: Does your case rise or fall on whether
10 the program is voluntary or not?

11 MR. FREE: The TVPA case does. The forced labor
12 case under the California and Federal Trafficking Victim
13 Protection Act --

14 THE COURT: Not the minimum wage case?

15 MR. FREE: No, it doesn't, no.

16 THE COURT: Why?

17 MR. FREE: Because they're performing work, and
18 whether they're performing it under a forced context or a
19 voluntary context, we don't have to show that for the
20 purposes of the California minimum wage law or the wage
21 order.

22 ICE has also said, and GEO has agreed, within its
23 contract what personal housekeeping is required, and so it
24 is not the case that the allegations in our complaint about
25 the work program which ICE distinguishes from the housing

1 sanitation policies that are at issue in *Menocal*, for
2 instance, it is not the case that those things, these
3 housekeeping chores, can be forced upon detainees.

4 Mr. Novoa has served for ten hours a day, seven
5 days a week as a barber. That's not housekeeping. That was
6 done under the \$1 a day program. He served as a janitor
7 cleaning up other communal areas. That's not housekeeping.
8 Housekeeping are the four specific tasks we talked about
9 before.

10 With respect to work authorization, this is
11 perhaps where the labyrinth of immigration laws most hurts
12 GEO's case, and I don't begrudge my friend the
13 misunderstanding because, as the late Judge Newman said,
14 immigration statutes are second only to the tax code in
15 complexity.

16 274a.12 is what governs work authorization, not
17 any of the statutes that they've cited. And detainees,
18 people who are in Adelanto, have a variety of ways to be
19 work-authorized. We don't have to make an allegation that
20 Mr. Novoa was work-authorized in order for him to recover
21 under minimum wage law --

22 THE COURT: Is your argument, then, that these
23 detainees could have work authorizations and would be able
24 to work if they were not in custody?

25 MR. FREE: Precisely. And the reason that matters

1 is because GEO has raised a conflict preemption argument.
2 They have said that it is impossible to comply with IRCA's
3 employment verification provisions and the California
4 minimum wage law's minimum wage. We think that analysis
5 turns the whole thing on its head because IRCA doesn't
6 determine who's an employee. As Your Honor noted, it
7 determines who's going to get sanctioned for hiring them.

8 So it amounts to: We can't possibly be held
9 liable under the minimum wage law because if we did, we were
10 breaking federal law, and that's not preemption. That's
11 nowhere near preemption. They bear the burden. That's the
12 Supreme Court's decision in *Pliva*.

13 And I noticed in the reply, GEO has said that the
14 presumption preemption doesn't apply in immigration cases.
15 That's one of their point headings. That's false.
16 *Medtronic versus Lohr* at page 485, the Supreme Court says it
17 applies in all preemption cases and that presumption has not
18 been overcome here. Congress hasn't occupied the field
19 either through IRCA or through 1555(d) --

20 THE COURT: I tend to agree with you on the
21 preemption argument. What I'm stuck on is what I started
22 with, which is whether or not the specific wage order in
23 this case covers persons who are civilly detained and a
24 detainer, a private facility, that doesn't offer its
25 services to the general public.

1 So I find it -- and I think their strongest
2 argument is that it can't. That the wage order applies to
3 sort of the types of institutions which are specifically
4 listed in the wage order -- and your argument is that is not
5 exhaustive -- and that the wage order should be read
6 liberally; and if you read through the actual words of the
7 wage order, there's meal and housing provided; so,
8 therefore, the wage order should apply to a detention
9 facility.

10 But there isn't a specific case or authority that
11 tells me that in the detention context in which services are
12 not generally offered to the public, this wage order
13 applies. And that's where I'm stuck on.

14 Now, you cited this other case. I'm going to have
15 to look at that case a little more carefully. And that's
16 what I was looking for in the order for supplemental
17 briefing, some kind of authority to tell me that this wage
18 order which seems to be not -- if you take a first glance at
19 it, it can't -- intuitively it's not the intent of the
20 legislature to apply to a custodial setting. I mean, that's
21 not what I think of when the California legislature sat down
22 and wrote down the wage order. But the wage order on its
23 face and by its words seems to apply to this context, and
24 yet there isn't authority which tells me that it definitely
25 does. And that's where I'm stuck.

1 MR. FREE: I have three quick responses that might
2 unstick you. The first, you can look at Judge Brian's
3 opinions in the *Washington versus GEO* case and the *Chen*
4 *versus GEO* case, and I think Judge Brian does an adroit job
5 at sifting through why the purpose of state minimum wage
6 laws, the purpose of labor regulation doesn't just require a
7 specific listing of who's covered. In fact, work is covered
8 and that makes sense.

9 The second point here is that Judge Kane and the
10 *Alvarado Guevara* court missed one of the key purposes of the
11 minimum wage. It's not just to ensure that the people who
12 are not getting the minimum wage aren't suffering from
13 substandard working conditions, it's to ensure that the
14 employers who are paying substandard minimum wages aren't
15 undercutting competition. And that's not discussed anywhere
16 in *Alvarado Guevara* or in Judge Kane's otherwise wonderful
17 decision in *Menocal*.

18 The point here is that GEO is a for-profit company
19 that every day detains 1,950 people at Adelanto. They have
20 5 percent of the nation's detained immigrant population on
21 any given day; and last year they had 30 percent of the
22 deaths in detention, but they are doing this at a profit.
23 And when they have to make their staffing plan, when they
24 have to tell ICE how many janitors are we going to have, and
25 instead of having a janitor, they pay Raul Novoa \$1 a day,

1 they're undercutting the market rates in San Bernardino.
2 They're taking labor that could be compensated at at least
3 the minimum wage --

4 THE COURT: No other person would get themselves
5 into immigration custody to do a janitor's job.

6 MR. FREE: Sure. It's not a lure to employment.
7 We're not talking about necessarily protecting just the
8 wages of the wage earners, we're talking about protecting
9 the market, the labor market.

10 THE COURT: But again, what's the definition of
11 the market? The definition of the market is people who are
12 detained in immigration detention, because nobody else can
13 access that market.

14 MR. FREE: We respectfully disagree. GEO does
15 have people who clean up in certain parts of the Adelanto
16 facility, and they could have people who clean up and serve
17 as barbers and serve as food service workers and serve as
18 medical clean-up people there --

19 THE COURT: So you're saying the market is for GEO
20 employees who would otherwise have to do that job?

21 MR. FREE: The market is for work performed. The
22 market is for a need that is demonstrated. Up until now,
23 GEO has treated this labor as a readily available supply
24 that can be used at its discretion essentially because
25 they've treated it as not belonging to the people there.

1 And in so doing, they have artificially suppressed the
2 amount of employment that comes from this facility.

3 THE COURT: Let me -- let me -- I'll give you the
4 last word.

5 MR. FREE: Thank you, Your Honor.

6 MR. EMERY: Your Honor, one of the reasons why I
7 put focus on the General Counsel's opinion again is because
8 my client's been doing this for close to 30 years. We work
9 side by side every single day with ICE, and there's a bit of
10 a misimpression that we need to clear up. Again, there are
11 ICE-run facilities and there are ICE-contract facilities;
12 they all operate under the same rules. And even at our
13 ICE-contract facilities, everything we do is under ICE's
14 guidance.

15 ICE sets the rules; ICE decides how much will be
16 paid for things; ICE supervises. Their offices are there.
17 There are ICE officers walking the halls every day. And to
18 think that there's some kind of systematic wage theft and
19 forced labor that's going on right under ICE's nose really
20 just goes past the bounds of credibility.

21 THE COURT: Their argument -- and I realize your
22 position. Their argument is that your client is a
23 for-profit institution so it's different than the Government
24 running it because you have an incentive to get tasks done
25 under -- by not paying for those tasks because that will

1 increase your profit. Because if those tasks were not done
2 by inmates, you would have to have them done by somebody
3 else and pay them the right wage. I think that's their
4 argument.

5 MR. EMERY: It's wrong, because this is detention.
6 Detention is unlike anything else. It's not another wage
7 market that you go into. It's not like people who are
8 working housekeeping jobs. Detention requires its own
9 logic. ICE and its predecessor institutions have been doing
10 this a long time. We've been doing this a long time. The
11 voluntary work program as it's set out and the other
12 challenged housekeeping policies all have reasons. If
13 you've ever been to a detention facility -- I'd be glad to
14 take you on a tour of one if you want to --

15 THE COURT: I have.

16 MR. EMERY: There's an order that has to be there,
17 and the idea that GEO would somehow be bringing in outside
18 employees to come in and do daily maintenance while the
19 detainees sit around and watch, that's not how it works.
20 There are reasons for this.

21 And at some point, we need to listen to what
22 Congress said about this. In 1950, Congress said: This is
23 what we have to say about -- about detainee employees. It's
24 an allowance. And for years they appropriated \$1 per day at
25 it. Our understanding is that still is under the agency's

1 guidance, the agency's discretion. And there's no reason
2 why state minimum wage laws, which could be different in
3 every single state, should be the determining word on how
4 and whether immigration detainees should be paid.

5 THE COURT: Let me tell you this. I'm maybe a
6 little bit closer to making up my mind on this, but I'm
7 still struggling with it. So if you wish, you know what my
8 central sticking point is. If you want to address that more
9 specifically in a supplemental brief, I'll let you file a
10 brief of no more than seven pages in length, to be filed no
11 later than a week from today.

12 MR. EMERY: Thank you, Your Honor. Can I just --
13 I'm glad to go look at the transcript, too, but could we
14 get --

15 THE COURT: So the issue that I'm having trouble
16 with is in interpreting this Wage Order No. 5. So what is
17 the interplay -- so as I read that wage order, it seems to
18 me that you provide the services that make that wage order
19 active, which you provide housing and meals. But part of
20 your argument is that those wage orders should not apply
21 because it's not an institution that provides its services
22 to the general public, as I understand it, and it's a
23 detention facility; right? So that is different. That wage
24 order does not apply to that type of institution.

25 One, because it's a custodial institution. Its

1 services are not offered to the general public, and it's
2 just different than what the wage order contemplates as to
3 the industries that it's meant to cover. So I want some
4 argument and/or authority where similar situations in which
5 that wage order has been applied, or not applied, to an
6 institution that is similar. Perhaps another civil
7 commitment-type of institution which services are not
8 offered to the general public and the persons in that
9 institution are not free to leave; right?

10 And then any kind of argument or interplay between
11 how courts in the Ninth Circuit or in California, more
12 particularly, have interpreted the scope and breadth of this
13 wage order as to analogous circumstances. And that's been
14 my primary point. I'm siding with the plaintiffs on the
15 preemption argument. I don't think it's preempted. I don't
16 think IRCA does it, but I am really concerned about this
17 particular point. So if you can address that point.

18 Thank you, Counsel.

19 MR. EMERY: Thank you, Your Honor.

20 MR. FREE: Thank you, Your Honor.

21 *(Thereupon, at 10:03 a.m., proceedings adjourned.)*

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript format is in conformance with the regulations of the Judicial Conference of the United States.

Date: May 17, 2018

Lisa M. Gonzalez
/s/ _____
Lisa M. Gonzalez, U.S. Court Reporter
CSR No. 5920

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