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,

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

## REPLY BRIEF IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f)

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# TABLE OF CONTENTS

**Page**

# TABLE OF CITATIONS

**Page(s)**

**CASES:**

**RULES:**



**OTHER SOURCES:**

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Before a federal court certifies a class action of current and former federal immigration detainees seeking state minimum wages for participation in a Voluntary Work Program ("VWP"), it should have a clear understanding of what the claim is, and how it will be tried. GEO's petition and the Plaintiffs' opposition underscore the inchoate character of the Plaintiffs' claim. Not a single class member has established authorization to be employed by GEO under federal law. Immigration and Customs Enforcement ("ICE"), ***not*** GEO, controls when detainees come and go from the facility and the risk classifications that limit their VWP participation. And the district court indiscriminately lumped together numerous different "jobs" that do not resemble work for which an employer would pay minimum wages in a real job market.

Plaintiffs' novel minimum wage claim does not arise from a typical "employment" relationship. And they have failed to show how their claims will be tried on an individual basis, much less on behalf of a class. That failure should have stopped the district court from certifying a class. Instead, the district court certified a giant, undifferentiated class of detainees, providing only a single sentence about whether common issues predominate over individual issues.

When Judge Kane certified a detainee class challenging the work practices at GEO's Aurora facility in Colorado, the Tenth Circuit ***granted*** GEO's Rule 23(f)

petition, noting "the complexity and difficulty of the issues presented." *The GEO Group, Inc. v. Menocal*, No. No. 17-701 (10th Cir. Apr. 11, 2017). *Menocal* was at a similar stage to this case: the court had only denied a motion to dismiss and discovery was in early stages. Like the Tenth Circuit, this Court should grant GEO's petition in light of the complex and difficult issues presented by this case.

## I. Plaintiffs Provide No Reason For Upholding Class Certification Based On The District Court's Conclusory Predominance Analysis.

The Court's review is particularly warranted because of the district court's manifestly inadequate finding of predominance under Rule 23(b)(3). That rule is designed to detect "situations in which class-action treatment is not as clearly called for." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (internal citations and quotations omitted). Congress intended it to provide the "addition of procedural safeguards" that require a court "to take a 'close look' at whether common questions predominate over individual ones." *Id*. Accordingly, Rule 23(b)(3)'s predominance criteria is "even more demanding than Rule 23(a)." *Id*.; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); *Green v. Fed. Express Corp*., 614 F. App'x 905, 907 (9th Cir. June 22, 2015).

In stark contrast, the district court's predominance discussion is comprised of a single sentence, which reads ***in its entirety*** as follows:

> "The common questions identified predominate over other issues, including damages."

Dkt. 114, at 3. This one-line stamp-of-approval is inadequate for several reasons.

*First*, this Court has vacated and remanded a nearly identical certification order. In *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996), the district court certified a nationwide class in a products liability case against the manufacturer of an epilepsy drug. The Court vacated the certification order because it "merely reiterate[d] Rule 23(b)(3)'s predominance requirement and is otherwise silent as to any reason why common issues predominate over individual issues." *Id*. at 1234. Consequently, the district court "abused its discretion by not adequately considering the predominance requirement before certifying the class." *Id*. (citing several cases in support). *See also Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1277-78 (11th Cir. 2009) (describing district court's two-line discussion of predominance as "engag[ing] in virtually no Rule 23(b)(3) analysis at all," and holding that "[t]his conclusory statement, which cannot truly be called analysis, is grossly insufficient and easily rises to the level of an abuse of discretion"). Likewise, the manifest inadequacy of the district court's one-line statement warrants this Court's review.

*Second*, the predominance analysis also fails because it offers "no showing by Plaintiffs of how the class trial could be conducted." *Valentino*, 97 F.3d at 1234; *see also Baxter Healthcare Corp. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 121 F.3d 714, 1997 WL 441397 (9th Cir. 1997). The Fifth Circuit has helpfully

explained why this failure warrants reversal of a certification order:

> Determining whether legal issues common to the class predominate over individual issues requires that the court inquire ***how the case will be tried***. [] This entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to "***understand the claims, defenses, relevant facts, and applicable substantive law***." [] Such an understanding prevents the class from degenerating into a series of individual trials.

*O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003) (emphasis added) (internal citations omitted). The district court conducted no such analysis here, and thereby failed to explain how the trial of the state minimum wage claim will not degenerate into a series of individual trials.

For the class to be entitled to wages under Washington Minimum Wage Act it will need to ***prove*** that each member of the class qualifies as an "employee" under that law. The most basic contours of how the claim would be tried at all—*e.g.*, what test will be used determine whether Mr. Nwauzor or Mr. Aguirre-Urbina or anyone else at NWDC ***was*** or ***is*** an "employee" under a state law, and how GEO's defenses will apply to that claim—remain profoundly unclear. Pet., at 14-16. The certification therefore puts GEO in the intolerable position of defending a claim against thousands of class members without any determination from the court as to what those class members must do to prove their claims at all.

Plaintiffs urge that "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." Opp., at 13. But the Plaintiffs, like the district court, fail to demonstrate of what those "identical terms and conditions" consist. As the class acknowledges, *see* Opp., at 5-6, detainees participated in many different tasks in the VWP. Each detainee's personal "work" narrative, including restrictions on work imposed by ICE, the type of job, job performance, and many other factors would be necessary when determining whether a particular class member—even if work-eligible—was an "employee" under the appropriate state law test, and if so, what pay is required by state law based on the facts of the work performed. *See* Pet., at 15-17.

Notably, in the briefing below the class representatives argued that a multi-factor "economic realities" test would be used to determine whether GEO and detainees have an employment relationship. *See* Dkt. 86, at 11-12 (citing *Anfinson v. FedEx Ground Package Sys., Inc.*, 281 P.3d 289 (Wash. 2012).[1] In their Opposition, however, they make no mention of that test. And with good reason:

[1] They claim various factors are relevant: GEO's degree of control over the method, timing, and performance of detainee labor; the inability of detainee workers to alter their income beyond the standard payment of $1 per day regardless of skill, initiative, or any other factor; GEO's training and equipment furnished to detainee workers; GEO's restrictions on the ability of detainee workers to seek outside employment; GEO's control over the detainee workers' rate of pay; and detainee workers' integral role in GEO's operation and maintenance of the NWDC. *Id*. at 13.

applying it would require the factfinder to analyze a complicated set of factors to determine whether each detainee participating in a particular way (laundry, barbershop, bathroom cleaning, mural painting) was actually engaged in an employment relationship with GEO or ICE (which exercises final discretion over all aspects of VWP work), or neither. *See* ICE-GEO Contract, Dkt. 19, at 82 ("It will be the sole responsibility of ICE to determine whether a detainee will be allowed to perform on voluntary work details and at what classification level.").

More fundamentally, whether differences between a kitchen shift and occasionally painting murals on a wall is "inconsequential," Opp., at 15, to a proof of employment turns entirely on ***how*** that employment ***will be proved***. *See* Pet., at 17. The district court was not free to ignore these problems. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (plaintiffs must affirmatively demonstrate all Rule 23 elements). The Order does not show the "rigorous analysis" of "evidentiary proof" required by Rule 23. *See* Pet., at 12-13 (citing cases); *O'Sullivan*, 319 F.3d at 738 (although certification does not resolve merits, a court must still "understand the … relevant facts, and applicable … law"). Here the Court will search the record in vain for any determination by the district court of what elements must be met to establish "employment" under Washington law.

GEO's defenses further complicate the analysis of wage liability and damages. For example, a significant "economic reality" would be whether a

detainee at the NWDC was eligible to work in the United States. Pet., at 6, 17-18. That individualized proof will be necessary for each and every detainee in the class. *E.g.*, Dkt. 69, at 11-18. The district court ignored this problem by ***explicitly declining to decide whether it would affect the outcome***. Dkt. 114, at 1-2. That is insufficient under Rule 23. *E.g.*, *O'Sullivan*, 319 F.3d at 738.

Furthermore, GEO has raised an offset defense that accounts for the efficiency differences between the voluntary program GEO believed it was running and the market-level employment for which Plaintiffs claim GEO is liable. *See* Dkt. 92, ¶ 8.9; Dkt. 38, at 20-21. GEO often split one task into several so more detainees would have something to do, *see* Dkt. 97, ¶ 1.24—which defies what a real "employer" would do in assigning work to wage-earning "employees." Detainees making $1 per day were under no incentive to be efficient, and GEO lacked the controls that a real "employer" would possess. *E.g.*, Dkt. 95, at 3-4, 16-17.

Given these complicating, individualized factors, *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009) is the controlling precedent. *See* Pet., at 16-17. There the Court reversed certification orders when an identified common policy provided no means to ***prove*** any class member's claim, since a blanket policy applied to the entire class—which comprised people performing only one task instead of the many types of tasks at issue here—did

nothing to establish whether that policy was ***properly*** applied to any ***specific*** class member. Pet., at 16-17; *Wells Fargo*, 571 F.3d at 959. Here, VWP participants' individual voluntary work narratives in the VWP are necessary to determine whether any specific participant ***should have*** been treated as an employee.

The problems with the certification of Plaintiffs' wage claim become more concrete when considered in light of the pending jury trial. *See* Dkt. 14. Neither Plaintiffs' briefing nor the Order explains what it takes to prove that an individual detainee is an "employee" and GEO its "employer." Notably, in wage claims by detainees brought under the Federal Labor Standards Act ("FLSA"), this issue does not arise as a factual matter because the courts (and ICE, through its own legal opinions) has determined that detainees categorically are not "employees" because they do not participate in a job market. *See*, *e.g.*, *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 396-97 (5th Cir. 1990); *Guevara v. I.N.S.*, 954 F.2d 733, 1992 WL 1029, *2 (Fed. Cir. Jan. 6, 1992); INS General Counsel, *The Applicability of Employer Sanctions to Alien Detainees Performing Work in INS Detention*, Genco Op. No. 92-8 (INS), 1992 WL 1369347 (Feb. 26, 1992).

It is entirely unclear how a jury would determine whether thousands of detainees, most of whom participated in multiple different VWP tasks, are employees. No detainee actually filled out a job application, so what standard will the jury use to determine whether any detainee's participation in a ***voluntary***

program was actually ***employment*** instead? Can detainees be under ***GEO***'s control when ***ICE*** makes unilateral and individualized decisions that control detainees' ability to participate in the VWP? How will the jury separate employable detainees from unemployable ones? Are detainees who worked shifts in the kitchen "employees" just as those who volunteered to paint murals to pass the time? Does GEO owe more wages to detainees who worked slowly than to those who worked efficiently? The district court's order did not even decide which of these issues—or any others—will ***affect*** the jury's decision.

Notwithstanding Plaintiffs' aloof suggestion that their claim is "obviously well-suited for class-wide disposition," Opp., at 13-14, their lone case citation—to *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)—actually shows the problem with their claim. This Court held that a ***settlement*** class—where ***both*** parties believed the issues allowed for settlement— that had been certified through "almost conclusory" findings was valid because the "issues [we]re plain and ***the analytical framework [was] clear***." *Id.* at 1023 (emphasis added).

Here, the situation is the exact opposite. This is the first detainee minimum wage class certified in the United States. Plaintiffs purport to prove that immigration detainees in the custody of the United States through the Department of Homeland Security that are participants in a voluntary program who are nearly all unemployable anywhere in America are "employees" of a federal contract

detention facility, and that it is acceptable to certify a class without any determination by the court (much less agreement among the parties) about the proper "analytical framework." *See* Pet., at 12, 19. Plaintiffs attempt to prove—in one stroke—that the dozens of different VWP tasks that individual detainees performed at the NWDC for their own purposes all qualify as minimum-wage-eligible employment, notwithstanding the differences between those tasks, the variations of ICE's control, and the obvious problems of trying to translate participation in a voluntary work program in a detention facility into compensation for hourly wage work in an open labor market. There are simply too many open questions for the district court to have certified class, ***especially*** with only a single, conclusory line regarding predominance.

## CONCLUSION

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

Dated: September 21, 2018

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**
**WITH WORD VOLUME LIMITATION**

This reply brief does not exceed 10 pages, excluding the parts of the brief covered by Fed. R. App. P. 27(a)(2)(B) and 32(f).

This brief also 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: September 21, 2018

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## CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I filed the foregoing brief 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), which will notify counsel for respondent:

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