No. 19-2207

In the

United States Court of Appeals

For the Fourth Circuit

DESMOND NDAMBI, MBAH EMMANUEL ABI, NKEMTOH MOSES AWOMBANG,
Plaintiffs-Appellants,

v.

CORECIVIC, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Maryland
(Richard D. Bennett, District Judge)

BRIEF OF APPELLANTS

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I. CORPORATE DISCLOSURE STATEMENT

Appellants Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang provide this disclosure under Federal Rule of Civil Procedure 26.1 and Local Rule 26.1 of the Fourth Circuit Court of Appeals. Appellants are real persons and not publicly held corporations or other publicly held entities. Appellants are not affiliated with a publicly held corporation or entity with an interest in the outcome of this litigation.

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III. INTRODUCTION

Appellants Desmond Ndambi, Mbah Emmanuel Abi, and Nkemtoh Moses Awombang ("Appellants") challenge practices that contravene the Fair Labor Standards Act ("FLSA") and the New Mexico Minimum Wage Act ("NMMWA"). Appellee CoreCivic, Inc. ("CoreCivic") is a multibillion-dollar private for-profit company that operates the Cibola County Correctional Center ("Cibola") in New Mexico which houses civilly detained immigrants while they await a resolution of administrative proceedings that adjudicate their immigration status. Appellants and others similarly situated perform work necessary for CoreCivic to generate a profit, but CoreCivic pays them less than the legally required minimum wage and sometimes as little as one dollar per day.

The District Court dismissed Appellants' claims in response to a 12(b)(6) motion, holding that Appellants were not employees under either the FLSA or NMMWA, but without applying the correct legal standard mandated under each law, and ignoring the well-pleaded facts in Appellants' Complaint establishing an employment relationship with CoreCivic. In its motion, CoreCivic argued that because Appellants are immigrants who were civilly detained for administrative purposes, the FLSA and the NMMWA do not protect them. This argument should have been rejected because, as demonstrated below, Appellants met the definition

of employees contained in the FLSA and NMMWA. Moreover, the economic reality of their work was materially different from that of both criminally convicted prisoners and civilly detained immigrants who did not work for a private for-profit company, and who were isolated from commercial markets. In contrast, Appellants worked directly within American industry, side-by-side with non-detained workers from the local community who performed identical work, in a bargained-for exchange of labor for economic gain. Proper application of the FLSA and the NMMWA requires a finding that Appellants properly pled they were employees of CoreCivic and reversal of the District Court's order.

IV. JURISDICTIONAL STATEMENT

The District Court had federal question jurisdiction under 28 U.S.C. § 1331 because this action arises under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201, et seq. It also had original jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d) ("CAFA"), and supplemental jurisdiction over Appellants' pendent state law claims under 28 U.S.C. § 1367. The District Court's September 27, 2019 Order dismissing all of Appellants' claims with prejudice was a final order. Appellants timely noticed their appeal on October 25, 2019. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

V. ISSUE PRESENTED FOR REVIEW

May a private for-profit company pay civilly detained immigrants less than the minimum wages required under the Fair Labor Standards Act and the New Mexico Minimum Wage Act where the work performed is necessary to operate the company's business?

VI. STATEMENT OF THE CASE

Appellee CoreCivic is a multibillion-dollar for-profit private corporation that operates immigration detention centers, prisons, and jails, including the Cibola County Correctional Center in New Mexico. J.A. 6, 9 (Dkt. 1-6 (Complaint) at ¶¶ 2, 18–19). CoreCivic uses the labor of civilly detained immigrants to perform work essential to the operation of Cibola. J.A. 6, 9 (*id.* at ¶¶ 2, 19). Instead of paying legally mandated federal and state minimum wages, CoreCivic paid civilly detained immigrants, including Appellants, as little as one dollar per day for this critical labor. J.A. 6, 11-12 at (*id.* at ¶¶ 3, 24, 28). Appellants used these wages to purchase basic necessities that CoreCivic fails to provide. J.A. 11–12, 14–15, 17 (*id.* at ¶¶ 24, 30, 40, 48, 54). In fact, a January 2018 inspection by ICE's Office of Detention Oversight found the facility to be deficient in no fewer than 31 contractually imposed standards. J.A. 12 (*id.* at ¶ 32). Appellants, who worked for CoreCivic while detained at Cibola for non-criminal, administrative purposes, filed suit on November 14, 2018, on behalf of themselves and others similarly situated,

alleging that CoreCivic violated the FLSA, the NMMWA, and the common law doctrine of unjust enrichment when it paid them less than the legally required wage for their work. J.A. 9–10 (*id.* at ¶¶ 19–21). On January 11, 2019, CoreCivic filed a motion to dismiss for failure to state a claim arguing that it is not covered by the FLSA and the NMMWA. J.A. 39 (Dkt. 36-1 at 1).

In response to CoreCivic's motion, Appellants argued that the FLSA and the NMMWA require CoreCivic to pay Appellants the minimum wage because Appellants are employees regardless of their status as civil immigration detainees. J.A. 69–72 (Dkt. 39-1 at 11–14). Principal canons of statutory construction require this interpretation because the FLSA and the NMMWA (which courts interpret consistently with the FLSA), contain the "broadest definition," *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (4th Cir. 2017), of the employment relationship and neither immigration nor detention status is among the specific exemptions enumerated by the FLSA. 29 U.S.C. §§ 203(d), (e)(1), (e)(3), (e)(4), (g). To determine whether an employment relationship exists, courts must examine the economic realities of the work, and Appellants more than sufficiently pled that they are employees under that standard. J.A. 72–74 (Dkt. 39-1 at 14–16) (citing *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 83 (4th Cir. 2016) and J.A. 11, 13–16 (Dkt. 1-6 at ¶¶ 27, 34, 37, 42, 45, 50, 52)). Fourth Circuit

decisions interpreting the FLSA compel its application to civilly detained immigrant workers such as Appellants, who pled that their work enables CoreCivic to operate the detention facility and generate a profit, and that Appellants used their meager wages to provide for basic necessities that CoreCivic failed to provide. Moreover, minimum wage protections serve the FLSA's purposes of protecting workers in American industry and preventing unfair competition among businesses through substandard wages. J.A. 77–78 (Dkt. 39-1 at 19–20) (applying *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993)). Appellants allege a different economic reality than that of criminally convicted prisoners who are required to work for punitive and rehabilitative purposes, J.A. 74-81 (Dkt. 39-1 at 16–23), and that of immigrants civilly detained by the now-defunct Immigration and Naturalization Service, which did not generate profits from detained immigrant labor, J.A. 81–84 (*id.* at 23–26). Appellants' challenge is novel in that it arises in the modern system of private for-profit civil immigration detention. *Id.*

On September 27, 2019, in a five-page order, the District Court granted CoreCivic's motion to dismiss, holding that Appellants were not covered by the FLSA and the NMMWA. J.A. 176 (Dkt. 49) ("Order"). The District Court described the economic realities test in a single sentence, but then failed to apply it properly; the Court also failed to address any of the arguments or analysis

Appellants provided in their opposition brief. J.A. 178–79 (*id.* at 3–4). These failures resulted in an erroneous application of the FLSA and the NMMWA that does not comport with Fourth Circuit precedent. The District Court also dismissed Appellants' unjust enrichment claim because it was contingent on the unlawfulness of CoreCivic's payment of substandard wages. J.A. 179–180 (*id.* at 4–5). Because the District Court erred in dismissing Appellants' FLSA and NMMWA claims, its unjust enrichment holding is also erroneous.

VII. SUMMARY OF ARGUMENT

Appellants are employees of CoreCivic under the FLSA and the NMMWA because they have pled facts more than sufficient to establish that they meet the statutory definition of employee under the applicable legal standard, which examines the economic reality of their relationship with their employer, CoreCivic. CoreCivic is a private for-profit corporation that employs Appellants and others similarly situated to perform work necessary to operate Cibola and generate a profit. Appellants have alleged facts sufficient to show their economic dependence on CoreCivic under the Fourth Circuit's economic reality test. While some non-binding jurisprudence exempts criminally convicted prisoners from the FLSA due to their punitive and rehabilitative custody, this jurisprudence is inapplicable because Appellants were civilly detained for administrative, not punitive or

rehabilitative, purposes, and CoreCivic operates Cibola for a profit. The FLSA mandates coverage here where it protects the standard of living of workers in American industry—both that of civilly detained immigrants who use their wages to purchase basic necessities, and workers in the community who CoreCivic hires to perform the same work as the civilly detained immigrants. The FLSA further mandates coverage here to prevent the unfair competition that results from CoreCivic's ability to generate a profit while paying workers substandard wages.

VIII. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews the grant of a motion to dismiss de novo. *Harbourt v. PPE Casino Resorts Md., LLC*, 820 F.3d 655, 658 (4th Cir. 2016); *Weidman v. Exxon Mobil Corp.*, 776 F.3d 214, 219 (4th Cir. 2015). To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court must construe the allegations and facts in the complaint in the light most favorable to the plaintiff and must grant

the plaintiff the benefit of all inferences that can be derived from the facts alleged. *Harbourt*, 820 F.3d at 658; *Weidman*, 776 F.3d at 219. A plaintiff raises plausible claims when she describes facts beyond a speculative level and "need not forecast evidence sufficient to prove a claim." *Harbourt*, 820 F.3d at 658 (internal quotation marks omitted).

B. THE FLSA AND THE NMMWA APPLY TO CORECIVIC'S EMPLOYMENT OF CIVILLY DETAINED IMMIGRANT WORKERS

1. Well-Established Principles of Statutory Construction Require a Finding That the FLSA and NMMWA Protect Appellants

A cardinal canon of statutory construction provides that courts should turn first to the plain meaning of a statute. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Ayes v. U.S. Dep't of Veterans Affairs*, 473 F.3d 104, 108 (4th Cir. 2006). Here, the plain language of the FLSA and NMMWA require coverage of civilly detained immigrant workers like Appellants and others similarly situated in the private for-profit facility operated by CoreCivic. The FLSA defines an "employee" as "any individual employed by an employer," 29 U.S.C. § 203(e)(1), an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," § 203(d), and "to employ" as "to suffer or permit to work," § 203(g). The NMMWA largely follows the definition of the

employment relationship from the FLSA and should be interpreted in accordance with the FLSA. *See* N.M. Stat. Ann. § 50-4-21 (West 1978) (defining "employee" to be "an individual employed by an employer [with exclusions not relevant here], and to "employ" to include "suffer or permit to work"). As this Court has explained, the definition of the employment relationship under the FLSA is "the broadest definition that has ever been included in any one act." *Salinas*, 848 F.3d at 133 (quoting *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945)). Courts, therefore, interpret FLSA coverage expansively. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985); *Nationwide Mut. Ins. Co. v Darden*, 503 U.S. 318, 326 (1992).

Another principle of statutory construction requires a finding that the FLSA applies here. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)); *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015) (same). The FLSA enumerates specific, limited exemptions to the broad definition of "employee," none of which relates to immigration or detention status. 29 U.S.C. §§ 203(e)(3), (e)(4). Courts have long held that categories of workers not on the list of specific

exemptions are covered so long as the worker otherwise meets the definition of employee. *See Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1990) ("[S]pecificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act."); *Amaya v. Power Design, Inc.*, 833 F.3d 440, 445 (4th Cir. 2016) (holding that electrical workers employed by private contractors to the defendant were employees of the defendant where the FLSA listed exemptions and none applied to the workers); *Patel v. Quality Inn S.*, 846 F.2d 700, 702 (11th Cir. 1988) ("This definitional framework – a broad general definition followed by several specific exceptions – strongly suggests that Congress intended an all encompassing definition of the term 'employee' that would include all workers not specifically excepted."); *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 934 (8th Cir. 2013) (Congress showed it "knows how to limit this broad definition [of employee] when it means to, and did not do so with respect to unauthorized aliens." (internal citation and quotation marks omitted)). Inconsistent with this framework, the District Court's ruling creates an exemption for civilly detained immigrants where none exists in the FLSA. *See* J.A. 70–71 (Dkt. 39-1 at 12–13) (describing an analogous situation where other circuits declined to carve out an exemption for undocumented workers that was not enumerated in the FLSA) (citing *Patel*, 846 F.2d at 705; *Lucas*, 721 F.3d at 933–

37; *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987); *Montoya v. S.C.C.P. Painting Contractors, Inc.*, 589 F. Supp. 2d 569, 577 (D. Md. 2008)).

2. The Purposes of the FLSA and NMMWA Also Require a Finding That They Apply to CoreCivic's Employment of Appellants

The protective purposes of the FLSA and NMMWA further compel the conclusion that they apply to CoreCivic's employment of civilly detained immigrants at its for-profit Cibola facility. The FLSA explicitly aims to eliminate "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" including the detrimental effects of substandard wages on labor markets, and the unfair competition that results. 29 U.S.C. § 202; *see also Steelman v. Hirsch*, 473 F.3d 124, 132 (4th Cir. 2007) (describing the unfair competition that results "when businesses cut their costs by paying exploitatively low wages"). The FLSA serves this purpose when applied to Appellants because their employment is necessary to maintain their own living standards even while detained. Appellants pled that CoreCivic failed to provide them and others similarly situated with adequate facilities and basic necessities, that CoreCivic operated Cibola in a seriously deficient manner as evidenced by a government inspection and report, and that Appellants used their wages to purchase basic necessities that CoreCivic did not

provide to them. J.A. 12 (Dkt. 1-6 at ¶¶ 30–32).

Coverage here also serves the FLSA's purpose of curbing the detrimental effects on labor markets more broadly. Appellants pled that their employment displaces non-detained workers from the local community who CoreCivic would have hired in the absence of Appellants' work, and who would be entitled to be paid the prevailing wage, which is significantly higher than the wage paid to Appellants. J.A. 6, 13, 15–16 (Dkt. 1-6 at ¶¶ 2, 37, 46, 51, 52). Thus, applying the FLSA's minimum wage protections to Appellants protects the standard of living of other workers in the local community. It further protects against unfair competition. Appellants pled that their work is a critical component of the operation of CoreCivic's for-profit business. J.A. 6, 11–12, 25 (Dkt. 1-6 at ¶¶ 2, 24, 30, 107). The requirement that CoreCivic pay Appellants at least the minimum wage ensures that CoreCivic does not receive a competitive advantage from exploiting detained immigrants' work. *See Steelman*, 473 F.3d at 132 (recognizing that the FLSA sought to prevent exploitatively low wages that result in unfair business competition); *Harker*, 990 F.2d at 134 (recognizing that an additional

purpose of the FLSA is to prevent unfair competition in commerce).[1]

C. APPELLANTS SUFFICIENTLY PLED THAT THEY WERE EMPLOYED BY CORECIVIC UNDER THE ECONOMIC REALITY TEST

To determine whether Appellants were employed by CoreCivic within the meaning of the FLSA and the NMMWA, the Court must apply the "economic reality test," which asks whether the worker is economically dependent on the business to which she is providing labor. *Kerr*, 824 F.3d at 83. While no single factor is dispositive, "[r]elevant factors include whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* (internal citation and quotation marks omitted).

The District Court failed to apply this test properly to Appellants, who pled more than sufficient facts to support an inference that an employment relationship existed between Appellants and CoreCivic as required by *Iqbal*. Appellants pled

[1] In *Harker*, this Court held that the purpose of preventing unfair competition was not served by applying the FLSA to the plaintiff who made goods while imprisoned on a criminal conviction because another statute specific to prison-made goods regulated the commercial transportation of such goods in a manner that prevented unfair competition. *Harker*, 990 F.2d at 134. Additional analysis in *Harker* is discussed *infra* section VIII. C.1.

that CoreCivic created, continuously revised, and implemented a facility staffing plan that accounted for the positions, hours, and pay of all detained immigrants who participated in the work program. J.A. 11 (Dkt. 1-6 at ¶ 27). Through this plan, CoreCivic had the ability to hire and fire workers, control their schedules, and determine their rate and method of payment. In addition, CoreCivic provided daily supervision over the detained immigrants' work. *Id*. at ¶ 27. CoreCivic employees supervised Appellants' janitorial, kitchen, and library work. J.A. 13–17 (*id.* at ¶¶ 34, 37, 42, 45, 50, 52). CoreCivic also provided the tools and materials—such as cleaning supplies—necessary for Appellants to perform their work. *Id*. Taken together, these allegations more than satisfy the threshold for plausibly pleading an employment relationship under the FLSA.

1. Appellants' Civil Immigration Detention Status Creates a Different Economic Reality than that of Criminally Convicted Prisoners

The District Court relied heavily on a single case finding criminally convicted prisoners exempt from FLSA coverage. J.A. 179 (Dkt. 49 at 4) (citing *Harker*, 990 F.2d at 133). This reliance was misplaced. In its Motion, CoreCivic did not dispute that the economic realities test applied, J.A. 42, 51 (Dkt. 36-1 at 4, 13), but argued that the four factors outlined in *Kerr* did not apply to prisoners in a custodial setting. J.A. 96 (Dkt. 45 at 7). Yet, Appellants plausibly pled facts

showing the difference between the circumstances of their work and that of criminally convicted prisoners.

Harker and cases involving criminally convicted prisoners rest on a premise, wholly inapplicable to the present case, that the U.S. Constitution sanctions unpaid prison work and serves both punitive and rehabilitative purposes. U.S. Const. amend. XIII, § 1. Here, however, Appellants have been detained civilly rather than pursuant to a criminal conviction. J.A. 10 (Dkt. 1-6 at ¶ 21). The corrective and punitive purpose of incarceration after criminal conviction (with its Constitutionally-protected "involuntary servitude") has no applicability to the civil detention of immigrants. The District Court failed to address this distinction.

In *Harker*, this Court reasoned that the custodial nature of a criminally convicted prisoner's incarceration removes him from the economy and the protective scope of the FLSA. 990 F.2d at 133. The Court held that the plaintiff prisoner was not covered by the FLSA when he made goods through a rehabilitation program that prepared prisoners for private employment after their release. In reaching this conclusion, the Court relied on three factors: (1) the plaintiff did not work to generate a profit for the prison but rather for rehabilitative purposes, (2) there was no bargained-for exchange of labor, and (3) the purpose of the FLSA to maintain a standard of living for workers was not served because the

Department of Corrections provided for the plaintiff's basic needs. *Id.* Applied to the facts of the present case, *i.e.*, Appellants' civil detention in a private, for-profit facility, these factors warrant the opposite result from *Harker*.

The first two factors are intertwined with the worker's prisoner status. First, because incarceration serves a rehabilitative purpose, the prison in *Harker* could require performance of work for that purpose. *Id.* at 133. Here, by contrast, Appellants were detained purely for administrative reasons. J.A. 10 (Dkt. 1-6 at ¶ 21). Their detention did not serve a punitive, corrective, or rehabilitative purpose, as Appellants have not been convicted of, or even charged with, an offense warranting punishment or rehabilitation. *Id*. Further, unlike the plaintiff in *Harker*, Appellants worked at Cibola to earn a wage. And, unlike the rehabilitative purpose of the work in *Harker,* Appellants' work furthered the profitable operation of CoreCivic's business. J.A. 6, 11 (*id.* at ¶¶ 2, 26).

Second, because the plaintiff in *Harker* was a criminally convicted prisoner, he could not participate in the type of "'bargained-for exchange of labor' for mutual economic gain that occurs in a true employer-employee relationship." *Harker*, 990 F. 2d at 133 (citing *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992)). Rather, the Department of Corrections had the authority to compel him to work. *Id.* Here, in contrast, CoreCivic did not have the authority to compel

Appellants to work. Appellants' participation in the work program involved mutual economic gain, enabling them to purchase basic necessities, and therefore more closely resembling a traditional bargained-for exchange of labor. *See* J.A. 12 (Dkt. 1-6 at ¶ 31). Paradoxically, in finding that the Appellants were similar to prisoners, the District Court stated that they worked "on an entirely voluntary basis." J.A. 179 (Dkt. 49 at 4). Such a finding supports, rather than undermines, FLSA application here. Furthermore, that Appellants did not plead that they were compelled to work depicts a relationship consistent with the bargained-for exchange that occurs in non-detained settings.

The third factor—that the inmate's basic needs were met in *Harker* and, therefore, the FLSA was unnecessary to ensure a minimum standard of living for workers—is at odds with the facts alleged in the Complaint. Appellants specifically alleged that CoreCivic failed to provide them with all their basic necessities, often serving insufficient amounts of food, at unsafe temperatures, and/or without hygienic food-handling safeguards, and failing to provide adequate access to telephones and legal materials. J.A. 12 (Dkt. 1-6 at ¶ 30); J.A. 166, 172 (Dkt. 45-3 at 7, 13). In fact, a January 2018 inspection by ICE's Office of Detention Oversight found the facility to be deficient in 31 contractually imposed standards. J.A. 12 (Dkt. 1-6 at ¶ 32); J.A. 164 (Dkt. 45-3 at 5). Because of these

deficiencies, Appellants used their wages to purchase items, such as food, toiletries, and phone calls that met their basic needs. J.A. 12 (Dkt. 1-6 at ¶¶ 30–32).

a. Harker does not hold that a worker is not an employee if she is provided food, shelter, and clothing

CoreCivic has argued that, under *Harker*, food, shelter, and clothing are the only items essential to maintain a basic living standard, and that because CoreCivic provides these items, Appellants are like criminally convicted prisoners. J.A. 102–103 (Dkt. 45 at 13–14) (citing *Harker*, 900 F.2d at 133). This argument is at odds with both the facts alleged in the Complaint and the law. Appellants pled that CoreCivic served insufficient amounts of food, at unsafe temperatures, and in unhygienic manners. J.A. 12 (Dkt. 1-6 at ¶ 30). As a result, Appellants used their wages to purchase food without these deficiencies. J.A. 12, 14–15, 17 (*id.* at ¶¶ 31, 40, 48, 54).

CoreCivic's reading of *Harker* as removing a worker from FLSA coverage where her food, shelter, and clothing are provided contravenes established Supreme Court precedent distinguishing employees from trainees and volunteers. In *Alamo Foundation*, 471 U.S. at 301, the Supreme Court held that a non-profit religious foundation engaged in various for-profit enterprises was required to pay

FLSA wages to allegedly-volunteer "associates" who staffed these enterprises, even though the foundation provided for the associates' food, shelter, and clothing. A key factor[2] requiring FLSA coverage was the foundation's engagement in commercial enterprise. *Id.* at 299.[3] Further, it is inconceivable that Congress intended the FLSA only to protect the standard of living of workers in American industry on the margins where workers were unable to afford food, clothing, or shelter, as numerous other factors are indicators of workers' standard of living. For example, the 1974 amendments to the FLSA increased the minimum wage through, "gradual and belated increases, approximately equivalent to productivity and cost-of-living increases in recent years." H.R. Rep. No. 93-913 (1974),

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[2] Another key factor leading to the conclusion that the associates were employees was that they expected in-kind benefits in exchange for their work. *Id.* at 301. Similarly, here, Appellants pled that they received pay (though in a legally insufficient amount) in exchange for their work. J.A. 12 (Dkt. 1-6 at ¶ 28, 31).

[3] In addition, the FLSA contains a provision to offset the cost of food, lodging, and other facilities provided to workers under circumstances that do not apply here. 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.30–531.32 (providing that for the § 203(m) offsets to apply, the board, lodging, and other facilities must be, among other requirements, (1) customarily furnished to employees, (2) voluntarily accepted by employees, and (3) primarily for the employees' benefit). Notably, this provision does not exempt the workers from FLSA coverage altogether, but merely offsets the cost of such services.

reprinted in 1974 U.S.C.C.A.N. 2811, 2812. The Department of Labor's Consumer Price Index, which is used to calculate cost of living increases, measures "the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services." *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Consumer Price Index*, https://www.bls.gov/cpi/.[4] Goods and services such as toiletries, telephone calls, and legal services, to name a few, should be taken into account when considering the standard of living under the FLSA. J.A. 12, 14–15, 17 (Dkt. 1-6 at ¶¶ 31, 40, 48, 54) (describing items that Appellants purchased with their wages); *see also* J.A. 12 (*id.* at ¶ 32) (describing a 2018 ICE inspection); J.A. 168 (Dkt. 45-3 at 9) (requiring access to personal funds to pay for legal services).

Moreover, the FLSA's legislative history shows that Congress was concerned greatly by the anti-competitive effects of paying subminimum wages and that without a wage floor, a race to the bottom would ensure a never-ending cycle of subminimum wages among workers who had little if any bargaining

[4] The Court's consideration of these sources is proper, as "this court and numerous others routinely take judicial notice of information contained on state and federal government websites." *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

power in the labor market. *See Hearings to Provide for the Establishment of Fair Labor Standards in Employments in and Affecting Interstate Commerce and for Other Purposes Before the J. Comm. on Educ. and Labor*, 75th Cong. 309-10 (1937) (statement of Isador Lubin, Comm'r of Labor Statistics) (describing the competition among businesses that, in the absence of government intervention, required them to exploit labor); President Franklin D. Roosevelt, Annual Message to Congress (Jan. 3, 1938) (stating that he sought "legislation to end starvation wages and intolerable hours"); *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669–70 (1946) ("Th[e] [Act's] purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate . . . the competitive advantage accruing from savings in cost based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not."); *Barrentine v. Ark. Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (describing the purpose of the act to ensure "[a] fair day's pay for a fair day's work," according to the President's Message to Congress on May 24, 1934, and to protect workers "from the evil of 'overwork' as well as 'underpay'"). This history makes clear that Congress intended to combat multiple facets of exploitation of workers, including its detrimental effects on broader markets. As a result, it is illogical for the FLSA's coverage to cease wherever the worker's food,

shelter, and clothing are provided. In such situations, the employer would gain a competitive advantage in not having to pay the legally required minimum wage for all time worked.

b. Following New Mexico Supreme Court precedent, Appellants are employees under the NMMWA

The above analysis demonstrates that cases regarding criminally convicted prisoners are inapplicable to Appellants and do not bar their claims. That conclusion is further compelled by the New Mexico Supreme Court's holding in *Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214–15 (1996), that prisoners who worked for a private company outside the prison could be employees for the purposes of workers compensation. The Court emphasized that the plaintiff worked alongside non-prisoners and noted that under New Mexico law, the State did not have the authority to compel the plaintiff to work. *Id.* at 214. Applying the economic reality test, the Court held that the lower court erred in concluding as a matter of law that plaintiff was not an employee. *Id.* at 215.

Here, Appellants alleged that they worked alongside non-detained workers and that CoreCivic had no authority to compel their labor. J.A. 76 (Dkt. 39-1 at 18). To the extent a New Mexico court would consider other factors from prisoner cases in other jurisdictions, Appellants have shown that they are employees

because their work generates a profit for CoreCivic (a private company), displaces other non-detained workers, and suppresses wages in the labor market. J.A. 6, 11, 13, 15–16 (Dkt. 1-6 at ¶¶ 2, 26, 34, 37, 46, 51, 52). Further, Appellants used their wages to provide for their basic necessities. J.A. 12 (*id.* at ¶ 31). For the above reasons, Appellants' civil immigration detention status creates a different economic reality than that of criminally convicted prisoners, which renders them employees within the meaning of the FLSA and the NMMWA.

2. CoreCivic's For-Profit Operation of Cibola in the Modern Detention Context Creates a Different Economic Reality than that of the Now-Defunct Immigration and Naturalization Service

In concluding that Appellants are not employees under the FLSA and NMMWA, the District Court relied on a non-binding, wrongly decided, and in any event factually distinguishable, case involving the now-defunct Immigration and Naturalization Service, *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 395 (5th Cir. 1990) (per curiam). In *Alvarado Guevara*, a per curiam opinion with little analysis,[5] the Fifth Circuit held that the FLSA did not apply to civilly detained immigrants, but failed to examine how the custodial setting of detained immigrants differs from that of criminally convicted prisoners. Three federal courts have

[5] The Fifth Circuit stated only that it upheld the District Court's opinion and attached an excerpt thereof. *Alvarado Guevara*, 902 F.2d at 395.

rejected *Alvarado Guevara* in the context of modern for-profit immigration detention. *See Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *25 (S.D. Cal. May 14, 2018) ("*Alvarado Guevara*'s reasoning presupposes that the immigration detention facility exerts nearly the same level of control over a detainee as a prison does over a prisoner. . . . Here, it is not clear that [d]efendant [a private immigration detention facility] exerts the same level of control over [p]laintiffs as a prison does over a prisoner."); *see also Chao Chen v. Geo Grp., Inc.*, 287 F. Supp. 3d 1158, 1168 (W.D. Wash. 2017) (declining to apply *Alvarado* to a state minimum wage statute); *Washington v. Geo Grp., Inc.*, 283 F. Supp. 3d 967, 982 (W.D. Wash. 2017) (same). The court in *Alvarado Guevara* also misconstrued or misapplied the FLSA's stated purposes, reasoning that the FLSA was enacted "to protect the 'standard of living'. . . of the worker in American industry" and that the plaintiffs were not covered because they were removed from American industry, 902 F.2d at 396, but ignoring the FLSA's goals of preventing unfair competition and protecting labor markets that the Supreme Court emphasized in *Alamo Foundation*, 471 U.S. at 299.

In any event, even if *Alvarado Guevara* were correctly decided, which it was not, it does not apply here. Appellants worked under a different economic reality than the plaintiffs in *Alvarado Guevara* because their work arose in the modern

system of private for-profit immigration detention. In contrast, the detained immigrants in *Alvarado Guevara* worked for the Immigration and Naturalization Service ("INS"), which was not generating profits from their labor or competing with private business. *Alvarado Guevara,* 902 F. 2d at 394; *see also Guevara v. I.N.S.*, No. 90-1476, 1992 WL 1029, at *1 (Fed. Cir. Jan. 6, 1992) (per curiam) (holding that immigrants detained by INS were not covered by the FLSA because they were removed from American industry).[6] For the reasons explained *supra*, Appellants were not removed from American industry. Indeed, CoreCivic injected them directly into American industry by relying on their labor to operate Cibola at a profit. In the nearly three decades since *Alvarado Guevara* was decided, the immigrant detention system has changed drastically. CoreCivic (then Corrections Corporation of America) opened the first private immigration detention facility in 1984, just 6 years before *Alvarado Guevara* was decided. *See* Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 Case W. Res. L. Rev. 1287, 1301 (2017). By 2014, 62%

[6] In *Guevara*, the Court further found that the plaintiffs could not be employees because they did not undergo the appointment process required to become a federal employee. *Id.* at *2. This analysis is plainly inapplicable to employees of a private corporation.

of immigrants detained by ICE were held in private facilities. *Id*. Private immigrant detention centers generate large profits using the labor of detained immigrants, who are held for administrative purposes, not because they are criminally charged. In 2017, CoreCivic reported $1.84 billion in revenue, with 48% from contracts with federal government agencies. J.A. 6 (Dkt. 1-6 at ¶ 2). CoreCivic profits from its operation of Cibola by relying heavily on a captive workforce of civilly detained immigrants, including Appellants, to perform labor necessary to keep Cibola operational and provide the services it is obligated to provide under the terms of its contract with Cibola County. *Id.* The modern private for-profit detention scheme exploits the immigrants, while suppressing the value of the labor required to operate the facilities and displacing workers who could otherwise be hired at the prevailing wage. This new context is plainly distinguishable from that of *Alvarado Guevara* and requires reversal of the District Court's order of dismissal.

3. Cibola County's Contract with Immigration and Customs Enforcement ("ICE") Does Not Change the Economic Reality of Appellants' Employment with CoreCivic

The District Court relied on the Intergovernmental Service Agreement ("IGSA") between Cibola County, New Mexico and ICE to find that CoreCivic was required to offer a voluntary work program for detained immigrants at Cibola.

J.A. 179 (Dkt. 49 at 4). However, while the IGSA requires its participants to meet various standards when operating Cibola, *see* J.A. 9, 10, 12 (Dkt. 1-6 at ¶¶ 19, 23, 32), it does not change the economic reality of CoreCivic's relationship with Appellants.

This Court is asked to consider whether Appellants were employees of CoreCivic. Whether any of CoreCivic's actions stem from requirements imposed by ICE on Cibola County are irrelevant to that question. As explained above, the economic reality test examines the extent to which Appellants are economically dependent on CoreCivic, *Kerr*, 824 F.3d at 83, an analysis unaffected by the terms of Cibola County's relationship with ICE and whether the IGSA requires it to follow the Performance Based National Detention Standards ("PBNDS").[7] *See Hardgers-Powell v. Angels in Your Home LLC*, 330 F.R.D. 89, 110–11 (W.D.N.Y. 2019) (holding that a regulatory regime that required the state to hire a fiscal intermediary to implement portions of its home health care services program did

[7] At the evidentiary stage of this case, the PBNDS may be evidence of CoreCivic's practices but at the pleading stage, the argument that these practices were required by ICE is irrelevant to whether Appellants were employees for purposes of FLSA and NMMWA coverage.

not insulate that fiscal intermediary from the employer/employee relationship under the FLSA).[8] The IGSA and the PBNDS do not affect, much less prohibit, the conclusion that Appellants are employees under the factors described in *Kerr*, 824 F.3d at 83. Further, the ISGA and the PBNDS neither affect nor prohibit the conclusion that Appellants are employees under the factors identified in *Harker*, since: (1) their work generated a profit for the prison rather than being performed for rehabilitative or punitive purposes, (2) there was a bargained-for exchange of labor, and (3) FLSA coverage would serve the FLSA's purpose of protecting workers in American industry. *Harker*, 990 F.2d at 133. Even if the IGSA or the PBNDS required a voluntary work program, that does not answer the question of whether the FLSA and NMMWA compel CoreCivic to pay participants the

[8] While several laws augment employers' responsibilities beyond the FLSA, it is an unusual argument that an agency's guidelines could diminish an employer's duties under the FLSA. The Fourth Circuit recently rejected an employer's argument that two statutes on federal government contractors, Davis-Bacon Act and Contract Work Hours and Safety Standards Act (CWHSSA) applied to the exclusion of the FLSA. *Amaya v. Power Design, Inc.*, 833 F.3d 440, 445 (4th Cir. 2016) (holding that the FLSA applied because Congress intended it to have broad reach and "the employers failed to show any 'instance[ ] ... where compliance with one Act makes it impossible to comply with the other'") (quoting *Powell*, 339 U.S. at 519)); *see also Garcia v. Skanska USA Bldg., Inc.*, 324 F. Supp. 3d 76, 80 (D.D.C. 2018) (following *Amaya* and reaching the same conclusion). Notably, here, the IGSA and PBNDS are not federal statutes, but like the statutes in *Amaya*, they cannot apply to the exclusion of the FLSA.

statutorily required minimum wage.

a. Whether CoreCivic complied with the IGSA and the PBNDS is a fact question not appropriate to resolve on a 12(b)(6) motion

Alternatively, even if this Court were to determine that the IGSA or the PBNDS impacted Appellants' employment relationship with CoreCivic under the FLSA, it would merely raise a fact question as to whether CoreCivic's treatment of Appellants followed these standards. Such a question cannot determine the outcome of the litigation at the motion to dismiss stage, where Appellants have plausibly pled all elements of their claims. *Iqbal*, 556 U.S. at 678. In fact, Appellants' Complaint alleges that CoreCivic deviated from the PBNDS in key respects: it deviated from its requirements to maintain and operate the facility in manner that provided for the care and safety of civilly detained immigrants. J.A. 11 (Dkt. 1-6. at ¶ 24) (CoreCivic failed to provide basic necessities), 12 at ¶ 30 (CoreCivic failed to provide sufficient food, and access to telephone and legal materials), 12 at ¶ 32 (A government inspection and report found CoreCivic to be deficient in 31 contractually imposed standards). CoreCivic's own allegation provides that the PBNDS represents a minimum payment of $1 per day. *See* J.A. 91 (Dkt. 45 at 2). Appellants allege that while CoreCivic paid Appellants and similarly situated detained immigrants less than the legally required wages and as

little as $1 per day, it sometimes paid them more than $1 per day, J.A. 6, 11–12, 17, 24–25 (Dkt. 1-6 at ¶¶ 3, 24, 28, 56, 95, 103, 107). If this case were to proceed to discovery, Appellants would introduce evidence that CoreCivic, not ICE, elects the pay rate for detained immigrant workers.

D. THE DISTRICT COURT'S OTHER RULINGS WHOLLY RELIED ON ITS ERRONEOUS FINDINGS ON THE FLSA AND NMMWA

The District Court held that Appellants' claim for unjust enrichment failed because it was "entirely dependent on CoreCivic's alleged violation of the FLSA and NMMWA." J.A. 180 (Dkt. 49 at 5). After dismissing all of Appellants' claims, the District Court denied as moot Appellants' Motion for Conditional Certification and Issuance of Notice. *Id.* Because these rulings relied entirely on the District Court's erroneous finding that Appellants were not employees under the FLSA and NMMWA, they too must be overturned.

IX. CONCLUSION

For the reasons above, Appellants respectfully request that the Court reverse the District Court's Order dismissing Appellants' claims under the FLSA, the NMMWA, and the common law doctrine of unjust enrichment, and the denial as moot of Appellants' Motion for Conditional Certification and Issuance of Notice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) and Local Rule 32(b) because this brief contains no more than 30 pages, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Stacy N. Cammarano
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CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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