No. 17-____

IN THE

Supreme Court of the United States

THE GEO GROUP, INC.,

Petitioner,

v.

ALEJANDRO MENOCAL, MARCOS BRAMBILA, GRISEL XAHUENTITLA, HUGO HERNANDEZ, LOURDES ARGUETA, JESUS GAYTAN, OLGA ALEXAKLINA, DAGOBERTO VIZGUERRA, and DEMETRIO VALERGA, on their own behalf and on behalf of all others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Department of Homeland Security, through its agency, U.S. Immigration and Customs Enforcement (ICE), is authorized to detain aliens the United States has placed into removal proceedings. 8 U.S.C. § 1226. To accomplish this mission, ICE uses a blended set of facilities: some are owned by the agency, and others are owned and operated by contractors. The GEO Group, Inc. (GEO) is a contractor that provides this service to ICE. All facilities, whether government-owned or contractor-run are required to meet ICE's detention standards.

The decision below affirms certification of two classes of ICE detainees, who are seeking monetary damages against GEO for administering ICE's policies. The first class claims that ICE's policy requiring detainees to occasionally clean their living areas, under the potential sanction of disciplinary segregation for refusing to do so, entitles them to damages and restitution under the Trafficking Victims Protection Act (TVPA), 18 U.S.C. § 1589(a). The second class claims that GEO was "unjustly enriched" by implementing ICE's Voluntary Work Program (VWP). This class claims that, because detainees are compensated at the rate of $1 per day, they are entitled to restitution for unpaid wages.

1. Whether Federal Rule of Civil Procedure 23(b)(3)'s requirement that common questions predominate over individual questions can be satisfied by a class-wide inference of causation based on circumstantial evidence that GEO caused detainees to labor solely "by means of" the threat of disciplinary sanctions, in violation of the TVPA, even though consent is a defense to TVPA liability and there are numerous other plausible reasons why

detainees may have agreed to clean their own living areas.

2. Whether an unjust enrichment claim for restitution is "susceptible to generalized proof" that satisfies Rule 23(b)(3)'s predominance requirement, without any consideration of the intentions, expectations or behavior of the detainees, who routinely agreed in writing to volunteer to participate in the VWP for $1 per day.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner was an appellant below and is a defendant in the district court. Respondents Alejandro Menocal, Marcos Brambila, Grisel Xahuentitla, Hugo Hernandez, Lourdes Argueta, Jesus Gaytan, Olga Alexaklina, Dagoberto Vizguerra, Demetrio Valerga and the certified class members were appellees below and are plaintiffs in the district court.

GEO is a publicly-traded corporation (NYSE: GEO) that has no parent company, and no publicly traded company owns more than 10% of GEO's stock.

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Petitioner The GEO Group, Inc. (GEO) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 882 F.3d 905 and reproduced at page 1a of the Appendix to this petition (App.). The district court's order

granting certification is reported at 320 F.R.D. 258 and reproduced at App. 44a.

JURISDICTION

The Tenth Circuit granted permission for an interlocutory appeal under Federal Rule of Appellate Procedure 5 and Federal Rule of Civil Procedure 23(f), App. 70a-71a, and entered judgment affirming the district court's class certification order on February 9, 2018. App. 1a. The Tenth Circuit entered an order denying a petition for rehearing on March 5, 2018. App. 42a-43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Trafficking Victims Protection Act, 18 U.S.C. §§ 1589, 1593, 1595 and 22 U.S.C. §§ 7101-7104 are set forth at App. 72a-90a.

INTRODUCTION

For decades, the Departments of Justice and Homeland Security have performed their law enforcement and border security missions to detain aliens placed in removal facilities in government- and contractor-owned facilities. All aspects of the operations of these facilities are governed by federal detention standards and not set by federal contractors.

This lawsuit, directed at policies developed and required by ICE, and administered since 2004 at ICE's Aurora Processing Center (Aurora) in Colorado, is the first-filed of many suits that are waging a proxy war against federal immigration policy by suing the contractors who operate ICE's

federal processing and detention facilities.[1] ICE detainees, their lawyers, and their supporting immigration advocacy groups are seeking to certify class actions that will cripple ICE's detention contractors and leave ICE without a critical partner in carrying out its law enforcement security mission.

The Tenth Circuit, in a published opinion, affirmed certification of two damages classes of more than 60,000 current and former federal immigration detainees, thereby allowing those classes to pursue two claims that not only are unfit for class-wide adjudication, but should never have survived dismissal to begin with. *First*, the detainee class members allege that GEO violates the "forced labor" provision of the Trafficking Victims Protection Act by implementing ICE's detention standards that require detainees to help clean their own living space and common areas. While detainees who do not

[1] This case was filed on October 22, 2014. Appellant's Joint Appendix ("J.A.") filed below, at 17. Following the district court's class certification in February 2017, there have been at least seven other class action or *parens patriae* lawsuits filed by or on behalf of ICE immigration detainees against GEO and another contractor, CoreCivic, alleging violations of the TVPA, unjust enrichment, as well as state minimum wage claims. *See Owino v. CoreCivic, Inc.*, No. 17-cv-01112-JLS-NLS (S.D. Cal., filed May 31, 2017); *State of Washington v. The GEO Group, Inc.*, No. 17-cv-05806-RJB (W.D. Wash., filed Sept. 20, 2017); *Chen v. The GEO Group, Inc.*, No. 17-cv-05769-RJB (W.D. Wash., filed Sept. 26, 2017); *Novoa v. The GEO Group, Inc.*, No. 5:17-cv-02514 (C.D. Cal., filed Dec. 19, 2017); *Gonzalez v. CoreCivic, Inc.*, 17-cv-2573-JLS-NLS (S.D. Cal. Dec. 27, 2017); *Gonzalez v. CoreCivic, Inc.*, No. 1:18-cv-169 (W.D. Tex., filed Feb. 22, 2018); *Barrientos v. CoreCivic, Inc.*, No. 4:18-cv-00070-CDL (M.D. Ga., filed Apr. 17, 2018). A similar class action suit has also been filed by prisoners at a GEO facility in Indiana. *Figgs v. The GEO Group, Inc.*, 1:18-cv-00089-TWP-MPB (S.D. Ind., filed Dec. 13, 2017).

perform these basic sanitation duties may be sanctioned through ICE's disciplinary code, respondents assert these potential sanctions entitle them to restitution and damages. *Second*, detainees who volunteered to participate in the Voluntary Work Program—which ICE requires its facility contractors to administer—allege that GEO was "unjustly enriched" by paying $1 per day for voluntary work at the facility, and that they are entitled to monetary restitution for their work, similar to a wage.[2] No federal appellate court has yet reviewed these claims on the merits *de novo*.

The Court's review of the class certification below is warranted because it marks an unprecedented use of class-wide inferences drawn from purported "circumstantial evidence" that a government policy implemented by a government contractor, without discretion, is illegal or unjust. The Tenth Circuit has tacitly allowed a factfinder to infer from the potential sanctions in a work policy alone that ***all*** detainees cleaned their common areas solely for that one coercive reason, even though there are consensual explanations—relieving boredom and staying busy; following the rules; or a sense of responsibility to clean-up after oneself. If any of these reasons, rather than alleged coercion prohibited by the TVPA, caused members of the class to work, then those class members have no claim. The causal question is necessarily individualized, and forecloses class certification for failure to satisfy Rule 23(b)(3).

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[2] The plaintiffs also alleged a claim for minimum wage under Colorado law, but that claim was dismissed. *See Menocal v. GEO Group., Inc.*, 113 F. Supp. 3d 1125, 1129-31 (D. Colo. 2015).

Unjust enrichment, as an equitable claim, is notoriously fact-intensive and specific to the relationship or course of dealing between the plaintiff and defendant, making it unfit for class actions. Yet the Tenth Circuit certified a class by deeming the "unjustness" element of the claim to be susceptible to aggregate proof, without evaluating the intentions, expectations, or behavior of the individual plaintiffs and class members, who routinely signed agreements that expressly stated that they were volunteering to work for $1 per day or even for no pay at all.

The certification of both classes conflicts with decisions of other circuits that have applied Rule 23(b)(3) differently and have rejected even narrower inferences drawn from circumstantial evidence. The Court should grant the petition to ensure that uniform standards control predominance in class actions, and that the class action not be used to replace or override the underlying (and here, novel) legal issues at stake.

STATEMENT OF THE CASE

A. Legal And Factual Background Of The Underlying Claims.

The federal government has "undoubted power over the subject of immigration." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Congress has delegated to federal agencies, particularly the Department of Homeland Security, the authority to use private contractors to operate facilities. *See*, *e.g.*, 8 U.S.C. §§ 1103(a)(11), 1226, 1231(a)(2), (g). GEO is a private contractor chosen by ICE to operate Aurora and other facilities under ICE's detailed contract terms, detention standards, and the agency's on- and

off-site supervision. Indeed, ICE has a significant and constant physical presence at Aurora. This case involves claims that arise from GEO's administration of ICE's contract requirements, detention standards, and policies that require detainees to do basic housekeeping chores, and from the VWP, which for decades has allowed detainees voluntarily to participate in useful activities for $1 per day.

1. The Sanitation Policy And Plaintiffs' TVPA Claim.

ICE's contract and standards require that a facility administrator "shall ensure that staff and detainees maintain a high standard of facility sanitation and general cleanliness." J.A. 730, 761. Under the Aurora facility's local implementation of this "Sanitation Policy," which ICE reviews and approves, GEO staff and detainees must "maintain the highest sanitation standards at all times in all locations without exception." *See* J.A. 714-15, 540-42, 761. This is done through "an organized, supervised and continuous program of daily cleaning by all detainees[.]" J.A. 714.[3] "Each and every detainee must participate in the facility's sanitation program." J.A. 714-15. Each day, facility staff draft and publicly post a list of detainees selected to help clean. J.A. 715.

The 2016 ICE National Detainee Handbook, which is given to all detainees, poses the question: "Will I get paid for keeping my living area clean?" The

[3] Not all of the housekeeping in common areas is done by detainees. Aurora's maintenance department maintains the facility's HVAC systems and changes filters and lightbulbs, and janitorial staff cleans some areas. J.A. 463 (19:21-20:13), 484 (101:6-16).

answer is: "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." *See* ICE, Nat'l Detainee Handbook, at 12 (https://www.ice.gov/sites/default/files/documents/Document/2017/detainee-handbook.PDF). Under ICE policy, "[r]efusal to clean [an] assigned living area" constitutes a 300-level "high moderate" offense, which could result in the typical sanctions of a warning or reprimand, but can include up to 72 hours of disciplinary segregation. *See* ICE, Performance-Based National Detention Standards ("PBNDS") (2011, rev. 2016) (https://www.ice.gov/doclib/detentionstandards/2011/pbnds2011r2016.pdf); J.A. 734-35; 722; 471 (51:12-52:23). If the rare step of segregation is used, the detainee is initially placed in administrative segregation while awaiting a hearing. J.A. 473 (57:15-58:5). In administrative segregation, detainees' social time is reduced to 2 hours, though they still have many other privileges, such as watching television. J.A. 472 (54:4-12, 55:15-19).

The plaintiffs allege that GEO violates the TVPA's "forced labor" provision by coercing plaintiffs and other class members "to work cleaning pods for no pay" through the government's "uniform policy" that subjected detainees to threats of discipline, including disciplinary segregation. J.A. 29-31 §§ 69-85. In relevant part, the TVPA's "forced labor" statute provides:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of * * * the following means—

> (1) *by means of* force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) *by means of* serious harm or threats of serious harm to that person or another person;
>
> (3) *by means of* the abuse or threatened abuse of law or legal process; or
>
> (4) *by means of* any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,
>
> shall be punished as provided under subsection (d).

18 U.S.C. § 1589(a) (emphases added). Plainly, the statute requires an element of causation: the defendant must knowingly provide or obtain labor "by means of" conduct prohibited by the statute. The statute requires both an objective and subjective proof of coercion, and consent is a defense to the statute.[4]

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[4] Section 1589 does not "shift[] the focus of the crime of forced labor solely to the defendant's conduct without concern for whether the defendant's conduct was sufficient to make the specific alleged victim render labor involuntarily." *David v. Signal Int'l, LLC*, No. 08-1220, 2012 WL 10759668, at *19 (E.D. La. 2012). Whether a plaintiff consents is critical to the claim. "[O]ne cannot determine whether the defendant's actions coerced or forced the victim to provide labor without looking to the specific victim involved." *Id.* The question is whether a defendant's "coercive conduct was such that it could overcome the will of the victim so as to make him render his labor *involuntary*." *Id.* at *21 (emphasis original). "It would be

Congress enacted the TVPA to combat the serious problem of international human trafficking. Congress made 24 findings describing its purpose to prevent and prosecute international trafficking, especially involving violence against women and children. 22 U.S.C. § 7101. There is not a shred of textual or historical evidence that Congress intended for the statute to provide a cause of action by lawfully detained aliens who are being housed, fed and cared for in an ICE-contracted processing center.[5]

Indeed, the Attorney General and Secretary of Homeland Security are charged by the TVPA to monitor and combat human trafficking. 22 U.S.C. § 7103(d)(7)(N). DHS has been appropriated at least $148 million since 2006 for that very purpose.[6] At

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inimical to the concept of damage recovery in a civil litigation to simply ignore the question of whether the individual plaintiff was in fact injured by the defendant's conduct." *Id*. at *20.

[5] Other courts have resisted extending the TVPA to contexts where it was not intended. *See*, *e.g.*, *United States v. Toviave*, 761 F.3d 623, 630 (6th Cir. 2014) (refusing to extend Section 1589 to criminalize conduct such as forcing one's children to do their homework, babysit on occasion, and do household chores, noting that a court "should not—without a clear expression of Congressional intent—transform a statute passed to implement the Thirteenth Amendment against slavery or involuntary servitude into one that generally makes it a crime for a person i*n loco parentis* to require household chores."). Additionally, 18 U.S.C. § 1589 was enacted in 2000, long after judicial decisions that have recognized that civil detainees can lawfully be required to perform housekeeping chores while in detention. *See*, *e.g.*, *Channer v. Hall*, 112 F.3d 214, 219 (5th Cir. 1997).

[6] 22 U.S.C. § 7110(i); Trafficking Victims Protection Reauthorization Act, Pub. L. No. 110-457, 122 Stat. 5044, 5085-87 (Dec. 23, 2008); Trafficking Victims Protection Reauthorization Act, Pub. L. No. 109-164, 119 Stat. 3558, 3572-

DHS, ICE is the lead agency for the investigation and prosecution of human trafficking crimes.[7] Further, under applicable law, GEO's contract provides that it could be terminated at any time for "the use of forced labor in the performance of the grant, contract, or cooperative agreement." 22 U.S.C. § 7104(g)(iii). If any government agency had concluded that GEO was violating the TVPA by forcing detainees in its custody to labor, it could have immediately terminated GEO. It has never done so.

The reason why is plain: the housekeeping and discipline policies at the heart of this case are ***ICE's own policies***. They reflect ICE's judgment, which the plaintiffs have not challenged. *See supra* at 6-7. In applying the forced labor provision of the TVPA, courts distinguish between "improper threats or coercion and permissible warnings of adverse but legitimate consequences." *See Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1180 (9th Cir. 2012); *United States v. Bradley*, 390 F.3d 145, 151 (1st Cir. 2004), *judgment vacated on other grounds*, 545 U.S. 1101 (2005). Discipline or the threat of it for refusal to clean is legitimate under ICE policy, and falls outside the TVPA's scope.

2. The Voluntary Work Program And Plaintiffs' Unjust Enrichment Claim.

As pled, the unjust enrichment claim "concerns [GEO's] employment of the Plaintiffs and others

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73 (Jan. 10, 2006). Thus, Plaintiffs not-so-indirectly allege that DHS and ICE have violated their statutory mandate of disrupting human trafficking by overseeing what plaintiffs allege is a human trafficking operation at ICE's facilities.

[7] *See generally* ICE, Human Trafficking and Smuggling (www.ice.gov/factsheets/human-trafficking).

similarly situated" in the VWP. J.A. 33 ¶ 103. Plaintiffs allege that "[b]y paying Plaintiffs and others $1 per day for all hours worked, [GEO] was unjustly enriched at the expense of and to the detriment of Plaintiffs and others" and GEO's "retention of any benefit collected directly and indirectly from Plaintiffs' and others' labor violated principles of justice, equity, and good conscience." *Id.* at 34 ¶¶ 104-05. The class alleges that it is "entitled to recover from Defendant all amounts that Defendant has wrongfully and improperly obtained, and Defendant should be required to disgorge to Plaintiffs and others the benefits it has unjustly obtained." *Id.* ¶ 106.

As a threshold matter, there is no "employment" relationship between detainees and GEO. ICE, through its predecessor agency, Immigration and Naturalization Service (INS), long ago determined that detainees that work in a detention facility—whether publicly or privately run—are not its "employees" because detainee work is performed for "institutional maintenance, not compensation." INS General Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention Facilitie*s, Gen. Counsel Op. No. 92-8, 1992 WL 1369347 (Feb. 26, 1992). Precedents under the Fair Labor Standards Act uniformly hold that ICE detainees are not "employees" because they do not participate in commerce; they work only for institutional maintenance. *Guevara v. I.N.S.*, 954 F.2d 733, 1992 WL 1029, *2 (Fed. Cir. Jan. 6, 1992); *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396-97 (5th Cir. 1990); *Whyte v. Suffolk Cty. Sheriff's Dep't*, 91 Mass. App. Ct. 1124, 2017 WL 2274618, at *1-2 (2017); *see also Bennett v. Frank*, 395 F.3d 409, 409

(7th Cir. 2005) (Posner, J.) ("[P]risoners are not employees of their prisons, whether it is a public or a private one"). Further, detainees in ICE custody virtually all lack work authorization under federal law. *See* 8 U.S.C. §§ 1324a, 1231(a).

The VWP is ICE's program, not GEO's; ICE requires contractors to administer the VWP by contract and policy. An "expected outcome" under the PBNDS is that contractors operate a VWP, whereby "[d]etainees may have opportunities to work and earn money while confined, subject to the number of work opportunities available and within the constraints of the safety, security and good order of the facility." PBNDS, 5.8.II. ICE approves GEO's facility VWP policy. *See* J.A. 571-75.

As its name implies, the VWP is voluntary. J.A. 571-72, 738. Participating detainees sign an agreement that expressly states that "work detail members will receive $1.00 per work day. The maximum paid out will be $1.00 per day." J.A. 779. Detainees sign a statement that they "have read, understand, and agree" to comply with the terms of the program, including that "[c]ompensation shall be $1.00 per day," and they may also check a box that they agree to work for free if there are none of the limited VWP positions are available. J.A. 778-79.

The $1 daily allowance has been a settled expectation for decades. In 1950, Congress specially authorized the "payment of allowances * * * to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555(d). The amount available for each fiscal year was to be "specified from time to time in the appropriation Act involved." *Id*. The appropriations bills from 1950-1979 authorized reimbursement for the VWP

program "at a rate not in excess of $1.00 per day." *See*, *e.g.*, Dep't of Justice Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (Oct. 10, 1978). After the 1979 appropriation, Congress ceased specifically appropriating monies for the VWP program, opting instead to provide more general appropriations authorization, but the wage remained $1 per day. *See* INS, *Your CO 243-C Memorandum of November 15, 1991; DOD Request for Alien Labor*, Gen. Counsel Op. No. 92-63, 1992 WL 1369402, *1 (Nov. 13, 1992) (citing 93 Stat. at 1042). The wage level is "a matter of legislative discretion." *Guevara*, 1992 WL 1029, at *2. The ICE-GEO facility contract contains a reimbursement rate of $1 per day per detainee, which cannot be raised without ICE approval. J.A. 70, 81. As such, the idea that detainee labor unjustly enriches GEO makes no sense: GEO passes through expenses, and ICE controls the reimbursement rate, so the issue is whether U.S. taxpayers are willing to pay a competitive wage for detainees to participate in the VWP.

B. Proceedings In The District Court.

Plaintiffs' 2014 complaint alleges entitlement to a minimum wage for VWP work under Colorado law, damages for violations of the TVPA for performing housekeeping chores, and monetary restitution for unjust enrichment. J.A. 17-18. The district court (Senior Judge John Kane) granted GEO's motion to dismiss the minimum wage claim, but denied the motion to dismiss the TVPA and unjust enrichment claims. J.A. 274-287. GEO sought certification for interlocutory review of these novel challenges to longstanding practices (and a government contractor

defense), but the district court denied the motion. J.A. 396-399.

In May of 2016, plaintiffs sought to certify a class for their TVPA forced labor claim comprising "all persons detained in Defendant's Aurora Detention Facility in the ten years prior to the filing of this action." J.A. 409. They also sought to certify an unjust enrichment class comprising "all people who performed work [in] Defendant's Aurora detention facility under Defendant's VWP policy in the three years prior to the filing of this action." J.A. 418. These categorical class definitions did not account for members of the classes that might have consented to perform housekeeping chores (rather than be coerced in violation of the TVPA), or volunteered to do VWP work for $1 daily without an expectation that GEO somehow received an unjust benefit from the work.

Judge Kane certified both classes without modification. App. 44a-69a. With respect to Rule 23(b)(3) predominance, the district court agreed with GEO that the "by means of" provision found in each of the sub-elements of 18 U.S.C. § 1589 included both an objective and a subjective component. *See* App. 58a-59a. However, the court held that this subjective proof requirement did not preclude class certification because the "by means of" element "can be satisfied by inferring from classwide proof that the putative class members labored because of GEOs improper means of coercion," and that "there is nothing preventing such an inference." App. 59a. The court found "it is possible that an inference of causation would be appropriate even despite some class members' purported willingness to work for reasons other than GEO's improper means of coercion." App. 59a-60a (discussing, *inter alia*, *CGC*

Holding Co. v. Broad & Cassel, 773 F.3d 1171, 1080-81 (10th Cir. 2013)).

The court rejected GEO's argument that an unjust enrichment claim—if adjudicated on the merits—would require a determination of "the intentions, expectations, and behavior of the parties." App. 64a-65a (noting *Melat, Pressman & Higbie, L.L.P v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012)). The court found it "not necessary to analyze the intentions, expectations, and behavior of each individual class member; it is enough to consider the overall context based on classwide proof." App. 65a. It found "there is a consistent policy under which detained individuals worked and were paid the same amount." *Id.*

GEO sought permission to appeal the order on an interlocutory basis. *See* Fed. R. Civ. P. 23(f); Fed. R. App. P. 5(b); 28 U.S.C. § 1292(e). Noting "both the complexity and difficulty of the issues presented" the Tenth Circuit granted permission. App. 71a.

C. Proceedings In The Court Of Appeals.

A panel of the Tenth Circuit (Judges Matheson, Bacharach and McHugh) affirmed the entire class certification order, largely adopting the district court's reasoning.

The court held that even if the "by means of" element of the TVPA required both a subjective and reasonable person requirement, a class could be certified based on its own precedent in *CGC Holding Co.*, in which the court inferred class-wide circumstantial proof of reliance in a RICO case, and therefore did not require the plaintiffs to produce individual proof that they relied on misrepresentations and omissions by the defendant

in participating in a pyramid scheme. *See* App. 23a. The court found that, under *CGC Holding Co.*, a class-wide inference of causation was warranted because all individual TVPA class members "could individually establish causation based on circumstantial evidence," by (1) showing notice of the Sanitation Policy's terms, and (2) performing housing unit cleaning work when assigned. App. 24a-25a.

GEO had argued that most, if not all, detainees would be unable to prove TVPA damages because they consented to work, and thus were not subject to coercion prohibited by the TVPA. For example, they might prefer to stay busy, respect the rules, or simply live in a clean room. The Tenth Circuit dismissed these arguments as "hypothetical possibilities" or "hypothetical alternative explanations." App. 27a-28a. The court faulted ***GEO*** for failing to provide "individualized rebuttal evidence to the district court that would cause individual causation questions to predominate at trial." *Id.* at 28a-29a. GEO had presented rebuttal evidence, but the court chose to reject it. *See id.* at 28a n.12. Instead, the court concluded that a reasonable factfinder could conclude that "each TVPA class member would not have performed his or her assigned cleaning duties without being subject to the Sanitation Policy." App. 30a. The Tenth Circuit approved of the district court's conclusion that "class members could show causation through class-wide inference and that individual damages assessments would not predominate over the class's common issues." App. 32a.

The court of appeals also affirmed the certification of the unjust enrichment class. The court found that "[t]he class members' unjustness showings rely on

common circumstances." App. 36a-37a. Noting "the narrow question of whether the unjustness element is susceptible to class-wide proof," App. 39a, the court affirmed the district court's view that class certification turned not on individualized determinations, but on the "overall context" and "uniform policies" shared by all class members. *Id.* at 39a (citing *Menocal*, 320 F.R.D. at 269).

GEO petitioned for panel rehearing and rehearing *en banc*, which was denied. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

I. THE CERTIFICATION OF THE TVPA CLASS CONTRAVENES THIS COURT'S PRECEDENTS AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

A class action for damages may be maintained if Rule 23(a)'s requirements are satisfied and if: "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members * * *." Fed. R. Civ. P. 23(b)(3). This inquiry "trains on the legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1999). The inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* (citation omitted). The predominance requirement is "far more demanding" than Rule 23(a)'s commonality requirement, *id.* at 624, as it "calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). "An individual question is one where members of a proposed class will need to

present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (quotation omitted). Predominance "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quotation omitted).

Inferring causation from circumstantial evidence may be permissible where class members all faced "the same more-or-less one-dimensional decisionmaking process," such that an alleged misrepresentation (or other alleged wrongdoing) would have been "essentially determinative" for each plaintiff. Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 121 (2009). Such inferences work in limited financial contexts where an element of causal proof did not require any genuine decision by the plaintiff, and therefore could be inferred across a class. *See*, *e.g.*, *CGC Holding Co.*, 773 F.3d at 1080-81; *cf. Klay v. Humana, Inc.*, 382 F.3d 1241, 1264-67 (11th Cir. 2004), *abrogated on other grounds, as recognized by Dickens v. GC Services, Ltd. P'ship*, 706 F. App'x 529 (11th Cir. 2017). Thus, for example, class members' payment of application fees for loans the defendant had no intention of approving allows for an inference of causation because no rational buyer would pay something for nothing. *CGC Holding Co.*, 773 F.3d at 1089-92.

This case, however, is different. As the district court correctly held, the TVPA's forced labor provision contains a subjective element. App. 58a-

59a. But that means that any class member who consented to perform housekeeping chores for any reason other than coercion was not the victim of a TVPA violation. Despite this problem, both the district court and the Tenth Circuit concluded that individual detainees could prove their case at trial based on "circumstantial evidence" that the detainee had notice of the government's disciplinary policy, and performed housekeeping when assigned. App. 24a-27a, 58a-59a. Unlike applicants for phantom loans who were unwittingly paying something for nothing, detainees clearly could have decided to help clean their own living spaces for numerous reasons other than the possible sanction of disciplinary segregation. Like any group of varied individuals, some class members may have been bored, others willing to follow the rules, and still others preferred clean surroundings. The Tenth Circuit dismissed these variations as "hypothetical possibilities." App. 27a-28a.

By allowing a jury to infer a single, class-wide cause in the face of a multiplicity of competing explanations for each class member's subjective motives, the Tenth Circuit has broken new ground that conflicts with other circuits.

The decision below conflicts with *Riffey v. Rauner*, 873 F.3d 558 (7th Cir. 2017), *petition for cert. filed*, No. 17-981 (docketed Jan. 10, 2018), in which the Seventh Circuit affirmed the denial of class certification that sought similar improper inferences. In *Riffey*, non-union home health care assistants alleged that involuntary collection of fair-share fees by the union from their paychecks violated the First Amendment. As a matter of law, the deduction of the fair-share fees could have caused a First

Amendment injury to a worker if he or she subjectively opposed the union or the fee at the time it was paid. *Id.* at 566. The Seventh Circuit held that whether fees were collected without consent in violation of the First Amendment "could not be resolved in a single adjudication," and "the individual questions for the over 80,000 potential class members would predominate over other questions." *Id.* Because each individual's consent was essential to determining whether an injury occurred, "the question whether damages are owed for many, if not most, of the proposed class members can be resolved only after a highly individualized inquiry. It would require exploration of not only each person's support (or lack thereof) for the [u]nion, but also to what extent the non-supporters were actually injured." *Id.* The defendant "would be entitled to litigate individual defenses against each member," suggesting that "individual questions predominate at this stage of the litigation," and that "it would be difficult to manage the litigation as a class." *Id.*

Likewise, both the TVPA liability and damages questions here would require similar individualized inquiries. Detainees may have worked for a number of consensual reasons, and not the sanctions set by ICE. *See* J.A. 734-35. The record shows that at least some detainees volunteered to work for free, thus undermining the inference that coercion is the detainees' only motivator. J.A. 438. In fact, the same detainee might have different reasons for cleaning the common areas from one day to the next. Some may not have even known about the policy, or understood it in different ways. Some might have had interactions at the facility that gave them false

information about refusing to work. This kind of individualized proof would need to be adduced at trial with respect to every class member. There is no reason to favor the class representatives' preferred inference—that each detainee helped clean each day only because of the potential sanction under the Sanitation Policy. Given that the TVPA includes a subjective-coercion element, no individual detainee could prove a claim based on the Policy alone; a class of 60,000 detainees over 10 years plainly cannot, either.

Other circuits have also refused to draw similar inferences from circumstantial evidence, where consent or other plausible individual alternatives exist. The Ninth Circuit denied certification in *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), to a putative class of plaintiffs who were allegedly induced to gamble by a casino's misrepresentations about their odds of winning. The court refused to infer from circumstantial evidence that every gambler would be induced by the misrepresentation: "Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning such that the appearance and labeling of the machines is irrelevant and did nothing to influence their perceptions. Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate." *Id.* at 665-666. For those gamblers, the alleged fraud played no causal role in their injury; and because there was no way to establish through generalized proof that each individual class member had, in fact,

relied on the casino's misrepresentations, certification was improper. *See id*. at 666.

Likewise, in *Babineau v. Federal Express Corp*., 576 F.3d 1183 (11th Cir. 2009), the plaintiffs filed a breach of contract claim and a quantum meruit claim on the ground that the defendant failed to pay them for some time spent on-the-clock. *Id*. at 1186. The plaintiffs alleged that FedEx had a policy of "requiring or encouraging employees to arrive early or stay late." *Id*. at 1193. However, "the existence of a general policy may not be sufficient to establish that a defendant is liable to individual class members." *Id*. The plaintiffs could not establish predominance, because "even if FedEx policies pressured some employees to arrive early or stay late, it is clear that other employees did so voluntarily and for purely personal reasons." *Id*. Thus, the district court properly found that common questions would not predominate. *Id*.

The Second Circuit has also rejected class certification for failure to satisfy Rule 23(b)(3) where the Tenth Circuit's decision permits it. In *McLaughlin v. American Tobacco Co*., 522 F.3d 215 (2d Cir. 2008) *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008), the putative class comprised cigarette smokers allegedly induced to buy "light" cigarettes by a tobacco company's misrepresentations that those cigarettes were healthier than regular ones. The plaintiffs' claim required proving that each class member bought light cigarettes because of that misrepresentation. *See id*. at 227. The Second Circuit held that the plaintiffs could not do so by generalized proof: "Individualized proof is needed to overcome the possibility that a member of the

purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative—for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style." *Id.* at 223.

In *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010), civil RICO plaintiffs sought to certify a class against defendant Eli Lilly for allegedly misrepresenting the safety and efficacy of a drug, Zyprexa. The Second Circuit reversed class certification, holding that the claim was not susceptible to generalized proof because physicians' individual prescription decisions "thwart[ed]" any generalized proof. *Id.* at 135. The plaintiffs had claimed that "the ultimate source for the information on which doctors based their prescribing decisions was Lilly and its consistent pervasive marketing plan." *Id.* at 135-36. But the Second Circuit held that the plaintiffs could not "use generalized proof when individual physicians prescribing Zyprexa may have relied on Lilly's alleged misrepresentations to different degrees, or not at all." *Id.* at 135-36. *See also Sergeants Benevolent Ass'n Health & Welfare Fund v. Sanofi-Aventis U.S. LLP*, 806 F.3d 71, 94 (2d Cir. 2015) (rejecting plaintiffs' attempt to prove, based on a circumstantial decline in sales, that "every individual physician's decision to prescribe [a drug] was truly a 'one-dimensional' decision based entirely on safety, and that the safety information allegedly withheld by Aventis was so significant that it would dictate every physician's decisionmaking").

Like the *Poulos* gamblers, the *Babineau* employees, or the class representatives in these Second Circuit decisions, the *Menocal* plaintiffs have depicted the

Sanitation Policy's sanctions as a coercive all-or-nothing policy that left all detainees with no choice but to clean. Unlike the Ninth, Eleventh, and Second Circuits, the Tenth Circuit concluded that the mere existence of the government's Sanitation Policy, along with proof that a detainee cleaned when assigned to do so, was "circumstantial evidence" of a TVPA violation from which a class-wide inference of subjective coercion could be drawn. That conclusion conflicts with these other circuits' holdings that there is no predominance under Rule 23(b)(3) where the class members had a choice that broke the causal chain. As noted, detainees can choose to clean for many consensual reasons that have nothing to do with any possible sanctions under the Sanitation Policy. In each case, no labor has been obtained "by means of" an act prohibited by the TVPA, and there is no entitlement to damages or restitution.

Unlike the Tenth Circuit, other circuits have not simply dismissed other possible motivations for a putative class member's conduct as mere hypotheses, since they showed that the plaintiffs failed to carry their burden to satisfy the requirements of Rule 23. The only way to know if any particular detainee worked on any particular day because of the Sanitation Policy, rather than some other reason, is to ask each detainee. Instead, the Tenth Circuit granted the plaintiffs a class-wide presumption that ***all*** detainees worked ***only*** because of the government's Sanitation Policy. And the Tenth Circuit flipped the burden of proof, noting that "***GEO*** did not present any individualized rebuttal evidence to the district court that would cause individual

causation questions to predominate at trial."[8] App. 28a (emphasis added). That was improper because "a party seeking to represent a class 'must affirmatively demonstrate compliance with all of Rule 23's requirements.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011)).

The Tenth Circuit relied heavily on its own precedent in *CGC Holding Co.*, in which the court held that that an individual civil RICO plaintiff could establish the element of "reliance" on a defendant's misrepresentation by circumstantial evidence, since the "commonsense inference of reliance applicable to the entire class" could be drawn when "the behavior of plaintiffs and members of the class ***cannot be explained in any way other*** than reliance upon the defendant's conduct." 773 F.3d at 1089-90 (emphasis added). Here, the Tenth Circuit went far beyond that principle by extending an inference based on circumstantial evidence of forced labor, when detainees' decision to help clean their living spaces ***can*** be explained in many other ways.

Even the inference in *CGC Holding Co.*—more modest in scope than the inference affirmed below—raised red flags about the dilution of Rule 23(b)(3)'s standards, which the decision below exacerbates. When the Fifth Circuit relied on *CGC Holding Co.* to infer reliance, it ultimately did so in a highly divided *en banc* proceeding, from which five judges dissented, and wrote or joined three different

[8] GEO did present evidence that at least one detainee volunteered to work for free. J.A. 437. To the extent the Tenth Circuit thought GEO should have produced *more* evidence, that only reinforces its error.

dissenting opinions that raised many of the same serious concerns that GEO raises here. *See*, *e.g.*, *Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 652-53 (5th Cir. 2016), (Jolly, J. dissenting) ("[T]he majority opinion dilutes both RICO's causation requirement and Rule 23's predominance requirement to the point that they have little relevance in cases based on allegations of a pyramid scheme."); *id.* at 650 ("[T]he majority errs in placing the burden regarding the appropriateness of class certification with the defendants, instead of the plaintiffs.").

Indeed, some of the Fifth Circuit's dissenting judges viewed *CGC Holding Co.* as allowing the misuse of the class action mechanism to force changes in the law through money damages, without addressing the underlying legal liability. *Id.* at 654 (Jones, J., dissenting) ("Had [plaintiffs' counsel] really believed [that the defendants ran a pyramid scheme], they could have invoked the Department of Justice or FTC to assist in shutting [defendant] down. Instead they claim [over $190 million in damages and fees]."); *id.* at 654 (Haynes, J., dissenting) (majority opinion "allows any group of plaintiffs who have lost money * * * to automatically obtain class action by making the simple allegation that the program was in actuality an illegal pyramid scheme," and thus "skirt their burden" under Rule 23(b)(3)).

Likewise here, the plaintiffs have been permitted simply to allege that the government's Sanitation Policy unlawfully coerced their labor in violation of the TVPA, and to try their novel claim as a class of 60,000 in the first instance, without having to determine whether individual members consented to do cleaning work. Contrary to other circuits, the

Tenth Circuit's holding allows the plaintiffs to "skirt their burden" to satisfy Rule 23(b)(3). This conflict among the circuits warrants this Court's review.

II. THE CERTIFICATION OF THE UNJUST ENRICHMENT CLASS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

Certifying a class to pursue an unjust enrichment claim is rare because the claim is equitable and highly dependent on the course of dealing between the party that confers a benefit and the party that unjustly retains it. The decision below certified an unjust enrichment class by essentially basing the "unjustness" determination on the factfinder's opinion of the federal VWP policy, without regard to any individual's expectations, or whether GEO did anything unjust with respect to an individual detainee. Doing so conflicts with several other circuit court decisions that have rejected unjust enrichment classes under Rule 23(b)(3).

In Colorado, unjust enrichment requires a plaintiff to demonstrate that: (1) at plaintiff's expense, (2) defendant received a benefit, (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying. *Melat*, 287 P.3d at 847. The claim requires "a fact-intensive inquiry in which courts look to, among other things, the intentions, expectations, and behavior of the parties." *Douglas Cty. Fed'n v. Douglas Cty. Sch. Dist. RE-1*, No. 17-CV-01047-MEH, 2018 WL 1449577, at *9 (D. Colo. Jan. 11, 2018) (quoting *Melat*, 287 P.3d at 847). The district court nonetheless concluded that "it is not necessary to analyze the intentions, expectations and behavior of each individual class member; it is enough to consider the overall context based on classwide proof." App. 65a. Because the unjust

enrichment claim was based on "uniform policies" it was "likely that, if its retention of benefit was unjust with respect to one class member, it was unjust with respect to all class members." App. 65a.

The Tenth Circuit accepted this rationale, App. 38a-39a, and the plaintiffs' claim that "GEO's retention of the benefit is unjust because GEO utilized a policy [of] paying extremely low wages to workers who were all detained, uniquely vulnerable as immigrants, and subject to GEO's physical control." App. 37a. The court found that plaintiffs seek to "establish the unjust nature of GEO's benefit" based on a common course of conduct by GEO, "the uniform VWP and the uniform payments." *Id*. Thus, much like it did with the TVPA claim, the Tenth Circuit completely removed the plaintiffs' own "intentions, expectations and behavior" from the class certification analysis, again putting its thumb on the merits scales.

The Tenth Circuit's decision conflicts with decisions of other circuits that address unjust enrichment claims under Rule 23(b)(3) with regard to the plaintiffs' intentions, expectations or behavior regarding a policy, and ***reject*** class certifications where an examination of the plaintiffs' conduct reveals individualized issues.

The Eleventh Circuit's holding in *Babineau*, discussed above, expressly rejected class certification of an unjust enrichment claim based on an alleged policy of pressuring employees into longer hours, because employees' expectations and experience under that policy was individualized. 576 F.3d at 1194-95. Similarly, in *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256 (11th Cir. 2009), the plaintiff filed an "unpaid wages" claim and an unjust enrichment

claim. The latter turned on whether the defendant had properly recouped commissions to salespeople for certain sales. The Eleventh Circuit held that the "unjust" element of the claim was not common to the class because some employees understood the terms of the commission-payment plan such that it was not unjust for the defendant to enforce them. *Id.* at 1274-75. Specifically, some employees did not know that commissions were subject to a charge-back, while others did. Thus, "whether or not a given commission charge-back was 'unjust' will depend on what each employee was told and understood about the commission structure and when and how commissions were 'earned.'" *Id.* at 1275. Because the equitable inquiry was individualized, the district court erred in granting class certification. *Id.* *See also Klay*, 382 F.3d at 1264-67 (reversing certification of unjust enrichment class because doctors' decision-making was individualized).

In *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006), the Seventh Circuit held that a plaintiff's consumer fraud claim relating to soda ingredients did not support class certification because her putative class included many people who likely were not deceived by advertisements about the presence of saccharin in the product. *Id.* at 513-14. The court held that certification of an unjust enrichment class was improper because the class could include "millions who were not deceived and thus have no grievance under the [consumer fraud statute]. Some people may have bought fountain Diet Coke *because* it contained saccharin, and some people may have bought fountain Diet Coke *even though* it had saccharin." *Id.* at 514 (emphasis original). Unjust enrichment required that Coca-Cola's retention of

profits from misrepresentation violate "fundamental principles of justice, equity and good conscience," but allowing class members to proceed without any individualized proof of deception would improperly allow a class to be certified without any showing of injury. *Id*. at 515.

Unlike the Eleventh and Seventh Circuits, the Tenth Circuit conducted its Rule 23(b)(3) analysis without demanding proof about intentions, expectations or behavior of the plaintiffs who are claiming the unjust enrichment. The plaintiffs' unjust enrichment claim is essentially an alternative to the wage claim that the district court dismissed. *See* App. 37a. The Tenth Circuit concluded that the VWP's payment policy, in the context of detention, was sufficient to establish predominance of a common question, but it did not determine whether individual detainees were injured by any defeated expectations of a wage, rather than $1 per day. It is unlikely that many did—detainees signed an agreement to participate for the $1 per day rate. *See* J.A. 761, 779. Some detainees—including the named plaintiff Mr. Menocal—worked ***for free*** until a VWP spot opened up. J.A. 437-38. But in the unlikely event that some class members had a different understanding of the VWP policy that would make GEO's $1 daily payment "unjust," that proof would individualized.

Under the Tenth Circuit's reasoning, all that was necessary for inclusion in the unjust enrichment class was to have participated at some point in the program. But that would be over-inclusive, since it would cover every detainee who volunteered to participate with full knowledge that payment was only $1 per day. Any detainees who were injured

because they expected more will need to show some individual proof explaining how that expectation arose. Without such evidence, there is no basis to determine whether there actually is a common theory of "unjustness" that predominates over individual detainees' understandings. Plaintiffs were required to establish that the class members actually had such expectations to justify a class action, and they failed to do so.

For this reason as well, the Tenth Circuit's decision conflicts with those of other circuits and warrants this Court's review.

III. THE ISSUES ARE IMPORTANT.

Class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348. Rule 23(b)(3)'s demanding requirements are an "adventuresome innovation," designed for situations in which "class-action treatment is not as clearly called for." *Id.* at 362.

Here, the Tenth Circuit has trampled Rule 23(b)(3)'s bulwark with its own adventurous innovations, certifying classes on novel TVPA and unjust enrichment claims that have never been tried to any court in this context. The court held not only that an individual plaintiff had plausibly alleged that a federal contractor subjected him to forced labor by following ICE's own policy, but also that he could prove such a claim for a class of 60,000 with nothing but a showing of action in response to one of numerous potential sanctions of that policy. Likewise, the court held that a longstanding government program aimed at reducing detainees' idle time may now be categorically unjust under

some standard that no one has quite pinned down. And the court did not just extend such circumstantial inferences to the plaintiffs, it also shifted the burden to GEO to show any individualized issues, even though this Court has made clear that the party seeking class certification "must * * * satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33.

It is critical that class certification decisions be based on the evidence presented by class representatives, rather than speculation and assumptions, because of their "death knell" potential to extract unwarranted settlements even where there is no legal liability. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (failure to strictly enforce Rule 23's requirements expose defendants to "judicial blackmail").

As a federal contractor, GEO is not in the normal position of a litigant that can settle a case. GEO is being sued for carrying out lawful and longstanding federal policies under an existing federal contract. GEO plays an important role in caring for thousands of persons in ICE custody in detention every day; it cannot unilaterally stop practices or operations of the facilities, even when the administration of ICE policies creates significant legal costs. Nor can GEO settle this case without the expectation that it will face many more class action suits. *See supra* at n.1. Those courts will surely be urged to use the same blueprint—certifying a class based on the alleged illegality or unjustness of a uniformly applied ICE policy. If interlocutory appeals are still denied, contractors will face a tidal wave of class actions by hundreds of thousands of detainees before a single

federal appellate court has reviewed *de novo* the merits of these TVPA and unjust enrichment claims. This problem flows from the Tenth Circuit's severe dilution of Rule 23(b)(3).

The combined force of these suits—and more that are sure to follow on the tailwinds of the panel's decision—are burdensome to GEO and threaten to pass on greater costs to American taxpayers, as the costs of private detention services must rise in response to the litigation. Indeed, that is plainly the goal: to reduce the availability of one of the federal government's chosen means of carrying out its Constitutional mandate to control the nation's borders. That alone warrants this Court's intervention.

These national circumstances underscore the enormous costs of making class certification too easy, and of failing to uphold the high standards this Court and other circuits have recognized. When a court finds Rule 23(b)(3) predominance in a theory that a government policy uniformly forced 60,000 individuals to clean, rather than demanding evidence to show that the class members did not clean for other common-sense reasons, the resulting class certification throws tremendous weight behind the court's view of the policy and merits of the underlying claims. In this case, allowing aggregate proof of causation "does not merely reflect a contested account of the facts but, more fundamentally, serves as a stalking horse for a contested account of governing law." Nagareda, *supra* at 130.

The Tenth Circuit's decision, by thumbing the scale so strongly in favor of novel and hotly contested interpretations of the TVPA and unjust enrichment

law, has become just such a stalking horse. The district court foreclosed review of the merits by denying GEO's motion for interlocutory review of its motion to dismiss. But then the district court granted a class certification that essentially declared that the entire class can prove its case circumstantially and inferentially. Consequently, GEO has had to combat class certification on the elevated abuse of discretion standard, notwithstanding that "the conflict over class certification is, at bottom, one over the meaning of governing law eminently suited for *de novo* appellate review." Nagareda, *supra* at 159.

Sometimes the consequences of class certification simply become too inequitable to uphold. In *McLaughlin*, discussed above, district court Judge Weinstein repeatedly noted the proposition that "[e]very violation of a right should have a remedy in court, if that is possible." *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1020 (E.D.N.Y. 2006), *rev'd sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2008). In reversing that certification, the Second Circuit "went out of its way to underscore that 'not every wrong can have a legal remedy, at least not without causing collateral damage to the fabric of our laws.'" *See* Nagareda, *supra* at 124 (quoting *McLaughlin*, 522 F.3d at 219). As the Second Circuit warned, "Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof." *McLaughlin*, 522 F.3d at 220.

Here, the "proof" on which both classes were certified consisted of nothing more than assumptions that plaintiffs would act uniformly upon or hold uniform opinions about allegedly illegal or unjust policies. Rather than demanding proof that cleaning

work by detainees was uniformly coerced or demanding proof regarding a course or dealing or understanding that explained why detainees believed the VWP's $1 per day payment was "unjust," Judge Kane instead assumed that the detainees' "circumstances are uniquely suited for a class action" because detainees shared the experience of being detained at the facility and "subjected to uniform policies that purposefully eliminate nonconformity." App. 45a. And the Tenth Circuit accepted that assumption. This type of ersatz macro-psychological reasoning cannot become a commonplace substitute for the burden of proof on class representatives and the rigor that this Court has expected from courts that apply Rule 23(b)(3).

It is not hard to imagine how the Tenth Circuit's logic may extend to other industries where a generally applicable policy is alleged to be illegal or unjust. The Tenth Circuit's decision opens the door to certifying classes based on a policy's general application alone, overriding necessary questions about how the policy differently impacts individual plaintiffs and shifting the burden to the defendant to prove that such differences exist. The Court's review is warranted to ensure that Rule 23(b)(3) continues to place proper limits on the class action remedy, and not allow it to be used—as it has been here—to skirt the burden of proof and push for policy changes before the merits of highly questionable claims have been tried or given any appellate review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, reverse the class certification order, and remand for proceedings on the merits.

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