

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

State of WASHINGTON,

Plaintiff,

v.

The GEO GROUP, INC.,

Defendant.

CASE NO. 3:17-cv-05806-RJB

MOTION OF AMERICAN CIVIL  
LIBERTIES UNION OF  
WASHINGTON, ONEAMERICA  
AND WASHINGTON DEFENDER  
ASSOCIATION FOR LEAVE TO  
FILE AMICI CURIAE BRIEF IN  
SUPPORT OF THE STATE OF  
WASHINGTON

**NOTE ON MOTION CALENDAR:  
JULY 26, 2019**

I. INTRODUCTION

American Civil Liberties Union of Washington (“ACLU-WA”), OneAmerica and Washington Defender Association (“WDA”) hereby respectfully submits this Motion for Leave to File an *Amici Curiae* Brief in support of Plaintiff’s Motion for Partial Summary Judgment. A copy of the proposed brief is attached as Exhibit A to this motion. This Motion is timely filed in accordance with the applicable rules found in the Federal Rules of Appellate Procedure. *See Microsoft Corp. v. United States Dep’t of Justice*, No. C16-0538JLR, 2016 WL 4506808, at \*9

(W.D. Wash. Aug. 29, 2016) (adopting, “[i]n the absence of local rules governing the role of amicus curiae, governing the role of amicus curiae, the court will adhere to the applicable rules found in the Federal Rules of Appellate Procedure. Accordingly, the ACLU must in the future file any memorandum commenting on a party’s memorandum no later than seven days after ‘the principal brief of the party being supported is filed.’ Further, any amicus curiae brief filed by the ACLU will be limited to no more than one-half the maximum length authorized by this court’s local rules for a party’s principal brief.”); Fed. R. App. P. 29(a)(6).

## II. IDENTITY AND INTEREST OF AMICI CURIAE

The ACLU-WA is a statewide, nonpartisan, nonprofit organization with over 135,000 members and supporters dedicated to the preservation of civil liberties. Like the national ACLU and other affiliates across the country, ACLU-WA has long been dedicated to protecting the constitutional rights of immigrants and workers, and drawing attention to the threats to civil liberties posed by private ownership and operation of prisons and detention facilities. The ACLU-WA frequently participates as a party and *amicus curiae* in cases involving civil liberties and criminal justice issues, including detention conditions and immigrants’ rights.

OneAmerica is a civic engagement, organizing and advocacy organization grounded in immigrant and refugee communities in Washington State. OneAmerica’s mission is to advance democracy and justice at the local, state and national level through building power in immigrant and refugee communities, with key allies. OneAmerica’s members are immigrants and refugees, living in Washington State under many immigration statuses, including undocumented immigrants and their family members who live in constant fear of immigration enforcement. Many of OneAmerica members have been in ICE custody at the Northwest Detention Center in Tacoma, WA managed by GEO. OneAmerica has raised persistent concerns

1 over the treatment of individuals detained at the NWDC. OneAmerica also served as a leading  
 2 member of the coalition that advocated for Washington State's minimum wage law, as adopted  
 3 by a large majority of Washington's voters at the ballot in 2016. OneAmerica is a leading voice  
 4 in Washington State on matters related to human rights, civil liberties and economic justice,  
 5 grounded in the experience of their members.

6 Washington Defender Association ("WDA") is a statewide nonprofit organization whose  
 7 membership comprises public defender agencies, indigent defenders, and those working to  
 8 improve the quality of indigent defense in Washington State. WDA's purpose is to protect and  
 9 ensure those individual rights guaranteed by the Washington and federal Constitutions, to resist  
 10 efforts made to curtail such rights, and to promote, assist, and encourage public defense systems.  
 11 In 1999, WDA created the Immigration Project to defend and advance the rights of noncitizens  
 12 within the Washington State criminal justice system. WDA has participated as *amicus curiae* in  
 13 numerous cases.  
 14

### 15 III. REASONS WHY MOTION SHOULD BE GRANTED

16 District courts have "broad discretion" to appoint amici curiae. *Skokomish Indian Tribe v.*  
 17 *Goldmark*, 2013 WL 5720053, at \*1 (W.D. Wash. Oct. 21, 2013) (quoting *Hoptowit v. Ray*, 682  
 18 F.2d 1237, 1260 (9th Cir. 1982)). "District courts frequently welcome amicus briefs from non-  
 19 parties concerning legal issues that have potential ramifications beyond the parties directly  
 20 involved or if the amicus has 'unique information or perspective that can help the court beyond  
 21 the help that the lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream*  
 22 *Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246  
 23 F. Supp. 2d 59, 62 (D.D.C. 2003)).  
 24

25 The Court should exercise its discretion to permit ACLU-WA, OneAmerica and WDA to  
 26

1 file the attached amici brief. As nonprofit public interest legal organizations dedicated to the  
 2 preservation of civil liberties, ACLU-WA, OneAmerica and WDA have a strong interest in  
 3 ensuring private prison corporations do not violate the rights of people detained in their facilities,  
 4 as protected by federal and state law. ACLU-WA, OneAmerica and WDA will draw upon its  
 5 expertise to provide a constitutional free labor rights perspective in this case, so as to fulfill “the  
 6 classic role of amicus curiae by assisting in a case of general public interest, supplementing the  
 7 efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-*  
 8 *Wohl Co. v. Comm’r of Labor & Indus., State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982).  
 9  
 10 ACLU-WA, OneAmerica and WDA respectfully submit that their experience and perspective as  
 11 nonprofit public interest legal organizations representing and advising individuals on civil  
 12 liberties, economic justice, and immigration matters will assist the Court in addressing the  
 13 State’s legal authority to enforce GEO’s compliance with Washington’s Minimum Wage Act.

#### 14 IV. CONCLUSION

15 For these reasons, ACLU-WA, OneAmerica and WDA respectfully requests the Court  
 16 grant it leave to file the amici curiae brief attached as Exhibit A.

17 DATED this 8th day of July, 2019.

18  
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 20 WASHINGTON FOUNDATION

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MOTION FOR LEAVE TO FILE AMICI BRIEF—5  
(No. 3:17-cv-05806-RJB)

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CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, the foregoing document was electronically filed with the United States District Court's CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Heather L. Hattrup

Heather L. Hattrup

# Exhibit A

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STATE OF WASHINGTON ,	)	
	)	CASE NO. 3:17-CV-05806-RJB
Plaintiff,	)	
	)	
v.	)	BRIEF OF AMERICAN CIVIL
	)	LIBERTIES UNION OF
THE GEO GROUP, INC. ,	)	WASHINGTON, WASHINGTON
	)	DEFENDER ASSOCIATION AND
Defendant.	)	ONEAMERICA AMICI CURIAE
	)	IN SUPPORT OF PLAINTIFF'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT
	)	
	)	
	)	
	)	
	)	

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON, WASHINGTON DEFENDER ASSOCIATION  
AND ONEAMERICA AMICI CURIAE IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
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WASHINGTON, WASHINGTON DEFENDER ASSOCIATION  
AND ONEAMERICA AMICI CURIAE IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - I  
CASE NO. 3:17-CV-05806-RJB

#1257546 v1 / 99988-544

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WASHINGTON, WASHINGTON DEFENDER ASSOCIATION  
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CASE NO. 3:17-CV-05806-RJB

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF  
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CASE NO. 3:17-CV-05806-RJB

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CASE NO. 3:17-CV-05806-RJB

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## I. INTRODUCTION

The American Civil Liberties Union of Washington (“ACLU”), OneAmerica and Washington Defender Association (“WDA”) submit this amici brief urging the Court to find that people detained and working at the Northwest Detention Center (“NWDC”) under the GEO Group, Inc.’s (“GEO’s”) Voluntary Work Program (“VWP”) are employees covered by Washington’s Minimum Wage Act (“MWA”) and protected under the Thirteenth Amendment’s prohibition against involuntary servitude. The ACLU and One America address the constitutional implications raised by failing to recognize the applicability of the MWA to immigration detainees participating in GEO’s VWP.<sup>1</sup>

Washington State and the Thirteenth Amendment recognizes the significance of a living wage for all people employed within our state.<sup>2</sup> Payment of a living wage “has long been cited as one of the basic distinctions between freedom and slavery.”<sup>3</sup> GEO’s profit-driven refusal to pay a living wage to people detained and working in NWDC’s kitchens, laundry rooms, and other facilities violates the Thirteenth Amendment’s prohibition against slavery and involuntary servitude. This ban does not distinguish between public and private action, and aids in finding violation of the MWA. Congress and the courts recognize that private actors like GEO pose the largest threat to the Amendment’s requirement of non-coerced labor and the extermination of the badges and incidents of slavery, no matter the name or form. In finding that detained workers at NWDC are employees for the purposes of Washington’s MWA, this Court ensures the protections of the Thirteenth Amendment and prevents the exploitation it prohibits.

<sup>1</sup> See, *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 200 L. Ed. 2d 122 (2018) (“Under the constitutional avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.”).

<sup>2</sup> E.g., Br. of Amici Curiae The Fair Work Center and Seattle Univ. Workers’ Rights Clinic 3:13–16, ECF No. 244-1 (“Amicus Br. FWC & SUWR Clinic”).

<sup>3</sup> James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 Yale L.J. 1474, 1536 (2010).

## II. IDENTITY AND INTEREST OF AMICI CURIAE

The ACLU, OneAmerica and Washington Defender Association are *amici curiae*, and their identity and interests are set forth in the accompanying Motion for Leave to file an amici brief.

## III. STATEMENT OF THE CASE

The parties' briefs present the relevant factual background and will not be repeated here.

## IV. ARGUMENT

### A. GEO Relies on and Is Incentivized by Cheap Labor to Drive Profit.

GEO, which owns and operates NWDC, is the second-largest private prison and detention corporation in the United States<sup>4</sup> and contracts with Immigration and Customs Enforcement ("ICE") to provide detention facilities and run their day-to-day operations. Seventy-four percent of immigrants in ICE custody are held in facilities operated by private prison companies, including GEO.

GEO relies on grossly cheap labor costs to maximize profit for shareholders, not to serve the public good.<sup>5</sup> By exploiting the labor of people in detention centers GEO reduces its costs to maximize profits; this fact is at the heart of the \$1 per day wage in issue here. In 2013, 60,000 immigrants worked in detention centers across the country at \$1 per day, representing at least \$40 million of uncompensated time.<sup>6</sup> At NWDC, detained workers "collect and distribute laundry, prepare and serve food, clean, paint interior walls, and . . . cut hair."<sup>7</sup> By avoiding hiring staff subject to minimum wage and other laws, GEO exploits the labor of people in detention to save millions of dollars. In 2015, at the time of its contract renewal with ICE, GEO projected NWDC

<sup>4</sup> Samantha Michaels, *America's Biggest Private Prison Company Just Hosted Its Annual Conference at a Trump Golf Resort* (Oct. 25, 2017), <https://www.motherjones.com/politics/2017/10/americas-biggest-private-prison-company-just-hosted-its-annual-conference-at-a-trump-golf-resort/>.

<sup>5</sup> See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 81 n.9, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) ("[A] private prison corporation's first loyalty is to its stockholders, rather than the public interest.").

<sup>6</sup> Ian Urbina, *Using Jailed Migrants as a Pool of Cheap Labor*, N.Y. Times (May 24, 2014), <https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html> (noting that this means more immigrants worked at GEO "than worked for any other single employer in the country, according to data from [ICE]").

<sup>7</sup> Order on Wash.'s Mot. for Summ. J. on The GEO Group, Inc.'s Affirmative Defenses, *Washington v. Geo Grp, Inc.*, No. 17-5806 RJB, 2019 WL 2084463, at \*1 (W.D. Wash., May 13, 2019).

alone would bring in \$57 million in yearly revenue at full capacity.<sup>8</sup> On a 10 year contract renewal, GEO's anticipated revenue for NWDC is approximately \$570 million.

Cost cutting measures frequently involve withholding basic necessities from detainees, reducing staff, and the general worsening of facility conditions.<sup>9</sup> GEO's profit-motive incentive jeopardizes the rights of people in detention, and encourages private prison corporations to use detainees as a source of labor, all while extensively lobbying against immigration reform in support of mass incarceration and regulations that impact profitability.<sup>10</sup> GEO lobbied its way around certain regulatory oversight but it is not immune from the Thirteenth Amendment's absolute prohibitions or the MWA.<sup>11</sup>

#### B. The Thirteenth Amendment Requires Payment of a Living Wage.

The Thirteenth Amendment is the only Constitutional provision to explicitly address labor, and its protective language provides the framework for labor rights.<sup>12</sup> It requires labor be truly voluntary – not forced or coerced. Where most constitutional provisions prohibit government action with respect to civil rights, the Thirteenth Amendment contains a positive guarantee applicable to both state and private actors,<sup>13</sup> and provides a mechanism through which Congress can affirmatively protect the right to free (as in non-coerced) labor. Congress enacted the Peonage Act to enforce the Thirteenth Amendment's guarantee of non-coerced labor. The Peonage Act abolished even "voluntary" peonage,<sup>14</sup> indicating Congress' disdain for exploitative labor practices.<sup>15</sup> "The undoubted aim of the Thirteenth Amendment as implemented by the Peonage

<sup>8</sup> Press Release, *Judge Rejects For-Profit Northwest Detention Center Operator's Motion to Dismiss AG Lawsuit*, Washington State Office of the Attorney General (Apr. 16, 2018), <https://www.atg.wa.gov/news/news-releases/judge-rejects-profit-northwest-detention-center-operator-s-motion-dismiss-ag>.

<sup>9</sup> Detention Watch Network, *A Toxic Relationship: Private Prisons and U.S. Immigration Detention* 3–6 (Dec. 2016), [https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship\\_DWN.pdf](https://www.detentionwatchnetwork.org/sites/default/files/reports/A%20Toxic%20Relationship_DWN.pdf).

<sup>10</sup> *Id.* At 10-11

<sup>11</sup> Between 1999-2009, GEO spent \$2,065,000 lobbying the federal government. Detention Watch Network, *The Influence of the Private Prison Industry in the Immigration Detention Business*, (May 2011) p. 3, <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Private%20Prison%20Influence%20Report.pdf>.

<sup>12</sup> Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 Nev. L.J. 479, 490 (2018).

<sup>13</sup> *Id.* at 481.

<sup>14</sup> 42 U.S.C. § 1994 (2012).

<sup>15</sup> Ruben J. Garcia, *The Thirteenth Amendment and Minimum Wage Laws*, 19 Nev. L.J. 479, 496 (2018).



Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”<sup>16</sup>

To this end, the Fair Labor Standards Act (“FLSA”), which establishes a minimum wage, was enacted under the Commerce Clause rather than the Thirteenth Amendment. However, the principle that no one can voluntarily enter a peonage relationship shares the same normative commitment of the Fair Labor Standards Act (FLSA) – that no one can agree to work for less than the minimum wage.<sup>17</sup> Washington’s MWA serves that same purpose. The sweeping, positive language of the Thirteenth Amendment reflects Congress’ intent not just to eradicate slavery itself, but also to improve the conditions of working people in general which is supported by legislation enacted pursuant to Section 2 of the Thirteenth Amendment. Minimum wage laws provide workers with the ability to resist coercion, exploitation, and “protect themselves against the kind of involuntary servitude the Thirteenth Amendment prohibited.”<sup>18</sup> The Thirteenth Amendment *requires* payment of a living wage.<sup>19</sup>

C. GEO’S VWP Violates the Thirteenth Amendment.

The framers of the Thirteenth Amendment considered slavery to be an evil to be eradicated<sup>20</sup> and intended to destroy entirely any remnants of slavery in the United States.<sup>21</sup> Section 1 prohibits not just slavery but “involuntary servitude.” “Involuntary servitude” includes “peonage, and all other forms of compulsory service for the mere benefit or pleasure of others.”<sup>22</sup> In including Section 2, the framers empowered Congress to eradicate the “badges and incidents of slavery in the United States,”<sup>23</sup> indicating the more expansive purpose of the Amendment. Historically, the reference to “badges and incidents of slavery,” beyond outlawing slavery itself, has provided a

<sup>16</sup> *Pollock v. Williams*, 322 U.S. 4, 17, 64 S. Ct. 792, 88 L. Ed. 1095 (1944).

<sup>17</sup> *Id.* at 485.

<sup>18</sup> Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 Duke L.J. 1609, 1677 (2001).

<sup>19</sup> See Pope, *supra* note 3.

<sup>20</sup> Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. Rev. 307, 328 (2004).

<sup>21</sup> *Id.* at 367.

<sup>22</sup> *Slaughter-House Cases*, 83 U.S. 36, 90, \_\_\_ S. Ct. \_\_\_, 21 L. Ed. 394 (1872) (Field, J., dissenting).

<sup>23</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 88 S. Ct. 2186, 20 L. Ed. 1189 (citing *The Civil Rights Cases*, 109 U.S. 3, 20, 3 S. Ct. 18, 27 L. Ed. 835 (1883)).



way to combat conduct such as the Black Codes and Jim Crow laws through legislation.<sup>24</sup> “Indeed, as new forms of involuntary servitude emerge . . . , Congress undoubtedly has authority to pass legislation that would prevent, proscribe, and/or remedy that conduct.”<sup>25</sup>

The Amendment indicates a constitutional concern about the creation of an underclass. “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>26</sup> In giving Congress the power to define “badges and incidents” under Section 2, the Thirteenth Amendment supports legislation to protect the vulnerable underclass. The labor practices within NWDC serve as a resounding reminder of the Thirteenth Amendment’s continued relevance.

1. GEO’S VWP Is a “Badge and Incident of Slavery”.

Forced labor obtained by threat of serious harm, including both physical<sup>27</sup> and psychological harm,<sup>28</sup> is coercive and impermissible under the Thirteenth Amendment. “[C]oercion can be mental as well as physical . . . . A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of ‘persuasion.’”<sup>29</sup> People detained at

<sup>24</sup> Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 581–82 (2012).

<sup>25</sup> *Id.* at 565–67.

<sup>26</sup> *Jones*, 392 U.S. at 440.

<sup>27</sup> A recent statute passed pursuant to Section 2 of the Thirteenth Amendment is the Trafficking Victims Protections Act of 2000 (“TVPA”). The “Forced Labor” section of the TVPA prohibits labor obtained “by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person . . . by means of the abuse or threatened abuse of law or legal process . . . by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person . . . would suffer serious harm or physical restraint.” 18 U.S.C. § 1589(c)(2) (2012). Notably, Congress defined “serious harm” to overturn *United States v. Kozminski*, 487 U.S. 931, 487 S. Ct. 2751, 101 L. Ed. 2d 788 (1988), where the Court found “serious harm” to include only physical or legal coercion. *United States v. Bradley*, 390 F.3d 145, 150 (1<sup>st</sup> Cir. 2004), *vacated*, 545 U.S. 1101, *remanded* to 426 F.3d 54 (1<sup>st</sup> Cir. 2005).

<sup>28</sup> See 18 U.S.C. § 1589(c)(2). Congress was concerned not just with physically forced labor, but also with labor that is coerced using “serious harm,” which includes “physical or nonphysical, including psychological, financial, or reputation harm.”

<sup>29</sup> *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) (noting that involuntary confessions may result even where no blood has been shed).

NWDC come from a variety of backgrounds.<sup>30</sup> GEO separates detainees from family and friends<sup>31</sup> and restricts their freedom of movement. These factors of vulnerability and coercion are heightened for anyone who does not speak English as a first language,<sup>32</sup> does not have regular access to legal counsel,<sup>33</sup> or is not sure whether or how record of participation might be used in pending immigration hearings.<sup>34</sup> The contract between GEO and ICE itself provides no limits, restrictions or assurances that a worker's record of participation will not be used to adversely impact a detainee's pending immigration hearing or detention status at NWDC. In fact, GEO's contract with ICE specifies that detention files can be used in ICE proceedings.<sup>35</sup> GEO's use of psychological coercion in its VWP takes it a step further by targeting "the most vulnerable detainees for the worst, most dangerous, and most exploitive work."<sup>36</sup> The conditions of detention at NWDC are inherently coercive and contradict GEO's representations that the VWP is voluntary.<sup>37</sup> Once detainees are in GEO's custody, they are subject to the coercive conditions of their detention, including the VWP.

<sup>30</sup> Detention by the Numbers, *Freedom for Immigrants*, <https://www.freedomforimmigrants.org/detention-statistics> (last visited July 8, 2019) (providing a graph showing that detained immigrants come from 50 different countries).

<sup>31</sup> For example, questioning someone in custody "who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." *Blackburn v. Alabama*, 361 U.S. at 206.

<sup>32</sup> For example, compare Detention by the Numbers, *supra* note 26 (listing 50 different countries of origin for people in immigration detention, with most people coming from Mexico, El Salvador, Honduras, and Guatemala) with Tom Jawetz & Scott Schuchart, *Language Access Has Life-or-Death Consequences for Migrants*, Center for American Progress (Feb. 20, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants> (reporting that Guatemalans made up 48 percent of families and 46 percent of unaccompanied minors who were apprehended by Border Patrol, yet noting that an estimated 40 percent of Guatemalans speak an indigenous language and that 7 percent speaks an indigenous language exclusively).

<sup>33</sup> About Us, La Resistencia, <https://www.nwdcresistance.org/about-us> (last visited July 8, 2019) (reporting that "approximately 90% of [civil detainees at NWDC] move forward in their cases unrepresented"). Compare Jennifer Medina, *Anyone Speak K'iche' or Mam? Immigration Courts Overwhelmed by Indigenous Languages*, N.Y. Times (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/us/translators-border-wall-immigration.html> (reporting that U.S. immigration officials have needed to provide interpreters for 350 different languages) with About Us, *supra* note 28 (reporting that even with interpreters helping, the vast majority of people going to immigration court must do so without legal counsel to explain their rights).

<sup>34</sup> The Performance-Based National Detention Standards 2011 ("PBNDS 2011"), which are incorporated by reference into GEO's contract with ICE, provides that "[c]ompleted [voluntary work] agreements shall be filed in the detainee's detention file" and that "[w]hen a detainee is removed from a work detail, the facility administrator shall place written documentation of the circumstances and reasons in the detainee detention file." PBNDS 2011, at 407-08, U.S. Immigration and Customs Enforcement (revised 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

<sup>35</sup> See *id.* at 443 ("When requested, IGSA facilities shall make inactive detention files available to ICE/ERO personnel.").

<sup>36</sup> Amicus Br. La Resistencia 16:18-23, ECF 257 ("Amicus Br. La Resistencia").

<sup>37</sup> *Maryland v. Shatzer*, 559 U.S. 98, 103, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010) (quoting *Miranda v. Arizona*, 384 U.S. 436, 458, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)); see also *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th

2. GEO'S VWP Promotes Involuntary Servitude.

The very “essence” of involuntary servitude prohibited by the Thirteenth Amendment is “that control by which the personal service of one man is disposed of or coerced for another’s benefit”<sup>38</sup> and “in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”<sup>39</sup> GEO owns, manages and directs the day-to-day operations<sup>40</sup> of the NWDC. As set forth in the State’s briefing, people detained at NWDC are subject to GEO’s control and, their labor is exclusively at GEO’s disposal<sup>41</sup> and to GEO’s financial benefit.<sup>42</sup> Given NWDC’s 1,575 capacity,<sup>43</sup> and a guaranteed minimum nightly occupancy,<sup>44</sup> the company has a constant pool of isolated and vulnerable labor which significantly reduces costs and maximizes profit.

a. GEO’s Coercive Conditions Undermines a “Voluntary” VWP.

As demonstrated above,<sup>45</sup> “the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly [compel] the victim[.]”<sup>46</sup> Whether detainees sign a contract is irrelevant as to the involuntary nature of the labor provided by civil detainees. Even voluntary contracts can violate the “full intent of the constitutional provision.”<sup>47</sup> The “voluntary” label does not defeat involuntary servitude. Congress passed the Peonage Act of 1867<sup>48</sup> pursuant to Section 2 of the Thirteenth Amendment. Peonage, banned by

Cir. 2012) (emphasizing that “[t]he power dynamics between prisoners and guards make it difficult to discern consent from coercion”).

<sup>38</sup> *Bailey v. Alabama*, 219 U.S. 219, 241, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

<sup>39</sup> *United States v. Kozminski*, 487 U.S. 931, 952, 487 S. Ct. 2751, 101 L. Ed. 2d 788 (1988).

<sup>40</sup> Order on GEO’s Mot. To Dismiss Compl., *Washington v. Geo Grp., Inc.*, 283 F. Supp. 3d 967, 973 (W.D. Wash. 2017).

<sup>41</sup> Pl. State of Wash.’s Mot. for Summ. J. on Minimum Wage Act Claim and Def. The GEO Group, Inc.’s Preemption Defense, 18:17–20:7, ECF 251 (“State Mot. Summ. J.”) (describing GEO’s ability to hire and fire workers).

<sup>42</sup> See Press Release, *supra* note. (noting that “GEO uses immigration detainee labor to perform virtually all non-security functions” and is projected to make \$57 million per year from the NWDC).

<sup>43</sup> State Mot. Summ. J. 2:23, ECF 251.

<sup>44</sup> Although GEO’s current contract does not disclose the minimum number of beds, in 2015, ICE’s contract with GEO guaranteed a minimum of 750 full beds every night. Lael Henterly, *Fewer Immigrants Filling Tacoma Detention Center, as Doubts Grow about New Contract*, The Seattle Globalist (Apr. 2, 2015), <https://www.seattleglobalist.com/2015/04/02/tacoma-detention-center-immigrant-ice-contract/35475>.

<sup>45</sup> See *supra* Part IV.B.1

<sup>46</sup> *Kozminski*, 487 U.S. at 952.

<sup>47</sup> *Bailey*, 219 U.S. at 242.

<sup>48</sup> 42 U.S.C. § 1994 (2012).

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF  
WASHINGTON, WASHINGTON DEFENDER ASSOCIATION  
AND ONEAMERICA AMICI CURIAE IN SUPPORT OF  
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT - 7  
CASE NO. 3:17-CV-05806-RJB

#1257546 v1 / 99988-544

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Act, is involuntary servitude based on debt.<sup>49</sup> The Peonage Act abolished even “voluntary” peonage,<sup>50</sup> indicating Congress’s disdain for exploitative labor practices.<sup>51</sup> “The undoubted aim of the Thirteenth Amendment as implemented by the Peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States.”<sup>52</sup> The Thirteenth Amendment does not allow “the guise of contracts” to circumvent its absolute prohibitions,<sup>53</sup> which “denounces a status or condition, irrespective of the manner or authority by which it is created.” *Clyatt v. United States*, 197 U.S. 207, 216, 25 S. Ct. 429, 49 L. Ed. 726 (1905).

GEO’s total control of NWDC operations illustrates the involuntary character of the VWP. Analogously, imprisonment for civil contempt is justified because those who are imprisoned ““carry the keys of their prison in their own pockets.””<sup>54</sup> At NWDC, the VWP is the sole programming provided.<sup>55</sup> Participation in the VWP thus presents the only “key” available to people detained at NWDC.<sup>56</sup> If people wish to move freely outside of their cells or have no other funds<sup>57</sup> to purchase basic necessities from the commissary,<sup>58</sup> they have no choice but to work for \$1 per day.<sup>59</sup> Participation in the program is not freely given if the VWP is the only path to humane conditions during detention.

In the detention context, where intimidation reigns and access to phone privileges, increased visitation, or “luxuries” like hygiene products are subject to the discretion and approval

<sup>49</sup> *Bailey*, 219 U.S. at 242.

<sup>50</sup> 42 U.S.C. § 1994.

<sup>51</sup> *Garcia*, *supra* note 12, 15 496.

<sup>52</sup> *Pollock*, 322 U.S. 4, 17 (1944)

<sup>53</sup> *Bailey*, 219 U.S. at 242.

<sup>54</sup> *Penfield Co. of Cal. v. Sec. & Exch. Comm’n*, 330 U.S. 585, 590, 67 S. Ct. 918, 91 L. Ed. 1117 (1947) (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).

<sup>55</sup> The only program required by the PBNDS 2011 is general “access to leisure reading materials.” PBNDS 2011, at 374, U.S. Immigration and Customs Enforcement (revised 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>. Although the PBNDS 2011 adds that “\*[f]acilities shall offer other programmatic activities, such as: 1. educational classes or speakers; 2. sobriety programs such as alcoholics anonymous; and 3. other organized activities or recreational activities,” *id.*, letters written from within NWDC indicate otherwise, *see* Home Page, La Resistencia, <https://www.nwdcresistance.org> (last visited July 8, 2019) (documenting the 2017 hunger strike at NWDC and listing among their demands, “schoolwork and other programs available to keep detainees occupied”).

<sup>56</sup> *Cf. Penfield Co. of Cal.*, 330 U.S. at 590.

<sup>57</sup> Amicus Br. La Resistencia 10:18–23, ECF 257 (reporting that many detained workers previously represented the sole income for their families so that once within NWDC, they receive no outside funds).

<sup>58</sup> *Id.* at 14:17–20 (reporting that detainees’ health often depends on items purchased from the commissary).

<sup>59</sup> *See id.* at 18:1–2 (noting that detainees “do not quit because they do not have other options to survive detention”).

of guards, it is “difficult to characterize” seemingly voluntary decisions as “truly the product of free choice.”<sup>60</sup> At NWDC, distribution of food, free time, phone privileges, family visitation, toiletries, or basic necessities are subject to the whims of local management and regulated only by GEO’s contract with ICE.<sup>61</sup> GEO corrections officers who determine the parameters of one’s life in custody are also a detainee’s boss.<sup>62</sup> The VWP’s coercive and involuntary nature is all the more apparent when wages are contrasted with the price of goods within NWDC commissary. Local phone calls cost 10 cents per minute and long-distance calls cost 15 cents per minute,<sup>63</sup> a pack of oatmeal that might cost 60 cents in prison is sold at NWDC commissary for more than \$2.<sup>64</sup> This shadow market of slave-wage labor and inflated prices create labor practices that amount to involuntary servitude while adding to GEO’s profit.

Immigrant detainees elsewhere in the country report being held in solitary confinement as a punishment for refusing to participate in these “Voluntary” Labor Programs.<sup>65</sup> Reports from NWDC allege that detainees are coerced or forced to work, and if they refuse or encourage others to stop working, they risk being punished with solitary confinement.<sup>66</sup> Solitary confinement is both physically and psychologically damaging.<sup>67</sup> When over-used, it is torture.<sup>68</sup> Given the lack of

<sup>60</sup> See *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012) (noting that in a condition of confinement, seemingly “voluntary” sexual relationships between prisoners and guards are not always consensual because “sex is often traded for favors” like shampoo, gum, or cigarettes).

<sup>61</sup> See generally Amicus Br. La Resistencia 5–15 (reporting that NWDC detainees are forced to work in order to ensure their basic needs of nutrition, family contact, and health are met).

<sup>62</sup> State Mot. Summ. J. 17 (describing GEO officers’ supervisory role).

<sup>63</sup> About the NW Detention Center, Northwest Immigrant Rights Project, <https://www.nwirp.org/resources/about-the-nw-detention-center> (last visited July 5, 2019).

<sup>64</sup> Steven Hsieh, *An Immigrant Detainee at Tacoma Northwest Detention Center Tells Us Why He’s On Hunger Strike*, The Stranger (Apr. 11, 2017, 9:51AM), <https://www.thestranger.com/slog/2017/04/11/25068068/an-immigrant-detainee-at-tacoma-northwest-detention-center-tells-us-why-hes-on-hunger-strike>.

<sup>65</sup> Spencer Woodman, *Private Prison Continues to Send ICE Detainees to Solitary Confinement for Refusing Voluntary Labor*, The Intercept (Jan. 11, 2018, 5:48 AM), <https://theintercept.com/2018/01/11/ice-detention-solitary-confinement/>.

<sup>66</sup> Amicus Br. La Resistencia 16:8–14, 21–22.

<sup>67</sup> ACLU Foundation, *The Dangerous Overuse of Solitary Confinement in the United States* 4 (Aug. 2014), <https://www.aclu.org/report/dangerous-overuse-solitary-confinement-united-states>.

<sup>68</sup> *Id.*; Sadie Dingfelder, *Psychologist Testifies on the Risks of Solitary Confinement*, American Psychological Association (Oct. 2012), <https://www.apa.org/monitor/2012/10/solitary> (quoting Craig Haney, PhD, testifying before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights) (“[Individuals held in isolation are] at grave risk of psychological harm.”).



1 safeguards to prevent GEO from using such tactics, and reports of the wide use of isolation as  
 2 punishment at GEO facilities,<sup>69</sup> this coercive tactic must be considered.

3 b. GEO'S VWP is Coercive Because People Cannot Change Employers.

4 The “defense against oppressive hours, pay, working conditions, or treatment is the right  
 5 to change employers.”<sup>70</sup> The Thirteenth Amendment recognizes “[t]here is no more important  
 6 concern than to safeguard the freedom of labor upon which alone can enduring prosperity be  
 7 based.”<sup>71</sup> Such employment conditions erode the protections available in a free labor market, for  
 8 “[w]hen the master can compel and the laborers cannot escape the obligation to go on, there is no  
 9 power below to redress and no incentive above to relieve a harsh overlordship or unwholesome  
 10 conditions of work.”<sup>72</sup>

11 c. The Criminal Punishment Exception of the Thirteenth Amendment is  
 12 Inapplicable.

13 The Thirteenth Amendment protects the people who are detained at NWDC. While the  
 14 Supreme Court recognized that “[b]y its terms the Amendment excludes involuntary servitude  
 15 imposed as legal punishment for a crime,”<sup>73</sup> this “express exception” is limited to punitive labor  
 16 resulting from a criminal conviction.<sup>74</sup> Detention at NWDC is civil rather than punitive and does  
 17 not fall into the exception for involuntary servitude as a legal punishment for a crime.

18 V. CONCLUSION

19 Failing to protect immigration detainees under the MWA diminishes and disregards the  
 20 absolute protections and goals of the Thirteenth Amendment. GEO's VWP reverts back to an era  
 21 of involuntary servitude which is repugnant to the purpose of the Thirteenth Amendment.

22 GEO exploits detainees to turn a substantial profit.<sup>75</sup> Asylum seeking immigrants, legal  
 23 residents, and citizens awaiting their civil hearings maintain, clean, and paint NWDC buildings;

24 <sup>69</sup> Woodman, *supra* note 65.

<sup>70</sup> Pollock, 322 U.S. at 18.

<sup>71</sup> Bailey, 219 U.S. at 244–45.

<sup>72</sup> Pollock, 322 U.S. at 18.

<sup>73</sup> Kozminski, 487 U.S. at 943.

<sup>74</sup> *Id.* at 942.

1 prepare and serve food; cut hair; and supply laundry services for \$1-a-day<sup>76</sup> in the facilities where  
 2 they are detained, with no opportunity to obtain alternate employment.<sup>77</sup> VWP laborers at the  
 3 NWDC are GEO's involuntary servants. This Court should find GEO is subject to Washington's  
 4 MWA and the protections guaranteed by the Thirteenth Amendment.

5  
 6 DATED this 8<sup>th</sup> day of July, 2019.

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