No. __-____

IN THE

United States Court of Appeals for the Ninth Circuit

UGOCHUKWU GOODLUCK NWAUZOR and FERNANDO AGUIRRE-URBINA, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant-Petitioner.

On Petition for Permission to Appeal from the U.S. District Court for the Western District of Washington, Civil Action No. 3:17-cv-05769-RJB, Judge Robert J. Bryan, Presiding

THE GEO GROUP, INC.'S PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION

Mark Emery
NORTON ROSE FULBRIGHT US LLP
799 9th Street NW, Suite 1000
Washington, DC 20001
(202) 662-0210
mark.emery@nortonrosefulbright.com

August 20, 2018

Counsel for Defendant-Petitioner

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), The GEO Group, Inc. states that it 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.

/s/ Mark Emery
Counsel for Defendant-Petitioner

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page(s)

CASES:

STATUTES AND REGULATIONS:

RULES:

OTHER SOURCES:

INTRODUCTION

The district court below is the first in history to certify a class of federal immigration detainees, held at the Northwest Detention Center ("NWDC") in the custody of U.S. Immigration and Customs Enforcement ("ICE"), for a claim that they are entitled to state minimum wage for participating in the facility's Voluntary Work Program ("VWP"). *See* Order, Docket No. ("Dkt.") 114 (Attachment A). The detainees sued The GEO Group, Inc. ("GEO"), which operates NWDC under a contract with ICE and administers the VWP under ICE's terms and supervision.

Despite established precedent holding that detainees are not entitled to benefit from federal wage laws because they have no employment relationship with a detention facility, Plaintiffs posit that they can nonetheless be considered "employees" under a state wage law that has consistently been interpreted to match federal law. No other court has ever brooked such a claim. And the record in this case is devoid of any coherent account of what this employment relationship is, or how the detainees' alleged "employment" will be proved.

The record gives no reason to think that this novel question can be tried at all, much less for the first time as a large class action. It makes much more sense to allow the named Plaintiffs to try to their claims—should those claims survive to trial—and determine the shape and scope of a detainee wage action before opening this issue to classwide treatment. The stakes are too high to experiment. The

certification of the class puts at issue the interpretation of federal statutes, federal agency regulations and policies, and a contract between a federal agency and its contractor. And it does all that without the relevant agency—ICE—as a party to the case.[1] This class action creates tremendous financial pressure on GEO, and Plaintiffs' success in this case has already prompted other similar suits. Further, GEO has ongoing contractual obligations to continue to administer the very program that is challenged here as violating state law. Accordingly, interlocutory review is needed, and GEO petitions this Court to grant review and reverse the order below. Fed. R. Civ. P. 23(f); 28 U.S.C. § 1292(e); Fed. R. App. P. 5.

STANDARD OF REVIEW

Rule 23(f) provides a "mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957-58 (9th Cir. 2005) (quotation omitted). And "the rule furnishes an avenue, if the need is

[1] GEO has separately argued in the district court that it is entitled to *Yearsley* immunity as a government contractor. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640 (4th Cir. 2018). GEO has also argued that this case should be dismissed because ICE is an indispensable party that cannot be joined under Fed. R. Civ. P. 19(b). *See* Dkt. 91, at 5-14, 20-24. The Court heard GEO's argument on these grounds along with class certification, and denied both. *See* Dkt. 113.

sufficiently acute, whereby the court of appeals can take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law." *Id*.

This Court has "unfettered discretion" to grant permission to appeal based on "any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23; Adv. Comm. Notes to 1998 Amendment. Three situations commonly warrant review: *First*, where a questionable certification decision presents a death-knell for either party independent of the merits of the underlying claims; *second*, where certification presents an unsettled, fundamental issue of law relating to class actions that is likely to evade later review; or *third*, the district court's class certification is manifestly erroneous. *Chamberlan*, 402 F.3d at 959. These categories reflect that "[i]nterlocutory appeals from class certification under Rule 23(f) are especially appropriate where the plaintiffs' theory is novel," or where "a doubtful class certification results in financial exposure to defendants so great as to provide substantial incentives for defendants to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 8 (1st Cir. 2008).

BACKGROUND

A. ICE Contracts With GEO To Provide Detention Facilities.

The Immigration and Nationality Act ("INA") authorizes DHS/ICE to detain

aliens in removal proceedings and mandates that ICE detain certain classes of aliens. *See* 8 U.S.C. §§ 1225, 1226, 1226a, 1231. DHS/ICE may contract with private entities, like GEO, to provide detention facilities. *Id*. §§ 1231(g), 1103(a), (c). Since 2005, GEO has operated NWDC under a contract (the "Contract") with ICE that requires an extensive range of detention services. *See* Dkt. 19.

B. The Voluntary Work Program.

1. The VWP Is A Service GEO Is Required To Provide.

One such service is the administration of ICE's VWP. All ICE detention facilities—whether privately or publicly operated—must follow the 2011 Performance-Based National Detention Standards ("PBNDS"), which make detainee work a regular part of a detention facility. PBNDS § 5.8.I, https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf. The PBNDS directs that "[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.1 ("Expected Outcomes"). GEO must administer the program. Dkt. 19, at 82 ("Detainee labor shall be used in accordance with the detainee work plan developed by [GEO], and will adhere to the [PBNDS]."); PBNDS § 5.8.V.

2. ICE Does Not Require GEO To Pay A Minimum Wage.

The Contract states that the VWP "shall not conflict with any other

requirements of the contract and must comply with all applicable laws and regulations." Dkt. 19, at 82. But other terms in the contract and incorporated PBNDS show that wage laws are not "applicable." For example, the next sentence in the contract distinguishes between detainee workers and employees. *See id.* And the PBNDS states that "detainee working conditions shall comply with all applicable federal, state and local ***work safety*** laws and regulations," but neither mentions nor includes any wage laws. PBNDS § 5.8.II.5 (emphasis added).

In fact, the PBNDS states that "compensation is at least $1.00 (USD) per day," which authorizes payment at amounts that are clearly below any state or federal minimum wage thresholds for employees. *See* PBNDS § 5.8.V.K. This amount is consistent with a federal statute by which Congress authorized ICE to pay "allowances (at such rate as may be specified from time to time in the appropriation Act involved) to aliens, while held in custody under the immigration laws, for work performed." 8 U.S.C. § 1555(d). The only rate Congress has ever specified is one "not in excess of $1 per day." *E.g.*, Dep't of Justice Appropriation Act, 1979, Pub. L. No. 95-431, 92 Stat. 1021, 1027 (Oct. 10, 1978).

The Congressionally-appropriated rate is plainly below federal or state minimum wage. But it is nonetheless legal, because "[a] detainee performs work for institution maintenance, not compensation." INS General Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS*

Detention Facilities, General Counsel Op. No. 92-8 (INS), 1992 WL 1369347, at *1 (Feb. 26, 1992); *Guevara v. I.N.S.*, 954 F.2d 733, 1992 WL 1029, *2 (Fed. Cir. Jan. 6, 1992) ("The Congress provided that under certain circumstances aliens who are lawfully detained pending disposition may be paid for their volunteer labor. The wage level is a matter of legislative discretion."). Accordingly, ICE's contract terms dictate that the VWP should operate at the "actual cost" of $1 per day per detainee and specify that GEO "shall not exceed" that amount without ICE's approval. Dkt. 19, at 5. Detainees are paid via a trust account that passes ICE's payments through to detainees. Dkt. 97, ¶ 1.28.

3. GEO Does Not Employ VWP Participants.

VWP participation is not employment. Indeed, GEO could not hire detainees even if it wanted to because federal detention facility operators are, like anyone else, prohibited by laws that DHS itself enforces from hiring unauthorized aliens. *See generally*, 8 U.S.C. § 1324a; 8 C.F.R. §§ 274a.12, 274a.14. And, as GEO explained in great detail below (and can explain on appeal), essentially all federal immigration detainees are unauthorized to work while detained. *See* Dkt. 69, at 15-18, Dkt. 95, at 10-11, 15-16; Dkt. 99, at 5-11. Even lawful permanent residents lose work authorization when detained under a removal order. 8 C.F.R. § 1001.1(p).

The Contract further restricts who GEO can hire, and does so in terms that

would disqualify every detainee. For example, GEO is not only forbidden from hiring aliens without work authorization, it is further forbidden from hiring aliens without lawful permanent resident status ***and*** at least five years of domestic residency. *See* Dkt. 19, at 63. Further, GEO must immediately remove from duty any employee with a "[c]onviction of a felony, a crime of violence, domestic violence, or a serious misdemeanor" or anyone "[p]ossessing a record of arrests." Dkt. 19, at 64-65. GEO must also perform background checks on all employees who interact with detainees. Dkt. 19, at Attachment 6, p. 5.

Even as to detainees who may somehow be eligible for employment by GEO, the relationship with GEO bears little similarity to a traditional employment relationship. Detainees' living costs are covered at taxpayer expense, so the VWP plays no role in providing a living wage. Rather, it aims to reduce institutional costs, and to provide productive activities to detainees. PBNDS § 5.8.II.4-5. Participation is voluntary, and detainees make no commitment to participate for any length of time. *See* Dkt. 97, ¶ 1.36. GEO does not track hours of participation, and detainees do not clock in or fill out timecards. *Id.* ¶ 1.37. Tasks are often subdivided—opposite to what a normal employer concerned with employee efficiency would do—just to give more detainees opportunities to stay busy. *Id.* ¶ 1.24.

Further, ICE exercises substantial control over the VWP, and it is ICE—not

GEO—that has ultimate discretion over whether and how a particular detainee may participate in the VWP. ICE exercises a critical level of control by setting detainees' classification level. That classification determines the type of work for which each detainee is eligible, PBNDS § 5.8.V.A, which affects the VWP's structure. Detainees with violent criminal pasts will have limited opportunities to participate, or even none at all. More importantly, it is "***the sole responsibility of ICE*** to determine whether a detainee will be allowed to perform on voluntary work details and at what classification level." Dkt. 19, at 82 (emphasis added). ICE reviews all rosters of detainees involved in the VWP. Dkt. 97, ¶ 1.27. ICE could wipe a slate of VWP jobs clean if there is no one it deems eligible to participate.

C. The Plaintiffs' Minimum Wage Claim And The District Court's Rulings.

Plaintiffs have brought one claim: that GEO is required to pay backpay to detainees participating in the VWP a minimum hourly wage under Washington's Minimum Wage Act ("MWA"), because they have retroactively become GEO's "employees." The court denied GEO's motion to dismiss on various grounds, including *Yearsley* immunity, preemption, failure to join necessary parties, and the inapplicability of the MWA. Dkt. 28; Dkt. 67; Dkt. 113. GEO has conditionally counterclaimed for offset and unjust enrichment on the ground that it should not be required to pay detainees a minimum wage ***on top of*** all living expenses. Dkt. 33.

After a former plaintiff sought to withdraw and replace himself, GEO

promptly moved the district court to deny class certification. Dkt. 69. The district court permitted the current named plaintiffs, Mr. Nwauzor and Mr. Aguirre-Urbina (the "Named Plaintiffs"), to be added and to file an amended complaint. Dkt. 77; Dkt. 83. Named Plaintiffs then moved to certify a class. Dkt. 86.

In roughly sixty pages of briefing, GEO extensively challenged several key aspects of the now-certified class. Dkt. 69; Dkt. 95; Dkt. 99. GEO argued primarily that individual issues defeated commonality or predominance and that any class action would be unmanageable. *First*, GEO argued that class members' near-uniform lack of work authorization gave GEO a defense to most, if not all, class members that could not be assessed without individualized proof that each detainee could have been legally employed by GEO. Dkt. 69, at 2-8, 10-18; Dkt. 95, at 3, 10-11; Dkt. 99, at 5-11. *Second*, GEO argued that even Plaintiffs' claimed common questions—which related to GEO's level of control over detainees—would fall prey to individualized issues because GEO's control over detainees is severely and unevenly limited by ICE's ultimate discretion over all aspects of immigration detention. Dkt. 69, at 19-21; Dkt. 95, at 11-14; Dkt. 99, at 12. *Third*, GEO argued that a class adjudication would be unmanageable because liability and damages determinations would rely entirely on detainees' individual testimony, and because any just award would need to account for job- and detainee-specific offsets. Dkt. 95, at 14-21; Dkt. 99, at 12. GEO challenged Named Plaintiffs'

showing on remaining factors as well. *See, e.g.*, Dkt. 95, at 21-24.

Despite this extensive briefing, the district court issued a conclusory, four-page order denying GEO's motion and granting class certification. *See* Order. The district court certified a class comprising "[a]ll civil immigration detainees who participated in the Voluntary Work Program at the Northwest Detention Center at any time between September 26, 2014, and the date of final judgment in this matter." Order, at 4. Thus, the class includes all detainees that participated in the program in any form, undifferentiated by their work authorization, risk classification, tasks, and any other details of their individual participation.

The district court's analysis comprised a one-paragraph discussion of the court's view of how the merits and class certification intertwine:

> GEO's core opposition to class certification centers on the argument that Plaintiffs are 'unemployable' by GEO because they lack work authorization, so they cannot represent the proposed class of detainees seeking for lost wages under the [MWA]. GEO has interwoven this argument in its briefing for both motions. … The argument begins from a premise, one of at least two plausible interpretations of the GEO-ICE Contract and related Volunteer Work Program (VWP) policies, but ignores the second plausible interpretation of the same. While the argument is not frivolous, the Court now declines to make the findings urged by GEO, and class certification should not be denied on such grounds.

Order, at 1-2. The court never explained what the "second plausible interpretation" of the contract was or why the mere existence that interpretation, if plausible, would avoid the problems GEO identified. Nor did the court discuss

GEO's many other arguments against class certification.

The district court then offered a few "findings" relating to Rule 23. *First*, the court found that "evidence presented by Plaintiffs indicates that the proposed class comprises at least several hundred individuals," satisfying numerosity. Order, at 2. *Second*, the court found what it considered to be "common issues of law and fact": (1) whether class members are employed by GEO for MWA purposes, given, *inter alia*, the terms of the Contract, the PBNDS, various policies of GEO and ICE, and federal law; and (2) whether the claim is preempted by federal law. *Id.* at 2. *Third*, the court found Named Plaintiffs' claims to be typical because they "arise from evidence pointing to a common course of conduct, that is, participation in the VWP at the Northwest Detention Center, and the same alleged injury, that is, compensation of $1 per day of work, an amount not commensurate with the MWA." *Id.* *Fourth*, the court found Named Plaintiffs to be adequate representatives "because there are no conflicts with the other members of the proposed class and they appear willing and able to prosecute this case vigorously on behalf of the class." *Id.* at 3.

Finally, the court found that a class action was superior because (1) "high costs of litigating threshold issues and potentially nominal recovery for individual proposed class members;" (2) no other similar litigation is in process (except for a "unique" wage action brought by the State of Washington under the same law);

and (3) class members may have individual impediments to individually litigating the case. *Id.* On the critical predominance element under Rule 23(b)(3), the court gave a one-line conclusion that common questions predominate, and no more. *Id.*

QUESTION PRESENTED

Whether the Court should review the district court's certification of a class on novel issues of wage law in the detention context, where the district court's analysis of the required elements was perfunctory, provided no explanation as to how any allegedly common questions can be proved to a jury, and, as to the demanding test required to demonstrate predominance, relied on a single, conclusory restatement of Rule 23(b)(3)'s requirement.

WHY IMMEDIATE REVIEW IS APPROPRIATE

I. The Certification Order Presents Unsettled And Important Issues Of Law That The District Court Failed To Properly Analyze.

The district court is not merely the first court to certify a class pertaining to state-minimum wage laws' application to federal detainees—***it is the first court to entertain such a claim at all***. In such circumstances, the district court's failure to resolve at the class stage uncertainties about the contours of the claim—to say nothing of how it would be tried on a classwide basis—warrants immediate review.

A party seeking class certification must "affirmatively demonstrate" compliance with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). That party bears the burden to show that all prerequisites are met, and a

district court must "conduct a 'rigorous analysis' to determine whether the party seeking certification" has met that burden. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Rule 23 is not a "mere pleading standard"; rather, a movant must support each prerequisite with evidence. *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 633 (9th Cir. 2018); *see also id.* at 631 ("A plaintiff seeking class certification bears the burden of affirmatively demonstrating ***through evidentiary proof*** that the class meets the prerequisites of Rule 23(a).") (emphasis added) (quotation omitted). Substantively, putative class representatives must show that their claim involves "common questions of law or fact that are apt to drive the resolution of the litigation." *Mazza*, 666 F.3d at 588 (quotation omitted). And when seeking damages, putative class representatives must further show that their claim will ***predominantly*** involve issues susceptible to common proof and that proceeding as a class action is superior to proceeding individually. *Id.* at 589.

Here, the district court failed to meaningfully analyze any element of Plaintiffs' claim and certified a class without offering any explanation as to how that claim can be productively tried on a classwide basis. And to the extent the district court properly analyzed any class certification factors at all, its analysis was manifestly erroneous. GEO briefly explains the district court's key failures below.

A. Predominance/Commonality.

It is well-settled that class actions must involve "questions of law or fact

common to the class." Fed. R. Civ. P. 23(a)(2). Commonality "does not mean merely that [class members] have all suffered a violation of the same provision of law" but that class members have suffered the same injury. *Wal-Mart*, 564 U.S. at 350. Indeed, all lawsuits pose some common questions. For example, in an employment discrimination action, do all of the plaintiffs work for the same employer? Do the managers have discretion over pay and promotion? Are class members seeking the same remedy? But reciting such rote questions is not enough. *Id.* at 349-350. Instead, a plaintiff must identify a common contention which can resolve "in one stroke" an issue that is "central to the validity of each of the claims." *Id.*

As a threshold matter, the district court's order fails in part because it does nothing but recite these kinds of rote issues. The district court found that Plaintiffs raised common questions that included "whether proposed class members have an employment relationship with GEO for MWA purposes, given *inter alia*, terms of the GEO-ICE Contract, the 2011 Performance Based National Detention Standards, various policies of GEO and ICE, and federal law; and whether Plaintiffs' MWA claim should be preempted by federal law." Order, at 2. And the court offered only a single, conclusory statement on predominance: "[t]he common questions identified predominate over the other issues, including damages." *Id.* at 3. The district court offered no analysis at all.

This approach fails because it does not identify any means through which Plaintiffs, as federal detainees, can ***prove*** the novel claim that they qualify as GEO's employees on a classwide basis. Prior to this case, courts had uniformly found VWP programs to be outside the reach of both federal and state wage laws. *See* Dkt. 8, at 6-9, 20-23. How the "terms of the GEO-ICE Contract, the 2011 Performance Based National Detention Standards, various policies of GEO and ICE, and federal law" relate to classwide proof that GEO ***employed*** detainees remains unclear. Without identifying the contours of any common proof, the court failed to address whether Plaintiffs' claim could be litigated on behalf of a class.

Indeed, the district court's order did not even address Named Plaintiffs' ***own*** theory of proof. They identified a series of purportedly common questions, which were drawn from cases distinguishing employees from independent contractors and thus turned on the degree of control an alleged employer exerts over a party designated as an independent contractor. *See* Dkt. 86, at 11-12 (citing *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289 (Wash. 2012)). In response, GEO explained that it does not exercise complete control over any detainee, since it is ICE that holds discretion over all fundamental aspects of detainees' experience in detention—arrival, departure, transfer, and risk classification—and the control GEO can exert is always subject to ICE's veto. *See* Dkt. 97, ¶¶ 1.29-1.31; Dkt. 19, at 82. The district court's order makes no mention of these issues at all. That is

not the "rigorous analysis" that Rule 23 requires. *See Mazza*, 666 F.3d at 588.

Even apart from the order's conclusory nature, the order fails because it does not address any of the individualized issues GEO exhaustively briefed. This Court has reversed class certification on employee wage claims where individualized proof was required. In *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009), for example, this Court reversed class certification when the district court improperly relied on one of the defendant's policies to ignore class-defeating individualized questions. There the plaintiffs sued for overtime pay on the grounds that they had been improperly classified as "exempt" employees under state and federal wage laws. *Id.* at 955. The plaintiffs sought to represent a single class of employee, and the district court found that the defendant's uniform policy with respect to those employees satisfied commonality and predominance, since it would be "manifestly disingenuous for [the defendant] to treat a class of employees as a homogenous group for the purposes of internal policies and compensation, and then assert that the same group is too diverse for class treatment in overtime litigation." *Id.* at 956 (quoting district court's opinion).

This Court granted interlocutory review and reversed. It explained that while the defendant's policy may have been relevant to class certification, the district court abused its discretion by relying on that policy to the exclusion of other relevant factors that undercut commonality or predominance. *Id.* at 958-59.

The Court reasoned that the "blanket application of exemption status" did not prove whether any individual employee was injured, since that proof would turn on individualized questions regarding each employee's actual work. *Id.* at 959. Even if the policy was relevant to the class claims, then, it did not suffice to support class certification because it did not tip "the balance between individual and common issues." *Id.* at 959. *See also Luiken v. Domino's Pizza, LLC*, 705 F.3d 370, 376-77 (8th Cir. 2013); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009).

Under this principle, the district court's order fails because it does not address any of the many complications GEO identified in its briefing. As GEO explained, detainees' experiences in the VWP involve tasks ranging from dusting and mopping to painting murals on walls, and the personnel in charge of VWP jobs often split up minor tasks to help give more detainees something to do. Dkt. 97, ¶¶ 1.19, 1.24, 1.26. Similar variations in jobs characteristics have precluded class certification in other wage cases. *E.g.*, *Vinole*, 571 F.3d at 946 (individualized job circumstances undercut predominance); *Keller v. Tuesday Morning, Inc.*, 179 Cal. App. 4th 1389, 1398-99 (2009) (same). Similarly, the district court ignored individualized problems relating to the measure and distribution of damages and GEO's offset defense. Dkt. 95, at 14-18; Order, at 2.

Further, the district court all but ignored GEO's extensive argument that

detainees' work authorization would present another individualized determination. *See* Order, at 1-2. The district court explained merely that this defense relies on "one of at least two plausible interpretations of the GEO-ICE Contract … but ignores the second plausible interpretation of the same." *Id.* at 2. The district court declined even to explain what two "plausible" interpretations it had in mind, much less how ***Plaintiffs'*** interpretation of GEO's contract with ICE—an absent party—could possibly overrule both GEO's and ICE's well-established and contrary interpretation of that very contract. The district court's decision to punt on this issue and in the meantime certify an enormous class was likely an effective decision on the merits of the defense, since the financial pressure it puts on GEO means GEO may never have any opportunity to press its contract-based defenses.

B. Superiority.

As GEO explained in the district court, superiority often focuses on whether a class action can be efficiently managed, which includes difficulties in calculating and distributing damage awards. Dkt. 95, 18-21. Plaintiffs seek to represent an enormous class of detainees who worked varying hours at varying efficiency levels and whose proof of liability and damages will likely rely on their individual memories. Even if such issues do not undercut predominance, they make a class action unmanageable. The district court ignored this argument. *See* Order, 3.

Instead, the district court ruled that the Plaintiffs' "potentially nominal

recovery" and possible "impediments to their ability to individually litigate" their claims made a class action superior to an individual one. *Id.* But Plaintiffs provided no evidence that their claims are insubstantial enough that they could not be tried individually, and their claims are not facially insubstantial. For example, Aguirre-Urbina is seeking backpay for several years of alleged work. *See* Dkt. 84, ¶ 3.2. Such a claim is no more "nominal" than any other individual wage claim. *E.g.*, *Ellerman v. Centerpoint Prepress, Inc.*, 22 P.3d 795, 797 (Wash. 2001).

At bottom, Named Plaintiffs' claim is unprecedented. The district court's order offers no insight into how it expects their proof to proceed, let alone how that proof will avoid the many problems GEO has identified. The multiplicity of jobs, GEO's pass-through payments from ICE, GEO's varying levels of control over detainees—subject always to approval or veto by a federal agency who is not even party to this case—and detainees' specific participation make this claim less suited for class treatment than the plaintiffs' in *In re Wells Fargo*, in which this Court reversed class certification ***despite*** the plaintiffs all doing the same job under the same policy. Certifying an enormous class on that questionable basis raises grave implications for GEO and warrants this Court's immediate review.

II. GEO's Federal Contractor Status Strongly Favors Immediate Review.

This Court has held that permission to appeal under Rule 23(f) is "most appropriate" in "death knell" cases, in which a "questionable" class certification

order is likely to force a defendant to resolve the case based on considerations independent of the merits. *Chamberlan*, 402 F.3d at 959; *see also In re New Motor Vehicles*, 522 F.3d at 8.

Named Plaintiffs' claim puts GEO in a position that is still ***more*** intolerable. GEO is the sole defendant here, even though it is ICE that established the terms of the program that they now attack. GEO's financial and legal positions are dictated by its contracts with ICE. Those contracts require GEO to administer a VWP and were drafted on the assumption that GEO would administer the program just as ICE does at its own facilities—a reasonable assumption given that the program has existed for decades without any successful legal attacks.

But the district court's novel certification of a wage class comprising all VWP participants at NWDC since 2014 poses a potentially catastrophic risk to GEO's ability to honor its contracts with the federal government. This suit is one of at least ***eight*** pending detainee labor suits; class certification will invite more. GEO's status as a government contractor puts it in the position of having to answer for what are essentially grievances against Congressional and DHS/ICE policies, and to face substantial monetary claims for carrying out its contractual obligations.

RELIEF REQUESTED

The Court should grant GEO's petition, reverse the certification order, and grant all other relief to which GEO is entitled.

Dated: August 20, 2018

Respectfully submitted,

/*s/ Mark Emery*
Mark Emery
Norton Rose Fulbright US LLP
799 9th Street NW, Suite 1000
Washington, DC 20001
(202) 662-0210
mark.emery@nortonrosefulbright.com

CERTIFICATE OF COMPLIANCE
WITH WORD VOLUME LIMITATION

This petition complies with the type-volume limitations of Ninth Circuit Rule 5-2 because it does not exceed 20 pages and contains 4,890 words, excluding the parts exempted by Fed. R. App. P. 5(b)(1)(E) and 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Dated: August 20, 2018

/s/ Mark Emery
Counsel for Defendant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, I filed the foregoing petition through the Court's CM/ECF system pursuant to Fed. R. App. P. 5 and Ninth Circuit Rules 5-2 and 25-5(b)(3). I further certify that I served by overnight mail and by email copies of the foregoing petition to the appointed class counsel for the Plaintiffs:

Adam J. Berger
Jamal N. Whitehead
Lindsay L. Halm
Schroeter Goldmark & Bender
810 3rd Ave., Suite 500
Seattle, WA 98104
berger@sgb-law.com
whitehead@sgb-law.com
halm@sgb-law.com

R. Andrew Free
Law Office of R. Andrew Free
P.O. Box 90568
Nashville, TN 37209
andrew@immigrantcivilrights.com

Devin T. Theriot-Orr
Sunbird Law, PLLC
1001 4th Ave., Suite 3200
Seattle, WA 98154
devin@sunbird.law

Meena P. Menter
Menter Immigration Law PLLC
8201 164th Ave NE, Suite 200
Seattle, WA 98052
meena@meenamenter.com

Dated: August 20, 2018

/s/ Mark Emery
Counsel for Defendant-Petitioner