The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THE GEO GROUP, INC.,

Plaintiff,

v.

JAY INSLEE, in his official capacity as the Governor of the State of Washington; BOB FERGUSON, in his official capacity as the Attorney General of the State of Washington,

Defendants.

NO. 3:21-cv-05313-BHS

REPLY IN SUPPORT OF DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The background of this case is straightforward and undisputed. California and Washington passed similar laws, and GEO challenged both of them. The Washington litigation was stayed, and the California case resulted in new case law that favored GEO. Washington's Governor and Attorney General (Defendants) recognized as much, and told GEO and this Court that they would not enforce the challenged Washington statute at the NWIPC. That is the way government is supposed to work: the law changed, and state officials responded accordingly.

GEO nonetheless staggers forward, seeking to prolong this litigation. But GEO's Reply in Support of Summary Judgment and Response to Defendants' Cross-Motion, ECF No. 74 (Response), confirms that it lacks standing to obtain an injunction restricting Defendants from taking an action they have already committed not to take. For the same reasons, this controversy is moot. And even if the case were justiciable, GEO falls well short of demonstrating any of the factors required for a permanent injunction—an injunction which, according to GEO, should permanently extend this Court's jurisdiction to monitor Washington's highest elected officials forever. Such a sweeping request has no basis in law or fact. The Court should deny GEO's motion, enter summary judgment for Defendants, and close this case.

II. ARGUMENT

A. GEO Cannot Meet Its Burden to Demonstrate Standing Following Defendants' Disavowal of Enforcement

GEO argues that standing is exclusively "backwards looking," and that it is enough that GEO had standing "at the time the complaint was filed." *See* Response at 8-9. GEO is wrong. "The party asserting federal jurisdiction" bears the burden to establish standing "*at every stage of the litigation*." *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1141 (9th Cir. 2010) (emphasis added). In addition, the plaintiff at each stage "must demonstrate standing . . . for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Under these rules, because GEO is seeking a declaration and an

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injunction *now*, it must show a "concrete and particularized," and "actual or imminent" harm that is occurring *now*. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

GEO cannot do so because of Defendants' Notice disavowing enforcement. Many of the appellate cases Defendants cited match the procedural posture here, where intervening notices of non-enforcement extinguished standing *after* the complaint had already been filed. *See, e.g.*, *Mink v. Suthers*, 482 F.3d 1244, 1250, 1255 (10th Cir. 2007) (no standing based on "written 'No File' decision" which was written after litigation commenced); *Winsness v. Yocom*, 433 F.3d 727, 731, 735 (10th Cir. 2006) (no standing where affidavits by prosecutors filed during litigation made clear that they had "no intention of prosecuting [plaintiff] under the statute"); *D.L.S. v. Utah*, 374 F.3d 971, 974-75 (10th Cir. 2004) (no standing where affidavit filed during litigation made it "exceedingly unlikely" that county prosecutor would enforce challenged statute against plaintiff); *Bronson v. Swensen*, 500 F.3d 1099, 1109 (10th Cir. 2007) (no standing, in part due to "policy statement" of non-enforcement issued by Attorney General the year after litigation was filed).

The same is true of the district court cases cited by Defendants. *See Union Pac. R.R. Co. v. Sacks*, 309 F. Supp. 3d 908, 916-17 (W.D. Wash. 2018) (no justiciable claim where "clarifying declaration" filed during litigation made clear that state agency "'will not enforce its [challenged] rule . . . against any interstate railroad'") (quoting declaration); *Downtown Soup Kitchen v. Municipality of Anchorage*, 576 F. Supp. 3d 636, 646-47, 661 (D. Alaska 2021) (no standing because affidavit submitted during litigation was "sufficient to establish that [future] enforcement against [plaintiff] is unlikely," even though ordinance had been enforced against plaintiff in the past); *W. States Trucking Ass'n v. Becerra*, No. 5:19-CV-02447-CAS (KKx), 2020 WL 2542062, at *6 (C.D. Cal. May 18, 2020) (no standing where California's litigation briefing and statements at oral argument "effectively disavowed any intent to prosecute [plaintiff organization's] members"); *Assoc. Or. Indus. v. Avakian*, No. CV 09-1494-MO, 2010 WL 1838661, at *2 (D. Or. May 6, 2010) (no standing because defendant "explicitly disavowed"

enforcement against plaintiffs through litigation declaration "and through counsel in open court"); *Weber v. Lockyer*, 365 F. Supp. 2d 1119, 1122, 1125 (N.D. Cal. 2005) (no standing based on "Information Bulletin issued by the California Department of Justice" after litigation began that would limit challenged law's applicability to plaintiffs).

GEO does not grapple with these precedents, omitting to discuss or distinguish any of their standing holdings. But the reasoning of these cases is on all fours with the matter here, and it necessitates summary judgment for Defendants. To be clear, GEO submitted no evidence—not even a single declaration—in support of its claim of *ongoing* harm. Following Defendants' disavowal of enforcement at the NWIPC, that silence is dispositive. There is simply no evidence in the record of any "continuing, present adverse effect[]" on GEO that could conceivably support an injunction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). *See also Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 n.5 (9th Cir. 2008) ("A plaintiff's basis for standing must *affirmatively appear* in the record.") (emphasis added).

GEO's cited cases are not the contrary. In one, the plaintiffs had not sufficiently alleged standing in the complaint, and the Supreme Court declined to permit intervening developments to cure deficiencies that exist "when the complaint is filed." *Lujan*, 504 U.S. at 571 & n.4. In others, even though intervening developments rendered injunctive relief unavailable, plaintiffs retained standing to pursue monetary relief. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 186-88 (2000) (plaintiff retained standing to seek civil penalties even after defendant came into compliance with Clean Water Act); *Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 838 & n.4 (9th Cir. 2007) (per curiam) (plaintiff retained standing to seek attorneys' fees and costs as prevailing plaintiff, even though defendant's business had since closed). None of these cases has any application here, where GEO requests only prospective relief and, in the words of GEO's own case, bases that request on a "speculative chain of [future] possibilities." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013).

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GEO's two remaining responses on standing are similarly weak. First, GEO argues that because the Ninth Circuit found standing in *Newsom*, this Court should reflexively find it here. Response at 10. But again, this argument would require the Court to ignore all developments since *Newsom*—including the new law that *Newsom* announced and that Defendants' Notice acknowledges. These developments bear on standing, and the Court must factor them into its analysis. In arguing to the contrary, GEO merely reasserts its argument that the standing inquiry is limited to the date the case was filed, a theory refuted by the extensive disavowal case law cited above.

Second, GEO asks the Court to skip over standing in order to prevent "the waste of already-spent judicial resources." Response at 9. That makes no sense. To date, the Court has not issued a substantive order in this case, instead agreeing with the parties to *conserve* judicial resources by waiting to see if *Newsom* would "simplify issues of proof and questions of law in this action." Stipulation to Stay Case Until After Issuance of Mandate in *Newsom* at 1, ECF No. 57; Order Granting the Parties' Stipulation to Stay Case Until After Issuance of Mandate in *Newsom*, ECF No. 58.

Newsom did just that. But now, instead of accepting Defendants' Notice of disavowal, GEO seeks a broad permanent injunction that extends to entities other than GEO, covers facilities that do not yet exist, and which would require the Court to "retain jurisdiction" permanently to "enforce[] th[e] Order" against Washington's highest elected officials. Proposed Order at 3-4, ECF 71-2.[1] Far from conserving judicial resources, GEO's approach would constitute "a major continuing intrusion of the equitable power of the federal courts" into state functions, which is wholly unwarranted given "the necessarily conjectural nature of the threatened injury." *O'Shea v. Littleton*, 414 U.S. 488, 502 (2001).

[1] GEO's Response equivocates on whether it continues to seek relief on behalf of non-party "Persons." *See* Response at 22 n.5 (calling Defendants' objections to relief for non-parties "irrelevant," but also arguing that future (though currently non-existent) GEO facilities should be covered by an injunction "[e]ven if the permanent injunction should not extend to all persons"). Because GEO has not submitted a revised proposed order, Defendants assume that GEO continues to seek a permanent injunction applicable to non-parties.

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In sum, intervening developments since *Newsom* prevent GEO from demonstrating standing to seek declaratory or injunctive relief. Because GEO lacks standing, the Court should grant summary judgment to Defendants and dismiss the case.

B. For All the Same Reasons GEO Lacks Standing, This Case Is Moot

In addition to lacking standing at the summary judgment stage, GEO's claims are all now moot. If it so chooses, the Court has discretion to rule based on mootness alone, rather than first considering standing. *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 66-67 (1997) (federal courts "may resolve the question whether there remains a live case or controversy . . . without first determining whether [plaintiff] has standing"). Whatever order the Court considers the issues, it is plain that intervening developments have mooted this case. Defendants' filing of their Notice accepting *Newsom* means Defendants "ha[ve] now announced" a change in policy with respect to enforcement of RCW 70.395.030 at the NWIPC that renders the case "moot." *Lyons v. City of Los Angeles*, 615 F.2d 1243, 1245 (9th Cir. 1980). *See also City of Auburn v. U.S. Gov't*, 154 F.3d 1025, 1028 n.5 (9th Cir. 1998) (holding Supremacy Clause claim moot because "the occurrence of intervening events renders a decision unnecessary").

GEO raises three objections to a finding of mootness, arguing Defendants' Notice is "[t]emporary, [c]onditional, and [s]ubjective." Response at 11. None of these characterizations accurately describes the Notice's application to this dispute, and none is sufficient to defeat mootness under established law.

Temporary. GEO first claims this case is not moot because there is a possibility that the Notice of disavowal constitutes a "voluntary cessation," instead of a "permanent" change. Response at 11-12. But as GEO's authorities confirm, the voluntary-cessation doctrine is an exception to mootness when officials voluntarily pause their actions, but "warn that [challenged] practices may be resumed *at any time*." 13C Charles A. Wright & Arthur R. Miller, Discontinued Off. Action, Fed. Prac. & Proc. Juris. § 3533.7 (3d ed.) (2023) (emphasis added). *See also Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (no mootness where conduct

could resume "as soon as the case is dismissed"); *Lyons*, 461 U.S. at 100-01 (no mootness where "a six-month moratorium" was imposed on challenged policy and officials asserted authority to lift it "at any time"); *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005) (state counsel's oral argument confirmed it was "probable" that challenged practices would resume).

But here, Defendants have not placed a time limit on their disavowal, nor have they claimed unilateral authority to change positions in the future. Instead, their disavowal is based on the Ninth Circuit's new, controlling decision in *Newsom* and applies for "as long as *Newsom* remains the law of the Ninth Circuit." ECF 65 at 2. That decision is not a voluntary change in position on Defendants' part—it is a "change in [appellate] case law coupled with evidence of [Defendants'] compliance with that case law." *Cook v. Brown*, 364 F. Supp. 3d 1184, 1189 (D. Or. 2019). "Therefore, the voluntary cessation doctrine is inapplicable," and GEO's objection to mootness is without merit. *Id.*

Conditional. GEO next objects that Defendants' Notice is conditioned on *Newsom* remaining controlling law. Response at 17. But that condition should be utterly unsurprising—*Newsom* is the entire basis for GEO's present motion as well as Defendants' Notice disavowing enforcement. If the law changes in the future, the parties will need to respond accordingly. It is silly for GEO to argue that a live controversy exists between the parties today, just because Congress or the Supreme Court—entities the parties here do not control—may someday change the law. *See, e.g.*, *Mayfield v. Dalton*, 109 F.3d 1423, 1425 (9th Cir. 1997) (case was moot where alleged harm rested on actions federal government may take "only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable"); *Foster v. Carson*, 347 F.3d 742, 748 (9th Cir. 2003) (dismissing case as moot where remaining harm depended on "[h]ow the political branches" and "state judicial system" address issue going forward, which were "all unknown"); *Union Pac. R.R.*, 309 F. Supp. 3d at 919 ("Plaintiff's argument, that the Defendant has left the door open for some kind of future enforcement, is speculative, at best, and depends on possible actions by third parties that could result in a change in the law.").

Defendants' Notice applies as long as *Newsom* controls, and that is enough to render this case moot.

Subjective. Lastly, GEO argues that Defendants' Notice is subjective because it "does not bind any other current or future actors" who may seek to enforce RCW 70.395.030 against GEO. Response at 16-17. Assuming GEO's argument is limited to Defendants' successors-in-office in their official capacities (as it must be, as no other defendant is before the Court), GEO's argument is still off base. A government official's "litigation position . . . conveyed to a court" about future enforcement of a statute against a plaintiff "becomes binding in any forum in which the same controversy arises." *Am. Civ. Liberties Union of Nev. v. Masto*, 670 F.3d 1046, 1065 (9th Cir. 2012). *See also New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) ("judicial estoppel prevents parties from playing fast and loose with the courts") (cleaned up) (citation omitted); 18 Moore's Fed. Prac. § 134.30 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."). "The State, like any party, is responsible for official representations that it makes to the court." *Masto*, 670 F.3d at 1065. As a result, GEO is wrong that "nothing would prevent" future state officials from simply changing their minds and again enforcing RCW 70.395.030 at the NWIPC. Judicial estoppel would prevent that, so unlike in GEO's cited cases, state officials are not "practically and legally free to return" at any moment to enforcing RCW 70.395.030 at the NWIPC. *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 772 (9th Cir. 2022) (cleaned up) (quoting *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1039 (9th Cir. 2018)). Defendants' judicial admission renders this case moot. *Id.*[2]

[2] Under these circumstances, GEO's proposed relief also violates the Eleventh Amendment. Following Defendants' Notice, unless there is a change in facts or law, neither Governor Inslee, Attorney General Ferguson, nor any of their successors-in-office can enforce RCW 70.395.030 at the NWIPC. As a result, there is now no "connection between the official sued and enforcement of the allegedly unconstitutional statute," because there is no "threat of enforcement" by the officials GEO sues. *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam). In addition to Article III, therefore, the Eleventh Amendment stands as a prohibitive barrier to GEO's requested injunction.

C. In Addition to Pressing Non-Justiciable Claims, GEO Cannot Meet Any of the Required Permanent-Injunction Factors

As predicted, GEO attempts to argue the injunction factors for the first time on reply. Response at 18-25. GEO claims its approach is permissible because its brief was "both a response and a reply." Response at 22 n.4. Yes, and the part about the injunction was the "reply" part. Because GEO was the movant seeking injunctive relief, its opening brief needed to "specifically and distinctly" argue eligibility for that relief. *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992) (quoting *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986)). GEO provides no authority for the idea that a party may wait until reply before arguing either the standard or the alleged evidence in support of *its own relief request*. GEO has thus waived the argument. *Wolf v. Life Ins. Co. of N. Am.*, 541 F. Supp. 3d 1191, 1197 (W.D. Wash. 2021) ("arguments not raised in the opening brief are ordinarily waived").

But even if the Court considers GEO's brief a pure "response," and the below argument from Defendants therefore a "reply," GEO cannot meet the high bar for obtaining a permanent injunction against state officials. The "proper balance in the concurrent operation of federal and state [systems] counsels restraint against the issuance of injunctions against state officers." *Gomez v. Vernon*, 255 F.3d 1118, 1128 (9th Cir. 2001) (quoting *O'Shea*, 414 U.S. at 499). *See also Lawson v. Hill*, 368 F.3d 955, 960 (7th Cir. 2004) ("A particularly appealing case for withholding injunctive relief is . . . when an injunction is sought against the performance of public functions by the officials of another sovereign[.]"). This longstanding rule stems from principles of federalism and comity, and is not limited, as GEO suggests, to the contexts of criminal prosecutions or internal affairs. *See, e.g.*, *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 350 (1951) (no injunction in civil case about interstate train service based on "avoidance of needless friction with state policies") (citation omitted); *Matthews v. Rogers*, 284 U.S. 521, 525 (1932) (no injunction in civil suit against state tax collectors based on "[t]he

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scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts").

To obtain a permanent injunction, then, GEO must make a "*clear showing*," *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012), on all four required elements: (1) irreparable injury, (2) absence of a remedy at law, (3) a balance of hardships favoring GEO, and (4) public interests that support an injunction, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). GEO can meet none of these.

1. GEO has no injury, and even if it did, GEO would have an adequate remedy at law

GEO does not argue that the mere existence of RCW 70.395.030 causes GEO to lose money, or that anything about the statute has altered its federal contract—including the millions of dollars in guaranteed payments that GEO receives regardless of the number of people it detains. *See* Defs.' Resp. to GEO's Mtn. for Prelim. J., ECF No. 29 at 16-17 (summarizing GEO's profit structure at the NWIPC). Instead, GEO argues exclusively that it will lose money *if* RCW 70.395.030 is successfully enforced against GEO in the future *and* a court order "forces GEO to close its ICE detention facility in Washington." Martin Decl. ¶ 30, ECF No. 9. In light of *Newsom*, this outcome is not possible and the fact that RCW 70.395.030 remains on the books triggers no harm to GEO, let alone irreparable harm. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (an injunction requires "a likelihood of irreparable injury," not "just a possibility" of harm); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1133 (9th Cir. 2014) (injunction must be "grounded in evidence, not in conclusory or speculative allegations of harm").

And even if future enforcement were a possibility—and, unless the underpinnings of *Newsom* change, it is not—GEO would have a remedy at law. Before any court could order the NWIPC shuttered, GEO would be able to present, as defenses, all of the same Supremacy Clause arguments it raises now. A federal plaintiff may not obtain injunctive relief where, in a future

proceeding under the challenged statute, that party would have the right to "appear and assert good faith defenses." *Zimmer v. Connett*, 640 F.2d 208, 209 (9th Cir. 1981). As Judge Posner explained, "an injunction will not be issued when the plaintiff has an adequate remedy at law, which he does if he can assert the ground on which he seeks an injunction as a defense to the very proceeding that the injunction would put a stop to." *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 490 (7th Cir. 1984). This rule is not confined—as GEO claims—to circumstances where there is an ongoing, parallel administrative proceeding. *See Zimmer*, 640 F.2d at 209 (describing future federal civil litigation as the adequate remedy at law). Instead, as long as "[a]ll [GEO's] objections and defenses may be interposed" in a future proceeding, GEO has a "plain, adequate, and complete" remedy at law that prevents the issuance of an injunction. *Georgia v. City of Chattanooga*, 264 U.S. 472, 483-84 (1924). That is the case here.

2. The balance of the equities and public interest are mandatory factors, and GEO does not rebut the evidence that it routinely abuses detained people

Finally, GEO breezily dismisses as "irrelevant" the considerable evidence that GEO abuses and endangers the people it detains. Response at 24. While GEO's wholesale indifference to its own safety record is remarkable, its legal argument is inconsistent with controlling law. In *Winter v. Natural Resources Defense Council*, the Supreme Court made clear that all four elements of the injunction standard—including "that the balance of equities tips in [the movant's] favor, and that an injunction is in the public interest"—must be met. 555 U.S. at 20. In that case, the Court vacated a district court injunction based on the equitable factors "alone," without disturbing "the lower courts' holding that plaintiffs have a likelihood of success on the merits" and "that plaintiffs had established a 'near certainty' of irreparable harm." *Id.* at 22-24 (quoting lower courts). In other words, the equitable factors did *all* of the work to render the injunction unavailable, demonstrating the importance of these factors to the injunction analysis.

The Ninth Circuit has likewise held that the equitable factors may preclude an injunction, including in a case strikingly similar to this one. In *United States v. California*, the

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Court concluded that the United States was likely to succeed on the merits of its Supremacy Clause challenge to a California statute regulating immigration detention. 921 F.3d 865, 894 (9th Cir. 2019). Nonetheless, the Court remanded to the district court for a consideration of the equities, noting "growing concerns of egregious conditions in facilities housing civil detainees." *Id.* Remand would have been pointless, if, as GEO posits, a Supremacy Clause violation *always* satisfies the equitable injunction factors. In remanding for an inquiry into detention conditions, the Ninth Circuit squarely rejected GEO's argument that "a Supremacy Clause violation alone constitutes sufficient harm to warrant an injunction." *Id.*

Following *California*, in order for GEO to obtain an injunction, this Court would have to consider the conditions of confinement at the NWIPC and find that they benefit the public interest and tip the balance of hardships in GEO's favor. *Id.* Given the mountain of evidence showing that GEO's facility is unsafe, unsanitary, and the site of frequent detainee abuse, there is no path by which the Court could reach such a holding. *See* Defs.' Opp'n to GEO's Mtn. for Summ. J. & Permanent Inj. and Cross Mtn for Summ. J. at 25-30, ECF No. 72 (citing evidence); Defs.' Resp. to GEO's Mtn. for Prelim. Inj. at 18-32, ECF No. 29 (same). GEO itself does not even argue that the equities fall in its favor—it just argues that the equities don't count. But controlling case law says they do, and GEO cannot obtain a permanent injunction.

III. CONCLUSION

After *Newsom* changed the law, Defendants committed not to enforce RCW 70.395.030 at the NWIPC. "Nothing in our case law prevents government actors from responsibly retreating from [a] prosecution, in response to controlling [appellate] authority." *Winsness*, 433 F.3d at 736. Defendants' disavowal of enforcement means GEO lacks standing and this case is moot. And GEO has not come close to demonstrating entitlement to a permanent injunction. Defendants respectfully ask that summary judgment be granted in their favor and that this case be dismissed.

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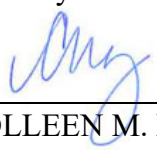
DATED this 11th day of October 2023.

Respectfully submitted,
ROBERT W. FERGUSON
Attorney General of Washington



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I certify that this memorandum contains 4,033 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED this 11th day of October 2023.

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