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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

REGULATIONS AND RULES:

OTHER AUTHORITIES:

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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.

Respectfully submitted,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

APPENDIX A

FILED
United States Court of Appeal
Tenth Circuit

February 9, 2018

Elisabeth A. Shumaker
Clerk of the Court

PUBLISH

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

ALEJANDRO MENOCAL, MARCOS BRAMBILA, GRISEL XAHUENTITLA, HUGO HERNANDEZ, LOURDES ARGUETA, JESUS GAYTAN, OLGA ALEXAKLINA, DAGOBERTO VIZGUERRA, and DEMETRIO VALGERA, on their own behalf and on behalf of all others similarly situated, Plaintiffs – Appellees v. THE GEO GROUP, INC., Defendant – Appellant,	No. 17-1125

and NATIONAL ADVOCACY CENTER OF THE SISTERS OF THE GOOD SHEPHERD; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL GUESTWORKER ALLIANCE; NATIONAL IMMIGRANT JUSTICE CENTER; NATIONAL IMMIGRATION LAW CENTER; PANGEA LEGAL SERVICES; PUBLIC CITIZEN; SANCTUARY FOR FAMILIES; SOUTHERN POVERTY LAW CENTER; AMERICAN IMMIGRANTS FOR JUSTICE; ASIAN AMERICANS ADVANCING JUSTICE; DETENTION WATCH NETWORK; HUMAN RIGHTS DEFENSE CENTER; ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS; JUSTICE STRATEGIES; LEGAL AID AT WORK; HUMAN TRAFFICKING PRO BONO LEGAL CENTER; TAHIRIH JUSTICE CENTER; ASISTA IMMIGRATION ASSISTANCE; FREEDOM NETWORK USA, Amici Curiae.	

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:14-CV-02887-JLK)

Mark Emery, Norton Rose Fulbright US LLP, Washington, D.C. (Charles A. Deacon Norton Rose Fulbright US LLP, San Antonio, Texas; and Dana Eismeier, Burns, Figa & Will, Greenwood Village, Colorado, with him on the brief), for Defendant-Appellant.

David Lopez, Outten & Golden LLP, Washington, D.C. (Juno Turner and Elizabeth V. Stork, Outten & Golden LLP, New York, New York; R. Andrew Free, Law Office of R. Andrew Free, Nashville, Tennessee; Alexander Hood, David Seligman, and Andrew Schmidt, Towards Justice, Denver, Colorado; Brandt Milstein, Milstein Law Office, Boulder, Colorado; Andrew H. Turner, The Kelman Beuscher Firm, Denver, Colorado; and Hans Meyer, Meyer Law Office, P.C., Denver, Colorado, with him on the brief), for Plaintiffs-Appellees.

Scott D. McCoy and Shalini Agarwal, Southern Poverty Law Center, Tallahassee, Florida, Alia Al-Khatib, Southern Poverty Law Center, Miami, Florida, and Lisa Graybill, Southern Poverty Law Center, New Orleans, Louisiana, filed a brief for the Southern Poverty Law Center as Amicus Curiae, in support of Appellees.

Adina H. Rosenbaum and Scott L. Nelson, Public Citizen Litigation Group, Washington, D.C., filed a brief for Public Citizen, Inc., and The National Employ-

ment Law Project, as Amici Curiae, in support of Appellees.

Katherine E. Melloy Goettel, Mark Fleming, Claudia Valenzuela, and Keren Zwick, National Immigration Justice Center, Chicago, Illinois, filed a brief for National Immigrant Justice Center, et al., as Amici Curiae, in support of Appellees.

Andrew C. Lillie, Nathaniel H. Nesbitt, and Ann C. Stanton, Hogan Lovells US LLP, Denver, Colorado, filed a brief for Human Trafficking Pro Bono Legal Center, Tahirih Justice Center, Asista Immigration Assistance, Freedom Network USA, and Sancuary for Families, as Amici Curiae, in support of Appellees.

Before **MATHESON**, **BACHARACH**, and **McHUGH**, Circuit Judges.

MATHESON, Circuit Judge.

This appeal addresses whether immigration detainees housed in a private contract detention facility in Aurora, Colorado (the "Aurora Facility") may bring claims as a class under (1) 18 U.S.C. § 1589, a provision of the Trafficking Victims Protection Act (the "TVPA") that prohibits forced labor; and (2) Colorado unjust enrichment law.

The GEO Group, Inc. ("GEO") owns and operates the Aurora Facility under government contract. While there, the plaintiff detainees (the "Appellees")

rendered mandatory and voluntary services to GEO. Under GEO's mandatory policies, they cleaned their housing units' common areas. They also performed various jobs through a voluntary work program, which paid them $1 a day.

The district court certified two separate classes: (1) all detainees housed at the Aurora Facility in the past ten years (the "TVPA class"), and (2) all detainees who participated in the Aurora Facility's voluntary work program in the past three years (the "unjust enrichment class").

On interlocutory appeal, GEO argues that the district court abused its discretion in certifying each class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. It primarily contends that the Appellees' TVPA and Colorado unjust enrichment claims both require predominantly individualized determinations, making class treatment inappropriate. Exercising jurisdiction under 28 U.S.C. § 1292, we affirm.

I. BACKGROUND

A. *Factual History*

At all times relevant to this appeal, GEO owned and operated the Aurora Facility under contract with the U.S. Immigration and Customs Enforcement ("ICE"). In operating this facility, GEO implemented two programs that form the basis for this case: (1) the Housing Unit Sanitation Policy, which required all detainees to clean their common living areas; and (2) the Voluntary Work Program, which compensated detainees $1 a day for performing various jobs.

1. **Housing Unit Sanitation Policy ("Sanitation Policy")**

The Aurora Facility's Sanitation Policy had two components: (1) a mandatory housing unit sanitation program, and (2) a general disciplinary system for detainees who engaged in "prohibited acts," including refusal to participate in the housing unit sanitation program.

Under the mandatory housing unit sanitation program, GEO staff generated daily lists of detainees from each housing unit who were assigned to clean common areas after meal service. Upon arriving at the Aurora Facility, every detainee received a handbook (the "Aurora Facility Supplement") notifying them of their obligation to participate in this program. Dawn Ceja, the Aurora Facility's Assistant Warden for Operations, confirmed at her deposition that "all of the detainees will have a turn on [the common area cleaning assignments]." App., Vol. II at 483.

Under the disciplinary system, detainees who refused to perform their cleaning assignments faced a range of possible sanctions, including: (1) the initiation of criminal proceedings, (2) disciplinary segregation—or solitary confinement—up to 72 hours, (3) loss of commissary, (4) loss of job, (5) restriction to housing unit, (6) reprimand, or (7) warning. The Aurora Facility Supplement included an explanation of the disciplinary system and the possible sanctions for refusing to clean.

The Appellees alleged that the TVPA class members were all "forced * * * to clean the [housing units] for no pay and under threat of solitary confinement as punishment for any refusal to work." App., Vol. I

at 19. Five of the nine named plaintiffs and three other detainees filed declarations further explaining that they had fulfilled their cleaning assignments because of the Sanitation Policy's threat of solitary confinement.

2. **Voluntary Work Program ("VWP")**

Under the Aurora Facility's VWP, participating detainees received $1 a day in compensation for voluntarily performing jobs such as painting, food services, laundry services, barbershop, and sanitation. Detainees who wished to participate in the VWP had to sign the "Detainee Voluntary Work Program Agreement," which specified that "[c]ompensation shall be $1.00 per day." App., Vol. V at 779. The Aurora Facility Supplement also specified that detainees would "be paid $1.00 per day worked (not per work assignment)" under the VWP. App., Vol. V at 761. Detainees had the additional option of working without pay if no paid positions were available.

The complaint alleged that the VWP class members were all "paid * * * one dollar ($1) per day for their [VWP] labor." App., Vol. I at 19. Five of the nine named plaintiffs and three other detainees who had participated in the VWP filed declarations further describing their work. Their jobs had included serving food, cleaning the facilities, doing laundry, and stripping and waxing floors. Their hours had ranged from two to eight hours a day, and they had all received $1 a day in compensation.

B. ***Procedural History***

The Appellees filed a class action complaint against GEO in the U.S. District Court for the District of Colorado on behalf of current and former ICE detainees housed at the Aurora Facility. The complaint

alleged: (1) a TVPA forced labor claim based on the Sanitation Policy, and (2) an unjust enrichment claim under Colorado law based on the VWP.[1]

1. **GEO's Motion to Dismiss**

GEO moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Regarding the TVPA claim, GEO argued that the Thirteenth Amendment's civic duty exception to the prohibition on involuntary servitude should also apply to the TVPA's ban on forced labor.[2] It further contended that such an exception would extend to government contractors in addition to the federal government. Regarding the unjust enrichment claim, GEO asserted sovereign immunity as a government contractor because ICE "specifically directed [it] to * * * establish a voluntary detainee work program, and pay the detainees who volunteer for that program $1.00 per day." App., Vol. I at 198-99.

The district court rejected these arguments and denied GEO's motion to dismiss the TVPA and unjust enrichment claims. *See Menocal v. GEO Grp., Inc.*, 113 F. Supp. 3d 1125 (D. Colo. 2015). GEO moved for reconsideration of the court's rulings. The court denied the motion, finding that GEO "d[id] not identify any intervening change in controlling law or

[1] The complaint brought a third claim under the Colorado Minimum Wages of Workers Act, but the district court dismissed this claim, and it is not at issue here.

[2] 2 GEO cited the Fifth Circuit's decision in *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997), which relied in part on the "judicially-created exception[]" to the Thirteenth Amendment to hold that "the federal government is entitled to require a communal contribution by an [immigration] detainee in the form of housekeeping tasks." *Id.* at 218-19.

new evidence previously unavailable" to warrant reconsideration. *Menocal v. GEO Grp., Inc.*, No. 14-cv-02887-JLK, 2015 WL 13614120, at *1 (D. Colo. Aug. 26, 2015).

GEO then moved for an order certifying an interlocutory appeal from the orders denying its motion to dismiss and its motion for reconsideration. It requested that the district court certify the following questions for interlocutory appeal:

> (1) Whether civil detainees lawfully held in the custody of a private detention facility under the authority of the United States can state a claim for "forced labor" under the TVPA, 18 U.S.C. § 1589, for allegedly being required to perform housekeeping duties.
>
> (2) Whether, under Colorado law, civil detainees may state a claim for unjust enrichment based on work performed pursuant to the Voluntary Work Program, absent any alleged reasonable expectation of being paid more than $1 per day.
>
> (3) Whether a state law claim for unjust enrichment brought by civil detainees against a federal contractor is barred by the "government contractor" defense, where such claims would require that detainees receive additional compensation even though the contract expressly requires that compensation of more than $1 per day be approved by the government's contracting officer.

App., Vol. II at 346. The district court denied GEO's motion to certify an interlocutory appeal on all three of these questions. Accordingly, the district court's rulings on these questions are not properly before us in this appeal. *See* 28 U.S.C. § 1292(b) (providing that a court of appeals may only permit an interlocutory appeal to be taken from most non-final decisions if the district judge first certifies the interlocutory appeal).

2. **The Appellees' Motion for Class Certification**

After they prevailed on the motion to dismiss, the Appellees moved for certification of a separate class for each claim under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure. For the TVPA claim, the Appellees proposed a class of "all persons detained in [GEO's] Aurora Detention Facility in the ten years prior to the filing of this action" (the "TVPA class"). App., Vol. II at 409. For the unjust enrichment claim, they proposed a class of "all people who performed work [for the] Aurora Detention Facility under [GEO's] VWP Policy in the three years prior to the filing of this action" (the "unjust enrichment class"). *Id.* at 418.

GEO opposed the certification of both proposed classes. It argued that neither class adequately satisfied the Rule 23 requirements. The district court rejected GEO's arguments and certified both classes as proposed by the Appellees. *See Menocal v. GEO Grp., Inc.*, 320 F.R.D. 258 (D. Colo. 2017). It also approved the nine named plaintiffs as the representatives of both classes. *Id.* at 271.

GEO petitioned this court for interlocutory review of the class certifications. We granted GEO's petition

for permission to appeal under Rule 23(f). *See* Fed. R. Civ. Pro. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification * * * *"); 28 U.S.C § 1292(e) (authorizing the Supreme Court to "prescribe rules * * * provid[ing] for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" by statute). Accordingly, only the district court's order granting class certification—and not its rulings on whether the complaint stated TVPA and unjust enrichment claims—is before us.

II. **DISCUSSION**

We begin with our standard of review. We then provide an overview of the Rule 23 class certification requirements relevant to this appeal, and additional background on the TVPA and Colorado unjust enrichment law as needed. We consider the TVPA and the unjust enrichment classes in turn, and conclude that the district court did not abuse its discretion in certifying each class under Rule 23.

A. ***Standard of Review***

"We review the district court's decision to certify [a] class for an abuse of discretion. The district court abuses its discretion when it misapplies the Rule 23 factors—either through a clearly erroneous finding of fact or an erroneous conclusion of law—in deciding whether class certification is appropriate. Our review is only de novo to the extent we must determine whether the district court applied the correct standard. In the end, as long as the district court applies the proper Rule 23 standard, we will defer to its class certification ruling provided that decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand."

Soseeah v. Sentry Ins., 808 F.3d 800, 808 (10th Cir. 2015) (citations and quotations omitted).

B. ***Class Certification Requirements***

Rule 23 of the Federal Rules of Civil Procedure provides the class certification requirements. *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). Plaintiffs seeking class certification must show that the underlying case (1) satisfies each of Rule 23(a)'s prerequisites, and (2) falls under at least one of Rule 23(b)'s categories of class actions. *See Soseeah*, 808 F.3d at 808. The district court must undertake a "rigorous analysis" to satisfy itself that a putative class meets the applicable Rule 23 requirements. *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1086 (10th Cir. 2014) (quotations omitted).

Rule 23(a) sets forth four threshold requirements:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Only requirements (2) (the "commonality" requirement) and (3) (the "typicality" requirement) are contested in this appeal.

Of the class action categories set forth in Rule 23(b), only the Rule 23(b)(3) class action is at issue here. A Rule 23(b)(3) class action must satisfy two

additional requirements: (1) the "questions of law or fact common to class members [must] predominate over any questions affecting only individual members" (the "predominance" requirement), and (2) a class action must be "superior to other available methods for fairly and efficiently adjudicating the controversy" (the "superiority" requirement). Fed. R. Civ. P. 23(b)(3).

We provide additional background on each of the Rule 23 requirements contested in this appeal: commonality, typicality, predominance, and superiority.

1. **Rule 23(a)'s Threshold Requirements: Commonality and Typicality**

a. *Commonality*

To satisfy the commonality requirement, a party seeking class certification must demonstrate "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In other words, the class members' claims must "depend upon a common contention * * * of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. In the context of class-wide proof by statistical evidence, the Supreme Court has instructed that a question is common if there is "some glue holding the [class members' allegations] together." *Id.* at 352.

"A finding of commonality requires only a single question of law or fact common to the entire class." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1195 (10th Cir. 2010); *see also Wal-Mart*, 564 U.S. at 359 ("We quite agree that for purposes for Rule

23(a)(2) even a single common question will do." (brackets and quotations omitted)).

b. *Typicality*

To satisfy the typicality requirement, a party seeking class certification must demonstrate that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[D]iffering fact situations of class members do not defeat typicality * * * so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014) (quotations omitted).

2. **Rule 23(b)(3)'s Additional Requirements: Predominance and Superiority**

a. *Predominance*

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "It is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *CGC Holding*, 773 F.3d at 1087. "Put differently, the predominance prong asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (quotations omitted).

In reviewing the district court's predominance determination, we must "*characterize* the issues in the case as common or not, and then *weigh* which issues predominate." *Id.* We do so by "consider[ing] * * *

how the class intends to answer factual and legal questions to prove its claim—and the extent to which the evidence needed to do so is common or individual." *Id*. And because we must thus consider the class's underlying cause of action and determine which elements are amenable to common proof, "it is impractical to construct an impermeable wall that will prevent the merits from bleeding into the class certification decision to some degree." *Id*. (quotations omitted). But "[f]or the purposes of class certification, our primary function is to ensure that the requirements of Rule 23 are satisfied, not to make a determination on the merits of the putative class's claims." *Id*.

b. *Superiority*

A putative class proceeding under Rule 23(b)(3) must show that a class action would be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) includes a non-exhaustive list of factors pertinent to the superiority analysis:

> (A) the class members' interests in individually controlling the prosecution
>
> or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy
>
> already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the
>
> claims in the particular forum; and

> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23(b) advisory committee's note to the 1966 amendment.[3]

Courts and commentators have observed that the Rule 23(b)(3) class action is superior when it allows for the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *See Amchem*, 521 U.S. at 617 (quotations omitted); *see also Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (crediting unlikelihood that class members would individually pursue their claims due to risks, small recovery, and costs of litigation as the consideration "at the heart" of the superiority analysis). For this reason, "the class action device is especially pertinent to vulnerable populations." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:65 (5th ed., Dec. 2017 update) (Newberg). Considerations such as class members' limited understanding of the law, limited English skills, or geographic dispersal therefore weigh in favor of class certification. *See id.*[4]

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[3] Although Rule 23(b)(3) states that these factors are pertinent to both superiority and predominance, "most courts analyze [these factors] solely in determining whether a class suit will be a superior method of litigation." 2 William B. Rubenstein, Newberg on Class Actions § 4:64 (5th ed., Dec. 2017 update).

[4] *See*, *e.g.*, *Silva-Arriaga v. Texas Express, Inc.*, 222 F.R.D. 684, 691 (M.D. Fla. 2004) (citing class members' "limited English skills and * * * understanding of the legal system" in support of superiority finding); *In re Monster Worldwide, Inc. Securities Litig.*, 251 F.R.D. 132, 139 (S.D.N.Y. 2008) (finding superiority based in part on class members' geographic dispersal).

C. *The TVPA Class*

We affirm the district court's certification of the TVPA class. We first provide background on the TVPA. We then analyze whether the district court abused its discretion in applying the Rule 23 requirements to certify the TVPA class. In reviewing the class certification decision, "our primary function is to ensure that the requirements of Rule 23 are satisfied, not to make a determination on the merits of the putative class's claims." *CGC Holding*, 773 F.3d at 1087.

1. **TVPA's Forced Labor Provision—18 U.S.C. § 1589**

The TVPA establishes a civil cause of action for victims of prohibited trafficking activity. 18 U.S.C. § 1595. As relevant to this appeal, the TVPA's forced labor provision prohibits persons from:

> *knowingly provid[ing] or obtain[ing] 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*[.]

Id. § 1589(a) (emphases added). The term "serious harm" denotes "any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to [render labor] * * * to avoid incurring that harm." *Id.* § 1589(c)(2).

2. **Application of Rule 23 Requirements**

GEO contends that the district court abused its discretion in determining that the TVPA class satisfies commonality, typicality, predominance, and superiority. The parties' arguments—both in their briefs and at oral argument—focus primarily on predominance, the closest issue. We address predominance last, after commonality, typicality, and superiority. The court did not abuse its discretion as to any of these requirements in certifying the TVPA class.

a. *Commonality*

The TVPA class meets Rule 23(a)'s commonality requirement. The district court identified "a number of crucial questions with common answers." *Menocal*, 320 F.R.D. at 264. These questions include: (1) whether the Sanitation Policy "constitutes improper means of coercion" under § 1589, (2) whether GEO "knowingly obtain[s] detainees' labor using [the Sanitation Policy]", and (3) whether a civic duty exception exempts the Sanitation Policy from § 1589. *Id.* at 264-65. Because all members of the TVPA class base their claims on the Sanitation Policy, we agree with the district court that the answers to these

questions would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Indeed, any one of these questions alone would satisfy the commonality requirement for the TVPA class. *See id*. at 359; *Stricklin*, 594 F.3d at 1195. The district court therefore did not abuse its discretion in applying the Rule 23(a) commonality requirement to the TVPA class.

b. *Typicality*

The TVPA class satisfies Rule 23(a)'s typicality requirement. Typicality requires only that "the claims of the class representative and class members are based on the same legal or remedial theory." *Colo. Cross-Disability*, 765 F.3d at 1216 (quotations omitted).

Here, the claims of all the class members—including the representatives—share the same theory: that GEO knowingly obtained class members' labor by means of the Sanitation Policy, which threatened—or was intended to cause them to believe they would suffer—serious harm or physical restraint if they did not fulfill their cleaning assignments. The class representatives allege that they—just like all other Aurora Facility detainees in the relevant period—performed "mandatory, uncompensated work * * * under [GEO's] Housing Unit Sanitation policy." App., Vol. I at 26; *see* App., Vol. II at 483 (Assistant Warden Ceja confirming that "all of the detainees * * * have a turn on [the cleaning assignments]"). And the class representatives' declarations present no circumstances that would give rise to a different theory of liability.[5] The district court therefore did not

[5] The only factual differences among the class representatives' experiences pertain to their specific interactions with Au-

abuse its discretion in applying the Rule 23(a) typicality requirement to the TVPA class.

c. *Superiority*

The TVPA class meets the Rule 23(b)(3) superiority requirement. The TVPA class members would have to overcome significant hurdles to adjudicate their individual claims and thus have little "interest[] in individually controlling the prosecution or defense of separate actions." *See* Fed. R. Civ. P. 23(b)(3). As the district court noted—and GEO does not dispute—"the putative class members reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States." *Menocal*, 320 F.R.D. at 268. Based on these considerations, the court did not abuse its discretion in applying Rule 23(b)(3)'s superiority requirement to the TVPA class. *See* Newberg § 4:65 (identifying these considerations as factors in favor of class certification); *see also Amchem*, 521 U.S. at 617 (explaining that Rule 23(b)(3) classes seek to "vindicat[e] * * * the rights of groups of people who individually would be without effective strength to bring their opponents into court at all" (quotations omitted)).[6]

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rora Facility guards and whether they witnessed firsthand other individual detainees being sanctioned or threatened with solitary confinement for refusal to clean. But these factual differences do not defeat typicality because the class members' legal theory—that GEO knowingly obtained their labor through the uniform Sanitation Policy—does not change based on their personal interactions with GEO staff or their knowledge of specific instances in which GEO threatened or carried out the threat of solitary confinement. *See Colo. Cross-Disability*, 765 F.3d at 1216.

[6] GEO also suggests that the class should instead seek to have the ICE standards relating to the Sanitation Policy "changed by the agency, declared invalid, or enjoined," Aplt. Br.

d. *Predominance*

Although Rule 23(b)(3)'s predominance requirement "regularly presents the greatest obstacle to class certification," *CGC Holding*, 773 F.3d at 1087, it does not defeat the TVPA class in this case. To determine whether the district court abused its discretion in applying the predominance requirement, we first "*characterize* the issues in the case as common or not, and then *weigh* which issues predominate." See id. GEO contends that two of the TVPA class's issues are not susceptible to generalized proof: (i) the causation element, and (ii) damages. But as the following analysis shows, (i) the causation element is susceptible to generalized proof and thus cannot defeat class certification, and (ii) individual damages assessments would not predominate over the class's common issues.

i. The causation element

The causation element is susceptible to generalized proof and thus cannot defeat class certification under Rule 23(b)(3)'s predominance requirement. As discussed above, the TVPA's forced labor provision prohibits the knowing procurement of labor "by means of" the use or threat of—or a scheme intended to threaten—serious harm or physical restraint. *See* 18 U.S.C. § 1589(a)(1)-(4). Although the statute does not use the word "cause," to show a § 1589 violation, plaintiffs must prove that an unlawful means of coercion caused them to render labor. *See United States v. Kalu*, 791 F.3d 1194, 1211-12 (10th Cir.

at 45. But such actions, even if feasible, would not provide damages relief and thus are not "superior * * * available methods for fairly and efficiently adjudicating the controversy," especially for *former* detainees in the TVPA class. *See* Fed. R. Civ. P. 23(b)(3).

2015) (affirming a jury instruction on § 1589 that advised the jury to consider whether "as a result of [the defendant's] use of * * * unlawful means, the [victim rendered labor] where, if [the defendant] had not resorted to those unlawful means, the [victim] would have declined to" (quotations omitted)).

The parties dispute whether a plaintiff may use a reasonable person standard to make this causation showing. The TVPA class contends that a plaintiff need only show that the unlawful means—here, the Sanitation Policy—would have caused a reasonable person to render the labor.[7] In contrast, GEO argues that a plaintiff must show that the unlawful means in fact caused the labor. But we need not decide which of these standards applies to § 1589's causation requirement in resolving the class certification question. Even assuming GEO's proposed standard applies, the causation element is susceptible to class-wide proof and thus does not preclude the TVPA class from satisfying the predominance requirement.

This analysis proceeds in three parts. First, in CGC Holding, this court held—at least in the fraud context—that plaintiffs may prove causation by class-wide inference. Second, *CGC Holding* applies to the circumstances of this case. Third, the mere speculative possibility that a class-wide inference would not apply to some TVPA class members does not make causation insusceptible to class-wide proof.

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[7] For purposes of deciding the class certification question, we do not address the merits of whether the Sanitation Policy qualifies as an unlawful means of coercion under § 1589. GEO does not dispute—and neither do we—the district court's determination that this question can be answered on a class-wide basis. *See Menocal*, 320 F.R.D. at 264 & n.2.

1) *CGC Holding*: Class-wide proof of causation from common circumstantial evidence

In *CGC Holding*, this court recognized that plaintiffs may prove class-wide causation based on inference from common circumstantial evidence. 773 F.3d at 1092-93. In that case, a putative class of borrowers brought a civil RICO claim[8] against the defendants, a group of lenders. *Id.* at 1080. The plaintiffs alleged that the defendants had fraudulently induced them to pay upfront fees for loans that the defendants never actually had the intent or ability to fund. *Id.* The putative class consisted of "at least 100 borrowers * * * who paid advance fees to defendants." *Id.* at 1084. We determined that "the fact that a class member paid the nonrefundable up-front fee in exchange for the loan commitment constitutes *circumstantial proof of reliance* on the misrepresentations and omissions regarding * * * the defendant entities' ability or intent to actually fund the promised loan." *Id.* at 1091-92 (emphasis added).

Because we would allow an individual plaintiff to establish an inference of reliance from this type of circumstantial proof, we saw "no reason why a putative class containing plaintiffs, who all paid substantial up-front fees in return for financial promises,

[8] The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits various activities performed in connection with an ongoing criminal organization. *See* 18 U.S.C. §§ 1961-68. In addition to enacting criminal penalties for racketeering activities, RICO also created a private cause of action for "[a]ny person injured in his business or property *by reason of*" the defendant's RICO violations. *Id.* § 1964(c) (emphasis added). A plaintiff bringing a civil RICO claim must show causation. *CGC Holding*, 773 F.3d at 1088. In civil RICO claims arising from fraud, reliance "frequently serves as a proxy for both legal and factual causation." *Id.*

should not be entitled to posit the same inference to a factfinder on a classwide basis." *Id.* at 1092. By allowing such an inference, the issue of reliance "becomes solvable with a uniform piece of circumstantial evidence [i.e., the payment of the up-front fee]." *Id.* We therefore held that "the putative class is not stymied, for purposes of class certification, under Rule 23(b)'s predominance element." *Id.*

2) Application of *CGC Holding*'s class-wide circumstantial evidence analysis to this case

CGC Holding said that, when a class member could individually establish causation based on circumstantial evidence, a court may likewise allow a class to rely on circumstantial evidence that the class shares to establish causation on a class-wide basis. *CGC Holding*'s reasoning applies with equal force to the facts of this case because (1) a court could permit an individual TVPA class member to establish causation through circumstantial evidence, and (2) the TVPA class members share the relevant evidence in common because their claims are based on allegations of a single, common scheme.

First, a TVPA class member could individually establish causation based on circumstantial evidence.[9] In *CGC Holding*, we said a jury could infer that a given class member relied on the defendants' misrepresentations. *Id.* at 1091-92. The circumstantial evidence in CGC Holding included: (1) the plaintiff received a loan commitment agreement promising

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[9] Plaintiffs are generally free to introduce any relevant admissible evidence to prove their claims, with no distinction between direct and circumstantial evidence. *See* Fed. R. Evid. 401*; see also* 1A Fed. Jury Prac. & Instr. § 12:04 (6th ed., Aug. 2017 update).

funds and requiring payment of an upfront fee in exchange for financing, and (2) the plaintiff in fact paid the fee. *Id*. at 1082, 1091-92. Here, a class member detainee could present the following circumstantial evidence to support an analogous inference that the Sanitation Policy caused the detainee to work: (1) the detainee received notice of the Sanitation Policy's terms, including the possible sanctions for refusing to clean; and (2) the detainee performed housing unit cleaning work for GEO when assigned to do so.

Second, because the TVPA class allegations are based on a single, common scheme, class members share the relevant circumstantial evidence in common, thus making class-wide proof possible. In *CGC Holding*, the lender defendants allegedly "engaged in a common scheme to defraud" the borrower plaintiffs. *Id*. at 1082. Under this "cookie-cutter scheme," potential borrowers received formulaic loan commitment agreements that required payment of nonrefundable upfront fees before receiving the falsely promised financing. *Id.* Likewise, the TVPA class members allege that GEO "coerced [their] labor through a *uniform* policy subjecting detainees who refused to perform such uncompensated work to discipline, up to and including solitary confinement." App., Vol. I at 29 (emphasis added).

GEO acknowledges that each class member received notice of the Sanitation Policy's terms upon admission to the Aurora Facility. *See* App., Vol. II at 480 (Assistant Warden Ceja testifying that upon admission to the Aurora Facility, each detainee "signs [a document] memorializing that he or she received this policy"). Under these circumstances, the Sanitation Policy provides the "glue" that holds together the class members' reasons for performing housing

unit cleaning duties assigned by GEO. *Wal-Mart*, 564 U.S. at 352.[10] As in *CGC Holding*, we "see no reason why a putative class containing plaintiffs, who all [performed housing unit cleaning work under the

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[10] In *Wal-Mart*, the Supreme Court held that anecdotal and statistical evidence "are insufficient to establish that [the plaintiffs' gender discrimination] theory can be proved on a classwide basis." 564 U.S. at 356. The *Wal-Mart* plaintiffs had "held a multitude of different jobs, at different levels of Wal–Mart's hierarchy, for variable lengths of time, in 3,400 stores, sprinkled across 50 states, with a kaleidoscope of supervisors (male and female), subject to a variety of regional policies that all differed." *Wal-Mart*, 564 U.S. at 359-60 (quotations omitted). The Wal-Mart plaintiffs therefore lacked "some glue holding the alleged reasons for [their adverse employment decisions] together." *Id*. at 352.

As the Court later explained in *Tyson Foods, Inc. v. Bouaphakeo*, the Wal-Mart plaintiffs could not have relied on statistical evidence even in *individual* suits—much less a class action—because they "were not similarly situated." 136 S. Ct. 1036, 1048 (2016). In contrast, the employees in *Tyson Foods*, who "worked in the same facility, did similar work, and w[ere] paid under the same policy," could have introduced statistical evidence in a series of individual suits. *Id.*

Here, the TVPA class members—unlike the *Wal-Mart* and *Tyson Foods* plaintiffs—do not rely on statistical evidence. A TVPA class member bringing an individual suit against GEO therefore would not need to make a "similarly situated" showing to rely on the circumstantial evidence discussed above. And, as *CGC Holding* instructs, because an *individual* TVPA class member could rely on this evidence and because the same evidence applies to all class members, class-wide proof is possible in this case. But even assuming that *Wal-Mart* and *Tyson Food*'s "similarly situated" analysis applies where—as here—the plaintiffs do not rely on statistical evidence, the TVPA class members are more like the *Tyson Foods* plaintiffs: they were detained in the same facility, did the same work, and faced the same potential sanctions for refusing to work under the same Sanitation Policy.

uniform Sanitation Policy], should not be entitled to posit the same inference to a factfinder on a class-wide basis." *See CGC Holding*, 773 F.3d at 1092.

3) Hypothetical possibilities do not defeat the class-wide inference

Based on the foregoing, the Appellees have met their burden to show that the causation element would not cause individual questions to predominate. *See id*. at 1087 ("The real question is whether plaintiffs have sufficiently met their burden under Rule 23(b) * * * [to] show that common questions subject to generalized, classwide proof predominate over individual questions."). Specifically, the Appellees have shown that the TVPA class could establish causation on a class-wide basis from the available circumstantial evidence. In contrast, as the district court noted, "GEO does not allege and there is nothing in the record to show that detainees who are not on the daily list still choose to perform the additional duties or that detainees work autonomously." *Menocal*, 320 F.R.D. at 265 n.3. GEO offers in rebuttal only speculative assertions regarding the class members' subjective motivations for performing their cleaning duties.[11]

GEO's hypothetical alternative explanations for the class members' labor do not defeat the Appellees' showing that the causation element is susceptible to

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[11] GEO posits possible alternative reasons class members may have worked: "They may like to have a sanitary environment. They may like to be social while working, or participate because of peer pressure. They may willingly obey the facility's policy out of respect for it. Or they may simply wish to stay busy." Aplt. Br. at 37.

class-wide proof. The permissibility of a class-wide inference depends on whether the class members' claims are "solvable with a uniform piece of circumstantial evidence" or instead "involve significant individualized or idiosyncratic elements." *CGC Holding*, 773 F.3d at 1092. Here, as we explained above, a factfinder could reasonably draw a class-wide inference of causation from common evidence pertaining to the uniform Sanitation Policy.

Had GEO "presented evidence that could rebut the Plaintiffs' common inference of [causation] on an individualized basis, we and the district court might have concluded that individual issues * * * would predominate at trial." *See Torres v. S.G.E. Mgmt., L.L.C.*, 838 F.3d 629, 644 (5th Cir. 2016) (en banc), *cert. denied*, 138 S. Ct. 76 (mem.) (2017). But even after three months of discovery regarding class certification issues, GEO did not present any individualized rebuttal evidence to the district court that would cause individual causation questions to predominate at trial.[12] In any event, "the district court may revisit

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[12] 12 At oral argument, GEO's counsel pointed to two pieces of rebuttal evidence. Oral Argument at 9:42-10:59. First, counsel cited Assistant Warden Ceja's deposition testimony stating that detainees may "help out" with housing unit cleaning because "[s]ometimes people just like to keep busy" and "[i]t makes the time go by faster." App., Vol. II at 483. Apart from its conjectural nature, this testimony does not raise concerns about individual issues predominating because GEO could introduce this same testimony against all class members at trial. Second, counsel suggested that the detainee declarations filed in this suit rebut causation as to the declarants: "Does that make sense—that the same detainees would be volunteering to step up and work a variety of jobs in food service and laundry for a dollar a day but yet at the same time say that they only performed occasional housekeeping chores as a result [of the Sani-

its decision and choose to decertify the class should [GEO] eventually produce individualized rebuttal evidence." *See Torres*, 838 F.3d at 645.

In *CGC Holding*, we stated that "causation can be established through an inference of reliance where the behavior of plaintiffs and the 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) (quotations omitted). GEO interprets this language to mean that conjectural possibilities alone may preclude an otherwise permissible class-wide inference. We disagree. Even on *CGC Holding*'s facts, it is at least conceivable that a class member may have paid advance loan fees even though he or she did not actually rely on the defendant's misrepresentations. For example, a hypothetical class member may instead have paid the fees solely because he or she trusted the judgment of a third party, who, for whatever reason, maliciously recommended entering into a loan agreement with the defendants. We nevertheless allowed a class-wide inference in *CGC Holding* because "the same considerations could lead a reasonable factfinder to conclude beyond a preponderance of the evidence that each individual plaintiff relied on the defendants' representations." *See id.* at 1090 (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004)).[13] And here, for the reasons already stated

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tation Policy.]" Oral Argument at 10:42-10:59. We see no inconsistency in the declarants' statements.

[13] In *CGC Holding*, we also "note[d] that the inference of reliance here is limited to *transactional* situations—almost always financial transactions—where it is sensible to assume that *rational economic actors* would not make a payment unless they assumed that they were receiving some form of the prom-

above, the same considerations could lead a reasonable factfinder to conclude by a preponderance of the evidence that each TVPA class member would not have performed his or her assigned cleaning duties without being subject to the Sanitation Policy.

* * * *

In assessing the causation element's susceptibility to class-wide proof, we take no position on whether the class would ultimately succeed on such proof at trial. *See id.* at 1087 ("For the purposes of class certification, our primary function is * * * not to make a determination on the merits of the putative class's claims."). Rather, we must affirm the district court's class certification determination if it "falls within the bounds of rationally available choices given the facts and law involved in the matter at hand." *See Soseeah*, 808 F.3d at 808 (quotations omitted). Under the circumstances here, the district court concluded that a factfinder could—but need not—accept a class-wide inference of causation. *Menocal*, 320 F.R.D. at 267. For the foregoing reasons, we are satisfied that the district court did not abuse its discretion.

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ised benefit in return." 773 F.3d at 1091 n.9 (emphases added). But we nowhere announced a brightline rule limiting class-wide inferences to cases involving an economic transaction amenable to rational choice theory. *See Torres*, 838 F.3d at 642 (emphases added) (explaining that our opinion in *CGC Holding* "says only that the absence of another rational explanation for the plaintiffs' behavior is *sufficient* to infer reliance—it does not say it is a *necessary* condition"). Our case—which involves alleged group coercion rather than individual arm's length transacting—not only allows for a class-wide inference of causation for the reasons stated above but arguably supports an even stronger inference.

ii. Damages

The presence of individualized damages issues does not defeat the predominance of questions common to the TVPA class. "[T]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013) (quoting *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008)); *see also* Newberg § 4:54 & n.2 (stating that "courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations" and listing cases).

Here, the district court reasonably determined that, "considering the numerous questions common to the class, * * * the possible need for specific damages determinations does not predominate." *Menocal*, 320 F.R.D. at 267. The TVPA class's common questions include: (1) whether the Sanitation Policy qualifies as an unlawful means under § 1589, (2) scienter, (3) causation, (4) whether a civic duty exception exempts the Sanitation Policy from § 1589, and (5) if so, whether it extends to government contractors like GEO. As we said in another case, "[t]he district court reasonably concluded that these questions drove the litigation and generated common answers that determined liability in a single stroke." *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1256 (10th Cir. 2014) (quotations omitted). Moreover, the district court could "preserve the class action model in the face of individualized damages," *XTO Energy*, 725 F.3d at 1220, such as by limiting the class action to liability issues. The court therefore did not abuse its discre-

tion in determining that individual damages would not predominate.

* * * *

The district court did not abuse its discretion in certifying the TVPA class based on its "rigorous analysis" of the Rule 23 requirements contested here. *See CGC Holding*, 773 F.3d at 1086. The court reasonably determined that the class members could show causation through class-wide inference and that individual damage assessments would not predominate over the class's common issues. Its findings on commonality, typicality, and superiority were likewise reasonable and fell within its discretion.

D. ***The Unjust Enrichment Class***

We affirm the district court's certification of the unjust enrichment class. We first provide background on unjust enrichment under Colorado law. We then analyze whether the district court abused its discretion in applying the Rule 23 requirements to certify the unjust enrichment class. As with the TVPA class, "our primary function is to ensure that the requirements of Rule 23 are satisfied, not to make a determination on the merits of the putative class's claims." *Id.* at 1087.

1. **Unjust Enrichment under Colorado Law**

Unjust enrichment "is an equitable theory of recovery that exists independent of any contract." *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm*, 287 P.3d 842, 847, 849 (Colo. 2012). Under Colorado common law, "a party claiming unjust enrichment must prove that (1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain

the benefit without commensurate compensation." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008).

The third element—whether the defendant's retention of the benefit would be unjust—calls for "a fact-intensive inquiry in which courts look to, *among other things*, the intentions, expectations, and behavior of the parties." *Melat*, 287 P.3d at 847 (emphasis added). Whether a plaintiff had a reasonable expectation of payment—while potentially relevant to the unjustness inquiry—is not itself an element of unjust enrichment under Colorado law. *See Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 799-800 & n.19 (Colo. 1991). In *Ed Duggan*, the Colorado Supreme Court explained that the plaintiff's reasonable expectation of payment is an element of implied-in-fact contract claims but *not* unjust enrichment (or implied-in-law contract) claims. *Id.*[14]

2. **Application of Rule 23 Requirements**

GEO argues the district court abused its discretion in determining that the unjust enrichment class satisfies commonality, typicality, predominance, and superiority. We address predominance, the closest issue, last. We conclude that the court did not abuse

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[14] The trial court in *Ed Duggan* had given an "erroneous[]" unjust enrichment instruction by conflating two distinct legal claims: (1) implied-in-fact contract, and (2) unjust enrichment (or implied-in-law contract). *Ed Duggan*, 821 P.2d at 800. A contract implied in fact "arises from the parties' conduct," which "must evidence a mutual intention by the parties to contract with each other." *DCB Constr. Co. v. Cent. City Dev. Co.*, 940 P.2d 958, 961 (Colo. App. 1996), *as modified on denial of reh'g* (Aug. 29, 1996), *aff'd*, 965 P.2d 115 (Colo. 1998). In contrast, a contract implied in law—or unjust enrichment—arises "not from consent of the parties, * * * but from the law of natural immutable justice and equity." *Id.* at 962 (quotations omitted).

its discretion as to any of these requirements in certifying the unjust enrichment class.

a. *Commonality*

The unjust enrichment class meets Rule 23(a)'s commonality requirement. The district court found "the existence of at least a single common question—whether GEO received a benefit from VWP participants' labor." *Menocal*, 320 F.R.D. at 269. GEO does not dispute—and neither do we—that answering this question would "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. And this question alone suffices to establish the commonality requirement for the unjust enrichment class. *See id.* at 359; *Stricklin*, 594 F.3d at 1195. The district court therefore did not abuse its discretion in applying the Rule 23(a) commonality requirement to the unjust enrichment class.

b. *Typicality*

The unjust enrichment class satisfies Rule 23(a)'s typicality requirement. Typicality requires only that "the claims of the class representative and class members are based on the same legal or remedial theory." *Colo. Cross-Disability*, 765 F.3d at 1216 (quotations omitted). Here, the claims of all the class members—including the representatives—share the same theory: that GEO unjustly retained a benefit from class members' labor under the VWP. The class representatives allege that they—just like all detainees participating in the Aurora Facility's VWP in the relevant period—"were uniformly paid $1 [per] day of work" and that GEO "was thereby unjustly enriched" by their work. App., Vol. I at 31. And the class representatives' declarations present no circumstances

that would give rise to a different theory of liability.[15] The district court therefore did not abuse its discretion in applying the Rule 23(a) typicality requirement to the unjust enrichment class.

c. *Superiority*

The unjust enrichment class, a subset of the TVPA class, meets Rule 23(b)(3)'s superiority requirement for the same reasons the TVPA class does. The district court noted that "[a]s stated above, many of the putative class members are immigrant detainees who lack English proficiency[,] * * * have limited financial resources and reside in countries around the world." *Menocal*, 320 F.R.D. at 270. It also was "not aware of any other suit asserting the claims brought in this case and no other class member has demonstrated an interest in controlling the litigation." *Id*. Based on these considerations, the court did not abuse its discretion in applying the Rule 23(b)(3) superiority requirement to the unjust enrichment class. *See* Newberg § 4:65; *see also Amchem*, 521 U.S. at 617.[16]

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[15] The only factual differences among the class representatives' experiences pertain to the nature of their jobs and the hours they worked. But these factual differences do not defeat typicality because the class members' legal theory—that GEO unjustly retained a benefit from their labor under the VWP—does not change based on the nature of their jobs or their hours worked. *See Colo. Cross-Disability*, 765 F.3d at 1216.

[16] GEO's suggestion that class members should "challenge ICE's underlying policy authorizing the $1 per day practice as violating some federal law or constitutional right," Aplt. Br. at 54, again ignores the nature of the controversy at hand. Notwithstanding GEO's attempts to divine "the Plaintiffs' real complaint," *id*., the alternatives proposed by GEO would not address the class members' claims for monetary relief and thus

d. *Predominance*

Although Rule 23(b)(3)'s predominance requirement "regularly presents the greatest obstacle to class certification," *CGC Holding*, 773 F.3d at 1087, it does not defeat the unjust enrichment class. GEO contends that two of the unjust enrichment class's issues are not susceptible to generalized proof: (i) the unjustness element, and (ii) damages. But as we show below, (i) the unjustness element is susceptible to generalized proof, and (ii) individual damages assessments would not predominate over the class's common issues.

i. The unjustness element

The unjustness element is susceptible to generalized proof and thus cannot defeat class certification under Rule 23(b)(3)'s predominance requirement. This analysis proceeds in two parts. First, unjustness presents a common question here because the class members seek to establish this element through shared circumstances susceptible to class-wide proof. *See CGC Holding*, 773 F.3d at 1087 (explaining that we consider "how the class intends to answer factual and legal questions to prove its claim—and the extent to which the evidence needed to do so is common or individual"). Second, GEO's sole argument to the contrary—that the common evidence cannot establish a reasonable expectation of payment on the part of the class members—fails because Colorado law does not require such a showing as an element of unjust enrichment.

1) The class members' unjustness showings rely on common circumstances

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are not "superior * * * available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3).

Although the unjustness element requires "a fact-intensive inquiry," *Melat*, 287 P.3d at 847, the unjust enrichment class members intend to rely on facts that are shared amongst the class and thus are susceptible to class-wide proof. The class members "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." Aplee. Br. at 48. They seek to establish the unjust nature of GEO's benefit based on "evidence of a common course of conduct by GEO—the uniform VWP and the uniform payments." *Id*. at 51. Because the class members' theory of unjustness depends on shared rather than individualized circumstances, the unjustness question is common to the class and does not defeat predominance. *See Tyson Foods*, 136 S. Ct. at 1045 ("[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." (brackets and quotations omitted)).

2) The class members need not show a reasonable expectation of payment under Colorado law

GEO's only argument as to why class members would need to rely on individualized circumstances to show unjustness is that Colorado law requires plaintiffs to show a reasonable expectation of payment beyond $1 per day, which the common evidence here does not support. This argument fails because, as discussed above, the Colorado Supreme Court has made clear that a reasonable expectation of payment is not a required element of unjust enrichment under

Colorado law. *See Ed Duggan*, 821 P.2d at 799-800 & n.19.[17]

In light of *Ed Duggan*, GEO's citation to an earlier, contrary decision by the Colorado Court of Appeals, Aplt. Br. at 46, 51, is not persuasive. *See Britvar v. Schainuck*, 791 P.2d 1183, 1184 (Colo. App. 1989) ("A plaintiff cannot recover for unjust enrichment * * * for services rendered absent proof of circumstances indicating that compensation is reasonably expected."). Moreover, post-*Ed Duggan* Colorado Supreme Court cases involving unjust enrichment claims have not required plaintiffs to show a reasonable expectation of payment by the defendant. *See*, *e.g.*, *City of Arvada ex rel. Arvada Police Dep't v. Denver Health & Hosp. Auth.*, 403 P.3d 609, 616-17 (Colo. 2017) (concluding that a public hospital could seek recovery against a municipality under unjust enrichment theory where it, "by virtue of its statutory obligation, performed a service [providing medical treatment to a municipal arrestee] normally covered under contract," even though the municipality "never

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[17] We address GEO's "reasonable expectation" argument—even though it overlaps with the merits of the underlying unjust enrichment claims— "only to the extent * * * [it is] relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). As we noted above, Rule 23(b)(3) predominance depends on "how the class intends to answer factual and legal questions to prove its claim—and the extent to which the evidence needed to do so is common or individual." *CGC Holding*, 773 F.3d at 1087. Answering the predominance question thus requires an understanding of the elements of the class's underlying claim (in this case, whether unjust enrichment has a "reasonable expectation" element under Colorado law). *See id.* at 1088.

promised to pay for that service, and has in fact refused to pay, but * * * may have received a benefit").

* * * *

In deciding the narrow question of whether the unjustness element is susceptible to class-wide proof, we take no position on whether the class would ultimately succeed on such proof at trial. *See CGC Holding*, 773 F.3d at 1087 ("For the purposes of class certification, our primary function is * * * not to make a determination on the merits of the putative class's claims."). Rather, we must affirm the district court's determination if it "falls within the bounds of rationally available choices given the facts and law involved in the matter at hand." *See Soseeah*, 808 F.3d at 808 (quotations omitted). Under the circumstances here, the district court determined that the class members could establish the unjustness of GEO's benefit based not on individualized transactions but on the "overall context" and "uniform policies" shared by all class members. *Menocal*, 320 F.R.D. at 269. For the foregoing reasons, we are satisfied that the district court did not abuse its discretion.

ii. Damages

As with the TVPA class, the presence of individualized damages issues does not defeat the predominance of questions common to the unjust enrichment class. "[T]he fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification." *XTO Energy*, 725 F.3d at 1220 (quoting *McLaughlin*, 522 F.3d at 231); *see also* Newberg § 4:54 & n.2 (stating that "courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied de-

spite the need to make individualized damage determinations" and listing cases).

Here, the district court reasonably found that "individual damages in this case should be easily calculable using a simple formula" based on number of hours worked, type of work performed, and fair market value of such work. *Menocal*, 320 F.R.D. at 270. It further stated that if damages proved to be less straightforward, "decertification or amendment of the class for damages determinations may be appropriate at a later juncture." *Id.* The court therefore did not abuse its discretion in determining that individual damages would not predominate over the liability issues common to the class—including (1) whether GEO received a benefit from the class members' VWP labor, and (2) whether it retained such a benefit unjustly. *See XTO Energy*, 725 F.3d at 1220 ("[T]he district court is in the best position to evaluate the practical difficulties which inhere in the class action format, and is especially suited to tailor the proceedings accordingly.").

* * * *

The district court did not abuse its discretion in certifying the unjust enrichment class based on its "rigorous analysis" of the Rule 23 requirements contested here. *See CGC Holding*, 773 F.3d at 1086. The court reasonably determined that the class members shared the circumstances relevant to the unjustness question and that individual damage assessments would not predominate over the class's common issues. Its findings on commonality, typicality, and superiority were likewise reasonable and fell within its discretion.

III. **CONCLUSION**

We affirm the district court's certification of both classes. We grant the outstanding motions for leave to file amicus briefs.

APPENDIX B

FILED
United States Court of Appeal
Tenth Circuit

March 5, 2018

Elisabeth A. Shumaker
Clerk of the Court

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

ALEJANDRO MENOCAL, et al. Plaintiffs – Appellees v. THE GEO GROUP, INC., Defendant – Appellant, --------- NATIONAL ADVOCACY CENTER OF THE SISTERS OF THE GOOD SHEPHERD, Amici Curiae.	No. 17-1125

ORDER

Before **MATHESON**, **BACHARACH**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
s/ *Elisabeth A. Shumaker*
ELISABETH A. SHUMAKER, Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-02887-JLK

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

Plaintiffs,

v.

THE GEO GROUP, INC.,

Defendant.

ORDER GRANTING MOTION FOR CLASS CERTIFICATION UNDER RULE 23(b)(3) AND APPOINTMENT OF CLASS COUNSEL UNDER RULE 23(g) (ECF NO. 49)

Kane, J.

Plaintiffs Alejandro Menocal, Marcos Brambila, Grisel Xahuentitla, Hugo Hernandez, Lourdes Argueta, Jesus Gaytan, Olga Alexaklina, Dagoberto Vizguerra, and Demetrio Valerga (Representatives) are current and former detainees of the Aurora Detention Facility (Facility), a private immigration detention center in Aurora, Colorado, owned and operated by Defendant The GEO Group, Inc. (GEO). Representatives originally brought three claims against GEO for: (1) noncompliance with the Colorado Minimum Wages of Workers Act, Colo. Rev. Stat. § 8-6-101, *et seq*.; (2) violations of the forced labor provision of the Trafficking Victims Protection Act (TVPA), 18 U.S.C. §§ 1589, 1595; and (3) unjust enrichment. Representatives brought the claims on their own behalf and on behalf of proposed classes of similarly-situated current and former detainees of the Facility. GEO moved to dismiss the claims, and I granted its motion as to only the Colorado minimum wage claim. Representatives now seek certification of the proposed classes for their remaining TVPA and unjust enrichment claims.

Although Representatives and putative class members have diverse backgrounds, their circumstances are uniquely suited for a class action. All share the experience of having been detained in the Facility and subjected to uniform policies that purposefully eliminate nonconformity. The questions posed in this case are complex and novel, but the answers to those questions can be provided on a classwide basis. Appreciating that the class action is "a valuable tool to circumvent the barriers to the pursuit of justice," Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 25:24 (4th ed.), I GRANT the Motion for Class

Certification Under Rule 23(b)(3) and Appointment of Class Counsel under Rule 23(g) (ECF No. 49).

I. Background

Representatives take issue with two aspects of GEO's operation of the Aurora Detention Facility. First, they allege that, in carrying out its Housing Unit Sanitation Policy, GEO violated the Trafficking Victims Protection Act by requiring detainees to clean the private and common areas of the Facility without any compensation and under the threat of solitary confinement and other punishments. Second, they claim that GEO was unjustly enriched by paying detainees who participated in its Voluntary Work Program (VWP) only $1 per day.

GEO, a for-profit, multinational corporation, operates the Facility pursuant to a contract with U.S. Immigration and Customs Enforcement (ICE). ICE's Performance Based National Detention Standards mandate that all detainees perform personal housekeeping. Specifically, [d]etainees are required to maintain their immediate living areas in a neat and orderly manner by:

> *1. making their bunk beds daily; 2. stacking loose papers; 3. keeping the floor free of debris and dividers free of clutter; and 4. refraining from hanging/draping clothing, pictures, keepsakes, or other objects from beds, overhead lighting fixtures or other furniture.*

Def.'s Opp. Class Certification Ex. 2 at 15-16, ECF No. 51-2. GEO combined these responsibilities with portions of the American Correctional Association standards and its own corporate policy to develop the Facility's Housing Unit Sanitation Policy, which has

been in effect since 1995. Mot. Class Certification Ex. 1 at 15:23-25, 27:9-14, 86:22-87:3, ECF No. 50-1. Representatives claim that the detainees' compulsory duties under the Sanitation Policy, such as sweeping and mopping floors and cleaning toilets and showers, fall outside the scope of ICE's personal housekeeping requirement. The GEO Detainee Handbook Local Supplement, with which all detainees at the Facility are provided, states that failure to perform one's duties under the Sanitation Policy is a "high-moderate" offense for which detainees can be punished by the initiation of criminal proceedings, termination from their jobs, and up to 72 hours in disciplinary segregation, among other sanctions. Mot. Class Certification Ex. 1 at 29:13-30:2, 79:13-25; Ex. 4 at 18, 26, ECF No. 50-3. Representatives and other detainees were aware of the Sanitation Policy during their detention and claim that they performed the required duties to avoid solitary confinement. See Mot. Class Certification Ex. 5 ¶ 3, ECF No. 49-2; Ex. 6 ¶ 3, ECF No. 49-3; Ex. 7 ¶ 3, ECF No. 49-4; Ex. 8 ¶ 3, ECF No. 49-5; Ex. 9 ¶ 3, ECF No. 49-6; Ex. 10 ¶ 3, ECF No. 49-7; Ex. 11 ¶ 3, ECF No. 49-8; Ex. 12 ¶ 3, ECF No. 49-9. Based on these allegations, Representatives assert that the labor performed by detainees at the Facility pursuant to the Sanitation Policy is forced labor in violation of the TVPA. They request that I certify a TVPA class of "[a]ll persons detained in Defendant's Aurora Detention Facility in the ten years prior to the filing of this action." Mot. Class Certification at 10, ECF No. 49.

Separately, GEO offers a Voluntary Work Program that allows detainees to work in various positions around the Facility and earn $1 per day. As part of the program, detainees perform tasks such as main-

taining the on-site medical facility, doing laundry, preparing meals, and cleaning the Facility. ICE's Performance Based National Detention Standards require that detainees be compensated "at least $1.00 (USD) per day" for work completed under the facility's VWP. Mot. Dismiss, Ex. 1 at 5, ECF No. 11-1. Representatives allege that GEO misled VWP participants to believe it could pay them no more than $1 per day under the ICE standards. Representatives also stress that GEO employs only a single outside custodian and that detainees are unable to seek other employment in a competitive market. Mot. Class Certification at 9. As a result, they claim that GEO derives significant economic benefit from its VWP and has been unjustly enriched because of it. Representatives propose certification of an unjust enrichment class comprised of "[a]ll people who performed work [at] Defendant's Aurora Detention Facility under Defendant's [Voluntary Work Program] Policy in the three years prior to the filing of this action."

II. Legal Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). The exception is appropriate when the party seeking certification can establish the four threshold requirements set forth in Federal Rule of Civil Procedure 23(a) and fulfillment of at least one of the provisions in Rule 23(b). "When addressing class certification, the district court must undertake a 'rigorous analysis' to satisfy itself that the prerequisites of Rule 23 * * * are met." *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1086 (10th Cir. 2014). Under Rule

23(a), the party requesting certification must first show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." If successful, the party must then demonstrate, pursuant to Rule 23(b), one of the following: (1) individual adjudication would create a risk of incompatible standards of conduct for the party opposing the class or would impair other members' ability to protect their interests; (2) injunctive or declaratory relief is appropriate for the class as a whole due to the action or inaction of the party opposing the class; or (3) common questions of law or fact predominate over any individual questions and a class action is the superior method for "fairly and efficiently adjudicating the controversy."

Here, Representatives rely on Rule 23(b)(3), which requires *predominance* of questions of law or fact common to the class and *superiority* of the class action method. The conditions of predominance and superiority were added "to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote * * * uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's note). In determining if these requirements are met, I must consider, among other factors: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any

litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

III. Discussion

GEO challenges Representatives' satisfaction of almost all of the Rule 23 considerations. Preliminarily, I find that Representatives have demonstrated that the proposed classes satisfy the numerosity[1] and adequacy requirements. As to the remaining factors—commonality and typicality under Rule 23(a) and predominance and superiority under Rule 23(b)(3), GEO's most compelling, but ultimately un-

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[1] Representatives have carried their burden by offering "'some evidence of established, ascertainable numbers constituting the class.'" *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1214-15 (10th Cir. 2014) (citing *Rex v. Owens ex rel. Okla.*, 585 F.2d 432, 436 (10th Cir. 1978)). With respect to the TVPA class, GEO's Assistant Warden of Operations estimated that, in the past ten years, 50,000 to 60,000 individuals have been detained at the Facility and subject to the Sanitation Policy. Mot. Class Certification Ex. 1 at 49:24-50:2. As for the unjust enrichment class, GEO's records show that 787 detainees participated in the Voluntary Work Program in November 2012 alone. Mot. Class Certification Ex. 15 at 7, ECF No. 50-6. Representatives approximate that there will be 2,000 total members of the class. GEO argues that Representatives cannot simply rely on the presumption that classes with greater than 40 putative members satisfy the numerosity requirement. Representatives do not just depend on that presumption, however; they have also shown that joinder would be impracticable due to the unique characteristics of the class members, namely that many are spread around the world and are not fluent in English or the U.S. legal system.

convincing, argument is that elements of both claims necessitate inquiries specific to each class member.

A. Trafficking Victims Protection Act Claim

> The forced labor provision of the TVPA makes it unlawful for anyone to: knowingly provide[] or obtain[] the labor or services of a person * * * (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.

18 U.S.C. § 1589 (emphasis added). The element that the labor be obtained "by means of" the defendant's improper coercion is central to the parties' dispute. GEO claims that evaluating whether this element is fulfilled requires an individualized assessment of what caused each putative class member to perform labor under the Sanitation Policy. Consequently, GEO asserts that the commonality, typicality, predominance, and superiority requirements are not met for the TVPA class.

Federal Rule of Civil Procedure 23(a): Commonality & Typicality

To fulfill the commonality requirement, Representatives must demonstrate that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(1). A qualifying question must be "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350. The analysis must not focus on the mere existence of common questions but on "'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id*. at 350 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Nevertheless, "[i]t is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive." *CGC Holding Co., LLC*, 773 F.3d at 1087 (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013)).

Representatives submit that the common questions putative class members share are: "(1) whether GEO obtains the labor of class members; (2) whether GEO threatens class members with physical restraint, serious harm, or abuse of the legal process; and (3) whether GEO 'knowingly' obtains class members' labor 'by * * * means of' these threats." Mot. Class Certification at 11. GEO argues that these questions fail to demonstrate, as required by *Wal-Mart Stores, Inc. v. Dukes*, that an issue central to the validity of Representatives' claim is susceptible to classwide resolution.

In *Wal-Mart*, the Supreme Court found that a proposed class of female employees alleging discrimination under Title VII lacked even a single question common to the class and thus did not satisfy the commonality requirement. 564 U.S. at 342, 359. Relying on the fact that the defendant had no specific discriminatory employment policy or biased evaluation method, the Court found that the central question of why each class member was disfavored could not produce a common answer. *Id*. at 352-55, 59. The defendant's local supervisors were given discretion over employment decisions such that it was unlikely that each manager exercised their discretion in a common discriminatory manner. *Id*. at 355-56. The Court stated that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it [would] be impossible to say that examination of all the class members' claims for relief [would] produce a common answer * * * *" *Id*. at 352.

Unlike in *Wal-Mart*, GEO has a specific, uniformly applicable Sanitation Policy that is the subject of Representatives' TVPA claim. This Policy is the glue that holds the allegations of the Representatives and putative class members together,[2] creating a number of crucial questions with common answers. For example: Does GEO employ a Sanitation Policy that

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[2] GEO argues that each class member could have labored due to different parts of the Policy so the Policy as a whole cannot be the glue. The text of the statute contradicts that assertion. The statue provides that "a scheme, plan, or pattern" can constitute improper means without requiring determination of which specific part of the scheme, plan, or pattern motivated the laborer. 18 U.S.C. § 1589. Thus, a uniform policy can be the glue that holds the allegations of a class together.

constitutes improper means of coercion under the forced labor statute? Does GEO knowingly obtain detainees' labor using that Policy? Is there a civic duty exception to the forced labor statute that makes the Policy acceptable? Representatives have demonstrated the existence of common questions that can resolve issues "central to the validity" of its TVPA claim "in one stroke." *Wal-Mart Stores, Inc*, 564 U.S. at 350.

"The commonality and typicality requirements of Rule 23(a) do not require that every member of the class share a fact situation *identical* to that of the named plaintiff." *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014) (citation omitted). Furthermore, "differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988).

GEO contends that Representatives' experiences could not be typical, because perception of a threat is subjective and because none of Representatives were actually placed in segregation for refusing to clean. GEO also points out that Representatives detention at the Facility only spans back to May 2011, while the proposed class goes back ten years. The nature of detention is unique in that it allows the detainer to almost fully control the experience of the detainee. In this case, Representatives and the putative class members were all subject to and impacted by the Sanitation Policy, and the duties they performed under the Policy were at the direction of GEO's staff.[3]

[3] One way in which GEO implements the Policy is by posting a list of detainees who are required to perform additional

Mot. Class Certification Ex. 2 at 1-3, ECF No. 50-2. I find it irrelevant that no Representative was actually disciplined with segregation for violating the Policy, since the forced labor statute includes threats, schemes, plans, and patterns as improper means of coercion. As for the time period covered by the class, GEO's Assistant Warden of Operations testified that its Sanitation Policy had been in effect since 1995, when she began working for the company. Mot. Class Certification Ex. 1 12:23-13:1, 23:8-16, 86:22-87:3. Representatives and the proposed class of individuals detained during the ten years prior to the filing of the Complaint could, therefore, bring claims based on the same legal or remedial theory. Representatives have shown that the typicality requirement is met for their Proposed TVPA class.

Federal Rule of Civil Procedure 23(b)(3): Predominance and Superiority

While the class undoubtedly satisfies the Rule 23(a) factors, the Rule 23(b)(3) "predominance criterion is far more demanding." *Amchem Prods., Inc.*, 521 U.S. at 623–24. Its "inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. In considering whether questions of law or fact common to class members predominate, I look to the specific elements of the underlying claim. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

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cleanup of the common areas each day. Mot. Class Certification Ex. 4 at 19. GEO does not allege and there is nothing in the record to show that detainees who are not on the daily list still choose to perform the additional duties or that detainees work autonomously.

GEO contends that, to satisfy the "by means of" element of the forced labor statute, each class member would need to show what specifically compelled him or her to perform the sanitation duties at the Facility. It suggests that some detainees labored just because they desired to stay occupied. And, with respect to those hypothetical detainees, GEO claims it could not have violated the TVPA because it did not obtain their labor "by means of" improper coercion. Representatives refute this argument, stating that, instead of individually inquiring as to why each detainee labored, a reasonable person standard should be used. According to Representatives, "the language and structure of the forced labor statute * * * call for an objective inquiry that turns on whether a reasonable person would provide labor to[] GEO if placed in the position of the person providing such labor." Mot. Class Certification at 15.

Representatives cite *Nuñag-Tanedo v. East Baton Rouge Parish School Board*, No. LA CV 10-01172 JAK (MLGx), 2011 WL 7095434 (C.D. Cal. Dec. 12, 2011), as support for their assertion that a reasonable person standard should be used. *Nuñag-Tanedo* involved a class of Filipino nationals who were recruited to work as teachers in Louisiana public schools and felt compelled to teach in order to repay the exorbitant debts they incurred as part of the recruitment process. *Id.* at *1. Construing the forced labor statute, the court in *Nuñag-Tanedo* found that the putative class members shared the same background and circumstances such that a reasonable person standard could be used to determine whether it was the defendants' scheme that ultimately compelled the plaintiffs to work. *Id.* at *1.

In turn, GEO relies on *Panwar v. Access Therapies, Inc.*, No. 1:12-cv-00619, 2015 WL 329013 (S.D. Ind. Jan. 22, 2015), and *David v. Signal International, LLC*, No. 08-1220, 2012 WL 10759668, at *15 (E.D. La. Jan. 4, 2012), to challenge the use of a reasonable person standard. The proposed classes in *Panwar* and *David*, as in *Nuñag-Tanedo*, were comprised of foreign citizens who were recruited to work in the United States and then were allegedly coerced by improper means to continue laboring. Unlike in *Nuñag-Tanedo*, however, the courts in both *Panwar* and *David* determined that the use of a classwide reasonable person standard was not appropriate. *Panwar*, 2015 WL 329013, at *1; *David*, 2012 WL 10759668, at *1-2.

In *Panwar*, the court found that the backgrounds and circumstances of the plaintiffs and class members varied too greatly to apply a uniform reasonable person standard. 2015 WL 329013, at *6. The class members had different contracts, worked in different states, and faced different working conditions. *Id.* The court reasoned that it was likely that "a significant number" of putative class members did not labor due to improper coercion as they never sought to terminate their contracts, were not threatened by deportation, or would not be seriously harmed by having to pay damages for breach of their employment contracts. *Id.* The facts in this case are distinct from those in *Panwar* given that Representatives and the putative class members here were all subject to a universal policy under uniform conditions.

The second case GEO cites, *David v. Signal International, LLC*, goes beyond looking at the similarities and differences of class members' circumstances and meticulously analyzes the "by means of" element

of the forced labor statute. The plaintiffs in *David* asserted, as Representatives do here, that the statute concerns only the defendant's conduct and whether a reasonable person in the plaintiffs' shoes would have been compelled to provide labor against his or her will. 2012 WL 10759668, at *17. For guidance on the proper query under the statute, the court looked to *United States v. Kozminski*, 487 U.S. 931 (1988). *Id*. at *17-19. The Supreme Court held in *Kozminski* that, for the purposes of criminal prosecution, involuntary servitude under 18 U.S.C. § 1584 is limited to the "compulsion of services by the use or threatened use of physical or legal coercion." 487 U.S. at 952-53. The forced labor statute was enacted in response to that holding in order to combat the exploitation of workers via means other than physical or legal coercion, including through threats of and actual non-physical "serious harm." H.R. Conf. Rep. 106-939, 3-5. In *Kozminski*, the Supreme Court alluded to causation, stating: "[T]he vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." 487 U.S. at 952. The court in *David* consequently determined that "the forced labor analysis cannot be confined solely to the defendant's conduct but necessarily must take into account the particular victim's vulnerabilities." *David*, 2012 WL 10759668, at *19. It additionally concluded that whether the defendants' coercive conduct caused the plaintiffs to labor could not "be answered via generalized class-wide proof but rather must be answered individually based upon individualized proof." *Id*. at *21.

I find the analysis in *David* to be persuasive in that the forced labor statute does contain both an objec-

tive and a subjective component. The subjective component is whether the victims actually labored *because of* the perpetrator's conduct, while the objective component is whether a reasonable person would respond in a similar way as the victims. *See id*. at *20. Representatives' proposal that the subjective component be eliminated by using only a reasonable person standard does not coincide with the statute.[4]

Nevertheless, the holding in *David* does not foreclose certification of the proposed class in this case. Representatives argue, as an alternative to eliminating the subjective component of the statue, that the "by means of" element can be satisfied by inferring from classwide proof that the putative class members labored because of GEO's improper means of coercion. Representatives are correct that there is nothing preventing such an inference. I have not found and GEO has not provided any authority requiring that, for TVPA claims, causation must be proven by direct and not circumstantial evidence. Were a jury deciding the individual merits of Representatives claims, it surely would be permitted to make such an inference. Thus, it should be allowed on a classwide basis as well. *See CGC Holding Co., LLC*, 773 F.3d at 1092.

Representatives and the putative class members in this case were directed by GEO's staff when, where,

[4] Representatives highlight that individuals can also be convicted of or held civilly liable for *attempting* to violate the forced labor statute under 18 U.S.C. § 1594. They claim that, even if some putative class members labored for reasons other than GEO's improper means of coercion, GEO still attempted to obtain their labor via those means. As a result, Representatives argue that such class members would be entitled to the same civil remedy, making an individual inquiry regarding causation unnecessary. Their Complaint, however, does not assert a claim for attempt under 18 U.S.C. § 1594.

and how to perform their sanitation duties. Given the climate in which they were detained, 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. *See David*, 2012 WL 10759668, at *21 ("[B]ased on the type of coercion used, there may be cases where consent becomes irrelevant."). For class certification purposes, though, I need only conclude that the "by means of" element could be established by classwide circumstantial evidence.

Representatives reference *CGC Holding Co., LLC v. Broad and Cassel* as an example of when circumstantial evidence can be used to show causation on a classwide basis. In *CGC Holding*, the Tenth Circuit held that certification of a class of real estate borrowers bringing claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act was appropriate even though actual and proximate causation were elements of the claim. 773 F.3d at 1080-81. The court found that, under certain circumstances, "it is beneficial to permit a commonsense inference * * * applicable to the entire class to answer a predominating question as required by Rule 23." *Id.* at 1089. The circumstances here—namely the class members' detainment, the imposition of a uniform policy, and the numerous other questions common to the class—certainly make it beneficial to permit such an inference.[5]

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[5] GEO argues that the rationale applied in the RICO context in *CGC Holding* cannot be extended to TVPA claims. I disagree. The analysis in *CGC Holding* may not dictate the outcome in this matter, but it is instructive.

In a final effort to show that individual questions predominate as to the TVPA claim, GEO asserts that any damages inquiry would have to be specific to each class member. But, considering the numerous questions common to the class, I find that the possible need for specific damages determinations does not predominate. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014); *see also* Fed. R. Civ. P. 23 advisory committee's note ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."). Since causation under the forced labor statute "can be found through generalized, classwide proof," common questions predominate in this case and "class treatment is valuable in order to take advantage of the efficiencies essential to class actions." *CGC Holding Co., LLC*, 773 F.3d at 1089 (citations omitted).

"[C]lass status is appropriate as long as plaintiffs can establish an aggregation of legal and factual issues, the uniform treatment of which is superior to ordinary one-on-one litigation." *Id.* at 1087. In including Rule 23(b)(3), "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem Prods., Inc.*, 521 U.S. at 617 (quoting Kaplan, *A Prefatory Note*, 10 B.C. Ind. & Com. L. Rev. 497, 497 (1969)). In this case, the putative class members reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States. It is unlikely that

they would individually bring these innovative claims against GEO. Further, if they were to do so, each detainee would have to litigate the same exact issues regarding GEO's Sanitation Policy. The class action is the superior method for adjudicating the TVPA claim. Representatives have thus demonstrated that their proposed TVPA class fulfills the requirements of Rule 23(a) & (b)(3) such that certification is appropriate.

B. Unjust Enrichment Claim

Turning to Representatives unjust enrichment claim, GEO's arguments against certification similarly involve whether an element of the claim compels individualized inquiries. To succeed on a claim of unjust enrichment, a plaintiff must prove "(1) the defendant received a benefit (2) at the plaintiff's expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation." *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008) (citing *Salzman v. Bachrach*, 996 P.2d 1263, 1266-67 (Colo. 2000)). Determining whether retention of the benefit is unjust involves "careful consideration of particular circumstances," *Lewis*, 189 P.3d at 1140 (citation omitted), and "a fact-intensive inquiry in which courts look to, among other things, the intentions, expectations, and behavior of the parties," *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 287 P.3d 842, 847 (Colo. 2012) (citing *Lewis*, 189 P.3d at 1140, 1143). The analysis "often will turn on whether a party engaged in some type of wrongdoing." *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 445 (Colo. 2000).

GEO argues that the "unjust" element, dependent on the intentions, expectations, and behavior of the

parties, requires an inquiry specific to each putative class member and cannot be demonstrated on a classwide basis. As with the TVPA claim, GEO contends that the necessity of an individualized inquiry for one of the elements of the claim prevents the commonality, typicality, predominance, and superiority requirements from being met.

Federal Rule of Civil Procedure 23(a): Commonality and Typicality

Again, I start the certification analysis with the Rule 23(a) commonality requirement that there be at least one question common to the class that will resolve an issue central to the validity of the claim "in one stroke." *Wal-Mart Stores, Inc.*, 564 U.S. at 350, 359. Representatives assert that the questions common to the proposed class are: "(1) whether the class provided GEO with a benefit in the form of substantially discounted labor, and (2) whether, under the circumstances of this case, it would be unjust for GEO to retain that benefit." Consistent with its overarching argument, GEO states that the second question regarding the "unjust" element is not a question common to the class as it requires an individualized inquiry.[6] I address this argument further

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[6] GEO's other arguments purportedly addressing commonality for the unjust enrichment class relate more to the merits of the claim than the existence of common questions. Citing *Alvarado Guevara v. Immigration and Naturalization Service*, 902 F.2d 394, 396-96 (5th Cir. 1990), GEO asserts that detainees are not participants in the same market as other persons who could become employed by ICE since they are removed from the American industry. According to GEO, detainees could not reasonably expect that they would be paid more than $1.00 per day. It is unclear how this line of reasoning relates to the commonality analysis. If anything, the question of whether detainees should be paid in line with the market seems to support

below in discussing the predominance factor. For the purposes of the commonality requirement, though, I find that Representatives have demonstrated the existence of at least a single common question—whether GEO received a benefit from VWP participants' labor—the determination of which will resolve an issue central to the validity of the unjust enrichment claim in one stroke.

GEO also claims that Representatives' experiences are not typical of the class because its representation that ICE dictates the $1.00 per day pay rate was only made to specific individuals and not on a classwide basis. According to GEO, Representatives and putative class members would not be challenging the same conduct under the same legal theories as required for typicality. Representatives respond by stating that their unjust enrichment claim does not turn on class members' individualized reliance on GEO's explanation of the pay rate, but instead, that the misrepresentation contributes to the context of GEO's enrichment. As noted throughout this order, detainment presents distinctive conditions. Representatives, like the putative class members, worked under the Voluntary Work Program in an environment GEO controlled. GEO dictated the jobs they performed, the rate they were paid, and the alleged savings it experienced.

Representatives' unjust enrichment claim challenges the same conduct under the same legal theo-

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the existence of questions that can be answered on a classwide basis.

ries as any unjust enrichment claim putative class members would bring. Thus, with respect to that claim, Representatives have demonstrated the proposed class fulfills the Rule 23(a) prerequisites.

Federal Rule of Civil Procedure 23(b)(3): Predominance and Superiority

The more stringent predominance factor demands that I look to the elements of the claim and fully consider GEO's argument regarding the necessity of individualized inquiries in determining whether its enrichment is unjust. The "unjust" element of the claim calls for an analysis of "the intentions, expectations, and behavior of the parties" to determine when retention of the benefit becomes unjust. *Melat, Pressman & Higbie*, 287 P.3d at 847 (citing *Lewis*, 189 P.3d at 1140, 1143). GEO insists that such expectations and intentions are highly individualized and could not be consistent classwide. I am not persuaded. 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. GEO "has failed to explain why it would be equitable for it to retain [the benefit conferred by] some of the putative class members, but inequitable to retain [the benefit] from others." *James D. Hinson Elec. Contr. Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 647 (M.D. Fla. 2011). GEO's treatment of participants in the VWP was based on uniform policies and, therefore, it is likely that, if its retention of a benefit was unjust with respect to one class member, it was unjust with respect to all class members.

GEO quotes *Friedman v. Dollar Thrifty Automotive Group, Inc.*, 304 F.R.D. 601 (D. Colo. 2015), twice to support the proposition that class certification is in-

appropriate for unjust enrichment claims, because "common questions will rarely, if ever, predominate." Def.'s Opp. Class Certification at 40, 42 (quoting *Friedman*, 304 F.R.D. at 611). In *Friedman*, however, the court determined that whether the defendant's enrichment from its sales were unjust turned on the circumstances of the sales, "implicat[ing] 2.58 million face-to-face individualized transactions in which customers with varying circumstances, preferences, and levels of knowledge * * * engaged with thousands of [the defendant's] agents * * * *" *Friedman*, 304 F.R.D. at 609, 611. Those interactions were unscripted and each could differ based on what was told to or understood by the consumer about purchasing the defendant's products. *Id.* at 609-10. Under those circumstances, it is logical that the answers to the common questions could not be established by common evidence and would not predominate, but those are not the facts of this case. Here, there is a consistent policy under which detained individuals worked and were paid the same amount. Perhaps the extent to which GEO was unjustly enriched would require individualized inquiries, but whether it was unjust at all could be determined on a classwide basis.

Observing that the extent inquiry would likely be particular to each class member, GEO argues that individualized damages questions predominate over any common questions. Since VWP participants worked varying hours and did not all perform the same type of work,[7] any award to them would need

[7] GEO also contends that, for the damages analysis, participants would need individualized proof of whether it made misrepresentations to them specifically. Def.'s Opp. Class Certification at 42-43. Any misrepresentations, however, should not be relevant in determining the extent to which a particular participant enriched GEO.

to account for those individual factors. Representatives assert that damages could be determined by a formula and statistical sampling taking into account the number of hours worked, type of work performed, and fair market value of such work. However, they have not provided a detailed model or expert opinion on calculating damages, which GEO claims is necessary for them to sufficiently carry their burden. I agree with Representatives that there is no requirement that they produce expert testimony at this stage on the precise formula to be used for the calculation of damages. See Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 12:4 (5th ed.) (explaining that, in many class actions such as wage and hour cases, individual damages are easily calculable, while other more complex cases require the proponents of class certification to provide a class-wide method for calculating individual damages). I find that Representatives have demonstrated that individual damages in this case should be easily calculable using a simple formula. If this proves untrue, decertification or amendment of the class for damages determinations may be appropriate at a later juncture.

Additionally, the class action is the superior method for adjudicating Representatives' unjust enrichment claim. I am not aware of any other suit asserting the claims brought in this case and no other class member has demonstrated an interest in controlling the litigation. As stated above, many of the putative class members are immigrant detainees who lack English proficiency. They have limited financial resources and reside in countries around the world. It is very likely that these claims would not be brought

by individual detainees, especially considering the case's innovative nature.

Representatives have demonstrated that the Rule 23(a) and (b)(3) requirements are satisfied with respect to their TVPA and unjust enrichment claims despite GEO's arguments that elements of each claim require individualized inquiries that preclude certification. In light of the pervasive character of the common issues and the *de minimis* nature of any individualized issues, I conclude that this case is an exception to the rule and class certification for both claims is appropriate. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006).

C. Appointment of Representatives' Counsel as Class Counsel

Upon certifying a class, class counsel must also be appointed. Fed. R. Civ. P. 23(g)(1). In doing so, I "must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handing class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class * * * *" *Id.*

Representatives' counsel have invested significant time, energy, and resources into this case. They have uniquely relevant experience with the client base and with bringing complex claims against detention facilities. Many of the attorneys and their staff are also Spanish speakers, making it easier for them to communicate with some members of the classes. I find that Representatives' counsel are well-suited to represent the classes and appoint them to do so.

IV. Conclusion

For the foregoing reasons, I GRANT the Motion for Class Certification Under Rule 23(b)(3) and Appointment of Class Counsel Under Rule 23(g) (ECF No. 49). The classes as proposed in the Motion are certified for Representatives' TVPA and unjust enrichment claims. Alejandro Menocal, Marcos Brambila, Grisel Xahuentitla, Hugo Hernandez, Lourdes Argueta, Jesus Gaytan, Olga Alexaklina, Dagoberto Vizguerra, and Demetrio Valerga are named as representatives of the classes. Attorneys Brandt Milstein, Andrew Turner, Andrew Free, Alexander Hood, David Seligman, Andrew Schmidt, and Hans Meyer are appointed as counsel for the classes. To proceed with this case, the parties shall file a revised Proposed Stipulated Scheduling and Discovery Order by March 27, 2017.

DATED this 27th day of February, 2017.

s/ *John L. Kane*
JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

FILED
United States Court of Appeal
Tenth Circuit

April 11, 2017

Elisabeth A. Shumaker
Clerk of the Court

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

THE GEO GROUP, INC., Petitioner, v. ALEJANDRO MENOCAL, MARCOS BRAMBILA, GRISEL XAHUENTITLA, HUGO HERNANDEZ, LOURDES ARGUETA, JESUS GAYTAN, OLGA ALEXAKLINA, DAGOBERTO VIZGUERRA, and DEMETRIO VALGERA, on their own behalf and on behalf of all others similarly situated, Respondents.	No. 17-701 (D.C. No. 1:14-CV-02887-JLK) (D. Colo.)

ORDER

Before **TYMKOVICH**, Chief Judge, **HARTZ** and **MATHESON**, Circuit Judges.

This matter is before the court on the GEO Group's *Petition for Permission to Appeal Class Certification*. *See* Fed. R. App. P. 5(a); Fed. R. Civ. P. 23(f). We also have a response from the plaintiffs/respondents. In addition, on March 30, 2017, the petitioner filed an unopposed motion for leave to file a reply in support of the petition. As a preliminary matter, we grant the motion to file the reply, and direct the clerk to file the reply attached to the motion.

Upon consideration of the Petition, the response, the reply, and the materials on file, we note both the complexity and difficulty of the issues presented, and we *grant* the Petition. Within 14 days of the date of this order, the petitioner shall pay the $505 filing and docketing fees to the Clerk of the District Court for the District of Colorado. See Fed. R. App. P. 5(d)(1)(A). The date of this order shall serve as the date of the notice of appeal in the new matter. *Id*. at 5(d)(2).

The clerk of this court is directed to open the new appeal once the clerk of the district court notifies this court that the filing fee has been paid. *Id*. at 5(d)(3).

Entered for the Court
s/ *Elisabeth A. Shumaker*
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

Excerpts from the Trafficking Victims Protection Act, as codified

18 U.S.C. § 1589
Forced labor

(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).

(b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in

the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

(c) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 1593
Mandatory restitution

(a) Notwithstanding section 3663 or 3663A, and in addition to any other civil or criminal penalties authorized by law, the court shall order restitution for any offense under this chapter.

(b) (1) The order of restitution under this section shall direct the defendant to pay the victim (through the appropriate court mechanism) the full amount of the victim's losses, as determined by the court under paragraph (3) of this subsection.

(2) An order of restitution under this section shall be issued and enforced in accordance with section 3664 in the same manner as an order under section 3663A.

(3) As used in this subsection, the term "full amount of the victim's losses" has the same meaning as provided in section 2259(b)(3) and shall in addition include the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.).

(4) The forfeiture of property under this subsection shall be governed by the provisions of section 413 (other than subsection (d) of such section) of the Controlled Substances Act (21 U.S.C. 853).

(c) As used in this section, the term "victim" means the individual harmed as a result of a crime under this chapter, including, in the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or a representative of the victim's estate, or another family member, or any other person appointed as suitable by the court, but in no event shall the defendant be named such representative or guardian.

18 U.S.C. § 1595
Civil remedy

(a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

(b) (1) Any civil action filed under subsection (a) shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.
(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under subsection (a) unless it is commenced not later than the later of--

(1) 10 years after the cause of action arose; or

(2) 10 years after the victim reaches 18 years of age, if the victim was a minor at the time of the alleged offense.

(d) In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

22 U.S.C. § 7101
Purposes and findings

(a) Purposes

The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.

(b) Findings

Congress finds that:

(1) As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually,

primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.

(2) Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.

(3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.

(4) Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.

(5) Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.

(6) Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.

(7) Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.

(8) Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.

(9) Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.

(10) Trafficking also involves violations of other laws, including labor and immigration codes and laws against kidnapping, slavery, false imprisonment, assault, battery, pandering, fraud, and extortion.

(11) Trafficking exposes victims to serious health risks. Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS. Trafficking victims are sometimes worked or physically brutalized to death.

(12) Trafficking in persons substantially affects interstate and foreign commerce. Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market. Within the context of slavery, servitude, and labor or services which are obtained or maintained through coercive conduct that amounts to a condition of servitude, victims are subjected to a range of violations.

(13) Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of Title 18, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal

coercion, and to exclude other conduct that can have the same purpose and effect.

(14) Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.

(15) In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.

(16) In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.

(17) Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.

(18) Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assis-

tance, which safely reintegrate trafficking victims into their home countries.

(19) Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.

(20) Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

(21) Trafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.

(22) One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. The right to be free from slav-

ery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.

(23) The United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

(24) Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral for a to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.

22 U.S.C. § 7102
Definitions

In this chapter:

(1) Abuse or threatened abuse of law or legal process
The term "abuse or threatened abuse of the legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

* * *

(3) Coercion

The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C) the abuse or threatened abuse of the legal process.

* * *

(9) Severe forms of trafficking in persons

The term "severe forms of trafficking in persons" means—

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

(10) Sex trafficking
The term "sex trafficking" means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

* * *

(12) Task Force
The term "Task Force" means the Interagency Task Force to Monitor and Combat Trafficking established under section 7103 of this title.

* * *

(14) Victim of a severe form of trafficking
The term "victim of a severe form of trafficking" means a person subject to an act or practice described in paragraph (9).

(15) Victim of trafficking
The term "victim of trafficking" means a person subjected to an act or practice described in paragraph (9) or (10).

22 U.S.C. § 7103
Interagency Task Force to Monitor and Combat Trafficking

(a) Establishment

The President shall establish an Interagency Task Force to Monitor and Combat Trafficking.

(b) Appointment

The President shall appoint the members of the Task Force, which shall include the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of National Intelligence, the Secretary of Defense, the Secretary of Homeland Security, the Secretary of Education, and such other officials as may be designated by the President.

(c) Chairman

The Task Force shall be chaired by the Secretary of State.

(d) Activities of the Task Force

The Task Force shall carry out the following activities:

* * *

(7) Not later than May 1, 2004, and annually thereafter, the Attorney General shall submit to the Committee on Ways and Means, the Committee on Foreign Affairs, and the Committee on the Judiciary of the House of Representatives and the Committee on Finance, the Committee on Foreign Relations, and the Committee on the Judiciary of the Senate, a report on Federal agencies that are implementing any provision of this chapter, or any amendment made by this chapter, which shall include, at a minimum, information on—

* * *

(N) activities or actions by Federal departments and agencies to enforce--

(i) section 7104(g) of this title and any similar law, regulation, or policy relating to United States Government contractors and their employees or United States Government subcontractors and their employees that engage in severe forms of trafficking in persons, the procurement of commercial sex acts, or the use of forced labor, including debt bondage;

(ii) section 1307 of Title 19; relating to prohibition on importation of convict-made goods), including any determinations by the Secretary of Homeland Security to waive the restrictions of such section; and

(iii) prohibitions on the procurement by the United States Government of items or services produced by slave labor, consistent with Executive Order 13107 (December 10, 1998);

* * *

22 U.S.C. § 7104
Prevention of trafficking

* * *

(g) Termination of certain grants, contracts and cooperative agreements

The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds are to be provided to a private entity, in whole or in part, shall include a con dition that authorizes the department or agency to terminate the grant, contract, or cooperative agreement, or take any of the other remedial actions authorized under section 7104b(c) of this title, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor, engages in, or uses labor recruiters, brokers, or other agents who engage in--

(i) severe forms of trafficking in persons;

(ii) the procurement of a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect;

(iii) the use of forced labor in the performance of the grant, contract, or cooperative agreement; or

(iv) acts that directly support or advance trafficking in persons, including the following acts:

(I) Destroying, concealing, removing, confiscating, or otherwise denying an employee access to that employee's identity or immigration documents.

(II) Failing to provide return transportation or pay for return transportation costs to an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment if requested by the employee, unless--

(aa) exempted from the requirement to provide or pay for such return transportation by the Federal department or agency providing or entering into the grant, contract, or cooperative agreement; or

(bb) the employee is a victim of human trafficking seeking victim services or legal redress in the country of employment or a witness in a human trafficking enforcement action.

(III) Soliciting a person for the purpose of employment, or offering employment, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.

(IV) Charging recruited employees unreasonable placement or recruitment fees, such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited.

(V) Providing or arranging housing that fails to meet the host country housing and safety standards.

* * *