**No. 19-50691**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

MARTHA GONZALEZ, individually and on behalf of all others similarly situated,

*Plaintiff-Appellee,*

v.

CORECIVIC, INCORPORATED,

*Defendant-Appellant*.

---

**On Certified Order from the United States District Court**
**For the Western District of Texas, Austin Division**
**No. 1:18-cv-00169-LY**
**Hon. Lee Yeakel**

---

# BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

---

Michael M. Hethmon
Christopher J. Hajec
Lew J. Olowski
Immigration Reform Law Institute
25 Massachusetts Ave. NW, Suite 335
Washington, DC 20001
(202) 232-5590
info@irli.org

*Attorneys for Amicus Curiae*
*Immigration Reform Law Institute*

## SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Undersigned counsel of record for *amicus curiae* Immigration Reform Law Institute certifies he is not aware of any persons interested in this case beyond those that have already been listed by the parties, and provides the following list of interested parties with an interest in this amicus brief:

**Amicus Curiae**
Immigration Reform Law Institute

**Attorneys for Amicus Curiae**
Michael Hethmon
Christopher J. Hajec
Lew J. Olowski

## DISCLOSURE STATEMENT

The Immigration Reform Law Institute is a 501(c)(3) nonprofit corporation. It does not have a parent corporation and does not issue stock.

All parties have consented to the filing of this *amicus curiae* brief. No party or party's counsel authored any part of this brief. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes**



**Other Authorities**

## IDENTITY OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens and to assisting courts in understanding federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases and federal venues. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing prepared by IRLI staff.

## SUMMARY OF THE ARGUMENT

By claiming that work programs in immigration detention facilities operated by federal contractors violate the Trafficking Victims Protection Act ("TVPA"), and seeking to certify a class consisting of all detainees participating in those programs, plaintiff-appellee does not primarily ask for redress of her own alleged injuries. Rather, she asks for a resounding declaration by this Court that the United States, when it contracted with private companies to detain aliens subject to detention under federal law, established (at least in the eyes of later-enacted law) a nationwide system of illegal slave camps. By sleight of hand, this declaration was provided by the court below. It should not be echoed by this Court.

Defendant-appellant CoreCivic, Incorporated ("CoreCivic") is a federal contractor that administers several immigration detention facilities. Plaintiff-appellee alleges that paying detainees $1-per-day compensation for work performed

at these facilities violates TVPA. This $1-per-day compensation rate was first set by Congress, and CoreCivic is required by its contract with the federal government to offer such compensation to detainees.

Against this background, the district court's sweeping holding that TVPA applies generally to federal contractors operating detention facilities according to the terms of their contracts, which include the standard term that detainees be made to clean their own living areas without compensation, was erroneous for at least three reasons.

First, plaintiff-appellee's position, which the district court accepted, implies that the TVPA worked a repeal by implication of earlier provisions of federal law—namely, those both authorizing federal contractors to detain aliens and setting the terms of their contracts, including the amount of compensation that must be given for work. Repeals by implication are strongly disfavored, and the conditions for such a repeal are entirely absent here. Congress gave no indication that it intended, in TVPA, to outlaw the system of privately-run detention facilities that it had created.

Secondly, such a reading of TVPA would be glaringly absurd. Under the longstanding—indeed, bedrock—Absurdity Doctrine, absurd interpretations of statutes are to be eschewed even when they otherwise might be consistent with the statutory text. Here, it is absurd to a high degree not only that Congress should have outlawed its immigration detention system *sub silentio*, but that illegal aliens and

criminal aliens subject to detention should be entitled to personal cleaning services at taxpayer expense—especially since they are often free to leave detention, return to their home countries, and pursue various immigration relief from there.

Thirdly, CoreCivic, as a federal contractor, enjoys derivative sovereign immunity against the instant action. Derivative sovereign immunity protects CoreCivic against any complaint where the allegations are based upon CoreCivic's exercise of authority validly conferred to it by the federal government. To be sure, derivative sovereign immunity does not apply when a detainee brings a complaint alleging that a contractor committed extreme abuse in excess of the authority that the government actually granted, or can validly confer, to a contractor. But to the extent that plaintiff-appellee's claims go beyond such allegations of abuse, and trench upon CoreCivic's exercise of its validly-conferred authority, they are barred.

## ARGUMENT

### I. The TVPA did not repeal by implication the statutes creating and governing contractor-run immigration detention facilities.

At immigration detention facilities, where the federal government assigns contractors for day-to-day operation, the federal government requires contractors to offer work programs for detainees. 8 U.S.C. § 1555(d) ("Appropriations now or hereafter provided for the Immigration and Naturalization Service shall be available for . . . payment of allowances (at such rate as may be specified from time to time in

the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed."). "The work program created by this law has been known as the 'Voluntary Work Program,' and ICE [Immigration and Customs Enforcement] detention standards *require it to be offered by detention facilities* and provide that 'compensation is at least $1.00 (USD) per day.'" Statement of Interest of the United States at 3, *State of Washington v. The GEO Group, Inc.*, No. 17-cv-05769 (W.D. Wash. Aug. 8, 2019) (emphasis added).

Indeed, using contractors such as CoreCivic to administer immigration detention facilities is the federal government's primary detention policy. Each day, the federal government holds more than 30,000 aliens in civil detention. R.E.027. Two-thirds of these aliens are detained at facilities "operated by private companies like CoreCivic." *Id.* Such companies operate "nine out of ten of the country's largest immigration detention facilities." *Id.*

Plaintiff-appellee's objection to this $1-per-day compensation rate is the gravamen of her complaint against CoreCivic. Plaintiff-appellee brings her complaint on behalf of a putative class of "all civil immigration detainees who performed labor for no pay or at a rate of compensation of $1.00 to $2.00 per day for work performed for CoreCivic at any detention facility." R.E.036. Plaintiff-appellee alleges that being paid $1 or $2 per day constitutes "illegally low-wage compensation." R.E.042. "Plaintiff also seeks to recover, on her own behalf and on

behalf of all others similarly situated, the difference between the fair value of the labor or work they performed and what they were paid ($1 to $2 per day).” R.E.029. “CoreCivic has been wrongly and unjustly enriched by the use of forced labor, human trafficking practices, and paying one or two dollars a day.” R.E.025. Partly because it pays them merely $1 per day, “CoreCivic treats these human beings as a slave labor force.” R.E.026.

Yet it was Congress—not Corecivic—that expressly determined this exact rate of compensation: $1 per day. This compensation rate was set by statute and has been in place for decades. *Alvarado Guevara v. INS*, 902 F.2d 394, 396 (5th Cir. 1990) (“Pursuant to 8 U.S.C. § 1555(d), which provides for payment of allowances to aliens for work performed while held in custody under the immigration laws, volunteers are compensated one dollar ($ 1.00) per day for their participation. The amount of payment was set by congressional act.”) (citing Department of Justice Appropriation Act, 1978, Pub. L. No. 95-86, 91 Stat. 426 (1978) (Authorizing “payment of allowances (at a rate not in excess of $1 per day) to aliens, while held in custody under the immigration laws, for work performed.”)).

The Supreme Court recently explained that a court will not find repeal by implication “unless the intention of the legislature to repeal is clear and manifest” and “unless the later statute expressly contradicts the original act or . . . such a construction is absolutely necessary in order that the words of the later statute shall

have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (interior alterations, citations, and quotation marks omitted). Here, Congress' intent to repeal its own $1-per-day work program is not "clear and manifest" under TVPA because no such intention existed. Nor is plaintiff-appellee's interpretation of TVPA "absolutely necessary in order that the words of [TVPA] shall have any meaning at all." TVPA prohibits forced labor in innumerable contexts outside of detention facilities.

## II. Plaintiff-appellee's interpretation of TVPA is absurd.

The Absurdity Doctrine is as necessary as it is long-established. "If there arise out of [acts of parliament] collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void." 1 WILLIAM BLACKSTONE, COMMENTARIES *91. "Even the strictest modern textualists properly emphasize that language is a social construct." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392 (2003). And mindfulness of absurd consequences is—and always has been—an essential element of reading a text, notwithstanding the plainest statutory language. "[T]he language being plain, *and not leading to absurd or wholly impracticable consequences*, it is the sole evidence of the ultimate legislative intent." *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (emphasis added). "From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may

deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results." Manning, *supra* at 2388. Reading statutes in this way "demonstrates a respect for the coequal Legislative Branch, which we assume would not act an in absurd way." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring). Thus, "[w]e are authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress." *United States v. Rodriguez-Rios*, 14 F.3d 1040, 1044 (5th Cir. 1994).

Of course, the district court correctly chose textualism as its interpretive approach. TVPA's plain meaning is more authoritative than even Congress's intent: a prohibition on international human trafficking. *See* Appellant's Brief at 18–24. By reading TVPA as it did, however, the district court adopted plaintiff-appellee's absurd theory that the United States operates "forced labor camps around the country." R.E.021. This interpretation of TVPA does not merely impose liability on CoreCivic in Texas, but further implies that every federal immigration-detention facility nationwide is "treating civil detainees as slave labor." R.E.024.

Plaintiff-appellee's additional claim that TVPA is violated when detainees are forced to clean up after themselves is also absurd. Plaintiff-appellee complains she and other class members were "forced by CoreCivic to clean the 'pods' where they were housed." R.E.029. But the alternative to forcing recalcitrant detainees to clean

their own pods is to provide them with taxpayer-funded cleaning service—an alternative particularly absurd because detainees are often free to leave detention to pursue various immigration relief from abroad, in their home countries. *E.g.*, *Nken v. Holder*, 556 U.S. 418, 424 (2009) ("Congress lifted the ban on adjudication of a petition for review once an alien has departed.").

Also, this particular detention feature is expressly required by the federal government. "Work assignments are voluntary; however, all detainees are responsible for personal housekeeping." U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2016) at 406, *available at* https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf. *See Channer v. Hall*, 112 F.3d 214, 215 (5th Cir. 1997) ("The federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks."). That regulation runs afoul of the plain meaning of TVPA only if TVPA is read—as it may not be—without regard for absurd consequences.

## III. CoreCivic enjoys derivative sovereign immunity.

Plaintiff-appellee's true grievance lies against the federal government, which has: (1) prohibited plaintiff-appellee's unlawful entry into the United States; (2) detained plaintiff-appellee; and (3) set the terms of plaintiff-appellee's detention, including her access to a $1-per-day work program. But plaintiff-appellee's

complaint singles out CoreCivic in the hope that, by jeopardizing the contractors whom the federal government assigns to manage two-thirds of the Nation's immigration detainees, plaintiff-appellee can accomplish a nationwide policy change through an attack on federal contractors. R.E.026 ("The For-Profit Detention Industry Abuses The Immigration System."). Indeed, plaintiff-appellee's complaint to the court below is just one front in a strategic litigation campaign. "This case is one of four copycat cases against CoreCivic in the last few years." Appellant's Brief at 31 n.9.

CoreCivic, however, is merely the federal government's agent. CoreCivic itself is not liable for plaintiff-appellee's objections to federal policy. "[I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940). CoreCivic can only be liable to plaintiff-appellee if CoreCivic exceeds the authority assigned to it by the federal government, or if the underlying federal policy is itself unlawful. "Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be *either that he exceeded his authority or that it was not validly conferred*." *Id.* at 21 (emphasis added). An agent of the government is not liable when it is faithfully implementing

the exact directive that the federal government has ordered it to do. "[T]there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred. The action of the agent is 'the act of the government.'" *Id.* at 22 (quoting *United States v. Lynah*, 188 U.S. 445, 465 (1903)). Here, CoreCivic is merely acting under the express authority of the federal government, which dictates CoreCivic's actions down to the very same compensation details that plaintiff-appellee complains about.

The holding of *Yearsley* controls in this case. Plaintiff's core allegation against CoreCivic, and plaintiff's definition of the putative class—"all civil immigration detainees who performed labor for no pay or at a rate of compensation of $1.00 to $2.00 per day"—does not allege that CoreCivic exceeded its authority. CoreCivic paid plaintiff-appellee, and paid everyone in the putative class of immigration detainees, no less than the federal government instructed.

Plaintiff-appellee raised the issue of derivative sovereign immunity in her response to CoreCivic's motion to dismiss. "Should CoreCivic be awarded sovereign immunity and Ms. Gonzalez's claims be dismissed?" Plaintiff's Opposition to Defendant's Motion to Dismiss and Alternative Motion for Leave to Amend at 1, *Gonzalez v. CoreCivic, Inc.*, No. 18-cv-00169 (W.D. Tex. Jul. 24, 2018). The issue having been raised by plaintiff-appellee, this Court should now find that CoreCivic does indeed enjoy derivative sovereign immunity against claims such

as plaintiff-appellee's, which challenges CoreCivic's faithful implementation of the federal government's authority.

When preemptively arguing that CoreCivic lacks sovereign immunity, plaintiff-appellee cited cases wherein a contractor lacked immunity because he was alleged to have exceeded his rightful authority. Plaintiff-appellee relies primarily on *Richardson v. McKnight*, 521 U.S. 399 (1997). There, prison guard contractors were alleged to have inflicted "cruel and unusual punishment" when they restrained a detainee in a manner that "caused him serious medical injury which actually required hospitalization." *McKnight v. Rees*, 88 F.3d 417, 419 (6th Cir. 1996). The federal government cannot validly confer the authority to inflict cruel and unusual punishment, so the contractor was not immune from liability. Likewise, in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), a contractor sent text messages to recipients without first obtaining their consent, violating the express terms of his contract with the federal government. His contract was "conditioned on sending the messages only to individuals who had 'opted in' to receipt of marketing solicitations." *Id.* at 667. That contractor exceeded the authority conferred by the federal government, so he was not immune from liability.

In this case, however, CoreCivic is operating within the express terms of its contract with the federal government, and those terms are within the federal

government's valid prerogative to set. Therefore, derivative sovereign immunity protects CoreCivic from liability.

Even though the issue of derivative sovereign immunity was raised and argued below, the district court did not even consider the issue when denying CoreCivic's motion to dismiss plaintiff-appellee's complaint. A lower court's failure to consider the merits of a dispositive issue presented is reversible error. *See, e.g., Wood v. Old Sec. Life Ins. Co.*, 643 F.2d 1209, 1214 (5th Cir. 1981) ("[T]he trial court's failure to consider the causation issue is reversible error. While we are in basic agreement with this contention . . . we remand the case to the trial court for a finding on the causation issue rather than simply rendering judgment . . . .").

Still, the district court's reasoning in its denial of CoreCivic's motion to dismiss hints at the correct approach. Specifically, the district court noticed that plaintiff-appellee alleges that CoreCivic threatened her with solitary confinement, which "constitutes serious harm" and "bears 'a further terror and peculiar mark of infamy.'" R.E.014 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J. concurring) (quoting *In re Medley*, 134 U.S. 160, 170 (1890))). Even if derivative sovereign immunity applies to CoreCivic's faithful implementation of its contract with the federal government, behavior unauthorized by that contract lies outside the scope of such immunity.

Subjecting immigration detainees to extreme abuse may expose a federal contractor to liability. Derivative sovereign immunity does not cover conduct by a contractor that exceeds the authority conferred to it, or that cannot be lawfully conferred in the first place. *Yearsley*, 309 U.S. at 21. Like the prison-guard contractors in *Richardson* who had committed "cruel and unusual punishment," federal contractors at immigration-detention facilities might forfeit their sovereign immunity in specific instances where their conduct is so extreme that it goes beyond the limits of what the federal government is itself allowed to do, or beyond what the federal government has authorized its contractor to do. 521 U.S. at 401–02. Even CoreCivic impliedly concedes that, if it *were* engaged in a human trafficking scheme—conduct that would place CoreCivic beyond the scope of its contract and beyond the scope of legitimate federal power—then TVPA could apply against it. Appellant's Brief at 24. But TVPA does not apply against CoreCivic's dutiful performance of its contract with the federal government, implementing Congress' express mandates for immigration detention facilities.

Plaintiff-appellee's complaint, and the district court's ruling, revives the Medieval stratagem of the motte-and-bailey. Factual allegations that could conceivably state a valid claim for relief—specific allegations of abusive behavior by CoreCivic—were buttressed against factual allegations that fail to state a claim upon which relief can be granted: namely, the mere observation that CoreCivic

operates the federal government's $1-per-day immigration-detention work program. The rhetorical effect of the former category of allegations is that it lends credibility to the latter category of allegations, which cannot stand on their own merits. Hence the district court's focus upon plaintiff-appellee's allegation of solitary confinement. R.E.014. But the district court's denial of CoreCivic's motion to dismiss drew no distinction between plaintiff-appellee's defensible motte allegations (for example, injury based on solitary confinement) and her indefensible bailey allegations (for example, injury based on $1-per-day compensation). Even though former allegations might justify a complaint under TVPA, the latter allegations do not. The district court's failure to recognize the difference between these categories in its denial of CoreCivic's motion to dismiss the complaint was reversible error.

## CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed.

Dated: October 23, 2019.

Respectfully submitted,

/s/ Michael M. Hethmon

Michael M. Hethmon
Christopher J. Hajec
Lew J. Olowski
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Avenue NW, Ste 335
Washington, DC 20001
(202) 232-5590
info@irli.org
Attorneys for *Amicus Curiae*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This document complies with the type-volume limit of FED R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED R. APP. P. 32(f), this document contains 3,107 words.

2. This document complies with the typeface requirements of FED R. APP. P. 32(a)(5) and the type-style requirements of FED R. APP. P. 32(a)(6) because this document has been prepared in a proportionately-spaced typeface using Microsoft Word 2016 in 14 Times New Roman

s/ Michael M. Hethmon

Attorney for *amicus curiae* Immigration Reform Law Institute

Dated: October 23, 2019

## CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on October 23, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

/s/ Michael M. Hethmon
Michael M. Hethmon