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THE VOLUNTARY WORK PROGRAM: A DISCUSSION ON MINIMUM WAGE FOR CIVIL IMMIGRATION DETAINEES

INTRODUCTION

Martha Gonzalez is a survivor of human trafficking who entered the United States after fleeing Mexico.¹ Upon entry, she spent fourteen months in two immigration detention centers in Texas run by CoreCivic, a for-profit prison corporation.² During her time in detention, she was forced to work seven days a week under the threat of solitary confinement.³ If she tried to take a day off, the staff refused to give her basic necessities, such as toothpaste or sanitary napkins during menstruation.⁴ Her work included scrubbing bathrooms, cleaning floors, preparing meals, and sorting clothing.⁵ Despite working for more than eight hours a day and seven days a week, she only received one or two dollars per day for her labor.⁶ Several states away, Wilhen Hill Barrientos participated in the Voluntary Work Program at a CoreCivic Detention Center in Georgia.⁷ Opting out meant he could not make phone calls to his family or have access to toilet paper.⁸

Both Ms. Gonzalez and Mr. Barrientos participated in Immigration and Customs Enforcement's (hereinafter "ICE") Voluntary Work Program, where immigration detainees are able to work for a wage while in a long-term immigration detention facility.⁹ They were repeatedly told

1. See Victoria Law, *Investigation: Corporations Are Profiting From Immigrant Detainees' Labor. Some Say It's Slavery*, IN THESE TIMES (May 29, 2018), http://inthesetimes.com/features/ice_immigrant_detention_centers_forced_prison_labor_investigation.html.

2. See *id.*

3. See *id.*

4. See *id.*

5. See Jury Demand at 5, *Gonzalez v. Corecivic, Inc.*, No. 1:18-CV-169-LY (W.D. Tex. Mar. 1, 2019) 2019 U.S. Dist. LEXIS 114595.

6. See *id.* at 15.

7. See Law, *supra* note 1.

8. See *id.*; *Wilhen Hill Barrientos, et al., v. Corecivic, Inc.*, S. POVERTY L. CTR., <https://www.splcenter.org/seeking-justice/case-docket/wilhen-hill-barrientos-et-al-v-corecivic-inc>. (last visited Feb. 11, 2020).

9. See Law, *supra* note 1; Jury Demand, *supra* note 5.

that participation in the program was voluntary, in spite of severe consequences for opting out.¹⁰ By participating, they received twenty to fifty cents per hour, well below the federal minimum wage.¹¹

The United States has been viewed as the land of opportunity and prosperity.¹² To meet the growing demand of immigrants, the Ellis Island Immigration Center opened in 1892 and became the first immigrant detention facility in the world.¹³ The building had an administrative purpose, allowing government officials to inspect who was entering the country.¹⁴ Individuals who needed additional inspection or medical care were placed under civil confinement for a short period of time.¹⁵ Today, the United States remains the largest operator of immigration detention systems in the world.¹⁶

With the emergence of the for-profit prison industry, the Federal Government began outsourcing the operations of federal immigration detention centers to multi-million dollar corrections corporations such as CoreCivic and the GEO Group.¹⁷ With the shift in operations, immigration detainees are housed with criminal detainees, despite never being charged with a crime.¹⁸ While the operations of detention facilities are overseen by Immigration and Customs Enforcement, the Performance-Based National Detention Standards that private prisons

10. See *Wilhen Hill Barrientos, et al., v. Corecivic, Inc.*, *supra* note 8; Law, *supra* note 1.

11. See *Wilhen Hill Barrientos, et al., v. Corecivic, Inc.*, *supra* note 8; Law, *supra* note 1.

12. See generally Isabel V. Sawhill, *Still the Land of Opportunity?*, BROOKINGS INST. (Mar. 1, 1999), <https://www.brookings.edu/articles/still-the-land-of-opportunity/> (“America is known as ‘the land of opportunity.’”).

13. Allyson Hobbs & Ana Raquel Minian, *A firsthand look at the horrors of immigration detention*, WASH. POST (June 25, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/06/25/a-firsthand-look-at-the-horrors-of-immigration-detention/>.

14. See *id.*

15. Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody,”* 48 U. MICH. J. L. REFORM 879, 881 (2015); Derek C. Julius, *Land of the Free? Immigration Detention in the United States*, THE FED. L., May 2017, at 46, 48, http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/May/Land-of-the-Free-Immigration-Detention-in-the-United-States.aspx?FT=.pdf.

16. See Emily Kassie, *DETAINED: How the US built the world’s largest immigrant detention system*, THE GUARDIAN (Sept. 29, 2019 1:39 AM), <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>; Julius, *supra* note 15, at 50.

17. Kassie, *supra* note 16; see also *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> (last visited Sept. 8, 2019). GEO Group and Corrections Corporation of America/CoreCivic are the private prison corporations that detain the highest and second-highest number of people, together detaining approximately 15,000 people in immigration detention per day. See *id.*

18. See Kassie, *supra* note 16.

need to abide by are the guidelines.¹⁹ As a result, some provisions, such as the pay guidelines for the Voluntary Work Program, are seen as suggestions rather than obligations.²⁰

Although Congress passed the Fair Labor Standards Act and established a Federal Minimum Wage in 1938, numerous courts have held that the protections created do not apply to immigration detainees.²¹ The Fair Labor Standards Act did not classify detainees as employees. In the 1950s, the concept of paid labor in detention centers was debated heavily.²² That year, Congress authorized the Department of Justice to appropriate funds for the payment of “aliens . . . while held in custody under the immigration laws, for work performed.”²³ It was left to the appropriation process to set the amount of pay, which Congress set at one dollar per day.²⁴ Over seventy years later, the per diem rate remains at one dollar and has not been adjusted for inflation.²⁵ This equates to twelve and a half cents per hour for an eight-hour workday.²⁶

Unable to claim relief under federal law, many immigration detainees have begun to look at other avenues for relief.²⁷ In 2017, the State of Washington joined a class action lawsuit against GEO Group, one of the largest private corrections corporations in the United States.²⁸ In its complaint, the State highlighted the corporation’s obligation to abide by Washington State’s Minimum Wage Act and pay eleven dollars an hour for the work completed by detainees.²⁹ Despite numerous motions to dismiss, the case went to a jury trial in 2021, paving the way for many states to decide if immigration detainees are covered by state minimum wage laws.³⁰

19. See U.S. IMMIGR. AND CUSTOMS ENF’T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS i (rev. 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

20. See *id.* at 406.

21. Patrice A. Fulcher, Note And Comment, *Emancipate The FLSA: Transform The Harsh Economic Reality Of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 698 (2015).

22. Anita Sinha, *Slavery by Another Name: “Voluntary” Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J.C.R. & C.L. 1, 1, 25 (2015).

23. *Id.* (citing *Hearing on H.R. 4645 and S. 2865 Before Subcomm. No. 2 of the H. Comm. On the Judiciary*, 81st Cong. 3 (1950) (language from H.R. 4645)).

24. *Id.*

25. See Law, *supra* note 1.

26. See generally 2011 U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19 (\$1 a day divided by 8 hours is 12.5 cents per hour).

27. See *e.g.*, *Washington v. Geo Grp.*, 283 F. Supp. 3d 967, 973 (W.D. Wash. 2017).

28. See *id.*

29. See *id.*

30. See *Ugochukwu Goodluck Nwauzor v. GEO Grp.*, No. C17-5769 RJB, 2020 U.S. Dist. LEXIS 10041, at *10 (W.D. Wash. Jan. 21, 2020). A three-week trial was conducted over Zoom in

This Article proposes a solution to the one dollar per day wage in the Voluntary Work Program by expanding state minimum wage laws to protect immigrant detainee workers who participate in the program.³¹ Part I of this Article discusses the formation of immigration detention centers in the United States and the rise of privatized detention centers.³² Part II examines the Voluntary Work Program, the one dollar per day wage, and its impacts on daily life within detention centers.³³ Part III explores the legislative history of the one dollar per day wage and judicial interpretation of labor protections for immigrant detainees.³⁴ Finally, Part IV discusses why The Fair Labor Standards Act is no longer a viable argument and how state minimum wage laws may offer immigrant detainees a path to relief.³⁵

I. OVERVIEW OF IMMIGRATION DETENTION CENTERS

A. *The Legal and Policy Construction of Immigration Detention as a Civil Scheme*

1. The Beginning of Federal Immigration Enforcement within the United States

Although the United States was considered a beacon of hope for migrants, public opinion began to switch towards the early 1880s.³⁶ “Before 1882 there were no significant federal immigration controls.”³⁷ However, certain parts of the country began to be more hostile towards immigrants believing that they were “dangerous, burdensome or not integrating into the community.”³⁸ At the time, economic conditions in certain states within the United States, such as California, deteriorated,

June 2021 and later declared a mistrial after the jury was unable to reach a unanimous verdict. See Daniel Wiessner, *Mistrial declared in case over GEO Group’s \$1-a-day detainee pay*, REUTERS (Jun. 18, 2021, 12:17 PM), <https://www.reuters.com/legal/litigation/mistrial-declared-case-over-geo-groups-1-a-day-detainee-pay-2021-06-18/>.

31. See *infra* Part IV.

32. See *infra* Part I.

33. See *infra* Part II.

34. See *infra* Part III.

35. See *infra* Part IV.

36. See DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS 9 (2011).

37. *Id.*

38. *Id.*

placing pressure on Congress to limit or screen the number of immigrants entering the country.³⁹

In response to public outcry, Congress passed the Immigration Act of 1882, which established a class of individuals prohibited from migrating to the United States and initiated a “head tax” that needed to be paid prior to being granted entry.⁴⁰ Although there was no single agency overseeing the implementation of the Act, the Secretary of the Treasury was authorized to “‘examine’ passengers and if found among such passengers any convict, lunatic, idiot or any person unable to care of himself or herself without becoming a public charge,” they were denied entry.⁴¹ While inspections were conducted, individuals were housed on ships.⁴² Long term detention, however, was frowned upon and reserved for individuals who were believed to be ill, insane, or unable to care for themselves.⁴³ The Act itself did not mention detention nor the procedures needed to care for the individuals who needed long term inspection.⁴⁴ Congress did not pass a “statutory legal basis for detention at [the] federal level until 1891.”⁴⁵

In implementing the Immigration Act of 1882, the Federal Government obtained exclusive control over immigration law and entry into the United States.⁴⁶ That same year, federal control over immigration was affirmed by Congress with the passing of the Chinese Exclusion Act, and later by the United States Supreme Court in *Chae Chan Ping v. United States*.⁴⁷ In the 1860s, the United States was in the midst of the Gold Rush in California.⁴⁸ To meet the demand of individuals traveling to the West Coast, the Central Pacific Railroad Company began construction on the

39. *Early American Immigration Policies*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/agency-history/early-american-immigration-policies> (last visited October 2, 2019). Pressure was placed on Congress because the “Supreme Court in 1875 declared regulation of immigration a federal responsibility.” *Id.* Prior to 1875, state legislatures began passing their own immigration laws, creating a conflict between federal and state law. *Id.*

40. *Id.*; see also WILSHER, *supra* note 36, at 11.

41. WILSHER, *supra* note 36, at 11.

42. *Id.*

43. See *id.*

44. See *id.*

45. *Id.*

46. *Id.* States began enforcing federal immigration law under the guidance of the United States Treasury Department. See *Early American Immigration Policies*, *supra* note 39.

47. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (commonly known as “The Chinese Exclusion Case”); see also *Early American Immigration Policies*, *supra* note 39. See generally ANDREW GYORY, *CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 1-2* (1998) (discussing various considerations behind the passage of the Chinese Exclusion Act).

48. GYORY, *supra* note 47, at 67.

First Transcontinental Railroad.⁴⁹ Due to the large scale of the project, there was a need for skilled laborers, leading the railroad companies to transport “thousands of workers directly from China.”⁵⁰ After completion of the railroad, the laborers entered other occupations, “including agriculture, manufacturing, and construction, often accepting wages below those of white workers.”⁵¹

By the 1870s, the economy began to decline due to the impact the Transcontinental Railroad had on the West Coast; it led to increased travel within the United States, a labor surplus, increased job competition, and declining wages.⁵² Residents within impacted cities, such as San Francisco, began looking for the cause of the economic decline.⁵³ At the time, Chinese immigrant workers made up eight and a half percent of California’s population.⁵⁴ In San Francisco, migrant workers made up one-third of the workforce, leaving many to believe they contributed to the economic depression.⁵⁵

Propaganda quickly spread throughout the United States, which created hostility towards immigration.⁵⁶ Newspapers, such as the New York Times, began publishing articles demeaning Chinese immigrants, as well as cartoons depicting anti-Chinese imaging.⁵⁷ Immigrants were called “dependent,” “ignorant,” heathens, barbaric, “semi-civilized,” and “alien.”⁵⁸ Imaging centered on immigrants stealing jobs and Americans building a wall to keep incoming migrants out, with captions such as “[w]e must draw the line *somewhere*, you know.”⁵⁹ These comments put

49. See *id.* at 7.

50. *Id.*

51. *Id.*

52. See *id.* at 15, 29.

53. See *id.* at 7.

54. *Id.*

55. *Id.*; see also *Immigration: Challenges for New Americans*, LIBR. OF CONG., http://www.loc.gov/teachers/classroommaterials/primarysourcesets/immigration/pdf/teacher_guide.pdf (last visited Oct. 2, 2019) (showing that residents on the East Coast felt similar hostility towards Irish and Italian immigrants beginning in the 1850s; immigrants were “subject to physical attacks by anti-immigrant mobs” and verbal abuse.).

56. See GYORY, *supra* note 47, at 10.

57. See *id.* at 18. See generally Joseph Ferdinand Keppler, *The Chinese Invasion* (illustration), in *The Chinese Invasion/J. Keppler*, LIBR. OF CONG., <https://www.loc.gov/item/91793028/> (last visited Apr. 8, 2021) (A series of nine cartoons depicting Chinese immigrants rushing into the United States as a “Wave.”).

58. GYORY, *supra* note 47, at 18.

59. Frank Leslie, *The only one barred out Enlightened American statesman* - “We must draw the line somewhere, you know.” (photograph), in *The Only One Barred Out Enlightened American Statesman* - “We Must Draw the Line Somewhere, You Know.” LIBR. OF CONG., <https://www.loc.gov/item/2001696530/> (last visited Apr. 8, 2021); see also Keppler, *supra* note 57; Marina Fang, *How The Chinese Exclusion Act Can Help Us Understand Immigration Politics Today*, HUFFPOST (May

pressure on politicians to restrict the number of immigrants entering the United States.⁶⁰ Although the Immigrant Act of 1882 was passed and active, congressional representatives saw the hostility towards Chinese immigrants as an opportunity for political gain, leading to Congress passing the Chinese Exclusion Act.⁶¹

The Chinese Exclusion Act was the first immigration law to prevent all members of an ethnic group from entering the United States.⁶² Once passed, the Act prevented Chinese individuals from immigrating into the United States for ten years and made those already in the country unable to become United States citizens.⁶³ In 1884, the Act was amended to allow Chinese individuals within the United States to leave and reenter the country if they obtained a certificate prior to departure.⁶⁴ By 1888, Congress repealed the amendment in the Scott Act, leaving many who departed the country with no way to return.⁶⁵ This was the basis of the Plaintiff's claim in *Chae Chan Ping*, where a laborer was unable to return to the United States because the Scott Act was passed while he was in transit to return.⁶⁶ The Court held that the power to exclude individuals from entering a country is part of its sovereignty, and is "a part of those sovereign powers delegated by the Constitution" to the legislature of the United States.⁶⁷ In the process, the Court took a step back and left decisions regarding immigration up to the legislature, defining immigration law as a political issue rather than a Constitutional issue.⁶⁸ The holding of *Chae Chan Ping* paved the way for Congress to enact more stringent immigration laws in the years that followed.⁶⁹

25, 2018, 5:45 AM), https://www.huffpost.com/entry/chinese-exclusion-act-immigration-politics_n_5b06a90fe4b05f0fc84552cf?ncid=engmodushpmg00000004 (highlighting that many of the anti-immigrant sentiments felt in the 1880s are mirrored today with society's hostility towards immigrants from Mexico).

60. GYORY, *supra* note 47, at 7.

61. *Id.* at 15 ("The single most important force behind the Chinese Exclusion Act was national politicians of both parties who seized, transformed, and manipulated the issue of Chinese immigration in the quest for votes.").

62. See History.Com Staff, *Chinese Exclusion Act*, HISTORY.COM, <https://www.history.com/topics/immigration/chinese-exclusion-act-1882> (Sept. 13, 2019).

63. *Id.*; see also *Chae Chan Ping v. U.S.*, 130 U.S. 581, 597 (1889).

64. *Chae Chan Ping*, 130 U.S. at 598.

65. *Id.* at 599.

66. See generally *id.* at 582.

67. *Id.* at 609.

68. See *id.* at 602-03.

69. See Torrey, *supra* note 15, at 887 n.45.

2. Federal Detention as an Administrative Procedure

By the end of the 1800s, immigration was on the rise.⁷⁰ Although the Chinese Exclusion Act was in full force, immigrants from Europe continued to enter the United States from the East Coast.⁷¹ In response, Congress passed the Immigration Act of 1891, establishing the first statutory basis for migrant detention.⁷² The Act gave inspection officers the authority to detain individuals to conduct a thorough investigation prior to granting them entry into the United States.⁷³ While temporary detention of immigrants was permitted under the Immigration Act of 1882, the procedures and processes dictating the detention were never codified into law.⁷⁴

The Immigration Act of 1891 expanded the scope of the 1882 Act and was the first time government officials obtained authority under a statute to detain immigrants.⁷⁵ The Act required that immigrants who were members of an excludable class, such as those carrying illnesses or felons, be subject to mandatory detention.⁷⁶ It did not address, however, how or when individuals detained should be released from custody.⁷⁷ Instead, the United States implemented the practice that every individual of an excludable class would be detained pending the completion of a medical examination.⁷⁸ Two years later, Congress passed the Immigration Act of 1893, which mandated immigration inspectors to detain every individual unless they knew “beyond doubt” that the individual was “entitled to admission.”⁷⁹ “Immigration officers were precluded from exercising their discretion in making custody

70. See *U.S. Immigrant Population and Share over Time, 1850-Present*, MIGRATION POL’Y INST., https://public.tableau.com/views/ImmigrantsintheU_S_-1850-2017/Dashboard1?:embed=y&:embed_code_version=3&:loadOrderID=0&:display_count=y&:origin=viz_share_link (last visited Feb. 8, 2020); see also *U.S. Immigration Timeline*, HISTORY.COM, <https://www.history.com/topics/immigration/immigration-united-states-timeline> (May 14, 2019) (“As America begins a rapid period of industrialization and urbanization, a second immigration boom begins. Between 1880 and 1920, more than 20 million immigrants arrive.”).

71. See *U.S. Immigration Timeline*, *supra* note 70.

72. See WILSHER, *supra* note 36, at 13; see also Torrey, *supra* note 15, at 885.

73. See Torrey, *supra* note 15, at 885.

74. See *generally id.* (“Although the 1891 Act provided no statutory basis for releasing a new arrival from detention prior to inspection, the informal practice of releasing a detainee on bond quickly developed in the East Coast’s main port of New York City.”).

75. *Id.*

76. HILLEL R. SMITH, CONG. RSCH. SERV., IMMIGRATION DETENTION: A LEGAL OVERVIEW 58 tbl.A-1, 59 (2019).

77. *Id.* at 58 tbl.A-1.

78. Julius, *supra* note 15, at 48.

79. *Id.*

determinations unless it was obvious that the new arrival was entitled to entry.”⁸⁰ This policy remained for the following sixty years but was not strictly enforced.⁸¹

In 1892, the Ellis Island Immigration Center opened and became “the first dedicated immigration detention facility in the world.”⁸² Over twelve million people passed through the facility until it closed in 1954, with about “fifteen to twenty percent of new arrivals” detained for a short period of time.⁸³ Of those detained, two percent were allegedly excluded from entering into the United States and deported.⁸⁴ By the 1950s, mandatory detention as an administrative method to inspect those entering the country was no longer necessary.⁸⁵ As the number of individuals entering the United States decreased, more immigrants were released on bond through the practice of discretionary release.⁸⁶ As a result, the US policy shifted towards internal immigration enforcement, paving the way for modern immigration detention centers.

3. Modern Mandatory Detention Policies Reflect Civil Confinement

From their inception, detention centers were meant to enforce the prevailing immigration law, give officials an opportunity to inspect who was entering the country, and determine if they should be denied entry.⁸⁷ There was never a penal aspect to the immigration law or enforcement.⁸⁸ Rather, detention centers were an administrative tool to maintain the government’s sovereignty and sustain national security.⁸⁹

80. Torrey, *supra* note 15, at 885.

81. *See id.* at 889.

82. Hobbs & Minian, *supra* note 13.

83. Torrey, *supra* note 15, at 886; *see also* Julius, *supra* note 15, at 48.

84. *See* Julius, *supra* note 15, at 48.

85. *See* Torrey, *supra* note 15, at 889. The Immigration and Nationality Act of 1952 was passed, which subsequently led to a decrease in detentions as it allowed authorities to use more discretion. *Id.*

86. *See id.*

87. *See generally id.* at 884-85 (highlighting the use of early immigration policies and temporary detention to facilitate entry into the United States).

88. *See id.* at 880; *see also* Zadvydas v. Davis, 121 S. Ct. 2491, 2499 (2001) (holding that the procedures surrounding immigration detention are assumed to be nonpunitive and not criminal).

89. *See generally* Chae Chan Ping v. U.S., 130 U.S. 581, 609 (1889) (holding that the power to exclude individuals from entering the United States is part of a country’s sovereign powers); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (holding “[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country”); Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1352 (2014) (“[D]eportation is considered nothing more than a physical manifestation of the nation’s sovereign prerogative to dictate the terms by which it admits noncitizens and allows them to remain within its borders.”).

From a judicial standpoint, the courts do not consider immigration detention a punitive punishment, thus maintaining that immigration law is civil law.⁹⁰ In *Wong Wing v. United States*, the plaintiff was a non-citizen sentenced to hard labor for violating the Chinese Exclusion Act.⁹¹ The Court held that while Congress had the power to deport those who violated the Act, it could not add a punishment of imprisonment with hard labor without a trial by a jury.⁹² However, those accused of violating the Act could be held in custody pending deportation proceedings.⁹³ In ruling this way, the Court defines immigration detention as civil in nature, stating that it is “not imprisonment in a legal sense.”⁹⁴ This holding affirmed the decision in *Chae Chan Ping*, stating that individuals facing deportation or denied entry into the United States do not have the same protections as those in criminal proceedings.⁹⁵ For example, detainees do not have a right to an appointed attorney and are not protected from ex post facto laws.⁹⁶ “Lawful immigration detention was therefore determined not to be punishment, but an administrative function of border control.”⁹⁷

B. The Structure of Immigration Detention Centers.

1. Overview of Federal Management of Immigration Detention Centers

The United States became the largest operator of immigration detention systems in the world when it opened Ellis Island Detention Facility.⁹⁸ It remains the largest operator to this day, almost sixty-five years after the closing of Ellis Island.⁹⁹ When detention first came into practice in the 1980s, “fewer than 2,000 people were held in immigration detention nationwide.”¹⁰⁰ Over the years, the number of individuals

90. See Torrey, *supra* note 15, at 880.

91. See Julius, *supra* note 15, at 48; see also *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

92. *Wong Wing*, 163 U.S. at 237.

93. *Id.* at 235.

94. *Id.*

95. See Torrey, *supra* note 15, at 880-81.

96. *Id.*

97. See Julius, *supra* note 15, at 48.

98. See *id.*

99. *Id.* at 50.

100. CARL TAKEI, MICHAEL TAN, & JOANNE LIN, AM. C.L. UNION, SHUTTING DOWN THE PROFITEERS: WHY AND HOW THE DEPARTMENT OF HOMELAND SECURITY SHOULD STOP USING PRIVATE PRISONS 7 (2016).

detained grew exponentially.¹⁰¹ In September 2019, over 50,000 migrants were detained in over 250 immigration detention centers across the United States.¹⁰² This is largely due to the change in demographics of those seeking to enter the country.¹⁰³ In the 1880s, immigrants were typically economic migrants, unmarried males seeking entry into the United States for employment.¹⁰⁴ Today, detained immigrants could be single individuals, families, or unaccompanied minors.¹⁰⁵ To meet demand, those seeking permission to enter or awaiting deportation are “confined in jails, prisons, tents and other forms of detention,” such as group homes or community shelters.¹⁰⁶

Within the United States, detention facilities are operated by ICE and Border Patrol.¹⁰⁷ Border Patrol oversees temporary detention facilities at ports of entry, where migrants remain until the inspection is completed or until they can be transferred into ICE custody.¹⁰⁸ Individuals within Border Patrol’s custody are supposed to remain there under forty-eight hours.¹⁰⁹ “ICE Enforcement and Removal Operations (hereinafter “ERO”) manages and oversees the nation’s civil immigration detention system, detaining individuals in furtherance of their removal proceedings or to effect their removal from the U.S. after a final order of removal from a federal immigration judge.”¹¹⁰ As a result, they oversee long-term detention, which can take days, months, or even years.¹¹¹ ICE detainees could be housed in “ICE-owned-and-operated facilities, local, county or

101. *Id.*

102. See Kassie, *supra* note 16.

103. See generally Miriam Jordan, *More Migrants Are Crossing the Border This Year. What’s Changed*, N.Y. TIMES (Mar. 5, 2019), <https://www.nytimes.com/2019/03/05/us/crossing-the-border-statistics.html> (highlighting the increase in families migrating to the United States from Central American countries).

104. See generally *Rise of Industrial America: Immigration to the United States*, LIBR. OF CONG., <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/immigrants/> (last visited Jan. 24, 2020) (“Fleeing crop failure, land and job shortages, rising taxes, and famine, many came to the U. S. because it was perceived as the land of economic opportunity.”).

105. See Jordan, *supra* note 103.

106. Kassie, *supra* note 16.

107. *Id.*

108. See *Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL (Jan. 2, 2020), <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency>.

109. See Guillermo Cantor, *Detained Beyond the Limit*, AM. IMMIGR. COUNCIL (Aug. 18, 2016), <https://www.americanimmigrationcouncil.org/research/prolonged-detention-us-customs-border-protection>.

110. *Detention Management*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/detention-management>, (last visited Sept. 8, 2019).

111. See *id.*

state facilities contracted through Intergovernmental Service Agreements, and contractor-owned-and-operated facilities.”¹¹² These facilities largely house adult men and adult women.¹¹³

Although the housing of ICE detainees can be delegated to states or private organizations, ICE maintains oversight of their operations.¹¹⁴ ICE conducts inspections of all the detention centers to ensure that they comply with the Performance-Based National Detention Standards of 2011 (hereinafter “2011 Standards”).¹¹⁵ Each detention center must maintain certain standards to ensure the safety and well-being of all detainees, including offering the opportunity for detainees to work and earn money while detained under the Voluntary Work Program.¹¹⁶ While these standards must be followed, they are not legally binding.¹¹⁷ The 2011 Standards are not “legally enforceable in court and injured detainees have no cause of action or other recourse under them.”¹¹⁸ This is because the standards laid out by ICE are only operational standards, not legally binding regulations; they are policies created by a Federal Agency and not statutes passed by Congress.¹¹⁹ Furthermore, not every detention center is obligated to abide by the 2011 Standards.¹²⁰ “Some detention centers only comply with the less stringent” standards, such as those from 2000 or 2008, “because their contracts with ICE do not specify that they have to comply with the 2011 PBNDS. . . .”¹²¹ As a result, some immigration

112. *Id.* Many contractor-owned-and-operated facilities are operated by for-profit organizations, such as The Geo Group and CoreCivic, the same organizations that operate private criminal prisons. See *infra* Part I.B.ii.

113. *Id.* (Under the Homeland Security Act of 2002, “the Department of Health and Human Services, Office of Refugee Resettlement” obtained the responsibility to care for unaccompanied minors.).

114. *Id.*

115. *Id.*; see also U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19. The Performance-Based National Detention Standards were revised in 2016. *Id.*

116. U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 405.

117. See Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. Rev. 167, 214 (2016).

118. *Id.*

119. See *Immigration Detention Oversight and Accountability*, NAT’L IMMIGRANT JUST. CTR. (May 22, 2019), <https://www.immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability>. ICE is obligated to report to Congress the conditions within each detention facility, as well as if it “enters into new contracts or extends contracts without requiring PBNDS 2011 compliance.” *Id.* These reports are seldom and “cursory in nature,” noting that “compliance with higher standards would be more expensive.” *Id.*

120. See Tovino, *supra* note 117, at 214.

121. *Id.*; see also *Facility Inspections*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/facility-inspections> (last visited Nov. 10, 2019). ICE ERO ensures detention centers comply with the Performance-Based National Detention Standards. *Id.* “Depending on the negotiated contract or agreement, detention facilities that house ICE adult detainees operate under one of three sets of ICE

detainees do not have access to certain programs or protections described in the 2011 standards, depending on when the entity entered into a contractual relationship with ICE.¹²²

2. The For-Profit Prison Industry and Immigration Detainees

Private Prison Corporations began to gain momentum in the 1980s when state-operated detention facilities became overcrowded.¹²³ To alleviate the health and safety concerns associated with overcrowding, private corporations “pledged to build and operate prisons with the same quality of service provided in publicly operated prisons but at a lower cost.”¹²⁴ In 2019, private detention centers held “less than ten percent of the nation’s prison population, but more than seventy percent of immigrant detainees.”¹²⁵ Today, the largest for-profit private prison corporations are CoreCivic and GEO Group.¹²⁶

The Federal Government outsources the operations of federal immigration detention centers to private corporations such as CoreCivic and the GEO Group.¹²⁷ Both corporations are publicly traded on the stock exchange and have multimillion-dollar profits. In June 2019, CoreCivic reported a quarterly revenue of \$490.29 Million.¹²⁸ That same quarter, GEO Group reported a quarterly revenue of \$613.966 Million.¹²⁹ In order to operate detention centers, the Government pays each corporation a

detention standards.” *Id.* Annual inspections are done by a third-party contractor and reports are given to the ERO to review. *Id.*

122. See Tovino, *supra* note 117, at 214.

123. See generally KARA GOTSUCH & VINAY BASTI, THE SENT’G PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS 5 (2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/>.

124. *Id.* at 12.

125. Victoria Law, *End Forced Labor in Immigrant Detention*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html>.

126. GOTSUCH & BASTI, *supra* note 123, at 6. CoreCivic was previously known as Corrections Corporation of America, a private corporation formed in the 1980s. *Id.* at 11.

127. *Id.* at 12; see also *Detention by the Numbers*, *supra* note 17 (showing that the GEO Group and Corrections Corporation of America/CoreCivic together detain approximately 15,000 people in immigration detention per day. These two companies are the top two private prison corporation holders of immigrant detainees).

128. CoreCivic, Inc. (CXW) CEO Damon Hininger on Q2 2019 Results – Earnings Call Transcript, SEEKING ALPHA (Aug. 9, 2019), <https://seekingalpha.com/article/4282303-corecivic-inc-cxw-ceo-damon-hininger-on-q2-2019-results-earnings-call-transcript>.

129. The GEO Group Reports Second Quarter 2019 Results, BUSINESSWIRE (July 30, 2019) <https://www.businesswire.com/news/home/20190730005291/en/The-GEO-Group-Reports-Second-Quarter-2019-Results>.

fixed amount each day for each detained individual.¹³⁰ As a result, these corporations “have an economic incentive to run their facilities as cheaply as possible, relying on detainees to cook meals, mop hallways, scrub toilets, mow lawns and even cut hair.”¹³¹

3. Location of Immigration Detention Centers

Over the past few years, the number of immigration detention facilities has sharply decreased, despite the increase in the number of immigrants detained due to the rise of the for-profit prison industry.¹³² In 2015, “[e]very state in the United States had at least one facility that ICE used to detain individuals.”¹³³ That same year, “Texas, California, Florida, New York, and Arizona” had the most facilities, while “Texas, California, Arizona, Louisiana, and New Mexico” housed the largest detainee populations.¹³⁴ Since then, numerous states have begun closing their detention facilities due to negative publicity regarding the health and safety of detainees.¹³⁵ Public pressure has caused many municipalities to close certain facilities, “while state legislatures are passing bills to push back against immigrant detention statewide.”¹³⁶ This includes ending existing ICE contracts to detain individuals in local and county jails,

130. Law, *supra* note 125.

131. *Id.*

132. See Lora Adams, *State and Local Governments Opt Out of Immigrant Detention*, CTR. FOR AM. PROGRESS: IMMIGR. (Jul. 25, 2019, 9:00 AM), <https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/>.

133. EMILY RYO & IAN PEACOCK, AM. IMMIGR. COUNCIL, *THE LANDSCAPE OF IMMIGRATION DETENTION IN THE UNITED STATES 2* (Dec. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_landscape_of_immigration_detention_in_the_united_states.pdf.

134. *Id.* The study conducted by the American Immigration Council included all types of immigration detention facilities, including both authorized ICE immigration dedicated facilities and non-dedicated facilities, which encompass both short-term processing facilities and over 72-hour housing facilities. See *id.* at 10. ICE Dedicated Facilities only house individuals in ICE custody, while non-dedicated facilities house ICE immigration detainees with other individuals, such as criminal inmates in local and county jails. See *Immigration Detention Oversight and Accountability*, *supra* note 119. It is important to note over 72-hour detention facilities can be either ICE Dedicated Facilities or non-dedicated facilities. *Id.*; see also *Authorized Over 72-Hour Facility List*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://web.archive.org/web/20191129195226/https://www.ice.gov/doclib/detention/Over72HourFacilities.xlsx> (last visited Nov. 29, 2019) (defining Authorized Over 72-Hour Adult Detention Facilities as “ICE’s active adult detention facilities that are authorized to hold detainees for longer than 72 hours”).

135. See Adams, *supra* note 132 (“Reports of inadequate medical care, sexual abuse, and deaths in detention centers across the country have sparked national and community outrage.”).

136. *Id.*; see also Tanvi Misra, *Where Cities Help Detain Immigrants*, BLOOMBERG CITYLAB (July 10, 2018), <https://www.citylab.com/equity/2018/07/where-cities-help-detain-immigrants-mapped/563531/>.

refusing to renew detention contracts, and banning privately run detention centers.¹³⁷ As a result, detainees are often transferred to other facilities:

Former Assistant Secretary Julie Myers repeatedly emphasized that ICE maintains the discretion to detain people wherever there is bed space. As a result, the government reports publicly that “[d]etainees are often transferred from one facility to another.” Immigrants are treated like so many boxes of goods—shipped to the warehouse with the cheapest and largest amount of space available to store them.¹³⁸

Many detainees, however, face hardship as a result of transferring detention facilities.¹³⁹ Once relocated, it becomes difficult to find an attorney, contact family members, receive medication, and find an available job within the detention facility.¹⁴⁰

Today, a majority of ICE Detention Facilities are primarily along the Southern Border of the United States.¹⁴¹ In 2019, ICE released a list of authorized seventy-two hour detention facilities where adult detainees are held for longer than seventy-two hours, sometimes several months or years.¹⁴²

137. Adams, *supra* note 132; see also Steve Gorman, *California Bans Private Prisons and Immigration Detention Centers*, REUTERS (Oct. 22, 2019, 5:40 PM), <https://www.reuters.com/article/us-california-prisons/california-bans-private-prisons-and-immigration-detention-centers-idUSKBN1WQ2Q9> (“Several states, including New York, Illinois and Nevada, have adopted similar bans on private prisons, and nearly half of all states have no such facilities.”); Andrea Castillo, *ICE May Circumvent California’s Ban on Private Immigrant Detention Centers*, L.A. TIMES (Nov. 9, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-11-09/ice-ignoring-california-ban-private-immigrant-detention-centers>.

138. ALISON PARKER, HUM. RTS. WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES* 20 (David Fathi et al. eds. 2009), <https://www.hrw.org/report/2009/12/02/locked-far-away/transfer-immigrants-remote-detention-centers-united-states>.

139. See *id.* at 66.

140. See *id.* at 3-5.

141. See RYO & PEACOCK, *supra* note 133, at 11; see also *Detention Facility Locator*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/detention-facilities> (last visited Nov. 10, 2019) [<https://web.archive.org/web/20191110230755/https://www.ice.gov/detention-facilities>]; *Authorized Over 72-Hour Facility List*, *supra* note 134.

142. See *Authorized Over 72-Hour Facility List*, *supra* note 134 (ICE has subsequently updated the number of seventy-two hour detention centers in 2020 to reflect an increase in facilities along the southern border.); see also Isabela Dias, *ICE Is Detaining More People Than Ever—And For Longer*, PAC. STANDARD MAG. (Aug. 1, 2019), <https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer> (“[T]he average length of stay in [immigrant] detention went from 28 to 46 days” under the Trump Administration.).

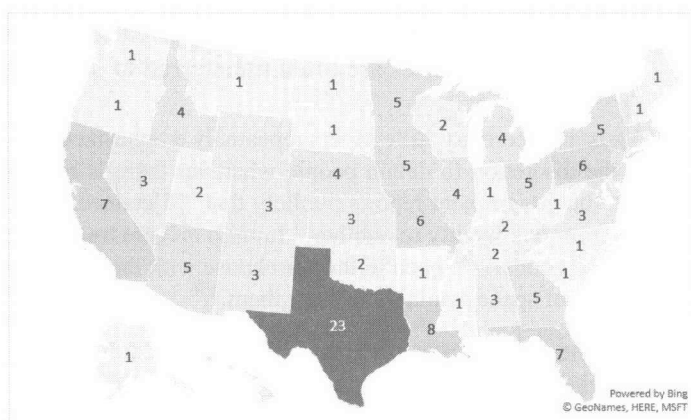


FIGURE 1: Number of Over-72 Hour Detention Facilities by State.

In the chart above, Texas, Louisiana, California, and Florida have the largest number of long-term detention facilities.¹⁴³ Texas has twenty-three long-term detention facilities in the United States, while Louisiana, has only eight long-term detention facilities.¹⁴⁴ The total number of long-term detention facilities detention facilities along the border is about sixty-two facilities or thirty-nine percent of the total long-term detention facilities currently open.¹⁴⁵

The number of detention facilities and the location of such facilities is important when advocating for immigrant rights through the court system. A majority of cases are brought in federal courts that have a large amount of immigrant detainees or detention centers in their jurisdiction.¹⁴⁶ Likewise, the number of cases brought in federal court depends on the political party of the presidential administration, since changes in administration result in changes to immigration policy.¹⁴⁷ After the 2016 Presidential election, cases began to flood federal courts in the Ninth, Eighth, and Tenth Circuits regarding the voluntary work program in long-term detention facilities.¹⁴⁸ Since 2017, twenty-four

143. See *Authorized Over 72-Hour Facility List*, *supra* note 134.

144. *Id.*

145. *Id.*

146. See PARKER, *supra* note 138, at 6.

147. See generally Misra, *supra* note 136 (discussing how contracts between municipalities and ICE “have come up under both Republican and Democrat administrations.”).

148. See generally Mike Carter, *Judge: Fight Can Continue to Force Tacoma Detention Center to Pay Immigrants Minimum Wage, Instead of \$1 a Day*, SEATTLE TIMES (Aug. 8, 2019), <https://www.seattletimes.com/seattle-news/judge-again-refuses-to-dismiss-lawsuit-over-1-a-day-wages-for-immigrant-detainee-workers/> (highlighting how the state of Washington was aware of the one dollar a day program but chose not to file suit until 2016).

by the ACA “and make no distinction between criminal inmates and immigration detainees” during the day-to-day operations.¹⁵⁸

Similar to prison inmates, immigrant “[d]etainees must wear government-issued uniforms and wristbands with identifying information at all times.”¹⁵⁹ Upon entering a detention facility and passing through classification, detainees are assigned “color-coded uniforms and wristbands,” with dark red indicating high security, bright orange indicating medium security, and dark blue indicating lowest security.¹⁶⁰ These classification standards are derived from the American Correctional Association’s Standards for Adult Local Detention, providing classification guidelines for criminal correctional facilities.¹⁶¹ Furthermore, immigrant detainees “can be subjected to discipline and segregation,” such as solitary confinement, similar to criminal inmates.¹⁶²

II. THE VOLUNTARY WORK PROGRAM

A. Overview of the Voluntary Work Program in Detention Centers

For-Profit Prison Corporations are able to minimize their operational costs by implementing a “Voluntary Work Program” for immigrant detainees, however, they are not required to offer the program.¹⁶³ Under the guidance of the United States Immigration and Naturalization Service, an agency under the authority of the United States Department of Justice, “[e]very facility with a work program will provide detainees the opportunity to work and earn money.”¹⁶⁴ The Voluntary Work Program allows immigrant detainees housed at over seventy-two Hour Detention Facilities to work and earn a wage while in detention, as long as work opportunities are available.¹⁶⁵ The goal is to “increase detainee productivity” and “morale,” while mitigating “disciplinary incidents.”¹⁶⁶

158. PHYSICIANS FOR HUM. RTS., BURIED ALIVE: SOLITARY CONFINEMENT, IN THE US DETENTION SYSTEM 12 (Apr. 2013).

159. RYO & PEACOCK, *supra* note 133, at 5.

160. U.S. IMMIGR. & CUSTOMS ENF’T, ICE/DRO DETENTION STANDARD: CLASSIFICATION SYSTEM (2008), https://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf.

161. *See Standards*, *supra* note 155.

162. RYO & PEACOCK, *supra* note 133, at 5.

163. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 405.

164. *See* IMMIGR. & NATURALIZATION SERV., INS DETENTION STANDARD: VOLUNTARY WORK PROGRAM (2000), <https://www.ice.gov/doclib/dro/detention-standards/pdf/work.pdf>.

165. *See* IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 1.

166. *Id.* at 405.

Immigration detainees are allowed to register for the Voluntary Work Program if they are at a detention facility that offers the program and their classification, or security level, allows them to work.¹⁶⁷ The ICE Detention Standards for the Voluntary Work Program emphasize that the program is voluntary; no detainee is forced to complete a work assignment.¹⁶⁸ Under the program, no worker is allowed to work more than eight hours a day, or forty hours per week, and must receive compensation for the work completed.¹⁶⁹

B. Application of the Voluntary Work Program

Although there are restrictions on the types of jobs immigrant detainees can have and the number of hours that can be worked, some detention centers do not strictly abide by the Voluntary Work Program's guidelines.¹⁷⁰ There have been instances where detainees worked beyond the maximum allowed hours or were punished for not formally participating in the program.¹⁷¹ Immigrant detainees who do not participate in the program are threatened to be placed in solitary confinement, while those who do work could lose their jobs if they complain of sub-par working conditions, strike, or refuse to work more than eight hours a day.¹⁷² In October 2015, nine detainees at the Aurora Detention Facility in Colorado sued GEO Group alleging that they were forced to work, with no compensation, regardless if they were enrolled in the Voluntary Work Program.¹⁷³ The complaint filed states that "GEO or its agents . . . randomly selected six detainees per pod each day and forced them to clean the pods . . . for no pay and under the threat of solitary confinement as a punishment for any refusal to work."¹⁷⁴ GEO Group

167. *Id.*

168. *Id.* Immigration detainees are obligated to clean their living areas to ensure their health and safety. *Id.* at 21. This includes making their beds and cleaning clutter. *Id.*

169. *Id.* at 407.

170. See generally Molly Hennessy-Fiske, *Paid \$1 to \$3 a day, unauthorized immigrants keep family detention centers running*, L.A. TIMES (Aug. 15, 2015), <https://www.latimes.com/nation/immigration/la-na-detention-immigration-workers-20150803-story.html> (critics questioning "how detainees are used to keep detention centers running.").

171. See *id.*

172. See Sinha, *supra* note 22, at 36.

173. See *Menocal v. Geo Grp., Inc.*, 113 F. Supp. 3d 1125, 1128 (D. Colo. 2015), *aff'd* *Menocal v. GEO Grp., Inc.*, 882 F.3d 905 (10th Cir. 2018); see also Zusha Elinson, *Detention Operators Face Suits Over \$1-a-Day Work Programs for Migrants*, WALL ST. J. (Jul. 21, 2018), <https://www.wsj.com/articles/detention-operators-face-suits-over-1-a-day-work-programs-for-migrants-1532170801> ("Geo Group is appealing the 10th Circuit decision to the Supreme Court.").

174. Class Action Complaint for Unpaid Wages and Force Labor at 3, *Menocal v. Geo Grp., Inc.*, 14-cv-02887 (D. Colo. 2015).

moved to dismiss, but the court denied their motion, stating that the plaintiffs could proceed with their claim for unjust enrichment.¹⁷⁵

Under the 2011 Standards, detainees who voluntarily choose to participate in the program must be paid a minimum of one dollar per day of work.¹⁷⁶ Detention facilities who are required to abide by the 2011 Standards are given the choice to pay immigrant detainees a higher wage. In contrast, detention facilities that are required to follow the 2000 Standards only need to pay workers in the program a set stipend of one dollar per day.¹⁷⁷ As a result, many detainees are paid only one dollar per day, despite detention facilities having the ability to pay more.¹⁷⁸ This equates to twelve and a half cents per hour for an eight-hour workday.

In 1990, detainees from a detention center in Texas filed a claim alleging the one dollar per day policy violated federal minimum wage laws as defined by the Fair Labor Standards Act.¹⁷⁹ The Fifth Circuit Court Of Appeals in *Guevara* held that the one dollar per day wage did not violate federal minimum wage laws because the Immigration and Naturalization Service (hereinafter “INS”) authorized the wage and did not classify the detainees as employees.¹⁸⁰ The court determined that immigration detainees are not classified as employees for purposes of the Fair Labor Standards Act since they are classified as volunteers, not employees.¹⁸¹ Since then, detention facilities have continued to pay “\$1/day for work that minimum wage laws would require compensation at \$29-\$58/day,” such as “cleaning up cells, working in the kitchen, and performing barber services.”¹⁸² Many detainees who are part of the

175. *Menocal*, 113 F. Supp. 3d at 1133.

176. See generally U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 407 (“Detainees shall receive monetary compensation for work...[of] at least \$1.00 (USD) per day.”).

177. See IMMIGR. & NATURALIZATION SERV., *supra* note 164, at 4.

178. Kristine Phillips, *Thousands of ICE Detainees Claim They Were Forced Into Labor, a Violation of Anti-Slavery Laws*, WASH. POST (Mar. 5, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/05/thousands-of-ice-detainees-claim-they-were-forced-into-labor-a-violation-of-anti-slavery-laws/>.

179. See Yana Kunichoff, “Voluntary” Work Program Run in Private Detention Centers Pays Detained Immigrants \$1 a Day, TRUTHOUT (July 27, 2012), <http://truth-out.org/news/item/10548-voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day>; see also *Alvarado Guevara v. INS*, 902 F.2d 394, 394 (5th Cir. 1990) (“Current and former alien detainees brought action against Immigration and Naturalization Service (INS) ... for violation of Fair Labor Standards Act.”).

180. See Kunichoff, *supra* note 179; see also *Guevara*, 902 F.2d at 396-97 (“Despite this apparent exchange of money for labor, Plaintiffs are not covered by the FLSA.”).

181. *Guevara*, 902 F.2d at 396.

182. Kunichoff, *supra* note 179; see also Seth H. Garfinkel, *The Voluntary Work Program: Expanding Labor Laws to Protect Detained Immigrant Workers*, 67 CASE W. RES. L. REV. 1287, 1293 (2017), <https://scholarlycommons.law.case.edu/caselrev/vol67/iss4/19>.

program, however, may not receive any pay, depending on which standards apply to their detention center and whether or not their detention center classifies them as volunteers.¹⁸³ “[A]bout five percent of detainees in the aggregate are not paid for their labor at all” because they are seen as volunteers and not employees.¹⁸⁴ As a result, corporations such as CoreCivic and GEO Group have been able to save \$40 million or more a year” in operational costs by paying less than minimum wage for work completed by detainees.¹⁸⁵

C. *The Reality of a \$1 Per Day Wage*

For many immigration detainees, enrollment in the Voluntary Work Program is necessary to obtain basic necessities within the detention center.¹⁸⁶ Private prison corporations, such as GEO Group, contract with outside vendors to run commissary stores, similar to convenience stores, within detention centers.¹⁸⁷ When detainees get paid through the Voluntary Work Program, their wages get sent to a commissary account, similar to the accounts criminal inmates receive in prison.¹⁸⁸ These funds can then be used to buy items, such as toothpaste or snacks from the commissary store.¹⁸⁹ GEO Group and other for-profit prison corporations obtain a commission from each item purchased at the store.¹⁹⁰

When immigrants are processed at detention centers, they are only given one bar of soap and shampoo in addition to their facility uniform.¹⁹¹

183. See Sinha, *supra* note 22, at 33.

184. *Id.*; Press Release, U.S. Comm’n On C.R., U.S. Commission on Civil Rights Concerned with Alleged Abusive Labor Practices at Immigration Detention Centers, (Dec. 21, 2017), <https://www.aila.org/infonet/us-commission-civil-rights-concerned-alleged> (last visited Jan. 24, 2020) (“In the case of privately-run detention centers, the Commission is concerned with the added pressure to coerce detainees to perform necessary labor in order to maximize profits”).

185. Sinha, *supra* note 22, at 23.

186. See generally Michelle Conlin & Kristina Cooke, *\$11 Toothpaste: Immigrants Pay Big for Basics at Private ICE Lock-Ups*, REUTERS (Jan. 18, 2019), <https://www.reuters.com/article/us-usa-immigration-detention/11-toothpaste-immigrants-pay-big-for-basics-at-private-ice-lock-ups-idUSKCN1PC0DJ> (“\$1-a-day salary at the privately run Adelanto Detention Facility did not stretch far.”).

187. See *id.*

188. See generally *id.* (commissary accounts to house funds donated by family members); U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19 at 407 (pay is given through a system established by the detention facility); *Inmate Account Deposits*, SHERIFF’S OFF. OF WASH. CTY., <https://www.co.washington.or.us/Sheriff/Jail/HelpInmate/inmate-account-deposits.cfm> (last visited Feb. 10, 2020) (describing how inmate accounts work in Washington prisons).

189. See Conlin & Cooke, *supra* note 186.

190. See *id.*

191. See Liz Robbins, *‘A Light for Me in the Darkness’: For Migrant Detainees, a Bond Forged by Letter*, N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/us/immigrant-detainee->

Under the ICE Detention Standards, “all new detainees [are] to be issued one uniform shirt and one pair of uniform pants or one jumpsuit; one pair of socks; one pair of underwear; and one pair of facility issued footwear.”¹⁹² Detainees need to use their commissary accounts to purchase other items.¹⁹³ At the Otay Mesa Detention Center in San Diego, California, care packages cannot be sent to detainees without prior approval.¹⁹⁴ Therefore, most items need to be purchased from the facility’s commissary store.¹⁹⁵ For example, detainees at Otay Mesa are given a pair of sandals upon entry, but they would need to purchase a pair of sneakers from the commissary store to use the facility’s gymnasium.¹⁹⁶ In addition to sneakers, the Otay Mesa commissary store sells books and magazines, and essentials such as additional soap.¹⁹⁷

While commissary stores within detention centers allow immigrant detainees to purchase items for comfort, some facilities use the store to sell basic necessities at marked up prices rather than providing them to detainees for free.¹⁹⁸ Necessities, such as toilet paper, therefore become unaffordable and sometimes unobtainable for immigrant detainees.¹⁹⁹ At the Stewart Detention Center in Georgia, detainees need to work through the Voluntary Work Program to purchase toilet paper.²⁰⁰ In a lawsuit filed against CoreCivic, detainees alleged that “items like toilet paper, soap, toothpaste, and lotion” were not provided and had to be purchased “from CoreCivic’s commissary—often using payment earned in the work

letters.html; XAVIER BECERRA, THE CALIFORNIA DEPARTMENT OF JUSTICE’S REVIEW OF IMMIGRATION DETENTION IN CALIFORNIA 73, 123 (Feb. 2019), <https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf>; U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 63.

192. OFF. OF INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES 21 (2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_07-01_Dec06.pdf.

193. See Conlin & Cooke, *supra* note 186.

194. See *Otay Mesa Detention Center*, U.S. IMMIGR. AND CUSTOMS ENF’T, <https://www.ice.gov/detention-facility/otay-mesa-detention-center> (last visited Feb. 10, 2020).

195. See *generally Otay Mesa Detention Center (ICE) – CoreCivic*, INMATEAID, <https://www.inmateaid.com/prisons/otay-mesa-detention-center-ice-corecivic> (Dec. 11, 2019) (highlighting the importance of the commissary store since unapproved packages will be destroyed).

196. See Robbins, *supra* note 191 (discussing how volunteers sent money to detainee accounts to purchase sneakers).

197. See *Otay Mesa Detention Center (ICE) – CoreCivic*, *supra* note 195.

198. See Conlin & Cooke, *supra* note 186.

199. See *id.*

200. See Madison Pauly, *Immigrant Detainees Claim They Were Forced to Clean Bathrooms to Pay for Their Own Toilet Paper*, MOTHER JONES (Apr. 18, 2018), <https://www.motherjones.com/politics/2018/04/immigrant-detainees-claim-they-were-forced-to-clean-bathrooms-to-pay-for-their-own-toilet-paper/>.

program.”²⁰¹ In the commissary store at the Adelanto Detention Facility in Adelanto, California, a can of tuna fish is sold for three dollars and twenty-five cents, “four times the price at a Target store” nearby.²⁰² A miniature stick of deodorant costs three dollars and twenty-five cents and “a 4oz. tube of Sensodyne toothpaste, available on Amazon.com for \$5.20” costs eleven dollars and two cents.²⁰³ At a wage of twelve and a half cents per hour, an individual needs to work about twelve full days to be able to afford toothpaste.²⁰⁴ As a result, basic items needed for personal hygiene are perceived as an “impossible luxury.”²⁰⁵

Additionally, immigration detainees use their commissary accounts to purchase phone credits.²⁰⁶ In 2013, the American Civil Liberties Union brought a case in the United States District Court Northern District of California alleging “insufficient and restrained access to affordable calling options” within detention centers is “a violation of immigrants’ constitutional rights.”²⁰⁷ At the time, a ten-minute domestic phone call cost five dollars and fifty cents, consisting of a three dollars processing fee and twenty-five cents per minute fee.²⁰⁸ The parties reached a settlement agreement with ICE in 2016 to ensure calls are not cost-prohibitive.²⁰⁹ However, phone calls remained cost-prohibitive.²¹⁰ In 2018, detainees were charged up to 20 cents per minute to call family members.²¹¹ By 2019, the cost increased to one dollar per minute.²¹² “For detainees who earn one dollar to three dollars per day in exchange for participating in ‘voluntary work programs,’ a fifteen-minute phone call could easily exceed a day’s paycheck.”²¹³ As a result, detainees have

201. *Id.*; see also *Barrientos v. Corecivic, Inc.*, 332 F. Supp. 3d 1305, 1308 (M.D. Ga. 2018) (denying CoreCivic’s motion to dismiss), *appeal filed* No. 4:18-cv-00070-CDL, 2020 U.S. Dist. LEXIS 229939 (M.D. Ga. Dec. 8, 2020).

202. See Conlin & Cooke, *supra* note 186.

203. *Id.*

204. See generally *id.*; U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19 (one dollar a day divided by eight hours is twelve and a half cents per hour).

205. See Conlin & Cooke, *supra* note 186.

206. *Id.*

207. *Lyon v. ICE, et al.*, ACLU, <https://www.aclu.org/cases/lyon-v-ice-et-al> (Jan. 5, 2016).

208. See *id.*; Complaint at 14, *Lyon v. ICE*, No. 3:13-cv-05878-EMC (N.D. Cal. Dec. 19, 2013).

209. See Press Release, ACLU, Settlement Agreement and Release (Jun. 10, 2016), <https://www.aclu.org/legal-document/lyon-v-ice-et-al-settlement-agreement>.

210. See Shannon Najmabadi, *Detained migrant parents have to pay to call their family members. Some can’t afford to*, TEX. TRIB. (July 3, 2018), <https://www.texastribune.org/2018/07/03/separated-migrant-families-charged-phone-calls-ice/> (many detainees cannot afford to call their children).

211. *Id.*

212. See Conlin & Cooke, *supra* note 186.

213. Najmabadi, *supra* note 210.

difficulty contacting their family members or an attorney due to the costs of phone calls.²¹⁴

The high costs of phone calls and commissary goods allow private prison corporations to “harness cheap inmate labor to lower operating costs and boost profits.”²¹⁵ By keeping costs high, they ensure that immigration detainees enroll in the Voluntary Work Program, despite subpar wages.²¹⁶ Despite backlash from activists, GEO Group maintains the position that the Voluntary Work Program is voluntary and that wages are in compliance with labor laws.²¹⁷

CoreCivic and GEO Group argue that paying detainees one dollar a day does not violate any laws; neither state nor federal minimum wage laws apply to immigration detainees.²¹⁸ GEO Group Chief Executive George Zoley stated that “the one dollar per day payment for immigration detention detainees was established by Congress” and clearly expressed in their contracts to operate detention facilities.²¹⁹ Therefore, unless there is a change in law, the GEO Group will “continue to pay the stipulated amount of one dollar per day,” while charging above-market rates even for basic necessities in its commissary stores.²²⁰

III. LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION OF WAGES IN DETENTION CENTERS

A. Federal Authorization for the Department of Justice to Pay Immigration Detainees

Before Congress passed the Immigration and Nationality Act (hereinafter “INA”) in the 1950s, the concept of paid labor in detention centers was debated heavily.²²¹ In 1950, Congress passed Section 6 of the Department of Justice Expenditure Bill (hereinafter “1950 Expenditure Bill”), authorizing the Department of Justice to appropriate funds for the payment of “aliens . . . while held in custody under the immigration laws, for work performed” as an “administrative expense[.]”²²² Under section

214. See Conlin & Cooke, *supra* note 186.

215. *Id.*

216. See *id.*

217. See *id.*

218. See Phillips, *supra* note 178.

219. Elinson, *supra* note 173.

220. *Id.*

221. See generally Sinha, *supra* note 22, at 3.

222. [A8] *Id.* at 26 (citing *Hearing on H.R. 4645 and S. 2864 Before Subcomm. No. 2 of the H. Comm. On the Judiciary*, 81st Cong. 3 (1950) (language from H.R. 4645)).

6(d) of the Bill, the payment was to be at a rate “specified from time to time in the appropriation act involved.”²²³ During congressional hearings, the suggested pay rate was proposed at “eighty cents or a dollar a day” by the Department of Justice.²²⁴ It was later decided that the pay rate would be a fixed amount to be determined by Congress through its annual budget appropriations.²²⁵

Through the 1950 Expenditure Bill, Congress fixed the amount of pay detainees could receive at \$1 per day.²²⁶ The same year the 1950 Expenditure Bill was passed, Congress codified section 6(d) in 8 U.S.C. § 1555, as an immigration service expense.²²⁷ As a result, one dollar a day became the set rate of pay until Congress discussed the Appropriations Act of 1979.²²⁸ Today, that one dollar would be “equivalent to about \$ 9.80” per day for eight hours of work.²²⁹ The one dollar per day wage set in 1978 has never been adjusted for inflation or increased.²³⁰

B. Congressional Power to Increase the Statutory \$1 Per Day Pay Rate

Although Congress has the statutory authority to increase the amount of pay detainees could receive, it has chosen not to do so.²³¹ In 1978, Congress began discussing a new appropriations bill to fund the Federal Government and the pay rate of immigrant detainees was at the forefront of discussions.²³² That same year, the 95th Congress passed Public Law 95-86, known as Department of Justice Appropriation Act of 1978, stating that “payment of allowances” could not exceed one dollar per day for aliens “while held in custody under the immigration laws, for work performed” while in detention facilities.²³³ The following year, INS recommended removing the one dollar wage rate from the Department of Justice Appropriation Act of 1979, stating that it would be redundant.²³⁴

223. *Id.*

224. *Id.* at 27.

225. *Id.*

226. *Id.*

227. See Garfinkel, *supra* note 182, at 1288; see also 8 U.S.C. § 1555 (1950).

228. See Sinha, *supra* note 22, at 30.

229. *Id.* at 27.

230. See Law, *supra* note 1.

231. See Garfinkel, *supra* note 182, at 1290.

232. See Sinha, *supra* note 22, at 30.

233. *Chen v. Geo Group, Inc.*, 287 F. Supp. 3d 1158, 1165-66 (W.D. Wash. 2017); Department of Justice Appropriation Act of 1978, Pub. L. No. 95-86, 91 Stat. 419, 426 (1977).

234. See Jacqueline Stevens, *One Dollar Per Day: The Slaving Wages of Immigration Jail, From 1943 to Present*, 29 GEO. IMMIGR. L.J. 391, 465 (2015) (“The INS wrote that it ‘propose[d] deletion

Both members of Congress and representatives of the INS believed that the set wage rate would be included in the Department of Justice's Authorization Act of 1979.²³⁵ The 96th Congress passed the Department of Justice Appropriation Act of 1979 with no nominal value for the wages earned by immigration detainees.²³⁶ Instead, the provision was left intentionally broad with the general understanding that the wage would continue to be one dollar per day and that Congress could choose to increase the amount through the annual appropriations bill if needed.

In 1979, members of the House and Senate appropriations committees discussed increasing the pay for detainees from one dollar to four dollars per day while negotiating the Department of Justice Appropriation Act of 1980.²³⁷ In the Department of Justice's budget proposal, the department suggested increasing the "payment of allowances (at a rate not in excess of \$ 4 per day)" for immigration detainees.²³⁸ When asked why the new language was included in the proposed bill, the acting Commissioner of the INS, David Crosland, compared the amount to the wages prisoners in criminal detention receive.²³⁹ Furthermore, Crosland highlighted the cap in wages would reduce the cost of maintenance and operations in detention facilities.²⁴⁰ In doing so, Jacqueline Stevens, a Professor at Northwestern University, claims Crosland's "statement ignore[d] the legislative history of immigration detention, explicitly rejecting connotations of prison labor" and the development of immigration detention as a civil administrative procedure.²⁴¹ Soon after, the House Appropriations Committee rejected the proposed increase.²⁴²

The following year, the Senate Appropriations Committee voted to amend the Department of Justice Appropriation Act of 1981 to increase the daily wage rate from one dollar to four dollars.²⁴³ Again, the House Appropriations Committee rejected the increase. Amendment 13 was introduced to reconcile the differences in the Appropriations Act, thus

of language which is proposed for inclusion in the Department of Justice Authorization Act,' implying the rate of payments was redundant.")

235. *Id.* at 465-66.

236. *See id.* at 466.

237. *See id.*

238. *Id.*

239. *See id.*

240. *See id.*

241. *Id.*

242. *Id.* at 467.

243. *See id.*

removing the set wage provision.²⁴⁴ The final appropriations bill was passed with the amount of wages to be paid to immigration detainees omitted.²⁴⁵ Forty years later, Congress has not revised nor increased the pay per day rate from one dollar.²⁴⁶

In 1992, Joan C. Higgins, Assistant Commissioner in the General Counsel's Office of the INS issued a legal opinion stating that Congress "discontinued" the practice of setting a pay rate for detained immigrant workers.²⁴⁷ Higgins claimed that because Congress did not include a set pay amount in the Department of Justice Appropriation Act of 1980, the legislature no longer intended to establish a set pay wage; 1979 was the last year Congress passed a set amount for detainee labor pay.²⁴⁸ While Congress has chosen not to pass a set pay amount with the annual Appropriations Bill, the Department of Justice recognizes that the omission does not absolve federal detention facilities from paying a wage for detainee labor.²⁴⁹ Immigrant detainee workers are still entitled to receive pay for their work. However, for-profit prison corporations such as GEO Group and CoreCivic, have argued that the federal requirement to pay a wage is not equivalent to the value of the federal minimum wage.²⁵⁰ Instead, the required minimum wage for immigration detainees in for-profit detention centers, if any, is the one dollar a day established in 1979.²⁵¹ Today, the 1992 legal opinion issued by the General Counsel's Office of the INS is at the forefront of most arguments in favor of the one dollar a day wage for detainees.²⁵²

244. *Id.*

245. *See id.*

246. Law, *supra* note 1.

247. *See* U.S. DEP'T OF JUST., IMMIGR. & NATURALIZATION SERV. GEN. COUNSEL'S OFF., LEGAL OPINION YOUR CO 243-C MEMORANDUM OF NOVEMBER 15, 1991.

248. *See id.*; *see also* Department of Justice Appropriations Act, 1980, Pub. L. No. 96-68, 93 Stat. 416, 420 (1979).

249. *See* U.S. Dep't of Justice, *supra* note 247 (finding that "[t]his failure to set the rate of compensation . . . does not abrogate Service authority to pay aliens for labor performed while in Service custody.").

250. *See* Order on Defendant the GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties at 2-3, *Chen v. Geo Grp.*, 287 F. Supp. 3d 1158 (W. D. Wash. 2017) (No. 3:17-cv-05769-RJB); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 U.S. Dist. LEXIS 81091, at *55 (S.D. Cal. May 14, 2018).

251. *See* Order on Defendant the GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties, *supra* note 250, at 2-3.

252. *See id.*

C. Congressional Silence and the Preemption Doctrine

In 2017, a group of immigration detainees at the Northwest Detention Center in Washington filed a class-action lawsuit against GEO Group, the private prison corporation that ran the facility.²⁵³ The complaint initially alleged that detainees, such as Mr. Chao Chan, were entitled to Washington State Minimum Wage.²⁵⁴ Within the detention center, GEO Group “relie[d] upon detainees for its grounds maintenance, cooking, laundry, cleaning, and other services,” while only paying detainees “\$1 per day.”²⁵⁵ Due to the work they completed, Mr. Chan and the other claimants believed that they were entitled to Washington’s Minimum Wage, which was eleven dollars per hour, at the time the suit was filed.²⁵⁶

In response, the GEO Group moved to dismiss the claim through the Supremacy Clause, arguing that federal law preempts state law.²⁵⁷ Under the preemption doctrine, “[s]tates are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.”²⁵⁸ To determine whether a law is preempted, courts look at the text of a statute, as well as the legislative intent behind a law to see if there is evidence that Congress intended to regulate a certain area or field.²⁵⁹ Through its motion to dismiss, the GEO Group highlighted the powers delegated to the Department of Homeland Security, including ICE, by Congress for purposes of regulating immigration.²⁶⁰ These federal statutes include the general powers of the Secretary of Homeland Security, the ability for the Attorney General to detain individuals during removal proceedings, and the discretion given to INS when determining immigration service expenses.²⁶¹ In doing so, the GEO Group argued that Congress intended to regulate the wages of detainees and delegate its authority to ICE, as exemplified through ICE’s operation of the Voluntary Work Program.²⁶²

253. See Order on the Defendant the GEO Group, Inc.’s Motion to Dismiss Class Action Complaint for Damages at 1-2 *Chen v. Geo Grp.*, 287 F. Supp. 3d 1158 (W. D. Wash. 2017) (No. 3:17-cv-05769-RJB).

254. *Id.* at 2.

255. *Id.*

256. *Id.*

257. See *Chen*, 287 F. Supp. 3d at 1165.

258. *Id.* (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

259. *Id.* at 1163.

260. *Id.* at 1165.

261. *Id.* (citing 8 U.S.C. §§ 1103, 1225, 1226, 1226a, 1231, 1324a, 1555(d)).

262. See *id.*

In its decision, however, the court notes that 8 U.S.C. § 1555 mentions the payment of wages to immigration detainees.²⁶³ The court held that although “Congress has abandoned direct appropriations payment of allowances” by not setting a wage for detainee labor since 1979, nothing in the legislative history of the statute shows that “Congress intended to preempt state law regarding detainee wages.”²⁶⁴ Instead, the court highlights that the current one dollar a day policy no longer comes from Congress, but rather is derived from the establishment of the Voluntary Work Program.²⁶⁵ Since the 2011 Standards expressly state that the “compensation is at least \$1.00 (USD) per day,” it is a matter of policy instead of statutory authority.²⁶⁶ “[T]he Voluntary Work Program [and recommended wage] is an ICE policy with no preemptive force at law.”²⁶⁷

Similar to Chen, the State of Washington filed a lawsuit against the GEO Group to enforce Washington’s State Minimum Wage Laws.²⁶⁸ The claim was brought on behalf residents of Washington State to protect their “health, safety, and wellbeing” through the state’s economic health.²⁶⁹ In the complaint, the State alleges that the GEO Group was unjustly enriched by relying on “detainees for a wide range of services, including laundry service, cleaning general living spaces, buffing floors, and painting.”²⁷⁰ In return, the GEO Group paid detainees only one dollar per day or “sometimes paid detainees with candy and snacks instead of money.”²⁷¹ Washington argued that since the GEO Group is an employer and that the immigration detainees in its detention centers are employees, the corporation must abide by Washington’s Minimum Wage laws.²⁷² Similar to Chen, the GEO Group moved to dismiss the case, but its motion was denied for failure to show that the Congressional intent of 8 U.S.C. § 155(d) preempted state minimum wage laws.²⁷³

263. *See id.*

264. *Id.* at 1166.

265. *Id.*

266. U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19, at 407.

267. *See* Chen, 287 F. Supp. 3d at 1166; *see also* Novoa v. Geo Grp., No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 117129*, at *13 (C.D. Cal. June 21, 2018); Owino v. CoreCivic, Inc., No. 17-CV-1112 JLS (NLS), 2018 U.S. Dist. LEXIS 81091*, at *54 (S.D. Cal. May 14, 2018) (“The Court finds that Congress has not preempted state law in the field of immigration detainee labor and employment.”).

268. *See* Washington v. GEO Grp., 283 F. Supp. 3d 967, 972 (W.D. Wash. 2017).

269. *Id.* at 973.

270. *Id.*

271. *See id.* at 973; U.S. Comm’n On C.R., *supra* note 184.

272. *See* GEO Grp., 283 F. Supp. 3d at 973.

273. *See id.* at 977.

Through the holdings in *Chen* and *Washington*, the United States District Court for the Western District of Washington emphasized the uncertainties surrounding the wages paid to immigration detainees.²⁷⁴ The largest uncertainty is whether the one dollar per diem rate set in the Department of Justice Appropriations Bill of 1979 still applies and is binding on detention facilities.²⁷⁵ There is no question that Congress still retains the authority to set a per diem rate and that detention centers are required to pay their immigration detainee labors.²⁷⁶ However, the court chose to ignore the implications of Congress's omission or refusal to a new per diem rate.²⁷⁷ This leaves open the question of whether the one dollar per day amount is binding or if it can be increased. The Court looked for other avenues that mandate a one dollar per diem rate, such as the ICE 2011 Detention Standards, but highlighted that the set amount was not binding.²⁷⁸ In doing so, the Court reinforced the notion that immigration detainees need to be paid at least the one dollar minimum for their labor, while also leaving the door open to explore whether state minimum wage laws could be binding.²⁷⁹ As a result, the litigation continued and subsequent motions were filed.²⁸⁰

In 2018, the GEO Group filed a second motion to dismiss the class action filed by Mr. Chan.²⁸¹ Unable to dismiss the complaint on grounds that Washington State's minimum wage did not apply, the GEO Group filed a motion to dismiss for failure to join mandatory government defendants since ICE was not listed as a defendant in the action.²⁸² Although the motion was one for failure to add a mandatory party, its basis focused on the underlying claim; the motion to dismiss had the legal opinion issued by the General Counsel's Office of the INS listed as an appendix.²⁸³ The court recognized this in its Order when it stated that ICE is not a mandatory party because the one dollar a day pay rate is not an

274. *See id.*; *Chen v. GEO Grp.*, 287 F. Supp. 3d 1158, 1166 (W.D. Wash. 2017).

275. *See Chen*, 287 F. Supp. 3d at 1165-66; *Geo Grp.*, 283 F. Supp. 3d at 977.

276. *See Chen*, 287 F. Supp. 3d at 1166; *Geo Grp.*, 283 F. Supp. 3d at 977.

277. *See Chen*, 287 F. Supp. 3d at 1166; *Geo Grp.*, 283 F. Supp. 3d at 977.

278. *See Chen*, 287 F. Supp. 3d at 1162.

279. *Id.* at 1166.

280. *See generally* Order on Defendant the GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties, *supra* note 250, at 1 (showing a subsequent motion filed by GEO Group, Inc. following this decision).

281. *See id.*

282. *See id.* at 1-2; Order on the Defendant the GEO Group, Inc.'s Motion to Dismiss Class Action Complaint for Damages, *supra* note 253, at 4.

283. *See* Order on Defendant the GEO Group Inc.'s Motion for Order of Dismissal Based on Plaintiff's Failure to Join Required Government Parties, *supra* note 250.

ICE policy, but rather a guideline.²⁸⁴ ICE contracted out the operation of the detention facility to GEO Group, who was obligated to run the detention center in accordance with the ICE Detention Standards.²⁸⁵ As a result, it was the responsibility of the GEO Group to ensure that detainees were being paid proper wages in accordance with the standards of the Voluntary Work Program, as outlined by the 2011 Standards.²⁸⁶ Therefore, the motion was dismissed and the action was allowed to proceed forward against the GEO Group.²⁸⁷

In the subsequent years, Mr. Chen's case proceeded in Federal Court.²⁸⁸ The complaint was amended to withdraw Mr. Chen as the named plaintiff and replace him with Ugochukwu Goodluck Nwauzor, an individual detained at Northwest Detention Center who was granted asylum in the United States.²⁸⁹ The case was consolidated with the State of Washington's claim against the GEO Group for purposes of trial.²⁹⁰ On January 21, 2020, the United States District Court for the Western District of Washington held that there would be a jury trial to determine liability surrounding Washington's Minimum Wage Act.²⁹¹ This includes determining whether: (1) detainees who work in the Northwest Detention Center are employees under the Act; (2) GEO Group is defined as an employer under the ACT; and (3) GEO Group must comply with the Act for work completed by immigration detainees.²⁹² If a jury rules in favor of the State of Washington, the same jury will be able to determine the plaintiffs' damages, including whether they receive back pay or lost wages for the work they performed while at the Northwest Detention Center.²⁹³

284. See Order on Defendant the GEO Group Inc.'s Motion for Dismissal Based on Plaintiff's Failure to Join Required Government Parties, or, Alternatively, to Add Required Government Parties at 5, *Chen v. GEO Grp.*, No. 3:17-cv-05806-RJB (W.D. Wash. 2018).

285. *Id.* at 2-3.

286. *See id.* at 3.

287. *See id.* at 12.

288. *See Chen v. GEO Grp.*, No. 3:17-cv-05769-RJB, 2018 U.S. Dist. LEXIS 99249* (W.D. Wash. June 13, 2018).

289. *See id.* at *1-2.

290. *See Ugochukwu Goodluck Nwauzor v. GEO Grp.*, No. C17-5769 RJB, 2020 U.S. Dist. LEXIS 10041, at *7-8 (W.D. Wash. Jan. 21, 2020).

291. *Id.* at *10.

292. *Id.* at *8.

293. *See id.* at *9.

IV. STATE LAW AS A ROUTE TO JUDICIAL RELIEF

A. *The Fair Labor Standards Act as a Losing Argument.*

In 1938, President Roosevelt signed the Fair Labor Standards Act (hereinafter “FLSA”), establishing a federal minimum wage and the right to receive overtime pay.²⁹⁴ Under the FLSA Act, an employee is “any individual employed by an employer,” and an employer is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”²⁹⁵ Although the Act applies to “full-time and part-time workers in the private sector and in Federal, State, and local governments,” the board definitions of employee and employee leave room for interpretation.²⁹⁶ Logistically, the United States Department of Labor “administers and enforces the FLSA.”²⁹⁷ The Department explicitly states on its website that the protections created under the FLSA apply regardless of immigration status; both documented and undocumented workers receive labor protections.²⁹⁸ However, courts have great discretion in determining whether the FLSA applies to immigration detainees in the United States through their classification as employees.²⁹⁹

Private prison corporations, such as GEO Group and CoreCivic argue that the FLSA does not apply because they are barred from hiring undocumented employees under the Immigration Reform and Control Act.³⁰⁰ In *Hoffman Plastic Compounds*, the United States Supreme Court held that “Congress created ‘a comprehensive scheme prohibiting the employment of illegal aliens in the United States’” through section 1324a(h)(2) of the Immigration Reform and Control Act (hereinafter “IRCA”).³⁰¹ This was because the IRCA made it “unlawful for employers

294. See Garfinkel, *supra* note 182, at 1307; see also *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP’T. OF LAB., <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa> (revised Sept. 2016).

295. Garfinkel, *supra* note 182, at 1307.

296. *Handy Reference Guide to the Fair Labor Standards Act*, *supra* note 294.

297. *Id.*

298. *Id.* (“As WHD authorized representatives, they conduct investigations and gather data on wages, hours, and other employment conditions in order to determine compliance with the law regardless of workers’ immigration status.”).

299. Garfinkel, *supra* note 182, at 1307.

300. See e.g., *Chen v. GEO Grp.*, 287 F. Supp. 3d 1158, 1167 (W.D. Wash. 2017); *Owino v. CoreCivic, Inc.*, No. 17-CV-1112 JLS (NLS), 2018 U.S. Dist. LEXIS 81091*, at *66 (S.D. Cal. May 14, 2018).

301. See *Chen*, 287 F. Supp. 3d, at 1164 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

knowingly to hire undocumented workers” by imposing sanctions.³⁰² However, the holding in *Hoffman* only applies to undocumented workers’ ability to collect back pay after being terminated from a position obtained with false employment documents.³⁰³ The decision has no bearing on other labor protections under the FLSA or when an employer knows of an individual’s immigration status.³⁰⁴ The FLSA still applies to protect undocumented workers for work completed; this includes minimum wage and overtime if applicable.³⁰⁵

Likewise, these corporations argue that even if undocumented workers qualify for protections under the FLSA, those protections do not extend to individuals in immigration detention centers.³⁰⁶ The Department of Labor’s Field Operations Handbook, chapter ten, lists certain statutory exclusions where the FLSA does not apply, such as the labor by inmates at correctional facilities:

[T]asks performed by individuals committed to training schools of a correctional nature, which are required as a part of the correctional program of the institution as a part of the institutional discipline and by reason of their value in providing needed therapy, rehabilitation, or training to help prepare the inmate to become self-sustaining in a lawful occupation after release.³⁰⁷

In interpreting the statutory text of FLSA and its accompanying handbook, “[t]he Fourth Circuit has held that prisoners are not ‘employees’ under the FLSA.”³⁰⁸ Other Circuits have followed suit, holding that prisoners do not receive the benefits of FLSA, and extending the exclusion to detainees at immigration detention centers.³⁰⁹ In 1990, The Fifth Circuit held that “civil immigration detainees, like prison

302. See *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 148 (“Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1).”).

303. *Id.* at 151; see also Genevieve Carlton, *FLSA Wage Protections Also Apply to Immigrants and Undocumented Workers*, WORKING: NOW AND THEN (July 6, 2018), <https://www.workingnowandthen.com/blog/wage-protections-for-undocumented-workers/>.

304. See Carlton, *supra* note 303.

305. *Id.*

306. See *Chen*, 287 F. Supp. 3d, at 1165.

307. U.S. DEP’T OF LAB., FIELD OPERATIONS HANDBOOK ch. 10b03(g) (2016), https://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

308. *Ndambi v. CoreCivic, Inc.*, No. RDB-18-3521, 2019 U.S. Dist. LEXIS 166396*, at *4 (D. Md. Sept. 27, 2019) (citing *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993)).

309. See, e.g., *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396 (5th Cir. 1990).

inmates, are not ‘employees’ as contemplated by the FLSA.”³¹⁰ Thirty years later, Circuit and District Courts across the country still take this view; immigration detainees, although in civil confinement, are treated the same as prisoners for purposes of the FLSA.³¹¹

In 2019, the United States District Court for the District of Maryland held that “[t]he economic reality of the Plaintiffs’ situation is almost identical to a prison inmate and does not share commonality with that of a traditional employer-employee relationship.”³¹² The plaintiff’s claims, like many before him, were dismissed.³¹³ As a result, immigration detainees have turned to other potential causes of action to receive relief.³¹⁴

B. Congressional and Agency Inaction in Relation to Profit Margins.

On December 21, 2017, The U.S. Commission on Civil Rights issued a press release calling upon the Department of Homeland Security (hereinafter “DHS”) and Congress to investigate immigration detention centers and their labor practices.³¹⁵ In its letter, the Commission “strongly urges Congress to hold a hearing to investigate labor practices at immigration detention centers, pass legislation requiring all detention centers to pay a fair wage for detainees, and conduct greater oversight to protect the rights of working detainees.”³¹⁶ Furthermore, it called upon ICE to revise its 2011 Standards to include a higher minimum wage for immigration detainees and ensure workers received labor protections.³¹⁷

310. *Ndambi*, 2019 U.S. Dist. LEXIS 166396*, at *4 (citing *Alvarado Guevara*, 902 F.2d at 396).

311. *See id.* at *4 (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961); *Harker*, 990 F.2d at 133; *Alvarado Guevara*, 902 F.2d at 396) (“Courts generally look to the ‘economic reality’ of an individual’s status in determining whether they are an ‘employee.’”); *see also* *Menocal v. Geo Grp., Inc.*, 113 F. Supp. 3d 1125, 1129 (D. Colo. 2015) (holding that immigration detainees, like prisoners, are not employees under the FLSA); *Novoa v. Geo Grp., Inc.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 117129*, at *18-19 (C.D. Cal. June 21, 2018) (granting leave to amend the complaint because immigration detainees and prisoners are excluded from FLSA protections, but immigration detainees may have labor protections under the state minimum wage laws); *Whyte v. Suffolk Cty. Sheriff’s Dep’t*, 86 N.E.3d 249, 249 (2017) (affirming the lower court’s characterization of an immigration detainee as a prison inmate for wage purposes, making him ineligible for federal minimum wage under the FLSA).

312. *Ndambi*, 2019 U.S. Dist. LEXIS 166396*, at *4.

313. *Id.* at *5.

314. *See infra* Part IV.C.

315. *See* U.S. Comm’n On C.R., *supra* note 184.

316. *Id.*

317. *See id.*

To date, neither of these calls to action has been implemented and no changes have been made.³¹⁸

GEO Group and CoreCivic continue to pay one dollar per day for an eight-hour workday.³¹⁹ These for-profit prison corporations argue that “[t]he wage rates associated with this federal government program are stipulated under long-established guidelines set by the United States Congress.”³²⁰ Therefore, only Congress can increase the daily wage through an Act passed in both chambers.³²¹ While the 1978 Appropriations Act sets one dollar a day wage, subsequent Appropriations Acts do not make the set wage a mandatory maximum.³²² Instead, Congress leaves the daily wage up to the discretion of the independent correction facilities through a delegation of power to the Department of Homeland Security, as evidenced through the ICE’s Performance-Based National Detention Standards for long-term facilities.³²³ Under the 2011 Standards, the one dollar per day wage is a minimum.³²⁴ Yet, corporations such as GEO Group and CoreCivic have little incentive to increase the wage.³²⁵

GEO Group and CoreCivic are for-profit publicly traded corporations.³²⁶ “If Congress instead forced these companies to pay the federal minimum wage, their profit margins would drop dramatically.”³²⁷ Thus, the profits obtained by their shareholders would decrease as well.³²⁸ In response, while local municipalities petitioned to end immigration detention contracts with ICE, GEO Group and CoreCivic increased the amount they spent on lobbying in Congress.³²⁹ “GEO Group’s annual lobbying expenditures doubled from \$560,000 to \$1 million from 2015 to

318. See U.S. IMMIGR. AND CUSTOMS ENF’T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES i (2019), <https://www.ice.gov/detention-standards/2019> (revised 2019 standards only apply to non-dedicated facilities, such as county or municipal jails, and remained non-mandatory).

319. See Victoria Law, *End Forced Labor in Immigrant Detention*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/opinion/forced-labor-immigrants.html>.

320. *Id.*

321. See generally *id.* (stating that action must come from Congress).

322. See *supra* Part III.B.

323. See U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19 at 407; see also discussion, *supra* Part I.B.

324. See U.S. IMMIGR. AND CUSTOMS ENF’T, *supra* note 19 at 407.

325. See Law, *supra* note 319.

326. See discussion, *supra* Part I.C.

327. Law, *supra* note 319.

328. See Law, *supra* note 1.

329. See Sunny Kim, *Private Prison Firm Quietly Ramps up GOP Lobbying Efforts as Trump Expands Immigrant Detention Centers*, CNBC NEWS, <https://www.cnbc.com/2019/10/04/private-prison-firm-ramps-up-lobbying-amid-trump-immigration-crackdown.html> (Oct. 4, 2019).

2016. This number hit an all-time high of \$1.7 million in 2017.”³³⁰ In 2018, the Senior Vice President of Business Development at GEO Group, David J. Venturella, traveled to Washington D.C. to lobby regarding the impact recent litigation surrounding conditions in its immigration detention centers.³³¹ Lawsuits against the corporation in Washington, Colorado, and California were estimated to “cost GEO [between] ‘\$15-\$20 million.’”³³² These lawsuits included labor violation claims under the Voluntary Work Program.³³³ While lobbying, Venturella asked the Department of Justice to intervene on the cases and get them dismissed from Federal Court.³³⁴ The Department of Justice asked U.S. District Judge Robert Bryan, the judge in *Nwauzor, et al.*, to dismiss the case, and he agreed.³³⁵ He later changed his mind and decided to allow the case to proceed to a jury trial.³³⁶

Furthermore, there is stark pushback from members of Congress to acknowledge a federal minimum wage for immigration detainees.³³⁷ In March 2018, a group of Republican congressmen sent a letter to the Department of Labor and ICE, stating that an increase in wages would get passed on to taxpayers and result in unnecessary expenses.³³⁸ They argue that immigration detainees are not employees of private prisons, and thus should not be paid the same wage as employees.³³⁹ In contrast, Democratic members of Congress have contacted for-profit corporations directly regarding the Voluntary Work Program.³⁴⁰ In November 2018, ten United States Senators sent letters to GEO Group and CoreCivic to

330. *Id.*

331. See Nick Schwellenbach, Katherine Hawkins, & Adam Zagorin, *Private Prison Exec Pursues Federal Cash, Spends at Trump Hotel*, DAILY BEAST, <https://www.thedailybeast.com/private-prison-executive-at-geo-group-pursues-federal-funds-spends-at-trump-hotel> (last updated Nov. 18, 2019).

332. *Id.*

333. See Christopher Zoukis & Matthew Clarke, *Lawsuits Filed Against GEO Group for Wage Violations at Detention Facilities*, PRISON LEGAL NEWS (June 7, 2018), <https://www.prisonlegalnews.org/news/2018/jun/7/lawsuits-filed-against-geo-group-wage-violations-detention-facilities/>.

334. See Schwellenbach, Hawkins & Zagorin *supra* note 331.

335. *See id.*

336. *Id.*

337. *See* Law, *supra* note 319.

338. *See id.*

339. See Tracy Jan, *These GOP lawmakers say it's okay for imprisoned immigrants to work for a \$1 a day*, WASH. POST (Mar. 16, 2018), <https://www.washingtonpost.com/news/work/wp/2018/03/16/republican-congressmen-defend-1-a-day-wage-for-immigrant-detainees-who-work-in-private-prisons/>.

340. See Conlin & Cooke, *supra* note 186.

comply with federal immigration standards.³⁴¹ Their letters were in response to a report released by the Department of Homeland Security Office of the Inspector General, highlighting the number of underreported violations and subpar conditions in immigration detention facilities:

‘These reports and the results of the OIG investigations indicate that the perverse profit incentive at the core of the private prison business model has resulted in GEO Group and CoreCivic boosting profits by cutting costs on expenditures including food, health care, and sufficient pay and training for guards and prison staff.’³⁴²

While the press release did not mention the voluntary work program, the focus on the profit obtained by lowering its operating costs earned the program more media attention.³⁴³ However, it did not result in any formal Congressional action; the one dollar per day wage remained in effect and immigration detainees remain unprotected under Federal Law and ICE regulations.³⁴⁴

C. Courts Begin to Recognize State Minimum Wage Laws as a Viable Method of Relief.

Rather than rely on Congress for a federal remedy, states have begun exploring whether state minimum wage law can be expanded to include immigration detainees who work under the Voluntary Work Program.³⁴⁵ In 2017, the State of Washington filed a lawsuit against the GEO Group for failing to pay immigration detainees under the Washington State Minimum Wage Act in violation of state law.³⁴⁶ The case was consolidated with *Nwauzor*, a civil case brought by an immigrant detainee for labor protections under state minimum wage laws.³⁴⁷ Multiple

341. See Press Release, Sen. Jeff Merkley, Wyden, Merkley Press Private Prison Companies On Compliance With Federal Immigration Detention Standards (Nov. 16, 2018), <https://www.merkley.senate.gov/news/press-releases/wyden-merkley-press-private-prison-companies-on-compliance-with-federal-immigration-detention-standards>).

342. *Id.*

343. See generally *id.*

344. See generally *id.* (ten Senators requesting information from GEO Group and CoreCivic, not demanding any action).

345. See generally *Washington v. GEO Grp.*, No. 3:18-cv-5806-RJB, 2018 U.S. Dist. LEXIS 208081, at *8 (W.D. Wash. 2017) (holding it is possible for the Washington State Minimum Wage Act to apply to immigration detainees).

346. See Zoukis & Clarke, *supra* note 333.

347. See *Ugochukwu Goodluck Nwauzor v. GEO Grp.*, No. C17-5769 RJB, 2020 U.S. Dist. LEXIS 10041, at *7-8 (W.D. Wash. Jan. 21, 2020).

motions to dismiss for failure to set a claim filed by GEO Group were denied and the cases were to be tried before a jury in 2021.³⁴⁸

Under the Washington State Minimum Wage Act, an employee is “‘any individual employed by an employer,’ subject to an enumerated list of exceptions.”³⁴⁹ Inmates in detention centers are generally excluded from the provision.³⁵⁰ However, the statute expressly identifies only inmates housed in state, municipal, or county facilities; federal detention centers are omitted from the list.³⁵¹ The court held that whether or not immigration detainees are covered under state minimum wage laws depends on the intent of the legislature at the time it was passed.³⁵² Rather than dismiss the claim, however, the court allowed it to proceed, cautioning that its role is not to re-write legislation.³⁵³ Instead, the court decided that it should interpret the reach of the statute using principles of statutory interpretation.³⁵⁴ It determined that the statutory language and underlying pleadings made “it [] plausible that the Plaintiff, arguably, comes within the State definition of ‘employee,’ and is not subject to any existing statutory exception.”³⁵⁵ As a result, the door remained open for litigations surrounding the Voluntary Work Program and its one dollar a day wage under state minimum wage laws.³⁵⁶

Similarly, in *Novoa*, the court explored the California Minimum Wage Law in relation to wages received by immigration detainees in the state.³⁵⁷ According to the California Labor Code, employees may bring a civil action for wages below state minimum wage, but the provision does not provide a statutory definition of an employee.³⁵⁸ “[T]he Labor Code applies to ‘men, women and minors employed in any occupation, trade, or industry. . .’ and all protections, rights, and remedies ‘are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.’”³⁵⁹

348. See US District Court Docket, GEO Grp., No. 3:18-cv-5806-RJB, 2018 U.S. Dist. LEXIS 208081, (W.D. Wash. 2017).

349. See *Chen v. GEO Grp.*, 287 F. Supp. 3d 1158, 1167 (W.D. Wash. 2017).

350. See *id.*; see also WASH. REV. CODE ANN. § 49.46.010(3)(k) (West 2019).

351. See § 49.46.010(3)(k).

352. See *Chen*, 287 F. Supp. 3d at 1168.

353. See *id.*

354. See *id.*

355. *Id.*

356. See *id.* (denying motion to dismiss).

357. See *Novoa v. GEO Grp.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 146609*, at *1-2 (C.D. Cal. Aug. 22, 2018).

358. See *Novoa v. Geo Grp.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 117129*, at *17 (C.D. Cal. June 21, 2018) (citing CAL. LAB. CODE § 1194).

359. *Id.* at *17-18 (citing CAL. LAB. CODE § 1171).

While California prisoners are exempted from the Labor Code, the provision denying them labor protections is found in the California Penal Code, which does not expressly cover immigration detainees.³⁶⁰

To determine whether the Labor Code claim should be dismissed, the court looked to the underlying purpose of minimum wage laws.³⁶¹ While immigration detainees are detained similar to prisoners, the Court held that the general rationale by the legislature that prisoners do not need to be paid a minimum wage to maintain their standard of living “may not apply in this case” because the “allegations concern the [immigration] detainees’ [ability] to support their basic living needs.”³⁶² The complaint focused on the notion that immigration detainees are forced or coerced to participate in the Voluntary Work Program at Adelanto Detention Center (hereinafter “Adelanto”), maintained by GEO Group, to obtain basic necessities.³⁶³ One plaintiff, Raul Novoa, alleged he “was required to work in Adelanto’s Work Program in order to buy . . . [items] such as food and bottled water that GEO refused to provide.”³⁶⁴ The Court denied GEO Group’s motion to dismiss, holding that there could be a distinction in the wages paid to criminal and immigration detainees when looking at the different standards of living in detention.³⁶⁵ Therefore, the Labor Code, and subsequent minimum wage laws, could classify immigration detainees as employees through the intent of the legislature.³⁶⁶ The plaintiffs were granted class certification in 2019.³⁶⁷

CONCLUSION

Through *Washington*, *Nwauzor*, and *Novoa*, the district courts in the Ninth Circuit have laid the foundation for immigrant detainees to receive more than one dollar a day wage for their labor in detention centers.³⁶⁸ These cases provide platforms for detainees to demand labor protections

360. See *id.* at *18-19. Although not specifically addressed by the court, it is important to note that detainees under the Penal Code are detained for purposes of criminal detention, while immigration is a civil detention scheme. *Id.*; see also discussion *supra* Part I.

361. See *Nova*, 2018 U.S. Dist. LEXIS 117129*, at *19-20.

362. *Id.*

363. *Id.* at *28-29.

364. *Id.* at *32.

365. See *id.* at *20, *28.

366. See *id.* at *28.

367. *Novoa v. GEO Grp.*, No. EDCV 17-2514 JGB (SHKx), 2019 U.S. Dist. LEXIS 222612*, at *2 (C.D. Cal. Dec. 6, 2019).

368. See *Novoa v. GEO Grp.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 146609* at *15 (C.D. Cal. Aug. 22, 2018); *Washington v. Geo Grp.*, 283 F. Supp. 3d 967, 968 (W.D. Wash. 2017); *Chen v. Geo Grp.*, 287 F. Supp. 3d 1158, 1158-59 (W.D. Wash. 2017).

when Congressional ears go silent and agency inaction is deafening.³⁶⁹ With the continued lobbying of Congress and ICE by for-profit prison corporations, there is little reason to believe the annual Appropriations Bill will raise the one dollar wage or the FLSA will be amended to include immigration detainees.³⁷⁰ Likewise, amendments to the Performance-Based Detention Standards to raise the set one dollar a day wage minimum are unlikely to occur due to continued lobbying efforts.³⁷¹ Even if the Performance-Based Detention Standards are updated to increase the wage, it is unlikely to be effective because they are not legally enforceable standards and viewed as guidelines.³⁷² Furthermore, the facilities run by for-profit corporations are only required to abide by the Standard listed in their contracts with ICE, which would allow facilities to continue paying wages less than one dollar.³⁷³ In order to be effective, all government contracts would need to be updated and ICE Standards need to become legally enforceable through an Act in Congress.³⁷⁴ Since legislation on a federal level is unlikely to occur, one must look to the States and state minimum wage laws to enforce labor protections for immigration detainees participating in the Voluntary Work Program.³⁷⁵

While there has been no formal court order establishing that state minimum wage laws apply to immigration detainees, pending litigation highlights an avenue to relief.³⁷⁶ The courts in *Washington*, *Nwauzor*, and *Novoa* acknowledge that state minimum wage laws may apply, depending on the intent of state legislatures and the statutory language used.³⁷⁷ This may only be probable, however, in states with liberal labor laws that broadly define employees under state law.³⁷⁸ To expand the definition of an employee, detainees and advocates may need to file statutory lawsuits in district courts to obtain court orders that clarify the protection under a state's minimum wage law.³⁷⁹ In contrast, if a state's labor law or code is

369. See discussion *supra* Part IV.B.

370. See *supra* Part IV.B.

371. See *supra* Part IV.B.

372. See *supra* Introduction; notes 19-20.

373. See *supra* Part I.B.i.

374. See *supra* Part I.B.i.

375. See discussion, *supra* Part IV.

376. See generally *Law*, *supra* note 319 (the Voluntary Work Program being the subject of six separate lawsuits).

377. See *Novoa v. GEO Grp.*, No. EDCV 17-2514 JGB (SHKx), 2018 U.S. Dist. LEXIS 146609* at *15 (C.D. Cal. Aug. 22, 2018); *Washington v. Geo Grp.*, 283 F. Supp. 3d 967, 968 (W.D. Wash. 2017); *Chen v. GEO Grp.*, 287 F. Supp. 3d 1158, 1158-59 (W.D. Wash. 2017).

378. See discussion *supra* Part IV.C.

379. See, e.g., *Washington v. GEO Grp.*, No. 3:17-cv-05806-RJB, 2018 U.S. Dist. LEXIS 208081* at *8 (W.D. Wash. Dec. 10, 2018).

narrowly construed, individuals may need to petition their state legislatures to broaden the definition of an employee through legislation or to add provisions explicitly stating immigration detainees are protected under the state's minimum wage laws.³⁸⁰ Supporters of increasing the one dollar a day wage should reach out to their state representatives to sponsor a bill to include immigration detainees' employees under state law.³⁸¹ In the meantime, district courts remain the most viable path to relief to ensure labor protections for detainees.³⁸²

The pending lawsuits in the Ninth Circuit "are not pushing to end the Voluntary Work Program altogether," but to ensure immigrant detainees are not exploited for their labor and can obtain necessities, such as toilet paper or toothpaste.³⁸³ The lawsuits are a reminder that immigrant detainees are human too.³⁸⁴ They strive to end inequality and labor exploitation, to ensure that detainees can afford to purchase items in the detention's commissary store and call their family members.³⁸⁵ Immigration detention was never meant to penalize individuals for entering the United States.³⁸⁶ It was meant to be a temporary administrative tool to maintain the government's sovereignty and sustain national security.³⁸⁷ To continue allowing for-profit detention facilities to pay immigrant detainees subpar wages through the Voluntary Work Program, while allowing them to obtain multimillion-dollar profits off of low-cost labor, is exploitation.³⁸⁸

Immigrant detainees, such as Martha Gonzalez, can spend more than a year in immigration detention, forced to participate in a for-profit detention facility's Voluntary Work Program.³⁸⁹ Ms. Gonzalez was forced to work seven days a week, for more than eight hours a day, but only earned one dollar a day.³⁹⁰ Despite earning seven dollars a week, she

380. See generally Tiffany Middleton, *Right to Petition*, AM. BAR. ASS'N (Nov. 14, 2019), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/learning-gateways—right-to-petition/ (describing citizen's right to petition the government and legislative bodies in order to ask these entities to do something or abstain from doing something).

381. See *supra* Part III.B.

382. See discussion *supra* Part IV.

383. See Law, *supra* note 319.

384. See *id.*

385. See *id.*

386. See *supra* Section I.A.i.

387. See *supra* Section I.A.i.

388. See Law, *supra* note 319.

389. See Law, *supra* note 1.

390. See *id.*

could not afford to purchase toothpaste.³⁹¹ As long as toothpaste costs eleven dollars and deodorant over three dollars, one cannot justify paying immigration detainees only twelve and a half cents per hour.³⁹² Paying less than one dollar a day, while surcharging basic hygiene products is to deny each detainee basic human rights.³⁹³ The law must protect the rights of immigrant detainees to ensure they are properly compensated for the work they perform.³⁹⁴ State minimum wage laws can establish and enforce labor protections for immigrant detainees.³⁹⁵

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391. *See id.*

392. *See Conlin & Cooke, supra* note 186.

393. *See id.*

394. *See id.*

395. *See supra* Section IV.C.

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