No. 22-01409

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Alejandro Menocal, *et al.,*

Plaintiffs-Appellees,

— v. —

The GEO Group, Inc.,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Colorado, No. 1:14-cv-02887 (Hon. John L. Kane)

APPELLANT'S OPENING BRIEF

(Oral Argument Requested)

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STATEMENT OF RELATED CASES

This appeal is related to a previous appeal on an unrelated issue in *Menocal v. The GEO Group, Inc.*, 882 F.3d 905 (10th Cir. 2018).

GLOSSARY

AIPC	Aurora Immigration Processing Center
DSI	Derivative Sovereign Immunity
ICE	Immigration and Customs Enforcement
INS	Immigration & Naturalization Service
FTCA	Federal Tort Claims Act
GEO	Defendant-Appellant The GEO Group, Inc.
NDS	National Detention Standards
PBNDS	Performance Based National Detention Standards
TVPA	Trafficking Victims Protection Act
VWP	Voluntary Work Program

JURISDICTIONAL STATEMENT

On October 18, 2023, the district court entered its order granting summary judgment for Plaintiffs and denying summary judgment for The GEO Group, Inc. ("GEO"), *inter alia*, on the applicability of derivative sovereign immunity ("DSI"). Appellant filed its notice of appeal on November 17, 2022. This Court ordered briefing on jurisdiction and set a schedule for briefing on the merits, all of which will be considered by the merits panel. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

STATEMENT OF ISSUES

Whether the district court properly granted summary judgment for Plaintiffs and against GEO on its assertion that the DSI doctrine precludes a trial on Plaintiffs' two claims:

1. Unjust enrichment, based upon Plaintiffs' voluntary participation in a federally-mandated Voluntary Work Program ("VWP") implemented by GEO in accordance with the provisions of GEO's contract with the United States Immigration and Customs Enforcement ("ICE") that provided detainee participants in the VWP a stipend of "$1 per day" or "at least $1 per day" for VWP assignments; and

2. Violation of the Trafficking Victims Protection Act, 18 U.S.C. § 1589 *et seq*. ("TVPA"), based upon GEO's implementation of federally-mandated housekeeping and disciplinary policies in accordance with the provisions of GEO's contract with ICE that require detainees to clean and maintain their assigned living areas or face possible discipline for refusing to do so.

INTRODUCTION

Government contractors perform essential functions that the government itself is unable to perform. Relevant here, Congress requires the Department of Homeland Security to use privately owned, contracted facilities for detaining persons accused of immigration offenses before building a government-run facility. 8 U.S.C. § 1231(g)(2). Contractors who accept and perform that work as directed by the relevant federal agency enjoy DSI: "Where the Government's 'authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress,' we explained, 'there is no liability on the part of the contractor' who simply performed as the Government directed." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 187 (2016) (citing *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18 (1940)).

Defendant GEO performed as directed. It implemented a VWP for detainees and paid a stipend of $1 per day or "at least $1 per day," just as ICE authorized and directed. GEO also adopted, subject to ICE review and approval, a housekeeping policy with an accompanying disciplinary scale mandated by ICE. No one disputes that each of these actions was properly within congressional authorization. The district court erred in applying an incorrect legal standard to conclude that GEO's work was not "performed as the Government directed" because GEO had small amounts of "discretion" in complying with these contractual requirements. That

incorrect standard for DSI derives from a pair of Ninth Circuit decisions that draw on a *dissenting* opinion from the Supreme Court in a case addressing different legal issues. *See* Part I.A *infra*. But "direction" under *Yearsley* and *Campbell-Ewald* does not require that a contractor have zero discretion with respect to how it carries out its contractual obligations. Since *Campbell-Ewald*, the Fourth and Fifth Circuits have both recognized that a contractor's exercise of discretion is compatible with working at the government's direction and therefore does not defeat DSI.

The contrary Ninth Circuit rule—which predates *Campbell-Ewald*—would make DSI illusory for private actors who perform essential government work. The result would be fewer contractors and higher government costs to compensate for contractors' litigation risk wherever enterprising plaintiffs' lawyers allege some amount of discretion in carrying out federal agencies' directions. This Court should cabin the Ninth Circuit's error and apply the common-sense rule set out by the Supreme Court in *Yearsley* and *Campbell-Ewald*. The result is that GEO is immune from suit for work performed pursuant to a lawful act of Congress and at ICE's direction.

STATEMENT OF THE CASE

I. As Directed by Congress, ICE Contracts with Private Entities like GEO for the Detention of Certain Individuals Pending Immigration Proceedings.

Congress created ICE to enforce immigration laws. 6 U.S.C. § 542; APP. Vol. II at 257 (Material Undisputed Fact #1). The Department of Homeland Security, in which ICE is located, has authority to arrange for all aspects of the detention of aliens pending the resolution of their immigration proceedings. 8 U.S.C. § 1231(g)(1) ("The [Secretary of Homeland Security] shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."). In making detention "arrange[ments]," ICE must consider the use of private contractors *before* constructing its own facilities. 8 U.S.C. § 1231(g)(2) ("Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use."). The Secretary also has "authority to make contracts . . . as may be necessary and proper to carry out the Secretary's responsibilities." 6 U.S.C. § 112(b)(2); *see Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 751 (9th Cir. 2022) (confirming authority "conferred by Congress, to use private contractors to run its immigration detention facilities").

Pursuant to these statutes, ICE contracts with GEO to house some of its detainees in GEO-owned detention facilities throughout the country, including the Aurora Immigration Processing Center ("AIPC") in Aurora, CO. *See* APP. Vol. II at 257 (Material Undisputed Facts #3 and #4). Relevant to the instant case, GEO has owned and continuously operated AIPC, under contracts with ICE from October 22, 2004 to October 22, 2014. APP. Vol. II at 257 (Material Undisputed Fact #5).

ICE's contracts require compliance with extensive regulations and standards. All immigration detention processing centers, including the AIPC, must adhere to ICE's standards, which appear in a variety of documents. In 2000, the Immigration and Naturalization Service ("INS"), ICE's predecessor, adopted the original National Detention Standards (the "2000 NDS") ECF 261-10. ICE promulgated similar standards in the form of the Performance Based National Detention Standards ("PBNDS") in 2008 (the "2008 PBNDS") APP. Vol. I at 160 and 2011 (later updated in 2016) (the "2011 PBNDS") APP. Vol. I at 95.

In each contract GEO entered into with ICE for the operation of the AIPC, the 2000 NDS, 2008 PBNDS, or the 2011 PBNDS, as applicable, were incorporated into the contract, and GEO was required to comply with those standards. APP. Vol. II at 261–262 (Additional Undisputed Fact #7). GEO's original contract required compliance with the 2008 PBNDS. ECF 262-2 at 38 (incorporating the 2008 PBNDS into the contract); APP. Vol. II at 262 (Additional Undisputed Fact #11,

#12). A later amendment to that contract on May 23, 2013 provided that, effective June 23, 2013, GEO would comply with the 2011 PBNDS. APP. Vol. II at 262 (Additional Undisputed Fact #12) (citing ECF 271-4); ECF 262-3 at 2 (GEO-MEN 00020406; APP. Vol. II at 262 (Additional Undisputed Fact #11, #12).

II. GEO Complied with ICE Directions to Provide a Stipend of at Least $1 Per Day to Participants in the Voluntary Work Program.

The 2000 NDS and all applicable versions of the PBNDS require that GEO provide AIPC detainees the opportunity to participate in a VWP. APP. Vol. II at 260 (Material Undisputed Fact #20). The VWP's purpose is to enhance essential operations and services through detainee productivity and reduce the negative impact of confinement through decreased idleness, improved morale and fewer disciplinary incidents. APP. Vol. I at 223.

The 2000 NDS required GEO to provide "compensation" and explicitly directed that "the stipend is $1.00 per day, to be paid daily." ECF 261-10 at 5. Likewise, the 2008 PBNDS mandated that VWP participants' "compensation is $1.00 per day." APP. Vol. I at 222. This is the same amount specified for VWP participants at ICE-owned and operated Service Processing Centers. APP. Vol. I at 222. Beginning on June 23, 2013, the AIPC contract required compliance with the 2011 PBNDS, which states that participants in the VWP will be compensated "at least $1.00 (USD) per day." ECF 271-4 at 2, 3; APP. Vol. I at 147. Here again, this

change also applied to VWP participants at ICE-owned and operated Service Processing Centers. APP. Vol. I at 144, 146, 147.

The 2008 PBNDS also requires that the facility administrator distribute the ICE National Detainee Handbook to all detainees. APP. Vol. I at 203, 223. The ICE National Detainee Handbook includes a section entitled "Voluntary Work Program." This section specifically states that "[w]e will make every effort to ensure that you have an opportunity to participate in a voluntary work program. . . . If you are housed in an ICE Service Processing Center or Contract Detention Facility, you will be paid $1.00 per day worked (not per assignment)." ECF 51-3 at 19. The AIPC is a Contract Detention Facility.

ICE reimburses its contractors, including GEO, no more than $1.00 per day for work performed by detainee participants in the VWP. APP. Vol. II at 260 (Material Undisputed Fact #22). In fact, Congress authorizes ICE to reimburse contractors no more than $1.00 per day for VWP participants. *See* 8 U.S.C. § 1555(d). ICE's contract with GEO for the AIPC included a specific contract line item entitled "Stipend for Detainee Work Program - Reimbursement for this line item will be at actual cost of $1.00 per day per detainee." ECF 262-2 at 5. At all relevant times, GEO provided VWP participants a stipend of at least $1 per day. APP. Vol. II at 267 (Additional Undisputed Facts #36, #37). The VWP at AIPC has

been audited by ICE each year and has passed each audit since 2004. APP. Vol. II at 266 (Additional Undisputed Fact #30) (citing GEO-MEN 00131936).

III. GEO Complied with ICE Directions to Require Detainees to Assist in Maintaining Clean and Sanitary Housing Units.

A. ICE Directs Contractors to Require Detainees to Participate in Housekeeping.

ICE directs its contractors to require detainees to participate in maintaining a clean and sanitary environment. *See* APP. Vol. I at 100. The 2000 NDS and all applicable versions of the PBNDS specify that detainees are responsible for personal housekeeping and maintaining their assigned living areas. *See* APP. Vol. I at 220. (2008 PBNDS: "all detainees are responsible for personal housekeeping. *** Detainees are required to maintain their immediate living areas in a neat and orderly manner…"); APP. Vol. I at 145 (2011 PBNDS: "Detainees are required to maintain their immediate living areas in a neat and orderly manner").

The ICE National Detainee Handbook in effect at the time of the 2011 Aurora Contract award includes the following explanation of the detainees' obligation to clean assigned living areas: "You are not entitled to compensation for tasks that involve maintaining your personal area or cleaning up after yourself in general use areas. You are required to perform basic cleaning tasks within your living unit, regardless of where you are held." ECF 51-3 at 19. Similarly, the 2013 version of the ICE National Detainee Handbook explains to detainees that they must clean their

living area and common areas: "Will I get paid for keeping my living area clean? No, you must keep areas that you use clean, including your living area and any general use areas that you use. If you do not keep your areas clean, you may be disciplined.") ECF 310-1 at 18.

The PBNDS also authorized and directed GEO to develop and issue to each newly admitted detainee a copy of a local supplement to the ICE National Detainee Handbook that fully describes all policies, procedures and rules in effect at the facility. APP. Vol. I at 132. The local supplement at AIPC (the "AIPC Handbook") is issued to all detainees entering Aurora. APP. Vol. II at 259 (Material Undisputed Fact #14). The AIPC Handbook provides the following explanation of detainees' housekeeping obligations:

> Each and every detainee must participate in the facility's sanitation program. A list of detainees is developed each day by staff and is posted daily for viewing. During a general cleanup all detainees must participate.
>
> ***
>
> Day rooms are open spaces in the housing units that are utilized for watching television, playing board games, dominos or cards, as well as for socializing among detainees. Tables with chairs are provided for your use in the dayroom. All detainees are required to keep clean and sanitary *all commonly accessible areas* of the housing unit including *walls. floors, windows, window ledges, showers, sinks, toilets, tables, and chairs*.
>
> ***
>
> Detainees will take turns cleaning the area. . . . If the detainees in the housing unit do not clean the area after being instructed to do so, the televisions will be turned off, and the detainees will not be permitted to participate in any activities/programs until the housing unit is cleaned. Continued refusal to clean will result in further disciplinary action.

APP. Vol. I at 244 (PL000047) (emphasis added). It is undisputed that all of GEO's policies, including the AIPC Handbook, are reviewed and approved by an ICE official. APP. Vol. II at 259 (Material Undisputed Fact #15); ECF 271-11 at 8-10; ECF 261-16 at 5-6; ECF 291-1.

ICE audits GEO to ensure that GEO complies with all requirements of its contract, including its obligations under the PBNDS. APP. Vol. II at 265 (Additional Undisputed Fact #24). The materials provided to detainees at intake, including the AIPC Handbook, are regularly audited and have passed each audit since 2004. *Id.*; APP. Vol. II at 266 (Additional Undisputed Fact #29). It is undisputed that under both the PBNDS and the AIPC Handbook, detainees must keep their living areas clean and sanitary. APP. Vol. II at 259 (Material Undisputed Fact #13).

B. ICE Prescribes a Disciplinary Scale for a Detainee's Failure to Clean His Living Area.

The 2000 NDS and all applicable versions of the PBNDS require that GEO "shall adopt, without changing, the offense categories and disciplinary sanctions set forth in this section." ECF 261-10 at 17 (2000 NDS); APP. Vol. I at 204 (2008 PBNDS) ("shall adopt, without alteration, the offense categories and disciplinary sanctions set forth in this section."); APP. Vol. I at 133 (2011 PBNDS) ("All facilities shall have graduated scales of offenses and disciplinary consequences as provided in this section.").

As directed by ICE, the graduated scale of offenses provided in the 2000 NDS and all relevant versions of the PBNDS explicitly include the "[r]efusal to clean assigned living area" as an offense which can be sanctioned by "[d]isciplinary segregation (up to 72 hours)." ECF 261-10 at 24 (2000 NDS); APP. Vol. I at 215 (2008 PBNDS); APP. Vol. I at 141, 142 (2011 PBNDS); APP. Vol. I at 72 (Plaintiffs' Undisputed Facts #77 and #79). The 2000 NDS and all relevant versions of the PBNDS also explicitly direct the adoption of a disciplinary severity scale that lists "[r]efusing to obey the order of a staff member or officer" as an offense which can be sanctioned by "[d]isciplinary segregation (up to 72 hours)." ECF 261-10 at 24 (2000 NDS); APP. Vol. I at 215, 216. (2008 PBNDS); APP. Vol. I at 142 (2011 PBNDS); APP. Vol. I at 72 (Plaintiffs' Undisputed Facts #77 and #79).

As directed, the AIPC Handbook's disciplinary severity scale does not deviate from the 2000 NDS or the applicable PBNDS. ECF 273-1 (2005 AIPC Handbook); ECF 273-2 (2007 AIPC Handbook); ECF 273-3 (2008 AIPC Handbook); ECF 273-4 (2010 AIPC Handbook); ECF 273-5 (2011 AIPC Handbook); APP. Vol. I at 245–248 (October 2013 AIPC Handbook, specifically identified in Plaintiffs' discovery responses as the basis for their claims); ECF 271-5 (Kevin Martin Dep. 40:21-24: "Q. Do you know if there's any deviation from between . . . the GEO Detainee Handbook and the PBNDS as far as disciplinary requirements? A. Not as far as disciplinary requirements[.]"). In fact, as required by the 2000 NDS and the

applicable versions of the PBNDS, the disciplinary severity scale is copied verbatim into the AIPC Handbook. ECF 271-5 (Kevin Martin Dep. 40:13-16, 83:17-22).

ICE audits GEO to ensure that GEO complies with all requirements of its contract, including its obligations under the PBNDS. APP. Vol. II at 265 (Additional Undisputed Fact #24). Each audit reviews compliance with each applicable PBNDS requirement. *Id.* ICE audits the materials provided to detainees at intake, including the AIPC Handbook and orientation video, as well as the disciplinary scale, all of which have passed each audit since 2004. *Id.* The audits specifically review intake procedures to ensure that the orientation information provides required information about "[u]nacceptable activities and behavior, and corresponding sanctions" as well as the detainee handbook. *Id.*

ICE has not only approved the disciplinary severity scale but has also acted to implement and enforce the sanctions therein. One of the named Plaintiffs in this case—Demetrio Valerga—explained during his deposition that ICE officers told him that he could be taken to segregation for refusing to help clean his living area. ECF 271-7 (Demetrio Valerga Dep., 135:15-137:19, 138:15-23). Furthermore, ICE's sworn declaration testimony in this case confirms that ICE's policies are "clear that all detainees, including those not participating in a Voluntary Work Program, are expected to participate in keeping general-use or detainee common areas clean and orderly." ECF 335-2. Ultimately, ICE directed the adoption of

GEO's policy, audited it to ensure compliance with the contract, and participated in enforcing it. At all times, GEO's cleaning and associated disciplinary policies and practices at the AIPC were implemented by GEO as authorized and directed by ICE.

IV. Proceedings Below

On October 22, 2014 Plaintiffs commenced this class action, alleging GEO's operation of the AIPC under its contracts with ICE involved: (1) noncompliance with the Colorado Minimum Wages of Workers Act, Colo. Rev. Stat. § 8-6-101, *et seq*.; (2) violations of the forced labor provision of the Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. §§ 1589, 1595; and (3) unjust enrichment. GEO filed a motion to dismiss, which the district court granted as to the alleged violations of the Colorado minimum wage claim. *Menocal v. GEO Grp., Inc*., 113 F.Supp.3d 1125, 1135 (D. Colo. 2015) ("*Menocal I*").

A. Class Certification

The district court certified two classes, corresponding to the two claims for which it concluded that GEO was not entitled to summary judgment.

First, the "Voluntary Work Program Class" is comprised of detainees who allege that GEO has been unjustly enriched by implementing and operating the VWP that GEO is required to implement and operate in accordance with the terms of its contract with ICE, including all incorporated operating standards. Plaintiffs specifically claim: "By paying Plaintiffs and others $1 per day for all hours worked,

Defendant was unjustly enriched at the expense of and to the detriment of Plaintiffs and others. Defendant's retention of any benefit collected directly and indirectly from Plaintiffs' and others' labor violated principles of justice, equity, and good conscience. As a result, Defendant has been unjustly enriched." APP. Vol. I at 29. The certified "Voluntary Work Program Class" class includes all people who performed work at the AIPC under GEO's VWP in the three years preceding the filing of this action—*i.e.*, from October 22, 2011, to October 22, 2014. APP. Vol. I at 26.

Second, the "Forced Labor Class" is comprised of detainees who allege GEO's implementation of ICE's policy authorizing disciplinary sanctions where a detainee refuses to clean his or her living area violates the Trafficking Victims Protection Act, 18 U.S.C. § 1589 *et seq*. ("TVPA"). ECF 49 at 3; ECF 57 at 21. Specifically, Plaintiffs allege GEO violated the TVPA by asking detainees to clean their living areas with no pay after informing them their refusal could result in segregation for up to 72 hours. ECF 49 at 3; APP. Vol. I at 24. The certified "Forced Labor Class" includes all persons detained at AIPC in the ten years preceding the filing of this action—*i.e.*, from October 22, 2004, to October 22, 2014. APP. Vol. I at 21.

B. Cross Motions for Summary Judgment

The district court's October 18, 2022 Order addressed four motions filed by GEO and one motion filed by Plaintiffs. As noted in the notice of appeal, GEO seeks this Court's review of only the district court's ruling on GEO's and Plaintiffs' cross motions for summary judgment on the applicability of DSI to Plaintiffs' two claims.

Plaintiffs' motion for summary judgment argued, *inter alia*, that GEO is not entitled to DSI because *GEO developed* the housekeeping policy and the $1-per-day stipend independently of any direction from ICE. APP. Vol. I at 80–82. Plaintiffs further argued that "derivative sovereign immunity applies only to acts that were directed by the government, not to acts the contractor undertook of its own discretion." APP. Vol. I at 88. As a result, Plaintiffs argued that GEO is not entitled to DSI because GEO had "discretion" to pay VWP participants more than $1 per day, APP. Vol I at 88, and "discretion" in determining the severity of discipline to apply to detainees that violate ICE-mandated obligations to clean assigned living areas. APP. Vol. I at 65, 86.

In its motion for summary judgment, GEO argued, *inter alia*, that it was entitled to summary judgment on all unjust enrichment and TVPA claims under the doctrine of DSI. APP. Vol. II at 306-316. Regarding Plaintiffs' unjust enrichment claims, GEO argued ICE's performance standards required a payment of exactly $1.00 per day for VWP participants for the vast majority of the applicable three-year

class period (October 22, 2011 through June 22, 2013), which clearly gives rise to DSI during that period. APP. Vol. II at 314-316. Outside of that window, GEO argued that it continued to follow ICE's direction and paid the specified minimum of $1.00 per day, which is the only amount that Congress permits ICE to reimburse its contractors, and, importantly, is the only compensation GEO is required to pay VWP participants. *Id.* Accordingly, GEO argued that because it was undisputed that its alleged actions underlying the unjust enrichment claim were authorized and directed by ICE, GEO is entitled to summary judgment based upon DSI. *Id.*

Regarding the TVPA claims, GEO argued that even assuming Plaintiffs' allegations, GEO is immune from suit under DSI because the ICE mandatory performance standards provide for punishment up to and including 72 hours of disciplinary segregation for a detainee's "[r]efusal to clean assigned living area." APP. Vol. II at 311-313.

C. The District Court's Order Entering Judgment on Derivative Sovereign Immunity

On October 18, 2022, the district court granted Plaintiffs' motion for summary judgment on DSI and denied GEO's corresponding cross-motion. APP. Vol. III at 717. The order separately addressed the application of DSI to Plaintiffs' unjust enrichment and TVPA claims.

In entering judgment against GEO, the district court held that the doctrine of DSI requires GEO to establish that "it acted as ICE's agent in paying VWP class

members $1.00 per day during the class period," and that GEO had "*no discretion*" regarding those payments. APP. Vol. III at 748–749. In so doing, it expressly adopted and misapplied the test articulated by the Ninth Circuit. *Id.* (citing *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720 (2015)). Based on the *Cabalce* ruling, the district court concluded that, because the government did not *prohibit* GEO from paying more than $1 per day, GEO was not entitled to DSI on Plaintiffs' unjust enrichment claims. *Id.* at 751–52.

Regarding Plaintiffs' TVPA claims, the district court again misapplied the *Calbace* ruling and determined that DSI was not applicable because GEO was "not '*required'* by its contracts with ICE" to advise detainees that refusal to clean one's living area could result in disciplinary segregation. APP. Vol. III at 745-748. The district court acknowledged that GEO's contracts required GEO to advise detainees that disciplinary segregation could result if a detainee refused to clean "areas that you use," and "assigned living area, including your living area and any general-use areas." APP. Vol. III at 746. However, the district court found that GEO was not entitled to DSI because the ICE contracts "did not mandate that detainees clean the common areas or clean up after others." *Id.* at 747. Additionally, the district court held that DSI did not apply even though "ICE officials 'reviewed and cleared'" GEO's housekeeping and disciplinary policies. *Id.* at 751.

This appeal followed.

SUMMARY OF ARGUMENT

The root of the district court's error traces to its adoption of the Ninth Circuit's approach to DSI, as articulated in *Cabalce*. That standard departs from the Supreme Court's recent confirmation that DSI attaches when a contractor "performed as the Government directed." *Campbell-Ewald*, 577 U.S. at 187. Here, ICE directed that GEO pay either exactly or at least—depending on the applicable ICE standards—$1 per day as the stipend to detainees who participated in the VWP. GEO performed as directed. Likewise, ICE directed that the housekeeping policy apply to common areas and that it needed to incorporate ICE's disciplinary schedule. Again, GEO performed as directed.

The district court erred in limiting DSI to hypothetical circumstances in which a contractor is confined to doing a specific list of tasks and nothing more, without the exercise of any discretion. Government contracts regularly direct contractors to perform tasks or meet performance goals according to minimum incorporated standards or specifications. Meeting those standards or specifications *is* following directions. If a plaintiff can later allege that DSI is unavailable because the government did not forbid the contractor from doing *more*, or because the contractor exercised *any discretion* in meeting contractual requirements, then the *Yearsley* doctrine loses its value. In the same way, the district court's approach creates a backdoor around the government's own sovereign immunity. When a contractor

follows government directions and meets a minimum requirement that plaintiffs consider inadequate, the plaintiffs' complaint is actually against the government for setting the bar too low. But sovereign immunity forecloses that claim. Allowing suit against the contractor under these circumstances would be a sleight of hand that permits plaintiffs to pursue contractors for decisions of the government. But the Supreme Court and other Circuits have rejected this approach and consistently held that when a contractor like GEO follows the directions provided by the government and acts according to a lawful congressional delegation, it is entitled to DSI as articulated in *Yearsley* and *Campbell-Ewald*.

With the district court's legal error corrected, the undisputed facts demonstrate that GEO was entitled to summary judgment. It undertook every contested action at the government's direction, often following review and approval by ICE officials. And there is no argument that Congress acted improperly in authorizing ICE to use contractors like GEO, nor is there any reasonable argument that GEO exceeded its mandate. The district court therefore erred in granting summary judgment for Plaintiffs on DSI and denying GEO's motion.

STANDARD OF REVIEW

The Tenth Circuit reviews a district court's denial of summary judgment *de novo*. *Fancher v. Barrientos*, 723 F.3d 1191, 1199 (10th Cir. 2013). As a result, this Court applies "the same legal standard as the district court, . . . view[ing] the

evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (quotations omitted). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. The District Court Applied an Incorrect Legal Standard to Deny GEO's Right to Derivative Sovereign Immunity on Plaintiffs' Unjust Enrichment Claims.

The government's sovereign immunity guarantees that the United States may not be sued without its consent. *United States v. Mitchell*, 463 U.S. 206, 212 (1983). As a result, courts lack jurisdiction to hear suits against the government, unless a plaintiff can point to a statute that specifically waives that immunity for the claims being advanced against the United States. *Campbell-Ewald*, 577 U.S. at 165; *Mitchell*, 463 U.S. at 212 ("[T]he existence of consent is a prerequisite for jurisdiction.").

In *Yearsley v. W. A. Ross Constr. Co*., 309 U.S. 18 (1940), the U.S. Supreme Court faced the question of whether the United States' sovereign immunity extends to contractors performing work for or on behalf of the United States. In *Yearsley*, a federal contractor was building dykes in the Missouri River, using paddles and pumps to produce artificial erosion. This conduct washed away part of the plaintiff's

land. *See* 309 U.S. at 19–20. In the landowner's suit against the contractor, the contractor "alleged in defense that the work was done pursuant to a contract with the United States Government." *Id.* at 19. It was undisputed that the work "was all authorized and directed by the Government," pursuant to the contract, "for the purpose of improving the navigation of the Missouri River, as authorized by an Act of Congress." *Id.* at 20. In *Yearsley* the Court did not examine or discuss the United States' involvement in the contractor's construction design, methods, or techniques—just as it would not examine the government's techniques in a case where sovereign immunity applied. Instead, the Court simply held the contractor was immune from suit, explaining "it is clear that if this authority to carry out the project was validly conferred . . . there is no liability on the part of the contractor." *Id.* at 20–21; *see also Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) ("[G]overnment contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertakings with the United States.").

In *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016), the U.S. Supreme Court affirmed the two-prong *Yearsley* standard for DSI, and explained the standard as follows: "Where the Government's 'authority to carry out the project was validly conferred, that is, [1] if what was done was within the constitutional power of Congress,' we explained, 'there is no liability on the part of the contractor' who simply [2] performed as the Government directed." *Id.* at 187 (quoting *Yearsley*).

The Court cited an earlier decision extending qualified immunity to a contractor, in which "[f]inding no distinction in the common law 'between public servants and private individuals engaged in public service,' we held that the investigator could assert 'qualified immunity' in the lawsuit." *Id.* at 167 (quoting *Filarsky v. Delia*, 566 U.S. 377, 387 (2012)). Since the ruling in *Campbell-Ewald*, numerous courts have utilized this long-standing two-prong *Yearsley* standard for DSI. *See, e.g., Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640 (4th Circ. 2018); *Taylor Energy Co., L.L.C. v. Luttrell,* 3 F.4th 172, 175–76 (5th Cir. 2021).

As detailed below, the district court's approach to DSI departed from this precedent and raised the legal bar beyond anything the Supreme Court or this Court have prescribed.

A. The District Court Erroneously Held that Under *Yearsley* a Contractor Cannot Claim Derivative Sovereign Immunity if the Contractor had any "Discretion."

The district court rejected GEO's claim of DSI "[b]ecause GEO was not complying with any federal direction or contractual requirement to compensate VWP participants $1.00 per day *and no more*, but was instead exercising its *discretion* . . . ." APP. Vol. III at 751-752 (emphasis added). The district court imported this erroneous formulation of the law, which denies DSI to anyone exercising a modicum of "discretion," from the Ninth Circuit's decision in *Cabalce*. APP. Vol. III at 749–51. As explained below, the DSI formulation contained in

Cabalce was mistaken when adopted, but in no event can it stand in light of *Campbell-Ewald.* This Court should confirm that *Cabalce* does not control in this Circuit.

1. The Government Contractor Defense

The Ninth Circuit's holding in *Cabalce* conflates DSI with the related but distinct doctrine known as the government contractor defense. The latter emerged in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), in which the U.S. Supreme Court determined that a defense contractor manufacturing a military product in accordance with precise government specifications may not be held liable for claims under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. § 1346(b), § 1402(b), § 2401(b), and §§ 2671-2680. Although the FTCA includes a general waiver of sovereign immunity, it limits that waiver with a carve-out for actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government." 28 U.S.C. § 2680(a). This is known as the "discretionary function exemption" from the FTCA's waiver of sovereign immunity. The Court in *Boyle* relied on the discretionary function exception in assessing a claim against a contractor, stating that "we think the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision." *Id.* at 511. This application of the FTCA's

discretionary function exception is now known as the government contractor defense.

DSI is conceptually and legally distinct from the government contractor defense. *See, e.g., Cunningham*, 888 F.3d at 646 n.4 ("*Boyle* is inapposite to determining the applicability of derivative sovereign immunity."); *Webb v. 3M Co.*, Civil Action No. 1:22-CV-145-KHJ-MTP, 2022 WL 4225393, at *4 (S.D. Miss. Sept. 13, 2022) (noting that the U.S. Supreme Court has "treated [*Yearsley*] immunity as separate and distinct from *Boyle* . . . ."). The latter relates exclusively to the statutory waiver of sovereign immunity in the FTCA. It has no relevance outside the small band of cases involving tort claims against federal contractors and the FTCA's waiver of sovereign immunity. This is not one of those cases.

2. *Cabalce & Hanford*

In *Cabalce*, a contractor whose destruction of fireworks went awry and killed several employees argued that it was entitled to "derivative sovereign immunity and the government contractor defense." 797 F.3d at 725. The Ninth Circuit addressed whether the defendant could establish that it was acting "under federal supervision or control in developing the destruction plan itself" for purposes of removal jurisdiction under 28 U.S.C. § 1442. *Id.* at 728. The court concluded that acts "occurring under the general auspices of federal direction" were not acts of a government agency or official, as required by the removal statute. *Id.* at 729. The

Ninth Circuit went on to find, in *dicta,* that even if defendant proved a nexus, removal was still not appropriate because defendant did not have a colorable federal defense.

The Ninth Circuit's *dicta* focused on the government contractor defense, finding that because defendant was not a military contractor, the government contractor defense was not available. *Id.* at 731. Next, it addressed DSI and noted "we have held that derivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had no discretion in the design process and completely followed government specifications.'" *Id.* at 732 (quoting *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir. 2008). This is the source of the no-discretion rule applied by the district court in the current case.

But examining *Hanford* reveals the *Cabalce* court's error. *Hanford* expressly considered "the common law government contractor defense" in connection with a class action claim under the Price-Anderson Act alleging radiation poisoning in connection with development of weapons-grade plutonium. 534 F.3d at 995. The Ninth Circuit held that "the defense is inapplicable as a matter of law, because Congress enacted the PAA before the courts recognized the government contractor defense . . . ." *Id.* at 995–96. Notably, the defendant in *Hanford* did not assert DSI or *Yearsley* immunity. The question before the court was simply whether or not the

government contractor defense was established at the time of the passage of the PAA.

The *Hanford* court then discussed *Yearsley* as part of a brief history of the government contractor defense prior to *Boyle*, while explicitly noting that "the cases antecedent to *Boyle do not materially affect this analysis*." *Id.* at 1001. Those cases included *Yearsley*. *Hanford* nevertheless cited the dissent in *Boyle* as part of its history of DSI. *Id.* (stating that the U.S. Supreme Court limited the applicability of DSI to "principal-agent relationships where the agent had no discretion in the design process and completely followed government specifications. . . . See *Boyle*, 487 U.S. at 524–25, 108 S.Ct. 2510 (*J. Brennan*, *dissenting*).").

From this exact language—appearing in *Hanford dicta* and quoting the *dissent* from *Boyle*—the Ninth Circuit in *Cabalce* and the district court below have gone astray. By following the Ninth Circuit's error, the district court grafted a zero-discretion requirement onto DSI. APP. Vol. III at 749–51. While this formulation of DSI based on a dissenting opinion in *Boyle* was erroneous at its inception, any continued reliance on this formulation after the U.S. Supreme Court's clear articulation of the two-prong DSI standard in *Campbell-Ewald* is simple disregard of binding precedent.

Notably, recent decisions in other Circuits have rejected the faulty *Cabalce* "discretion" test for the application of DSI. And at least one court has noted the

existence of a circuit split on this issue. *Gay v. A.O. Smith Corp.*, No. 2:19-CV-1311, 2022 WL 2829887, at *2 (W.D. Pa. Apr. 21, 2022). Among the courts rejecting *Cabalce* are the Fourth and Fifth Circuits. The Fourth Circuit expressly noted that "*Boyle* is inapposite to determining the applicability of derivative sovereign immunity." *Cunningham*, 888 F.3d at 646 n.4. Similarly, in *Taylor Energy Company, L.L.C. v. Luttrell,* 3 F.4th 172, 174 (5th Cir. 2021), the plaintiff argued the contractor's design and execution of an environmental remediation plan required by the contract was not "authorized" by the contract because the contract statement of work only required the accomplishment of certain goals, and the contractor had "*leeway*" to design various components of the plan to accomplish those goals. The Fifth Circuit rejected the argument that contractor discretion defeated DSI, finding the plaintiff "misunderstands the *Yearsley* analysis," and that "the appropriate inquiry is whether [the contractor] adhered to the Government's instructions as described in the contract documents." *Id.* at 176. The Fifth Circuit found the first prong of *Yearsley* was satisfied because the "Government directed [the contractor] to come up with" the "site assessment procedure" and "authorized [the contractor's] plan, the design of the response system, and the installation of the system." *Id.* at 176. The Fifth Circuit's holding that "leeway" does not preclude DSI is more faithful to Supreme Court precedent and the practicalities of hiring contractors without controlling their every move.

B. The District Court Erroneously Held that for DSI to Apply the ICE AIPC Contract must have Specifically "*Required*" that GEO Not Provide More than $1 Per Day to VWP Participants.

The district court held that "to enjoy the vast protection of derivative sovereign immunity," GEO must show its "challenged actions were *required* by its contractual obligations." APP. Vol. III at 749 (emphasis added); *id.* at 745 ("[W]ere GEO's challenged actions *required* by its contractual obligations?"). The district court concluded that because GEO was not complying with any "contractual *requirement* to compensate VWP participants $1.00 per day *and no more*" it is not immune from suit. APP. Vol. III at 751-752. This formulation departs from precedent and changes *Yearsley*'s second prong from "direction" to "puppet-like control."

As the Supreme Court formulates the DSI test, "'there is no liability on the part of the contractor' who simply performed as the Government directed." *Campbell-Ewald*, 577 U.S. at 187 (quoting *Yearsley*). Through the AIPC contracts, the government explicitly directed GEO to provide VWP participants at the AIPC a stipend of "$1 per day," and later, "at least $1 per day." Additionally, ICE reimburses the contractor's "actual cost" of exactly $1 per day. By establishing a VWP and paying $1 per day, GEO complied with the government's directions.

The district court departed from the *Yearsley* test by holding that a contractor's compliance with specific contractual directions is insufficient to obtain immunity.

Under the district court's formulation, a contractor claiming DSI must also prove that the government *specifically prohibited* the contractor from taking additional and otherwise allowable actions that a plaintiff might later allege resulted in harm. In other words, the district court found that a federal contractor's failure to do more than what it was authorized and directed to do under the terms of its contract defeats its entitlement to DSI. The U.S. Supreme Court has said no such thing. Not surprisingly, the district court's order is devoid of citation to any authority supporting this formulation of DSI, apart from the *Cabalce* decision discussed above.

And other courts have rejected the notion that contractors lose DSI simply because they could have done something more. The Fourth Circuit in *Cunningham* considered and rejected a formulation of DSI similar to the one utilized by the district court in this case. That court addressed the argument that DSI should not apply because, although the contractor complied with the government's specific directions, the contractor should have taken additional actions. Specifically, the plaintiffs alleged that, although defendant's contract directed it to place phone calls to plaintiffs, defendant should have additionally obtained consent from plaintiffs before placing those calls, as required by the Telephone Consumer Protection Act ("TCPA"). *Id.* at 647–48. The Fourth Circuit disagreed. It held that the contractor was entitled to DSI because its actions "adhered to the terms of its contract," which

did not require the contractor to obtain consent before placing the calls. *Id.* That outcome makes sense because the federal government—from whose sovereignty the contractor's DSI derives—could not be sued for not complying with its own laws.

Applying the logic of *Cunningham* and *Taylor Energy* supports GEO's motion for summary judgment. Just as the *Cunningham* defendant *could have* followed the TCPA, GEO *could have* paid a higher stipend—neither action was prohibited by the government. But DSI asks a different question. It looks to whether the contractor complied with the terms of its contract and the directions *actually provided*, and there is no allegation that GEO did not follow ICE's direction as expressed in its contract.

As a policy matter, the district court's rule opens a geyser of liability that would discourage any rational business from contracting with the government. *See generally Campbell-Ewald*, 577 U.S. at 167–68 (explaining that extending qualified immunity to contractors is important because "[q]ualified immunity reduces the risk that contractors will shy away from government work"). Because a contractor can never be sure which contract provision a plaintiff's lawyer will later claim was merely a minimum, the district court's approach will cause reasonable people to "shy away from government work." *Id.* One can easily imagine, for example, a highway contract that directs the contractor to erect a guardrail between mile markers 50 and 60 but does not affirmatively *prohibit* a guardrail along the entire length of the

highway. As the district court construes *Yearsley*, the contractor would lose DSI against a motorist who sustained injuries after sliding off the road at mile marker 62. Similarly, federal contractors are required to pay their employees a minimum wage set by the U.S. Department of Labor for each contract employee position. 29 U.S.C. 214(c). Under the district court's formulation, a contractor who could, but chooses not to, pay its employees more than the minimum DOL-established wage rate could be sued by employees who believe their pay should have been higher and that the contractor was unjustly enriched by not paying more than what was minimally required. If government entities must specify everything that contractors need *not* do, DSI becomes an illusory shield.

Finally, even assuming, *arguendo*, that DSI can only apply if GEO was specifically "*required*" to compensate VWP participants $1.00 per day "*and no more*," the undisputed evidence shows that from March 27, 2003 through June 22, 2013, the AIPC contracts and related ICE Detention Standards specifically required GEO to provide VWP participants a stipend of *exactly* $1 per day. ECF 261-10 at 5 (2000 NDS); APP. Vol. I at 222 (2008 PBNDS); ECF 51-3 at 19. The district court therefore erred even under its own, mistaken standard by not granting summary judgment for the vast majority of the timeframe at issue.

C. The District Court Erroneously Applied a Novel Distinction Between an "Agent" of the Government and an "Independent Contractor."

The district court held that "GEO must establish that it acted as ICE's agent in paying VWP class members $1.00 per day during the class period." APP. Vol. III at 749. The district court then attempted to distinguish between "agents" and "independent contractors," concluding that "independent contractors" are not agents and therefore not entitled to DSI. APP. Vol. III at 750. In support of this version of the DSI standard, the district court cited a law review article, and a single quote from *Yearsley*. APP. Vol. III at 749-750. No other court has ever recognized this rule, and even a cursory review of the district court's cited authority belies its false dichotomy.

The *Yearsley* Court drew no distinction between the applicability of DSI to "agents" and "independent contractors." The language from *Yearsley* cited by the district court appeared in the *Yearsley* Court's secondary discussion of petitioner's claim that the erosion of his property caused by the subject construction constituted a taking of property for which compensation must be made under the Fifth Amendment. *Yearsley*, 309 U.S. at 21–22. The *Yearsley* Court held that it was not necessary to address that question, because the remedy for a Fifth Amendment takings claim was recovery by a suit in the Court of Claims. *Id.* In that context, the *Yearsley* Court noted, that under standard Fifth Amendment takings and eminent domain jurisprudence, the acts of officers of the government acting under

government direction are to be treated as the acts of the government, and cited *United States v. Lynah* for the proposition that "[t]he action of the agent is 'the act of the government.'" *Yearsley*, 309 U.S. at 22. The *Yearsley* Court never suggested that DSI was only available to "agents" of the government, and not applicable to "independent contractors." The district court's dichotomy also makes little sense on its own terms because, as a matter of agency law, independent contractors can be agents. *See* Restatement (Third) of Agency § 1.01 cmt. c.

The district court also cited to and explicitly relied upon a recent law review article in finding that DSI is not available to "independent contractors:"

> In other words, it is the distinction between an agent and an independent contractor. "[U]nder the agency principles underlying *Yearsley* immunity, courts have looked to see if the contractor is hired as an 'independent contractor,' expected to use its expertise and discretion to decide how best to get the job done, or as something more akin to an agent of the United States, just following orders." Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 Stan. L. Rev. 969, 1001 (2021).

APP. Vol. III at 750.

First, the cited article was written specifically to aid plaintiffs in this litigation. The article notes that it was prepared "to lay bare how government contractors attempt to exploit" the doctrines of preemption, DSI, and intergovernmental immunity, and specifically references GEO's use of these doctrines in a closely related class action: "A private-prison group operating under a contract with Immigration and Customs Enforcement relied on preemption principles to seek to

avoid liability under state minimum-wage laws in Washington." Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 Stan. L. Rev. 969, 974–75 (2021). The article further promises to sound "an alarm about the consequences of this particular alliance," and describes the doctrines of "preemption, derivative sovereign immunity, and intergovernmental immunity" as "sly, sideways moves [to] reduce the power of individuals and states out of sight of public scrutiny or democratic accountability." *Id.* at 973–75. This is not disinterested scholarship.

Second, the district court relied on a section of this article that does not purport to describe the current state of the law. Instead, the cited passage appears in a section of the article that admittedly blends and mixes different factors from various immunity doctrines, and acknowledges that these blended formulations "have not been articulated as a test by any court." *Id*. at 995.

Finally, an examination of the authority presented in the article reveals that it is wholly inapplicable to the current circumstances. The sole authority cited in the article for the proposition that DSI is available only to "agents" of the government and not "independent contractors" is *Whitaker v. Harvell-Kilgore Corp*., 418 F.2d 1010 (5th Cir. 1969). *The Sovereign Shield*, 73 Stan. L. Rev. at 974–75 n.157. *Whitaker* involved physical injuries to a military service member and resulting claims against the manufacturers of a grenade and the grenade fuse. *Whitaker*, 418

F.2d at 1012. The district court granted the manufacturers' motion to dismiss the complaint, and plaintiff appealed. *Id.* at 1013.

On appeal, the manufacturers argued that sovereign immunity barred the claims because they were an "alter ego" of the United States and the "suit is in reality a suit against the United States." *Id.* at 1013–14. The Fifth Circuit rejected the assertion of an "alter ego" basis for the manufacturers' defense against the plaintiff's claim. The manufacturers did not assert a right to DSI, so the Fifth Circuit never addressed that doctrine. Indeed, the circumstances presented by *Whitaker* would, today, likely be addressed under the separate government contractor defense outlined in *Boyle*. *See* Part I.A *supra*. Simply stated, *Whitaker* is inapposite and provides no support for the district court's erroneous formulation of the doctrine of DSI post-*Campbell-Ewald*.

In summary, the district court made a number of legal errors regarding the circumstances in which DSI applies. Its insistence on a complete lack of discretion and the novel distinction between agents and independent contractors shrink *Yearsley* to the point of disappearance. Correcting these errors leads to the inescapable conclusion that GEO is entitled to summary judgment because there can be no genuine dispute that it acted at the government's direction in paying a stipend of $1 per day to participants in the VWP. As a result, GEO is entitled to DSI against Plaintiffs' unjust enrichment claims. The Court should reverse the judgment below.

II. The District Court Erroneously Rejected GEO's Claim of Derivative Sovereign Immunity to Plaintiffs' TVPA Claims.

ICE required GEO to develop a policy for maintaining a clean and sanitary facility consistent with ICE standards. APP. Vol. I at 100. To enforce that important policy, ICE provided its approved schedule of sanctions which included the sanction of segregation for detainees that refused to clean. ECF 261-10 at 24 (2000 NDS); APP. Vol. I at 215 (2008 PBNDS); APP. Vol. I at 141, 142 (2011 PBNDS); APP. Vol. I at 72 (Plaintiffs' Undisputed Facts #77 and #79). Plaintiffs claim that the possible sanction of segregation in response to failing to clean amounts to involuntary servitude in violation of the TVPA. APP. Vol. I at 22. In addition to being meritless, that claim cannot defeat GEO's DSI for actions undertaken pursuant to housekeeping and disciplinary policies written, required, reviewed, and approved by ICE. The district court erred in holding that GEO is not entitled to DSI because GEO's policies were "independently developed and implemented." APP. Vol. III at 745. To the contrary, GEO drafted the policies at ICE's direction and subject to its approval. They follow the very policies that ICE itself prescribed in its Handbook and the PBNDS. That matches the U.S. Supreme Court's characterization of DSI in *Yearsley* and *Campbell-Ewald*. This Court should reverse the summary judgment order below.

A. The District Court's Judgment was Based on an Erroneous Formulation of DSI.

Unsurprisingly, the district court applied the flawed Ninth Circuit's *Cabalce* standard in its analysis of Plaintiff's claims under the TVPA, just as it did for unjust enrichment. APP. Vol. III at 748. That legal error—based on Justice Brennan's dissenting opinion in a government contractor defense case—is as inappropriate in the TVPA context as it is in the context of unjust enrichment.

The district court reasoned that DSI does not apply when "ICE officials 'reviewed and cleared' [GEO's] policies" regarding potential sanctions for refusing to clean living areas. *Id.* This is a variation on the theme that DSI cannot coexist with *any* discretion on the part of a contractor in fulfilling its contractually-mandated responsibilities and duties. But the error is even more stark in this analysis. Under the district court's approach, if the contractor's actions involved any exercise of discretion in performance of the contract, DSI cannot apply even if the government reviewed and approved those "discretionary" actions. *Id.* at 747-748. Even modest amounts of discretion thus become a stain that nothing can cleanse.

Here again, precedents from other circuits and the U.S. Supreme Court (majority opinions) disagree. As noted above, the Fifth Circuit rejected a zero-discretion straitjacket in *Taylor Energy*. In that case, the contract for environmental remediation required the accomplishment of certain goals and left "leeway" for the contractor to accomplish those goals. *Taylor Energy*, 3 F.4th at 174. Nevertheless,

the Fifth Circuit applied *Yearsley*, noting that the Supreme Court never required that the government design the river dikes or specify every move the contractor made. *Id.* at 176. In relevant part, the *Taylor Energy* court found *Yearsley* controlling because the "Government directed [the contractor] to come up with" the "site assessment procedure" and "authorized [the contractor's] plan, the design of the response system, and the installation of the system." *Id.* at 176. This structure mirrors GEO's task of developing a plan for housekeeping based on ICE's own formulation, which ICE then "authorized." ECF 291-1.C.

If the government directs a contractor to develop plans, designs, or procedures to accomplish contractual goals, all consistent with proscribed government policy and standards, and then reviews and accepts those plans, it has "directed" the contractor's action as required for application of *Yearsley* and *Campbell-Ewald*. This is particularly true where, as here, the government has provided an explicit list of disciplinary sanctions for detainees which must be incorporated into the contractor's policies. The district court's contrary rule stands the doctrine of DSI on its head and would eliminate the protection of contractors acting in accordance with government authorization and direction in many, if not nearly all, circumstances.

B. ICE Reviewed and Approved All Aspects of GEO's Housekeeping and Disciplinary Policies Before Their Implementation.

Far from forced labor, GEO's housekeeping and disciplinary policies reflect the requirements and oversight of the federal government for ICE detainees. To

create the appearance of novelty, the district court selectively compared portions of ICE and GEO documents while disregarding as irrelevant the fact that ICE directed and approved all of them. This contorted analysis distorts the undisputed factual record and, with it, GEO's right to summary judgment.

GEO's housekeeping and disciplinary "policies" for detainees were not, as the district court found, "independently developed and implemented." APP. Vol. III at 745. It is undisputed that GEO was required to comply with the ICE Detention Standards incorporated into the ICE AIPC contracts. APP. Vol. II at 261–262 (Additional Undisputed Fact #7). It is also undisputed that all applicable versions of the ICE Detention Standards require that all detainees are responsible for "personal housekeeping" and maintaining their "immediate living areas." *See, e.g.,* APP. Vol. I at 145 (2011 PBNDS). The ICE National Detainee Handbook in effect at the time of the 2011 Aurora Contract award, and distributed to each detainee, includes the following explanation of the detainees' obligation to clean assigned living areas: "You are not entitled to compensation for tasks that involve maintaining your personal area or cleaning up after yourself in *general use areas*. You are required to perform *basic cleaning tasks within your living unit*, regardless of where you are held." ECF 51-3 at 19 (emphasis added). Similarly, the 2013 version of the ICE National Detainee Handbook explain to detainees that they must clean their living area and common areas: "Will I get paid for keeping my living area clean?

No, you must keep areas that you use clean, including *your living area* and *any general use areas* that you use. If you do not keep your areas clean, you may be disciplined." ECF 310-1 at 18 (emphasis added).

The PBNDS also directed and required GEO to develop and issue to each newly admitted detainee a copy of a local supplement to the ICE National Detainee Handbook that fully describes all policies, procedures and rules in effect at the facility. APP. Vol. I at 132. The PBNDS also required that this local supplement include a copy of the ICE-mandated disciplinary scale. APP. Vol. I at 132.

The local supplement at AIPC (the "AIPC Handbook") is issued to all detainees entering Aurora. APP. Vol. II at 259 (Material Undisputed Fact #14). The AIPC Handbook provides the following description of detainee housekeeping requirements:

> Each and every detainee must participate in the facility's sanitation program. A list of detainees is developed each day by staff and is posted daily for viewing. During a general cleanup all detainees must participate.
>
> ***
>
> Day rooms are open spaces in the housing units that are utilized for watching television, playing board games, dominos or cards, as well as for socializing among detainees. Tables with chairs are provided for your use in the dayroom. All detainees are required to keep clean and sanitary *all commonly accessible areas* of the housing unit including *walls. floors, windows, window ledges, showers, sinks, toilets, tables, and chairs*.
>
> ***
>
> Detainees will take turns cleaning the area. . . . If the detainees in the housing unit do not clean the area after being instructed to do so, the televisions will be turned off, and the detainees will not be permitted to

> participate in any activities/programs until the housing unit is cleaned. Continued refusal to clean will result in further disciplinary action.

APP. Vol. I at 244 (PL000047) (emphasis added). As mandated by the PBNDS, the AIPC Handbook's disciplinary scale simply mirrors the applicable ICE Detention Standards. ECF 273-1. It is undisputed that all of GEO's policies, including the AIPC Handbook, are reviewed and approved by an ICE official. APP. Vol. II at 259 (Material Undisputed Fact #15).

In denying GEO's claim of DSI, the district court cited the highlighted portions of the AIPC Handbook supplement quoted above, and erroneously stated that they were "independently developed and implemented." APP. Vol. III at 745. This assertion is inconsistent with the evidence. ICE specifically directed GEO to "develop" and "issue" the AIPC Handbook, which ICE officials reviewed and approved. GEO's conduct was less "independent" than the contractors in *Yearsley* and *Taylor Energy*. If doing what the government requires and then seeking approval before implementing the same is sufficient to strip a contractor of DSI, then the doctrine is meaningless. It also defeats the purpose of having contractors in the first place—they exist so that the government need not do everything itself but can instead assign needed tasks to contractors, whom government officials supervise. *See Filarsky*, 566 U.S. at 387.

Next, the district court extinguished whatever vestige of DSI might have survived its application of *Cabalce* by insisting on verbatim wording to qualify for

what the Supreme Court characterized as mere "direct[ion]." The district court drew semantic distinctions between the language used in the PBNDS, ICE National Handbook, and the AIPC Handbook, despite the ordinary meaning that confirms that all three documents envision an obligation by detainees to clean their common living areas or face sanctions for refusing to do so. In granting judgment against GEO, the district court declared that the language in the AIPC Handbook quoted above "far exceeded its contractual obligations with ICE." APP. Vol. III at 745. In support of this finding, the district court attempted to fashion a distinction between "all commonly accessible areas of the housing unit" referenced in the AIPC Handbook and the "living unit" and "general use areas" referenced in the PBNDS and ICE National Handbook. APP. Vol. III at 745-747.

As a matter of contract interpretation, the district court was mistaken. This Court looks to federal law when construing federal government contracts. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002); 14 Charles Alan Wright et al., Federal Practice and Procedure § 3657 & n.30 (3d ed. 1998); 17A James Wm. Moore et al., Moore's Federal Practice ¶ 124.42 (3d ed. 2008). "The words of a contract are deemed to have their ordinary meaning appropriate to the subject matter, unless a special or unusual meaning of a particular term or usage was intended, and was so understood by the parties." *Lockheed Martin IR Imaging Systems, Inc. v. West,* 108 F.3d 319 (Fed. Cir. 1997). Dictionary

definitions and industry definitions, standards, and practices may be used in determining if there is ambiguity in a contract term. *Reliable Contracting Group, LLC v. Department of Veterans Affairs,* 779 F.3d 1329, 1333 (Fed. Cir. 2015) (citations omitted).

The phrase "commonly accessible areas of the housing unit" used in GEO's AIPC Handbook and the terms "living unit" and "general use areas" used in the PBNDS and ICE National Handbook refer to the same areas of the housing units. The phrase "common area" refers to "any areas that are shared by others in the same building," (https://thelawdictionary.org/common-areas/) or "a portion of a building that is generally accessible to all occupants," (https://www.lawinsider.com/). That is precisely the description of the area at issue in this lawsuit. The AIPC facility is organized around large living units, which include common areas and day rooms where detainees socialize, watch television, and play games. Importantly, the record also includes an ICE official's sworn declaration specifically noting that detainees' housekeeping obligations include a "co-responsibility to keep the dormitory, dayroom, shower and bathroom areas tidy and clean" or possibly face discipline. ECF 335-2. This testimony confirms that GEO and ICE are in accord as to the scope of the detainees housekeeping obligations—a scope that matches the ordinary meaning of ICE's directives to its contractors.

On this record, there is no basis to conclude that the phrase "commonly accessible areas of the housing unit" used in the AIPC Handbook differs materially from the phrase "general use area" used in the PBNDS and ICE National Handbook. Moreover, the PBNDS itself uses the term "housing unit" interchangeably with "living areas." *See* APP. Vol. I at 145 ("Generally, high custody detainees shall not be given work opportunities outside their *housing units/living areas*." (emphasis added)). Both as a general matter of common usage and in the specific context of the PBNDS, the district court erred in finding that AIPC housekeeping requirements applicable to "all commonly accessible areas of the housing unit" far "exceeded its contractual obligations with ICE." APP. Vol. III at 745.

Similarly, the district court erred in drawing a distinction between portions of "living areas" or "common areas" that an individual detainee *has actually used* versus portions of a detainee's living areas and common areas *to which the detainee has access* but has not used:

> ICE's National Detainee Handbook similarly limited the scope of a detainee's cleaning duties to only those areas that a detainee used himself, informing detainees: "[Y]ou must keep areas that *you* use clean, including *your* living area and any general-use areas that *you* use."

(emphasis in original) APP. Vol. III at 746 (quoting 2013 ICE Handbook, ECF No. 310-1 at 18). Relatedly, the district court further concluded that "[t]he PBNDS did

not mandate that detainees . . . clean up after others. Yet GEO's policies clearly did." APP. Vol. III at 747.

These distinctions are detached from the realities of the use of common areas in the detention facility. Under the district court's formulation, GEO is entitled to DSI to the extent it required a detainee to clean up dirt, trash, etc. in general use areas that are *solely attributable to that individual detainee*, but if GEO required a detainee to clean up dirt, trash, etc. attributable to *another* detainee, it would exceed ICE's directions, strip GEO of DSI, and amount to forced labor in violation of the TVPA. The notion of tracing untidiness in common use areas to particular detainees is, at best, impractical. The district court's approach would make dusting, for example, a *per se* violation of the TVPA. Even if untidiness could be traced to specific individuals, construing ICE's directions as mandating this level of investigatory effort for litter is unreasonable.

The text of the ICE Handbook confirms the common-sense understanding of ICE's instructions to its contractors. The Handbook's use of "your" in "your living area" and "you" in "general-use areas you use" defines and delineates the physical areas covered—it does not limit a detainee's cleaning obligations to dirt and debris that the detainee personally created. Given this reasonable meaning, the Handbook's instruction matches GEO's policy. Both documents require detainees to participate in housekeeping in the area where they live. At both a practical and linguistic level,

GEO correctly understood its agreement with ICE to require detainees to participate in housekeeping in the areas where they lived.

Even if, *arguendo*, the *Cabalce* ruling limiting the application of *Yearsley* can be seen as justified based upon the specific facts of that case, those facts are not present in the instant case, making the district court's adoption of the *Cabalce* rationale wholly inappropriate. In *Cabalce*, the court specifically noted that the contractor "designed the destruction plan without government control or supervision." 797 F.3d at 732. GEO, by contrast, acted in accordance with ICE's explicit directions and approval. GEO's disciplinary policy directly mirrored the applicable ICE Detention Standards, and its housekeeping policy was consistent with mandatory requirements of the PBNDS and the ICE National Detainee Handbook. Moreover, unlike the circumstances in *Cabalce*, GEO's disciplinary policy and its housekeeping policy were both reviewed and approved by ICE. As a result, in the current case ICE directed, dictated, controlled, reviewed and approved GEO's housekeeping and disciplinary policies, and the application of *Cabalce* to these facts was erroneous.

Finally, the district court's ruling against GEO on Plaintiffs' TVPA claim misunderstood the nature of that claim. The district court repeatedly commented that "Plaintiffs do not make the claim that detainees' personal housekeeping tasks constitute forced labor in violation of the TVPA." APP. Vol. III at 746 n.16; *see*

also id. at 760 ("Plaintiffs do not claim the personal housekeeping tasks constitute forced labor, and ICE's disciplinary severity scale only applies to those tasks."); *id.* at 785 ("because Plaintiffs' claim does not allege that the PBNDS' personal housekeeping tasks violate the TVPA, it is not necessary to determine whether those tasks, if coerced, would be permissible under the statute or if liability turns on the type of labor performed.").

This attempt at avoidance is mistaken. Plaintiffs' Complaint claims in no uncertain terms that all of detainees' personal housekeeping tasks constitute forced labor in violation of the TVPA: "Defendant's policy of requiring Plaintiffs and the class members to clean the cells on their pods under threat of solitary confinement violated 18 U.S.C. § 1589." APP. Vol. I at 22.

Even more baffling is the court's ultimate action. After stating that it does not need to resolve the application of DSI to Plaintiffs' TVPA claim for "personal housekeeping tasks," the court entered judgment against GEO on the application of DSI to those claims. The inconsistency between the court's statements and its ultimate action compounds its legal errors in misinterpreting GEO's contract with ICE. The reasoning is difficult to follow, but its consequences are plain: GEO and every other ICE contractor must now defend against claims of forced labor for implementing a commonsense rule to maintain safe and sanitary housing units. DSI

exists to prevent the burden of such absurd but costly litigation. This Court should reverse.

CONCLUSION

The district court's denial of summary judgment for GEO and grant of summary judgment for Plaintiffs on DSI rested on an erroneous formulation of that doctrine and factual findings at odds with the undisputed record. This Court should decline to follow *Cabalce* and reverse the judgment below because GEO acted as directed by ICE pursuant to a lawful act of Congress. As a result, under *Yearsley* GEO is entitled to derivative sovereign immunity from Plaintiffs unjust enrichment and forced labor claims.

STATEMENT REGARDING ORAL ARGUMENT

GEO requests oral argument to address any questions the Court might have in this matter.

January 23, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on January 23, 2023, a copy of the foregoing brief was filed on CM/ECF and service was thereby electronically delivered to all counsel of record.

January 23, 2023

/s/ Scott A. Schipma
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CERTIFICATE OF COMPLIANCE

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January 23, 2023

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