No. 17-1125

IN THE

United States Court of Appeals for the Tenth Circuit

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-Appellees,

v.

THE GEO GROUP, INC.,

Defendant-Appellant.

Appeal from the U.S. District Court for the District of Colorado,
Civil Action No. 1:14-cv-02887-JLK, Judge John L. Kane, Presiding

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GLOSSARY

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ICE	U.S. Immigration and Customs Enforcement
TVPA	Trafficking Victims Protection Act
VWP	Voluntary Work Program

STATEMENT OF RELATED CASES

This Court granted Defendant-Appellant The GEO group, Inc. ("Defendant" or "GEO")'s petition for Interlocutory Appeal in *The GEO Group, Inc. v. Menocal*, No. 17-701. There are no other prior or related appeals.

INTRODUCTION

The District Court acted well within its broad discretion when it certified two classes of immigrant detainees in this case – the "Trafficking Victims Protection Act (TVPA) class" and the "unjust enrichment class." These two classes allege, respectively, anti-trafficking and unjust enrichment claims, the merits of which hinge on uniform policies applied to them in uniform conditions of confinement. They do not call for individualized determinations. Further, Plaintiffs' and class members' circumstances as current and former immigrant detainees – vulnerable, with limited resources, and dispersed geographically (if no longer detained) – render this case uniquely suitable for class treatment. This Court should affirm the District Court's ruling on class certification.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. This Court has appellate jurisdiction pursuant to Fed. R. Civ. P. 23(f) to review the District Court's order granting Plaintiffs-Appellees' motion for class certification. Fed. R. Civ. P. 23(f); Fed. R. App. P. 5; 28 U.S.C. §

1292(e). This Court granted GEO's petition for review on April 11, 2017, which serves as the date of the timely filed notice of appeal. Fed. R. App. P. 5(d)(2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court abused its discretion in certifying a Rule 23(b)(3) class for Plaintiffs'-Appellees' claims that GEO violated the TVPA, based on GEO's Housing Unit Sanitation Policy ("Sanitation Policy").

2. Whether the District Court abused its discretion in certifying a Rule 23(b)(3) class for Plaintiffs'-Appellees' common law unjust enrichment claims based on GEO's policy of paying only $1 per day to detainees participating in the Voluntary Work Program ("VWP").

STATEMENT OF THE CASE

This appeal reviews the decision to certify two class claims brought by detainees in a single detention facility. The merits of those claims hinge upon GEO's uniform policies, the similar situations of the immigrant detainees subject to those policies, and the uniform conditions of confinement in which GEO applied those policies.

I. Factual Background

Plaintiffs and the members of the TVPA class and the unjust enrichment class (collectively, "class members") are current or former civil immigration detainees who performed free labor for GEO on threat of discipline pursuant to

GEO's Sanitation Policy, and who performed additional work for GEO for only $1 per day as part of GEO's Voluntary Work Program. *See* Opening Brief for Appellant ("Aplt. Br.") 6-11; Appellant's Appendix ("Aplt. App.") 29-33. GEO is a for-profit prison corporation that owns and operates the Aurora, Colorado Detention Facility ("Aurora") under contracts with the U.S. Department of Homeland Security, Immigration and Customs Enforcement ("ICE"). Aplt. Br. 5-6; Aplt. App. 226-27.

The class members are civil detainees, not prison inmates. They are nonetheless confined to the prison-like Aurora facility and subject to GEO's uniform rules. Violations of those rules are punishable by further deprivations of their liberties.

The GEO Detainee Handbook Local Supplement ("Detainee Handbook"), distributed to all Aurora detainees, describes an initial admission procedure akin to a prison, including body and property searches, confiscation of personal property, and housing "classification" with other detainees at GEO's discretion. Aplt. App. 747-49. Detainees must be present for "official counts" at least three times per day. Aplt. App. 753. Their access to family, friends, and legal counsel via telephone and in-person visits is subject to facility rules and is limited in timing and duration. *Id.* at 755-56. Detainees must wear uniforms and abide by the facility's grooming requirements. *Id.* at 759-60. The Detainee Handbooks also

explain the detainees' obligations to follow facility rules, including fulfilling their "responsibility to take advantage of work opportunities" in the facility, and explain that guards may use force where necessary to control detainees and "ensure the orderly operation of the facility". *Id.* at 746-48; 752. To enforce its rules, GEO employs a multi-leveled disciplinary system set forth in its Detainee Handbook. *Id.* at 480 (87:22-88:23); 566-70. The discplinary policy groups "prohibited acts" into categories of severity, from "Low Moderate" to "Greatest," each with a range of corresponding sanctions, including reprimand, loss of access to commissary or job, solitary confinement, referral to ICE, and even criminal prosecution. *Id.* at 568-70; 750-51.

A. GEO's Policies Governing Civil Detainees' Labor

According to GEO, ICE requires that its detention facilities "maintain the highest standards at all times in all locations without exception," and GEO achieves these high standards "through 'an organized, supervised and continuous program of daily cleaning by all detainees.'" Aplt. Br. 6. GEO's "organized, supervised and continuous program" of detainee labor encompasses two policies: the Sanitation Policy and the Voluntary Work Program. Aplt. App. 467 (34:13-36:7).

Aurora has thirteen ICE housing units, each of which contains up to 80 beds and a common living area. *Id.* at 464-65 (24:14-17, 25:15-26:5). Aurora can

house up to 525 ICE detainees at any given time, and it houses between 3,000 and 4,000 immigration detainees per year. *Id.* at 468 (38:14-22), 471 (49:8-50:5). GEO employs only one non-detainee janitor at Aurora, whom GEO pays at least $12 per hour under the U.S. Department of Labor's Register of Wage Determinations.[1] Aplt. App. 484 (101:6-8, 103:1-20). This janitor cleans only the administrative offices of GEO, ICE, and the on-site immigration court. *Id.* (101:13-16). There is also a maintenance department of three employees who maintain roofs, light fixtures, and ventilation systems, but detainees also sometimes perform this work. *Id.* at 463 (19:21-20:4), 469-70 (44:8-16, 46:2-25). Class members perform the vast majority of the remaining labor required to clean and maintain Aurora, and they do so on threat of punishment under the Sanitation Policy, or for $1 per day under the VWP. *Id.* at 606 (47:12-24).

1. Sanitation Policy

GEO's Sanitation Policy has applied to every detainee housed in Aurora over the past ten years. Aplt. Br. 7; Aplt. App. 466 (29:13-16); 714-15; 471 (49:24-50:20). This policy requires detainees to clean both their personal areas and the common living areas of their housing units, from cleaning walls, sinks, and

[1] GEO's contract to operate Aurora is subject to the McNamara-O'Hara Service Contract Act, 42 U.S.C. § 351, *et seq.*, which requires the payment of a minimum wage and fringe benefits to employees, according to wage determinations issued by the U.S. Department of Labor. Aplt. App. 200, 244-53.

toilets to sweeping and mopping the floors and wiping down tables in the common area after meal service. Aplt. Br. 6-7; Aplt. App. 467-68 (36:13-37:4), 470 (45:6-25), 715. GEO staff selects a list of detainees to clean common areas each day, and all detainees must also participate in periodic "general cleanup[s]," as directed by the Housing Unit Officer. Aplt. Br. 7; Aplt. App. 715.

Under GEO's disciplinary policy, failing to comply with the Sanitation Policy by refusing to work is a 300-level, "High-Moderate" offense, punishable by various sanctions ranging from reprimand to loss of commissary privileges to up to seventy-two hours in "disciplinary segregation" – GEO's term for solitary confinement. Aplt. App. 471 (52:12-20); 722. All detainees are on notice, "clearly set forth in the detainee handbook," that if they do not comply with the Sanitation Policy, they could be sent to administrative or disciplinary segregation as punishment. Aplt. App. 478 (79:19-80:25). "Administrative segregation" is solitary confinement pending a hearing, where detainees are confined to a cell twenty hours per day and restricted to two hours of social time per day. Aplt. App. 471-72 (53:1-54:16), 478 (77:21-78:21). "Disciplinary segregation" involves twenty-two hours per day of confinement without any social time. Aplt. App. 471-72 (53:1-54:16), 488 (117:2-20).

2. Voluntary Work Program.

Through the VWP, GEO obtains detainee labor to perform other functions in addition to cleaning that are vital to maintaining and operating the Aurora facility. GEO uses the VWP to "enhance[]" the facility's "[e]ssential operations" "through detainee productivity." Aplt. App. 737. Under the VWP, GEO "utilizes detainees to perform such functions as painting, food services, laundry services, barbershop and sanitation." *Id.* at 704.

All participants in the VWP – up to 80 people per day, *id.* at 597 (12:5-8) – apply to and are assigned to jobs by Aurora's Classification Officer. *Id.* at 704. VWP jobs include janitorial work in living areas and other units such as the medical unit or library, laundry, food service, maintenance, and barber. *Id.* at 573, 604 (37:18-38:19). All participants in the VWP receive an orientation and are asked to sign a statement that they understand the job requirements. *Id.* at 704.

GEO pays all participants $1 per day for their work under the VWP, and prohibits payment of more than $1 per day for this work in its Aurora facility. *Id.* at 604 (38:20-39:1). Although GEO claims its rates are dictated by its contract with ICE, the contract is not as restrictive as GEO claims. ICE merely requires GEO to pay VWP participants *at least* $1 per day – it does not prohibit GEO from paying detainees *more* for their work. *Id.* at 740 ("Detainees shall receive monetary compensation for work completed in accordance with the facility's

standard policy. The compensation is *at least* $1.00 (USD) per day.") (emphasis added). Thus GEO could pay VWP participants more than $1 per day, irrespective of ICE's reimbursement rate.[2]

By obtaining cheap detainee labor through the VWP, GEO is able to operate a facility housing up to 525 detainees with only one janitor. *Id.* at 484 (101:6-8, 103:1-20). Without the VWP , it would have to hire and pay employees to do the janitorial, maintenance, and operations work currently performed by detainees, at rates set according to the Register of Wage Determinations. *Id.* at 606 (47:12-24).

B. The Named Plaintiffs

Plaintiff Alejandro Menocal Lepe was detained at Aurora from June to September 2014. Aplt. App. at 437 (¶ 2). During his detention at Aurora he performed work cleaning the recreation yard and the common area of his housing unit without pay "because if you did not, the guards would send you to the 'hole,'" or solitary confinement. *Id.* at 437 (¶ 3). Menocal witnessed other detainees being put in the "hole" for refusing to work. *Id*. From July to September 2014, Menocal worked serving food and cleaning up after meal service for $1 per day under the VWP. *Id.* at 438 (¶ 4). He typically worked between six and eight hours per day but received $1 per day regardless of hours worked or duties performed. *Id*.

[2] The District Court found that GEO's contract with ICE does not prohibit it from paying detainees more than $1 per day. Aplt. App. 286.

Plaintiff Grisel Xahuentitla-Flores was detained at Aurora from May to September 2014. *Id.* at 439 (¶ 2). She cleaned detainees' common and private living areas when guards called upon her to clean, without pay, because "[i]f we didn't do the cleaning, we would be sent to the hole – or solitary confinement." *Id.* (¶ 3). Xahuentitla-Flores saw a guard threaten a sick detainee once "that she would be sent to the hole if she did not do the cleaning." *Id.* Xahuentitla-Flores also worked as a "trustee," cleaning and serving food, for about six hours per day from May to June 2014 under the VWP. *Id.* at 440 (¶ 4). GEO personnel told her when to work and for how long, but she was paid $1 per day regardless of hours worked. *Id.* She knew about 50 other detainees who worked varying jobs under the VWP, all for $1 per day. *Id.*

Though she has since been removed from the United States, Plaintiff Lourdes Argueta was detained at Aurora from approximately May 2014 to approximately February 2015. *Id.* at 441 (¶ 2). While she was detained, she performed cleaning duties in her "pod," or housing unit for no pay, on threat of being put in solitary confinement or "segregation". *Id.* (¶ 3). GEO guards told Argueta that detainees who refused to clean would be "put in solitary." *Id.* Argueta also worked cleaning the medical unit under the VWP since May 2014. *Id.* at 442 (¶ 4). As part of that work, she cleaned toilets, windows, and desks, emptied trash, and swept and mopped floors (including cleaning blood, feces, and

urine). *Id.* Argueta also worked under the VWP assembling new detainee clothing packages and creating new detainee files in the booking area of the facility. *Id*. Argueta and the other detainees she worked with under the VWP were paid $1 per day regardless of the type or length of the work. *Id*.

Plaintiff Jesus Gaytan was detained at Aurora from May to October 2014. *Id.* at 443 (¶ 2). While detained he was assigned to clean common and private living areas as part of a "cleaning crew" designated by the guards, without pay. *Id*. (¶ 3). Gaytan cleaned because he was threatened with solitary confinement. *Id*. (¶ 3). Gaytan also worked in the laundry for 6-8 hours per day, five days per week, under the VWP, and was paid $1 per day for that work. *Id.* at 444 (¶ 4).

Plaintiff Demetrio Valerga was detained from May to June 2011 and from September 2013 to July 2014. *Id.* at 445 (¶ 2). During his detention, Valerga performed work cleaning the private and common living areas, when selected for the cleaning crew by the guards, for no pay because "it was well known that those who refused to do that work for free were put in 'the hole' – or solitary confinement." *Id*. (¶ 3). A guard once threatened Valerga with being put in the hole when he protested cleaning for free. *Id*. Valerga also worked under the VWP from approximately October 2013 to June 2014, both working in the kitchen and stripping and waxing floors for 7-8 hours per day, five days per week. *Id.* at 446 (¶

4). Valerga received $1 per day under the VWP regardless of the hours he worked. *Id*.

Class members Eliezer Ortiz Muñoz, Alejandro Hernandez Torres, and Adriana Mendoza Castellanos also testified that while they were detained at Aurora between 2012 and 2015, they worked for no pay as part of cleaning crews cleaning the common and private living areas on threat of being put in segregation. *Id.* at 447-455. They also each worked in the VWP for no more than $1 per day performing various jobs, including kitchen duties, cleaning, and waxing floors. *Id*.

At all times, GEO understood the detainees subject to its policies were immigrants from all over the world, in the uniquely vulnerable situation of civil confinement while subject to forcible removal from the United States. *Id.* at 726. GEO understood the detainees subject to its policies were locked in a secure facility, obliged to follow the orders of GEO's staff and the facility's rules on threat of punishment, and with limited access to social, emotional, and financial resources, as their visits from family and friends were restricted, their belongings confiscated, and their privacy was violated. *Id.* at 566-70; 746-60.

Plaintiffs-Appellants Menocal, Xahuentitla, Argueta, Gaytan, and Valegra, as well as Marcos Brambila, Hugo Hernandez, Olga Alexaklina, and Dagoberto Vizguerra (collectively, "Plaintiffs") filed this action against GEO on October 22, 2014, on behalf of themselves and a putative class of detainees at Aurora. *Id.* at

17-37. Plaintiffs allege that GEO violated the forced labor provisions of the TVPA by compelling detainees to perform labor on threat of discipline, including solitary confinement, under the Sanitation Policy. *Id.* at 29-30. Plaintiffs also allege unjust enrichment claims under Colorado law on behalf of themselves and a class of detainees who performed work at Aurora under GEO's VWP for just $1 per day.[3] *Id.* at 31-33.

II. The District Court's Class Certification Decision

On May 6, 2016, Plaintiffs filed a motion for class certification, which the parties fully briefed. Aplt. App. 400-806. The District Court granted Plaintiffs' motion on February 27, 2017, certifying two overlapping subclasses:

1. **The TVPA class**: All persons detained in Defendant's Aurora Detention Facility in the ten years prior to the filing of this action.

[3] Plaintiffs also brought claims under Colorado's Minimum Wages of Workers Act, as implemented by the Colorado Minimum Wage Order ("CMWO"). Aplt. App. 24-26. GEO timely moved to dismiss all claims, and on July 6, 2015, the District Court dismissed the claims under the CMWO but allowed Plaintiffs' TVPA and unjust enrichment claims to proceed. Aplt. App. 287. GEO moved the District Court to reconsider its decision on August 4, 2015, Aplt. App. 305-336. The District Court denied this motion on August 26, 2015. Aplt. App. 341-43. GEO requested permission to appeal the denial of its motion to dismiss the TVPA and unjust enrichment claims, but the District Court denied the motion. Aplt. App. 344-68, 396-99.

2. **The unjust enrichment class**: All people who performed work at Defendant's Aurora Detention Facility under Defendant's VWP in the three years prior to the filing of this action.

Id. at 807-27.

In its class certification order, the District Court undertook a thorough review of the record, citing to ICE and GEO policy documents, corporate deposition testimony, and class member and other detainee declarations. *Id.* at 808-10; 815; 819-20. The District Court found that Plaintiffs satisfied the numerosity and adequacy requirements of Rule 23(a), Aplt. App. 812, neither of which GEO challenges in this appeal. *See generally* Aplt. Br.

The District Court also found that Plaintiffs' TVPA claim raised several common issues that could be answered through class-wide evidence, and that common questions predominated over individualized inquiries. Aplt. App. 813-21. In particular, the District Court examined GEO's Sanitation Policy, evidence of which was presented in the form of corporate policy documents, the Detainee Handbook, and testimony from GEO's 30(b)(6) witnesses. *Id.* at 808-09. The language of the policy, its substantive requirements and consequences for violations, its application to all detainees, and notice of the policy to all detainees via the Detainee Handbook are undisputed by GEO. *Id.* at 650-53; Aplt. Br. 6-8.

The District Court properly found that whether the uniform Sanitation Policy constituted a "scheme, pattern, or plan" prohibited under the TVPA entailed common questions – whether the Sanitation Policy constitutes improper means of coercion under the TVPA; whether GEO knowingly obtains detainee labor by means of the policy; and whether a civic duty exception applies as a defense to GEO's conduct – answerable by common evidence – the "glue" of the policy itself and the uniform conditions in which it was administered. Aplt. App. 814-15. Because Plaintiffs and putative class members were all subject to the same policy and performed duties under the policy at the direction of GEO's staff, the District Court found that Plaintiffs had met their burden to show typicality as well. *Id.* at 815. Because the TVPA prohibits "threats, schemes, plans, and patterns as improper means of coercion," in addition to physical coercion, the District Court concluded that differences in whether individual class members were or were not punished for violating the policy did not defeat typicality. *Id.*

In analyzing the predominance prong of Rule 23(b)(3), the District Court carefully examined all elements of the TVPA claim, and found that even if Plaintiffs' TVPA claim required proof of a subjective motivation to perform work, the question whether the detainees worked *because of* the policy was answerable by common, circumstantial evidence because all detainees were subjected to the same detention conditions. *Id.* at 819. Contrary to GEO's assertion, the District

Court did not "conclud[e] that the conditions of detainee confinement are so uniformly coercive as to guarantee that labor is provided or obtained by GEO only through a TVPA violation." Aplt. Br. 30-31. Rather, the District Court carefully reviewed the evidence and the law, and found that the uniformity of detention conditions at a single facility, coupled with the uniform substance and application of the policy, provide class-wide, circumstantial evidence that a factfinder could consider in weighing the merits of Plaintiffs' TVPA claim. Aplt. App. 814-21.

The District Court also found that Plaintiffs' unjust enrichment claim raised issues of fact and law common to the class – specifically, whether GEO received a benefit from detainees' labor under the VWP and whether GEO's retention of the benefit was unjust. *Id.* at 822-25. Further, the District Court properly found that the uniform conditions of detention and the uniform application of the VWP made Plaintiffs' claims typical of the class, outweighing any potentially individualized differences in expectation of payment. *Id.* at 823.

In finding that Plaintiffs met their burden of showing commonality and predominance, the District Court relied again on evidence of GEO's indisputably uniform policy, the VWP, which applied to all detainees and paid them the same amount regardless of hours worked or duties performed. *Id.* at 822-25. The District Court carefully considered that analysis of the "unjust" element of Plaintiffs' claim would require analysis of "intentions, expectations, and behavior

of the parties." *Id.* at 823. The Court concluded that evidence of a consistent policy, applied to detained individuals, paying them the same amount, could provide class-wide proof that the circumstances surrounding GEO's retention of the benefit of their labor were unjust. *Id.* at 824-25. Moreover, the District Court noted that GEO failed to explain or present any evidence showing why GEO's retention of the benefit under its uniform policy would be just as to some class members and unjust as to others. *Id.* at 824.

With respect to both the TVPA and unjust enrichment claims, the District Court duly considered whether individualized damages inquiries would predominate over the numerous common questions in the case. *Id.* at 820-21, 825. As to the TVPA claim, the District Court properly found that the "numerous questions common to the class" as to liability meant that "the possible need for individualized damages determinations does not predominate." *Id.* at 820 (citing *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1255 (10th Cir. 2014) and Fed. R. Civ. P. 23 advisory committee's note). As to the unjust enrichment claim, the District Court considered Plaintiffs' proposal that damages could be calculated using statistical sampling taking into account hours worked, type of work performed, and fair market value of the labor. Aplt. App. 825. The Court properly concluded that Plaintiffs were not required to produce a precise formula or expert testimony on damages at the class certification stage, and the District Court could,

if necessary, exercise its discretion to amend the class for damages determinations at a later stage in the proceedings. *Id*.

Finally, the District Court correctly found that the characteristics of both overlapping classes render this case uniquely suitable for class adjudication, given class members' unique vulnerability, lack of familiarity with the American legal system, limited financial resources, geographic dispersion, and lack of English proficiency. *Id.* at 821, 826. Further, the District Court found that there were no other actions asserting these claims, and that if class members were to bring separate claims, they would be duplicative of this action. *Id.* Thus, the Court concluded, certifying this case as a class action is both efficient and in the interests of justice. *Id*.

GEO filed a petition for interlocutory review of the District Court's order, and this Court granted the petition on April 11, 2017. *Id.* at 828-29.

STANDARD OF REVIEW

This Court reviews "the standard the district court used in making its Rule 23 determination de novo and the merits of that determination for an abuse of discretion." *D.G. ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010) (quoting *Vallario v. Vandehey*, 554 F.3d 1259, 1264 (10th Cir. 2009)). "Recognizing the considerable discretion the district court enjoys in this area," the Court "defer[s] to the district court's certification if it applies the proper Rule 23

standard and its 'decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand.'" *Id.* Reversal for abuse of discretion is only appropriate where "the district court bases its decision on either a clearly erroneous finding of fact or conclusion of law or by manifesting a clear error of judgment." *Id*. *See also J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) ("There is no abuse of discretion when the trial court applies the correct criteria to the facts of the case.") (internal quotation marks and citation omitted); *Vallario*, 554 F.3d at 1264 ("Because class certification decisions are necessarily case specific, district courts possess significant latitude in deciding whether or not to certify a class.") (internal citation omitted).

SUMMARY OF ARGUMENT

The District Court's decision to certify the classes should be upheld. The District Court did not abuse its broad discretion when it certified two classes – the TVPA class and the unjust enrichment class – where Plaintiffs' and the class members' claims are based on uniform policies applied to immigrant detainees housed at a single detention center under the same conditions of confinement. The District Court's findings of commonality, typicality, predominance, and superiority for each certified class were well grounded in law and fact and well within the District Court's discretion.

After twice failing to secure reconsideration or review of the District Court's order denying its motion to dismiss, GEO now seeks a third bite at the apple on the merits. To do this, GEO ignores the standard of review and attempts to use this appeal as a backdoor attack on the merits and purported novelty of Plaintiffs' claims. Although Plaintiffs are confident they will be able to demonstrate the merits of their claims, whether Plaintiffs can or should prevail on the merits is not the proper inquiry in this appeal. The appropriate focus is whether Plaintiffs' claims can be tried on a class-wide basis. On that question, the District Court, GEO, and Plaintiffs agree on nearly all of the key facts and the applicable legal standards on which the District Court based its decision to certify the classes. Specifically, GEO acknowledges that it applied its Sanitation Policy and VWP to class members uniformly, without individual differences in punishment threatened or payment offered. Aplt. App. 650-56; Aplt. Br. 6-11. These policies, and the uniform conditions of confinement in which they were applied, create multiple common questions of law and fact that will drive the resolution of the litigation.

For the TVPA class, whether the Sanitation Policy would coerce a reasonable person in class members' position to labor is a question susceptible to class-wide proof. Whether GEO has a defense rendering such coercion legitimate is also a class question. Whether GEO knowingly coerced detainees' labor in violation of the TVPA is likewise susceptible to class-wide proof because it

concerns GEO's knowledge and intentions. Finally, whether detainees worked *because of* GEO's threat of punishment is a question that can be answered by a class-wide inference of causation, given the uniform circumstances of involuntary detention, the uniform policy and disciplinary scheme applied to all class members, and the threat that detainees' liberty would be even further restrained. Even if one of these questions were individualized – which Plaintiffs do not concede – the common issues in the class would predominate.

For the unjust enrichment class, whether GEO obtained a benefit at class members' expense by paying them $1 per day for janitorial and maintenance duties presents a clear common question. GEO concedes there was no variation in the policy, or the reasonable expectation, from detainee to detainee. Aplt. Br. 11-12 ("The $1 daily allowance has been a settled expectation for decades."), 21 ("Participating detainees sign a form that expressly states that 'work detail members will receive $1.00 per work day."). Although GEO suggests that class members' reasonable expectations could predominate over common issues, it fails to show either that this is an essential element of the unjust enrichment claim or that it would in fact vary from individual to individual – especially given the uniform application of its policy.

Further, the District Court found that the possibility of individualized damages assessments did not defeat the predominance of these key common

questions, a decision firmly grounded in Supreme Court precedent and Tenth Circuit as well as other Circuits' case law.

Finally, GEO fails to show how the District Court abused its discretion in finding the class mechanism superior. There is no similar litigation in progress, the class is dispersed nationally and internationally, and current and former immigrant detainees are among the most vulnerable, least powerful, and least likely to be able to use the American legal system on an individual basis. The class action mechanism achieves efficiency and justice by giving these class members the opportunity to pursue their claims as a group.

For these reasons, and as discussed in greater detail below, the Court should affirm the District Court's order certifying the TVPA class and the unjust enrichment class.

ARGUMENT

I. GEO's Own Arguments Illustrate the Propriety of Class Certification in This Case.

The question on appeal is limited to whether the District Court abused its discretion in certifying the TVPA and unjust enrichment classes. GEO, however, attempts to improperly bootstrap consideration of the merits into this appeal by declaring that "there is no clean line between the profound flaws in the underlying claims and the class certification issues." *See* Aplt. Br. 2. GEO's core argument centers not on whether the District Court abused its discretion in granting class

certification, but instead on the District Court's previous denial of GEO's request to appeal the partial denial of its motion to dismiss. *Id*. Although GEO confuses the issues before this Court, its arguments highlight key class-wide issues that this litigation will raise *after* class certification, and thus reinforce the propriety of the District Court's certification decision.[4]

GEO falls back on two defenses that, if successful, would apply to the class as a whole. Specifically, GEO seeks to defend against the merits of Plaintiffs' TVPA claim by arguing that (1) detainees' status as federal detainees rather than employees should prevent them from recovering any damages, and (2) the "purpose, design or history" of the Sanitation Policy make clear that GEO should not be held liable. *See* Aplt. Br. 38; *id.* at 8-9 (citing inapposite cases holding that requiring detainees to perform housekeeping duties did not violate constitutional

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[4] GEO disparages Plaintiffs' claims as "experimental" and only extant in an "alternative universe." [sic] Aplt. Br. 1, 2. But the TVPA was enacted to prohibit forced labor obtained by various means, from a wide variety of sources. *See* 18 U.S.C. §1589; *United States v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008) (noting that the TVPA was broaden protections beyond the involuntary servitude statute, "to combat severe forms of worker exploitation that do not rise to the level of involuntary servitude"). Similarly, unjust enrichment is an equitable cause of action that creates a remedy for a wide variety of unjust and unfair practices; that unjust enrichment could encompass profiting from unconscionably low wages is not radical.

Most importantly, the alleged novelty of Plaintiffs' claims is a red herring for the purposes of this appeal. Even if, as Judge Kane stated, "[t]he questions posed in this case are complex and novel," the District Court was correct that "the answers to those questions can be provided on a class-wide basis." Aplt. App. 808.

rights). *See also* Aplt. App. 281-83 (considering and rejecting, on GEO's motion to dismiss, GEO's argument that a "civic duty" exception should be read into the TVPA). GEO argues that the TVPA should not apply to its conduct because GEO does not "'knowingly . . . obtain' labor like the trafficker of a domestic servant," but rather, "detainees are in the lawful custody of the federal government" and are not "employees" being extorted. Aplt. Br. 38; *see also id.* at 2-3, 43.

All of these defenses present common questions subject to common proof, and by arguing that Plaintiffs' claims must collectively fail on these bases, GEO concedes the propriety of a class-wide liability determination. *See Torres-Vallejo v. Creativexteriors, Inc.*, 220 F. Supp. 3d 1074, 1082 (D. Colo. 2016) ("[Defendant's arguments contest the merits or veracity of Plaintiffs' claims. . . . If anything, the existence of these disputes relevant to the proposed class as a whole tends to show there are common issues of fact for resolution.").

With respect to the unjust enrichment claim, GEO argues that Plaintiffs failed to demonstrate commonality, typicality, and predominance because a single aspect of the claim – the reasonable expectation of the plaintiff – is subject to individualized rather than class-wide proof. Aplt. Br. 32. First, reasonable expectation is not a required or essential element of an unjust enrichment claim under Colorado law. *See Luttgen v. Fischer*, 107 P.3d 1152, 1157 (Colo. App. App. 2005) ("Unlike the claims for promissory estoppel and negligent

misrepresentation, a plaintiff need not demonstrate justifiable reliance to succeed on a claim of unjust enrichment.") (citing *Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 800 (Colo. 1991)). Second, as with the TVPA claim, GEO's arguments as to the merits of the claim undermine its opposition to class certification. By asserting that "*no* detainee was likely to have a reasonable expectation of an allowance in excess of the $1.00 daily amount," Aplt. Br. 32 (emphasis added),[5] GEO identifies another issue susceptible to class-wide proof: whether Plaintiffs must prove that they had a reasonable expectation of receiving in excess of $1 per day to prevail on this claim. *See Torres-Vallejo*, 220 F. Supp. 3d at 1082. This question is best resolved on a class-wide basis

II. The District Court Did Not Abuse Its Discretion In Certifying The TVPA Class.

GEO largely ignores the applicable "abuse of discretion" standard and instead improperly seeks to re-litigate the District Court's entire Rule 23 analysis and the merits of the case. *See* Aplt. Br. 27-28 (setting forth Rule 23 standard under Standard of Review). As long as the District Court applied the proper Rule 23 standard – which GEO does not dispute, *compare generally* Aplt. Br. *with* Aplt. App. 807-27 (applying same standard for Rule 23 certification) – this Court must

[5] *See also id.* at 47 ("The amount that detainees could expect to be paid for participating in the VWP was disclosed to all detainees upon arrival . . . and again when they applied [to the VWP].").

affirm if the "decision falls within the bounds of rationally available choices given the facts and law involved in the matter at hand." *Stricklin*, 594 F.3d at 1194 (citation omitted). Contrary to GEO's argument, unlike in *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, the District Court here did not presume the class-wide existence of any element of Plaintiffs' claim, 725 F.3d 1213, 1218 (10th Cir. 2013). Rather, the Court carefully considered each element of Plaintiffs' TVPA claim and the common evidence in the record – policy documents, corporate testimony, class member declarations,[6] and the circumstances of immigration detention at a single facility – and concluded that questions answerable by common evidence predominated. Aplt. App. 813-21.

The TVPA prohibits "knowingly provid[ing] or obtain[ing]" the labor of another by means of the following: "force, threats of force, physical restraint, or threat of physical restraint," "serious harm or threats of serious harm," "abuse or threatened abuse of law or legal process," or any "scheme, plan, or pattern

[6] Although GEO argues that Plaintiffs rely on "cookie cutter" declarations, Aplt. Br. 36 n.6, GEO had ample opportunity to depose Plaintiffs in the months of discovery preceding class certification, but did not notice a single deposition. Moreover, the plaintiffs in the case GEO cites for support, *Baricuatro v. Industrial Personnel and Management Services, Inc*, were denied class certification under Rule 23(b)(2) because they presented only declarations and evidence of isolated threats of deportation, but no "uniform policy with uniformity of injury required under Rule 23(b)(2)." No. 11 Civ. 2777, 2013 WL 6072702, at *21 (E.D. La. Nov. 18, 2013) (unpublished). By contrast, the Plaintiffs here present ample evidence of precisely the uniform policy that the *Baricuatro* plaintiffs lacked.

intended to cause the person to believe that, if the 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.

The District Court was persuaded by the analysis in *David v. Signal International, LLC*, No. 08 Civ. 1220, 2012 WL 10759668 (E.D. La. Jan. 4, 2012) (unpublished) that violations of the TVPA include both a subjective and objective 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." Aplt. App. 818-19 (citing *David*, 2012 WL 10759668, at *20). As discussed further below, Plaintiffs disagree with that reading of the statute, but as the District Court also concluded, class certification is appropriate under either statutory interpretation.

A. Commonality

The District Court's finding of commonality under Rule 23 was well within its sound discretion. Rule 23(a)(2) requires that at least one question of law or fact common to the class and central to the validity of the claims exist, such that the class-wide proceeding can generate "common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (citation omitted). *See also Stricklin*, 594 F.3d at 1195 ("A finding of

commonality requires only a singles question of law or fact common to the entire class.").

Here, the District Court correctly concluded that GEO applied the Sanitation Policy uniformly to all class members while they were confined to Aurora, and that class members were all on notice that they were subject to punishment, including solitary confinement, for violation of the policy. Aplt. App. 478 (79:19-80:25). In *Dukes*, the class was improperly certified because it did not meet the commonality requirement without the "glue" of a common policy or method of exercising discretion to bind together thousands of allegedly discriminatory employment decisions. 564 U.S. at 352. Here, by contrast, there is a clear, indisputably common policy, and whether a reasonable person would be compelled to work by means of the policy presents a common question central to the validity of Plaintiffs' claims that may generate a common answer. *See id*. at 350; *see also United States v. Kalu*, 791 F.3d 1194, 1212 (10th Cir. 2015) (threatening foreign nationals "with legal action, revocation of their visas, deportation, and financial ruin, and [in some cases] fear of physical harm . . . are precisely the types of threats that could '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'") (quoting 18 U.S.C. § 1589(c)(2)); *Tanedo v. E. Baton Rough Parish Sch. Bd.*, No. 10 Civ. 1172, 2011 WL 7095434, at *6 (C.D. Cal.

Dec. 12, 2011) (unpublished) (commonality was met with respect to the TVPA claims of teachers whose immigration papers were ransomed for portions of their salary, because "whether Defendants utilized threats of serious financial harm to compel Plaintiffs to work," was a common question, and "if the Plaintiffs were threatened with serious financial harm," this would determine an issue central to their TVPA claim).[7]

Contrary to GEO's argument, Aplt. Br. 37-38, whether GEO "knowingly obtain[s]" detainee labor for the purposes of the TVPA is a common question answerable by class-wide proof. The term "knowingly" adds a scienter requirement to the TVPA, such that "[o]btaining the services of another person is not itself illegal; it is illegal only when accompanied by one of [the] given circumstances" in the statute such as force or threat of force, restraint or threat of restraint, serious harm or threat of serious harm, "and the [factfinder] must find that the defendant knew that the circumstance existed." *United States v. Calimlim*,

[7] *See also In re Urethane Antitrust Litig.*, 768 F.3d at 1254 (district court did not abuse discretion in basing class certification decision on common evidence of key elements of claim, despite potential for individualized questions, including damages issues); *Torres-Vallejo*, 220 F. Supp. 3d at 1084 (certifying class where key elements of the wage and hour claims were likely to be provable on a class-wide basis, including by class-wide policy and class-wide evidence of work performed, despite argument that wage deduction claim requires individualized proof); *Jacob v. Duane Reade, Inc.*, 602 F. Appx. 3, 6 (unpublished) (2d Cir. 2015) (unpublished) (district court did not abuse discretion in finding commonality in misclassification case based on evidence of uniform policies, procedures, and baseline responsibilities that applied to all class members).

538 F.3d 706, 711 (7th Cir. 2008). *See also Muchira v. Al-Rawaf*, 850 F.3d 605, 618 (4th Cir. 2017) (explaining that "'[t]he linchpin of the serious harm analysis under § 1589 is not just that serious harm was threatened but that the [perpetrator] intended the victim to believe that such harm would befall her'" if she did not perform the labor) (quoting *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011)). Thus, whether GEO acted "knowingly" concerns whether it knew that its Sanitation Policy's threat of solitary confinement and other punishment for refusal to work and the otherwise-coercive conditions of confinement would cause detainees to perform labor for free, not whether such a policy was otherwise appropriate given ICE's mandates or the program's design.

Further, whether GEO acted "knowingly," or even, as it maintains, otherwise lawfully, in creating, disseminating, and implementing its Sanitation Policy is a question answerable by class-wide proof.[8] *See In re Tex. Int'l Sec. Litig.*, 114 F.R.D. 33, 39-40 (W.D. Okla. 1987) (scienter presents common issue where there is "an alleged scheme or continuous course of misconduct" despite

[8] GEO also argues that the District Court improperly certified the class absent *additional* evidence that GEO's threat of segregation was the sole reason why class members worked. Aplt. Br. 36-37. Because commonality does not require that *every* question important to Plaintiffs' claims be a common question, Plaintiffs address this argument about the subjective component of the TVPA claim below in discussing predominance. *See Stricklin*, 594 F.3d at 1195. Additionally, whether the TVPA requires that the defendant's conduct be the sole cause of the victim's labor is a legal question common to the class.

argument that basis of defendant's knowledge as to allegedly fraudulent misrepresentation fluctuated over class period); *Mazzanti v. General Electric Co.*, No. 13 Civ. 1799, 2017 WL 923905, at *6 (D. Conn. Mar. 7, 2017) (unpublished) ("A scienter requirement is appropriate for proof on a class-wide basis because it implicates defendant's knowledge and intentional or willful conduct.").

B. Typicality

The District Court did not abuse its discretion in finding that Plaintiffs' claims were "typical of the claims or defenses of the class[.]" Fed. R. Civ. P. 23(a)(3). GEO essentially contends that because the circumstances of Plaintiffs and the class are not identical, they cannot be typical. But this is not the correct inquiry. "[E]very member of the class need not be in a situation identical to that of the named plaintiff to meet Rule 23(a)'s commonality or typicality requirements." *Stricklin*, 594 F.3d at 1195 (internal quotation omitted). Because typicality tests "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct," typicality and commonality tend to merge. *Morris v. Davita Healthcare Ptnrs., Inc.*, 308 F.R.D. 360, 372 (D. Colo. 2015) (internal quotations omitted).

Whether or not Plaintiffs assert explicitly that they worked due to a threat of solitary confinement, "[d]iffering 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." *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1216 (10th Cir. 2014). It is enough that class members and representative Plaintiffs were all subject to the same policy while detained at Aurora, that the policy threatened punishment, including solitary confinement, for all persons in GEO's custody who refused to work, and that class members and representative Plaintiffs claim that the policy coerced their labor in violation of the TVPA. Aplt. App. 437-55, 650-56; Aplt. Br. 6-11.

C. Predominance

To satisfy predominance under Rule 23(b)(3), "[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 v. Broad & Cassel*, 773 F.3d 1076, 1087 (10th Cir. 2014) (citing *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 467-68 (2013)). Rather, "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." *CGC Holding Co.*, 773 F.3d at 1087 (internal quotation marks and citation omitted).

1. The Question Whether Class Members Labored Because of GEO's Policy Does Not Defeat Predominance

GEO argues that the subjective component of Plaintiffs' TVPA claim – whether class members labored *because of* GEO's threat of discipline – presents individualized issues that predominate over issues common to the class. Aplt. Br. 40. As an initial matter, Plaintiffs dispute that that their TVPA claims call for a subjective analysis. *See, e.g.*, *Tanedo*, 2011 WL 7095434, at *7-8 (applying "reasonable person" standard); Aplt. App. 414-16. But even if this Court, like the District Court, agrees with GEO that Plaintiffs' TVPA claim entails a subjective component, the Court should affirm the District Court's conclusion that any subjective inquiry is susceptible to common proof. Aplt. App. 818-20.

The District Court reasoned that a jury could rely on class-wide circumstantial evidence to infer that GEO obtained class members' labor "by means of" of the requirement to work and the threat of discipline for not working. *See* Aplt. App. 818-20. The Court did not conclude that the jury would be *required* to draw such an inference, nor did it draw such an inference itself. Rather, as this Court reasoned in *CGC Holding Co.*, the District Court concluded that the trier of fact would "merely [be] permitted to utilize [such an inference] as common evidence" in deciding whether the class had established the legal elements of its claim. *CGC Holding Co.*, 773 F.3d at 1093; Aplt. App. 819.

That conclusion is proper for three reasons. ***First***, Section 1589 is rooted in the Thirteenth Amendment's core concern with institutionalized forced labor. Where forced labor takes this institutionalized form, logic and history counsel against scrutinizing the mind of the laborer for direct evidence of involuntariness. *See, e.g.*, *David*, 2012 WL 10759668, at *21 ("[T]here may be cases where consent becomes irrelevant."). In his concurrence in *United States v. Kozminski*, Justice Brennan wrote:

> It is of course not easy to articulate when a person's actions are "involuntary." In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, *or go to jail*. We can all agree that these choices are so illegitimate that any decision to work is "involuntary."

487 U.S. 931, 959 (1988) (emphasis added).[9] Here, detainees and named Plaintiffs were already jailed, confined, and given the choice of non-paying work or further punishment, including heightened levels of confinement such as solitary confinement, all while GEO purported to exercise its authority pursuant to a government contract. This case, involving forced labor performed in an

[9] In *Kozminski*, the Supreme Court interpreted "involuntary servitude" under 18 U.S.C. § 1584 to "encompass those cases in which the defendant holds the victim in servitude by placing the victim in fear of . . . physical restraint or injury or legal coercion." 487 U.S. at 952. The TVPA was enacted to broaden what Congress perceived to be a narrow definition of "involuntary servitude" in *Kozminski*, to include conduct in addition to physical or legal coercion that can have "the same purpose and effect." *See* 22 U.S.C. § 7101(b)(13); *United States v. Kaufman*, 546 F.3d 1242, 1261 (10th Cir. 2008).

institutionalized civil detention context, is the epitome of the case in which circumstantial evidence of causation is appropriate.

Second, the particular class-wide facts of this case would allow a fact-finder to draw a class-wide inference of causation. In *CGC Holding Co.*, this Court explained that in certain circumstances, an individual's behavior on its own can constitute circumstantial evidence that she behaved a particular way because of another's assurances or threats. In that case, "the fact that a class member paid [a] nonrefundable upfront fee . . . for [a] loan commitment constitutes circumstantial proof of reliance on the misrepresentations and omissions regarding [the defendants'] ability or intent to fund the promised loan." 773 F.3d at 1091-92. In the court's view, *CGC Holding Co.* involved a "*quid pro quo*" not present in other cases where individualized issues had defeated class certification: if a class member paid money for a loan it was likely that she had relied on assurances that the loan would be available. *Id.* at 1091-93.

A fact-finder could rely on similar reasoning to infer causation across the class when evaluating Plaintiffs' TVPA claims. As a general matter, when someone is threatened with discipline for not "clean[ing] walls, sinks, and toilets [or] sweeping and mopping . . . floors," Aplt. App. 467-68 (36:13-37:4), 470 (45:6-25), 471 (51:3-52:23), and that person then performs those cleaning tasks, it is logical to conclude that she did so *because of* the threats. *See CGC Holding Co.*,

773 F.3d at 1091-92. GEO's suggestion, unsupported by any evidence, that predominance cannot be met because some detainees may have complied with the Sanitation Policy voluntarily, Aplt. Br. 3-4, is akin to the claim that, had a facility denied the detainees food, an inference of class wide predominance could be defeated by the mere suggestion that some of the detainees were on a diet.

Here, such an inference is supported by more than common sense. It finds further support in other class-wide facts identified by the District Court. As the District Court recognized, GEO uniformly applied its Sanitation Policy to immigrants in a "climate in which they were detained," deprived of their liberty, subject to the discipline of guards, with limited access to emotional, social, and financial resources and subject to forcible removal from the United States. Aplt. App. 746-51. They were thus inherently vulnerable to GEO's threats.[10] Further, these threats were extreme: any failure to work could result in serious discipline, including up to seventy-two hours in or solitary confinement. Aplt. App. 471 (52:12-20), 722. The inherent coerciveness of the detention context and the

[10] *Kozminski* explained: "[A] trial court could properly find that evidence of other means of coercion or of extremely poor working conditions is relevant to corroborate disputed evidence regarding the use or threatened use of physical or legal coercion, the defendant's intention in using such means, or the causal effect of such conduct." Kozminski, 487 U.S. at 952. The Supreme Court further recognized there the unique vulnerability of immigrants to coercion of their labor. *Id*. at 948 ("[I]t is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude.").

potency of the threats directed toward class members provide additional, class-wide evidence upon which a fact-finder could rely in drawing an inference of causation.

As the Supreme Court and this Court have instructed, in deciding whether to certify a class that will ask the fact-finder to draw an inference based on circumstantial or representational evidence, the court must ask whether the rules of evidence would permit a fact-finder to draw such an inference in an individual case alleging the same theory of liability. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016) (representational method "permissible . . . [where] each class member could have relied on that sample to establish liability had each brought an individual action"); *CGC Holding Co.*, 773 F.3d at 1090 (citing *Klay v. Humana*, 382 F.3d 1241, 1259 (11th Cir. 2004)). That is precisely what the District Court did here. *See* Aplt. App. 818-20 ("Were a jury deciding the individual merits of Representatives[']claims, it surely would be permitted to make such an inference [that GEO's conduct caused detainees' labor]. Thus, it should be allowed on a class-wide basis as well."). An individual detainee could rely on circumstantial evidence, including GEO's clearly stated policies containing threats of discipline, to persuade a jury that she labored because of the threat of what would happen to her if she did not. She would not need to provide direct and individualized evidence of her mental state. Plaintiffs may rely on similar

evidence to persuade a jury on behalf of a class. *See Tyson Foods, Inc.*, 136 S. Ct. at 1046 (where a particular type of evidence "is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class.").

Indeed, other courts have recognized the important role of circumstantial evidence in establishing causation in TVPA cases. In *Kalu*, for example, evidence that the defendant threatened foreign nationals with legal action, deportation, physical harm, and financial ruin was sufficient to support a conviction under the TVPA, as "[t]hese are precisely the types of threats that could 'compel a reasonable person of the same background and in the same circumstances to perform or continue performing labor[.]" 791 F.3d at 1212.

Similarly, in *Dann*, there was sufficient evidence that the defendant intended the victim to believe she would suffer serious harm if she stopped laboring, because "the *inference* was clear" that the victim would owe defendant money if she left, even if the defendant never actually told her that. 652 F.3d at 1171 (emphasis added). Further, in *Dann*, even though there was no evidence that the defendant explicitly threatened the victim with deportation, "a juror could reasonably have concluded that [the defendant] intended to keep [the victim] in fear of serious immigration consequences" where she threatened to send the victim back to Peru. *Id.* at 1172 (noting particularly vulnerable nature of immigrant

victims). The Ninth Circuit in *Dann* concluded that the sum of the threatened harms to the victim, coupled with the jury's reasonable inferences of the defendant's intent to put the victim in fear of those harms, were sufficient to support a TVPA conviction. *Id.* at 1171, 1173 ("[A] juror could further conclude that the *sum* of these threatened harms would have compelled a reasonable person in [the victim]'s position to continue to work for [the defendant.]").

Third, Plaintiffs' evidence showing that GEO enforces its Sanitation Policy with a range of punishment including solitary confinement, presents a sufficient basis for the District Court to find Plaintiffs carried their burden of showing predominance. By contrast, GEO has not presented *any* evidence that class members labored for any reason other than because GEO requires it. In cases where courts have declined to certify a class based on class-wide circumstantial evidence, the defendant has been able to show that it will rely on specific, individualized evidence in mounting a defense. *Compare Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) (noting that defendants produced evidence of individual negotiations to undermine reliance), with *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 120-22 (2d Cir. 2013) (reasonable inference of reliance supported predominance where customers paid allegedly fraudulent invoices and no individualized evidence in

record showed that they paid for reasons other than belief in invoices' accuracy). In this case, GEO has not pointed to any such evidence.

GEO cites to district court cases denying certification of TVPA claims. But such cases, like *David*, involved workers who had the physical freedom to leave their jobs, or involved individualized questions as to the exact threats they faced under differing contracts, debts, or isolated threats of deportation. *See David*, 2012 WL 10759668, at *21; *see also Panwar v. Access Therapies, Inc.*, No. 12 Civ. 619, 2015 WL 329013, at *7 (S.D. Ind. Jan. 22, 2015) (unpublished) (denying certification where underpayment of wages and contracts differed across class); *Baricuatro v. Indus. Pers.& Mgmt. Servs., Inc.*, No. 11 Civ. 2777, 2013 WL 6072702, at *21 (E.D. La. Nov. 18, 2013) (unpublished) (declining to certify Rule 23(b)(2) class of workers subject to differing, isolated threats of deportation not unified by common policy).

This case does not involve any of those individualized issues regarding different promises of payment, sporadic and differing threats of deportation, or deeply-held religious beliefs that could have caused Plaintiffs to work. *See Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1179-80 (9th Cir. 2012) (plaintiffs failed to show violation of TVPA by Church of Scientology where they joined and worked for Church organization due to apparent religious belief and had "innumerable opportunities to leave," as they were living outside the Base with

access to vehicles, phones and the internet). Rather, the ultimate, unifying, and decisive cause of Plaintiffs' work was that they were all unequivocally *in jail*, with *no* other choices, at the command of and punishable by guards who ordered them to work under GEO's uniform policy.

2. The Possibility of Individualized Damages Assessments Does Not Defeat Predominance

GEO argues that the possibility of individual damages assessments defeats predominance.[11] That argument also fails. As an initial matter, the Supreme Court has reaffirmed that plaintiffs can establish damages on a class-wide basis through representational evidence of the sort that would be sufficient to establish damages in an individual case. *See, e.g.*, *Tyson Foods*, 136 S. Ct. at 1046; William B. Rubenstein, Newberg on Class Actions § 12:4 (5th ed. 2017) (explaining that class issues predominate where there is a "method for quantifying individual damages that applies across the board and hence is common to the class").

Here, individual compensatory damages could be calculated based on variables such as hours worked and the prevailing wage rate, *see Francisco v. Susano*, 525 F. App'x 828, 835 (10th Cir. 2013) (unpublished) (noting that

[11] For support, GEO cites to a case with a dramatically different set of facts and claims, *Stender v. Archstone-Smith Operating Trust*, No. 07 Civ. 2503, 2015 WL 5675304, at *10-11 (D. Colo. Sept. 28, 2015) (unpublished). There, damages inquiries defeated predominance because the damages model turned on complicated assumptions about the financial impact of electing units of stock, class members' marginal tax rates and whether they took deductions or offsets. *Id*.

"requiring those who have engaged in or benefited from forced labor to rectify the wrong by compensating the victim at the prevailing wage rate for the work done" is a permissible way to calculate compensatory damages under TVPA, and punitive damages are also available), and punitive damages could be calculated based on class-wide considerations like the severity of threatened punishment, *see Taha v. Cnty. of Bucks*, 862 F.3d 292, 308-09 (3d Cir. 2017) (differing punitive damages amounts for individual plaintiffs did not defeat predominance, where essential element to defendant's liability for punitive damages was willfulness, a common issue). Again, these are precisely the sorts of considerations that Plaintiffs would rely on to establish damages in an individual case, and they should be permitted to rely on them in proving the damages of class members. *See Tyson Foods, Inc.*, 136 S. Ct. at 1046.

But even if damages cannot be determined by formula, this Court and other Courts of Appeals around the country have held that the possibility of individual damages determinations does not defeat predominance. *See, e.g., In re Urethane Antitrust Litig.*, 768 F.3d at 1254 ("Class-wide proof is not required for all issues," so individualized damages do not defeat certification); *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 408 (2d Cir. 2015) (same); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 374-75 (3d Cir. 2015) (same); *Pulaski & Middleman, LLC v.*

Google, Inc., 802 F.3d 979, 987-88 (9th Cir. 2015) (same); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (same).

There are many tools within the trial court's discretion that would allow for individualized damages determinations to follow resolution of the important and class-wide liability issues in this case. "There are ways to preserve the class action model in the face of individualized damages," including dividing the class into subclasses for adjudication of damages or certifying a class for liability purposes only, with subsequent proceedings to calculate damages. *XTO Energy, Inc.*, 725 F.3d at 1220 (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg, J. and Breyer, J., dissenting)). As the District Court recognized, these tools are available to it as it exercises its discretion with an eye toward the "just, speedy, and inexpensive" resolution of the TVPA claims of the numerous current and former GEO detainees included in the TVPA class. Fed. R. Civ. P. 1; App. 808, 825-26. The District Court did not abuse its discretion in allowing Plaintiffs' TVPA claims to move forward on a class-wide basis. "[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." *XTO Energy, Inc.*, 725 F.3d at 1220.

D. Superiority

GEO claims that a class action is not a superior means to resolve Plaintiffs' claims, arguing, without any authority, that an APA action, request for an injunction, or governmental administrative oversight are better avenues for challenging the Sanitation Policy. Aplt. Br. 31. 45. However, the fact that Plaintiffs and the class members could hypothetically challenge the terms of their confinement through other avenues is distinct from whether the District Court abused its discretion in finding the class mechanism is a superior procedural device for adjudicating the TVPA claim that Plaintiffs brought. It did not.

Class treatment is superior where it will "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." *CGC Holding Co.*, 773 F.3d at 1096 (quoting *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). In these circumstances, as the District Court correctly concluded, a single class proceeding is superior to individual actions that would be nearly impossible to bring due to the detainees' disparate locations, vulnerabilities, limited access to resources, and limited language proficiency. Aplt. App. 821, 826.

Other courts have found the class action mechanism superior in cases involving vulnerable populations like immigrant or migrant workers and prisoners. *See Silva-Arriaga v. Tex. Exp., Inc.*, 222 F.R.D. 684, 691 (M.D. Fla. 2004) (class

action superior to joining individual migrant agricultural workers in wage and hour claims, given class members' "limited English skills and limited understanding of the legal system, along with the fact that few live permanently within the [district]"); *Ramirez v. DeCoster*, 203 F.R.D. 30, 36 (D. Me. 2001) (class action mechanism superior where "[e]ach individual claim is relatively modest, these plaintiffs live at great distances from Maine and are not wealthy" and "some of them have language obstacles"); *Leyva v. Buley*, 125 F.R.D. 512, 516 (finding superiority where class of immigrant workers were unlikely to be permanently located in the district, had limited English proficiency, and lacked familiarity with U.S. legal system); *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 230 (2d Cir. 2006) (class action mechanism superior for prisoners challenging strip searches where prisoners were unlikely to know their rights).

Fear of retribution by class members currently detained in Aurora also makes the class mechanism superior to individual lawsuits. *See Noble v. 93 Univ. Pl. Corp.*, 224 F.R.D. 330, 346 (S.D.N.Y. 2004) (in class action for overtime pay, superiority requirement was "easily satisfied" where "there [was] reason to believe that class members may fear reprisal and lack familiarity with the legal system, discouraging them from pursuing individual claims"); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 268 (D. Conn. 2002) (class action superior for labor law claims

where individual class members might fear reprisal for bringing individual suits against employer).

III. The District Court Did Not Abuse Its Discretion In Certifying The Unjust Enrichment Class.

To succeed on their unjust enrichment claim under Colorado law, class members must show that "(1) at [class members'] expense; (2) [GEO] received a benefit; (3) under circumstances that would make it unjust for [GEO] to retain the benefit without paying." *Dudding v. Norton Frickey & Assocs*., 11 P.3d 441, 445 (Colo. 2000) (en banc). An unjust enrichment claim arises "not from consent of the parties, as in the case of contracts, express or implied in fact, but from the law of natural immutable justice and equity." *DCB Const. Co., Inc. v. Cent. City Dev. Co.*, 965 P.2d 115, 119 (Colo. 1998) (en banc), *as modified on denial of reh'g* (Aug. 18, 2008). The unjust enrichment doctrine creates a contract implied in law, which "is not really a contract at all, and may even be imposed in the face of a clearly expressed contrary intent if justice requires." *Id.*

Assessment of an unjust enrichment claim involves "careful consideration of particular circumstances" surrounding the defendant's retention of the benefit. *See Lewis v. Lewis*, 189 P.3d 1134, 1140 (Colo. 2008) (en banc), *as modified on denial of reh'g* (Aug. 18, 2008). However, detainees' reasonable expectations are not the most important or even a necessary element of such an assessment. *See Luttgen v. Fisher*, 107 P.3d 1152, 1157 (Colo. App. 2005) ("Unlike the claims for promissory

estoppel and negligent misrepresentation, a plaintiff need not demonstrate justifiable reliance to succeed on a claim of unjust enrichment." (citing *Ninth Dist. Prod. Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788, 800 (Colo. 1991))). Rather, as the District Court properly concluded, consideration of the particular circumstances – here, the uniform and unique context of detention, coupled with a uniform VWP applied to all class members – does not require individualized assessments in this case. Aplt. App. 824-25.

A. Commonality and Typicality

The District Court correctly concluded that the question of whether GEO received a benefit from class members' labor is a common question, "the determination of which will resolve an issue central to the validity of the unjust enrichment claim in one stroke." Aplt. App. 823; *see also Dukes* 564 U.S. at 349-50. The VWP is a uniform policy that paid $1 per day to all who labored under it, regardless of duties or hours worked, resulting in dramatically discounted labor – a benefit GEO received at class members' expense. *Cf. DCB Const. Co.*, 965 P.2d at 120 ("there is no question that any benefit [defendant] received came at [plaintiff's] expense" where plaintiff "performed construction work on [defendant's] building over a period of approximately six months," and was paid "for only a fraction of the work."); Aplt. App. 606 (47:12-24) (without the VWP, GEO would have to pay prevailing wages for variety of janitorial and maintenance

positions at the facility). That question alone satisfies commonality. *See In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. 652, 667-68 (D. Kan. 2013) (commonality satisfied for unjust enrichment claims based on common course of conduct by defendant in selling plaintiffs motor fuel without disclosing or adjusting for temperature, as common questions were whether defendant received a beneift from its practice, and whether defendant knew of and unjustly retained the benefit).

The District Court also properly found typicality because representative Plaintiffs and other class members all challenge the same work program, were all paid the same amount regardless of hours worked, and were all confined to the same detention facility. *See In re Motor Fuel Temperature Sales Practices Litig.*, 292 F.R.D. at 672 (typicality met where claims of representative plaintiffs and class members based on same legal and remedial theories and arise from same course of conduct – defendant's sale of motor fuel without adjusting for temperature expansion).

Additionally, whether the circumstances surrounding the VWP render GEO's retention of the benefit unjust is a class-wide question in this case. *See Walshe v. Zabors*, 178 F. Supp. 3d 1071, 1087 (D. Colo. 2016) (whether retention of benefit is unjust turns on whether the conduct is somehow "improper," such as conduct involving "bad faith," "fraud," or "coercion"). Although there are some

cases in which the circumstances of many, varying individual transactions – such as those between customers and company agents – prevent certification of an unjust enrichment or unfair business practices claim, the District Court correctly distinguished those claims from Plaintiffs' claims here because the claims hinged on specific and varied representations made to the putative class members. Aplt. App. 824-25 (distinguishing *Friedman v. Dollar Thrifty Auto. Grp.*, 304 F.R.D. 601, 611 (D. Colo. 2015), which denied class certification due to variation in interactions between customers and car rental agents in forming agreements alleged to be unjust). *See also Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1070 (9th Cir. 2014), *abrogated on other grounds by Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017) (where class members rented tools from defendant under same contract but there was variance in oral notice given to class members by defendant's employees about key elements of the contract, there was no commonality as to key issue of material misrepresentation).

Here, Plaintiffs claim that GEO's retention of the benefit is unjust because GEO utilized a policy paying extremely low wages to workers who were all detained, uniquely vulnerable as immigrants, and subject to GEO's physical control, and Plaintiffs allege that by virtue of that coercion, GEO was able to save outside labor costs. The purportedly "unjust" circumstances here are all susceptible to common proof.

B. Predominance

The District Court did not abuse its discretion in finding that common questions predominate for the unjust enrichment class. As noted above, asssessment of whether retention of the benefit is unjust is context-specific, and, in this context, susceptible to class-wide proof. Because individualized assessments of the detainees' reasonable expectations are not a necessary element of the unjust enrichment analysis, *see Luttgen*, 107 P.3d at 1157, this Court should reject GEO's argument that assessments of "reasonable expectation" would defeat predominance, Aplt. Br. 46-47, 51-52. Moreover, even if reasonable expectations were a necessary or important element of Plaintiffs' unjust enrichment claim, GEO makes the contradictory argument that *no* expectations of payment above $1 per day were reasonable, a class-wide defense that bolsters the finding of predominance. *See* Aplt. Br. 47 ("The record shows that any expectation of payment in excess of the daily allowance would likely have been unreasonable," since all participants in the VWP knew about the daily allowance upon arrival and application to the program).

As discussed above, individual issues might predominate in unjust enrichment cases involving transactions over products such as rental cars, because they involve individual oral transactions between customers and agents. *See Friedman v. Dollar Thrifty Auto. Grp.*, 304 F.R.D. 601, 611 (D. Colo. 2015).

Similarly, in *In re Motions to Certify Classes Against Court Reporting Firms*, which GEO cites for the proposition that courts rarely certify unjust enrichment claims for class treatment, Aplt. Br. 49, the deceptive practices and unjust enrichment claims for court transcript charges involved individualized inquiries into whether particular class members had reviewed invoices, negotiated special rates, or been repeat customers. 715 F. Supp. 2d 1265, 1268, 1282-83 (S.D. Fla. 2010). Here, by contrast, there were no individual agreements or negotiations. The VWP was a uniform policy whose terms were non-negotiable. Aplt. App. 604 (38:20-39:1), 704. This is consistent with GEO's cited authority, which noted that deceptive practices claims *can* be proven on a class-wide basis in some cases, such as "a merchant that charges a greater sales tax than allowed by law," or a cruise line that used "port charge[s]" that were "nothing more than a profit center for the cruise line." *In re Motions to Certify Classes Against Court Reporting Firms*, 715 F. Supp. 2d at 1282-83 ("We would not hesitate to say that an intentional overcharge . . . which is kept by the company itself, is an unfair and deceptive trade practice . . . . That is so even though the consumers clearly were willing to pay the price charged.") (internal citation and quotation omitted).

Thus, the District Court did not "flip[] the burden of proof" by noting that GEO had failed to explain why the unjust circumstances of its retention of the benefit would *not* be the same across the class. Aplt. Br. 50. On the contrary, the

District Court merely highlighted that here the Plaintiffs met their burden to show overwhelming evidence of a common course of conduct by GEO – the uniform VWP and the uniform payments – without variation as to individual class members. Because this common course of conduct is the focus of Plaintiffs' unjust enrichment claim, the factfinder could assess evidence of the unjust nature of the benefit conferred on GEO on a class-wide basis. Faced with this common proof, GEO failed to show why individualized inquiries should predominate.

As to damages, the District Court properly exercised its discretion in finding individualized damages issues would not predominate. Aplt. App. 825. Plaintiffs have shown that class-wide liability issues predominate and have no burden to produce an expert opinion or detailed model for calculating damages. *See Tyson*, 136 S. Ct. at 1046; *supra*, Section II.C.2. Further, damages determinations here would not be unduly complex or novel, but rather would track similar cases involving underpayment of wages, considering factors such as hours of work performed, types of work, and the minimum wage and/or fair market value of the work, and could include representative evidence. *See In re Urethane Antitrust Litig.*, 768 F.3d at 1254 (individualized damages questions do not defeat certification); *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) ("In wage-and-hour disputes, such individualized damages inquiries are common, and typically do not defeat certification."); *In re Motor Fuels Temperature Sales*

Practices Litig., 292 F.R.D. at 674-75 (possibility of individualized damages determinations did not defeat certification of unjust enrichment claims); *Day v. Celadon Trucking Servs., Inc.*, 827 F.3d 817, 835 (8th Cir. 2016) (representative evidence as to damages, as well as liability, is permissible under *Tyson*, 136 S. Ct. at 1046); William B. Rubenstein, *Newberg on Class Actions* § 12:4 (5th ed.) (2017) (contrasting "many class actions," such as wage and hour and securities cases, where need to calculate individual damages "is not a problem," with antitrust cases requiring "economists with fancy models to show what the price of the product would have been absent a restraint of trade").

C. Superiority

As with the TVPA claim, GEO argues, again without citation to authority, the class action mechanism is not superior for Plaintiffs' unjust enrichment claim by attacking the merits of the claim. Aplt. Br. 53-54.[12] GEO does not show that the District Court abused its discretion applying Rule 23's superiority standard to this case, which, for the reasons stated in Section II.D., *supra*, is uniquely suited to the efficiencies and underlying purposes of class adjudication.

[12] GEO cites *Alvarado Guevara v. I.N.S.*, 902 F.2d 394, 397 (5th Cir. 1990) to support its argument that unjust enrichment claims are not a proper avenue for challenging the VWP. That case involved Fair Labor Standards Act and constitutional claims against a purported government employer, and therefore did not address the applicability of Colorado's unjust enrichment law to detainee labor for a private company, or the superiority of the class action mechanism to adjudicate the same.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Tenth Circuit affirm the District Court's order granting Plaintiffs' motion for class certification.

REQUEST FOR ORAL ARGUMENT

Plaintiffs request oral argument because this case raises important questions regarding the district court's discretion to manage and certify a class action.

Class actions are critical to securing justice for groups unlikely to be able to bring their claims on an individual basis. Class actions are also particularly suited to claims challenging widespread and consistent policies and practices that affect large groups of people in the same way, like the immigrant detainees here. Overriding the District Court's discretion to certify this action as a class action would deprive a large group of acutely vulnerable detainees of their opportunity to challenge policies that applied and will continue to apply to all of them equally. This is a matter of exceptional importance, and the Court would benefit from oral argument in resolving it.

Dated: August 4, 2017

Respectfully submitted,

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Date: August 4, 2017

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I hereby certify that with respect to the foregoing documents:

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Date: August 4, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, on August 4, 2017, I electronically filed a true and correct copy of the foregoing document and all attachments using the CM/ECF system, which will send notification of such filing to all counsel of record.

Date: August 4, 2017

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