No. _____

In the
Supreme Court of the United States

THE GEO GROUP, INC.,

Petitioner,

v.

UGOCHUKWU NWAUZOR, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The GEO Group, Inc. is a service provider at the Northwest ICE Processing Center ("NWIPC") in Tacoma, Washington, under contract with the U.S. Immigration and Customs Enforcement ("ICE"). Consistent with congressional direction, that federal contract requires GEO to offer the immigration detainees at the facility the opportunity to participate in a voluntary work program. The program is designed not to treat immigration detainees, who are generally ineligible for lawful work in the United States, as employees, but to give them an outlet to avoid idleness during their detention. To that end, while all ICE detention facilities must offer the program, Congress has long capped the amount it will reimburse from appropriated funds at $1 per day per participant. Washington state had radically different ideas, and would classify federal immigration detainees participating in this federal voluntary work program as ordinary employees entitled to the state minimum wage, even as it exempts its own detainees from that same law. The Ninth Circuit blessed this extraordinary inversion of our constitutional order, rejecting intergovernmental immunity and preemption arguments endorsed by three other circuits and the three most recent administrations, and saddling GEO with an approximately $37 million judgment that has forced the suspension of the federal work program at the federal facility at issue.

The question presented is:

Whether the Supremacy Clause allows a state to reclassify federal immigration detainees participating in a federal work program as employees and thereby

impose its state minimum-wage law just because a private contractor provides detention services at the federal facility where the detainees are housed.

PARTIES TO THE PROCEEDING

Petitioner is The GEO Group, Inc. It was the defendant-appellant below.

Respondents Ugochukwu Goodluck Nwauzor and Fernando Aguirre-Urbina, individually and on behalf of all others similarly situated, were plaintiffs-appellees below. Respondent State of Washington was also a plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

The GEO Group, Inc. is a publicly traded company. BlackRock Fund Advisors and The Vanguard Group, Inc. each own 10 percent or more of GEO's stock. GEO has no corporate parent.

STATEMENT OF RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1(b)(iii), petitioner states that the following proceedings are directly related to this case:

State of Washington v. The GEO Group, Inc., Nos. 21-36025 & 22-35027 (9th Cir.).

Ugochukwu Goodluck Nwauzor, et al. v. The GEO Group, Inc., Nos. 21-36024 & 22-35026 (9th Cir.).

State of Washington v. The GEO Group, Inc., No. 3:17-cv-05806-RJB (W.D. Wash.).

Ugochukwu Goodluck Nwauzor, et al. v. The GEO Group, Inc., No. 3:17-cv-05769-RJB (W.D. Wash.).

Nwauzor v. The GEO Group, Inc., No. 101786-3 (Wash. Dec. 21, 2023) (answers to certified questions).

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PETITION FOR WRIT OF CERTIORARI

For nearly two decades, The GEO Group, Inc. has provided detention, transportation, and food services for the Northwest ICE Processing Center ("NWIPC") located in Tacoma, Washington, under contract with the U.S. Immigration and Customs Enforcement ("ICE"). Reflecting a federal mandate, that contract requires GEO to offer the federal detainees at the federal facility the opportunity to participate in a voluntary work program. And reflecting a limit on appropriations established by Congress, the contract requires GEO to pay participating detainees at least $1 per day; the federal government will reimburse that amount—but no more. That reimbursement cap has remained unchanged since 1979 and reflects the reality that immigration detainees, the vast majority of whom are ineligible for lawful employment in the United States, are not employees for federal-law purposes. Instead, the voluntary work program exists to promote the safety of the facilities by avoiding idleness and accompanying disciplinary issues. For that reason, courts have long recognized that program participants are not entitled to the federal minimum wage. Washington, however, has very different ideas about the proper compensation for participants in the voluntary work program, so it decided to reclassify them as state-law employees entitled to a far higher state minimum wage that the state does not apply to its own inmates.

Under bedrock Supremacy Clause principles, that state effort to dictate the terms of a federal program at a federal detention facility is foreclosed several times over. By wresting control over a federal

program in a federal detention facility, the state has directly regulated a federal function in violation of the intergovernmental-immunity doctrine. By demanding that federal detainees be paid a wage the state is unwilling to pay its own detainees, the state has impermissibly discriminated against the federal government. And by interfering with a program established by Congress and treating federal immigration detainees as ordinary state-law employees, the state has taken action that is preempted by federal law.

In the divided decision below, the Ninth Circuit blessed this remarkable inversion of the constitutional order. It did so in full recognition that if Washington had tried to impose its will on an immigration facility run by the federal government itself, the Supremacy Clause would block that effort. But the Ninth Circuit insisted that the same rules do not apply when a private service provider is involved. In the Ninth Circuit's view, once the federal government decides for reasons of efficiency and flexibility to partner with a private party to discharge a federal function, it opens the door to state interference with that federal function. That misguided decision has had enormous practical consequences, including causing the federal government to suspend the operation of its voluntary work program—a program Congress wants to be available nationwide—at the Tacoma facility.

The decision conflicts with the decisions of at least three other circuits, which squarely reject the notion that states may evade the Supremacy Clause by regulating federal contractors rather than the federal government. It conflicts with a long line of this Court's cases—stretching all the way back to *McCulloch v.*

Maryland, 17 U.S. (4 Wheat.) 316 (1819)—confirming that states have no more leeway to obstruct the execution of federal functions by a private party than they do to obstruct the execution of federal functions by the federal government itself. And it rejects the position of the three most recent administrations expressed in amicus briefs filed at every stage of the proceedings below. Those administrations may have strongly disagreed on immigration policy, but they spoke with one voice in condemning Washington's effort to dictate the terms of a federal voluntary work program for federal immigration detainees.

The Ninth Circuit's decision cannot stand. At any given time, some state will view federal immigration policy as too harsh or too lax. The decision below provides a roadmap for states to interfere with the critical federal prerogative to establish a uniform immigration policy. And beyond the immigration context, there are countless areas where the federal government looks to private contractors to provide the flexibility and expertise it needs to efficiently discharge federal functions. The decision below makes the cost of enlisting such private-sector assistance an open door for state interference in core federal functions, including those in areas of unique federal interest. That is not a cost that the Supremacy Clause requires or this Court should tolerate. The Court should grant certiorari and confirm that states cannot demand of federal contractors performing federal functions what they could not demand of the federal government itself.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 127 F.4th 750 and reproduced at App.1-60. The Ninth Circuit's order denying rehearing en banc and the statements respecting that order are reported at 146 F.4th 1280 and reproduced at App.61-96. The Supreme Court of Washington's opinion answering questions certified by the Ninth Circuit is reported at 540 P.3d 94 and reproduced at App.97-120. The relevant orders of the United States District Court for the Western District of Washington are unreported and are reproduced at App.121-196.

JURISDICTION

The Ninth Circuit issued its opinion on January 16, 2025, App.1, and denied a timely rehearing petition on August 13, 2025, App.61. Justice Kagan extended the time for filing a petition to January 9, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix.

STATEMENT OF THE CASE

A. Legal Background

1. The Supremacy Clause provides that the Constitution and federal statutes are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. This Court has long held that state laws that regulate the federal government and its instrumentalities are foreclosed by the Supremacy Clause. *See McCulloch*, 17 U.S. at 432-37. That principle, known as intergovernmental

immunity, is "almost as old as the Nation" itself, *Dawson v. Steager*, 586 U.S. 171, 173 (2019), and it forbids states from attempting to invert the constitutional order by enacting state laws that "[i] directly regulate or [ii] discriminate against" the federal government, *United States v. Washington*, 596 U.S. 832, 835 (2022). There is an obvious temptation, also as old as the Nation itself, for states to interfere with certain national policies that Congress has deemed national imperatives, but that are locally unpopular. In the early days of the Republic, the First Bank of the United States provided the flash point. In more recent days, federal immigration policy has been viewed with suspicion of being either too lax or too unforgiving, depending on the state and the prevailing federal enforcement posture. But the through line across the varying pressing issues of the day is that states cannot interfere with the federal government's operations, for "[i]t is of the very essence of supremacy, to remove all obstacles to its action within its own sphere." *McCulloch*, 17 U.S. at 427.

Another aspect of the Supremacy Clause is Congress' undoubted power to preempt state law when it validly legislates on matters of federal concern. Although this Court's cases have recognized various flavors of preemption—*e.g.*, "conflict," "express," "field"—"all of them work in the same way." *Murphy v. NCAA*, 584 U.S. 453, 477 (2018). Congress enacts laws expressing a federal policy and charging federal agencies with implementing it; "a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted." *Id.* The touchstone for resolving preemption claims, then, is

congressional intent. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990).

Both Congress and this Court have recognized the special status of federal contractors and the importance of ensuring that they do not face liability under state law for assisting the federal government in discharging federal responsibilities that are nationally important, but locally unpopular. For example, Congress has expressly provided and continuously expanded a federal forum not just for federal officers, but for those "acting under" them. 28 U.S.C. §1442(a)(1). As this Court has observed, federal contractors are the quintessential example of those acting under federal officers. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 153-54 (2007). And the federal forum ensures that federal contractors will get a fair adjudication of their colorable federal defenses, which in many cases stem from the federal contract itself. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 505-09 (1988). Moreover, federal contractors cannot be held liable for discharging their contractual obligations when "what was done was within the constitutional power of Congress." *Yearsley v. W.A. Ross Constr.*, 309 U.S. 18, 20-21 (1940).

2. When it comes to "the subject of immigration and the status of aliens," "[t]he Government of the United States has broad, undoubted power." *Arizona v. United States*, 567 U.S. 387, 394 (2012). The exercise of that national power has obvious ramifications for employers and local communities across the Nation, which, depending on the prevailing national policies, may view federal enforcement as too harsh or too lax. For that reason, this Court has repeatedly held that

federal law displaces state laws that frustrate federal immigration policy. *See, e.g.*, *id.* at 400-16.

Exercising that broad and distinctly federal power, Congress has mandated that certain aliens be detained pending their immigration proceedings. *See* 8 U.S.C. §§1225(b), 1226, 1231(a). To that end, Congress directed the executive branch to "arrange for appropriate places of detention," and authorized the Attorney General to "acquire" or "build" detention facilities if existing federal facilities "are unavailable" or unsuitable. *Id.* §1231(g)(1). Mindful of the cost of building new facilities, Congress directed agencies to "consider the availability" of existing detention centers that could be leased "[p]rior to" building new facilities. *See id.* §1231(g)(2). Entering contracts to make use of those facilities comes within further congressional authorization for the Secretary of Homeland Security to "carr[y] out," "in [her] reasonable discretion," the activities of ICE "through any means, including ... through contracts, grants, or cooperative agreements with non-Federal parties," unless such agreements are otherwise precluded by federal law. 28 U.S.C. §530C(a)(4); *see also* 6 U.S.C. §112(b).

Consistent with that congressional directive, the executive branch has promulgated regulations that allow ICE to contract with private detention facilities to house federal immigration detainees. *See* 48 C.F.R. §3017.204-90; 8 C.F.R. §235.3(e). ICE, in turn, relies on an extensive network of privately owned facilities to house tens of thousands of detainees—roughly 80 percent of all federal immigration detainees. D.Ct.Dkt.577 at 35. The federal contractors that

provide detention services at those facilities carry out the federal government's immigration policy. D.Ct.Dkt.577 at 34-35.

ICE relies heavily on privately owned facilities in part because the fluctuating number and location of detainees makes it difficult to predict when and where space will be needed. C.A.Dkt.114 at 3-4. By contracting for the exclusive use of infrastructure that privately owned facilities already have in place, ICE avoids wasting resources constructing facilities that end up unnecessary or underutilized. Private contractors can also rapidly adapt to changing circumstances.

3. Among the most controversial aspects of federal immigration policy is the extent to which immigrants are eligible for lawful employment in the United States. As a general matter, those who are not in the country lawfully are ineligible for employment in the United States. *See Arizona*, 567 U.S. at 404. Thus, detainees in ICE facilities are typically ineligible for employment as a matter of federal law. *See* C.A.App.151. Nonetheless, Congress has long recognized the benefits of giving immigration detainees a limited opportunity to perform work during their federal detention.

Shortly after World War II, Congress authorized appropriation of funds to INS (now ICE) for the "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved)" to "aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. §1555(d). Congress established that voluntary work program based on its determination that keeping

immigration detainees engaged with meaningful labor serves federal interests, such as preserving order. D.Ct.Dkt.568 at 141.

Every ICE detention facility—whether operated by the agency itself or by federal contractors—must offer detainees the opportunity to participate in a voluntary work program. D.Ct.Dkt.577 at 86. Congress capped what the federal government may reimburse detainees for participation in the work program at $1 per day. *See* Pub. L. No. 95-431, 92 Stat. 1021, 1027 (1978). Accordingly, while federal law does not expressly preclude federal contractors from paying detainees more, the restriction on using appropriated funds to pay more than $1 a day acts as a de facto cap. Despite occasional proposals to raise that cap, it has remained unchanged since it was set in 1979, even as the federal minimum wage has increased. In recognition of immigration detainees' ineligibility for lawful employment, and the specificity with which Congress has addressed the reimbursement rate for such detainees, courts have routinely held that the Fair Labor Standards Act has no application to immigration detainees. *See Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 371-75 (4th Cir. 2021); *Alvarado-Guevara v. INS*, 902 F.2d 394 (5th Cir. 1990) (per curiam).

B. Factual Background

1. In 2005, ICE entered into a contract with GEO to provide detention, transportation, and food services for its facility in Tacoma, Washington. C.A.App.68. As the only dedicated ICE detention facility in Washington, the NWIPC serves a critical role in the

federal government's immigration operations in the Pacific Northwest.

As with all other ICE detention facilities, GEO is required under its contract with ICE to give detainees the opportunity to participate in the voluntary work program Congress authorized. C.A.App.68. GEO's contract requires it to pay participating detainees "at least $1.00 (USD) per day" and caps GEO's entitlement to federal reimbursement at that rate. C.A.App.69; *see* Pub. L. No. 110-329, 122 Stat. 3574, 3659 (2008) (requiring compliance with national standards to receive funding). In 2017, Washington's attorney general began investigating the voluntary work program at NWIPC after receiving complaints from detainees.

At the time, Washington's Minimum Wage Act ("MWA") required covered "employees" working in the state to be paid $11 per hour. *See* Wash. Rev. Code §49.46.020(1)(a). The MWA's definition of "employee" is subject to more than a dozen exceptions, including one for "[a]ny resident, inmate, or patient of a *state, county, or municipal* correctional, detention, treatment or rehabilitative institution." *Id.* §49.46.010(4)(k) (emphasis added). Washington accordingly need not and does not pay detainees minimum wage under the voluntary work programs it offers in its own detention facilities; it instead caps their compensation at $40 a week. *See* App.38 (Bennett, J., dissenting). But Washington does not provide a comparable exception for federal detainees. That presumably reflects the state's recognition of its inability to regulate federal instrumentalities at all. Yet the attorney general took the absence of an

express exception for *federal* detainees to argue that GEO must pay federal detainees who participate in the federal work program not $1 per day, but $11 per hour (the then-existing state minimum wage, which has since increased to $17.13 an hour).

2. The attorney general's investigation culminated in two consolidated lawsuits against GEO, one brought by the state, C.A.App.408, and the other on behalf of a class of detainees at the NWIPC who participated in the voluntary work program, *see* C.A.App.446-50. GEO objected that federal law bars the state from classifying detainees as "employees" under the MWA, and that both intergovernmental-immunity and preemption principles bar Washington from dictating the pay scale for federal detainees participating in a federal voluntary work program. As for its immunity defense, GEO argued that Washington was both unlawfully regulating and impermissibly discriminating against the federal government since the state exempts work programs at its own detention facilities. As for preemption, GEO argued that forcing it to pay federal detainees the state minimum wage intrudes on the exclusively federal field of immigration detention and conflicts with federal law.

The United States filed a statement of interest in the district court condemning the "aggressive and legally unjustified effort by the State of Washington to interfere with federal immigration enforcement." C.A.App.406. It urged the court to hold the MWA "invalid as applied to federal contractors," explaining that Washington's effort to dictate what federal contractors must pay federal detainees under a federal

work program—and to require them to pay more than the state pays its own detainees, to boot—is preempted and violates the intergovernmental-immunity doctrine. C.A.App.420-21.

The district court refused to dismiss, and after a trial, entered a $37 million judgment against GEO and enjoined GEO from operating the voluntary work program unless it pays federal detainees the state minimum wage. C.A.App.2-3, 13, 35, 37-38. As a result of the crippling costs that would impose, and given the appropriations cap on reimbursing more than $1 a day, GEO received ICE's permission to cease offering the program at NWIPC altogether. App.54 (Bennett, J., dissenting).

3. GEO appealed, and the Ninth Circuit certified multiple questions to the Washington Supreme Court, including: (1) whether federal detainees in NWIPC's work program are "employees" under the MWA, and (2) if so, whether the MWA would apply to *state* detainees in work programs operated by state contractors at privately owned facilities—a purely hypothetical question, as Washington prohibits the use of private contractors for detention. C.A.Dkt.97 at 15-16. The Ninth Circuit also invited the United States to submit an amicus brief. C.A.Dkt.95 at 1-2.

The Washington Supreme Court held that, as a matter of state law, federal detainees who participate in the federal voluntary work program are "employees" under the MWA. *See* App.104-05. And it opined that if (contrary to fact and state law) the state contracted with private detention facilities with work programs, those facilities would need to comply with the MWA, despite the exemption for state, county and

municipal detention facilities. *See* App.106-07, App.37-48 (Bennett, J., dissenting).

Meanwhile, the United States filed an amicus brief that, despite a change of administration, continued to argue that Washington's effort to subject federal detainees to a state minimum-wage law is both preempted and precluded by intergovernmental immunity. As it explained, Washington plainly could not require ICE to pay the state minimum wage if ICE ran the facility itself. C.A.Dkt.114 at 2. And "[i]t is no more permissible to treat the same federal detainees as employees if they are housed in a facility owned and operated by a federal contractor." *Id.* The United States likewise agreed with GEO that federal law preempts Washington's effort to dictate what federal detainees must be paid under the federal voluntary work program. *See id.*

4. A divided panel of the Ninth Circuit affirmed. App.1-34. The majority first rejected the argument that forcing a federal contractor to pay federal detainees participating in a federal program a state-set minimum wage impermissibly regulates a federal function in violation of the intergovernmental-immunity doctrine. App.10-16. The majority did not dispute that the doctrine would bar Washington from requiring ICE to pay federal detainees the state minimum wage if ICE operated the facility itself. But the majority thought it made all the difference that "GEO[,] … a private for-profit company … operates" that facility, because "[t]he scope of a federal contractor's protection from state law under the Supremacy Clause is substantially narrower than

that of a federal employee or other federal instrumentality." App.10-11.

The majority also rejected the argument that the MWA impermissibly discriminates against the federal government, relying principally on the Washington Supreme Court's holding that the MWA would apply to state detainees at a private facility if there were any. App.16-25. By relying on an advisory opinion about an entirely hypothetical scenario, the majority sidestepped the reality that the MWA exempts state and local detention facilities, yet contains no exemption for federal detention facilities, App.38-40 (Bennett, J., dissenting).

Finally, the court rejected the preemption argument advanced by GEO and the United States. The majority began by invoking the presumption against preemption on the theory that "[t]he MWA falls squarely within the states' historic police powers to establish and require payment of a minimum wage." App.27. And it held that the presumption is not overcome because federal law caps reimbursement at $1 per day, without expressly *forbidding* GEO from paying detainees more. App.29.

Judge Bennett dissented on both issues. On intergovernmental immunity, he found it obvious that Washington's effort to impose a state minimum wage on federal detainees, while exempting state and local detainees, unconstitutionally discriminates against the federal government and its contractors. App.35-48; *see* Wash. Rev. Code §49.46.010(4)(k). "Put simply, if the NWIPC were run by Washington, the facility would *not* be forced to pay detainees the minimum wage." App.40. "But because NWIPC is run by a

federal contractor, the facility must pay that minimum wage." App.40. "That is the very definition of a state affording itself better treatment than it affords the United States," in violation of the Supremacy Clause. App.40.

Turning to preemption, Judge Bennett found the presumption against preemption wholly inapposite to the state's effort to regulate federal detainees and a federal contractual relationship in the immigration context. App.55-56. And he concluded that the lack of an express federal prohibition on paying inmates more than $1 per day at most rules out impossibility preemption but does not avoid the obvious conflict with the congressional limit on using appropriated funds to reimburse more than $1 per day. App.48-60.

Judge Bennett warned that the panel's decision will have "serious ramifications for the United States operating immigration detention facilities around the country," App.48—ramifications that had already been seen when the district court's judgment forced GEO to obtain ICE's permission to shut down the voluntary work program entirely, App.54.

5. GEO petitioned for rehearing en banc, and the United States, after yet another administration change, filed another amicus brief reiterating that both intergovernmental immunity and preemption preclude Washington's effort to apply its state minimum-wage law to federal detainees—especially when the state exempts its own detention facilities. The Ninth Circuit denied the petition over the dissent of seven judges, with dissenting opinions authored by Judges Bumatay and Collins. App.61-96.

Judge Bumatay, joined by Judges Callahan and VanDyke, began by explaining that the "fundamental question" is "whether the Supremacy Clause protects a federal program, performed by federal contractors, from state regulation." App.73. The answer "must be 'yes,'" he reasoned, because "[w]hen a federal contractor acts on behalf of the federal government to administer a federal function—like the detention of aliens—the contractor is not merely a private business; it steps into the shoes of the federal government for Supremacy Clause purposes." App.73-74. It has been clear since at least *McCulloch*, he explained, that intergovernmental immunity applies with the same force "if the federal government chooses to use contractors to execute" federal policy rather than to carry out that federal policy itself. App.74. Judge Bumatay also explained that it made no sense to treat ICE detainees ineligible for lawful employment in the United States as employees subject to state minimum-wage law. App.72-73, 93-94. He warned that the panel's contrary conclusion "set[] a dangerous precedent" that will empower states to "undermine federal operations based on policy disagreements whenever federal contractors are involved." App.74.

Judge Collins, joined by Judges R. Nelson and Bress, issued a statement noting that they would have granted rehearing for the reasons set forth in Judge Bennett's dissent. App.96. Meanwhile, Judges Murguia and W. Fletcher, the two judges in panel majority, issued a statement reiterating that they "strongly disagree" with the dissenters' view that federal contractors stand on equal footing with the

federal government for intergovernmental-immunity purposes. App.63.

REASONS FOR GRANTING THE PETITION

The decision below inverts our constitutional order by holding that a state may impose a minimum-wage law on federal detainees, while exempting its own state detainees. The Supremacy Clause prohibits that counterintuitive result twice over.

First, bedrock principles of intergovernmental immunity tracing back at least to *McCulloch v. Maryland* preclude Washington's effort to interfere with and discriminate against federal operations. The decision below evaded that established law by treating federal contractors performing a quintessential federal function as entitled to substantially diminished protection from state interference. That result is deeply flawed and works its own interference with federal prerogatives by creating artificial incentives to avoid private contracting, even when efficiencies and congressional policy favors employing more flexible private-sector expertise and resources. It also creates a clear circuit split with decisions from the Second, Third, and Fourth Circuits, which all (correctly) hold that states cannot evade the force of the Supremacy Clause by targeting federal contractors instead of the federal government itself.

Second, the decision below incorrectly ignores the position of the United States, reiterated by three successive administrations with very different immigration policies, that Washington's law is preempted and interferes with the efficient administration of federal immigration policy. The federal government has uniquely national interests in

and correspondingly broad powers over immigration. As relevant here, Congress has made clear that illegal immigrants are ineligible for lawful employment, that private contractors provide vital flexibility for changing detention needs, that federal immigration detainees should have the option of participating in voluntary work programs, and that reimbursements for participation in those programs from appropriated funds should be capped at $1 a day. States are free to criticize those federal judgments, but they are not free to countermand them with contrary state legislation—especially legislation that they do not apply to their own detainees. The decision below missed that obvious conclusion only by importing a presumption against preemption into just about the last context where it should apply, and then disregarding anything short of impossibility preemption.

The Ninth Circuit's decision is as exceptionally important as it is exceptionally wrong. Immigration is a core and uniquely federal responsibility, and a recurring source of tension with the states. Depending on the prevailing federal policies, some states will think enforcement is too lax, while others will view enforcement as too harsh. But though immigration priorities may have vacillated, the United States has spoken with one voice across the past three administrations about the palpable threat that Washington's misguided effort to apply its state minimum-wage law to immigration detainees poses to federal immigration policy—and to every other federal policy carried out by contractors rather than government employees.

The federal government has long relied on private contractors to assist with its varying need for immigration detention. The decision below poses a direct threat to its ability to do so—as evidenced by the fact that it has forced ICE to shut down the federal voluntary work program at the NWIPC facility altogether. Washington has thus succeeded in frustrating federal immigration policy. Meanwhile, ICE's policy of giving all immigration detainees, whether detained in ICE's own facilities or in private facilities, the chance to participate in voluntary work programs continues unabated at ICE facilities outside the Ninth Circuit. The Court should grant certiorari to resolve the circuit split that the Ninth Circuit is on the wrong side of, and to confirm that states may not obstruct federal functions, period—whether the object of their regulation is the federal government or the private contractors it enlists to carry out those functions.

I. The Supremacy Clause Forbids Washington's Effort To Impose Its Minimum-Wage Law On Federal Detainees While Exempting The State's Own Detainees From Its Burdens.

The last time this Court addressed the intergovernmental-immunity doctrine, it reiterated that states can neither directly regulate the federal government nor "'discriminat[e] against the Federal Government or those with whom it deals,' (e.g., contractors)." *Washington*, 596 U.S. at 838. That lesson should not have been lost on Washington or the Ninth Circuit, as that case reversed a Ninth Circuit decision permitting Washington to impose its will on the federal government. Undeterred, the Ninth

Circuit blessed Washington's latest effort to impose its will on the federal government, this time imposing burdens on federal contractors that Washington eschews as to its own detainees. That decision flies in the face of this Court's precedent and splits with three circuits that have squarely held that states may not regulate federal functions by targeting the contractors through which the United States acts.

A. The Circuits Are Divided Over How the Intergovernmental-Immunity Doctrine Applies When States Regulate Federal Contractors.

Courts of appeals have adopted two irreconcilable rules for deciding when state regulations of federal contractors violate the intergovernmental-immunity doctrine. The Second, Third, and Fourth Circuits hold that a state cannot circumvent intergovernmental immunity by regulating federal contractors: If a regulation has the same practical effect—or "the same sting," *CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315, 322 (3d Cir. 2025)—as regulation of the federal government itself, then it is barred. The Ninth Circuit, by contrast, holds that federal contractors' intergovernmental-immunity protection is "substantially narrower" than the federal government's, such that states may regulate contractors in ways that they concededly could not regulate the federal government itself. That split is entrenched, was outcome-determinative here, and warrants this Court's review.

1. The Second, Third, and Fourth Circuits all hold that states cannot evade intergovernmental immunity by regulating federal contractors instead of regulating the federal government itself. When a private party

contracts with the federal government to perform a federal function, those courts afford the contractor the same immunity the federal government would enjoy if it performed the work through its own employees.

The Second Circuit first reached that conclusion in *United States v. Town of Windsor*, 765 F.2d 16 (2d Cir. 1985). There, the Department of Energy contracted with the General Electric Company ("GE") to manage a nuclear research and training facility in Windsor, Connecticut. *Id.* at 17. At DOE's direction, GE began construction. *Id.* Nuclear research was about as popular in Connecticut in the 1980s as federal immigration enforcement is in Washington state today. So when the town learned of that federal work, it ordered GE to cease construction until it obtained certain state-law permits. *Id.* GE refused, prompting litigation. Although Windsor acknowledged that the Supremacy Clause would forbid it from "demand[ing] compliance with the Code from the government" itself, it maintained that "it may demand compliance from the Government's contractors." *Id.* at 18. The Second Circuit squarely rejected that argument. As it explained, "[e]nforcement of the substance of the permit requirement against the contractors would have the same effect as direct enforcement against the Government." *Id.* at 19. "Either way," applying the state's law would frustrate the federal government's objectives. *Id.*

The Third Circuit's recent decision in *CoreCivic, Inc. v. Governor of New Jersey*, 145 F.4th 315 (3d Cir. 2025), reached the same conclusion. That case involved a New Jersey law that barred any "new, expanded, or renewed agreements to detain people for

civil immigration purposes" within the state. N.J. Stat. Ann. §30:4-8.15(d). By design, the law forced a private company to cease operating an ICE detention center in New Jersey. 145 F.4th at 319. Although the court found the structure of the law "admittedly clever" because it regulated contractors rather than ICE directly, it saw "the law for what 'it really is': a direct regulation on the federal government" that "violates intergovernmental immunity." *Id.* And like the Second Circuit before it, *see id.* at 326 (citing *Windsor*, 765 F.2d at 19), the court rejected the state's view that it could evade the Supremacy Clause by regulating federal contractors rather than "the federal government directly," *id.* at 321-22. Heeding this Court's admonition to "'look through form and behind labels to substance'" when "gauging intergovernmental immunity," *id.* at 322 (quoting *City of Detroit v. Murray Corp.*, 355 U.S. 489, 492 (1958)), the court held the law invalid, as it "carrie[d] the same sting as a law whose text applies expressly to the federal government," *id.*

The Fourth Circuit, too, has reached the sensible conclusion that states cannot evade the Supremacy Clause by training their sights on federal contractors. *See United States v. Virginia*, 139 F.3d 984 (4th Cir. 1998). The law in *Virginia* required private investigators to obtain a state license. *Id.* at 985-86. When the Commonwealth threatened to enforce that requirement against private investigators who served as independent contractors for the FBI, the Bureau and one of the contractors sued. *Id.* at 986-87. The Fourth Circuit held that Virginia could not force the FBI's contractors to obtain state licenses because that would impermissibly burden the federal government's ability

to select and use its chosen agents to carry out federal functions. *Id.* at 989-90.

The common thread among these decisions is that states cannot evade the Supremacy Clause by regulating federal contractors rather than the federal government. As each court has recognized, so long as a state law "carries the same sting" as a law that directly regulates or discriminates against the federal government, *CoreCivic*, 145 F.4th at 322, it makes no difference that a state has accomplished those forbidden ends by regulating federal contractors.

2. The Ninth Circuit eschews that dominant approach in favor of deeming "a federal contractor's protection from state law" "substantially narrower" than the federal government's. App.10-11 (quoting *GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 755 (9th Cir. 2022) (en banc)). Under Ninth Circuit law, the federal government's immunity from state regulation of a federal function does not extend to a federal contractor carrying out the precise same function.

The decision below is illustrative. Consider first the court's rejection of GEO's direct-regulation defense. GEO (joined by the United States at every stage of the litigation) argued that "[t]here can be no dispute that if the federal government *operated the detention facility* and *implemented the Voluntary Work Program directly*, principles of intergovernmental immunity would bar application of state minimum wage laws to detainees." App.11. The Ninth Circuit did not disagree; it instead declared that "obvious[ly]" irrelevant because, under circuit precedent, "a federal contractor's protection from state law" is "substan-

tially narrower" than the federal government's, App.10-11 (quoting *GEO Grp.*, 50 F.4th at 755).

The Ninth Circuit employed the same reasoning when it came to GEO's nondiscrimination argument. App.16-25. Washington exempts inmates at its own detention facilities from its minimum-wage laws. Thus, demanding compliance for participants in a federal voluntary work program is rank discrimination against federal operations. But Washington, unlike the federal government, does not use private detention facilities. The Ninth Circuit used that distinction—along with the Washington Supreme Court's answer to an entirely hypothetical question whether the minimum-wage law would apply to private state prisons if they existed—to ignore that clear discrimination. The majority agreed that "[i]f the federal government operated NWIPC directly," there would be "a good argument" that forcing it to pay participants in the federal program the state minimum wage would violate the nondiscrimination principle since the state exempts detainees in state and local detention centers from the MWA. App.16. "But that hypothetical case" is irrelevant, the court posited, because the federal government chose to contract with a private party rather than to operate the NWIPC facility itself. *Id*. at 16-17. Once again, the court insisted that states have greater leeway to discriminate against contractors who perform federal functions because "private, for-profit entities" that enter into such contracts do not "enjoy[]" the "same intergovernmental immunity protection … [as] the federal government" itself. App.22.

The panel majority doubled down on that reasoning when denying rehearing en banc. In his dissent from denial, Judge Bumatay homed in on the majority's claim that federal contractors are entitled to less intergovernmental-immunity protection than the federal government. Rejecting that premise, he explained that "[w]hen a federal contractor acts on behalf of the federal government to administer a federal function[,] … the contractor is not merely a private business; it steps into the shoes of the federal government for Supremacy Clause purposes." App.73-74. The panel majority responded by issuing a statement "strongly disagree[ing]" with Judge Bumatay's position, and reiterating their view that there is a "fundamental distinction between the federal government and its contractors" when it comes to intergovernmental immunity under the Supremacy Clause. App.65.

In short, the circuits are squarely divided over whether, for intergovernmental-immunity purposes, a federal contractor stands in the federal government's shoes and is entitled to the same immunity from state interference as a federal instrumentality or employee when performing a federal function. That division of authority necessitates this Court's resolution.

B. The Ninth Circuit's Intergovernmental-Immunity Holding Is Profoundly Wrong.

The Ninth Circuit is on the short side of a circuit split for a reason: The decision below is irreconcilable with this Court's precedent. As this Court has recognized for centuries, states cannot evade the Supremacy Clause by targeting those who perform critical federal functions under contract in lieu of targeting

the federal government itself. Indeed, the dichotomy erected by the Ninth Circuit not only fails to protect federal functions from state interference, but interferes with the federal government's discretion to decide whether federal functions—like housing federal detainees awaiting federal process—are best done via agreement with federal contractors or by the federal government itself.

1. Starting with GEO's direct-regulation defense, as this Court has long explained, "the federal function must be left free of state regulation" even when "the federal function is carried out by a private contractor." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988). That principle traces back to the Nation's earliest years. As Judge Bumatay wrote, in *McCulloch*, this Court famously vindicated the Supremacy Clause even though "Maryland taxed the Bank of the United States, which was neither a federal agency nor run by federal employees." App.90. Several years later, "when Ohio likewise tried to tax the Bank of the United States, the Court *expressly* compared the employees of the Bank to 'contractors' and yet still considered the Bank's operations to be protected by federal supremacy." App.91 (quoting *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824)).

This Court has never retreated from the commonsense notion that states cannot interfere with federal objectives by targeting private contractors who act under the direction of full-time federal officials in discharging federal functions. For example, this Court has struck down under the Supremacy Clause laws requiring federal contractors to secure state approval before charging certain rates, *see Pub. Utils.*

Comm'n v. United States, 355 U.S. 534, 543-44 (1958), to obtain a state license before initiating construction projects, *see Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam), to procure a state-issued driver's permit before delivering the mail, *see Johnson v. Maryland*, 254 U.S. 51, 57 (1920), and to obtain an air-pollution permit before operating a uranium-processing facility, *see Hancock v. Train*, 426 U.S. 167, 174 n.23, 180 (1976). The state laws in each instance were nondiscriminatory, yet they were held unconstitutional as applied to the federal contractors because they "interrupt[ed] the acts of the general government itself." *Johnson*, 254 U.S. at 55.

Of course, not *all* state regulation of federal contractors violates the Supremacy Clause—just as not *all* regulation of the federal government violates the Supremacy Clause. *See Hancock*, 426 U.S. at 179. Federal employees and contractors alike must follow state laws that do not interfere with their ability to carry out a federal function. *See, e.g.*, *North Carolina v. Ivory*, 906 F.2d 999, 1000-02 (4th Cir. 1990) (finding a federal postal worker subject to liability under local traffic laws because he did not allege that "anything in the conduct of his federal responsibilities … justified his violation of these laws"). But the Ninth Circuit did not reject GEO's immunity defense because it concluded that dictating what the federal contractor must pay federal detainees under a federal voluntary work program would not interfere with any federal function; to the contrary, the court assumed that it would. The court rejected GEO's immunity defense nonetheless because, under Ninth Circuit precedent, a federal contractor's "protection from state law under the Supremacy Clause is substantially

narrower than that of a federal employee or other federal instrumentality." App.10-11. That rule is no more compatible with this Court's precedent than it is with the law of the Second, Third, and Fourth Circuits.

The Ninth Circuit's view is also impossible to square with Congress' repeated judgment that private contractors "acting under" full-time officials have every bit as much of a need for and entitlement to a federal forum as full-time federal officials. *See* 28 U.S.C. §1442(a)(1). Congress has consistently expanded the reach of that statutory protection for those "acting under" federal officers, and this Court has recognized as much in insisting that the statute "should not be frustrated by a narrow, grudging interpretation." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Indeed, this Court has recognized that the quintessential example of one "acting under" a federal officer is a federal contractor supplying the federal government with good and services it needs. *Watson*, 551 U.S. at 153-54. The whole point of that statutory protection is to ensure a federal forum for litigating a federal defense, such as intergovernmental immunity or preemption. The Ninth Circuit's "narrow, grudging interpretation" of intergovernmental immunity for government contractors thus runs counter to the consistent judgments of both Congress and this Court. *Willingham*, 395 U.S. at 407.

2. The Ninth Circuit's grounds for rejecting GEO's nondiscrimination claim fare no better. Just a few Terms ago, this Court reaffirmed—in another case reversing a Ninth Circuit decision sanctioning a Washington law, no less—that states may not "'discriminat[e] against the Federal Government or

those with whom it deals,' (e.g., *contractors*)." *Washington*, 596 U.S. at 838 (emphases added). States violate that rule when they "trea[t] someone else better than [they] treat[]" the federal government, *Washington v. United States*, 460 U.S. 536, 544-45 (1983), like when they grant themselves favorable tax exemptions that do not apply to federal actors, *see Dawson*, 586 U.S. at 176, or impose novel regulatory obligations uniquely on federal actors, *see Washington*, 596 U.S. at 838-39. And it has long been settled that that rule applies with equal force whether the target of state regulation is the federal government or a party with whom it contracts—as was the case in *Washington*. *See id.*

Here, the MWA discriminates against the federal government on its face because it provides state and local detention facilities with an exemption that it does not extend to federal detention facilities. *See* Wash. Rev. Code §49.46.010(4)(k); *cf. Dawson*, 586 U.S. at 173-80 (holding unlawful a state law that granted state, but not federal, law enforcement officers a tax exemption). One might have thought the failure to expressly carve out federal detainees simply reflects that the legislature did not even contemplate that the state statute would—or could lawfully—apply to federal detainees involved in a federal voluntary work program. But the Washington Supreme Court confirmed that, under state law, federal immigration detainees are "employees" and thus presumptively subject to the MWA. Under those circumstances, the MWA's exemption of state, but not federal, detainees is the kind of rank discrimination that plainly violates the Supremacy Clause.

The Ninth Circuit evaded that straightforward conclusion by seizing on the state supreme court's dictum that the MWA would apply to a private entity housing state inmates if (contrary to fact and state law) any such privately housed inmates existed. That entirely hypothetical determination led the Ninth Circuit to claim that there is no discrimination even though the net effect is that federal detainees (who by virtue of their immigration status are ineligible for normal work) are subject to the MWA, while state inmates are exempt and paid sums far below the minimum wage foisted on the federal program. That effort to ignore the undeniable practical operation of Washington's law fares no better than the Ninth Circuit's misguided notion that federal contractors have a substantially diminished claim to intergovernmental immunity even when they discharge uniquely federal functions for the federal government.

C. The Ninth Circuit's Preemption Analysis Is Equally Wrong.

The Ninth Circuit further erred in rejecting the preemption argument advanced by GEO and the most recent three administrations. Congress controls the field of immigration detention. That is apparent not only in the constitutional assignment of immigration to the federal government, but in numerous statutes charging the Secretary of Homeland Security with regulating the conditions of detention at all ICE facilities. *See supra*, pp.7-9. Among the regulations is a requirement that federal immigration detainees, whether housed in federal-owned or contracted-for facilities, should have the opportunity to participate in voluntary work programs.

That opportunity advances several federal objectives, including easing the impact of confinement by decreasing idleness, improving morale, and reducing disciplinary incidents. Congress also decided that detainees who participate in voluntary work programs should receive "allowances at []such rate as may be specified" by appropriations from Congress. 8 U.S.C. §1555(d). Congress set that rate at $1 per day, and expressly provided that appropriated funds may not be used to provide reimbursements in amounts greater than that cap. That amount strikes a balance among several competing factors, including providing incentives for participating, containing the costs of operating federal detention centers, and avoiding the anomaly of paying immigration detainees who are generally ineligible for lawful work in the United States anything like a normal wage.

Those congressional policies were translated into the terms of GEO's contract with ICE, which specified the $1 a day rate as the maximum rate at which the federal government would compensate GEO for fulfilling its obligation to operate the federal voluntary work program. To be sure, nothing in that contract or federal law expressly precludes GEO from paying detainees more. But the cap on federal reimbursement from appropriated funds generally acts as a practical cap on what federal contractors pay.

By reclassifying detainees as employees receiving wages governed by the MWA, Washington has "displace[d] the contractual floor established by Congress and solidified in the contract between ICE and GEO," App.55 (Bennett, J., dissenting), and replaced it with a floor that is orders of magnitude

higher than what Congress authorized, what the parties' contract contemplates, and what ICE agreed to reimburse. That plainly frustrates the purpose of federal law, as evidenced by the fact that ICE agreed to call a halt to the voluntary work program at NWIPC, notwithstanding Congress' clear judgment that voluntary work programs should be an option for all immigration detainees, whether housed by the federal government or by federal contractors, and whether the private facilities are located within or without the Ninth Circuit.

The conflict runs deeper still, as federal law generally views the classes of immigrants subject to federal detention as ineligible for lawful employment. In part for that reason, courts have consistently rejected the argument that participants in these programs are subject to the federal minimum wage or other protections of the Fair Labor Standards Act. *See Ndambi*, 990 F.3d at 374; *Alvarado-Guevara*, 902 F.2d at 396; *Guevara v. INS*, 1992 WL 1029 (Fed. Cir. Jan. 6, 1992). The decision below overrides that federal policy by treating participants in the federal program as lawful workers entitled to state minimum-wage laws. While states have considerable latitude to define employees for purposes of state law, they are not free to do so in ways that frustrate important federal policies, including federal policies concerning the eligibility of immigrants for lawful employment. *See, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 10-19 (1982).

The Ninth Circuit's contrary conclusion is the product of (at least) two fundamental errors. First, the majority's reliance on the presumption against preemption was wholly misplaced. App.55-56

(Bennett, J., dissenting). To be sure, the states' "historic police powers include '[t]he power to regulate wages and employment conditions.'" App.26. But the terms of work programs in detention facilities are far removed from any ordinary regulation of "wages and employment conditions." They instead reflect programmatic considerations having much more to do with the management of a particular institution than with employment relations.

Even more to the point, the idea that the states' historical police power over wages would extend to the uniquely and exclusively national area of immigration —let alone the "employment conditions" of those in federal custody—cannot be taken seriously. This case involves an effort to dictate what federal detainees in a federal detention center must be paid for participating in a federal work program. States do not have any "historic" power to regulate inherently federal relationships like those between GEO, ICE, and federal detainees. *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001). The fact that this case involves immigration detainees is just one more strike against the Ninth Circuit's benighted effort to invoke the presumption against preemption. It is the federal government, not the states, that has "broad" and "undoubted" power over immigration. *Arizona*, 567 U.S. at 394; *see Hines v. Davidowitz*, 312 U.S. 52, 62 (1941). The notion that the Ninth Circuit could view the presumption against preemption as applicable, and well-nigh outcome determinative, in this distinctly federal context is a powerful argument for this Court's intervention.

Second, the Ninth Circuit fixated on the fact that neither Congress nor GEO's contract with ICE "imposes [a] limit on the amount that may be paid to a detained worker." App.27-28. That is true only in the most formal sense, because in the context of government contracting, when Congress sets an express limit on what can be reimbursed from appropriated funds, that cap acts as a powerful practical constraint. Moreover, while the absence of an express federal prohibition on doing what state law requires may rule out the most rigorous form of impossibility preemption, it does not foreclose the possibility that state law could frustrate federal law by making mandatory what federal law makes discretionary (and purposefully so). As the United States explained in supporting GEO's en banc petition, Congress did not give states a role in deciding what federal detainees who participate in the federal work program must be paid. C.A.Dkt.157 at 7.

In fact, the radical difference between what federal and state law require here erases any practical distinction between impossibility and obstacle preemption. There is no denying that Washington has *in fact* rendered continued operation of the federal voluntary work program impossible, as ICE had no choice but to authorize GEO to stop offering it at the NWIPC at all—because Washington rendered it cost-prohibitive by subjecting it to its own compensation regime. That is proof positive that this is a context in which federal contractors must be left free to "perform [the federal] functions" they have been assigned "without conforming to the police regulations of a state." *Arizona v. California*, 283 U.S. 423, 451 (1931).

II. The Question Presented Is Exceptionally Important, And This Is An Excellent Vehicle To Resolve It.

The question presented is exceptionally important, both to the operation of federal immigration detention facilities (in which 80% of detainees are held by private contractors) and to the performance of federal functions by federal contractors more generally. Federal contractors need to know whether they can rely on the Supremacy Clause protections that shield the federal government when they perform federal functions itself, or whether they at best receive some ill-defined junior-varsity protection. And the federal government needs to know whether it is opening the door to state interference when it enlists private contractors to perform federal functions that they can perform with greater flexibility or expertise. The answers to both questions should be clear, and should not depend on whether they arise on the East Coast or the West Coast.

The discord the Ninth Circuit's decision creates is particularly problematic in the immigration context. Though federal immigration policy is supposed to "be left entirely free from local interference," *Hines*, 312 U.S. at 63, it understandably generates passionate local concerns on both sides of the aisle depending on varying priorities of federal officials. While Arizona thought one administration was being too lax, Washington apparently thought the next administration was being too harsh. But the one constant is that the federal government has agreed across three consecutive administrations that Washington's effort "to interfere with federal

immigration enforcement" is especially "aggressive and legally unjustified." C.A.App.406.

And interfere, the state certainly has: "[F]or the past three years, detainees at NWIPC have had no ability to participate in … and receive the benefits from the program only because Washington seeks to hold federal contractors to an illegal minimum wage standard." App.54 (Bennett, J., dissenting). That perverse outcome plainly undermines Congress' judgment that the program should be available to all detainees. In short, the decision below "chart[s] a roadmap for states to circumvent the Supremacy Clause and Congress's authority" in a uniquely federal area. App.49 (Bennett, J., dissenting).

As Judge Bumatay explained, the decision below threatens to have much more "widespread" consequences too, as it "sets a dangerous precedent" that empowers states to "impair *any* federal policy—no matter how central to the federal government—so long as the State regulates federal contractors rather than the federal government itself." App.74 (Bumatay, J., dissenting) (emphasis added). That denial of needed protections to federal contractors harms the federal government itself, which now has to choose (at least in the Ninth Circuit) between the efficiencies of contracting out and the deficiencies of opening the door to state interference. The Supremacy Clause spares the federal government that dilemma. This Court should not leave standing a decision that allows the basic design of the Constitution to be so easily evaded.

This is an excellent vehicle to resolve the exceptionally important question presented. The case

was litigated to final judgment on a full record, and the Supremacy Clause issues were pressed and passed on below. The arguments on both sides were thoroughly aired by majority and dissenting opinions, and the legal issues on which the Ninth Circuit has parted ways with other circuits were dispositive. Moreover, the Ninth Circuit declined the opportunity to take this case *en banc* and bring its precedent into line with the law of its sister circuits and this Court—over the dissent of seven judges. Its view that federal contractors occupy a materially different position than the federal government even when they are performing identical federal functions is therefore thoroughly entrenched. This Court should grant review and reverse before that outlier position can wreak even more havoc than it already has.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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January 9, 2026

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21-36024, 22-35026

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

Plaintiffs-Appellees,

v.

THE GEO GROUP, INC., a Florida corporation,

Defendant-Appellant.

Nos. 21-36025, 22-35027

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

THE GEO GROUP, INC.,

Defendant-Appellant.

Argued and Submitted: Oct. 2, 2022
Filed: Jan. 16, 2025

Before: Mary H. Murguia, Chief Judge, and William A. Fletcher and Mark J. Bennett, Circuit Judges.

OPINION

W. FLETCHER, Circuit Judge:

The GEO Group ("GEO") is a publicly traded private corporation that operates detention and prison facilities. Since 2005, GEO has operated the Northwest Immigration and Customs Enforcement Processing Center ("NWIPC"), an immigration detention center in Tacoma, Washington. GEO operates the NWIPC under contract with United States Immigration and Customs Enforcement ("ICE"), the federal agency tasked with enforcement of immigration laws.

During the period relevant to this appeal, GEO had a voluntary work program at the NWIPC. Every day, hundreds of civil detainees at the NWIPC worked for GEO, performing tasks essential to the operation of the facility. GEO usually paid these workers $1 per day, the minimum compensation mandated by ICE. Without objection from ICE, GEO occasionally paid them up to $5 per day when necessary to attract sufficient workers. Because of the labor provided to GEO by the detained workers employed under this program, GEO operated its facility with just a handful of full-time staff hired from the local area, thereby saving millions of dollars that it would otherwise have spent on payroll.

In 2017, a class of detainees and Washington State each sued GEO in federal court for violations of Washington's Minimum Wage Act ("MWA"). The district court consolidated the actions. A jury awarded

$17,287,063.05 in back pay damages to the detainee class. After a bench trial, the court awarded $5,950,340.00 in unjust enrichment to Washington State and enjoined GEO from employing detainees without paying Washington's minimum wage.

GEO appealed to this court. After hearing oral argument, we certified three questions to the Washington Supreme Court. *Nwauzor v. GEO Group, Inc.* ("*Nwauzor*"), 62 F.4th 509 (9th Cir. 2023). We have now received the answers to those questions. We affirm the judgment of the district court.

I. Background

The NWIPC has a maximum capacity of 1,575 detainees. Detainees at the NWIPC are awaiting administrative review of their immigration status. They are civil detainees. They are not in criminal proceedings. Some detainees at the NWIPC lack legal status in the United States. Others are lawful permanent residents with work authorization. Detainees are held until they are either deported because they have no legal status or released into the United States because they have a legal right to be here.

The current ten-year contract between GEO and ICE began in 2015 and awards GEO a minimum of $700 million over ten years. Between 2010 and 2018, GEO's gross profit from managing the NWIPC ranged between $18.6 million and $23.5 million per year, with general net profit margins of 16 to 19 percent.

GEO's contract with ICE requires GEO to comply with "all applicable federal, state, and local laws and standards," including "labor laws and codes." Critically for purposes of the case before us, the

contract does not exclude state minimum wage laws from the definition of state "labor laws and codes." Further, and also critically, the contract provides that if "a conflict exist[s] between [federal and local] standards, the most stringent standard shall apply." Finally, the contract provides, "*Subject to existing law*, regulations *and/or other provisions of this contract*, illegal or other undocumented aliens will not be employed by the Contractor, or with this contract." (Emphasis added.) This provision does not exclude state labor laws and codes from its definition of "existing law." Nor does it negate the "other provision[] of this contract" that allows GEO to offer paid employment to undocumented noncitizen detainees at the NWIPC.

GEO's contract also requires GEO to comply with ICE's Performance-Based National Detention Standards ("PBNDS"). Section 5.8 of the PBNDS requires private contractors operating detention facilities to offer a Voluntary Work Program ("VWP"). Section 5.8 states that the purpose of the VWP is to provide detainees "opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of the safety, security and good order of the facility." Detainees who choose to participate in the VWP are not permitted to work more than 8 hours per day and 40 hours per week. Section 5.8 requires contractors to ensure that "working conditions . . . comply with all applicable federal, state and local work safety laws and regulations." Section 5.8 also requires contractors to compensate detainees at a rate of "*at least* $1.00 (USD) per day" (emphasis added).

Nothing in GEO's contract with ICE or in the PBNDS provides that GEO may not compensate civil detainees at rates higher than $1.00 per day. As described in greater detail below, GEO has routinely paid detainees up to $5 per day when necessary to attract sufficient workers. GEO has done so without any objection from ICE.

ICE played no role in the development or management of the VWP at the NWIPC. GEO created job roles and descriptions, set work schedules, provided training, supervised detained workers, and managed payroll. Detained workers' responsibilities included meal preparation and kitchen sanitation, janitorial work, building repairs, waste management, and laundry. GEO started the VWP when it first began to operate the NWIPC in 2005. In the years since then, the number of daily participants in the VWP has ranged from 200 to 470 detainees.

GEO's contract with ICE requires it to keep the NWIPC clean and free of pests, dispose of waste appropriately, provide clean linens and blankets, and serve detainees three nutritious meals daily. During the period relevant to this case, GEO relied heavily on the labor of the detained workers it employed to fulfill its contractual duties. In the kitchen, GEO employed thirteen full-time outside employees and used nearly one hundred detainees each day to prepare meals, cook and serve food, and wash dishes. Without the help of detainees, the kitchen staff would have been "absolutely" unable to meet demand. In the laundry room, one full-time outside employee typically supervised twelve to fifteen detainees processing industrial loads of laundry for the entire facility seven

days a week. Detainees cleaned the majority of the facility's secured common areas, including the kitchen, laundry room, communal bathrooms and showers, and recreational areas. GEO employed three outside employees as full-time janitors to clean non-secured areas to which detainees were not permitted access. GEO estimated that if the VWP at the NWIPC ended, it would have to hire approximately 85 additional full-time outside employees.

GEO usually paid its employed detained workers $1 per day. GEO sometimes increased their pay up to $5 per day. These temporary increases incentivized detainees to take undesirable shifts or to work additional shifts when program participation was low, such as during hunger strikes or outbreaks of disease. GEO always resumed paying detainees $1 per day as soon as practicable. GEO never paid its employed detainees Washington's minimum wage. Despite the low pay and working conditions, detainees participated in the VWP because of the situation in which they had been placed. One detainee testified in his deposition: "I need the money desperately. I have no choice."

In 2017, a class of detained workers at the NWIPC and Washington State brought separate actions against GEO in federal district court. Both suits claimed that GEO violated Washington's MWA. The court consolidated the actions and held two trials. A jury found that GEO violated the MWA and awarded $17,287,063.05 in back pay damages to the detainee class. After a bench trial, the district court awarded $5,950,340.00 in unjust enrichment to the State. The court enjoined GEO from continuing operation of the

VWP without paying Washington's minimum wage to the detainees it employed under the VWP. In response, rather than pay Washington's minimum wage to the detained workers, GEO, with the approval of ICE, suspended the VWP at the NWIPC during the pendency of this litigation.

GEO appealed to this Court. After hearing oral argument, we certified three questions of state law to the Washington Supreme Court: (1) whether detained workers at the NWIPC, a private detention center, are "employees" within the meaning of the MWA; (2) whether RCW 49.41.010(3) (k), the MWA's government-institutions exemption from MWA coverage, applies to work performed by detainees confined in a private detention facility operated under a contract with the State; and (3) whether the damages award to the class forecloses equitable relief to the State in the form of an unjust enrichment award. *Nwauzor*, 62 F.4th at 516-17.

The Washington Supreme Court answered all three questions. *Nwauzor v. The Geo Group., Inc.* (*Nwauzor II*), 540 P.3d 93 (Wash. 2023). It answered "yes" to the first question, concluding that the detainees employed by GEO in its VWP program were employees within the meaning of the MWA, and that the MWA requires GEO to pay Washington's minimum wage to those detainees. It answered "no" to the second question, concluding that the MWA government institutions exception "does not apply to detained workers in private detention facilities regardless of whether the private entity that owns and operates the facility contracts with the state or federal government." *Id.* at 99. It answered "no" to the third

question, concluding that GEO may be held liable to the State for unjust enrichment when detainees employed in the VWP program are paid less than Washington's minimum wage.

In its appeal to us, GEO presented five questions. Two are no longer relevant in light of the responses of the Washington Supreme Court. The three remaining questions are: (1) whether Washington's MWA violates the doctrine of intergovernmental immunity; (2) whether the MWA is preempted by federal law; and (3) whether the MWA violates GEO's derivative sovereign immunity. These are questions of law that we review de novo. *Hickcox-Huffman v. U.S. Airways, Inc.*, 855 F.3d 1057, 1060 (9th Cir. 2017); *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 1000 (9th Cir. 2008). We conclude that the district court answered all those questions correctly in granting judgment to the detainees and the State. Our dissenting colleague contends that we (and the district court) have answered questions (1) and (2) incorrectly. We address the three questions in turn.

II. Discussion

A. Intergovernmental Immunity

"The Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that [1] directly regulate or [2] discriminate against it." *United States v. Washington*, 596 U.S. 832, 835 (2022) (bracketed numbers added); *see also North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion) (explaining that states shall not "regulat[e] the United States directly or discriminat[e] against the Federal Government or those with whom it deals," including private contractors). For purposes

of intergovernmental immunity, federal contractors are not equivalent to the federal government. Thus, "states may impose some regulations on federal contractors that they would not be able to impose on the federal government itself." *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 760 n.10 (9th Cir. 2022) (en banc).

Case law distinguishes between the two kinds of intergovernmental immunity. An example of the first kind of intergovernmental immunity—immunity from direct regulation—is *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014), in which a California statute authorized the State to "'compel a responsible party . . . to take or pay for appropriate removal or remedial action necessary to protect the public health and safety and the environment at the Santa Susana Field Laboratory site.'" *Id.* at 839 (quoting Cal. Health & Safety Code § 25359.20(a)). There was extensive radioactive contamination at the Santa Susana site. All of the contamination either was the result of federal activity or was indistinguishable from the result of such activity. The federal government "accepted responsibility for the clean up of radioactive contamination" at the site and "actively conduct[ed] the cleanup through its cleanup contractor." *Id.* California law imposed higher cleanup standards on the federal government than federal law or policy required. We held that California law improperly imposed direct regulation on the federal government because a state law cannot "regulate what [a] federal contractor[] ha[s] to do or how they d[o] it pursuant to their contracts." *Id.* In a later case, we characterized the California law as "impermissibly interfer[ing] with federal functions by overriding federal contracting

decisions" as opposed to "merely increas[ing] the federal government's costs." *Newsom*, 50 F.4th at 760.

An example of the second kind of immunity—immunity from discriminatory regulation—is *United States v. Washington*, 596 U.S. 832 (2022), in which a Washington statute provided enhanced workers' compensation benefits to employees of federal contractors performing cleanup work at the Hanford nuclear site in eastern Washington. Washington law allowed workers employed by federal contractors at Hanford to establish eligibility for benefits more easily than other workers covered by Washington's workers' compensation law. Because it mandated greater eligibility for benefits for federal contractors' Hanford workers, the law increased the workers' compensation costs borne by the federal government compared to the costs borne by other employers. *Id.* at 835-36. The Supreme Court held that the law providing enhanced benefits for the Hanford workers was improperly discriminatory because it "singl[ed] out the Federal Government for unfavorable treatment" compared to similarly situated state and private employers. *Id.* at 839.

We address the two kinds of immunity in turn.

1. Immunity from Direct Regulation

"When a state regulation of a contractor would control federal operations, enforcement of the substance of the regulation against the contractors would have the same effect as direct enforcement against the Government." *Newsom*, 50 F.4th at 760 (citation and internal quotation marks omitted). However, "[t]he scope of a federal contractor's protection from state law under the Supremacy Clause

is substantially narrower than that of a federal employee or other federal instrumentality." *Id.* at 755. "Private contractors do not stand on the same footing as the federal government, so states can impose many laws on federal contractors that they could not apply to the federal government itself." *Id.* at 750.

GEO is a private for-profit employer that operates the NWIPC for its shareholders' economic gain. The MWA applies equally to all private employers, including GEO. In the case before us, the MWA neither controls federal operations nor dictates the terms of the contract between ICE and GEO. It requires no action by federal officials. Nor does it determine the work that detainees may perform.

In evaluating a federal contractor's claim of intergovernmental immunity, "courts distinguish regulations that merely increase the federal government's costs from those that would control its operations." *Id.* at 755; *see also Boeing*, 768 F.3d at 839. Appearing as amicus, the government argues that direct-regulation intergovernmental immunity applies here because "[t]here can be no dispute that if the federal government *operated the detention facility* and *implemented the Voluntary Work Program directly*, principles of intergovernmental immunity would bar application of state minimum wage laws to detainees." (Emphasis added.) The problem with the government's argument is obvious on its face: The government does not "operate[] the detention facility." Nor does it "implement[] the Voluntary Work Program directly." Instead, GEO, a private for-profit company, performs those functions.

In its contract with GEO, the federal government has chosen to control only some aspects of GEO's operations at the NWIPC. The government made a deliberate choice to dictate to GEO the minimum rate at which it must pay its detained workers under the VWP. But, critically, it also made a deliberate choice *not* to dictate to GEO a maximum rate at which it may pay those workers. GEO has usually paid the minimum rate, but in recognition of the fact that its contract with ICE does not cap the wages it may pay detainees it has sometimes paid five times that rate. The government has never objected to GEO so doing. More to the point, the government has not claimed in this litigation that GEO violated its contract—or, indeed, any federal law—in so doing.

Washington's MWA is analogous to state laws that impose requirements on federal contractors that the Supreme Court have upheld as merely increasing the federal government's costs. "Absent federal law to the contrary, the Supremacy Clause . . . leaves considerable room for states to enforce their generally applicable laws against federal contractors." *Newsom*, 50 F.4th at 755. As we have explained, a "state law is [not] unconstitutional just because it indirectly increases costs for the Federal Government, so long as the law imposes those costs in a neutral, nondiscriminatory way." *Id.* (quoting *Washington*, 568 U.S. at 839) (alteration in original). The Washington Supreme Court has made clear that the MWA imposes minimum wage standards on private employers in a neutral, nondiscriminatory way, irrespective of whether the private employer is contracting with the federal or state government. *See Nwauzor II*, 540 P.3d at 99.

There is a long-standing line of cases holding that states may impose non-discriminatory taxes on federal contractors even though those taxes may increase the costs of the government. *See, e.g.*, *South Carolina v. Baker*, 485 U.S. 505, 523 (1988); *United States v. New Mexico*, 455 U.S. 720 (1982). But the principle is not limited to tax cases. *See, e.g.*, *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943) (upholding state law imposing price control on federal suppliers even though this may result in increased costs to the government); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 104 (1940) (upholding state law requiring federal contractor to use planking as walkways even though it "may slightly increase the cost of construction to the government").

In *Newsom*, we struck down a California law that categorically forbade the federal government to operate private detention facilities in California. We held that by categorically forbidding the federal government to use private contractors, the law impermissibly sought to "control its operations," as opposed to merely increasing its costs. *Newsom*, 50 F.4th at 755. The case before us is a far cry from *Newsom*. Washington's MWA does not forbid the federal government to use private contractors to confine civil detainees. Nor does it impose requirements on private contractors that conflict with any requirement imposed by the federal government. It merely requires private contractors to pay civil detainees Washington's minimum wage for work these detainees perform for the benefit of the contractor.

The MWA is not comparable to state licensing requirements that conflict with the federal government's requirements and thereby interfere with the government's authority to select its contractors. *See, e.g.*, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 188 (1956); *Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 438-39 (1991); *Taylor v. United States*, 821 F.2d 1428, 1431-32 (9th Cir. 1987). Nor is it comparable to a law requiring state approval of federal rates for a common carrier transporting federal property. *See Pub. Util. Comm'n of State of Cal. v. United States*, 355 U.S. 534 (1958). Those impermissible licensing and permitting regimes involved direct control by the state over federal government operations. They directly regulated the federal government by "preventing [the federal government] from hiring the personnel of its choice" or by dictating the terms of a federal contract. *Newsom*, 50 F.4th at 757; *see also Gartrell*, 940 F.2d at 438-39.

Washington's MWA does not interfere with or dictate federal decisions in the manner of the laws at issue in the cases just cited. There is nothing—either in federal law or in GEO's contract with the federal government—that prevents GEO from paying Washington's minimum wage to its civil detainees who perform work for the benefit of GEO. Indeed, as we noted above, GEO's contract with ICE explicitly requires it to comply with "state labor laws and codes." The contract does not exclude minimum wage laws from its definition of state labor laws and codes. Further, a former GEO detention officer testified at trial that GEO was free to add fully paid positions to its staff at the NWIPC without a contract modification, and that GEO often did so with the

understanding that it would not be reimbursed by the federal government for the cost of those additional positions.

If GEO were able to renegotiate a higher rate with the federal government so as to retain its current level of profit while also complying with the MWA, this would indirectly increase costs to the federal government. At this time, there has been no renegotiation, and we are unable to predict the outcome of such renegotiation. However, we note that financial data in the record suggest that even after complying with Washington's MWA GEO could still profit substantially from operating the NWIPC under its current contract. At trial, the class of detained employees won a verdict of $17,287,063.05 for failure to pay Washington's minimum wage for work from 2014 through 2021. That figure divided by seven years equals just under $2,500,000 per year. GEO's gross profit from managing the NWIPC between 2010 and 2018 ranged between $18.6 million and $23.5 million per year. Subtracting $2.5 million from GEO's profits during those years would allow GEO—even operating under its current contract—to retain a profit margin of roughly $16 to $21 million per year while complying with the MWA.

In sum, we agree with the district court's conclusion that "[a]pplication of the [MWA] does not mandate the way in which GEO runs the [VWP]" or "replace or add to the contractual requirements . . . GEO [must] fulfill in running the [P]rogram." That is, a requirement that GEO pay its detained workers in compliance with Washington's MWA does not directly regulate the federal

government. Even if the government does ultimately pay more under future contracts with GEO as a result of GEO's compliance with the MWA, such indirect effect would not violate the principle of intergovernmental immunity.

2. Immunity from Discriminatory Regulation

A state law or regulation discriminates against the federal government if it treats comparable classes of federal and state employees differently, advantaging the state employees. *Dawson v. Steager*, 586 U.S. 171, 175-76 (2019). GEO and the federal government point to Wash. Rev. Code § 49.46.010(3)(k), which exempts "resident, inmate, or patient" employees of Washington government institutions from coverage under the MWA. A covered "employee" under the MWA "includes any individual employed by an employer *but shall not include*: . . . *[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment, or rehabilitative institution*." *Id.* (emphasis added). That is, the MWA does not apply to residents, inmates, or patients of institutions operated by Washington State governmental entities. The statute contains no comparable exemption for residents, inmates or patients in federally operated institutions.

GEO and the government argue that Washington's MWA discriminates because it treats the federal government differently from the state government. If the federal government operated the NWIPC directly, and if Washington sought to apply its MWA to employees of the federal government working in the NWIPC, this would be a good argument. But that hypothetical case is not the case before us. In the

case before us, the federal government does not operate the NWIPC. Nor does it employ civil detainees at the NWIPC. GEO does those things. Thus, the question presented is not whether the MWA treats differently facilities operated by the federal and state governments. Rather, the question is whether the MWA treats private facilities operated under contract with the federal government differently from private facilities operated under contract with the state government.

The Washington Supreme Court's response to our second certified question provides the answer. The Court wrote that the exemption from coverage under the MWA does not apply to detained workers in private facilities operating under contract with *either* the state or federal government. *See Nwauzor II*, 540 P.3d at 99. Specifically, the Court wrote that the exemption "does not apply to detained workers in private detention facilities regardless of whether the private entity that owns and operates the facility contracts with the state or federal government." *Id*. The Court emphasized that the critical distinction under the statute is between publicly and privately run institutions, not between federal and state institutions. According to the Washington Supreme Court, privately run detention facilities—whether operated under contract with the federal or the state government—are simply not included in the exemption from the MWA. Both are subject to the MWA. That is, privately run detention facilities are treated equally, regardless of "whether the institution is operated pursuant to a contract with the federal or state government." *Id.* at 100.

Our dissenting colleague asks a different question from the question presented by this case. He writes, "This case involves a simple question: whether Washington can force a federal contractor operating an immigration detention facility to pay a higher minimum wage than its contract with the federal government requires when Washington does not require the same of detention facilities it operates." Dissent at 36. Our colleague asks the wrong question. He does not ask whether Washington's MWA treats equally apples and apples. That is, he does not ask whether the MWA treats equally private employers who have contracted with the state and private employers who have contracted with the federal government. Instead, our colleague asks whether the MWA treats equally apples and oranges. That is, he asks whether the MWA treats equally *state employers*, on the one hand, and private employers who have contracted with the federal government, on the other. Because our colleague asks the wrong question, he gets the wrong answer.

Our colleague relies on the Supreme Court's decision in *Dawson* to support his conclusion. But *Dawson* supports our holding rather than his dissent. Plaintiff Dawson was a retired U.S. Marshal. His home state of West Virginia taxed as income the retirement benefits of all retired federal employees, but it did not tax as income the benefits of certain retired state law enforcement employees. Dawson contended that West Virginia should treat him in the same manner as it treated the retired state law enforcement employees. The Supreme Court agreed, holding that West Virginia was required to give the same tax benefit to Dawson as it gave to the retired

state law enforcement employees because "there aren't any 'significant differences' between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees." *Dawson*, 586 U.S. at 175.

Dawson allows the application of the MWA to GEO's VWP. The question in *Dawson* was whether retired federal law enforcement employees were improperly discriminated against as compared to retired state law enforcement employees. *Dawson*'s holding requires a comparison between the employees of the federal and state governments to ensure that similarly situated federal and state employees are treated equally. *Dawson* does not require, and should not be expanded to require, that employees of the government and employees of private institutions be treated equally.

The Washington Supreme Court made clear, in its answer to our second certified question, that the MWA treats equally the employees of state and federal government institutions. The exception to the MWA applies to both. But that exception does not apply to employees of private institutions operated under contract with either the state or the federal government. That is, the exception "does not apply to detained workers in private detention facilities regardless of whether the private entity that owns and operates the facility contracts with the state or federal government." *Nwauzor II*, 540 P.3d at 99. The government institutions exception "applies only to workers detained in a *government* institution." *Id.* (emphasis added). The MWA applies equally to all

private institutions regardless of whether they are contracting with the state or federal government. *Id*.

We have long recognized, in many contexts, that there are "significant differences" between federal and state government entities, on the one hand, and private companies that contract with those governmental entities, on the other. There are many examples. Federal government entities are presumptively entitled to sovereign immunity, but private companies that contract with the government do not have sovereign immunity unless their conduct was dictated and controlled by the federal government. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). Federal entities have a presumptive intergovernmental tax immunity, but private contractors do not share that immunity unless their conduct is "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *New Mexico*, 455 U.S. at 735. For purposes of the Fourteenth Amendment's state action requirement, acts performed by "private contractors do not become acts of the [state] government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Federal officers can use the federal-officer removal statute, but employees of a company contracting with the federal government cannot use the statute unless they demonstrate that they are "common-law agents" of the government. *DeFiore v. SOC LLC*, 85 F.4th 546, 556 (9th Cir. 2023). In the context of qualified immunity, the Supreme Court has emphasized the difference between "[g]overnment-employed prison guards" and "prison

guards who are employees of a private prison management firm," holding that only government-employed guards are entitled to qualified immunity. *Richardson v. McKnight*, 521 U.S. 399, 405, 401 (1997).

According to our dissenting colleague, *Dawson* "suggests" that we should compare state entities to private entities that contract with the federal government. Dissent at 42. The dissent characterizes *Dawson* as suggesting that "the relevant question isn't whether [the NWIPC is] similarly situated to [other private employers covered by the MWA]; the relevant question is whether [it is] similarly situated to those who [are exempt from the MWA]." *Id.* (quoting *Dawson*, 586 U.S. at 178; bracketed language supplied by the dissent). The dissent goes on:

> The relevant comparison in *Dawson* was between state employees, who received the benefit, and federal employees, who did not. *Dawson*, 586 U.S. at 178. Applied to the MWA, *Dawson* requires equal treatment between Washington state facilities, which receive the benefit, and the NWIPC, *a federal facility*, which does not.

Id. at 42 n.5 (emphasis added). In both of these passages, the dissent insists on comparing the NWIPC, a privately operated facility, to facilities operated by Washington State. In so insisting, the dissent refuses to acknowledge the obvious. Contrary to what the dissent writes, the NWIPC is not a "federal facility," comparable to "Washington state facilities." Rather, it is a private facility, operated under contract with the federal government.

Our dissenting colleague's interpretation of *Dawson* would improperly expand the intergovernmental immunity doctrine. Our colleague's interpretation would provide to private, for-profit entities the same intergovernmental immunity protection enjoyed by the federal government when those entities are merely contracting with the federal government. This reading of *Dawson* is inconsistent with *Geo Group, Inc. v. Newsom*, where we recently explained that "states may impose regulations on federal contractors that they would not be able to impose on the federal government itself." 50 F.4th at 760 n.10 (en banc) (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 867 (1824); *United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982)).

Our colleague also relies on *United States v. California*, 921 F.3d 865 (9th Cir. 2019). Dissent at 44. The case before us is poles apart from that case. In *United States v. California*, the federal government challenged a California statute that required state review of "facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California." *Id.* at 882 (quoting Cal. Gov't Code § 12532(a)). The statute specifically required review by state officials of "the 'standard of care and due process provided to' detainees, and 'the circumstances around their apprehension and transfer to the facility.'" *Id.* at 882-83 (quoting Cal. Gov't Code § 12532(b) (1)). We wrote, "These additional requirements burden federal operations, and *only* federal operations." *Id.* at 883. That is, these requirements did not apply to state facilities that housed or detained noncitizens; they applied only to

federal facilities that performed those functions. Because of the differential treatment, we held that the California statute violated the doctrine of intergovernmental immunity. In contrast to the statute at issue in *United States v. California*, Washington's MWA does not apply differently to private facilities employing civil detainees depending on whether the facility is operating pursuant to a contract with the state or a contract with the federal government. Instead, the MWA applies equally to such facilities.

Our dissenting colleague reads an excerpt from Washington Department of Labor and Industries guidance as suggesting that a privately operated detention facility contracting with Washington is exempt from the MWA. Dissent at 40-41. The Washington Supreme Court, however, relied on precisely this guidance to conclude that such a privately operated detention facility is *not* exempt from the MWA. *See Nwauzor II*, 540 P.3d at 99-100. The guidance specifies that "residents, inmates, or patients of a *state, county or municipal* correctional detention, treatment or rehabilitative institution *assigned by facility officials to work on facility premises for a private corporation at rates established and paid for by public funds* are not employees of the private corporation and would not be subject to the MWA." *Id.* (quoting Wash. State Dep't of Lab. & Indus. Policy No. ES.A.1, § 5(k), Minimum Wage Applicability (Dec. 29, 2020) (emphasis added by the Washington Supreme Court)). In its answer to our certified question, the Washington Supreme Court emphasized that the guidance used the words "assigned by facility officials to work on facility

premises." Relying on this language, the Court interpreted the guidance as applying only to MWA exemptions of government-operated facilities. *See id.* Thus, according to the Court, the guidance indicates that privately operated facilities are not exempt from the MWA.

The Washington Supreme Court was explicit in saying that the MWA treats equally employees of private facilities operated pursuant to contracts with the state and the federal governments. According to that Court, both sets of employees are covered by the MWA. It is true that at this time there is no such private facility operating pursuant to a contract with the State. But the Court stated clearly, in answer to our second certified question, that Washington's MWA would apply to a private detention facility operating under contract with the State. We have no reason to disbelieve the Washington Supreme Court when it writes that Washington's MWA would apply equally to such a facility.

Our dissenting colleague asks us to disregard the considered opinion of the Washington Supreme Court. Our colleague states accurately that at this time there is no private detention facility operating under contract with the State. From that undisputed fact, he argues that we should ignore the opinion of the Washington Supreme Court on a question of Washington law. We disagree. When we have asked a question to that Court, and have received its answer, we are not free to disregard that answer. To disregard the considered opinion of the Washington Supreme Court on a question of law of that State, when we have asked for that very opinion, is not only disrespectful to

that Court but is also contrary to the principles of federalism upon which our Constitution is based.

Finally, during the pendency of this appeal, the parties brought to our attention *United States v. King County*, No. 23-35362, ___F.4th___, 2024 WL 4918128 (9th Cir. Nov. 29, 2024), in which we held that an executive order of King County, Washington, barring private servicing of charter flights used for deportations at a local airport violated the intergovernmental immunity doctrine. *Id.* at *9-11. We held that the executive order effectively banned the federal government from using privately contracted flights for deportations at the local airport and discriminated directly against the United States by singling out the federal government and its contractors for unfavorable treatment. *Id.* at *10.

King County is consistent with our holding today. As explained above, the MWA neither improperly regulates federal operations nor discriminates against the federal government and its contractors. The King County executive order targeted specific kinds of flights, effectively preventing the federal government from using private contractors for deportations at the local airport (improper direct regulation) and applied only to private companies contracting with the federal government (improper discrimination). *Id.* at *9-11. The executive order was comparable to the laws struck down in *Newsom v. Geo Group* and *United States v. California* rather than to the MWA. In contrast to the laws in those cases, the MWA is a generally applicable statute that for over sixty years has required private institutions in Washington State to pay their workers minimum wage. *See Nwauzor II*, 540 P.3d at 99.

B. Preemption

Federal law preempts state law when a party cannot comply with both federal and state law, or when state law poses an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016) (citation omitted). There is a presumption against preemption "when a state regulates in an area of historic state power." *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018) (citation omitted). As relevant here, the States' historic police powers include "[t]he power to regulate wages and employment conditions." *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1150 (9th Cir. 2004). States "possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Id.* (citation omitted).

Once triggered, the presumption against preemption applies "even if the law 'touch[es] on' an area of significant federal presence." *Knox*, 907 F.3d at 1174. The presumption applies to state laws that affect areas of exclusive federal regulation, such as immigration, even if they have "incidental effects in an area of federal interest." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976) ("[T]he Court has never held that every state enactment which in any way deals with [noncitizens] is a regulation of immigration and thus per se preempted by this constitutional power."); *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) ("[W]hile the [challenged] laws certainly have effects in the area of immigration, the text of the laws

regulate for the health and safety of the people of Arizona.").

The MWA falls squarely within the states' historic police powers to establish and require payment of a minimum wage. The fact that the MWA applies to civil detainees working in an immigration detention center operated by a private for-profit company does not transform it into a law that has more than an incidental effect on immigration. *Knox*, 907 F.3d at 1177; *DeCanas*, 424 U.S. at 355; *Puente Ariz.*, 821 F.3d at 1104. We therefore apply the presumption against preemption.

To overcome the presumption against preemption, the challenging party must show a "clear and manifest purpose of Congress" to preempt state law. *Arizona v. United States*, 567 U.S. 387, 400 (2012) (internal citations omitted). GEO and the government attempt to show a "clear and manifest purpose" by arguing that in two statutes Congress showed its intent to preempt the application of the MWA to civil detainees held in private for-profit detention centers. Neither argument is persuasive.

First, GEO and the government cite a statute enacted in 1950 providing that "[a]ppropriations . . . shall be available for . . . payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555. This statute empowers Congress to appropriate funds to ICE to pay allowances to detainees who perform work while detained. The statute imposes no limit on the amount that may be

appropriated. Nor does it impose any limit on the amount that may be paid to a detained worker. Finally, in enacting the statute, Congress could not have had in mind payment of civil detainees held in private facilities operated by for-profit companies because privately run immigration detention centers did not exist until the 1980s, thirty years after the statute was enacted.

Second, GEO and the government cite a congressional appropriations act from the late 1970s. In that act, Congress appropriated funds to the precursor agency to ICE "at a rate not in excess of $1 per day" for compensating detained workers. Department of Justice Appropriations Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021 (1978). In the same act, Congress authorized other uses for the appropriated funds, including leasing aircraft, "tracking lost persons," hiring security guards, "attend[ing] firearms matches," and providing allowances to immigrants in custody. The act is no longer in force. "As a general rule of thumb, appropriations acts are in force during the fiscal year of the appropriation and do not work a permanent change in the substantive law." *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 304 (9th Cir. 1991). Congress did not reenact this provision in a subsequent bill, and the text of the appropriation specified that it would lapse. *See* Department of Justice Appropriations Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1021 (1978) ("An Act making appropriations . . . for the fiscal year ending September 30, 1979.").

But even if the act were currently in force, it would not help GEO. GEO contends in its brief that

the act forbids it to pay its detainees more than $1.00 per day. It writes, "[T]he maximum rate of payment for 'work performed' by 'aliens, while held in custody under the immigration laws,' is $1 per day." GEO is clearly incorrect. It is uncontested that GEO has paid its civil detainees at up to five times the rate it is now claiming is the maximum permitted rate, and that ICE has never objected to its doing so. The government explicitly disagrees with GEO on this point. The government correctly concedes in its amicus brief that the act, if still in force, would not forbid GEO from paying more than $1.00 per day. The act merely provided that the government would not reimburse payments in excess of that amount.

Further, even if the act were currently in force, it would appropriate funds to ICE only to pay civil detainees held in government facilities. The act did not and would not, if it were still in force, address payment of civil detainees held by private, for-profit contractors. Nothing indicates that Congress intended, during the period the act was in force, much less in perpetuity, to limit wages paid to such workers and to preempt a state minimum wage requirement applicable to private contractors that employ such workers.

The federal government as amicus makes an additional argument not made by GEO. The government speculates that compelling private contractors to pay state-mandated minimum wage to detained workers will result in financial disparities among detainees, and that such disparities could lead to unrest in detention facilities. The government further speculates that private contractors may scale

back or eliminate the VWP due to the increased financial burdens associated with paying detained workers the state-mandated minimum wage. The government argues that these possible effects would impermissibly interfere with the accomplishment of Congress's goal in authorizing the VWP. Whether or not the government's speculations will be borne out is, on the record before us, unknowable. We are aware that, with the permission of the government, GEO has suspended the VWP at the NWIPC during the pendency of this litigation. However, we see nothing in this litigation-specific response to indicate what the long-term consequences will be if GEO is required to pay Washington's MWA to its civil detainees held at the NWIPC.

Our dissenting colleague disagrees with our analysis. He contends that Washington's MWA is preempted because it poses an "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Dissent at 49-50 (quoting *Newsom,* 50 F.4th at 758 (quoting *United States v. California,* 921 F.3d at 879)). It is true that requiring GEO to pay Washington's minimum wage to its civil detainees who perform work for GEO at the NWIPC may result in the federal government paying more to GEO, if and when its contract for the NWIPC is renewed. That is, the rate paid under the new contract may take into account the expense to GEO of paying Washington's minimum wage to its civil detainee employees.

It is, of course, true for all federal contractors that the federal government takes into account, when setting contract rates, the expenses the contractor will

incur. If a federal contractor is required to pay state minimum wage to its employees, the cost of the contract to the government is likely to reflect that fact. The parties have not cited a case—and we are aware of none—holding that state minimum wage laws may not apply to federal contractors.

However, our dissenting colleague contends that the federal contractor in this case is different from other federal contractors. He points out that regulation of immigration is an important and quintessential federal function, and contends that the federal government should therefore be spared the expense of entering into a contract when its contractor would be required to comply with Washington's minimum wage law. We agree with our colleague that regulation of immigration is an important and quintessential federal function. But so are other federal functions, such as, for example, designing and building aircraft and ships for our national defense. State minimum wage laws are routinely applied to federal defense contractors. No one, including our dissenting colleague, has ever suggested that the application of a state minimum wage law to federal defense contractors is an "obstacle to the accomplishment and execution of the full purpose and objectives of Congress."

C. Derivative Sovereign Immunity

Derivative sovereign immunity protects a private entity that has contracted with the federal government, provided that the government acted within its constitutional authority and that the government has specifically authorized the contractor's actions at issue. *Campbell-Ewald Co.*, 577

U.S. at 167; *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988); *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940).

We have characterized the government contractor defense as "allow[ing] a contractor-defendant to receive the benefits of sovereign immunity when a contractor complies with the specifications of a federal government contract." *In re Hanford Nuclear*, 534 F.3d at 1000 (9th Cir. 2008) (citing *Boyle*, 487 U.S. at 511-12). A contractor whose challenged conduct is not dictated by its contract with the government, but is rather within the contractor's discretion, is not entitled to derivative sovereign immunity. *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 732 (9th Cir. 2015). In *Cabalce*, we held that a private company with a government contract to store fireworks was not entitled to derivative sovereign immunity where the record did not show that the company "'had no discretion' in devising the destruction plan for the fireworks" and it was "undisputed that [the contractors] designed the destruction plan without government control or supervision." *Id.* at 732 (quoting *Hanford*, 534 F.3d at 1001).

GEO's argument that it is entitled to derivative sovereign immunity fails on two grounds.

First, GEO's contract with ICE does not forbid GEO to comply with Washington's MWA. Indeed, the plain language of the contract requires quite the opposite. As noted above, the contract requires GEO to comply with "all applicable federal, state, and local laws and standards," including "labor laws and codes." It specifies that if "a conflict exist[s] between [federal

and local] standards, the most stringent standard shall apply." The plain meaning of state "labor laws and codes" includes state minimum wage laws. Only an explicit exclusion of minimum wage laws from the definition of "labor laws and codes" would allow us to conclude that minimum wage laws are not included. There is no such exclusion in the contract. Finally, the contract provides, "*Subject to existing law*, regulations *and/or other provisions of this contract*, illegal or other undocumented aliens will not be employed by the Contractor, or with this contract." (Emphasis added.) This provision does not exclude state labor laws and codes from its definition of "existing law." Nor does it negate the "other provision[] of this contract" that allows GEO to offer paid employment to undocumented noncitizen detainees at the NWIPC. We therefore conclude that the plain language of the contract requires GEO to pay its civil detainees Washington's minimum wage so long as the MWA is "applicable." In response to our certified question, the Washington Supreme Court wrote that Washington's MWA is applicable to work performed by civil detainees held by GEO at the NWIPC.

Second, even if the contract did not require GEO to pay its detainees in accordance with Washington's MWA, there is nothing in the contract that would forbid GEO to do so. The contract sets a minimum compensation of $1 per day, but it does not forbid payments in excess of that amount. GEO chose to exceed that amount, without objection from the government, by paying up to $5 per day whenever necessary to persuade detainees to participate in the VWP. GEO could equally well have chosen, consistent

with the contract, to exceed that amount by paying workers Washington's minimum wage.

CONCLUSION

We hold that the application of Washington's MWA to civil detainees held in GEO's privately operated federal detention center does not violate the doctrine of intergovernmental immunity. Further, we hold that Washington's MWA is not preempted by federal law. Finally, we hold that GEO does not have derivative sovereign immunity under the government contractor defense.

We affirm the judgment of the district court.

BENNETT, Circuit Judge, dissenting:

This case involves a simple question: whether Washington can force a federal contractor operating an immigration detention facility to pay a higher minimum wage than its contract with the federal government requires when Washington does not require the same of detention facilities it operates. The majority holds that Washington can do so. Because I believe that Washington's Minimum Wage Act (MWA) violates the Supremacy Clause and is preempted by federal immigration law, I respectfully dissent.

I. The MWA violates the Supremacy Clause and is unconstitutional as applied to the Northwest Immigration and Customs Enforcement Processing Center.

On August 22, 2019, the United States filed a statement of interest before the district court arguing that "[b]asic constitutional principles prevent a State from interfering with the federal government's activities in the way Washington is trying to do here." DOJ Statement of Interest at 1, *Nwauzor v. GEO Grp., Inc.*, No. 17-cv-05769 (W.D. Wash. Aug. 20, 2019), ECF No. 185. Nearly five years later, on February 21, 2024, the United States filed an amicus brief before this court maintaining its argument that "[a]pplication of the [MWA] also[1] independently contravenes intergovernmental immunity because it would make federal detainees subject to provisions that do not apply, and never have applied, to persons in state

[1] As discussed below, the United States's 2024 brief reiterates its argument before the district court that the MWA is also preempted. DOJ Amicus Br. at 12, ECF No. 114.

custody." DOJ Amicus Br. at 2. I agree with the United States that applying the MWA to The GEO Group, Inc. (GEO) here is both unconstitutional and preempted.

The MWA prescribes a minimum wage that must be paid to all "employees" in the State. Wash. Rev. Code § 49.46.020. Now that wage is $16.28 per hour. *See id.* § 49.46.020(2) (b). GEO contracted with Immigration and Customs Enforcement (ICE) to provide "detention management services" at the Northwest ICE Processing Center (NWIPC) in Tacoma, Washington. As part of that contract, GEO agreed to abide by ICE's Performance-Based National Detention Standards (PBNDS). The PBNDS require that GEO offer detainees the opportunity to participate in the Voluntary Work Program (VWP).

Congress created the VWP to reduce the "negative impact of confinement . . . through decreased idleness, improved morale and fewer disciplinary incidents," while also allowing detainees to earn money. Performance-Based National Detention Standards § 5.8, at 405 (ICE 2016). The VWP provides substantial benefits to participating detainees. As GEO notes, detainees can earn money to pay for "calls to family and friends," build a more personalized relationship with security staff, experience a "change of pace and location in an otherwise necessarily restricted area," and acquire valuable work experience that detainees can leverage to their advantage in finding post-detention employment. The VWP is voluntary: "Detainees shall be able to volunteer for work assignments but otherwise shall not be required to work, except to do personal housekeeping." Performance-Based National Detention Standards

§ 5.8, at 405 (ICE 2016). Before this lawsuit, between 200 and 500 detainees at NWIPC participated in the VWP program and received its benefits.[2]

The Supremacy Clause, through a doctrine known as intergovernmental immunity, "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States v. Washington* (*Washington I*), 596 U.S. 832, 838 (2022). Originally, intergovernmental immunity barred any state law whose "effect . . . was or might be to increase the cost to the Federal Government of performing its functions," including laws that increased the costs to federal contractors. *United States v. County of Fresno*, 429 U.S. 452, 460 (1977). Now, however, a state law is "no longer unconstitutional just because it indirectly increases costs for the Federal Government, *so long as* the law imposes those costs in a *neutral*, *nondiscriminatory* way." *Washington I*, 596 U.S. at 839 (emphasis added).

State laws applied to federal contractors are unconstitutionally discriminatory if they "single[] out contractors" for less favorable "treatment," *Washington v. United States* (*Washington II*), 460 U.S. 536, 546 (1983), or if they unfavorably regulate contractors based on their governmental "status," *North Dakota v. United States*, 495 U.S. 423, 438 (1990) (plurality opinion); *see Washington I*, 596 U.S. at 839 (adopting *North Dakota*'s discrimination analysis). "[W]hat matters isn't the intent lurking behind the law but whether the letter of the law treats

[2] As discussed below, because of the district court's ruling, the VWP at the NWIPC has been suspended since October 28, 2021.

those who deal with the federal government as well as it treats those with whom the State deals itself." *Dawson v. Steager*, 586 U.S. 171, 177 (2019) (cleaned up) (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960)).

The MWA expressly exempts "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution." Wash. Rev. Code § 49.46.010(3) (k). The MWA thus facially treats the federal government differently because it does not include federal facilities in its list of exemptions. Even if Washington intends for the MWA to apply equally to all private employers, including hypothetical private operators of state detention facilities, the effect of the letter of the law is to treat the federal government differently than Washington treats itself. Putting this effect in context, Washington caps its own labor programs at paying detainees a rate that "will not exceed $40 per week." Wash. State Dep't of Corr., Policy No. 700.100 at 3, *Class III Work Programs* (Oct. 6, 2023). If a detainee in a state facility in Washington works 40 hours per week, the detainee is entitled to no more than $40. The effect of the majority's opinion is that an NWIPC detainee working the same 40 hours per week would be entitled to more than $640—a more than *1500%* increase over what Washington would pay its detainees—solely because the NWIPC detainee is housed in a facility operated by a federal contractor.

The majority's rejoinder that the MWA is neutral and generally applicable to all private employers—that is, not based on an employer's affiliation with the federal government—is unpersuasive because the

statute's application to GEO has the clear effect of targeting only the federal government.

Washington conceded at oral argument that nothing in the record suggests that *any* detention facility in Washington other than NWIPC will be subject to the MWA. Oral Arg. at 27:40-28:55. And the record was developed so that if there were such a facility, it *would* have been brought to the district court's attention. All evidence before us indicates that the NWIPC federal detention facility is the only detention facility in Washington subject to the MWA.

Moreover, guidance from the Washington State Department of Labor and Industries suggests that even were there a privately operated state-run detention facility, those private operators would be exempt from the MWA.[3] Wash. State Dep't of Lab. & Indus., Policy No. ES.A.1, § 5(k), *Minimum Wage Act Applicability* (Dec. 29, 2020). This guidance underscores that Washington is singling out only federal detention facilities for MWA coverage. The majority contends that the Washington Supreme Court specifically addressed the Washington State Department of Labor and Industries guidance and

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[3] The Department of Labor and Industries has determined that:

> Residents, inmates or patients of the state, county or municipal correctional detention, treatment or rehabilitative institution assigned by the facility officials to work on facility premises for a private corporation at rates established and paid for by public funds are not employees of the private corporation and would not be subject to the MWA.

Wash. Dep't of Lab. & Indus., Policy No. ES.A.1, § 5(k), *Minimum Wage Act Applicability*, (Dec. 29, 2020).

found that a hypothetical privately-operated state immigration facility would not be exempt from the MWA. Maj. at 25-27. But the Washington Supreme Court's hypothetical does not modify what the Washington State Department of Labor and Industries said and, more importantly, does not alter the reality that there are presently no private state facilities that meet this hypothetical.

Put simply, if the NWIPC were run by Washington, the facility would *not* be forced to pay detainees the minimum wage set by the MWA. But because NWIPC is run by a federal contractor, the facility must pay that minimum wage. The majority asserts the question posed here would be different "[i]f the federal government operated the NWIPC directly, and if Washington sought to apply its MWA to employees of the federal government working in the NWIPC," Maj. at 19, but the only reason GEO must abide by the MWA is because it is a federal contractor. The MWA, as interpreted by the majority, punishes the federal government for its policy choice to use private contractors and treats the federal government differently from state facilities. That is the very definition of a state affording itself better treatment than it affords the United States. This violates the Supremacy Clause.[4]

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[4] The majority claims the MWA does not "dictate[] the terms of the contract between ICE and GEO. It requires no action by federal officials. Nor does it determine the work that detainees may perform." Maj. at 14. The majority contends that the MWA "is analogous to state laws that impose requirements on federal contractors that the Supreme Court ha[s] upheld as merely increasing the federal government's costs." Maj. at 15. But this claim highlights the constitutional flaw in the majority's holding.

Caselaw from both the Supreme Court and our court is illustrative. In *Dawson v. Steager*, the Supreme Court struck down a law that "treat[ed] retired state employees more favorably than retired federal employees [when] no significant differences between the two classes justif[ied] the differential treatment." *Dawson*, 586 U.S. at 175 (internal quotation marks omitted) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 814-16 (1989)). Here, there is no question that Washington treats the NWIPC worse than it treats its own detention facilities. Indeed, *Dawson* suggests that "the relevant question isn't whether [the NWIPC is] similarly situated to [other private employers covered by the MWA]; the relevant question is whether [it is] similarly situated to those who [are exempt from the MWA]."[5] *Id.* at 178. Thus, the "relevant question" is

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The only detention facility to which the MWA applies is the only one that is operated by a federal contractor, and the federal government can either maintain the status quo and pay the over 1500% increase in labor costs GEO will incur or cease the use of federal contractors in Washington. As Washington has acknowledged, if the federal government operated the NWIPC, it could not dictate the wages paid to detainees. So either Washington is forcing a federal contractor to pay more just because it is a federal contractor, or it is forcing the federal government to change how it operates the NWIPC. Putting the United States to this choice violates the Supremacy Clause.

[5] The majority argues that "*Dawson* does not require, and should not be expanded to require, that employees of the government and employees of private institutions be treated equally." Maj. at 21. My application of *Dawson* does not expand its scope. The relevant comparison in *Dawson* was between state employees, who received the benefit, and federal employees, who did not. *Dawson*, 586 U.S. at 178. Applied to the MWA, *Dawson* requires equal treatment between Washington state facilities,

whether the NWIPC is similarly situated to Washington's own detention facilities exempt under the MWA.

Under this lens, the NWIPC is no different from the detention facilities operated by Washington. Although GEO may have a more explicit profit motive than government entities, both state and federal governments also share an interest in reducing the costs of detention or incarceration. And all have an interest in providing meaningful programs, including work programs, for detainees. Under this same lens, I see no relevant difference between the work programs for detainees at public detention facilities operated by government entities and detention facilities operated by entities like GEO. In all cases, work programs both provide meaningful activities for detainees and decrease the cost of detention facilities. The majority points out that detainees at the NWIPC are not facing criminal proceedings. Maj. at 7. But state facilities exempt from the MWA also detain those not facing criminal proceedings, including those who are civilly committed.[6] The majority contends that "significant

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which receive the benefit, and the NWIPC, a federal facility, which does not. The Supreme Court in *Dawson* even provided an example when it had previously "compared the class of federal lessees with the *favored* class of state lessees, even though the State urged [it] to focus instead on the disfavored class of private lessees." *Id.* at 178-79 (citing *Phillips*, 361 U.S. at 381-82).

[6] The MWA exempts from the definition of "employee" "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution." Wash. Rev. Code § 49.46.010(3) (k). As one example of the reach of this exemption, Chapter 71.05 of the Revised Code of Washington provides for a broad range of circumstances in which individuals may be civilly committed. As the ACLU of

differences" in how our precedent treats private contractors and state entities render the comparison between the NWIPC and state facilities inapposite. Maj. at 22-23. While those differences might be relevant in other contexts, they simply do not apply here.

In *United States v. California*, 921 F.3d 865 (9th Cir. 2019), we struck down a California statute that imposed an inspection requirement on federal immigration detention facilities because that requirement did not apply to state facilities. *Id.* at 882-85. Although we permitted the state's imposition of other inspection requirements that did apply to state facilities, we reasoned that the state cannot "impose an additional economic burden exclusively on the federal government." *Id.* at 884. We compared inspections imposed on *privately run* federal immigration detention facilities with inspections at state and municipal detention institutions. *Id.* at 882-85. We held that the relevant inquiry was whether the state treated its own detention centers in the same manner it treated federal detention facilities run by private contractors. The same rule must apply here. Washington seeks to impose a requirement on the

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Washington, Disability Rights Washington, and the Washington Defender Association have explained, the focus of Washington's Involuntary Treatment Act, Wash. Rev. Code, ch. 71.05, which provides for civil commitment proceedings, "has shifted from protecting personal liberty and facilitating the deinstitutionalization of mental health care to committing more people over a concern for public safety." Amicus Br. for ACLU of Wash., et al. at 11, *In re Detention of A.C.*, 533 P.3d 81, 85 (Wash. 2023) (Nos. 100668-3, 100690-0). As a result, the MWA employee exception is exceedingly broad.

NWIPC that it apparently does not impose on *any* other detention facility in the state. That violates the Supremacy Clause.

The majority asserts that "[t]he case before us is poles apart" because "Washington's MWA does not apply differently to private facilities employing civil detainees depending on whether the facility is operating pursuant to a contract with the state or a contract with the federal government." Maj. at 24-25. This argument ignores the context of this case. As the majority readily admits, "at this time there is no such private facility operating pursuant to a contract with the State." Maj. at 26. The effect of the majority's holding is to treat federal facilities differently from relevantly comparable state facilities.

Plaintiffs rely in large part on *North Dakota*, 495 U.S. 423, for the proposition that "[t]he Supremacy Clause requires Washington to treat federal contractors and state contractors equally—not to treat contractors like it treats government institutions." The majority holds that the MWA does not violate intergovernmental immunity because it treats all private actors equally. Maj. at 19-22. In doing so, the majority ignores the effect of the MWA, which is to treat one facility that just so happens to be operated by a federal contractor differently than all state operated detention facilities. But in *North Dakota*, the Supreme Court upheld a North Dakota law establishing labeling and reporting requirements for suppliers of alcoholic beverages.[7] 495 U.S. at 434-39.

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[7] Although only four Justices joined the lead opinion in *North Dakota*, 495 U.S. at 426, Justice Scalia fully concurred in the judgment, *id.* at 444-48 (Scalia J., concurring in the judgment),

The case is inapposite. In *North Dakota*, the federal government could not point to a single supplier in the state that was *not* subject to the reporting and labeling requirements. *Id.* at 437-39. All alcohol suppliers were treated the same, regardless of their affiliation with the federal government. *Id.*

Here, by stark contrast, *all* state detention facilities in Washington are treated better than the NWIPC. Washington is applying a regulation against a federal contractor running a federal detention facility that it does not apply to itself, any of its facilities, or any of the facilities run by its municipalities or other subsidiary government entities. Contrary to the majority's framing of the issue, our inquiry is not whether Washington treats all private entities alike, but whether Washington treats a federally affiliated entity worse than it treats any similar entity. "[T]he relevant question isn't whether [NWIPC is] similarly situated to [other private employers that are not exempt from the MWA]; the relevant question is whether [it is] similarly situated to those who [are exempt]." *Dawson*, 586 U.S. at 178.

In *Graves v. O'Keefe*, 306 U.S. 466 (1939), the Supreme Court upheld a New York state income tax on salaries above a certain income level, which happened to apply to a person employed by an instrumentality of the federal government. *Id.* at 477-80. As in *North Dakota*, the tax applied equally to *all* New York residents with salaries above the income

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and the remaining Justices concurred as to the reporting requirement, *id.* at 448-71 (Brennan, J., concurring in the judgment in part and dissenting in part).

threshold. *Id.* at 480-81. It made no difference that some state residents fell below the threshold, because all federal employees were treated the same as all other employees with respect to the neutral and universally applicable threshold. *Id.* Again, that is not the case here. Although the MWA nominally extends to all private employers, it carves out an exception for only some detention facilities—those operated by the state. Because application of that exception treats a federal contractor worse than a similarly situated class of state-run institutions, the MWA is not like the tax at issue in *Graves*. As *Dawson* instructs, if a state law exempts a class of employers from an otherwise generally applicable requirement, it must extend that exemption to all similarly situated employers regardless of federal affiliation. *Dawson*, 586 U.S. at 178.[8]

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[8] *Dawson* stated:

> The problem here is fundamental. While the State was free to draw whatever classifications it wished, the statute it enacted does not classify persons or groups based on the relative generosity of their pension benefits. Instead, it extends a special tax benefit to retirees who served as West Virginia police officers, firefighters, or deputy sheriffs—and it categorically denies that same benefit to retirees who served in similar federal law enforcement positions.

586 U.S. at 179. One could easily transform this basic premise to the MWA:

> The problem here is fundamental. While the State was free to draw whatever classifications it wished, the statute it enacted does not classify [detention facilities based on what they do]. Instead, it extends a special . . . benefit to [facilities run by the State or other parts of State government by exempting those

As these cases demonstrate, we must compare the NWIPC to Washington state-run detention facilities, the group favored by the MWA. Because all parties agree that Washington applies an exception to itself that it does not extend to the NWIPC, the MWA discriminates against a federal contractor and thus violates intergovernmental immunity principles. As noted above, the United States adopted this view in its statement of interest filed in the district court, arguing that Washington's application of the MWA to GEO was "an aggressive and legally unjustified effort . . . to interfere with federal immigration enforcement," and because "Washington excludes its state inmates from the minimum wage . . . [t]his is a quintessential violation of intergovernmental immunity principles." DOJ Statement of Interest at 2.

The United States reiterates this view in its amicus brief filed in this court, writing "Washington has exempted its own detention operations from the state minimum wage laws," meaning "[t]he only detainees in the state that must be paid minimum wage are thus federal detainees—and only if those detainees are housed in facilities owned and operated

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> state facilities from the obligation to pay the MWA wage]—and it categorically denies that same benefit to [federal facilities that perform] similar [detention functions].

Id.

As the United States explains, applying the MWA to GEO "contravenes intergovernmental immunity because it would make federal detainees subject to provisions that do not apply, and never have applied, to persons in state custody, singling out a [federal] contractor . . . for obligations Washington does not itself bear." DOJ Amicus Br. at 2.

by a private contractor pursuant to the federal government's authority to contract." DOJ Amicus Br. at 25-26. Because the purpose of the intergovernmental immunity doctrine is to protect the federal government from burdensome or discriminatory state regulation, either directly or through its contractors, the federal government's views are particularly relevant. *See North Dakota*, 495 U.S. at 437-38 ("The nondiscrimination rule finds its reason in the principle that the States may not directly obstruct the activities of the Federal Government."). I agree with the United States that the application of the MWA "independently contravene[s] principles of intergovernmental immunity by discriminating against the federal government's detention operations." DOJ Amicus Br. at 25. Applying the MWA to GEO violates the Supremacy Clause and is thus unconstitutional.

II. The MWA is preempted as applied to the NWIPC.

The majority concludes that GEO and the United States have failed to show any congressional intent "to preempt the application of the MWA to civil detainees held in private for-profit detention centers." Maj. at 29. In so holding, the majority elects to support Washington's use of its police powers to set the minimum wage over the federal government's broad authority over immigration. As the United States points out, this decision has serious ramifications for the United States operating immigration detention facilities around the country. DOJ Amicus Br. at 14-16. Applying the MWA to GEO "create[s] dramatic distinctions in the allowances applicable to detainees

based on the happenstance of the location of their detention and the operator of their detention facility." *Id.* at 15-16. Congress has recognized the benefits of the VWP for decades, but the majority's holding "imperil[s] the [VWP's] ongoing viability." *Id.* at 16. The majority has charted a roadmap for states to circumvent the Supremacy Clause and Congress's authority and force the federal government to meet a higher standard than the state imposes on itself.

Preemption stems from the "fundamental principle of the Constitution . . . that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). There are three types of preemption: "conflict, express, and field." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 477 (2018) (internal quotation marks omitted). Here, conflict preemption requires us to reject application of the MWA to GEO. Conflict preemption comes in two forms: impossibility preemption, which is when "it is impossible . . . to comply with both state and federal requirements," and obstacle preemption, which exists when a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ryan v. Editions Ltd. W., Inc.*, 786 F.3d 754, 761 (9th Cir. 2015) (internal quotation marks omitted).

For obstacle preemption, "a state law is preempted if it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 758 (9th Cir. 2022) (en banc) (quoting

California, 921 F.3d at 879). In evaluating any preemption claim we

> must be guided by two cornerstones of [the Supreme Court's] jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

Wyeth v. Levine, 555 U.S. 555, 565 (2009) (alterations in original) (citations omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

Few areas of the law are as exclusively within the domain of the federal government as immigration. As the Supreme Court has explained, "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona v. United States*, 567 U.S. 387, 395 (2012). As part of that immigration policy, "Congress has directed federal officials to detain noncitizens in various circumstances during immigration proceedings." *Geo Grp.*, 50 F.4th at 751 (citing 8 U.S.C. §§ 1225(b) (1) (B) (ii), (b) (2) (A), 1226(a), (c) (1), 1231(a) (6)). To carry out that directive, the Secretary of the Department of Homeland Security (DHS) is empowered to contract with private parties "as may be

necessary and proper to carry out the Secretary's responsibilities." 6 U.S.C. § 112(b) (2). This includes the responsibility given to the Attorney General and carried out by DHS to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g) (1).

ICE, a component of DHS, does not operate its own facilities for immigration detention. "Instead, ICE contracts out its detention responsibilities to (1) private contractors, who run facilities owned either by the contractor or the federal government, and (2) local, state, or other federal agencies." *Geo Grp.*, 50 F.4th at 751. ICE's contract with GEO here comes from Congress's preference that the federal government use existing facilities for immigration detention. *See* 8 U.S.C. § 1231(g).

Embedded in this congressionally mandated relationship between ICE and GEO, Congress has approved "allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555(d). DHS implements this detainee work provision through the VWP. As noted, the VWP is governed by ICE's PBNDS. *See* Performance-Based National Detention Standards § 5.8, at 405-09 (ICE 2016). The PBNDS allows detainees to "volunteer for work assignments" and guarantees monetary compensation of "at least $1.00 (USD) per day" for any work completed. *Id.* at 405, 407. The VWP is purely voluntary: "Detainees shall be able to volunteer for work assignments but otherwise shall not be required to work, except to do personal housekeeping." *Id.* at 405. Congress has

operated in this space and set the daily rate since the late 1970s. *See* Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (1978). As the Eleventh Circuit recently reaffirmed: "[N]o Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wage." *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1277 (11th Cir. 2020) (alteration in original) (quoting *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997)).

Congress has expressly capped the amount which DHS will reimburse contractors for detainee work under the VWP. *See* 8 U.S.C. § 1555(d). Congress has reserved the right to set the wage amount for detainee work performed under the VWP through the appropriations process. *Id.* Congress has set that wage rate at $1.00 per day and has not changed that since its implementation in 1979. The majority contends that "other federal functions, such as, for example, designing and building military aircraft and ships for our national defense" are important quintessential functions yet "[s]tate minimum wage laws are routinely applied to federal defense contractors." Maj. at 32-33. However, Congress has told us the federal immigration context is different by expressly capping the rate at which DHS will reimburse contractors. Yet the majority finds no issue with applying Washington's MWA to GEO, even though doing so results in a dramatic increase to the wage rate set by Congress. For instance, if an NWIPC detainee works one hour per day, the wage set by the MWA represents an increase of more than 1500% over the rate set by

Congress. If an NWIPC detainee works four hours per day, that percentage increase amounts to more than *6000%*. And as noted, Washington pays its detainees no more than $40 per week, no matter how many hours those detainees work. Applying the MWA to a federal contractor carrying out immigration policy like GEO fundamentally frustrates, if not entirely defeats, the delicate immigration public and private partnership structure envisioned and created by Congress.

The majority argues ICE does not forbid GEO from complying with the MWA and that GEO's "contract requires GEO to comply with 'all applicable federal, state, and local laws and standards,' including 'labor laws and codes'" such that the contract requires GEO to pay its civil detainees Washington's minimum wage. Maj. at 34. This is, at best, a strained reading of the contract. As the United States points out in its amicus brief, "[n]either party understood the contract to impose this obligation, and the federal government has never understood any contract for operation of the Voluntary Work Program to require payments under a State's minimum wage laws." DOJ Amicus Br. at 18. The contract's plain language supports this mutual understanding. GEO's contract requires that "each person employed" by GEO is a U.S. citizen or a lawful permanent resident with work authorization and has resided in the United States for the past five years. GEO's contract prohibits "illegal or undocumented aliens" from being employed under the contract. By its plain language, the contract, consistent with the intent of the parties, did not intend for GEO to pay civil detainees the Washington state minimum wage.

The effect of the majority opinion is that "[c]ontractors are unlikely to agree to operate the [VWP] on terms that would inevitably lead to considerable unreimbursed costs," which means "detainees at some facilities would have no opportunity to participate in the [VWP], despite the benefits Congress and DHS have determined flow from that Program." DOJ Amicus Br. at 16. As a result, detainees will lose access to a voluntary program that provides meaningful benefits. This is not speculation. As GEO notes, "application of the []MWA has *already* interfered with a federal function," because "GEO can no longer operate the VWP at the NWIPC." "As an immediate consequence of the district court's judgments that Washington employment law applies to operation of the VWP at the NWIPC, ICE, at GEO's request, suspended operation of the program." The detainees at NWIPC have not been able to benefit from the VWP since October 28, 2021, when GEO and ICE discontinued operating the VWP as a result of the district court's injunction. The effect of the district court's judgments, which the majority affirms, is that for the past three years, detainees at NWIPC have had no ability to participate in the VWP and receive the benefits from the program only because Washington seeks to hold federal contractors to an illegal minimum wage standard.

As the United States persuasively argues in its amicus brief, the "statutory structure does not contemplate a role for states or state law in governing the [VWP]" and any approval of the application of Washington's MWA to GEO here threatens to "create dramatic distinctions in the allowances applicable to detainees based on the happenstance of the location of

their detention and the operator of their detention facility." DOJ Amicus Br. at 14-16. The majority attempts to minimize the extreme ramifications of its opinion by noting that while it might force the federal government to "pay more under future contracts with GEO," the federal government's concerns that private contractors "may scale back or eliminate the VWP due to the increased financial burdens" is "unknowable." Maj. at 18, 31.

While I think the majority's speculation is just incorrect, the larger point is that it is irrelevant, as the majority misunderstands the presumption against preemption. Maj. at 28-29. The majority is correct that the "presumption against preemption [applies] 'when a state regulates in an area of historic state power.'"[9] Maj. at 28 (quoting *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018)). But as we have more recently explained, "the presumption does not apply when a state law would interfere with inherently federal relationships." *Geo Grp.*, 50 F.4th at 761. The MWA displaces the contractual floor established by Congress and solidified in the contract between ICE and GEO. It also dictates the terms by which federal detainees perform work under the VWP authorized by Congress. We have not only previously rejected the presumption against preemption when a statute required federal construction contractors to be

[9] The majority's definition of the "area of historic state power" is far too broad. The majority looks to the state's police power to regulate wages. Maj. at 28-29. But the appropriate "area" on which we should focus is regulation of federal immigration detainees—an area in which states (for obvious reasons) have *not* historically exercised their police powers.

licensed under state law, but we essentially applied a presumption *for* preemption because of the lack of a "'clear Congressional mandate' and 'specific Congressional action' that unambiguously authorize state regulation of a federal activity." *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 440-41 (9th Cir. 1991) (quoting *Hancock v. Train*, 426 U.S. 167, 178-79 (1976)).

We apply such a presumption *for* preemption where the matter involves "states' active frustration of the federal government's ability to discharge its operations." *California*, 921 F.3d at 885. While the MWA "does not regulate whether or where an immigration detainee may be confined," it does "require that federal detention decisions . . . conform to state law" in that GEO must pay the minimum wage set by the MWA. *Id.* To state that the MWA does not frustrate the federal government's ability to discharge its operations relative to immigration—an area of law reserved to the federal government—is to turn a blind eye to the reality of the majority's opinion.

Even setting aside the incorrect application of the presumption against preemption, there are two other flaws in the majority's reasoning. Individually, they undermine the MWA's application to GEO, but, together, they present a danger to the nation's immigration policy.

First, the majority diminishes the effect of its opinion. ICE and GEO specifically contracted with the understanding that GEO would pay $1.00 per day to detainees who participate in the VWP. The current rate set by the MWA is *$16.28 per hour*. It is naïve to think that GEO is willing to incur an increase in

detainee labor costs of more than 1500% for each hour worked with only minimal financial repercussions to the federal government should ICE and GEO renegotiate the contract to operate the NWIPC.[10] Put differently, the majority believes GEO can simply incur the costs associated with paying a detainee $65.12 for four hours of work when currently GEO pays $1.00 and carry on with business as usual. The reality of the majority's opinion is that it will force ICE to either operate the NWIPC itself, something ICE does not do and is contrary to congressional policy,[11]

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[10] The majority gives as one reason for its holding that the resulting 1500% increase in wage-related costs to GEO "merely increas[es] the federal government's costs." Maj. at 15. The majority claims that "even after complying with Washington's MWA GEO could still profit substantially from operating the NWIPC under its current contract." Maj. at 18. The majority may well be correct, but it is not up to the majority to set the nation's immigration policy, including the policy of how much immigration detainees should be paid. The majority also recognizes that GEO's NWIPC contract expires at the end of 2025. Maj. at 7. While the majority attempts to diminish the severity of its erroneous holding by claiming "[a]t this time, there has been no renegotiation, and we are unable to predict the outcome of such renegotiation," Maj. at 18, this is simply irrelevant to the preemption issue. And I could speculate that perhaps the reason for no new negotiation is that GEO and the federal government hope that either our court or the Supreme Court will correct the fundamental flaws in the district court's opinions.

[11] As we have recognized, "ICE does not build or operate its own detention facilities. Instead, ICE contracts out its detention responsibilities to (1) private contractors . . . and (2) local, state, or other federal agencies." *Geo Grp.*, 50 F.4th at 751. According to the ACLU, "as of July 2023, 90.8 percent of people detained in ICE custody each day are held in detention facilities owned or operated by private prison corporations." Eunice Hyunhye Cho,

contract with the state, as the state exempts its own facilities from the MWA, or have no immigration detention facilities (other than those effecting brief detentions, pending transfers out of state) in the State of Washington.[12] In reaching its conclusions, the majority has severely restricted ICE's ability to negotiate and contract with contractors in Washington. This clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Second, the majority's opinion will result in vast discrepancies in ICE's ability to contract with contractors throughout the country. In fact, the discrepancies and ramifications that come with the majority's opinion are near certainties. A detainee would receive more than $16.00 per hour in Washington and $1.00 per day in Nevada for performing the same work. As the federal government

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Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years Into the Biden Administration, ACLU (Aug. 7, 2023), https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration.

[12] The latter is not unlikely. And were it to occur, Washington immigration detainees and their families would be the ones to suffer from the detainees being held in other states instead of Washington. And, of course, it is detainees who already suffer from the elimination of the VWP at the NWIPC. Again, what has been eliminated is not a mandatory work requirement, but a purely voluntary and beneficial work program which provides both daily tangible and intangible benefits to hundreds of detainees.

notes, ever since the district court issued its injunction on October 28, 2021, *the VWP at NWIPC has been suspended*—undermining any argument by the majority that the application of the MWA will not undermine Congress's goals associated with the VWP. DOJ Amicus Br. at 16. The majority rejects the federal government's contention that the MWA's application to GEO will result in a chilling effect that "private contractors may scale back or eliminate the VWP due to the increased financial burdens" as "unknowable," Maj. at 31, *even though that is precisely what has happened here*. In 1979, Congress devised a statutory scheme to provide for allowances for federal immigration detainees to work for a rate of $1.00 per day. Every federal contractor operating an immigration detention facility has operated within that statutory scheme.[13] In this uniquely federal area of the law, Congress has created a public-private partnership to provide for detainees to receive

[13] The majority oddly challenges the 1979 Appropriations Act's expiration date. Maj. at 30. Section 1555(d) authorizes the use of appropriated funds "hereafter provided" to pay allowances "at such [a] rate as may be specified from time to time in the appropriation Act involved." 8 U.S.C. § 1555(d). Congress has *never* altered the rate set in the 1979 Appropriations Act, so, regardless of its expiration as an appropriations act in general, the rate set remains the current rate for purposes of § 1555(d) until Congress specifies otherwise. As the United States points out in its amicus brief, because Congress has not modified the rate set in 1979, "DHS accordingly cannot expend appropriations in excess of that amount to reimburse contractors for operating the [VWP]." DOJ Amicus Br. at 5. Thus, as stated by the United States, the rate set in the 1979 Appropriations Act "remains the case for Voluntary Work Programs administered by private contractors in facilities operated on behalf of DHS." *Id.* at 14.

payment for their work while detained. The application of the MWA to GEO "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016) (quoting *Crosby*, 530 U.S. at 373), by making the VWP too costly to operate, creating discrepancies between similarly situated immigration detainees, and severely restricting if not entirely undermining ICE's ability to negotiate with federal contractors. The MWA therefore is preempted as an obstacle to the execution of the federal VWP and its application to the nation's immigration policy.

* * *

The MWA violates the Supremacy Clause of the Constitution because Washington grants preferential treatment to its own detention facilities while holding the NWIPC to a more onerous standard just because GEO is a federal contractor. Plus, applying the MWA to GEO impermissibly frustrates Congress's ability to effectuate its immigration policy and the VWP. As a result, it is preempted. Accordingly, I would vacate the judgments against GEO and the district court's injunction against GEO enjoining continued operation of the VWP, and order it to instead enjoin application of the MWA to GEO.[14]

[14] As I would reverse on both intergovernmental immunity and preemption grounds, I would not reach GEO's derivative sovereign immunity argument.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 21-36024

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

Plaintiffs-Appellees,

v.

THE GEO GROUP, INC., a Florida corporation,

Defendant-Appellant.

Nos. 21-36025

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

THE GEO GROUP, INC.,

Defendant-Appellant.

Filed: Aug. 13, 2025

Before: Mary H. Murguia, Chief Judge, and William A. Fletcher and Mark J. Bennett, Circuit Judges.

ORDER

Chief Judge Murguia and Judge W. Fletcher voted to deny the petition for panel rehearing. Judge Bennett voted to grant the petition for panel rehearing. Chief Judge Murguia voted to deny the petition for rehearing en banc, and Judge W. Fletcher so recommended. Judge Bennett voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40(c). Judges Christen and Miller did not participate in the deliberations or vote in this case.

Appellant's Petition for Panel Rehearing or Rehearing En Banc (Dkt. No. 145) is **DENIED**.

MURGUIA, Chief Judge, and W. FLETCHER, Circuit Judge, respecting the denial of rehearing en banc:

Our colleague, Judge Bumatay, dissents from our Court's denial of rehearing en banc.

Our majority opinion speaks for itself, and we will not repeat here everything we wrote in the opinion. We write briefly to emphasize three points.

First, our colleague contends that our holding discriminates against the federal government. We strongly disagree. Our colleague argues that we require GEO to pay higher wages to its employees than Washington pays its comparable employees. He compares the wage GEO must pay to its detainees to the wage Washington pays to its "detainees." He writes, "Washington State's own policy caps pay to *detainees* at its criminal detention facilities at '$40 per week,'" a "more than a '*1500%* increase'" over what GEO is required to pay. Diss. at 11 (first emphasis added).

Our colleague's comparison is inapt. The Washington "detainees" to which he refers are convicted felons held in state-operated and state-owned prisons. The employment of these "detainees" is part of Washington's penal regime. The plaintiffs in the case before us are civil detainees, held while their immigration status is determined. They are not convicted felons.

Through its employment of civil detainees, GEO is able to avoid hiring about 85 full-time employees. Plaintiffs' employment was not part of a State's penal regime. It was part of a private company's business model. The Washington Minimum Wage Act regulates this type of private business activity uniformly

regardless of whether the entity is contracting with the federal or state government.

Second, our colleague argues that plaintiffs were not "employees" and Washington therefore cannot apply its Minimum Wage Act. This is a new argument, not made by any party or amicus. Here, too, we strongly disagree. In support of his argument, our colleague argues that "federal law prohibits the employment of illegal aliens." Diss. at 26. Even if our colleague's statement of law were applicable to this case, it ignores the fact that some of the detainees confined by GEO are not "illegal aliens." Some detainees held by GEO are entitled to remain in the United States. They will be released back into the United States once their immigration status is determined. Further, our colleague ignores the basic facts and law of this case. The Washington Supreme Court's reasoned response to our certified question concluded that "detained workers at a private detention facility are 'employees' within the meaning of the [Minimum Wage Act]." *Nwauzor v. The Geo Grp., Inc.*, 540 P.3d 93, 104 (2023). Our majority opinion faithfully applied that holding. However much our colleague would like to see the matter differently, plaintiffs were, in fact, employees. They performed work for GEO, and they were paid for performing that work. Finally, our colleague again compares plaintiffs in this case to convicted criminals, writing that "the State cannot dictate terms about their employment status any more than it could if the facility housed federal prisoners serving custodial sentences." Diss. at 13. Our colleague continues to ignore the fact that federal prisoners are convicted criminals, whose

employment in prison is part of their criminal punishment, while plaintiffs are civil detainees.

Third, our colleague ignores the fundamental distinction between the federal government and its contractors. He would require Washington to treat the federal government's contractors in the same manner it is required to treat the federal government itself. He writes, "When a federal contractor acts on behalf of the federal government to administer a federal function— like the detention of aliens— the contractor is not merely a private business; it steps into the shoes of the federal government for Supremacy Clause purposes." Diss. at 14. Again, we strongly disagree.

Our colleague's equation of the federal government and its contractors is contrary to long-settled black letter law. Adoption of his position would allow any government contractor to refuse to pay state-mandated minimum wage to its employees. For example, any defense contractor could refuse to pay minimum wage. No one in this case, not even GEO, has suggested that this is the law.

BUMATAY, Circuit Judge, joined by CALLAHAN and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

State frustration with federal policies is nothing new. From the very beginning, States have sought to thwart federal policies. In 1792, Thomas Jefferson was incensed about the establishment of a national bank. *See* Thomas Jefferson, From Thomas Jefferson to James Madison, Founders Online, Nat'l Archives (Oct. 1, 1792).[1] In his view, the creation of a bank was left to the States alone, and the federal government had no authority to erect one. *Id.* His opposition to a national bank was so vehement that he told James Madison that it was "an act of *treason* against the state." *Id.* Indeed, instead of Virginia creating a competing bank as suggested by Madison, Jefferson proposed that the State should "adjudge[]" any employee of the national bank "guilty of high treason and suffer death accordingly, by the judgment of the state courts." *Id.* He had hope that this "example"—executing bank employees—would be followed by other States. *Id.* To Jefferson, it was this extreme response or else "nothing should be done." *Id.*

Of course, Jefferson's hyperbole never came to fruition. But another State, Maryland, did try to interfere with the Bank of the United States years later by taxing its operations. *See McCulloch v Maryland*, 17 U.S. 316, 425 (1819). Even while recognizing that taxation was within the traditional sphere of state power, the Supreme Court stopped Maryland's tax as violating the Constitution's

[1] https://perma.cc/28U9-H7UY.

Supremacy Clause. *Id.* at 436. Simply, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.*

True, under our federalism, States may generally regulate businesses within their borders. And it's largely an advantage of our constitutional system that each State may experiment with social and economic policies through its police powers. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

But by ratifying the Constitution, we placed some limits on state power. *See* U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, if state law interferes with the operation of federal law, then federal law trumps—no matter how strong the state opposition. And States can't get around that supremacy by indirect means. Given the explosion of federal work done by contractors, the Supremacy Clause would mean little if States could attack federal policies through regulation of federal contractors. Thus, anytime a state law "would defeat the legitimate operations" of the federal government—even if only through the federal government's contractors—it's unconstitutional. *McCulloch*, 17 U.S. at 427.

* * *

Since the 1980s, the federal government has used privately owned facilities to assist with immigration control. By 1991, private contractors operated half of the federal government's detention facilities. In 2020, the federal government owned only five detention facilities, and even those were contractor run. This reflects the federal government's belief that contracted facilities better serve its needs—expanding and contracting more nimbly than permanent federal institutions as the detainee population fluctuates. This results in cost savings for the public. Since 2005, Immigration and Customs Enforcement ("ICE") has operated one privately owned immigration-detention facility in the State of Washington—the Northwest ICE Processing Center in Tacoma ("Northwest ICE Center"). The Northwest ICE Center is owned and operated by the GEO Group, Inc., a private corporation.

It's no understatement to say that the State of Washington dislikes the federal government's use of private facilities for immigration detention. In 2021, the Washington Legislature passed a law prohibiting the operation of "a private detention facility within the state." *See* Wash. Rev. Code § 70.395.030. Armed with this law, Washington tried to shut down the Northwest Detention Center. *See Geo Grp., Inc. v. Inslee*, 702 F. Supp. 3d 1043, 1046 (W.D. Wash. 2023) ("*Inslee I*"). But even the State conceded that its efforts to close the facility violated the Constitution's Supremacy Clause. *See id.* As we've said, a State's attempt to ban private immigration-detention centers violates the "foundational limit on state power." *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 758 (9th Cir. 2022) (en banc). Undeterred, in 2023, the Washington

Legislature tried again by enacting onerous requirements on private-detention facilities within the State. *GEO Grp., Inc. v. Inslee*, 720 F. Supp. 3d 1029, 1037 (W.D. Wash. 2024) ("*Inslee II*"). While written broadly, the law's "history and text ma[d]e clear that it applie[d] only to" the Northwest ICE Center. *Id.* Once again, much of the law was struck down as discriminating against the federal government. *Id.* at 1039.

What Washington couldn't do directly, it now tries indirectly by attacking ICE's work program at the facility. ICE requires its detention facilities to establish a Voluntary Work Program for detainees. *See* U.S. Immigr. & Customs Enf't, *Performance-Based National Detention Standards 2011* § 5.8, at 406 (rev. 2016) ("ICE Detention Standards").[2] The Voluntary Work Program is important to ICE's detainee management. ICE believes that the Program enhances operations and services "through detainee productivity." *Id.* at 405. It helps mitigate the negative impact of confinement by decreasing idleness, improving morale, and reducing disciplinary incidents. *Id.* In other words, ICE implemented the Program to improve conditions and safety at detention facilities for both the detainees and staff. Nothing in ICE's guidelines classifies those who participate in the Program as "employees." For decades, Congress has blessed these voluntary work programs—appropriating allowances to pay "aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555(d). Given that these detainees are not "employees," Congress last set the

[2] https://perma.cc/NY8C-U394.

rate for these allowances at $1 per day in 1978. *See* Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act of 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (1978). It has not raised the allowance since then.

GEO's contract obligates it to run the Voluntary Work Program at the Northwest ICE Center. Under ICE's guidelines, GEO pays detainees the minimum allowance of $1 per day, as established by Congress. Washington now seeks to interfere with the operation of the Voluntary Work Program at the Northwest ICE Center. In 2017, Washington and a class of detainees sued GEO, arguing that detainees who participate in the Program are "employees" and thus the State's minimum wage law must apply to them. In 2025, that would mean detainees are owed $16.66 per hour. *See* Wash. Rev. Code § 49.46.020.[3] Put differently, the detention facility would need to pay *more than 130 times* the minimum wage set by Congress in an eight-hour day ($133.28 v. $1). By contrast, Washington State's own policy caps pay to detainees at its criminal detention facilities at "$40 per week." *See Nwauzor v. GEO Grp., Inc.*, 127 F.4th 750, 773 (9th Cir. 2025) (Bennett, J., dissenting). So if a detainee works for 40 hours in a week, Washington State would pay the detainee only $40 but the Northwest Detention Center would have to pay the same detainee $666—more than a "*1500%* increase." *See id.* Even so, a jury found that GEO violated the minimum wage law and awarded more than $17 million in back pay to the detainee class. After a bench trial, the district court penalized

[3] Wash. State Dep't of Labor & Indus., *Minimum Wage*, https://perma.cc/SAU3-273M.

GEO almost $6 million in unjust enrichment and enjoined GEO from operating the Voluntary Work Program without paying detainees Washington's minimum wage. That represents a cumulative $23 million in added cost and a mandatory restructuring of ICE's program. In response, ICE permitted GEO to shut down the Voluntary Work Program at the Northwest ICE Center.

On appeal, a divided panel of this court affirmed the rulings. *Id.* at 750 (majority opinion). First, the panel majority rejected GEO's claim of intergovernmental immunity on two grounds. *Id.* at 763. It ruled that the minimum wage law "neither controls federal operations nor dictates the terms of the contract between ICE and GEO." *Id.* at 761. And it concluded that the minimum wage law isn't discriminatory because it doesn't treat "private facilities operated under contract with the federal government differently from private facilities operated under contract with the state government." *Id.* at 761-63. Second, the panel majority determined that the minimum wage law wasn't preempted by federal law because the state law "falls squarely within the states' historic police powers to establish and require payment of a minimum wage." *Id.* at 768. Finally, the panel majority refused to grant GEO derivative sovereign immunity because the company's contract with ICE didn't prohibit the company from complying with the minimum wage law. *Id.* at 770-71.

Judge Bennett forcefully dissented on two grounds—each reason enough to reconsider this case en banc. First, the dissent correctly concluded that Washington's law discriminated against the federal

government. As the dissent noted, Washington's law "punishes the federal government for its policy choice to use private contractors and treats the federal government differently from state facilities. That is the very definition of a state affording itself better treatment than it affords the United States." *Id.* at 774 (Bennett, J., dissenting). Second, the dissent made strong arguments that federal law preempts the minimum wage law's application to the Northwest ICE Center. *Id.* at 778-83. The dissent emphasized that "[t]he majority has charted a roadmap for states to circumvent the Supremacy Clause and Congress's authority and force the federal government to meet a higher standard than the state imposes on itself." *Id.* at 778.

On top of the reasons laid out in the dissent, here's another—reclassifying the detainees as "employees" and applying the minimum wage law would interfere with the performance of a federal operation. Simply, ICE, with the blessing of Congress, has determined that operating a Voluntary Work Program at its detention facilities assists in its immigration-control duties. As part of that operation, Congress has determined that participants in the program are not federal employees and should be paid a minimum allowance of $1 per day. The State of Washington can't then countermand that congressional directive by demanding the restructuring of the Voluntary Work Program and imposing a higher wage floor. As the Court has said, "because the Supremacy Clause immunizes the activities of the Federal Government from state interference, . . . direct state regulation of federal facilities is allowed only to the extent that Congress has clearly authorized such regulation."

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 n.1 (1988). Washington does not have the power to define the employment status of federal detainees. While the detainees at the Northwest ICE Center may be housed in a private facility, they are there because they're *federal detainees* in federal custody. So the State cannot dictate terms about their employment status any more than it could if the facility housed federal prisoners serving custodial sentences.

And while Washington's attempt to impair the Northwest ICE Center is less draconian than Jefferson's suggestion, it's still interference contravening the Supremacy Clause. In denying intergovernmental immunity on direct-regulation grounds, the panel majority all but admitted that the minimum wage law would violate the Supremacy Clause if the federal government had run the ICE Detention Center "directly." *See Nwauzor*, 127 F.4th at 761. The panel majority didn't contest the government's argument that there would be "no dispute that if the federal government *operated the detention facility* and *implemented the Voluntary Work Program directly*, principles of intergovernmental immunity would bar application of state minimum wage laws to detainees." *Id.* Instead, the panel majority simply brushed away the argument because the government doesn't "perform[] those functions" but "GEO, a private for-profit company," does. *Id.*

So the fundamental question here is whether the Supremacy Clause protects a federal program, performed by federal contractors, from state regulation. The answer must be "yes." When a federal contractor acts on behalf of the federal government to

administer a federal function—like the detention of aliens—the contractor is not merely a private business; it steps into the shoes of the federal government for Supremacy Clause purposes. The constitutional directive of federal supremacy shouldn't turn on the ownership of the plot of land used to carry out the federal policy or who provides the immediate paycheck of those implementing the federal policy. In the end, if a federal policy is "made in Pursuance" to constitutional law, U.S. Const. art. VI, cl. 2, then States can't "retard, impede, burden, or in any manner control" that federal policy, *McCulloch*, 17 U.S. at 436—even if the federal government chooses to use contractors to execute it.

Allowing the panel majority's decision to stand sets a dangerous precedent. Under this court's decision, any State can impair any federal policy—no matter how central to the federal government—so long as the State regulates federal contractors rather than the federal government itself. Doing so would be unworkable—granting States the power to undermine federal operations based on policy disagreements whenever federal contractors are involved. Otherwise, to avoid all this, the federal government would be forced to stop using contractors to carry out its work. That contravenes the constitutional design. We should have taken this case en banc to correct this error.[4]

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[4] Because the Supremacy Clause is enough to invalidate the application of Washington's minimum wage law to the Northwest ICE Center, there's no need to discuss the panel majority's derivative sovereign immunity ruling. But that doesn't mean it's correct.

I respectfully dissent from our decision not to rehear this case en banc.

I.

The use of private contractors to implement government policies predates the Founding of our country. Indeed, our government's contracting practices trace their origins to the French and Indian War, when American colonists helped supply the British Army's war effort in the Americas. That conflict served as the colonists' first introduction to the challenges of supplying an army during war. James F. Nagle, *A History of Government Contracting Vol. I* 10 (3d ed. 2012). Under the British contracting system, the generals in charge of an army awarded supply contracts to merchants. These contracts "were more like carte blanche delegations of authority" and suppliers were expected to use their own contacts (and credit) to keep the army supplied. *Id.* at 11, 13. In return, contractors received a 5% commission on the supplies they procured for the army. *Id.* at 11; Theodore Thayer, *The Army Contractors for the Niagara Campaign, 1755-1756*, 14 Wm. & Mary Q. 31, 33 (1957).

Keeping with the British tradition, the use of contractors continued through the American Revolution. Private merchants supplied the Continental Army largely on a commission basis. The Continental Congress appointed the first commissary general in 1775 and George Washington appointed a quartermaster general soon after—both merchants paid by salary or commission. Nagle, *History of Government Contracting Vol. I*, at 19. Even then, the Continental Congress recognized that government

functions, such as supplying the military, benefited from partnerships with the private sector. After all, "[o]nly a merchant had the knowledge, the trade connections, and the credit needed to handle procurement." *Id.*; *see also* E. Wayne Carp, *To Starve the Army at Pleasure: Continental Army Administration and American Political Culture 1775-1783* at 20-21 (1984) (noting the Continental Congress's lack of expertise in organizing and supplying a war effort). After Independence, our nation continued to depend on private parties for government functions—offering the same 5% commission used during the war. Nagle, *History of Government Contracting Vol. I*, at 42. The national government also relied on private parties to transport and deliver mail—another fundamental government function at the time. *Id.* at 42-43.

Things became more formalized after the Constitution's ratification. Congress established the Office of Purveyor of Public Supplies in 1795. *See* Act to establish the Office of Purveyor of Public Supplies, ch. 27, 1 Stat. 419 (1795). Congress placed the Purveyor of Public Supplies under the Secretary of the Treasury and empowered him "to conduct the procuring and providing of all arms, military and naval stores, provisions, clothing, Indian goods, and, generally, all articles of supply requisite for the services of the United States." *Id.*

How did government contracting look in the post-ratification period? Lighthouses are a good early example. Lighthouses served an important public safety function and facilitated the flow of commerce—a particular focus of our early government. According

to the National Park Service, "[i]n one of its first acts after its formation in 1789, the US Government assumed control of all aids to navigation in the country." National Park Service, *History of Lighthouses in the United States* (2009).[5] And yet, private parties largely operated lighthouses—federal contractors built, supplied, and inspected them. Nagle, *History of Government Contracting Vol. I*, at 46. These contractors "virtually administered the lighthouse organization and exercised wide discretion in performing their duties" for more than 50 years after the Founding. *Id.*

Following the War of 1812, the federal government made greater efforts to standardize its contracting and procurement processes. For instance, Congress charged the Ordnance Department with procuring arms and munitions for the military, as well as "supervising the government armories and storage depots." *Id.* at 81. This brought about significant change—most notably the introduction of a "uniformity system," which imposed strict quality controls on contractors. *See id.* at 85, 87.

The Civil War marked a massive expansion in government contracting. The federal government expanded the military rapidly to meet the needs of the war.

Particularly, the federal government used a combination of its own production and contracts with private parties who manufactured or dealt in arms. *Id.* at 132. The government contracted with private parties for all sorts of supplies—everything from

[5] https://perma.cc/WSN3-XUSX.

weapons and clothing to railroad transportation and ships. *See id.* at 130-33, 136, 139, 146-50. The massive spike in production and contracting during the Civil War led to the significant increase of private corporations and further entrenched the government's reliance on the private sector to fulfill its most essential functions. *See id.* at 157-58.

In the modern era, the federal government's reliance on contractors has increased still. Following the World Wars and the New Deal, the federal government's activities expanded into a range of new areas. *See* James F. Nagle, *A History of Government Contracting Vol. II* 149-52 (3d ed. 2012). While the federal government once primarily contracted for goods—military supplies and the like—it now increasingly contracts for services. *Id.* at 170. Service providers help the government perform various tasks, including those historically considered quintessentially government activities. For example, private companies now directly "train troops, collect and analyze intelligence, and carry out special operations." Lindsay Windsor, *James Bond, Inc.: Private Contractors and Covert Action*, 101 Geo. L.J. 1427, 1428 (2013); *see also* P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* 121, 124, 136, 142-44 (2003) (describing how private contractors provided instructors for command colleges, developed training plans and analyses, and supported logistics for military operations).

So our government has relied on private contractors to assist with, and indeed sometimes perform, its constitutional duties from the very beginning. The partnership with the private sector

offered the federal government the expertise and efficiency needed to build our country from the ground up. And today that partnership is as vital as ever. Disturbing the federal government's use of private contractors by state regulation would impair the federal government from carrying out its duties.

II.

Today, the constitutional directive of federal supremacy has evolved into two related doctrines—intergovernmental immunity and preemption. First, under intergovernmental immunity, the Supremacy Clause "prohibit[s] state laws that *either* regulate the United States directly *or* discriminate against the Federal Government or those with whom it deals (*e.g.*, contractors)." *United States v. Washington*, 596 U.S. 832, 838-39 (2022) (simplified). Second, preemption occurs when "state and federal law directly conflict," and requires that "state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (simplified).

Judge Bennett's panel dissent conclusively establishes how Washington's minimum wage law singles out the federal government's contractors for less favorable treatment and so violates the Supremacy Clause. *See Nwauzor*, 127 F.4th at 771-77 (Bennett, J., dissenting). The panel dissent also makes strong arguments for preemption of the state law as applied to the Northwest ICE Center. *Id.* at 777-83. Those arguments show why we should have taken this case en banc.

But applying Washington's minimum wage to the Northwest ICE Center *also* violates another facet of the Supremacy Clause—the direct regulation of the federal government. Simply, the state law "retard[s],

impede[s], burden[s]" and "control[s]," *McCulloch*, 17 U.S. at 436, the operation of the Voluntary Work Program—a congressionally approved program to maintain order and safety at a federal detention center. Thus, even if run by federal contractors, the state law violates the Supremacy Clause when applied to the Northwest ICE Center.

A.

Alexander Hamilton observed that the supremacy of federal law is essential to our constitutional system because, without it, the Constitution "would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy." The Federalist No. 33 (Alexander Hamilton). He was right. The Supremacy Clause reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl.2. By its own terms, the Supremacy Clause "creates a rule of decision" that commands courts to "not give effect to state laws that conflict with federal laws." *Armstong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Instead, the Clause establishes that, in the event of a conflict with state law, state and federal courts "shall" recognize the federal law as "supreme." U.S. Const. art. VI, cl.2.

"The Clause, in the standard account of its origins, was profoundly nationalistic, rejecting the weakly constructed union of the Articles of Confederation and creating a true national government that would prevail in contests with the states—and indeed enlisting state judges as enforcers of national power." Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 Ohio St. L.J. 559, 575 (2013).[6]

McCulloch v. Maryland shows how interference with a federal objective violates the Supremacy Clause—even if a private corporation is involved. By 1816, Congress incorporated the Second Bank of the United States. The Bank was no federal government agency. Instead, it was privately owned—taking deposits and loans from both the federal government and private parties. The Bank proved unpopular with some—particularly the Jeffersonian Republicans. In response, the State of Maryland enacted a seemingly

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[6] The constitutional design didn't leave States without a say in what became the "supreme Law." All three sources of "supreme Law"—the "Constitution," "the Laws of the United States which shall be made in pursuance thereof," and "Treaties made . . . under the Authority of the United States"—required some buy-in from the States as an original matter. *See* Ramsey, *The Supremacy Clause*, *supra*, at 565, 598. Statutes and treaties require approval from the Senate, U.S. Const. art. I, § 7—and Senators were originally chosen by state legislatures and were thus direct representatives of the States' interests in Congress. *See id.* art. I, § 3, cl. 1. The Constitution's ratification itself needed the approval of nine States. *Id.* art. VII. And amendments need to be approved by three-fourths of States (either by legislatures or ratifying conventions) to become part of the Constitution. *See id.* art. V. So States weren't powerless in determining the "supreme" law as an original matter.

general law—"an act to impose a tax on all banks . . . in the state of Maryland, not chartered by the [state] legislature." *McCulloch*, 17 U.S. at 320 (quoting from syllabus). The tax required these banks to pay a 1-2% tax on bank notes or pay $15,000 to the State in advance. *Id.* at 321. While broadly written, the tax *only* targeted the Bank of the United States. *Id.* at 392 ("But this tax is levelled exclusively at the branch of the United States Bank established in Maryland. There is, in point of fact, a branch of no other bank within that state, and there can legally be no other.") (statement of William Pinkney, attorney for the Bank, at oral argument).

Under the Supremacy Clause, the Court held that no State has the power to defeat a constitutional congressional directive. The Court started with three axioms: (1) the "power to create implies a power to preserve," (2) a "power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve," and (3) "where [a] repugnancy exists, that authority which is supreme must control." *Id.* at 426. So, "[i]t is the very essence of supremacy, [for a supreme government] to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *Id.* at 427. Since Congress had the authority to establish the Bank under the Necessary and Proper Clause, Maryland's tax could not stand. After all, "the power to tax involves the power to destroy" and that "power to destroy may defeat and render useless the power to create." *Id.* at 431. In sum, "states have no power, by taxation or otherwise, to retard, impede, burden, or in

any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436.

So it didn't matter that Maryland imposed the tax on the Bank and not directly on a federal agency. Instead, it was enough the bank was an "instrument" "employed by the government in the execution of its powers." *Id.* at 432. Thus, as it was argued in *McCulloch*, the bank could "equally claim" the federal government's "protection" as "proceed[ing] from the supreme power." *Id.* at 396 (Pinkney). While States could still tax real property of the Bank like other real property within their borders, they couldn't place a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." *Id.* at 436-37.

B.

It flows directly from *McCulloch* that the State of Washington can't demand treatment of detainees of a federal detention facility as "employees" and increase the minimum allowance paid to them to defeat the operation of a federal work program. First, the federal government's immigration-detention policies are entitled to the protection of the Supremacy Clause. Second, both Congress and the executive branch have determined that a voluntary work program will help carry out the government's duty to detain certain aliens in removal proceedings. Third, Washington's minimum wage law burdens voluntary work programs because it requires the federal government to treat immigration detainees as "employees" and given them concomitant pay. Fourth, it makes no difference that

federal contractors administer the Voluntary Work Program on behalf of the federal government. The result of all this? Applying Washington's minimum wage law to the Northwest ICE Center violates the Supremacy Clause.

1. Federal policy over immigration detention is entitled to federal supremacy. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). And Congress "has plenary power over immigration matters." *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 201 (1993) (Blackmun, J., dissenting); *see* U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization"). Under that authority, Congress mandates that federal officials detain certain aliens. *See, e.g.*, 8 U.S.C. §§ 1225(b) (1) (B) (ii), (b) (2) (A), 1226(a), (c) (1), 1231(a) (6). Congress thus directed that the federal government "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g) (1). To complete this duty, Congress has authorized the federal government to "expend . . . amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities . . . necessary for detention." *See* 8 U.S.C. § 1231(g) (1). The federal government has "broad discretion" to decide where aliens should be detained. *Newsom*, 50 F.4th at 751 (simplified).

Given the federal government's constitutional duty to oversee immigration detention, any state interference with federal immigration-detention policy offends the Supremacy Clause. Simply, no state

law can "defeat the legitimate operations of [the federal] government." *McCulloch*, 17 U.S. at 427.

2. ICE's Voluntary Work Program stems directly from congressional and executive action. The benefits of the Voluntary Work Program are obvious. As we recognized elsewhere, these detention center work programs "occupy idle prisoners" and "reduce disciplinary problems." *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994) (simplified). And ICE has found that the Voluntary Work Program "enhance[s]" the "[e]ssential operations and services" of a detention facility "through detainee productivity." *See* ICE Detention Standards § 5.8, at 405. In ICE's view, the Program reduces "the negative impact of confinement . . . through decreased idleness, improved morale and fewer disciplinary incidents." *Id.* So Congress authorized the Program to promote safety and maintain order at federal immigration-detention facilities.

Congress decided not to treat detainees who volunteer for the Program as "employees" entitled to federal minimum wage laws and other benefits. *See* 8 U.S.C. § 1324a(1) (A) (prohibiting employment of illegal aliens); *see also Ndambi v. CoreCivic, Inc.*, 990 F.3d 369, 371-75 (4th Cir. 2021) (alien detainees participating in ICE's work program are not "employees" under the Fair Labor Standards Act). Instead, Congress authorized funds for the federal government to offer "payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555(d). Notice Congress used

the term "allowances," not "wages." It then set the rate—"not in excess of $1 per day." *See* Pub. L. No. 95-431, 92 Stat. at 1027. The $1-a-day rate applies until Congress changes it. And despite efforts over the years, Congress has stuck with that allowance. *See* H.R. 4431, 117th Cong. § 221 (2021) (proposing changes to the minimum allowance which did not become law).

Consistent with that congressional authority, ICE promulgated detention standards *requiring* detention facility contractors to offer detainees the opportunity to participate in the Voluntary Work Program. *See* ICE Detention Standards § 5.8, at 406 ("Detainees shall be provided the opportunity to participate in a voluntary work program."). The detention standard implements detainee allowances—it must be "at least $1.00 (USD) per day." *Id.* at 407.

Thus, ICE's Voluntary Work Program, including its minimum-allowance standard, was enacted "in pursuance" of a constitutional authority and is entitled to protection under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2.

3. Applying Washington's minimum wage law to the Voluntary Work Program interferes with federal immigration-detention policy. The Washington law "frustrate[s] the expressed federal policy" of not treating detainees as "employees" and providing only a minimal allowance. *See Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956). Congress said that detainees are not employees, that they should be given an allowance of only $1 a day, and that no allowance increase was necessary. The State's minimum wage law effectively overrides Congress's decision on the

detainee's status and the appropriate floor to pay detainees at immigration-detention facilities. In effect, Washington stepped in and said, "no, detainees are employees and they should be paid more than 130 times more." Whatever reasons Congress had for its classification decision and for setting the allowance floor so low, it's not up to us or any State to second guess it.

Congress has the exclusive authority to define the status of aliens present in the United States. *See* U.S. Const. art. I, § 8, cl. 4. And federal law prohibits the employment of illegal aliens. *See* 8 U.S.C. § 1324a(1)(A). ICE's contract similarly prohibits GEO from both employing illegal aliens *and* from using detainees participating in the Voluntary Work Program "to perform the responsibilities or duties of an employee of the Contractor." So GEO cannot treat the detainees at the Northwest ICE Center as "employees" and comply with the requirements of federal law or the mandates of its contract with ICE.

And restructuring of the Voluntary Work Program enables the State to control federal operations. As Chief Justice Marshall noted long ago, "the power to tax involves the power to destroy." *McCulloch*, 17 U.S. at 431. While a minimum wage is not exactly a tax, the same logic applies here. *McCulloch* was concerned that increased costs to the Bank of the United States through taxation could make bank services so costly that they would interrupt the Bank's operations. In the same way, Washington could set a minimum wage so high that the Voluntary Work Program becomes too expensive.

GEO and the federal government say that Washington has already done so. Under Washington's minimum wage law, detainees participating in the Voluntary Work Program must be paid $16.66 per hour—*more than 130 times* higher for an eight-hour period than the $1-per-day rate set by Congress. That's on top of the $23 million that GEO owes for back pay and unjust enrichment. All told, these costs make the Voluntary Work Program unworkable, according to GEO and the federal government. Indeed, ICE permitted the Voluntary Work Program at the Northwest ICE Center to be shut down because of the district court's injunction.

And contrary to the panel majority's view, it doesn't matter that GEO has at times given detainees more than the minimum allowance or that Congress did not set a *maximum* allowance rate for detainees. *See Nwauzor*, 127 F.4th at 761. When it comes to state interference with federal operations, "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988). The bottom line is that Congress and the executive branch may decide how to execute their constitutional authority over immigration detention. And state law can't "retard, impede, burden, or in any manner control, the operations of" the federal government's legitimate immigration-detention program. *McCulloch*, 17 U.S. at 436. And there's no question that a 130-fold increase in the minimum allowance burdens immigration-detention policy. *Cf. Ry. Mail Ass'n v. Corsi*, 326 U.S. 88, 95-96 (1945) (observing that a state law would interfere with a federal function if it "burdens" the government's "selection of its

employees," "its relations with them," or "define[s] the terms of . . . federal employment or . . . any aspect of it").

The panel majority brushes away these concerns by essentially arguing that GEO makes a lot of money. According to the panel majority, the $17-million back pay figure represents only $2.5 million a year over seven years. *Nwauzor*, 127 F.4th at 763. Meanwhile, the panel majority observed that GEO makes between $18.6 million to $23.5 million per year in gross profits running the Northwest ICE Center. *Id.* So because the panel majority thought that GEO makes enough money on the facility to pay Washington's minimum wage law, the law is constitutional. Even if the law were really that burdensome, the panel majority thought that GEO could just renegotiate a higher rate to operate the Voluntary Work Program. *Id.* Or, the panel majority would presumably tell the federal government to just stop using federal contractors.

But this is not how constitutional law works. We don't see if the federal government can afford the state regulation to decide whether it violates the Supremacy Clause. Compare this with *McCulloch*, in which the Court didn't engage in a cost-benefit analysis into whether the Bank of the United States could pay Maryland's 1% to 2% tax on bank notes or the $15,000 prepayment requirement. *See* 17 U.S. at 321. Instead, it was enough that Maryland could tax the bank "to the excess of destruction, . . . which[] would banish that confidence which is essential to all government." *Id.* at 431. So it was the mere contention that Maryland was "capable of arresting all the measures of the government, and of prostrating [the federal

government] at the foot of the states" that made the tax unconstitutional. *Id.* at 432.

Regardless of whether Washington's current minimum wage law makes it impossible to run the Voluntary Work Program now (as GEO and the federal government believe), it's an affront to the Supremacy Clause that Washington is "capable of arresting" the Program at all. *See id.* If a State can unilaterally regulate terms at a federal detention facility against the wishes of Congress, the federal law "would not be the supreme law of the land" and the State's actions would be "an usurpation of power not granted by the [C]onstitution." *See* The Federalist No. 33.

4. And nothing in the historical understanding of the Supremacy Clause excludes federal contractors administering a federal program from the protection of federal supremacy.

Consider again *McCulloch*. In that case, Maryland taxed the Bank of the United States, which was neither a federal agency nor run by federal employees. Instead, the Bank of the United States was a private commercial bank that served both the federal government and the public at large. And the federal government didn't directly control the Bank. The federal government owned only one-fifth of the Bank's stock and the President appointed only one-fifth of its directors.[7] So in the foundational Supremacy Clause case, the Court did not require the federal prerogative to be owned or run by the federal

[7] Federal Reserve Bank of New York, The Founding of the Fed, https://perma.cc/R3PA-FMCJ.

government. It only mattered that the state tax impeded the "operation of an instrument employed by the government of the Union to carry its powers into execution." 17 U.S. at 436-37.

To put a finer point on it, when Ohio likewise tried to tax the Bank of the United States, the Court *expressly* compared the employees of the Bank to "contractors" and yet still considered the Bank's operations to be protected by federal supremacy. *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824). The Court acknowledged that the bank's directors and officers were not "officers of government" and instead had more "resemblance to contractors." *Id.* at 867. Even then, the Court held that "the right of the State to control [the Bank's] operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained." *Id.* at 867. The Court then compared taxing the Bank to interference with more well-known federal contractors: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed?" *Id.* Of course not, said the Court. "[W]e do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control." *Id.*

And the understanding that States can't interfere with federal contractors in the performance of federal duties has continued to this day. In *Hancock v. Train*, Kentucky sought to enforce against federal agencies a state law requiring all air-contaminant sources to obtain a state permit. 426 U.S. 167, 172-73 (1976). The Court said that no State may "[place] a prohibition on

the Federal Government"—and it made no difference that one of the federal facilities was operated by a contractor rather than the federal government. *Id.* at 174 n.23, 180 (simplified). "*Hancock* thus establishes that a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation." *Goodyear Atomic Corp.*, 486 U.S. at 181; *see also United States v. New Mexico*, 455 U.S. 720, 735 n.11 (1982) ("[S]tate [regulations] on contractors are constitutionally invalid if they . . . substantially interfere with [the Federal Government's] activities."); *Boyle*, 487 U.S. at 507 (observing that the "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts" either by contractors refusing to perform for fear of state liability or by raising the costs of the contractors' goods or services).

Contrary to the panel majority, it also doesn't matter that the state regulation appears to be a "neutral, nondiscriminatory" law. *Nwauzor*, 127 F.4th at 761. Recall that Maryland's tax, too, was facially neutral—but it only applied to the Bank of the United States. *See McCulloch*, 17 U.S. at 317-18, 392. As in *McCulloch*, Washington's minimum wage law applies to no other detention facility in the State but the Northwest ICE Center. In any case, while States may enact regulations borne "in common" by others similarly situated within their border, it still can't regulate "the operations" of "an instrument employed by the [federal] government." *Id.* at 436-37. So if a seemingly "neutral, nondiscriminatory" state regulation impedes a federal government operation, it

violates the Supremacy Clause. *See Hancock*, 426 U.S. at 172-73; *New Mexico*, 455 U.S. at 735 n.11.

Thus, the panel majority is simply wrong to assert "[t]he scope of a federal contractor's protection from state law under the Supremacy Clause is substantially narrower than that of a federal employee or other federal instrumentality." *Nwauzor*, 127 F.4th at 760-61 (simplified); *see also id.* at 761 ("Private contractors do not stand on the same footing as the federal government, so states can impose many laws on federal contractors that they could not apply to the federal government itself.") (simplified). When a state regulation interferes with federal operations or when there's a clear conflict between state and federal objectives, it makes no difference that the state law falls only on federal contractors. *See Pub. Utils. Comm'n of Cal. v. United States*, 355 U.S. 534, 544 (1958).

The panel majority now claims that following the Supremacy Clause here would allow government contractors to refuse to pay state minimum wages to its employees. But that's wrong. A state minimum-wage law on all employees in the State isn't a regulation on federal operations, even when applied to federal contractors. As *McCullouch* made clear, the general principle "does not extend" to taxes that are "in common with the other" taxpayers in the State. 17 U.S. at 436. The heart of the problem here is that Washington wants to force ICE to *reclassify* its "detainees" housed at the Northwest ICE Center as "employees." Neither the federal government nor Congress established them as employees. It's only after the forced restructuring of the Voluntary Work

Program that GEO must pay these extra minimum-wage costs. As the panel majority acknowledges, Washington State doesn't treat their own criminal detainees as "employees" and nothing gives the State the authority to compel the federal government to classify its immigration detainees as such. Thus, States are generally free to impose minimum-wage laws on federal government employees as long as the law is neutrally and non-discriminatorily applied to all employees in the State. What they can't do is force the federal government to accept the State's classification of detainees to cram down a minimum-wage law.

Here, GEO houses immigration detainees under the federal government's exclusive power to detain aliens in removal proceedings. GEO is tasked by the federal government to implement its Voluntary Work Program, which the federal government believes assists with its federal duties. Washington's minimum wage law interferes with GEO's ability to carry out that federal directive. It overrides Congress's determination that detainees are not employees and need only be paid $1 a day. Thus, the Supremacy Clause precludes applying Washington's minimum wage law to detainees at the Northwest ICE Center.

In contrast, the panel majority's position would grant States near unfettered authority to regulate any federal operation run by federal contractors. If States may force the federal government to recognize its detainees at privately run detention facilities as employees, what's to stop States from making the federal government also provide them healthcare benefits, pensions, and vacation leave as other

employees receive? Even more, because the panel majority provides no limiting principles, the same rules would also apply to federal criminal detainees in work programs at contractor-run prisons. The Constitution would not countenance such interference.

III.

Whether for the reasons in the panel dissent or in this dissent, the panel majority got this case wrong. And the effect of this decision will be widespread. Our court provides a "roadmap" for States seeking to undermine federal policies with which they disagree. *Nwauzor*, 127 F.4th at 778 (Bennett, J., dissenting). Our court's message is clear: So long as States focus their regulation on federal government contractors—rather than on the federal government itself—the States may frustrate the performance of any federal government activities they wish. We should have taken this case en banc to correct this error.

As always, I respectfully dissent.

COLLINS, Circuit Judge, with whom R. NELSON and BRESS, Circuit Judges, join, dissenting from the denial of rehearing en banc:

For substantially the reasons set forth in Judge Bennett's panel dissent, *see Nwauzor v. GEO Grp., Inc.*, 127 F.4th 750, 771-83 (9th Cir. 2025) (Bennett, J., dissenting), I agree that the panel majority's decision contravenes controlling Ninth Circuit and Supreme Court precedent applying the doctrines of intergovernmental immunity and federal preemption. Accordingly, we should have reheard this case en banc, and I dissent from our failure to do so.

Appendix C

SUPREME COURT OF THE STATE OF WASHINGTON

No. 101786-3

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

Plaintiffs,

v.

THE GEO GROUP, INC., a Florida corporation,

Defendant.

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

En Banc

Filed: Dec. 21, 2023

OPINION

JOHNSON, J.—The certified questions in this case concern a challenge to a private, for-profit

corporation's practice of paying civil immigration detainees less than Washington's minimum wage to work in its private detention center. We are asked to determine whether Washington's Minimum Wage Act (MWA), ch. 49.46 RCW, applies to detained workers in a privately owned and operated detention facility. We conclude that it does. We are also asked to decide whether a legal remedy to one plaintiff forecloses the availability of equitable relief to a different plaintiff. It does not.

CERTIFIED QUESTIONS[1]

1. Whether detained workers at the NWIPC, a private detention center, are "employees" within the meaning of the MWA?

2. Whether RCW 49.46.010(3)(k), the MWA's government-institutions exemption, applies to work performed by detainees confined in a private detention facility operating under a contract with the State?

3. Whether the damages award to the class forecloses equitable relief to the State in the form of an unjust enrichment award?

FACTS & PROCEDURAL HISTORY

The GEO Group Inc. is a private, for-profit corporation that owns and operates the Northwest ICE Processing Center (NWIPC),[2] a private immigration detention center in Tacoma, Washington,

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[1] We exercise our discretion to reformulate the certified questions. *See, e.g.*, *Nelson v. P.S.C., Inc.*, 2 Wn.3d 227, 233 n.2, 535 P.3d 418 (2023).

[2] Formerly named the Northwest Detention Center.

pursuant to a contract with the federal government. GEO contracts with the United States Immigration and Customs Enforcement (ICE) to confine up to 1,575 noncitizen adults in administrative civil custody as they await review and determination of their immigration status. Immigration detainees, as a group, "have not been found to have committed any crime, but are awaiting civil procedures that may lead ultimately to U.S. residence and citizenship." Excerpts of Record (ER) at 29; *see* Ord. Certifying Questions to Wash. Sup. Ct., No. 21-36024, at 6 (9th Cir. Mar. 8, 2023) (stating they are not confined based on criminal convictions or pending criminal matters nor as a penalty for immigration status violations). Immigration detainees are held until they are removed ("deported") or released. ER at 111.

GEO has owned and operated the NWIPC and has contracted with ICE since 2005. The corporation contracts with ICE to provide "civil immigration detention management services." ER at 68. These services include "the building, management and administration, security, clean and vermin free facilities, food service with three nutritious meals per day, clean uniforms and bedding, and barbershop/grooming services." ER at 68. They also include "detention officers, management personnel, supervision, manpower, training certificates, licenses and supplies." ER at 19.

Under the ICE contract, GEO is required to "develop and manage a VWP [Voluntary Work Program]," the purpose of which "is to provide detainees opportunities to work and earn money while

confined." ER at 109, 19-20. The NWIPC detainees worked in the facility under the VWP.

As the manager of the VWP, GEO sets the pay rate, drafts job descriptions, assigns detained workers to work assignments, sets the work schedule, provides detained workers with "orientation, training, uniforms, equipment," and "supervises and directs the detainees in their duties." ER at 110. Pursuant to the ICE contract, GEO is required to provide detainees certain core services, including food, laundry, cleaning, and barber services. The detained workers "were not to be used to perform" the "core obligations" that, under the ICE contract, were the responsibilities and duties of GEO. ER at 22. However, GEO relied on the detained workers to perform "substantially the core work required of GEO under the contract." ER at 22; *see also* ER at 69. GEO paid its detained workers $1 per day to perform these essential tasks.

Pursuant to ICE's Performance-Based National Detention Standards (PBNDS),[3] GEO is required to compensate its detained workers *at least* $1 per day but has discretion to pay more than that amount. Further, the ICE contract expressly states that GEO is required to comply with all applicable federal, state, and local laws and codes. Nevertheless, GEO has never paid its detained workers the state minimum wage.

The State of Washington and a class of NWIPC detainees (Class) brought two separate actions

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[3] GEO is required to comply with ICE's PBNDS, "which are a set of national detention standards to ensure all entities that ICE contracts with meet baseline requirements." ER at 108.

against GEO in September 2017, alleging that GEO's practice of paying detainees less than Washington's minimum wage to work in the detention center violates Washington's MWA. The United States District Court for the Western District of Washington consolidated the two actions on the MWA liability issue only, leaving the issue of damages to be considered separately.

After a jury trial, judgment was entered in favor of the State and the Class (collectively Plaintiffs) on the MWA issue. The jury found that GEO permitted the detainees to work and paid less than the MWA required. In separate proceedings, the Class was awarded $17,287,063.05 in back pay damages. The State was awarded $5,950,340.00 in equitable relief for unjust enrichment, and GEO was enjoined from continuing operation of the VWP without complying with the MWA.

GEO appealed the judgments to the Ninth Circuit Court of Appeals. The Ninth Circuit consolidated the matters and certified three questions to this court. The first certified question asks us to determine the threshold issue of whether detained workers at the NWIPC, a private detention center, are "employees" within the meaning of the MWA. Our answer is yes. The second question is whether the MWA's government-institutions exemption applies to work performed by detainees confined in a private detention facility operating under a contract with the State. Our answer is no. And finally, we are asked to determine whether a legal remedy to one party forecloses the availability of equitable relief to a separate party. Our answer is no.

Amici briefs in support of the Plaintiffs on the MWA issue were filed by the Washington State Department of Labor and Industries, the American Civil Liberties Union of Washington Foundation, and La Resistencia, Fair Work Center, and Professor Angelina Snodgrass Godoy.

ANALYSIS

I. Washington's Minimum Wage Act.

We are asked to interpret the MWA and determine whether the detained workers at the NWIPC are "employees" under the act. We review questions of statutory interpretation de novo. When interpreting a statute, our primary objective is to "ascertain and give effect to the legislature's intent as manifested by the statute's language." *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 238, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094 (2022). To determine the meaning of a statute's language, "we look to the text, the context of the statute, related statutory provisions, and the statutory scheme as a whole." *State v. Valdiglesias LaValle*, 2 Wn.3d ___, 535 P.3d 856, 861 (2023) (citing *State v. Haggard*, 195 Wn.2d 544, 548, 461 P.3d 1159 (2020)). If the statute is susceptible to more than one reasonable interpretation, then it is ambiguous and we may resort to statutory construction, legislative history, and relevant case law to discern legislative intent. *Valdiglesias LaValle*, 535 P.3d at 861.

Washington has a "'long and proud history of being a pioneer in the protection of employee rights.'" *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760, 426 P.3d 703 (2018) (internal quotation marks omitted) (quoting *Int'l Ass'n of Fire Fighters, Loc. 46 v.*

City of Everett, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). The Washington Legislature enacted the MWA "for the purpose of protecting the immediate and future health, safety[,] and welfare of the people of this state." RCW 49.46.005(1). In doing so, it recognized that "the establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature to establish minimum standards of employment within . . . Washington." RCW 49.46.005(1). Consistent with Washington's priority of protecting employee rights, courts must liberally construe the MWA "'[in favor of the employee].'" *See, e.g.*, *Hill*, 191 Wn.2d at 762 (alteration in original) (internal quotation marks omitted) (quoting *Int'l Ass'n of Fire Fighters*, 146 Wn.2d at 34); *see also* RCW 49.46.820 (requiring that the MWA "be liberally construed to effectuate the intent, policies, and purposes").

The MWA provides that employers shall pay their employees not less than the statutory minimum wage. RCW 49.46.020. The MWA defines "employee" as "any individual employed by an employer but shall not include" the statutory exemptions listed in subsections (a) through (p). RCW 49.46.010(3). "Employ" means "to permit to work." RCW 49.46.010(2). Thus, "employee" generally means "any individual permitted to work by an employer." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012).

Recognizing that this definition of "employee" is broad, we have stated that "[i]nstead of being primarily defined by employments included, the MWA

carves out from the definition of 'employee' more narrow provisions that operate as exemptions." *Rocha v. King County*, 195 Wn.2d 412, 420-21, 460 P.3d 624 (2020). These statutory exemptions are necessary to determine whether a worker falls within the MWA's definition of "employee." When interpreting these exemptions, we are required to construe them narrowly and apply them only to situations that are "plainly and unmistakably consistent with the terms and spirit of the legislation." *Rocha*, 195 Wn.2d at 421 (citing *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wash.2d 291, 301, 996 P.2d 582 (2000)).

Relevant to this case is the government-institutions exemption, RCW 49.46.010, which states, "(3) 'Employee' includes any individual employed by an employer but shall not include: . . . (k) Any resident, inmate, or patient of *a state, county, or municipal* correctional, detention, treatment or rehabilitative institution." (Emphasis added.) GEO argues the MWA does not cover workers who are detained. The Plaintiffs argue that the subsection (k) exemption indicates the Washington Legislature contemplated the MWA's application to individuals in detention or custody who are permitted to work. And, they argue, the exemption unambiguously applies only to individuals detained in public, government-run institutions. Therefore, the subsection (k) exemption does not apply to the detained workers at the NWIPC, which is a privately owned and operated facility. We agree with the Plaintiffs.

The subsection (k) exemption applies to persons detained in a "state, county, or municipal" institution. The terms "state, county, [and] municipal" plainly

refer to government divisions within the state. And they modify the terms "correctional, detention, treatment or rehabilitative institution." The only reasonable interpretation of the subsection (k) exemption is that it applies to any resident, inmate, or patient of a government institution.

GEO argues the subsection (k) exemption's language does not distinguish between publicly and privately operated facilities. And if the legislature intended to create such a distinction, it would do so explicitly. However, GEO's argument undercuts its own position because the legislature, by specifying that the exemption applies to persons detained in "state, county, or municipal" institutions, distinguished public institutions from private institutions. And, as GEO states, if the legislature intended to also exclude persons detained in private institutions, it would have done so explicitly.

Because the subsection (k) exemption is unambiguous, we need not resort to additional aids of statutory interpretation to decipher the legislature's intent. Based on the language of the statute, we conclude the detained workers at the NWIPC are "employees" under the MWA. The only relevant exemption—the subsection (k) or government-institutions exemption—does not "plainly and unmistakably" apply to detainees held in a private detention center. *See Rocha*, 195 Wn.2d at 421. This interpretation is consistent with the requirements to liberally construe the MWA in favor of the employee and to narrowly construe the MWA's exemptions.

The second certified question is also resolved by our interpretation of the subsection (k) exemption. We

are asked to determine whether the subsection (k) exemption applies to detained workers in a private detention facility that operates under a contract with the state government rather than with the federal government. We conclude the government-institutions exemption, RCW 49.46.010(3)(k), does not apply to detained workers in private detention facilities regardless of whether the private entity that owns and operates the facility contracts with the state or federal government.

As explained above, the subsection (k) exemption unambiguously applies only to workers detained in a government institution. The exemption, which we construe narrowly, would not apply to a detainee held in a private institution that is owned and operated by a private entity even where that entity operates the facility pursuant to a contract with the State.[4]

GEO points to the Washington State Department of Labor and Industries' (L&I) guidance to support its conclusion that the subsection (k) exemption applies to private detention facilities that operate under contract with the State. However, the guidance does not support GEO's position. The L&I's guidance states:

> Residents, inmates or patients of *state, county or municipal* correctional, detention, treatment or rehabilitative institution are exempt from all MWA protections and are not

[4] The Ninth Circuit Court of Appeals' certification order does not ask us to resolve any federal constitutional arguments raised by GEO. And we need not reach the constitutional arguments as a tool of statutory interpretation because there exists only one reasonable interpretation of RCW 49.46.010(3)(k).

> required to be paid minimum wage *if they perform work directly for, and at, the institution's premises* where they are incarcerated, and *remain under the direct supervision and control of the institution*. Residents, inmates or patients of *state, county or municipal* correctional, detention, treatment or rehabilitative institution *assigned by facility officials* to *work on facility premises for a private corporation at rates established and paid for by public funds* are not employees of the private corporation and would not be subject to the MWA.

ER at 496 (emphasis added). Importantly, the guidance follows the language of the statute by specifying that the exemption applies to individuals held in a state, county, or municipal institution, i.e., a government institution. It does not apply to individuals held in a private institution regardless of whether that institution is operated pursuant to a contract with the federal or state government. Therefore, in response to the second certified question, we conclude the MWA's government-institutions exemption, RCW 49.46.010(3)(k), does not apply to work performed by detainees confined in a private detention facility that operates under a contract with the State.

Turning back to the first certified question, GEO argues that the "reside or sleep" exemption, RCW 49.46.010(3)(j), to the definition of "employee" applies. It does not.

RCW 49.46.010 states:

> (3) "Employee" includes any individual employed by an employer but shall not include:
>
> . . . .
>
> (j) Any individual *whose duties require* that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties.

(Emphasis added.) According to GEO, the detained workers "plainly fit within this exception" because they "resided and slept at the [NWIPC], which was their place of work." Opening Br. of Def.-Appellant on Certified Questions (GEO Opening Br.) at 44. And, GEO argues, the subsection (j) exemption categorically excludes any worker who resides or sleeps at their place of employment. In response, the Plaintiffs highlight that the subsection (j) exemption specifically excludes those "*whose duties require*" that they sleep or reside at their place of employment. In emphasizing this key language, the Plaintiffs argue that the exemption does not broadly apply to anyone who resides at their place of work, as GEO suggests. We agree with the Plaintiffs.

GEO's interpretation of RCW 49.46.010(3)(j) ignores the statute's "whose duties require" language. When interpreting statutes, we presume that the legislature "'says what it means and means what it says.'" *Portugal v. Franklin County*, 1 Wn.3d 629, 650, 530 P.3d 994 (2023) (internal quotation marks omitted) (quoting *City of Seattle v. Long*, 198 Wn.2d 136, 149, 493 P.3d 94 (2021)). And we will not "'rewrite

unambiguous statutory language under the guise of interpretation.'" *Portugal*, 1 Wn.3d at 652 (internal quotation marks omitted) (quoting *State v. Hawkins*, 200 Wn.2d 477, 492, 519 P.3d 182 (2022)). GEO does not argue that the exemption is ambiguous nor can it. The subsection (j) exemption applies to individuals who sleep or reside at their place of employment because their work duties, not some other reason, require it. And, while we are not bound by L&I's interpretation of the statute, we note that the agency's interpretation of the reside or sleep exemption is consistent. It provides that

> [m]erely residing or sleeping at the place of employment does not exempt individuals from the MWA. In order for individuals to be exempt, their *duties* must require that they sleep or reside at the place of their employment. An agreement between the employee and employer for the employee to reside or sleep at the place of employment for convenience, or merely because housing is available at the place of their employment, would not meet the exemption.

ER at 495 (emphasis added) (L&I, Admin. Pol'y ES.A.1 (revised Dec. 29, 2020) (MWA Applicability)). Because a person detained in a facility, as here, does not sleep or reside in the detention facility because of their job responsibilities, the subsection (j) exemption is not applicable.

Finally, to support its interpretation of the subsection (j) exemption, GEO cites to *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.3d 82 (2005). GEO alleges this court has previously interpreted the

"reside or sleep" exception to "'categorically exclude[] from the MWA definition of "employee" those workers who are required to "reside or sleep" at their workplace.'" GEO Opening Br. at 45 (emphasis omitted) (quoting *Berrocal*, 155 Wn.2d at 588 (quoting former RCW 49.46.010(5)(j) (2002)[5]). In doing so, GEO misreads this court's holding in *Berrocal*.

In *Berrocal*, there was no dispute that the plaintiffs' duties required them to reside at their workplace. The issue was whether the subsection (j) exemption's final modifying phrase—"not engaged in the performance of active duties"—also applied to the "sleep or reside" language in the first clause. The employer argued the exemption excluded two distinct categories of workers: (1) those whose duties require them to sleep or reside at work and (2) those who otherwise spend a substantial portion of their work time subject to call and not engaged in the performance of active duties. The plaintiffs argued that the first clause of RCW 49.46.010(3)(j) excluded any individual whose duties require that they reside or sleep at their place of work *and* is not engaged in the performance of active duties. A majority of the court agreed with the employer's reading. We held that the

> [subsection (j) exemption] excludes two categories of workers from the MWA's definition of "employee": (1) those individuals who reside or sleep at their place of employment and (2) those individuals who otherwise spend a substantial portion of work

[5] RCW 49.46.010(5)(j) was renumbered to (3)(j) by the code reviser in 2012.

> time subject to call, and not engaged in the performance of active duties.

Berrocal, 155 Wn.2d at 598. In our holding, we paraphrased the exemption as covering "individuals who reside or sleep at their place of employment" and, in so doing, omitted the phrase "whose duties require." However, this paraphrase cannot be read as a holding that we eliminated RCW 49.46.010(3)(j)'s express language. Our analysis and conclusion in *Berrocal* have no relevance to the interpretation of the subsection (j) exemption's phrase "whose duties require," and we reject GEO's argument to the contrary.

Accordingly, we conclude the reside or sleep exemption, RCW 49.46.010(3)(j), does not apply to persons who work in the facility in which they are detained because their duties do not require them to sleep or reside in the facility. Here, the detained workers are in the custody of ICE and are not permitted to leave the detention facility until ordered released or removed. It is their detention that requires them to sleep or reside at the NWIPC, not their participation in the work program.

GEO further asserts that the court should not look solely at the statutory exemptions to the MWA's definition of "employee" to determine whether the detained workers fall within that definition. Instead, GEO argues, the first step in the analysis is to determine whether the workers fall within the definition of employee in the first instance. If the answer is no, then—according to GEO—we do not take the next step of looking at the statutory exemptions to the "employee" definition.

This approach is inconsistent with how we interpret the MWA's definition of "employee" where we carve out "narrow provisions that operate as exemptions" from the broad definition of employee. *Rocha*, 195 Wn.2d at 421. Also, this proposed analytical approach contravenes our rules of statutory interpretation, under which statutory language must be interpreted in "the context of the statute, related statutory provisions, and the statutory scheme as a whole." *Valdiglesias LaValle*, 535 P.3d at 861 (citing *Haggard*, 195 Wn.2d at 548). By its very definition, "employee" is defined by its exemptions. RCW 49.46.010(3) (defining "employee" as "any individual employed by an employer *but shall not include*" the statutory exemptions listed in subsections (a) through (p) (emphasis added)). Therefore, we reject an analytical approach where we first ask whether the detained workers fall within the MWA's definition of "employee" without looking at the related statutory exemptions. However, even if we agreed with taking this approach, GEO's arguments are unpersuasive.

GEO argues the MWA's definition of "employee" categorically excludes detainee labor. GEO first points to the "ordinary meaning" of the word "employee" and argues that it would "rightly strike people as odd" to describe a federal immigration detainee "as an 'employee' of the facility detaining [them]." GEO Opening Br. at 20, 49 ("[T]he definition of 'employee' must be given its commonsense meaning and exclude detainee labor."). Though GEO argues for us to interpret "employee" consistent with its ordinary meaning, it provides no dictionary definitions for support. *See In re Det. of A.C.*, 1 Wn.3d 731, 750, 533 P.3d 81 (2023) (Madsen, J., concurring/dissenting)

("Absent a specific statutory definition, words in a statute are given their ordinary meaning and we may discern that meaning from the dictionary."). The Class, however, cites to several definitions of "employee" from various dictionaries, showing that none contemplate the exclusion of detained individuals. Nwauzor Appellees' Br. at 28 n.11 ("Webster's New World Dictionary of the American Language 476 (1959) (defining employee as 'a person hired by another, or by a business, firm, etc. to work for wages or salary'); American College Dictionary 394 (1959) (defining employee as 'a person working for another person or a business firm for pay'); Oxford Universal Dictionary 602 (1955) (defining employee as 'one who is employed, esp[ecially] one employed for wages or a salary'); Black's Law Dictionary 617 (4th ed. 1968) ('[o]ne who works for an employer; a person working for salary or wages'); The Merriam-Webster Dictionary 235 (2016) ('a person who works for another'); Collins English Dictionary 295 (2015) ('a person who is hired to work for someone in return for payment'); Employee, Black's Law Dictionary (11th ed. 2019) ('Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.').").

The only support GEO points to is a Washington Court of Appeals case that considered whether a pretrial detainee held in a civil commitment facility was an "employee" under the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW. *See Calhoun v. State*, 146 Wn. App. 877, 886, 193 P.3d 188 (2008). Quoting *Calhoun*, GEO argues detainee-

workers are not employees in the ordinary sense of the word because the work they perform does not provide sufficient "indices of employment." 146 Wn. App. at 886. *Calhoun* is unhelpful here. There, the court considered whether the pretrial detainee, who was in custody at a civil commitment center operated by the State, was an employee for purposes of the WLAD. The court specifically noted that the detainee would not be an employee under the MWA because he fell within the government-institutions exemption, RCW 49.46.010(3)(k). Thus, while the court considered factors such as the primary goal of the work the detainee performed to decide whether the detainee was an employee, that analysis does not aid the argument that the ordinary meaning or the MWA's definition of "employee" excludes detained workers.

Additionally, an interpretation that "employee" excludes all detained workers would render other portions of the MWA superfluous. And "it is a basic rule of construction that, whenever possible, statutes should be construed so that no portion is superfluous." *Sim v. Wash. State Parks & Recreation Comm'n*, 90 Wn.2d 378, 383, 583 P.2d 1193 (1978). RCW 49.46.010(3)(k) specifies that "employee" does not include "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution." If the term "employee" excludes persons who perform labor while in detention or custody, then the subsection (k) exemption would be wholly unnecessary.

Still within its proposed analytical framework, GEO next argues that the detained workers are not "employees" because no employee-employer

relationship exists under the economic-dependence test we adopted in *Anfinson*, 174 Wn.2d 851. GEO argues the economic-dependence test is a necessary step in determining whether a worker falls within the MWA's definition of "employee" in the first instance, i.e., before looking to the exemptions. We reject this argument.

In *Anfinson*, we considered the appropriate test for determining whether a worker is an independent contractor or an "employee" under the MWA. We adopted the economic-dependence or economic realities analysis to resolve that issue. We have since applied this test in two relevant circumstances: (1) to determine whether a worker is an independent contractor or an "employee" for purposes of the MWA and (2) to determine whether a joint employment relationship exists under the MWA.[6] We have not adopted the economic-dependence analysis as a generally applicable test to determine whether a worker falls within the MWA's definition of "employee." And we decline to apply that approach in this case.

First, none of the MWA's statutory exemptions to the definition of "employee" were relevant or at issue in *Anfinson*. The MWA was silent as to how it applied to independent contractors. Here, the MWA's

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[6] *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 196, 332 P.3d 415 (2014). Outside the context of the MWA, we have applied the economic realities test to determine, in the joint employment context, the liability of an employer under the Washington Industrial Safety and Health Act, ch. 49.17 RCW. *Dep't of Lab. & Indus. v. Tradesmen Int'l, LLC*, 198 Wn.2d 524, 497 P.3d 353 (2021).

definition of "employee" contains the government-institutions exemption, RCW 49.46.010(3)(k), which is relevant to work performed by individuals in custody or detention. And because the MWA defines "employee" by carving out narrow provisions from its definition, we need not look beyond the relevant exemption.

Second, we adopted the economic-dependence test because a liberal construction of the MWA favored it within the context presented in *Anfinson*. In *Anfinson*, this court considered whether the right-to-control test, which is a test set forth in *Restatement (Second) of Agency* § 220 (Am. L. Inst. 1958), was the proper standard to apply to determine whether a worker is an independent contractor or an employee under the MWA. We rejected the application of the right-to-control test and instead adopted the economic-dependence test because it favors classification as an "employee" under the MWA and thus provides broader coverage. *Anfinson*, 174 Wn.2d at 870 ("The economic-dependence test provides broader coverage than does the right-to-control test. Liberal construction favors the economic-dependence test." (citation omitted)).

Here, a liberal construction of the MWA disfavors the application of the economic-dependence test to determine whether the detained workers are "employees." The MWA contains a relevant exemption for detained workers, and imposing an additional test to determine whether the workers are employees in the first instance before reaching the exemptions is unnecessary and would only function to limit MWA coverage. We decline to apply the economic-dependence test under these circumstances.

Finally, GEO suggests we follow federal courts that have concluded detainees who work in the "custodial context" are not employees under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219. GEO Opening Br. at 23 n.4. GEO argues the Fourth Circuit Court of Appeals case *Ndambi* is especially persuasive because the court considered whether immigration detainees in a privately owned and operated detention center are "employees" under the FLSA. *Ndambi v. CoreCivic, Inc.*, 990 F.3d 369 (4th Cir. 2021). The *Ndambi* court concluded the detained workers are not employees under the FLSA, reasoning that "[p]ersons in custodial detention . . . are not in an employer-employee relationship but in a detainer-detainee relationship that falls outside that paradigm." *Ndambi*, 990 F.3d at 372. GEO urges us to adopt a similar categorical exclusion from MWA coverage for persons who perform work while in custody. Because that case interpreted federal law, it is not relevant nor helpful to the certified questions specifically asking us to answer Washington state law.

While we have stated that federal authority under the FLSA may provide helpful guidance in interpreting the MWA, we have also recognized that these two statutory schemes "are not identical and we are not bound by such authority." *Drinkwitz*, 140 Wn.2d at 298. We will not rely on a federal court's interpretation of the FLSA where, like here, the relevant portions of the statutes are distinct. The MWA contains a government-institutions exemption to its definition of "employee" that is relevant to detained workers. The FLSA's definition of "employee" contains no similar exemption. *See* 29 U.S.C. ch. 8, § 203(e).

II. Unjust Enrichment.

The district court granted equitable relief to the State in the form of an unjust enrichment award. The Ninth Circuit's third and final question asks us to decide whether the damage award to the Class forecloses equitable relief to the State. It does not.

The equitable theory of unjust enrichment is rooted in notions of fairness and justice. It is "the method of recovery for the value of the benefit retained absent any contractual relationship." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). This equitable relief is generally available where a benefit was unjustly received and the law does not authorize or recognize a legal remedy to redress the harm. It is a form of relief intended to undo an inequity, such as the receipt of ill-gotten gains, and to "force the defendant to give up a gain that had been acquired wrongfully or that would be wrongful to be kept without payment." Howard O. Hunter, Modern Law of Contracts § 15:4 (2023) (*Concepts of Public Law and Justice, Unjust Enrichment, and Receipt of Benefit*).

To sustain an unjust enrichment claim, the State must establish

"'[1] a benefit conferred upon the defendant by the plaintiff; [2] an appreciation or knowledge by the defendant of the benefit; and [3] the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.'"

Young, 164 Wn.2d at 484 (quoting *Bailie Commc'ns, Ltd*. v. *Trend Bus. Sys., Inc*., 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991) (quoting BLACK'S LAW

DICTIONARY 1535-36 (6th ed. 1990))). The district court concluded that the State satisfied these requirements. GEO challenges this conclusion and argues the State is not entitled to this relief because the Class's award of damages forecloses the availability of equitable relief to the State. *See Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984) (providing that a plaintiff generally is not entitled to equitable relief, such as relief based on unjust enrichment, where an adequate legal remedy is available to them). We disagree.

The Class and the State are separate parties that brought separate causes of action against GEO. GEO does not cite to any authority in which we have held the award of a legal remedy to one party forecloses the availability of an equitable remedy to a separate party. And we decline to so hold now. Accordingly, the MWA damages award to the Class does not bar equitable relief on the basis of unjust enrichment to the State.

Finally, GEO argues the State's unjust enrichment claim must fail because it was the detained workers, not the State, that conferred the benefit on GEO. However, the State represents the rights and interests of those harmed by GEO's failure to pay the minimum wage from 2005 to 2021 (when final judgment was entered). ER at 22-23. This includes the rights and interests of the NWIPC's detained workers from that time period. The State's unjust enrichment claim does not fail on this basis, and the award of equitable relief to the State is consistent with Washington law.

CONCLUSION

We conclude that detained workers at a private detention facility are "employees" within the meaning of the MWA. We also conclude the MWA's government-institutions exemption, RCW 49.46.010(3)(k), does not apply to work performed by detainees confined in a private detention facility that operates under a contract with the State. Finally, we conclude that a legal remedy to one party does not foreclose the availability of equitable relief to a separate party. Accordingly, we answer the certified questions as follows:

1. Whether detained workers at the NWIPC, a private detention center, are "employees" within the meaning of the MWA? Yes.

2. Whether RCW 49.46.010(3)(k), the MWA's government-institutions

exemption, applies to work performed by detainees confined in a private

detention facility operating under a contract with the State? No.

3. Whether the damages award to the Class forecloses equitable relief to the State in the form of an unjust enrichment award? No.

[handwritten: signature]
Johnson, J.

WE CONCUR:

* * *

Appendix D

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 17-cv-5806

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Dec. 10, 2018

ORDER DENYING DEFENDANT THE GEO GROUP, INC'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST CAUSE OF ACTION

THIS MATTER comes before the Court on Defendant The GEO Group, Inc.'s Motion for Summary Judgment on Plaintiff's First Cause of Action. Dkt. 149. The Court has reviewed the motion, Plaintiff's Response (Dkt. 155), Defendant's Reply (Dkt. 161), and the remainder of the file herein. Oral argument is unnecessary. W.D.Wash.LCR 7(b) (4).

Defendant has invoked the doctrine of intergovernmental immunity, arguing that finding for Plaintiff on the First Cause of Action impermissibly discriminates against Defendant, a Federal

Government contractor, in violation of the Supremacy Clause. U.S. Const. art. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land"). The First Cause of Action seeks declaratory relief that the Washington Minimum Wage Act (MWA) applies to the compensation of certain immigration detainees at the Northwest Detention Center (NWDC), and injunctive relief, that Defendant be enjoined from compensating detainees below the prevailing minimum wage. Dkt. 1 at 6, 7.

I. Background

A. Judicial estoppel.

First, as a housekeeping matter, the Court must clarify its prior Order on GEO's Motion to Dismiss. *See* Dkt 29 at 17. The Order remarked that, "it is plain that the definition [of 'employee'] excepts residents of "state . . . detention" facilities, not federal facilities . . . The [NWDC] is a federal detention facility and thus does not fall under the exception." *Id*. The Order attempted to make the point that, based on the pleadings, the NWDC is not a state detention facility, but in so doing, the Court arguably inartfully mischaracterized the NWDC. The words used were not intended to be a finding of fact regarding the nature of Defendant's facility, except to point out that the referenced statutory exception does not apply. The NWDC is better characterized as a private facility that detains federal detainees under a contract with the Federal Government. *See* Dkt. 19 at 47. As raised by Defendant, Dkt. 149 at 7, judicial estoppel does not apply.

B. Facts.

The facts necessary to resolving this motion are agreed. Defendant is a private corporation that has owned and operated the NWDC, a 1,575 bed detention facility, since 2005 under a contract with Immigration and Customs Enforcement (ICE). Dkt. 19 at 47, 49. Defendant is obligated to provide "detention management services" for detainees awaiting resolution of immigration matters, operating the NWDC under certain standards and policies, including the Performance-Based Detention Standards (PBNDS). *Id.* at 49, 86. *See* 8 U.S.C. § 1231(g). The PBNDS require Defendant to implement a Voluntary Work Program (VWP), under which detainees perform a variety of tasks. Dkt. 156 at 10, 11; 2011 PBNDS, § 5.8, Voluntary Work Program, available online at http://www.ice.gov/detention standards/ 2011/ (last accessed Dec. 3, 2018). Detainee VWP participants receive $1 per day, a disbursement the parties characterize as an allowance (Defendant) or compensation (Plaintiff). Defendant must "perform in accordance with the most current version of [ ] constraints . . . includ[ing] . . . all applicable federal, state and local labor laws and codes[.]" *Id.* at 47, 48.

C. Procedure.

In two prior motions to dismiss filed by Defendant, the Court denied dismissal. Dkt. 29 at 8-12; Dkt. 58 at 5. Neither motion to dismiss raised intergovernmental immunity. On November 8, 2018, Defendant filed the instant motion, which was ripe for consideration on November 30, 2018. The dispositive

motions deadline is April 3, 2019, and trial is set for July 1, 2019. Dkts. 137, 149.

I. Legal Standards.

A. Motion for Summary Judgment.

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(d). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a

preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. The Minimum Wage Act.

The legislature for the State of Washington has "endeavore[e]d . . . to establish a minimum wage for employees of this state to encourage employment opportunities within the state." RCW 49.46.005. The protections and benefits of the MWA are directed at employees; the statute applies indirectly to employers. *See id.* First effective in 1975, the MWA guarantees persons who are "employees" certain minimum wage protections. RCW 49.46.902, 1975 1st ex.s. c 289 § 5. By statute, an "employee" is "any individual employed by an employer" in the State of Washington. Exceptions apply, including, "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution[.]" RCW 49.60.010(3) (k). Considerations in determining employment relationships are set out in case law. *See, e.g.*, *Anfinson v. FedEx Ground Package Sys., Inc.*, 174

Wn.2d 851, 870 (2012); *Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 196-97 (2014).

C. Intergovernmental immunity generally.

The doctrine of governmental immunity is rooted in the Supremacy Clause, which guarantees that "the activities of the Federal Government [be] free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). "Courts take 'a functional approach to claims of governmental immunity, accommodating [ ] the full range of each sovereign's legislative authority.'" *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010), citing *North Dakota v. United States*, 496 U.S. 423, 435 (1990). State laws are invalid if they either "regulate the United States directly or discriminate against the Federal Government or those with whom it deals." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014) (internal quotations and citations omitted). Defendant's motion has advanced the second theory, that the MWA discriminates against Defendant.

"The nondiscrimination rule finds its reason in the principle that the States may not directly obstruct the activities of the Federal Government." *North Dakota*, 495 U.S. at 437-38. "A state or local law discriminates against the federal government if it treats someone else better than it treats the government." *Boeing*, 768 F.3d at 842. "Since a regulation imposed on one who deals with the [Federal] Government has as much potential to obstruct the governmental functions as a regulation imposed on the Government itself . . . the regulation [must] be . . . imposed on some basis unrelated to the object's status as a Government contractor or supplier,

that is, that it be imposed equally on other similarly situated constituents of the State." *Id.* at 438.

II. DISCUSSION.

In light of the background and applicable standards, the Court observes the following.

First, the MWA is imposed equally on other similarly situated constituents of the State. *See North Dakota* 495 U.S. at 438. When creating the MWA, the legislature invoked its police power to care for the health, safety, and welfare for the people of the State of Washington generally, and stated its intent to "endeavor[]. . . to establish a minimum wage for employees of this state to encourage employment opportunities within the state." RCW 49.46.005. At its core, and by design, the MWA protects employees and prospective employees in Washington generally, placing private firms that contract with the Federal Government on equal footing with all other private entities. The MWA expressly excludes as employees, "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution," but, importantly, this exclusion does not extend to residents, inmates or patients of private entities, which, again, remain on equal footing. If the word "federal" was added to the subsection (3) (k) exception (e.g., "state, county, municipal or federal . . . institution"), the MWA exception still would not apply to residents of a private institution, like the NWDC. It therefore cannot be said that the MWA "meddl[es] with federal government activities indirectly by singling out for regulation those who deal with the government." *In re Nat'l Sec. Agency Telecommunications Records Litig.*, 633 F.

Supp. 2d 892, 903 (N.D. Cal. 2007). *Compare to, e.g.*, *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 814 (1989) (state tax on federal retirement benefits discriminates against Federal Government); *City of Arcata*, 629 F.3d at 988, 991 (municipal ordinances prohibiting federal government employees or agents from engaging in military recruitment activities targeting minors discriminates against the Federal Government).

Second, there is no showing that the MWA is imposed against Defendant on any basis related to its status as a Federal Government contractor. *See North Dakota*, 495 U.S. at 438. The state minimum wage arguably relates indirectly to federal government activities—the Federal Government and its contractors may employ persons within the State of Washington—but the MWA does not regulate the Federal Government directly, and, in fact, imposes no duty on the Federal Government itself.

For this reason, this case is distinguishable from *Boeing*, the case upon which Defendant most heavily relies. In *Boeing*, the court analyzed a State of California regulation directed at a single location, Santa Susa Field Laboratory, a former NASA test site targeted "because of the radioactive pollution created by federal activity on the site." *Boeing*, 768 F.3d at 842. The state regulation imposed a "more stringent cleanup standard than generally applicable under state environmental laws[,]" *id.*, whereas in this case, the MWA *is* the generally applicable law. Furthermore, unlike the State of California, the State of Washington has not imposed other regulations or laws directed only to the Federal Government or its

contractor more stringent than a generally applicable law.

Instead, this case can be better analogized to cases where courts upheld generally applicable state laws or regulations because they did not impermissibly discriminate against the Federal Government or its contractors, which is to say, the laws or regulations did not "directly obstruct the activities of the Federal Government." *City of Arcata*, 629 F.3d at 991. *See, e.g.*, *North Dakota* 495 U.S. at 441 (state liquor regulations laws indirectly affecting the Federal Government's liquor costs); *In re Nat'l Sec. Agency Telecommunications Records Litig.*, 633 F.Supp.2d at 903-04 (state law regulating public utilities); *United States v. California*, 314 F.Supp.3d 1077, 1093 (E.D. Cal. 2018) (state bill directing its Attorney General to review and report on conditions of confinement for detainees held at county, local, and private detention facilities); *Student Loan Servicing All. v. D.C.*, 2018 WL 6082963, at *31 (D.D.C. Nov. 21, 2018) (state licensing scheme for student loan providers).

Third, the MWA leaves open the question, and places no limitation on, whether Congress *could* decree that detainees must be compensated at a certain wage. And, in fact, as discussed in a prior order, at intermittent times in the past, Congress has done so. *See preemption discussion*. Dkt. 29 at 5-12. Such is the nature of a system organized with two overlapping governments.

Fourth, Defendant's argument that it should be treated the same as the Federal Government is not convincing, because the MWA applies the same to all

private employees. The MWA, which was enacted long before Defendant contracted with ICE for detention services, generally applies to "employees." *See Anfinson*, 174 Wn.2d at 870; *Becerra*, 181 Wn.2d at 196-97.

Fifth, a key question in this case is how to interpret the clause requiring Defendant to "all perform in accordance with the most current version of [ ] constraints . . . includ[ing] . . . all applicable federal, state and local labor laws and codes[.]" Dkt. 19 at 47, 48. Under this clause, even if the MWA had the effect of discriminating against the Federal Government, the Federal Government and Defendant arguably waived any objection to the MWA, and agreed to be bound by it. Also, a question remains: Is this clause "applicable" to the MWA? Notably, Defendant has not addressed the waiver issue here.

Relatedly, Defendant emphasizes that the MWA applies equally to Defendant as a government contractor and to the Federal Government. This argument is far too broad, and overlooks the Federal Government's discretion to decide whether to extend its cloak of sovereign immunity to contractors, e.g., by terms of a contract.

Sixth, if the MWA applies here, it may not affect the Federal Government at all. Whether the Federal Government (ICE) must reimburse Defendant for VWP compensation is between Defendant and ICE. The State is not involved in the source of funding VWP compensation, whether under the MWA or not.

In summary, the burden placed on Defendant by the MWA, which is neutral on its face, is "but [a] normal incident of the organization within the same

territory of two governments." *North Dakota*, 495 U.S. at 435. The MWA does not discriminate against the Federal Government or Defendant, but instead, affects Defendant only incidentally to "a broad, neutrally applicable rule." *City of Arcata*, 629 F.3d at 991. The doctrine of intergovernmental immunity does not shield Defendant from application of the MWA. Defendant's motion for summary judgment for dismissal should be denied.

Whether the MWA actually applies here remains to be seen.

* * *

THEREFORE, it is HEREBY ORDERED that Defendant The GEO Group, Inc.'s Motion for Summary Judgment on Plaintiff's First Cause of Action (Dkt. 149) is DENIED.

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 10th day of December, 2018.

[handwritten: signature]
ROBERT J. BRYAN
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 17-cv-5806

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Aug. 6, 2019

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on The GEO Group Inc.'s ("GEO") Motion for Summary Judgment against the State of Washington (Dkt. 245) and the State of Washington's Motion for Summary Judgment on Minimum Wage Act Claim and Defendant The GEO Group, Inc.'s Preemption Defense (Dkt. 251). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

This case arises out of GEO's alleged failure to compensate immigration detainees at the Northwest Detention Center ("NWDC"), a private detention center, in accord with the Washington Minimum Wage Act ("MWA"). Dkt. 1. The parties now file cross

motions for summary judgment. Dkts. 245 and 251. For the reasons provided below, GEO's motion (Dkt. 245) should be denied and the State's motion (Dkt. 251) should be granted as to GEO's preemption defense and denied in all other respects.

I. Relevant Facts and Procedural History

A. Facts

GEO is a private corporation that has owned and operated the NWDC, a 1,575-bed detention facility in Tacoma, Washington, since 2005. Dkt. 156, at 8-9. GEO operated and still operates the NWDC based on a series of contracts with the U.S. Immigration and Customs Enforcement ("ICE"). Dkts. 16-2, and 19. The first contract, contract ALC-2-C-0004, was signed by the company GEO acquired in 2002 ("2002 Contract") and applied to GEO's provision of services to ICE in 2005. Dkt. 246-1, at 1-137. Starting on October 24, 2009, GEO operated the NWDC pursuant to ICE contract HSCEDM-10-00001 ("2009 Contract"). Dkt. 246-2. From September 28, 2015 to the present, GEO has operated the NWDC under ICE contract HSCEDM-15-00015 ("2015 Contract"). Dkt. 246-3, at 1-203.

Under these contracts, GEO provides "detention management services including the facility, detention officers, management personnel, supervision, manpower, training certifications, licenses . . . equipment, and supplies" for immigration detainees awaiting resolution of immigration matters. *See e.g.* Dkt. 246-3, at 45.

Language in the 2002 Contract between GEO and ICE is different than that used in the 2009 or 2015 contracts as provided below.

2002 CONTRACT

Under the 2002 Contract, a detainee is defined as "[a]n individual confined within the facility under the authority of [the ICE];" and an employee "refers to a person employed by the contractor." Dkt. 246-1, at 18. The 2002 Contract provides that, "[s]ubject to existing laws, regulations Executive Orders and other provisions of this contract, aliens unauthorized to be employed in the United States shall not be employed by [GEO] . . . to work on, under or with this contract." Dkt. 246-1, at 111.

Under the heading "Detainee Labor," the 2002 Contract provides: "[GEO] shall provide work opportunities for detainee volunteers subject to the approval of ICE." Dkt. 246-1, at 46. It notes that:

1. [GEO] may solicit volunteers. The number and activities of such volunteers shall be controlled and approved by [ICE's Contracting Officer's Technical Representative "COTR")] prior to the assignment of the activities. . .
2. [GEO] remains fully responsible to perform all services required under this contract with neither interruption nor diminishment of service regardless of the availability of detainee volunteers.
3. Creation of work opportunities is viewed primarily as a benefit to [ICE] and the detainees in custody. It should not be considered by [GEO] as an opportunity to diminish services or responsibilities.

Dkt. 246-1, at 46. The 2002 Contract's COTR was "designated to coordinate the technical aspects of [the contract] . . . however, he [was] not [authorized] to change any terms and conditions of the resultant contract, including price." Dkt. 246-1, at 107.

2009 CONTRACT AND 2015 CONTRACT

The 2009 Contract and 2015 Contract require that GEO comply with all "applicable federal, state and local labor laws," and the Illegal Immigration Reform and Immigrant Responsibility Act. Dkts. 246-2, at 19 and 58; 246-3, at 46 and 52. They further provide that "[s]hould a conflict exist between any of these standards, the most stringent shall apply." Dkt. 246-2, at 58 and 246-3, at 52. Both contracts require that GEO perform all services in accordance with the applicable ICE Performance-Based National Detention Standards ("PBNDS"), and other standards. Dkt. 246-2, at (applying ICE 2008 PBNDS) 246-3, at 45 (applying ICE 2011 PBNDS).

The 2009 Contract and 2015 Contract define a "contractor employee" as an "employee of a [GEO] hired to perform a variety of detailed services under this contract. Dkts. 246-2, at 51 and 246-3, at 47. They define a detainee is "any person confined under the auspices and the authority of any federal agency. Many of those being detained may have substantial and varied criminal histories." Dkts. 246-2, at 51 and 246-3, at 47. Under the heading "Minimum Personnel Qualification Standards," the 2009 Contract and the 2015 Contract provide that:

> [GEO] shall agree that each person employed by [GEO] shall have a social security card issued and approved by the Social Security

> Administration and shall be a United States citizen or a personal lawfully admitted into the United States for permanent residence, have resided in the U.S. for the last five years . . . possess a high school diploma or equivalent (GED), and obtain a favorable Suitability for Employment Determination.

Dkts. 246-2, at 69 and 246-3, at 63. They further provide that "[s]ubject to existing law, regulations and/or other provisions of this contract, illegal or undocumented aliens will not be employed by [GEO] or on this contract." Dkt. 246-2, at 77 and 246-3, at 71.

Under the heading "Manage a Detainee Work Program" the 2009 Contract and 2015 Contract require that, "[d]etainee labor shall be used in accordance with the detainee work plan developed by [GEO], and will adhere to the ICE PBNDS on Voluntary Work Program" ("VWP"). Dkt. 246-2, at 89 and 246-3, at 82. While the ICE 2008 PBNDS (applicable to the 2009 Contract) provided that the VWP "compensation is $1 a day," (available online at http://www.ice.gov/detention-standards/2008/ (last accessed Aug. 5, 2019), under the ICE 2011 PBNDS (applicable to the 2015 Contract) on the VWP, "the compensation is at least $1.00 (USD) per day" (Dkt. 253-14, at 4). The 2009 Contract and the 2015 Contract further provide:

> The detainee work plan must be voluntary, and may include work or program assignments for industrial, maintenance, custodial service or other jobs. The detainee work program shall not conflict with any other requirements of the contract and must

> comply with all applicable laws and regulations.
>
> Detainees shall not be used to perform the responsibilities or duties of an employee of [GEO]. Detainees shall not be used to perform work in areas where sensitive documents are maintained . . .
>
> Appropriate safety/protective clothing and equipment shall be provided to detainee workers. Detainees shall not be assigned work that is considered hazardous or dangerous. . .
>
> 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.

Dkt. 246-2, at 89 and 246-3, at 82.

Both the 2009 Contract and the 2015 Contract contain a contract line item number that provides, "Detainee Volunteer Wages for the Detainee Work Program. Reimbursement for this line item will be at the actual cost of $1.00 per day per detainee. Contactor shall not exceed the amount shown without prior approval by the Contracting Officer." Dkts. 246-2, at 6 and 246-3, at 5. The unit price is listed as $114,975.00. *Id.* As was the case with the 2009 Contract, in the 2015 Contract, the contracting officer is the person authorized to change the contract. Dkts. 246-2, at 23 and 246-3, at 54 and 96. The 2009 Contract and the 2015 Contract provide that "[t]he contracting officer is the only person authorized to approve changes in any of the requirements under this contract. Notwithstanding any clause contained

elsewhere in this contract, the said authority remains solely with the contracting officer." Dkt. 246-2, at 23 and 246-3, at 54.

VOLUNTARY WORK PROGRAM AT THE NWDC

As above, GEO is also required by the 2009 Contract and 2015 Contract to manage a VWP. Dkts. 246-1, at 46 (2002 Contract), Dkt. 246-2, at 89 (2009 Contract) and Dkt. 246-3, at (2015 Contract). The 2002 Contract also refers to a VWP. Dkt. 246-1, at 46. GEO developed various polices regarding the VWP and discusses those policies in detainee handbooks. Dkt. 246, at 4 and 250.

Detainees who participate in the VWP collect and distribute laundry, prepare and serve food, clean, paint interior walls, and use electric shears to cut hair. Dkts. 184-1, at 8-19; 254-11 and 253-11, at 10. The detainees request to participate in the program (Dkts. 253-11, at 12-14 and 253-56, at 4-5), are assigned to jobs by GEO (Dkt. 253-11, at 8), are scheduled by GEO (Dkts. 253-21, at 13-14; 253-6, at 13-14), are trained by GEO (Dkt. 253-21, at 21; 253-20, at 6-10), are supervised by GEO (Dkt. 253-21, at 20-21) and GEO provides all equipment, materials and personal protective equipment (Dkts. 254-23 and 253-6, at 30-31). GEO pays detainees through a system called the "key banking system," electronically depositing their pay the day after they work. Dkt. 253-41, at 5-6. GEO also makes removal decisions. Dkt. 253-9, at 5.

GEO generally pays detainees who participate in the VWP at $1 per day (Dkt. 156, at 10) but acknowledges that it has occasionally paid workers more than $1 per day (Dkt. 253-15, at 20-21; 254-10,

at 15 and 253-11, at 9). Each participant signs a "Voluntary Work Program Agreement," which is provided to the detainees in English or Spanish. Dkt. 247, at 2. These agreements indicate that compensation shall be $1 per day. *Id.*

B. Procedural History

On September 20, 2017, the State filed this case in Pierce County, Washington Superior Court. Dkt. 1-1. The Complaint maintains that the GEO-ICE Contracts at least allow for, if not require, GEO to compensate detainees working in the VWP commensurate with the State MWA. *Id.* The State alleges that GEO has been unjustly enriched by compensating detainees below that required by state law. *Id.* In its "quasi-sovereign interest," the State makes a claim against GEO for unjust enrichment, and seeks: (1) an order requiring GEO to disgorge its unjust enrichment for compensating detainees below the minimum wage, (2) declaratory relief that GEO is an "employer" subject to the MWA when managing detainee employees, and (3) injunctive relief for GEO to be enjoined from paying detainees less than the minimum wage. *Id.*

In its Answer, GEO makes a counterclaim for unjust enrichment, seeks declaratory and injunctive relief, and asserts thirteen affirmative defenses. Dkt 34.

On December 6, 2017, GEO's motion to dismiss, based in part on the defenses of express preemption and conflict/obstacle preemption, was denied. Dkt. 29.

On February 28, 2018, GEO's counterclaim for unjust enrichment was dismissed. Dkt. 44. Further, State's motion to strike the affirmative defenses of

laches, unclean hands, failure to join L & I and ICE, and ripeness, justiciability, and a portion of the offset defense, were denied without prejudice; no finding was made as to the affirmative defense of preemption. *Id.* The remaining affirmative defenses were stricken. *Id.*

On April 26, 2018, GEO's motion to dismiss for failure to join ICE was denied. Dkt. 58. On May 13, 2019, the State's motion for summary judgment on GEO's affirmative defenses of laches, unclean hands and failure to join L & I and ICE was granted and those claims were dismissed. Dkt. 202.

C. Pending Motions

GEO moves for summary judgment, arguing that derivative sovereign immunity bars the State from bringing these claims, the State's claims are preempted, and even if the State could bring these claims, its claim for violation of the WMWA should be dismissed because the detainees are not "employees," and that the State's unjust enrichment claims fails. Dkt. 245. The State moves for summary judgment on its WMWA claim, arguing that GEO has an employee-employer relationship with the detainees and the affirmative defense of preemption should be dismissed. Dkt. 251. Both parties have responded (Dkts. 266 and 270) and replied (Dkts. 273 and 275) to the motions, and they are ripe for review.

II. Discussion

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine

issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(d). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in

the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

B. GEO's Defense of Derivative Sovereign Immunity

GEO moves for dismissal of the State's claims, arguing that it is entitled to derivative sovereign immunity. Dkt. 245.

"[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), as revised (Feb. 9, 2016). This immunity is not absolute. *Id.* A contractor is entitled to immunity when it performs work "authorized and directed by the Government of the United States." *Id.*, at 673. "[D]erivative sovereign immunity . . . is limited to cases in which a contractor had no discretion in the design process and completely followed government specifications." *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 732 (9th Cir. 2015).

GEO's motion for summary judgment, based on derivative sovereign immunity should be denied. GEO has not shown that it was directed to pay participants in the VWP only a $1 for the relevant period. GEO has not shown that it had "no discretion in the design process and completely followed government specifications." *Cabalce, at 732.* The State points out

that GEO has, in the past, paid workers more than a $1 a day and has the ability to, and has requested, changes to the contracts, including modifications to be reimbursed more than was originally agreed upon. GEO's motion to for summary judgment based on derivative sovereign immunity should be denied.

C. Cross Motions on GEO's Defense of Preemption

GEO moves for summary judgment, arguing that the State's claims are expressly preempted by federal law and that the State's interpretation of Washington law presents an obstacle/conflict to existing federal law. Dkt. 245. The State moves for summary judgment on GEO's obstacle/conflict preemption defense (Dkt. 251, at 26-27) and notes that the Court has already determined that its claims are not barred by express or field preemption (Dkt. 251, at 26, n.1).

The applicable law is in the Court's December 6, 2017 Order on GEO's Motion to Dismiss Complaint (Dkt. 29) and is repeated here, for ease of reference:

The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land[,] . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, or (3) obstacle/conflict preemption. *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 724 (9th Cir. 2016). "Regardless of the type of preemption involved—express, field or conflict—the purpose of Congress is the ultimate touchstone of pre-emption analysis." *Id*.

Analysis "starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). This presumption applies in "all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*internal quotation marks and citations omitted*). "[L]abor standards fall[] within the traditional police power of the State." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987). *See also*, RCW 49.46.005(a). The party seeking to set aside state law bears the burden to show preemption. *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 634 (2011).

1. Express Preemption

In the December 6, 2017 Order, this Court held that GEO "has not shown that the State minimum wage provision is expressly preempted" by the Immigration Reform and Control Act ("IRCA"). Dkt. 29, at 8. GEO fails to make the showing again. The December 6, 2017 Order's findings on express preemption is adopted here, again. GEO's motion for summary judgment, based on express preemption should be denied.

2. Obstacle/Conflict Preemption

Conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements," and obstacle preemption exists "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

GEO's motion for summary judgment of the State's case, based on conflict or obstacle preemption (Dkt. 245) should be denied and the State's motion to dismiss those affirmative defenses (Dkt. 251) should be granted. GEO has failed to show that it would be impossible for it to comply with federal law and still pay the detainees minimum wage. If GEO pays detainees more than a $1 a day, that alone does not violate the federal law. It has failed to show that paying the detainees minimum wage "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." This affirmative defense should be dismissed.

D. Cross Motions on the State's WMWA Claim

GEO moves for summary judgment on the State's WMWA claim, arguing that even if it is not entitled to immunity and the claims are not preempted, the claim should be dismissed because detainees do not satisfy the economic-dependence test under the WMWA. Dkt. 245. The State asserts it is entitled to summary judgment on the WMWA claim because under Washington's economic-dependence test, which incorporates 13 non-exclusive factors, GEO has an employee-employer relationship with detainee workers. Dkt. 251.

Under the WMWA, "an employee includes any individual permitted to work by an employer." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871 (2012). Washington uses the "economic-dependence test developed by the federal courts in interpreting the [Fair Labor Standards Act]. The relevant inquiry is whether, as a matter of

economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *Id.* "[T]he evaluation of whether an employment relationship exist[s] rest[s] upon the circumstances of the whole activity." *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 708 (2013), aff'd, 181 Wn.2d 186, 332 P.3d 415 (2014). The "test is flexible and depends on the totality of the circumstances of each case." *Id.* Washington courts consider several factors, including:

> (1) "The nature and degree of control of the workers;"
>
> (2) "The degree of supervision, direct or indirect, of the work;"
>
> (3) "The power to determine the pay rates of the methods of payment of the workers;"
>
> (4) "The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;"
>
> (5) "Preparation of payroll and the payment of wages;"
>
> (6) "Whether the work was a specialty job on the production line;"
>
> (7) "Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;"
>
> (8) "Whether the premises and equipment of the employer are used for the work;"
>
> (9) "Whether the employees had a business organization that could or did shift as a unit from one worksite to another;"

> (10) "Whether the work was piecework and not work that required initiative, judgment or foresight;"
>
> (11) "Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill;"
>
> (12) "Whether there was permanence in the working relationship;" and
>
> (13) "Whether the service rendered is an integral part of the alleged employer's business."

Becerra, at 717-718 (*citing Moreau v. Air France*, 356 F.3d 942, 947-48 (9th Cir. 2004)). Analysis and application of those factors are not appropriate for summary judgment here. There are genuine issues of material fact as to whether GEO and the detainee workers have an employee-employer relationship under the WMWA. GEO's motion for summary judgment (Dkt. 245) and the State's cross motion for summary judgment (Dkt. 245) should be denied.

E. GEO's Motion on the State's Claim of Unjust Enrichment

"Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159 (1991).

GEO's motion for summary judgment on the entire unjust enrichment claim (Dkt. 245) should be denied. First, GEO argues that the claim should be dismissed because the State is barred from seeking this equitable remedy because the detainees have an adequate remedy under the law—either they are

employees under WMWA and they can be compensated under that statue or they are not employees and are bound by the contracts (the Voluntary Work Program Agreements) they signed to participate. These are not sufficient grounds to dismiss the unjust enrichment claim. There are so many issues of fact in this case, it is not yet clear whether the detainees will be considered employees under WMWA. Further, the State points out that the validity of the Voluntary Work Program Agreements is at issue.

Second, GEO argues that the State's unjust enrichment claim fails because the program is voluntary by its express terms and the detainees could not reasonably expect more. Dkt. 245. Again, the State points to issues of fact as to the validity of the Voluntary Work Program Agreements. The agreements are not yet grounds to dismiss the unjust enrichment claims.

Third, GEO argues that, if the State prevails on its unjust enrichment claim, the proper remedy is the reasonable value of services rendered, not disgorgement of profits, and so moves for summary judgment on the State's claim for the disgorgement of profits. Dkt. 245. GEO maintains that the remedy should be limited to the value of services rendered.

In an action for unjust enrichment in Washington, a court, "reviewing the complex factual matters involved in the case, has tremendous discretion to fashion a remedy to do substantial justice to the parties and put an end to the litigation." *Young v. Young*, 164 Wash.2d 477, 487-88 (2008).

GEO's motion for summary judgment on the unjust enrichment remedy of disgorgement of profits (Dkt. 245) should be denied without prejudice. In addition to having several issues of fact, at this stage in the litigation, it is unclear which remedy, disgorgement of profits or reasonable value of services rendered, would "do substantial justice to the parties." *Young*, at 488.

III. Order

Therefore, it is hereby **ORDERED** that:

- The GEO Group Inc.'s Motion for Summary Judgment against the State of Washington (Dkt. 245) **IS DENIED WITHOUT PREJUDICE, as to the State's claim for disgorgement of profits for its unjust enrichment claim, and DENIED, IN ALL OTHER RESPECTS**; and
- The State of Washington's Motion for Summary Judgment on Minimum Wage Act Claim and Defendant The GEO Group, Inc.'s Preemption Defense (Dkt. 251) **IS GRANTED, as to GEO's preemption defenses,** and **DENIED, IN ALL OTHER RESPECTS.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 6th day of August, 2019.

[handwritten: signature]
ROBERT J. BRYAN
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 17-cv-5806

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Nov. 4, 2021

CIVIL JUDGMENT

X Jury Verdict. This action came to consideration before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Judgment is entered in favor of PLAINTIFF STATE OF WASHINGTON against DEFENDANT THE GEO GROUP, INC., in the amount of $5,950,340. Defendant is enjoined from continuing operation of the

Voluntary Work Program as it has been operating without paying detainee workers the minimum wage.

Dated this 4th day of November, 2021.

Ravi Subramanian
Clerk of Court

s/Tyler Campbell
Tyler Campbell, Deputy Clerk

Appendix G

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. 17-cv-5806

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Dec. 8, 2021

MEMORANDUM OF DECISION INCLUDING AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the conclusion of the trial in this matter, the Court made oral Findings of Fact and Conclusions of Law consistent with Federal Rule of Civil Procedure 52(a) (1). Following motions and recommendations of counsel (Dkts. 637, 655 & 662), the Court issued an order making amendments and additions to clarify the oral Findings of Fact and Conclusions of Law (Dkt. 664 filed December 8, 2021).

Following is the Courts' Oral Findings of Fact and Conclusions of Law with the amendments and additions incorporated therein in **bold**, which

comprises the Findings of Fact, Conclusions of Law, and opinion:

AFTERNOON SESSION
NOVEMBER 2, 2021

THE COURT: Good afternoon.

Before I embark on findings, there are a couple of preliminary matters. Exhibits marked as A-304, A-309 and A-310 were offered in evidence. They may be admitted. They are basically statements of law. They may be admitted.

I also wanted to say one other thing preliminarily, and that is that all exceptions to the Minimum Wage Act and affirmative defenses have been resolved against the defendants, over a long period of time in this case.

The last one, the last affirmative defense that was still alive at the time of the trial was the derivative sovereign immunity defense. That went by the wayside as well. I wanted to make it clear on the record that the reason for that is that the defense did not put up evidence at trial to support that defense. In fact, it went by the wayside based on the agreed facts in the case. It was not proven. That is also out of the case.

If the federal contractor had no discretion, then derivative sovereign immunity applies. Here, ICE gave GEO discretion over the Voluntary Work Program and, specifically, the rate of pay for detainee workers, and GEO admitted that it had discretion to pay more than $1 per day. (*See* Court's Preliminary Instructions to the Jury (Dkt. 582) at Instruction

#15, the agreed facts: "GEO has the option to pay more than $1/day to detainee workers for work performed in the Voluntary Work Program at the Center.") Derivative sovereign immunity does not apply.

This is the time for Findings of Fact and Conclusions of Law in the third phase of this case. As I indicated the other day, it is my habit to give oral opinions, including Findings of Fact and Conclusions of Law. They need not be reduced to writing under Federal Rule of Civil Procedure 52(a) (1). That rule requires that findings and conclusions be stated separately. I try to do that, but there are some mixture of findings and conclusions when one gives an oral opinion.

My first finding are the admitted facts that are found in the pretrial order and in the preliminary jury instructions submitted to the jury early in this proceeding. I adopt those agreed facts as my Findings of Fact, which covers part of the issues in the case.

I have before me, in addition to those agreed facts, the events of the joint trial and the events of the short addition to trial that was held without a jury. I have the jury's verdicts before me.

The information presented is considerable. A lot of it, I need not comment on, but there is a great deal I need to comment on in making findings and conclusions.

One thing that I found in this case is that there was no substantial change in the voluntary work program or in the way it operated from 2005, the time of the contract between GEO and ICE, until now. **Similarly, GEO had the discretion to pay**

detainee workers more than $1/day throughout this entire period and did, in fact, pay more than $1/day on occasion during periods covered by former PBNDS Standards and the prior ICE-GEO contracts. It is appropriate that we consider all of that time, not only the time from the start of this lawsuit in 2017.

This case has been based not only on what has been occurring on the site of the detention facility, but also it is based on the ICE-GEO contract. That contract is found at Exhibit 129. It is a complex contract. In order to fully understand it, one has to be aware of and consider Exhibit 127, which is the PBNDS standards that I will refer to as the "standards." It is in those standards that we find that the minimum wage to be paid to detainees engaged in the voluntary work program is "at least a dollar a day."

I think I should first address here the purpose of the contract. That is found in a couple of places in the record, and I have decided I should refer to the Bates stamped pages because the paging in the contract and the standards can be quite confusing.

There are two places that the purpose of the contract between ICE and GEO are set out. One is at Exhibit 129. I will be referring mostly to that contract here at Bates No. 036867. The objective of the GEO and US Immigration and Customs Enforcement contract is to obtain a facility for the detention, transportation and food services for the detainees located in the Seattle, Washington area.

At another page or pages it goes on to say, and this is at Bates 03869, "The GEO contract with ICE is to provide detention management services, including the

facility, detention officers, management personnel, supervision, manpower, training certificates, licenses and supplies."

GEO also agreed they are to be responsible for other ancillary services, including, but not limited to, transportation and food service.

The ancillary services mentioned in the contract, obviously, from all the evidence in the case, include maintaining a clean environment, laundry services, food services, and barber services.

The purpose of the contract is also found in great detail in the contract at Bates Nos. 036881 to 883. I don't need to go through all of that. What is clear from those provisions is that GEO was to provide certain core services, including food service, laundry, cleaning, and barber services. It is those things that are mostly at issue in this case. The purpose of the voluntary work program, the program, of course, being at the heart of this case, is found a couple of places in the standards and in the contract. The standards provide that the purpose of the voluntary work program, according to the standards, is to provide detainees opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of safety, security and good order of the facility.

It is clear under the contract, GEO agreed to develop a detainee work program that is voluntary and may include work or program assignments for industrial, maintenance, custodial service or other jobs. In that provision, it also says the detainee work program shall not conflict with any other requirements of the contract and must comply with all

applicable laws and regulations. That covers the purposes of the voluntary work program.

The next issue is the question about whether there is a necessity for GEO to follow state laws, including the Minimum Wage Act. Besides the provision that I just referred to, there are many places in the contract that indicate that part of GEO's requirements is to comply with all federal, state and local labor laws and codes, and all applicable federal, state and local laws and codes. It is also clear that the contract indicates that if there are issues about those standards, the most stringent standard shall apply. That language being at Bates 06876.

Those provisions speak of the applicability of State laws, and the only evidence in the record that the State Minimum Wage Act did not apply to the voluntary work program and to detainees came from a couple of witnesses who opined that the Minimum Wage Act was not applicable under the contract. They gave no reason for their opinions, except the argument was made that GEO has never interpreted the contract to include the Minimum Wage Act as applicable at all. That is no argument at all. **There is no credible information in the record that indicates that that particular local labor law, the Minimum Wage Act, should not apply. The contract speaks for itself , and indicates, by plain inference and plain meaning, that among the state laws that are applicable, the Minimum Wage Act should apply.**

In that regard, I wanted to refer further to the constraints on the contract that GEO was obligated to know and, I think, to apply. That appears at Bates

036868. There are not just one, but four constraints that are, I think, important to consider in regard to the applicability of the Minimum Wage Act.

Constraint (p) refers to "applicable federal, state facility codes, rules, regulations and policies."

(q) provides the constraint that they "must follow applicable federal, state and local labor laws and codes."

(r) provides they are to "follow applicable federal, state and local firearm laws, regulations and codes."

Lastly in this group, subparagraph (s) provides that "GEO should consider alignment with external sources," that is state and local law enforcement organizations.

It is clear from those four provisions that there is, built in to the contract, an expectation that GEO will consider local laws and decide, based on facts and evidence, as to what should apply, and should not just come to the conclusion that something applies or doesn't apply based on the whim of GEO.

I must say I found the testimony of those witnesses who opined that the Minimum Wage Act was not applicable was not believable. I think they came to that conclusion for reasons other than the merits that were to be considered under the terms of the contract.

I want to comment here also that the reimbursement rate in the contract is not relevant to the issues in this case. Whether the reimbursement rate goes up in the future to cover higher wages to detainees is unknown. It is clear from the agreed facts

that GEO could pay more regardless of that reimbursement rate.

As I indicated, it is also clear that there are core obligations of GEO in the case and that the detainee workers under the voluntary work program were not to be used to perform the responsibilities or duties of an employee of the contract. It appears to me that that is largely what brings us here today is that the voluntary work program detainees were doing substantially the core work required of GEO under the contract.

I would comment in that regard on the testimony of Bertha Henderson, the main head cook, who seemed like a nice lady and a competent head cook. She testified at great length about her responsibilities of leadership and management of the food service program. As she testified, my mind went to, well, who is doing the work? The answer was the very many members of the detainee work program, who are doing various parts of food preparation and food service and doing the work that the contract required be done by GEO.

It is my conclusion, from all the evidence in the case, that GEO, by ignoring the Minimum Wage Act and misusing the detainee labor to do core work that was required of GEO under the contract and that they were not to be doing under the contract, that GEO profited and continued to violate the Minimum Wage Act by paying the minimum of only one dollar a day.

Those are my Findings of Fact on the first portion of the case.

It is my conclusion that the jury's two verdicts were well supported by the evidence, and I agree with

those findings of the jury and with those verdicts, and that is part of my Findings and Conclusions.

Now, let me turn more directly to the basis for the State's claim. The State has brought this action under the State's parens patriae authority, alleging unjust enrichment. The defendants have argued that the State has the burden of proving that there is no legal remedy available to them as a condition for any equitable relief.

The findings and conclusions of this Order related to the PBNDS, the purposes of the VWP, and the provisions of GEO's contract are included as part of the Court's evaluation of the equities of Washington's Unjust Enrichment claim.

The Court also finds, independent of the MWA, that Washington proved all three prongs of Unjust Enrichment in this case: 1) GEO benefitted from detainee labor both operationally and financially, as that work fulfilled core services that GEO agreed to perform under its contract with ICE and GEO was paid for; 2) GEO was aware of the benefit conferred on it by detainee workers, recognized it as 'meaningful and valuable,' and GEO itself created the detainee job descriptions, assigned detainees to particular jobs that needed to get done, and supervised their work to ensure they performed satisfactorily; and 3) it is unjust for GEO to have paid them only $1/day from October 2005 to present and retain the benefit of that labor while paying inadequate wages.

I want to point out something that seems to me to be important in this whole analysis. The members of the class are part of the State's representation of those harmed by failure to pay the minimum wage. They are, along with all the other people protected by the Minimum Wage Act, part of who the State has brought this case on behalf of. You can't separate them out as not being part of the body of people that are protected by the Minimum Wage Act.

There is a legal remedy to that extent that the jury has already ruled on, but there are the rest of the people protected by the Minimum Wage Act for whom there is no legal remedy. It is appropriate to examine the evidence to determine whether the unjust enrichment claim has been made out.

In that regard, the Consumer Protection Act in the Revised Code of Washington 19.86 does not apply. It is not the basis for the State's claim, and it is limited by its terms to consumer protection. So it is not relevant here.

What is relevant to the State's claim is the law as it occurs in the State case of *Young vs Young* found at 164 Wn.2d 477. The *Young* case differentiated between quantum meruit and unjust enrichment, and this language is from that case: "Unjust enrichment is the method of recovery for the value of the benefit retained, absent any contractual relationship, because notions of fairness and justice require it.

"Unjust enrichment occurs when one retains money or benefits, which in justice and equity belong to another." That page went on to say, "The three elements that must be established in order to sustain a claim based on unjust enrichment are: a benefit

conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value."

This case is different. It doesn't have the same factual background, the same parties as *Young*. To interpret that case and to apply it here, it appears to me the first requirement is a benefit conferred on GEO by the State of Washington. That is, the benefit is the failure to pay the minimum wage or the failure to collect the minimum wage for many years.

As to knowledge of the benefit they were getting, GEO knew or should have known that payment under the Minimum Wage Act should have been made and considered.

Last, is it unfair for GEO to retain the benefit? The answer to that is "yes."

There was a lot of argument on the last day about the equities because the last requirement of proof is unfairness. That is sort of a moving target, because what is fairness to one person may not be fairness to another. The Court needs to consider, in that regard, the totality of the circumstances. I wanted to point out a few things, although I am not sure how important this analysis is to the bottom line.

First, GEO has argued that they should not have been aware or should not be required to have been aware of the Minimum Wage Act. Ignorance of the law is no excuse**. Everybody in the state, with some narrow exceptions not relevant here, is**

obligated, if they permit people to work, that the Minimum Wage Act applies.

Deliberate ignorance should not be rewarded. It appears to me that the position of GEO was not necessarily ignorant, but more deliberate ignorance.

There was argument on other matters. There are statutes of limitation. Most in the State, I think, are three-year statutes. There are some two-year and some longer. That is true that most claims have limitations periods.

There is a reason for this claim and claims like it not having a statute of limitation, and that is because there have been some 16 years of failure to follow the law and the contract and 16 years of unfairness to detainees involved in the voluntary work program.

GEO also argues that the State doesn't pay its detainees, and it maintains a voluntary work program in some of its institutions. The exception for state governmental programs is clear on the law, and it is there for good reason. This program, under control of the private corporation, is different than the provision in the Minimum Wage Act regarding State programs.

There was much argument and now evidence in the record about the Department of Labor & Industries' early conclusions about this issue, and doubts they had about whether the Minimum Wage Act could be enforced against GEO. Those debates never were with GEO or ICE. They were discussions that people had, but there was no formal State judgment or determination that the Minimum Wage Act did not apply.

Also argued as a matter of equity is the question of the government's interest and their notice of interest in this case. That was litigated to some extent some time ago, and I, frankly, thought it was misplaced interest. The question is: What about now, what is the government's interest?

I think ICE's absence from this case speaks volumes. As near as I can tell, the government's interest and ICE's interest is in having the contract enforced according to its terms. I guess that is all I have to say about that.

The equities in the case in considering the totality of the case and the circumstances—the equities favor the State. The amount of the remedy to the State is not based on comparative equities. It is based on the unfairness of the amount that GEO should have paid and did not.

Now, I am coming to the question of what remedy should be provided here. The first issue in this regard was whether the Court should consider the minimum wage or the prevailing wage.

In looking at Dr. Nickerson's numbers and estimates, it is my judgment that all of the voluntary work program detainees that worked at the GEO facility were for jobs at the entry level as unskilled labor. Some of them, of course, had more skills than others. What they were used for in the kitchen, in the food service, in the pods, in the laundry, was entry-level, unskilled work. I think it is not appropriate to use prevailing wages for those things, based on some other standard, other than the minimum wage program. I think the minimum wage program is what the standard should be.

Now, Dr. Nickerson's estimates and numbers have not been challenged. It appears that they are reasonable. He multiplied the estimates of hours worked by minimum wages going back to 2005 up to the present and computed out those figures, and then deducted from them the one dollar per day wages actually paid to detainees. He got the bottom line of $23,237,403. That seems to me to be an appropriate base.

I think it is inappropriate, as I indicated, to use some standard of prevailing wages. I think it is appropriate to use the minimum wage as he did in the documents he presented and in his testimony.

I think it is not appropriate to add to that number the FICA addition. The State and the citizens of the State haven't lost that money. It would not ever have been paid to the State. It seems to me not something that ought to be added to the base number I mentioned.

It also seems to me that it is not appropriate to add the interest figures that Dr. Nickerson ran for us. These numbers are only estimates, after all. The citizenry, it seems to me, has not, or the State has not lost those things. It appears to me that it would be punitive to add those things in, and we are dealing with a number that is not sufficiently certain in amount to justify adding interest to it or to attempt to multiply the number somehow upward to the conceived present value. I think that exercise is too speculative to be justified here.

We start with the basic figure from Dr. Nickerson of $23,237,403 as reflected in his Exhibit No. 620.

The next question is whether the award to the class should be deducted from that or not. It appears to me that the class action has succeeded in recovering the same numbers that are covered in that $23 million figure. To have GEO pay that number twice is a double recovery that would not be appropriate.

The class members that recovered the $17 million verdict are people permitted to work and within the broad group of those protected by the Minimum Wage Act, so that is the same number as the first $17 million of the $23 million that I mentioned.

My bottom line is that we should subtract from $23,237,403 the $17,287,063 that was the class's recovery, for a net unjust enrichment against the Defendant GEO in the sum of $5,950,340. It is my Conclusions of Law that that amount should be reduced to a judgment in favor of the State.

Now, one can argue, of course, about unjust enrichment, whether we are really talking about disgorgement. It was not possible from what was presented to find a reasonable number to justify a disgorgement of profit. The profits based on GEO's acts are unspecified in the evidence, in my opinion, and the unjust enrichment and restitution are the same number.

I want to point out this is not a penalty. I think that the Court should not set out to penalize GEO, but rather to try to even the playing field by the award of unjust enrichment for monies that should have been paid and were not paid. Now, that is part of what I must decide.

The State has also asked for an injunction. I have thought about that considerably from the beginning of

this case, without coming to very good conclusions, perhaps.

It seems to me that an injunction against GEO should be issued to this extent: GEO should be enjoined from continuing operation of the voluntary work program as it has been operating without paying detainee workers the minimum wage.

Let me repeat that: They should be enjoined from continuing operation of the voluntary work program as it has been operated without paying detainee workers the minimum wage.

The Court will not require specific changes to the voluntary work program, nor do I know the effect of any changes to the Minimum Wage Act requirements. I would not speculate as to the employment status of detainee workers if they are receiving the minimum wage. I won't require reports.

On the other hand, GEO should cooperate with the State as the contract contemplates in the listed constraints requirements, including the restraint (s), which requires "alignment with external sources," which includes the Attorney General, which is a state law enforcement organization as GEO should clearly now know.

The injunction is only directed at how things have been operating and not how things might operate in the future.

I am mindful that I have made scores of controversial decisions in these cases, and that the results are contrary to what the defendant says are 150 court decisions that have gone the other way.

I am not aware of any of those 150 cases that have the extensive record of abuse of the voluntary work program and detainees that exists in this case. I am aware that many of those cases wrongly conflate immigration detainees with criminals under sentence or awaiting trial.

Immigration detainees, as a group, have not been found to have committed any crime, but are awaiting civil procedures that may lead ultimately to U.S. residence and citizenship or, of course, may lead to deportation.

I learned at the National Judicial College in 1967 that "judges should not turn their backs on the locked prison gates." That thought is even more important as it relates to civil detention facilities.

I hope that other judges who review these proceedings will not be swayed by the idea, as quoted in the *Ndambi vs Corecivic* case at 990 F.3d, 369, that "fair payment for prisoners is too outlandish to consider."

Judgment will be entered probably tomorrow, not only the money judgment, but the limited injunction that I referred to.

If there are any Findings that I have overlooked or Conclusions that I have overlooked, you should bring those to my attention by motion and I can supplement, if I have omitted anything that is important.

Thank you, all.

* * *

IT IS SO ORDERED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 8th day of December, 2021.

[handwritten: signature]
ROBERT J. BRYAN
United States District Judge

Appendix H

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. C17-5769

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Apr. 7, 2020

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on the Plaintiffs' Motion for Summary Judgment (Dkt. 221 refiled in redacted form Dkt. 233) and The GEO Group, Inc.'s ("GEO") Motion for Summary Judgment (Dkt. 227). The Court has considered the pleadings filed regarding the motions, the remaining file and the file in *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, which is joined with this case for liability purposes. Because the issues in the motions overlap, the motions are here discussed together.

For the reasons provided below, Plaintiff's motion for summary judgment (Dkts. 221 and 233) and GEO's motion for summary judgment (Dkt. 227) should be denied.

I. Facts

On September 26, 2017, the Plaintiffs filed this class action, alleging that the Defendant, GEO, failed to comply with the State of Washington's Minimum Wage Act ("MWA") regarding work performed by civil detainees at the Northwest Detention Center ("NWDC"), which was recently renamed the "Northwest ICE Processing Center." Dkt. 1. (For ease of reference, this opinion will continue to refer to it as the NWDC). On August 6, 2018, the undersigned certified a class in this case of "all civil immigration detainees who participated in the Voluntary Work Program [("VWP")]at the [NWDC] from September 26, 2014 and the date of final judgment in this matter." Dkt. 114.

A. GEO and the Contracts

GEO is a private for-profit corporation that provides correctional and detention services. Dkt. 230-1, at 46. The NWDC, a 1,575-bed facility, is owned and operated by GEO. Dkt. 230-1, at 46. In 2009, and through a renewed agreement in 2015, GEO contracted with U.S. Immigration and Customs Enforcement ("ICE") to provide "detention management services including the facility, detention officers, management personnel, supervision, manpower, training certificates, licenses . . . [and] supplies . . ." Dkt. 230-1, at 46 (2015 Contract); *and see* Dkt. 229-4, at 57 (2009 Contract). GEO also agreed to

"be responsible for other ancillary services including but not limited to transportation and food service." *Id.*

The contracts with ICE require that GEO comply with ICE's Performance-Based National Standards ("PBNDS"), which are a set of national detention standards to ensure all entities that ICE contracts with meet baseline requirements. Dkt. 230-1, at 46 and Dkt. 229-4, at 57. The contracts also require GEO to comply with all federal, state, and local laws and regulations. Dkt. 230-1, at 45 and 53; Dkt. 229-4, at 19. If ambiguity arises, the most stringent standard applies. Dkt. 230-1, at 53.

According to ICE official, Tae D. Johnson, the NWDC "operates pursuant to a performance-based contract[s], which is a results-oriented method of contracting focused on outputs, quality, and outcomes. Performance-based contracts do not designate *how* a contractor is to perform the work, but rather establishes the expected outcomes and results that the government expects." Dkt. 229-2, at 3-4. Further the contracts are also "firm-fixed price contracts, which means that GEO responded to the government's requirements by quoting fully burdened rates (i.e. bed day rate, transportation rate, etc.) at which it would perform the requirements." *Id.,* at 4. Johnson maintains that "one of the many aspects of ICE's detention standards is the [VWP]," which is intended to "reduce the negative impact of confinement through decreased idleness, improved detainee morale, and fewer disciplinary incidents." *Id.,* at 5. The program also allows detainees to earn money to buy commissary goods and pay for phone calls. *Id.*

B. VWP

The contracts require GEO develop and manage a VWP which adheres to the PBNDS and "all applicable laws and regulations." Dkt. 230-1, at 83; and Dkt. 229-4, at 89. The 2008 PBNDS requires that detainees receive VWP compensation at "$1.00 per day." Dkt. 223-12, at 5. The revised 2011 PBNDS requires that GEO pay "at least $1.00 per day" for work performed in the VWP. Dkt. 223-13, at 7. Both contracts provide for an annual $114,975 for "Detainee Volunteer Wages for the Detainee Work Program. Reimbursement for this line item will be at the actual cost of $1.00 per day per detainee. [GEO] shall not exceed the amount shown without prior approval by the Contracting Officer." Dkt. 230-1, at 6 and 229-4, at 6. GEO and ICE acknowledge that GEO has the option to pay more than a $1.00 a day for work performed in the VWP. Dkts. 224-4, at 2; 223-21, at 22 and 224-5, at 2.

GEO's classification unit manages the VWP at the NWDC. Dkt. 223-24, at 4. GEO has "job descriptions" for worker assignments, which contain "job titles," "work hours," "specific work duties," hours, requirements and grounds for "termination." Dkt. 223-24, at 5-6; Dkt. 223- 25, at 2-7; and Dkt. 223-33, at 2. The VWP includes work in the kitchen, work in the laundry unit, janitorial services, barber shop (including cutting hair), and painting. Dkt. 223-3, at 16 and 19. Detainees request work assignments by completing kites which are reviewed by GEO's classification officers, who make the assignments. Dkt. 223-22, at 18. GEO looks at "classification level, attitude, behavior, and physical ability to perform the job." Dkt. 223-9, at 26. It has the discretion over who

to hire in the program. Dkt. 223-22 and 24. ICE plays no role in assigning detainee workers to work assignments. Dkt. 223-22, at 7-9.

GEO sets the work schedule for the detainees, provides the detainees with orientation, training, uniforms, equipment, and supervises and directs the detainees in their duties. Dkt. 233- 3, at 24-25; Dkt. 223-7, at 6-10, 16-28; Dkt. 223-8, at 6-9; and Dkt. 223-9, at 5-7, and 12-13. The detainees do not have discretion to deviate from GEO's rules, regulations, or directions in how they perform their duties. Dkt. 223-7, at 11, 23-24, and 36; Dkt. 223-8, at 23; Dkt. 223-9, at 15. Detainees cannot seek employment outside the facility and those with pre-existing skills have no opportunity to earn more than the VWP pays. Dkt. 223-3, at 26-27; and Dkt. 223-9, at 27 and 44. GEO estimates that the average shift in the VWP is around 1.72 hours. Dkt. 223-3, at 4. It pays the workers directly to a detainee's trust account. Dkt. 223-3, at 27. GEO makes the initial decision of whether to terminate a detainee's participation in the program. Dkt. 223-3, at 26; Dkt. 223-7, at 34-35; and Dkt. 223-8, at 28. ICE plays no role in directing or supervising detainees ins the VWP. Dkt. 223-9, at 22-23; Dkt. 223-7, at 21; and Dkt. 223-8, at 12-13. A detainee can appeal GEO's VWP termination decision to ICE. Dkt. 275-9, at 10.

Detainees held at the facility are in the custody of ICE. Dkt. 228, at 2. They live and sleep at the facility until they are ordered released or deported. Dkt. 228, at 2. Detainees are provided a living area, clothing, food, and healthcare at no cost to them. Dkt. 228, at 2. GEO asserts that it does not have a system in place to

track all the hours the detainees work and estimates that if the participants in the VWP were considered employees, this would result in over an additional 400 employees per day (over the 340 employees currently there). Dkt. 228, at 2. GEO maintains that if they had to start considering the detainees as employees, they would need additional human resources support staff and would have to "restructure and renegotiate the pricing of its contracts with ICE to account for the increased cost." Dkt. 228, at 2. It asserts that implementing those changes (with the additional costs) would be a significant burden. Dkt. 228, at 2.

C. Washington State Work Programs in Detention Centers

The State of Washington operates civil detention centers where it pays less than minimum wage for work performed by detainees. *See e.g*. Dkt. 229-6, at 5-7. For example, detainees at the Special Commitment Center for sexually violent predators engage in work activities for subminimum wage. Dkt. 229-6, at 5-7. Further, political subdivisions of Washington State, like Pierce County, own and operate jails where some of the detainees are awaiting criminal proceedings but have not been convicted of a crime. Dkt. 229-7. Detainees in the Pierce County jail can participate in the Inmate Worker Program, which includes activities like food preparation, laundry, and janitorial services. Dkt. 229-7, at 3. Participants in the Pierce County jail program do not get paid wages but may receive extra food or recreational time. Dkt. 229-7, at 3. Pierce County contracts with a private entity, Consolidated Food Management to assist in managing the food service program and Aramark Correctional Services,

LLC to handle the commissary. Dkt. 229-7, at 3. GEO points to the declaration of Julie Williams, who is a retired Contract Services Manager at the Pierce County Sheriff's Department, who states that Consolidated Food Management "operates the kitchen using detainee and inmate labor." Dkt. 229-7, at 4. Williams asserts that this private contractor "handles all meal preparation and clean up, using detainees and inmates to perform the work that [Consolidated Food Management] oversees." Dkt. 229-7, at 4. She attaches a contract dated July 9, 2014, which purports to be between Pierce County and Consolidated Food Management. Dkt. 229-7, at 43-80. The contract indicates that Consolidated Food Management would do activities like purchase all the food and supplies, hire supervisors and staff, and operate the program. Dkt. 229-7, at 49-50. Pierce County agreed to provide the kitchen, corrections staff for security, equipment, and pay the utilities. Dkt. 229-7, at 53-54. Consolidated Food Management agreed not to serve meals to corrections security that was prepared by inmates. Dkt. 229-7, at 49. The County agreed to "provide the appropriate number of inmate kitchen helpers to assist the cook in meal preparation, service and sanitation. The number assigned [was] subject to negotiation and may change at any time within the contract period." Dkt. 229-7, at 54. The State has also contemplated contracting with GEO to provide out-of-state detention services (which included a work program) for people convicted of a crime, but no contract was completed. Dkts. 229-10, and 229-11, at 1-33.

D. Other Relevant Procedural History in *Washington v. GEO*

On September 20, 2017, the State filed a case against GEO, maintaining that GEO failed to pay civil detainees participating in the VWP in accord with MWA. *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, Dkt. 1. As one of its affirmative defenses in *Washington*, GEO maintained that it was entitled to intergovernmental immunity. *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, *see e.g.*, Dkt. 162. In December of 2018, the Court denied GEO's motion for summary judgment on its defense of intergovernmental immunity (Dkt. 162) and denied its motion for reconsideration of the denial of the motion for summary judgment (Dkt. 165). *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB. Discovery in *Washington* continued.

On May 28, 2019, this class action case was consolidated with the State case, *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, for liability purposes only. Dkts. 174 and 175. The Court ordered that the deadlines in the cases would remain unchanged. *Id.*

On August 6, 2019, GEO's motion for summary judgment based on the defense of derivative sovereign immunity and the State and GEO's cross motions for summary judgment on the State' MWA claim were all denied. *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, Dkt. 288.

After the close of discovery in *Washington* and after giving the parties another opportunity to address

the defense of intergovernmental immunity, on October 9, 2019, the Court reaffirmed its prior ruling and denied GEO's motion for summary judgment on the defense of intergovernmental immunity. *Washington v. GEO Grp., Inc.*, Western District of Washington Case No. 17-5806 RJB, Dkts. 306 and 322. On October 28, 2019, GEO's motion for reconsideration, or in the alternative, to reopen discovery and move for summary judgment, was denied in *Washington*. *Id.*, Dkt. 326.

D. Pending Motions

The Plaintiffs now move for summary judgment asserting that (1) GEO is an "employer," the Plaintiffs are "employees" under the MWA, (2) GEO's contract with ICE does not prevent GEO from paying detainee workers minimum wage, and (3) GEO's counterclaim and affirmative defense of "offset/unjust enrichment" should be dismissed because GEO contracted with ICE and received payment for the benefits it now seeks to disgorge from the Plaintiffs. Dkt. 221.

GEO opposes the motion and argues that (1) the detainees are not "employees" under the plain language of the MWA, (2) the Plaintiffs cannot satisfy the economic dependence test and so are not "employees," (3) there are issues of fact as to whether GEO is entitled to "offset/unjust enrichment." Dkt. 274.

The Plaintiffs reply and argue that (1) the exceptions to the MWA urged by GEO do not apply, (2) they are/were GEO's "employees" under MWA, and (3) GEO's offset/unjust enrichment" affirmative defense/counterclaim should be dismissed. Dkt. 279.

GEO also moves for summary judgment, asserting that (1) detainees at the NWDC do not fall within the MWA's definition of "employee" and so are exempted from coverage, (2) it is entitled to intergovernmental immunity against the Plaintiffs' claims, and (3) it is immune from the MWA under the doctrine of derivative sovereign immunity. Dkt. 227.

The Plaintiffs oppose the motion and argue that (1) the Plaintiffs are "employees" under the MWA and no exemption applies, (2) GEO is not entitled to intergovernmental immunity—it points to no facts supporting its claim of either direct regulation of the federal government or discrimination against the federal government in application the MWA, and (3) the doctrine of derivative sovereign immunity does not apply. Dkt. 272. The Plaintiffs also move for 17 findings of fact pursuant to Fed. R. Civ. P. 56(g) on which that they assert all parties agree. *Id.* GEO replies and argues that (1) the detainees are exempt from MWA coverage, (2) it is entitled to intergovernmental immunity, and (3) it is entitled to derivative sovereign immunity. Dkt. 278.

E. Organization of Opinion

This opinion will first address the Plaintiffs' motion for findings of fact under Rule 56(g), second, provide the standard of review on a motion for summary judgment, third, address both parties arguments regarding whether the Plaintiffs are "employees" under the MWA, fourth, GEO's defense of intergovernmental immunity, fifth, GEO's defense of derivative immunity and last the Plaintiffs' motion to summarily dismiss GEO's counterclaim and/or affirmative defense for offset/unjust enrichment.

II. Discussion

A. Plaintiffs' Motion for Findings of Fact

Fed. R. Civ. P. 56(g), "Failing to Grant All the Requested Relief," provides, "[i]f the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case."

The Plaintiffs' motion for the Court to enter findings of fact on undisputed facts (Dkt. 272) should be denied. The parties are free to agree on facts before trial in preparation of the pre-trial order, but the Court should not do so at this point.

B. Standard on Motion for Summary Judgment

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P.

56 (d). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non-specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

C. Whether Detainees in VWP Are Employees Under the MWA

"The MWA 'establishes minimum standards of employment within the state of Washington,' including setting the minimum wage" for employees. *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 618 (2018) (*quoting* RCW 49.46.005(1)). Under the MWA,

"an employee includes any individual permitted to work by an employer." *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871 (2012). "Because the MWA is based upon the [Fair Labor Standards Act ("FLSA")], federal authority under the FLSA often provides helpful guidance." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298 (2000).

1. Exclusions from Coverage Under MWA

As is relevant here, the MWA excludes from the definition of "employee:"

> (j) Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties;
>
> (k) Any resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution; . . .

RCWA § 49.46.010(3).

Pointing to sections (j) and (k), GEO maintains that the Plaintiffs' claims must be dismissed because they are excluded from the definition of "employee" based on the plain language of the act. Dkts. 227 and 274. Each will be considered in turn.

a. Section (j) "Residential" Exclusion

GEO's motion for summary judgment based on section (j) should be denied. The Plaintiffs argue that GEO failed to plead section (j) as an affirmative - a

defense for which it has the burden of proof. *See Mitchell v. Pimco Mut. Ins. Co.,* 134 Wash.App.723 (2006) (employer has burden of proof to demonstrate that MWA exemption applied); *David v. Bankers Life & Cas. Co.*, C14-766RSL, 2018 WL 3105985, at *4 (W.D. Wash. June 25, 2018) (examining MWA exemptions as affirmative defenses); *Magana v. Com. of the N. Mariana Islands*, 107 F.3d 1436, 1445 (9th Cir. 1997) (exemption under FLSA is an "affirmative defense that must be pleaded and proved by the defendant"). "Defendants may raise an affirmative defense for the first time in a motion for summary judgment only if the delay does not prejudice the plaintiff." *Magana*, at 1446. GEO's answer did assert that the MWA did not apply to the Plaintiffs. The issue was sufficiently raised. GEO has not waived the affirmative defense of the section (j) exclusion.

In any event, GEO is not entitled to summary judgment on its affirmative defense of the section (j) exclusion to the MWA. GEO fails to acknowledge the key phrase in the exclusion - it applies to individuals "who's duties require that he or she reside or sleep at the place of his or her employment." GEO fails to point to any facts which support the notion that the detainees' duties require that they sleep or reside at the NWDC. All parties agree that the detainees are in the custody of ICE and are not permitted to leave the facility until the detainees are ordered released or deported. It is their detention which leads to the requirement that they "reside or sleep" at the NWDC. Their participation in the program does not lead to the requirement that they "reside or sleep" at the NWDC. Further, GEO fails to point to facts which support the other clause of the section (j) exclusion: "who

otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties." GEO fails to point to evidentiary support that the detainees spend work time "on call" and not engaged in their kitchen, laundry, janitorial, etc. duties. GEO points to *Berrocal v. Fernandez*, 155 Wash.2d 585 (2005). In *Berrocal*, two sheepherders asserted that they should be paid minimum wage. *Id.* They willingly engaged in a contract of employment which required that they live on the ranch to be available 24 hours a day, seven days a week, to care for the sheep. *Id.* The *Berrocal* court found the section (j) exclusion applied and they were not entitled to minimum wage. The detainees here did not choose work that required that they reside and live at the NWDC. They were forced to reside and sleep at the NWDC due to being in ICE custody. They then requested what work they could. At least, there are material issues of fact regarding application of this exclusion.

b. Section (k) "Government Institution" Exclusion

GEO's motion for summary judgment based on the detainee exclusion found in RCW § 49.46.010(3)(k) (Dkt. 227) should be denied. GEO argues that the detainees at the NWDC are "residents" of a detention facility and so are excluded under the plain language of the statute. The statute clarifies, though, that it is those who are detained in "a state, county, or municipal . . . facility," of which the NWDC is not. GEO maintains that the statute does not define the work "state" and so its common usage—that of a "political system" is the proper one. Dkt. 227, at 11-12.

GEO surmises that the federal government is a "political system" and so is included in the term "state." *Id.* GEO's assertions fall short. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The word "state" is followed by "county, or municipal" indicating that the word state means Washington State. GEO's motion for summary judgment of dismissal on the grounds that the Plaintiffs' are not employees under the MWA due to their detainee status should be denied.

2. Economic-Dependence Test to Determine Whether Plaintiffs are Employees

Washington uses the "economic-dependence test developed by the federal courts in interpreting the [Fair Labor Standards Act]. The relevant inquiry is whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *Anfinson,* at 871. "[T]he evaluation of whether an employment relationship exist[s] rest[s] upon the circumstances of the whole activity." *Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 708 (2013), *aff'd*, 181 Wn.2d 186 (2014). The "test is flexible and depends on the totality of the circumstances of each case." *Id.* Washington courts consider several factors, including:

(1) "The nature and degree of control of the workers;"

(2) "The degree of supervision, direct or indirect, of the work;"

(3) "The power to determine the pay rates of the methods of payment of the workers;"

(4) "The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers;"

(5) "Preparation of payroll and the payment of wages;"

(6) "Whether the work was a specialty job on the production line;"

(7) "Whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes;"

(8) "Whether the premises and equipment of the employer are used for the work;"

(9) "Whether the employees had a business organization that could or did shift as a unit from one worksite to another;"

(10) "Whether the work was piecework and not work that required initiative, judgment or foresight;"

(11) "Whether the employee had an opportunity for profit or loss depending upon the alleged employee's managerial skill;"

(12) "Whether there was permanence in the working relationship;" and

(13) "Whether the service rendered is an integral part of the alleged employer's business."

Becerra, at 717-718 (*citing Moreau v. Air France*, 356 F.3d 942, 947-48 (9th Cir. 2004)).

There are genuine issues of material fact as to whether GEO and the detainee workers have an employee-employer relationship under the MWA. The Plaintiffs' motion for summary judgment on this issue (Dkt. 221 refiled in redacted form Dkt. 233) should be denied. Likewise, GEO's argument that the Court can decide whether the Plaintiffs can satisfy the economic dependence test as a matter of law (Dkt. 274) should be denied. While there is evidence that GEO sets the work schedule for the detainees, provides the detainees with orientation, training, uniforms, equipment, and supervises and directs them in the detainees in their duties (Dkt. 233-3, at 24-25; Dkt. 223-7, at 6-10, 16-28; Dkt. 223-8, at 6-9; and Dkt. 223-9, at 5-7, and 12-13) there is also evidence that GEO does not choose who participates—detainees have to volunteer. Dkt. 275-9. There are issues regarding whether the work relationship is all that permanent. The detainees are in ICE custody and can be moved at any time. GEO points out that all the detainees' needs are met—lodging, meals, health care, etc. and asserts that the detainees are not "economically-dependent." Moreover, GEO does not have the last word on who is terminated from the program—ICE does. Dkt. 275-9, at 10. There are significant issues of fact as to whether the detainees in the VWP are "employees" under the MWA.

D. GEO's Defense of Intergovernmental Immunity

"The doctrine of intergovernmental immunity is derived from the Supremacy Clause, U.S. Const., art. VI, which mandates that 'the activities of the Federal Government are free from regulation by any state.'"

United States v. California, 921 F.3d 865, 878 (9th Cir 2019) (*quoting Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014)). "State laws are invalid if they regulate the United States directly or discriminate against the Federal Government or those with whom it deals." *Id.* "When the state law is discriminatory, a private entity with which the federal government deals can assert immunity." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014); *See also Davis v. Michigan Dep't. of Treasury,* 489 U.S. 803, 814 (1989) (*holding* that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with the federal government can receive the protection of the intergovernmental immunity doctrine).

1. Whether application of the MWA "regulates the United States directly?"

GEO has failed to show that application of the MWA here "directly interferes with the functions of the federal government." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014). In *Boeing,* the Ninth Circuit found that California was prevented by the doctrine of intergovernmental immunity from imposing more onerous environmental regulations on a federal hazardous waste site that was being cleaned up by a federal contractor (Boeing) than the state applied to state hazardous waste sites. *Id.* The *Boeing* court noted that the California regulations attempted to mandate the way Boeing cleaned up the site and replaced the federal contract's provisions. *Id.* GEO has made no such showing here. Application of the MWA does not mandate the way in which GEO runs the

VWP. It does not replace or add to the contractual requirements the GEO fulfill in running the program. Application of the statue would not regulate the terms of the contract itself. GEO has not demonstrated that the private Plaintiffs' enforcement of the MWA violates the doctrine of intergovernmental immunity because GEO has not shown that it directly interferes with the functions of the federal government.

GEO's assertion that, because it runs a federal immigration detention center it should be "treated the same as the federal government itself for purposes of intergovernmental immunity," is unpersuasive. Dkt. 227, at 17, n.6 (*citing California,* 921 F.3d at 882 n.7). GEO attempts to extend the reach of the doctrine too far. The case that GEO cites for that provision, *California,* did not make such a sweeping ruling. There, the Ninth Circuit found that some of the California laws relating to the immigration facility at issue there did not violate the doctrine. *California,* at 884 (*holding* that only those provisions of the California law that "impose an additional economic burden exclusively on the federal government are invalid under the doctrine of intergovernmental immunity"). Further, GEO's claim would mean that no State or local laws would apply to it, contrary to the provisions in its contract with ICE. There are, at least, material issues of fact on whether GEO should be considered "the federal government itself" for immunity purposes.

2. Whether application of the MWA "discriminates against the Federal government or those with whom it deals" (GEO here)?

"A state or local law discriminates against the federal government if it treats someone else better than it treats the government." *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014). The Ninth Circuit recently noted that:

> The doctrine [of intergovernmental immunity] has been invoked . . . "to prevent a state from imposing more onerous clean-up standards on a federal hazardous waste site than a non-federal project, . . . to preclude cities from banning only the U.S. military and its agents from recruiting minors, . . . and to foreclose a state from taxing the lessees of federal property while exempting from the tax lessees of state property . . . Those cases dealt with laws that directly or indirectly affected the operation of a federal program or contract.

United States v. California, 921 F.3d 865, 880 (9th Cir. 2019) (*citing Boeing,* at 842-43; *United States v. City of Arcata*, 629 F.3d 986, 988, 990-92 (9th Cir. 2010); and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 381-82, 387 (1960)).

GEO has not shown it is entitled to summary judgment based on a violation of the doctrine of intergovernmental immunity premised on discrimination. It has not demonstrated that there are no issues of fact as to whether application of the MWA

here treats State contractors better than it treats the federal government's contractor GEO.

GEO points to the state's work program at the Special Commitment Center for sexually violent predators, Pierce County's work program for inmates and pre-trial detainees, and the State's contract to have GEO house prisoners out-of-state (which was never completed) to demonstrate that the State of Washington treats itself better than it treats the federal government. There are issues of fact as to whether these various programs are sufficiently similar to the VWP to show discrimination. Unlike GEO's NWDC, the Special Commitment Center and the Pierce County facilities are government owned and operated. Contractor involvement, if any, appears, on the record, to be limited. There are sufficient questions as to whether GEO points to a contractor that was sufficiently similar to it in either facility. Moreover, the contract (between GEO and the State of Washington) to which GEO refers was never finalized and related to the provision of services out-of-state. GEO's motion for summary judgment based on the doctrine of intergovernmental immunity should be denied.

E. GEO's Defense of Derivative Sovereign Immunity

"[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016). This immunity is not absolute. *Id*. A contractor is entitled to immunity when it performs work "authorized and

directed by the Government of the United States." *Id*., at 673. "[D]erivative sovereign immunity . . . is limited to cases in which a contractor had no discretion in the design process and completely followed government specifications." *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 732 (9th Cir. 2015).

GEO's motion for summary judgment, based on derivative sovereign immunity (Dkt. 227) should be denied. GEO has not shown that it was directed by the government to pay participants in the VWP only $1 per day. GEO has not shown that it had "no discretion in the design process and completely followed government specifications." *Cabalce*, at 732. The record indicates that GEO has, in the past, paid workers more than a $1 a day and has the ability to, and has requested, changes to the contracts, including modifications to be reimbursed more than was originally agreed upon. GEO's motion to for summary judgment based on derivative sovereign immunity (Dkt. 227) should be denied.

F. Plaintiffs' Motion for Summary Judgment to Dismiss GEO's Counterclaim/Defense for Offset/Unjust Enrichment

GEO must make a showing on three elements to make a counterclaim or affirmative defense based on offset/unjust enrichment. *Young v. Young*, 164 Wn.2d 477, 484 (2008) (*internal citation omitted*). It must show (1) "a benefit conferred" on the detainees by GEO; (2) "an appreciation or knowledge by the [detainees] of the benefit;" and (3) "the acceptance or retention by the [detainees] of the benefit under such

circumstances as to make it inequitable for the [detainees] to retain the benefit without the payment of its value." *Id.*

The Plaintiffs move to dismiss GEO's counterclaim or affirmative defense based offset/unjust enrichment. It is undisputed that GEO has provided the detainees with benefits - lodging, meals, health care, etc. There is no evidence that the detainees are not aware of the benefits conferred. Moreover, the Court has already ruled in the February 28, 2018 Order on Plaintiff's Motion to Dismiss or Strike Defendant's Counterclaims and Affirmative Defenses:

> The second element [of the unjust enrichment test] is satisfied under the theory that if Plaintiff receives an award for lost wages from Defendant, Plaintiff has received both the benefit conferred and the award for lost wages, both at Defendant's expense. The third element is satisfied under the theory that such compensation would unfairly increase Defendant's burden to comply with ICE contract obligations.

Dkt. 40, at 5. Even though this is a motion for summary judgment, the result is the same—there are facts at issue precluding summary judgment. GEO points out that if it has to pay detainees more than the amount allotted under the ICE contract for the VWP, it may well have to bear that cost. Dkt. 228, at 2. Whether that would be "inequitable" is an issue of fact for the jury.

Moreover, as they did in the motion to dismiss, Plaintiffs again advance the argument, that GEO

cannot recover restitution from Plaintiff because it has already been fully paid by ICE. As was the case in the motion to dismiss, is still valid—that argument is relevant to the second and third elements and "is an equitable argument better reached at trial." Dkt. 40, at 5. The Plaintiff's motion for summary judgment on the GEO's counterclaim/affirmative defense of unjust enrichment/offset should be denied.

This issue appears to be triable only if Plaintiffs prevail on their MWA claims.

G. Conclusion

The parties' cross motions for summary judgment should be denied.

III. Order

It is **ORDERED** that:

- The Plaintiffs' Motion for Summary Judgment (Dkt. 221 refiled in redacted form Dkt. 233) **IS DENIED;** and
- The GEO Group, Inc.'s Motion for Summary Judgment (Dkt. 227) **IS DENIED**.

The Clerk is directed to send copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 7th day of April, 2020.

[handwritten: signature]
ROBERT J. BRYAN
United States District Judge

Appendix I

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

No. C17-5769

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

Filed: Nov. 2, 2021

CIVIL JUDGMENT

X **Jury Verdict.** This action came to consideration before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Judgment is entered in favor of PLAINTIFFS UGOCHUKWU GOODLUCK NWAUZOR, individually and on behalf of all those similarly

situated, and FERNANDO AGUIRRE-URBINA, individually, against DEFENDANT THE GEO GROUP, INC., in the amount of $17,287,063.05.

Dated this 2nd day of November, 2021.

Ravi Subramanian
Clerk of Court

s/Tyler Campbell
Tyler Campbell, Deputy Clerk

Appendix J

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

8 U.S.C. §1555. Immigration Service expenses

Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for payment of (a) hire of privately owned horses for use on official business, under contract with officers or employees of the Service; (b) pay of interpreters and translators who are not citizens of the United States; (c) distribution of citizenship textbooks to aliens without cost to such aliens; (d) payment of allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed; and (e) when so specified in the appropriation concerned, expenses of unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General, who shall make a certificate of the amount of any such expenditure as he may think it advisable not to specify, and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.