No. 18-80095

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-Respondents,

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

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RESPONDENTS' ANSWER IN OPPOSITION TO PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION

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I. INTRODUCTION

The GEO Group, Inc. ("GEO") seeks immediate appellate review of the district court's order certifying a class of civil immigration detainees at the Northwest Detention Center ("NWDC"). The certified class seeks backpay damages against GEO pursuant to the Washington Minimum Wage Act for labor performed under the auspices of GEO's Voluntary Work Program ("VWP"). This Court has held that such petitions should be granted "sparingly," and that those few worthy of interlocutory review will typically fall within three limited categories. GEO makes only passing mention of these guidelines and fails to identify, much less demonstrate, a permissible basis on which interlocutory appellate review should be granted here.

Instead, GEO focuses almost exclusively on the "novel" and "unprecedented" nature of the litigation and the merits (or lack thereof, in GEO's view) of Plaintiffs' case. Even if these were relevant concerns on a Rule 23(f) petition—*they are not*—GEO is wrong on both counts. This action presents nothing novel about the law relating to class actions, as the district court based its decision on a straightforward application of Rule 23. In doing so, the district court joined at least one other district court in certifying a class of detained immigrants

seeking damages from GEO.[1] As for GEO's merits-based arguments, they are simply a retread of its *three* prior motions to dismiss, which have all been denied by the district court, and one of which is now pending before this Circuit on interlocutory appeal. More than anything, GEO's merits arguments underscore the need for a speedy, efficient, and uniform resolution of the detained workers' claim against GEO—exactly the kind of resolution driven by class certification.

Accordingly, Plaintiffs-Respondents Ugochukwu Goodluck Nwauzor and Fernando Aguirre-Urbina respectfully request that this Court deny GEO's petition.

II. STATEMENT OF THE CASE

A. GEO's Implementation Of The Voluntary Work Program At The NWDC.

GEO contracts with United States Immigration and Customs Enforcement ("ICE") to house up to 1,575 adults in civil immigration detention at the NWDC in Tacoma, Washington. Between 2014 and 2017, the average daily population at the NWDC was approximately 1,300 detainees. There is no penological aspect to the civil immigration detention GEO supervises and profits from at the NWDC.[2]

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[1] *Menocal v. The GEO Grp., Inc.*, 320 F.R.D. 258 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018) (certifying a class of detainees alleging that GEO was unjustly enriched by paying detainee workers participating in the VWP only $1 per day), *cert. petition pending*.

[2] *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (U.S. 1893) ("The order of deportation is not a punishment for crime."); *see King v. County of Los Angeles*, 885 F.3d 548, 557 (9th Cir. 2018) ("Under the Due Process Clause of the

Under its contract with ICE, GEO agreed to design and operate a work program in which "[d]etainee labor shall be used in accordance with the detainee work plan developed by the Contractor, and will adhere to the ICE PBNDS [Performance-Based National Detention Standards] on Voluntary Work Program." Ex. 1[3] (ICE Contract) at p. 86.

GEO's contract obligates the company to comply with all applicable state and local work regulations in administering the VWP, including, Plaintiffs argue, the Washington Minimum Wage Act. *See* Ex. 1 (2011 PBNDS) at § 5.8.II.5; ICE Contract at p. 86. The PBNDS limits work to "8 hours daily, 40 hours weekly," 2011 PBNDS at § 5.8.V.F, .G, and .K, and outlines the terms of detainee compensation under the VWP:

> Detainees shall receive monetary compensation for work completed in accordance with the facility's standard policy. The compensation is *at least* $1.00 (USD) per day. The facility shall have an established system that ensures detainees receive the pay owed them before being transferred or released.

Id. at § 5.8.V.K (emphasis added). Under the contract, GEO must continuously re-evaluate its compliance obligations. And where two potentially conflicting legal

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Fourteenth Amendment, an individual detained under civil process cannot be subjected to conditions that amount to punishment." (internal quotations omitted)).

[3] All Exhibits are attached to the accompany declaration of Jamal Whitehead filed in support of Plaintiffs-Respondents' answer in opposition to GEO's petition for permission to appeal.

obligations could govern, the ICE contract requires GEO to adhere to the most stringent, protective standard.

Thus, GEO's contract with ICE and the PBNDS establish a floor, not a ceiling, for GEO's payments to detainees for their labor.

GEO argues otherwise by pointing to pre-1980 Congressional appropriations bills authorizing allowances for detainees, as well as its contract with ICE, to claim that the $1-a-day per worker reimbursement GEO receives from ICE for administering the VWP is evidence that the maximum pay rate to detainee workers is also $1-a-day. Congress last passed an appropriations bill dealing with pay rates for the VWP almost 40 years ago, before any privately-run, for-profit detention facilities even existed.[4] And documents obtained to date—including signed admissions on the company's behalf by its counsel of record—show that GEO can and does pay detained immigrant workers more than a $1 per day at some of its other facilities, including immigration detention centers located in Texas and Louisiana. *See* Exs. 2, 3, 4.

Based on information obtained through the Freedom of Information Act about ICE's payments to GEO, Plaintiffs estimate that between 350 and 430

[4] *See* GEO Group History Timeline, https://www.geogroup.com/history_timeline (last visited Sept. 10, 2018); The CCA Story: Our Company History, http://www.corecivic.com/about/history (last visited Sept. 10, 2018).

detainee shifts took place each day at the NWDC under the VWP during the class period. Exs. 6, 7.

B. GEO's Policies, Procedures, And Practices For The VWP Apply Uniformly To All Detainees At The NWDC.

Upon entry into the NWDC, GEO issues each detainee a copy of its Detainee Handbook, which details the facility's "specific rules, regulations, policies, and procedures" concerning the VWP, among other things, which apply equally to all detainees. Ex. 1 ("Handbook") at p. 4. All detainees are eligible to work in the VWP, although restrictions may apply to the specific work assignments given depending on the detainee's risk classification. *Id.* at p. 7-8; *see also* Ex. 5 (GEO's Resp. to Pltf.'s 1st IRFPs) at p. 9 ("A detainee would be eligible to participate in the [VWP] if the detainee were [sic] detained at the NWDC and volunteered to participate.").

GEO uses civil immigration detainees participating in the VWP to perform virtually all non-security work functions at the NWDC. Work assignments uniformly involve cleaning, maintenance, and other service-type work, such as "Kitchen worker," "Recreation/Library/Barber," "Laundry," "Living area clean-up/janitorial," and "Evening workers (facility janitorial)." Handbook at 9. GEO "provide[s] any necessary training to perform the job to which [detainees] are

assigned," *id*., as well as any safety and other equipment associate with the tasks to be performed. PBNDS at § 5.8.V.N.

Detainees are not permitted to work outside the NWDC's grounds, and thus, cannot seek offsite employment during their detention. *See id*. at § 5.8.V.B ("In … [Contract Detention Facilities], low custody detainees may work outside the secure perimeter on facility grounds."). Moreover, GEO prohibits detained immigrants from running their own businesses while detained, subjecting detainees to penalties for "conducting a business," which the Handbook describes as a "Category IV" offense. Handbook at p. 24. GEO also maintains the right to remove any detainee from the VWP for "[u]nexcused or frequent absences or unsatisfactory work performance." *Id*. at p. 15; *see also* PBNDS at § 5.8.V.L.

GEO pays all detained immigrants participating in the program at the NWDC the same amount—$1.00 per day—regardless of how many hours they actually work, and it calculates and pays wages earned on a daily basis. Handbook at p. 15.

C. The Class Representatives and their Claim.

Plaintiffs Ugochukwu Goodluck Nwauzor and Fernando Aguirre-Urbina performed various jobs at the NWDC during their detention: Mr. Nwauzor primarily cleaned the common showers within his pod, while Mr. Aguirre-Urbina, who is presently detained, has worked as a shower cleaner, dayroom cleaner,

barbershop cleaner, food porter, juice server, in the kitchen, and picking up garbage outside the pods. Regardless of how many hours they worked in a day or week, GEO never compensated them more than $1 per day for their labor.

Plaintiffs estimate that thousands of detained immigrants worked in the VWP at the NWDC under the same terms and conditions that applied to Mr. Nwauzor and Mr. Aguirre-Urbina.

Plaintiffs argue that an employment relationship exists under Washington law between GEO and the detainees taking part in the VWP, and that GEO's practice of paying subminimum wages to these workers violates Washington's Minimum Wage Act ("MWA"), RCW 49.46 *et seq*. Although the MWA contains an exception for "[a]ny resident, inmate, or patient of a state, county, or municipal correctional, detention, treatment or rehabilitative institution," this list conspicuously omits any reference to privately-run federal detention facilities. RCW 49.46.010(3)(k).[5]

[5] The State of Washington shares this view, and has also sued GEO for violating the MWA because of its implementation of the VWP at the NWDC. *See Washington v. GEO Grp., Inc.*, 283 F. Supp. 3d 967 (W.D. Wash. 2017) (denying motion to dismiss State's "action to enforce Washington's minimum wage laws and to remedy the unjust enrichment" from Defendant's long standing failure to adequately pay immigration detainees." (internal quotations omitted)).

D. Procedural History.

To date, GEO has filed three motions to dismiss Plaintiffs' suit—the district court has denied each of these motions. *See Nwauzor et al. v. GEO Grp., Inc.*, 3:17-CV-05769-RJB, order denying motion to dismiss (W.D. Wash. Aug. 6, 2018);[6] *Chen v. GEO Grp. Inc*., 3:17-CV-05769-RJB, 2018 WL 1963669 (W.D. Wash. Apr. 26, 2018) (same); *Chen v. GEO Grp., Inc.*, 287 F. Supp. 3d 1158 (W.D. Wash. 2017) (same).[7] The first motion sought dismissal under Fed. R. Civ. P. 12(b)(6), arguing that federal law preempted Plaintiffs' claims and that Plaintiffs failed to state a claim under the MWA. GEO's second motion sought dismissal for Plaintiffs' alleged failure to join ICE as a necessary or indispensable party. Finally, GEO argued in its third motion that dismissal was warranted by derivative sovereign immunity, in addition to rehashing the rest of the arguments previously raised and rejected in its prior two motions to dismiss. GEO folds aspects of each of these failed motions into the instant petition.

III. STANDARD OF REVIEW

"[P]etitions for Rule 23(f) review should be granted sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). Generally, a Rule 23(f) petition presents a "rare" case "worthy" of interlocutory review only when:

[6] Ex. 8 (Order).
[7] Mr. Nwauzor and Mr. Aguirre-Urbina were substituted as the named plaintiffs in this action in place of the original named plaintiff, Chao Chen.

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id.

The district court's certification decision "is subject to a *very limited* review and will be reversed only upon a *strong showing* that the district court's decision was a clear abuse of discretion." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 461 (9th Cir. 2000), as amended (June 19, 2000), (internal quotations omitted) (emphasis added); *see Bernard v. CitiMortgage Inc*., 637 Fed. Appx. 471, 472 (9th Cir. 2016) (citing *In re Mego* with approval). This is especially true when reviewing an order *granting* class certifications, which this Court gives "noticeably more deference than when we review a denial." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016).

IV. REASONS GEO'S APPEAL SHOULD NOT BE ALLOWED

Although GEO's petition acknowledges the Rule 23(f) guidelines set forth in *Chamberlan*, it fails to identify how its petition fits within the Court's accepted framework for granting permissive review. Plaintiffs analyze each of the

Chamberlan factors below, and how poorly suited this matter is for interlocutory review.

A. GEO Fails To Demonstrate That It Runs The Risk Of Ruinous Liability And Therefore Does Not Meet The Death Knell Standard.

GEO makes passing reference to the death-knell standard—the first of the *Chamberlan* factors—but does not argue, much less prove, that "the damages claimed would force a company of its size to settle without relation to the merits of the class's claims." *Chamberlan*, 402 F.3d at 960; *see* Pet. at 19. The death knell standard requires more than conclusory statements, but rather proof through "declarations, documents, or other evidence demonstrating potential liability or financial condition" that GEO "lacks the resources to defend this case to a conclusion and appeal if necessary or that doing so would run the risk of ruinous liability." *Id.* (internal quotations omitted).

Here, GEO has offered hardly any argument and no evidence demonstrating that class certification has forced GEO into an "all or nothing" class trial. GEO is a massive company with recent annual revenue of $2.26 billion, and annual net operating income of $592.9 million. *See* The Geo Group, Inc., *The GEO Group Reports Fourth Quarter and Full-Year 2017 Results* (Feb. 14, 2018), available at http://investors.geogroup.com/file/Index?KeyFile=392182203 (last visited Sept. 12, 2018). Moreover, this case involves only GEO's operations at the NWDC and

not its nationwide web of private prisons, detention facilities, transportation and medical services, and community corrections portfolio. GEO can easily afford the cost of litigating the certified class to judgment and rightly does not argue forcefully to the contrary.

Rather, GEO argues that it should not be held to answer for its implementation of the VWP and that the Plaintiffs' claim "poses a catastrophic risk to GEO's ability to honor its contracts with the federal government." Pet. at 20. Plaintiffs strongly dispute both propositions; Plaintiffs here seek only a damages judgment, which might impinge on GEO's profitability but would not prevent it from complying with its contract obligations to the federal government. More importantly, these issues relate not to class certification but to the merits of Plaintiffs' claims and are therefore beyond the proper scope of a 23(f) petition.[8]

Accordingly, this case does not fit within the death-knell category because there is no credible evidence that class certification threatens to ruin GEO financially.

[8] These arguments merely paraphrase GEO's indispensable party and derivative sovereign immunity defenses, both of which were correctly rejected by the district court. *See Chen v. GEO Grp. Inc.*, 3:17-CV-05769-RJB, 2018 WL 1963669 (W.D. Wash. Apr. 26, 2018) (denying GEO's motion to dismiss); Ex. 8 (Order).

B. GEO's Petition Does Not Fit Within the "Unsettled Question of Law" Category.

GEO's petition also does not fit within the second *Chamberlan* factor, which considers whether the certification decision presents an "unsettled and fundamental" issue of *class-action* law that is likely to "evade end-of-the-case review." *Chamberlan,* 402 F.3d at 959. Here, GEO identifies no such conflict or ambiguity within the law relating to class actions. This is so because the district court applied Rule 23 in a typical fashion to reach its certification decision. Thus, the second avenue of review under *Chamberlan* is foreclosed to GEO. Indeed, the class device was designed specifically to address the legal questions GEO raises as to the merits of Plaintiffs' claims far more efficiently and inexpensively than one-off litigation.

C. GEO Has Not Demonstrated Any Manifest Error That Is Virtually Certain To Be Reversed On Appeal.

The third *Chamberlan* factor requires GEO to show that the district court's decision was "manifestly erroneous and virtually certain to be reversed on appeal from the final judgment." *Chamberlan*, 402 F.3d at 962 (citation omitted). As a practical matter, "[i]t is difficult to show that a class certification order is manifestly erroneous unless the district court applies an incorrect Rule 23 standard or ignores a directly controlling case." *Id.*

GEO does not argue that the district court formulated Rule 23 wrongly or ignored controlling case law; rather, GEO takes issue with the brevity of the certification order, arguing that its concision indicates the court failed to "meaningfully analyze" the class certification issue. Pet. at 13. It has long been held, however, that some cases simply require less explication than others. *Id.* (citing *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). And when the class certification issues are "plain enough," "no further explanation is required to justify the district court's decision." *See id.* at 962. Indeed, when the issues are "readily apparent," "[r]equiring the district court to expand its analysis would produce nothing more than a lengthy explanation of the obvious." *Id.*

Here, the claims at issue are obviously well-suited for class-wide disposition, as the rights of thousands of detained immigrant workers laboring under identical terms and conditions at the NWDC can be resolved at once. Common issues of law and fact abound and predominate, as do their common answers. Under these circumstances, a lengthier order simply was not necessary, and the district court's findings concerning numerosity, commonality,[9] typicality,[10]

[9] The district court identified the following common issues: "[w]hether proposed class members have an employment relationship with GEO for MWA purposes, given inter alia, terms of the GEO-ICE Contract, the [PBNDS], various policies of GEO and ICE, and federal law; and whether Plaintiffs' MWA claim should be preempted by federal law."

adequacy, predominance, and superiority were more than adequate. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1023 (9th Cir. 1998) (although the district court was almost conclusory, the issues were plain and the analysis clear, making additional analysis unnecessary).

GEO relies upon *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009), to argue the district court erred by not addressing the "individualized issues GEO exhaustively briefed," Pet. at 16, but this case provides no guidance here. In *Wells Fargo*, the district court certified a group of mortgage consultants seeking overtime pay, claiming that the defendant employer had wrongly classified them as "exempt" from state and federal overtime laws. *Id.* at 955. The defendant employer maintained a blanket exemption policy, but five separate exemptions under varying state and federal laws were actually at issue. *Id.* at 956.

This Court reversed the trial court's certification order because, in assaying the predominance factors, it applied an erroneous presumption about blanket employment policies. *Id.* at 958-59. This Court held that while "centralized rules, to the extent they reflect the realities of the workplace, suggest a uniformity among

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[10] The district court found Plaintiffs' claims to be typical of the claims of the class "because the claims 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 at $1 per day of work, an amount not commensurate with the MWA."

employees that is susceptible to common proof," the blanket policy in question was not such a rule because individualized inquiries about job duties and experiences were necessary to determine whether any of the five overtime exemptions were in fact met for any given employee. *Id.* Thus, individual questions about *liability* predominated over common questions, weighing heavily against certification. *See id.*

Unlike the defendant in *Wells Fargo*, GEO has identified no individualized questions with respect to liability, focusing instead on inconsequential differences between the discrete tasks performed by detainee workers. Pet. at 17 ("experiences in the VWP involve tasks ranging from dusting and mopping to painting murals on walls…"). GEO fails to explain the import of these distinctions, and in the context of this case, it makes no difference for liability purposes whether a VWP participant worked within their pod as a porter or outside their pod as a janitor, cook, or barber or whether their security classifications permitted work in one position versus another.

Because the district court's order presents no error of law and is *not* manifestly erroneous, GEO's petition for appellate review must be denied.

D. GEO's Remaining Arguments Are Unavailing.

Perhaps because it cannot meet the Rule 23(f) standards developed by this Court, GEO focuses instead on the merits of the case. This Court has repeatedly

held, however, that "merits inquiries unrelated to certification exceed [this Court's] limited Rule 23(f) jurisdiction…." *Stockwell v. City & Cty. of San Francisco,* 749 F.3d 1107, 1113 (9th Cir. 2014). Moreover, even taking GEO at its word about the "unprecedented" nature of the case, Pet. at 10, the scope of the Court's review upon a 23(f) petition will not expand merely because of the unconventional background of the workers seeking back wages or GEO's belief that their claim lacks merit. As the D.C. Circuit explained:

> [a]lthough [Defendant] is correct that [this] is a novel question of law, the question is unrelated to class certification under Rule 23. … [Defendant's] effort to recast its Rule 12(b)(6) arguments as a challenge to class certification … is to no avail. That [Defendant's] argument … may dispose of the class as a whole and thereby preclude a lawsuit … goes well beyond the purpose of Rule 23(f) review because it is unrelated to the Rule 23 requirements.

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 107 (D.C. Cir. 2002) (citations omitted).

Finally, without citation to law or evidence, GEO posits that "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." Pet. at 1. This notion is completely at odds with Rule 23, whose purpose is to ensure a single, fair, and efficient proceeding. *See Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 345–46 (S.D. Ga. 1996), *aff'd sub nom. Jones v. H & R Block Tax Servs.*, 117 F.3d 1433

(11th Cir. 1997) ("Class actions serve three essential purposes: (1) to facilitate judicial economy by the avoidance of multiple suits on the same subject matter, (2) to provide a feasible means for asserting the rights of those who "would have no realistic day in court if a class action were not available"; and (3) to deter inconsistent results, assuring a uniform, singular determination of rights and liabilities." (internal citations omitted)). While GEO may prefer to force detainee workers to pursue their claims against it one at a time, that is exactly the type of inefficient, imbalanced, and multiplicative litigation that Rule 23 is designed to avoid.

V. CONCLUSION

For the reasons stated above, Plaintiffs-Respondents respectfully request that the Court deny GEO's petition seeking appellate review of the district court's class certification order.

Dated this 13th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,923 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionately spaced typeface using Microsoft Word 2010, Times New Roman 14-point font.

DATED this 13th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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