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)

REPLY BRIEF OF APPELLANTS

JOSEPH M. SELLERS
MICHAEL HANCOCK
STACY N. CAMMARANO
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Washington, D.C. 20005
T: (202) 408-4600 | F: (202) 408-4699
jsellers@cohenmilstein.com
mhancock@cohenmilstein.com
scammarano@cohenmilstein.com

ROBERT S. LIBMAN
MINER, BARNHILL & GALLAND, P.C.
325 North LaSalle Street, Suite 350
Chicago, IL 60654
T: (312) 751-1170
rlibman@lawmbg.com

Counsel for Appellants

January 30, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction

Appellants' complaint pleads straightforward claims under the Fair Labor Standards Act ("FLSA"): Appellants performed work for the benefit of CoreCivic, and qualify as its employees even under the most stringent "control" test, and therefore the FLSA requires CoreCivic to pay them the minimum wage. *See infra* at 4. In its Brief, CoreCivic has failed to show that any exemption to the FLSA applies, including the non-statutory exemption for prisoner labor. *See U.S. Dep't of Labor v. N. Carolina Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004) (employer has the burden to establish an exemption). As Appellants were detained while awaiting processing of their immigration status, and not charged with or convicted of a crime, the prisoner-labor exemption has no application here. J.A. 10 (Dkt. 1-6 at ¶ 21). Appellants were denied payment of a lawfully-mandated wage for work they performed for the benefit of CoreCivic simply because they are being civilly detained for an administrative, not a criminal, purpose.

Even under the test applicable to criminally incarcerated prisoners, which should not apply here, Appellants pled that CoreCivic's relationship to Appellants bore the indicia of traditional free-market employment: CoreCivic is one of the largest for-profit prison and detention corporations in the United States, with a market capitalization of nearly $3 billion. J.A. 6, 9 (*id.* at ¶¶ 2, 18). It has a

lucrative contract with Cibola County, New Mexico to operate Cibola County Correctional Center ("Cibola"), and it hires detained immigrants to perform work necessary to fulfill that contract. J.A. 6, 11 (*id.* at ¶¶ 2, 24). CoreCivic hires these workers in a program designed to provide "the opportunity to earn money," J.A. 155 (Dkt. 45-2 at 2), and they work in exchange for pay from CoreCivic, J.A. 6,13,15–16 (Dkt. 1-6 at ¶¶ 3, 34, 38, 45, 53), which they use to buy goods and services they need that are not provided by CoreCivic, J.A. 12, 14–15, 17 (*id.* at ¶¶ 30–32, 40, 48, 54). CoreCivic's employment of detained immigrants displaces workers from the community who would otherwise be hired and paid the prevailing wage but for the detainees' labor, depressing the value of labor in the private market for such services. J.A. 6, 14–17 (*id.* at ¶¶ 2, 39, 46, 51, 52).

CoreCivic has not identified any court, let alone any federal appellate court, that has held that a private, for-profit company can pay civilly detained immigrant workers who perform services that are valuable and necessary to the company less than the minimum wage under the FLSA or the New Mexico Minimum Wage Act ("NMMWA"). Under well-established FLSA caselaw defining the employment relationship broadly and prohibiting waivers of workers' rights under the statute, Appellants' claims are legally sound and should not have been dismissed. *See, e.g.*, *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985).

Nor should CoreCivic's parade-of-horribles speculation that a ruling in Appellants' favor will upend the Voluntary Work Program have any impact here, as none of its requirements preclude paying the minimum wage. Appellee's Br. at 4; J.A. 157 (Dkt. 45-2 at 4). The order dismissing the complaint should be reversed.

II. The FLSA Applies to Cibola's Voluntary Work Program Under All Applicable Tests.

Appellants ask the Court to apply a contextual, common-sense approach to interpret the employment relationship under the FLSA that is consistent with both Congressional intent and binding jurisprudence. Employing that approach, Appellants pled a valid employment relationship with CoreCivic, as it is well established that the FLSA uses the "broadest definition [of employment] that has ever been included in any one act," *U.S. v. Rosenwasser*, 323 US 360, 363, n. 3 (1945), and defines work to include all time spent for the benefit of the employer, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). Nor is there any dispute that the exceptions enumerated in the statute do not include for-profit civil immigration detention. 29 U.S.C. §§ 203(d), (e)(1), (e)(3), (e)(4), (g). Where an employment relationship is pled, as Appellants have done here, the employer has the burden to establish that an exemption applies. *N. Carolina Growers Ass'n*, 377 F.3d at 350. On the well-pled allegations of the complaint, CoreCivic has failed to meet its

burden.

Appellants' interpretation is not "boundless" as CoreCivic contends, Appellee's Br. at 10, but rather is bounded by the foregoing principles and jurisprudence assessing the economic reality of their work. Appellants' Br. at 13–17. Appellants have pled facts that plausibly show, under any applicable legal standard, that they had an employment relationship with CoreCivic. Appellants qualified as employees even under the more restrictive common law "control test" set forth in *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 83 (4th Cir. 2016), because CoreCivic: (a) created the staffing plan that controlled the detained immigrants' hiring, firing, schedules, and pay; (b) supervised their work; and (c) provided their tools and materials. J.A. 11, 13–17 (Dkt. 1-6 at ¶¶ 27, 34, 37, 42, 45, 50, 52).

While CoreCivic contends that *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 137 (4th Cir. 2017) precluded use of this common-law test for determining the existence of an employment relationship, it offers no alternative standard that examines the entire relationship between Appellants and CoreCivic.[1]

[1] *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (employment under the FLSA depends on the circumstances of the whole activity); *Steelman v. Hirsch*, 473 F.3d 124, 130–132 (4th Cir. 2007) (same).

Appellee's Br. at 17. *Salinas* rejected the common law *Kerr* test as not broad enough to comport with "Congress's intent that the FLSA's definition of 'employee' encompass a *broader* swath of workers than would constitute employees at common law." 848 F.3d at 137 (emphasis added). *Salinas* recognized that Congress intended to look to the economic realities of the workplace relationship in determining whether an employment relationship exists under the FLSA. *Id.* at 150. Having pled facts that satisfy the more restrictive common-law *Kerr* test, Appellants *necessarily* satisfy any more expansive iteration of the economic-realities test.[2] Nor does the custodial status of the Appellants, as explained below, defeat FLSA coverage or subject them to the standards applicable to work performed by criminally incarcerated prisoners. *See infra* at 13–14.

[2] While examining the economic reality, *Salinas* used a six factor test to determine whether workers qualify as employees rather than independent contractors: "(1) the degree of control that the putative employer has over the manner in which the work is performed; (2) the worker's opportunities for profit or loss dependent on his managerial skill; (3) the worker's investment in equipment or material, or his employment of other workers; (4) the degree of skill required for the work; (5) the permanence of the working relationship; and (6) the degree to which the services rendered are an integral part of the putative employer's business." *Id.* at 150. Many of those factors are equally applicable here, as CoreCivic controlled Appellants' work through its staffing plan and supervision and invested in the equipment and materials, J.A. 11, 13–17 (Dkt. 1-6 at ¶¶ 27, 34, 37, 42, 45, 50, 52), and Appellants' work was essential to the profitable operation of Cibola. J.A. 6, 9, 11 (Dkt. 1-6 at ¶¶ 2, 18, 24).

CoreCivic argues simultaneously that detained immigrants' custodial status so removes them from free-market employment that they are not employees (an argument derived from caselaw premised on the involuntary nature of prison labor, *see infra* at 11–12) and that its payment scheme does not violate the FLSA's purposes because Appellants' work is voluntary. Appellee's Br. at 3, 5, 12–16, 21. However, *all* work in the United States must be deemed voluntary unless the worker is a criminally incarcerated prisoner whose work can be coerced as a result of her convicted and incarcerated status. U.S. Const. amend. XIII. CoreCivic fails to acknowledge that an employee may not voluntarily waive her rights to payment under the FLSA or Service Contract Act ("SCA"). *Alamo Found.*, 471 U.S. at 301. The need to protect labor markets and fair competition require universal observance of the minimum standards in those Acts unless specifically exempted. Appellants' Br. 11–12, 20–21.

CoreCivic concedes that if Appellants are employees under the FLSA they are also employees under the NMMWA. Appellee's Br. at 33. While the NMMWA is analogous to the FLSA, federal courts must interpret state law in accordance with the precedent of the highest court of that state. *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002 (4th Cir. 1998). In a case involving a similar determination of workers' compensation claims, the New Mexico Supreme

Court found that prisoners working for a private company outside the prison were employees. *Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214–15. CoreCivic erroneously claims that the *Benavidez* court did not apply the economic realities test merely because it did not use those words. Appellee's Br. at 34. *Contra Benavidez*, 122 N.M. at 215 ("In determining the existence of an employer-employee relationship, no one single factor is decisive; rather, all relevant circumstances must be considered."). But the factors considered in *Benavidez* were the same factors included in the economic realities test. Appellants' Br. at 21. *See also Garcia v. Am. Furniture Co.*, 101 N.M. 785, 789 (1984) (stating that the economic realities test is the proper test for determining the existence of an employment relationship). Moreover, CoreCivic has not identified any meaningful difference between CoreCivic's relationship to Appellants and that of the parties in *Benavidez*. *See* Appellee's Br. at 33 –34 (stating only that appellants are not seeking workers' compensation benefits and they do not have a contract). *C.f. infra* at 13–14 (Appellants' complaint alleged a bargained for exchange of labor).

III. Congress Has Not Authorized CoreCivic to Pay Detained Immigrants at Cibola Less Than the Minimum Wage.

CoreCivic argues that its payment scheme is authorized under an Immigration and Naturalization Service ("INS") appropriation statute, 8 U.S.C.

§ 1555(d), and subsequent appropriation Act, setting the rate "not in excess of $1 per day." Appellee's Br. at 2. This argument is without merit, as this provision merely appropriates funds to INS, *see id.*, but does not dictate the amount CoreCivic must pay the detained immigrants. Indeed, CoreCivic admits that it is contractually required to pay Appellants *at least* $1 per day and that it can elect to pay more. Appellee's Br. at 4; J.A. 157 (Dkt. 45-2 at 4); *see also* J.A. 6, 13, 15–16 (Dkt 1-6 at ¶¶ 3, 34, 38, 45, 53) (alleging that sometimes CoreCivic elected to pay more than $1 per day, but always paid less than the minimum wage). There is nothing in ICE's agreement requiring CoreCivic to maintain a Voluntary Work Program that prevents CoreCivic from paying Appellants the legally required wages. Appellee's Br. at 4; J.A. 157 (Dkt. 45-2 at 4) ("The compensation is at least $1.00 (USD) per day."). On the contrary, CoreCivic's contract requires it to pay its workers the prevailing SCA wage, including for employees engaged in food preparation, library work, laundry and janitorial services—the jobs held by Appellants. J.A. 6–7, 10–11, 13–16 (Dkt. 1-6 at ¶¶ 3, 23, 24, 36, 44, 51); J.A. 113, 126 (Dkt. 45-1 at 2, 15) (requiring compliance with U.S. Dep't of Labor, Wage Determination No. 2015-2361 (2016), https://beta.sam.gov/search?index=wd&page=1&is_active=false).

CoreCivic also argues that Section 1555(d) demonstrates that Congress did

not intend the FLSA to apply to detained immigrants. Appellee's Br. at 28–29. This argument, too, should be rejected. As an initial matter, when the appropriations provision was passed in 1950, the private for-profit system of immigrant detention did not yet exist, nor did it exist in 1979 when Section 1555(d) was last updated. Alyssa Ray, *The Business of Immigration: Tracking Prison Privatization's Influence on Immigration Policy*, 33 Geo. Immigr. L.J. 115, 116 (2018) (for-profit immigrant detention had a limited scope from the 1980s until the early 2000s). Further, CoreCivic's interpretation of Section 1555(d) would implicitly amend the plenary coverage of the FLSA, violating the bedrock principle that amendments by implication are heavily disfavored. *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (requiring a new statute to show a "clear and manifest" intent to amend the prior statute); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (finding that the Immigration Reform and Control Act of 1986 did not amend the FLSA by implication and emphasizing the FLSA's broad remedial purposes). In the 80 years since the FLSA was enacted, Congress could have exempted detained immigrants or for-profit detention center operators from FLSA

coverage, but it has not done so.[3]

IV. CoreCivic's Focus on the Custodial Relationship Writ Large Ignores Critical Differences Between Different Types of Custodial Relationships.

Citing cases involving post-conviction incarceration, pre-trial detention, and civil commitment, CoreCivic argues that the FLSA does not extend to workers in *any* custodial detention context. Appellee's Br. at 16. These cases are inapposite, as none of them examined whether the FLSA applies to work performed by civil immigration detainees for a private, for-profit corporation. Nor has any other federal court. Accordingly, finding the FLSA applicable in the present case will not result in a "circuit split" as CoreCivic contends. Appellee's Br. at 7. Moreover, despite CoreCivic's assertions to the contrary, even where convicted prisoners are involved, courts generally have declined to impose a categorical rule, *see Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992) (prisoners not

[3] In finding that Section 1555(d) does not preempt state minimum wage laws from applying to civilly detained immigrant workers, several federal courts have emphasized that Congress has set no rate, and has not authorized INS or ICE to do so for over 40 years. *Chao Chen v. Geo Grp., Inc.*, 287 F. Supp. 3d 1158, 1166 (W.D. Wash. 2017) ("At least since fiscal year 1979, Congress has abandoned direct appropriations payment of allowances, despite its awareness of how to do so"); *Washington v. Geo Grp., Inc.*, 283 F. Supp. 3d 967, 977 (W.D. Wash. 2017) (same); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 WL 2193644, at *20 (S.D. Cal. May 14, 2018) ("Congress did not include similar language in subsequent years, nor did it codify the $1 per day limitation in the United States Code.").

categorically excluded); *Hale v. State of Ariz.*, 993 F.2d 1387, 1392 (9th Cir. 1993) (same); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994) (same) ("[A] federal prisoner seeking to state a claim under the FLSA must allege that his work was performed without legal compulsion and that his compensation was set and paid by a source other than the Bureau of Prisons itself."), and two circuits have applied FLSA protections to criminally incarcerated workers in some situations, *see Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 15 (2d Cir. 1984) (custodial detention did not foreclose FLSA application to prisoners tutoring students); *Watson v. Graves*, 909 F.2d 1549, 1556 (5th Cir. 1990) (prisoners on work release to private company were employees under FLSA).

CoreCivic contends that *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993), which involved a worker incarcerated pursuant to a criminal conviction, establishes the standard for workers in all custodial settings, and that Appellants are "indistinguishable" from the convicted prisoners in *Harker*. Appellee's Br. at 12–15, 17. However, as Appellants have shown, the economic reality of their work in civil immigration detention at CoreCivic's facility differs dramatically from work in the custodial setting of convicted prisoners. Appellants' Br. at 14–18. While CoreCivic asserts that *Harker* did not turn on the fact that the inmates were criminally convicted and had lost their rights under the Thirteenth

Amendment, Appellee's Br. at 18, that fundamental fact undergirds the caselaw upon which *Harker* relies. *See* 990 F.2d at 133 (citing *Vanskike*, 974 at 809 (emphasizing that the Thirteenth Amendment excludes prisoners, who therefore can be compelled to work, and the department of corrections did not have a pecuniary interest in the work)); *see also, e.g. Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997) ("[T]he FLSA presupposes a free-labor situation constrained by the Thirteenth Amendment.").

The cases cited by CoreCivic that involve workers in pre-trial detention and civilly committed individuals determined too dangerous to release after a conviction, Appellee's Br. at 16, do not support CoreCivic's argument either. Pre-trial detention and civil commitment are not analogous to Appellants' custody because the former are necessarily connected to criminal charges, and they involve levels of control not present here. For example, following a criminal conviction, the plaintiff in *Matherly v. Andrews* was involuntarily committed for protective and rehabilitative purposes as a sexually dangerous person. 859 F.3d 264, 268, 276 (4th Cir. 2017). Because of his prior conviction and designation, he could be subjected to more control targeted to his condition. *Id.* at 276; 18 U.S.C. § 4247 (requiring the facility to provide treatment targeted to "the nature of the offense and the characteristics of the defendant"). In addition, in *Matherly*, this Court

distinguished *Gonzales v. Mayberg*, No. CV-07-6248 CBM (MLG), 2009 WL 2382686 (C.D. Cal. July 31, 2009)), a case with more markers of free market employment: the worker displaced other workers and used his wages to pay for medical care. *See* 859 F.3d at 278 (citing, in a footnote, *Gonzales*, 2009 WL 2382686, at *4).

A key principle is present in the caselaw examining the FLSA's application to custodial detention: "the more indicia of traditional, free-market employment the relationship between the prisoner and his putative 'employer' bears, the more likely it is that the FLSA will govern the employment relationship." *Villarreal*, 113 F.3d at 207 (quoting *Henthorn*, 29 F.3d at 686)). Such indicia exist here:

> (1) **Profitability**: Appellants' work added to CoreCivic's profitability—they were hired to perform tasks essential to the functioning of the facility, J.A. 6, 9, 11, 14–17 (Dkt. 1-6 at ¶¶ 2, 24, 39, 46, 52), for which CoreCivic was contractually obligated to hire workers at the prevailing wage. J.A. 6–7, 10–11 (*id.* at ¶¶ 2–3, 23–24).
>
> (2) **Bargained-For Exchange**: One stated purpose of the Voluntary Work Program is to provide detained immigrants the opportunity to earn money. J.A. 155 (Dkt. 45-2 at 2). Appellants worked in exchange for pay, sometimes $1 per day and other times up to $15 per week. J.A. 6, 13, 15–16 (Dkt 1-6 at ¶¶ 3, 34, 38, 45, 53). This fluctuation in pay suggests a bargained for exchange that incentivizes

people to work.[4]

(3) **Workers' Standard of Living**: Appellants used their wages to make purchases that contributed to their standard of living. J.A. 12, 14–15, 17 (*id.* at ¶¶ 30–32, 40, 48, 54). Appellants' work displaced workers from the community and suppressed the value of labor in those jobs. J.A. 6, 14–17 (*id.* at ¶¶ 2, 39, 46, 51, 52). Appellants' sub-minimum wage work contributes to unfair competition because it suppresses wages in the local market, J.A. 7 (*id.* at ¶ 3), with national consequences due to CoreCivic's size and scope. J.A. 6, 9 (*id.* at ¶¶ 2, 18).[5]

These facts satisfy the three-part test outlined in *Harker* and *Matherly*. *See Matherly,* 859 F.3d at 278 (worker not covered by the FLSA where he (1) did not work to turn a profit for the prison, (2) did not have a bargained for exchange of labor, and (3) all necessities were provided to maintain a standard of living); *Harker*, 990 F.2d at 132 (same).

V. CoreCivic's Challenges to Cases Applying State Minimum Wage Laws to

[4] CoreCivic misses the point when it relies on *Alamo Foundation* to argue that Appellants do not have the same type of bargained-for exchange of labor as the "volunteers" who received food, shelter, and clothing as in-kind compensation. Appellee's Br. at 23. Here, Appellants were paid money, not in-kind services, as the *quid pro quo* for their work. J.A. 6, 13, 15–16 (*id.* at ¶¶ 3, 34, 38, 45, 53). That Appellants used their wages for basic necessities that CoreCivic failed to provide is relevant here only to show the impact of their wages on their standard of living.

[5] The Court can infer from facts in the Complaint that CoreCivic's payment of sub-minimum wages gives it a competitive advantage in operating detention facilities, such that no other operator could enter the market while paying minimum wages to all workers who perform work essential to operate the facilities.

Civilly Detained Immigrants in For-Profit Prisons are Misplaced.

CoreCivic argues that Appellants have not cited authority holding that the FLSA applies to for-profit immigration detention. Appellee's Br. at 31. But no court has held the contrary either. CoreCivic attempts to bolster its reliance on *Alvarado Guevara v. INS*, 902 F.2d 394 (5th Cir. 1990), which Appellants have shown is inapposite to the Voluntary Work Program at Cibola, Appellants' Br. at 23–26, by challenging Appellants' reliance on recent, analogous cases holding that detained immigrants in private facilities are employees under state minimum wage laws. Appellee's Br. at 30. CoreCivic alleges that such laws use different tests. *Id.* On the contrary, two cases concern the Washington Minimum Wage Act, which mirrors the FLSA. *Chao Chen*, 287 F. Supp. at 1167; *Washington*, 283 F. Supp. at 981. While *Owino* applies a state law with a different test for determining coverage, the court considered the FLSA test at length and described the numerous ways that prisoner caselaw is inapplicable to immigrants detained in a private, for-profit facility.

In contrast, CoreCivic's reliance on *Menocal v. GEO Grp., Inc.*, which found a state minimum wage law inapplicable, succumbs to the same critique CoreCivic invokes against Appellants—the state minimum wage law at issue employs a different test. 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015). *Compare 7*

Colo. Code Regs. 1103–1:2 (defining "employee" as "any person performing labor or services for the benefit of an employer in which the employer may command when, where, and how much labor or services shall be performed.") (amended 2018) *with* 29 U.S.C. § 203 (defining "employee" as "any individual employed by an employer"). *Menocal* is further unavailing because its sole rationale for finding the state minimum wage law inapplicable was that the purposes of the law would not be served where the detained immigrants did not use their wages to provide for themselves. 113 F. Supp. 3d at 1129. That rationale does not apply here, where Appellants have alleged that they used their wages to provide for themselves. J.A. 12, 14–15, 17 (*id.* at ¶¶ 30–32, 40, 48, 54).[6]

VI. CoreCivic Inappropriately Asks the Court to Resolve Factual Disputes.

CoreCivic improperly injects into its brief facts not alleged in the Complaint and that directly conflict with Appellants' allegations. *See, e.g.*, Appellee's Br. at 2, 4, 20, 22, 24 26, 27. In considering a motion to dismiss, the Court must construe

[6] CoreCivic's reliance on *Whyte v. Suffolk Cty. Sheriff's Department*, Appellee's Br. at 30 n.8, is also misplaced, as that case did not involve immigrants in a private, for-profit facility. 91 Mass. App. Ct. 1124 (2017) (unpublished). Similarly, a 1992 INS advisory opinion upon which Appellee relies, Appellee's Br. at 30 n.8, was drafted before the surge of for-profit private immigration detention and pertained only to immigrants detained in INS custody. *See* INS Gen. Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilities*, Op. 92-8, 1992 WL 1369347, at *1 (Feb. 26, 1992).

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 v. PPE Casino Resorts Md., LLC*, 820 F.3d 655, 658 (4th Cir. 2016). Where a disputed issue of material fact exists, it cannot be decided on a 12(b)(6) motion. *Andrew v. Clark*, 561 F.3d 261, 267 (4th Cir. 2009).

First, CoreCivic contends that it fully complies with the Performance Based National Detention Standards ("PBNDS") and the Intergovernmental Service Agreement ("IGSA"). Appellee's Br. at 2, 4 (requirement to provide services in accordance with the PBNDS and the IGSA) 22, 26 (requirement to provide Appellants with various basic necessities). CoreCivic then claims, erroneously, that Appellants do not dispute this contention, Appellee's Br. at 4, when the contrary is true. J.A. 7, 10, 11, 12 (Dkt. 1-6 at ¶¶ 3, 23, 24, 29, 32) (alleging that CoreCivic has violated the IGSA by hiring detained immigrants at wages less than the prevailing SCA wage and displacing workers from the surrounding community); J.A. 11, 12 (Dkt. 1-6 at ¶¶ 24, 30, 32) (alleging that CoreCivic failed to provide Appellants with various necessities in violation of its contractual requirements). These Complaint allegations must be accepted as true for purposes of determining whether Appellants state a claim.

Second, CoreCivic asserts that it does not have a choice between hiring a

detained immigrant and hiring an outside worker from the community. Appellee's Br. at 27. However, the Complaint alleges that detained immigrants work in the same jobs as non-detained community members. *See, e.g.*, J.A. 6, 16 (Dkt. 1-6 at ¶ 2, 51). The PBNDS provides the opportunity to work "subject to the number of work opportunities available." J.A. 155 (Dkt. 45-2 at 2). There is no requirement that CoreCivic hire detained immigrants to perform the same work that would otherwise be filled by local community members and there is no requirement to give preference to detained immigrants for those jobs. *See id.*

Third, CoreCivic asserts that there is no market upon which its payment scheme would cause a race to the bottom and that its payment scheme has no effect on the national economy. Appellee's Br. at 27. These facts are in dispute, *see supra* n. 5, and cannot be inferred from Appellants' well-pled allegations. To the contrary, Appellants allege that they performed services for a national corporation that are essential to CoreCivic's profitable operation of Cibola. *E.g.* J.A. 6, 9, 11 (Dkt. 1-6 at ¶¶ 2, 18, 24).

Finally, CoreCivic alleges that ICE's purpose in requiring the Voluntary Work Program is not to generate a profit. Appellee's Br. at 20. Relying on this factual allegation, CoreCivic argues that the benefit it receives from Appellants' work is collateral. *Id.* This contradicts the Complaint's allegations that absent

Appellants' work, CoreCivic would hire members of the community and pay them the prevailing wage and that, accordingly, CoreCivic profits from Appellants' work. J.A. 6, 9, 11, 14–17 (Dkt. 1-6 at ¶¶ 2, 18, 24, 39, 46, 51, 52) (alleging how CoreCivic profits from its hiring and pay scheme); *see Harker*, 990 F.2d at 133.

CoreCivic's reliance on facts not alleged in the Complaint, and in direct conflict with Appellants' allegations, is improper at this stage. *See Harbourt*, 820 F.3d at 658. Relying on the allegations in Appellants' Complaint and drawing all reasonable inferences in their favor requires a finding that the FLSA and the NMMWA apply to CoreCivic's employment of Appellants.

VII. Conclusion

For the reasons above, Appellants respectfully request that the Court reverse the District Court's Order dismissing Appellants' claims and the denial of Appellants' Motion for Conditional Certification and Issuance of Notice as moot.

Respectfully submitted,

JOSEPH M. SELLERS
MICHAEL HANCOCK
STACY N. CAMMARANO
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Avenue, NW
Washington, D.C. 20005
(202) 408-4600
jsellers@cohenmilstein.com
mhancock@cohenmilstein.com
scammarano@cohenmilstein.com

ROBERT S. LIBMAN
MINER, BARNHILL & GALLAND, P.C.
325 North LaSalle Street, Suite 350
Chicago, IL 60654
(312) 751-1170
rlibman@lawmbg.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) and Local Rule 32(b) because this brief contains 5,412 words. 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
Stacy N. Cammarano

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 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.

/s/ Stacy N. Cammarano
Stacy N. Cammarano