The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STATE OF WASHINGTON, DEPARTMENT OF HEALTH

Plaintiff,

v.

GEO SECURE SERVICES, LLC; THE GEO GROUP, INC.,

Defendant.

No. 3:24-cv-05029-BHS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

NOTED FOR HEARING DATE: MARCH 22, 2024

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I. INTRODUCTION

On July 13, 2023, in a related case, The GEO Group, Inc. ("GEO") filed a Complaint and Motion for Preliminary Injunction seeking a declaration invalidating and enjoining the enforcement of Second Substitute H.B. 1470, 68th Leg., Reg. Sess. (Wash. 2023) ("HB 1470"). *The GEO Grp., Inc. v. Inslee*, No. 3:23-cv-05626-BHS ("*GEO v. Inslee*"). In response, on August 7, 2023, the State of Washington ("State") filed a Motion to Dismiss, arguing that GEO lacked standing and that the case was not ripe because GEO faced no threat of enforcement. *GEO v. Inslee*, Dkt. *GEO v. Inslee*, Dkt. #17 ("Korrell Ex. 1") at 7-9. The State further represented to this Court that "neither GEO nor the State will be harmed if judicial resolution is postponed," because there was ***no "credible threat of enforcement to justify pre-enforcement judicial review."*** *Id.* (emphasis added). A few weeks later, and before this Court had ruled on the State's motion, the State deployed the Washington Department of Health ("DOH" or "Plaintiff"), the Washington Department of Labor & Industries ("L&I"), and the Tacoma-Pierce Couty Health Department in repeated attempts to enter, inspect, investigate, and enforce HB 1470 at the Northwest ICE Processing Center ("NWIPC" or "Facility"). On each occasion when DOH attempted entry to the NWIPC, ICE explicitly directed GEO to deny access.

DOH and L&I then attempted another end-run around this Court and filed separate actions against GEO and a GEO affiliate in different Washington state courts. GEO properly removed those cases to this Court under the authority of 28 U.S.C. § 1442(a)(1). DOH now appears to have abandoned its motion to remand and instead is pursuing the instant Motion for Preliminary Injunction ("Motion"). Central to DOH's Motion and the narrative of its suit are two critical fictions: (1) the claim that DOH attempted to enter the NWIPC pursuant to statutory authority ***other than HB 1470***, and; (2) the claim that ***it was GEO and not ICE*** that denied DOH entry. However, these factual assertions which are central to DOH's Motion and suit are ***belied by DOH's own sworn declarations***. Whether DOH might be entitled to some relief based on the version of events proffered in its brief (DOH seeking to enter and inspect pursuant to other statutory authority, to enforce other regulatory requirements) is a purely hypothetical question, raising an issue that is

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not prudentially ripe. What DOH actually tried to do (enter the NWIPC and inspect pursuant to HB 1470, which this Court has held is unconstitutional) and what GEO actually did (communicate to DOH the ICE decision to deny entry) cannot give rise to a claim for injunctive relief.

If DOH wants unlimited unannounced access to the NWIPC so it can directly regulate federal immigration detainees in the custody of ICE, it needs to seek that relief not from GEO but from the entity that actually has custody of the detainees and controls access to the Facility. The fact that DOH has not sought the requested relief from ICE[1] strongly suggests that the actual purpose of this case (and a similar case filed by L&I) is to indirectly burden ICE's immigration enforcement operations to advance HB 1470's stated goal of eliminating the same in Washington.

On March 8, 2024, in *GEO v. Inslee,* this Court issued a preliminary injunction in favor of GEO, enjoining any attempt by the State to enforce Sections 2, 3, 5, and 6 of HB 1470. *GEO v. Inslee* Dkt. #35 ("Korrell Ex. 3"). As explained in detail below, DOH's Motion in this case must be denied because (1) it is based on demonstrably inaccurate key factual assertions, (2) DOH has no chance of success on the merits because GEO is immune from suit under the doctrine of Derivative Sovereign Immunity ("DSI"), and its defenses of Intergovernmental Immunity and Preemption are likely to succeed, (3) GEO will suffer irreparable harm if an injunction is granted, and (4) the public interest and balance of equities favor denial of the Motion.

II. BACKGROUND

A. Washington's Sole Dedicated ICE Facility: Northwest ICE Processing Center

There is currently one dedicated federal ICE detention facility in Washington: the NWIPC in Tacoma, with a capacity of 1,575 beds. (*GEO v. Inslee*, Dkt. #10, Amber Martin Decl. in Supp. Of Mot. For Prelim. Inj. ("Martin Decl.") ¶¶ 5, 6).[2] GEO provides secure residential housing and

[1] Although Plaintiff has not sought relief from ICE, the views of the United States regarding attempts to enforce Washington statutes on ICE operations at the NWIPC are detailed in an *Amicus Curiae* brief filed by the United States with the Ninth Circuit just weeks ago in *Nwauzor v. The GEO Grp., Inc.* and *Washington v. GEO Grp., Inc.*, Nos. 21-36024 and 21-36025, ECF No. 114 (9th Cir. Feb 21, 2024) ("Korrell Ex. 2").

[2] For ease of reference, the Martin Decl. and Exhibits A and B to the Martin declaration which are referenced in this brief, have been attached to Korrell Decl. as Exhibits 4-6. However, in this brief they will continue to be referred to as "Martin Decl.", "Martin Ex. A" and "Martin Ex. B."

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support services at the NWIPC pursuant to a contract with ICE. *Id.* ¶¶ 6, 7.

The current ICE contract for NWIPC ("HSCEDM-15-D-00015" or "Contract") mandates, *inter alia*, that GEO provide all services in conformance with the Congressionally mandated Performance Based National Detention Standards ("PBNDS"). *Id.* at ¶ 9. The Contract repeatedly notes that where any other applicable standards conflict with the PBNDS, the PBNDS prevails. *GEO v. Inslee,* Dkt. #10-1, Martin Decl., Exhibit A, ("Martin Ex. A") at 44-46.

The PBNDS set forth detailed requirements and contractors are required to implement all those standards and are regularly audited to ensure compliance. *See GEO v. Inslee*, Dkt. #10-2, Martin Decl., Exhibit B, ("Martin Ex. B"). The current PBNDS were implemented at the direction of Congress:

> Within 45 days after the date of enactment of this Act, ICE shall report on its progress in implementing the 2011 Performance Based National Detention Standards (PBNDS) … including a list of facilities that are not yet in compliance; a schedule for bringing facilities into compliance. … The Committee expects ICE to refrain from entering into new contracts or IGSAs that do not require adherence to 2011 PBNDS standards.

H.R. Rep. No. 114-668, at 35 (2016). The PBNDS applicable to NWIPC are approximately 475 pages long and include detailed standards governing facility (1) Safety, (2) Security, (3) Order, (4) Care, health and welfare, (5) Activities, (6) Justice, and (7) Administration and Management. *Id*. *See* Martin Ex. B.

The Contract also contains requirements that establish ICE control over access to the NWIPC. The Contract Performance Work Statement ("PWS") notes that ***"Pre-clearance approvals are required for access to ICE field staff, facilities and information."*** (Martin Ex. A at 45). Consistently with the requirements of GEO's Contract, ICE exercises exclusive control over all access to secure portions of the NWIPC. *See* ECF 3, Declaration of Bruce Scott in Support of Notice of Removal ("Scott Decl.") ¶ 4. All requests for access to the secure portions of the NWIPC must obtain pre-clearance approvals by ICE, including all requests for access by federal and state employees, as well as GEO employees. GEO is without authority to provide access to the secure portions of the NWIPC absent ICE clearance and approval. *Id*. ¶¶ 5-6.

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B. HB 1470

1. HB 1470 Applies Exclusively to NWIPC by Design

The legislative history of HB 1470 reveals that it was conceived, crafted, and amended specifically to target and impose unique burdens on a single facility—the NWIPC—while specifically exempting any similarly-situated Washington State facilities. The Washington Multiple Agency Fiscal Note Summary accompanying HB 1470 states, "While prior versions of the bill ***could have impacted private detention facilities that DSHS might wish to contract with in the future***, the new language in ***Section 10 of this bill exempts those types of facilities from the new requirements.***" (emphasis added). The Fiscal Note explains: "***New Section 10's criteria reduced the amount of private detention facilities from three to now just one at the Northwest Detention Center in Tacoma.***" (emphasis added). https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=68477.

Consistent with this discriminatory approach, HB 1470 Section 5 creates a private right of action for detained persons and specifies available monetary damages, injunctive relief, and the recovery of attorneys' fees and costs against operators of detention facilities while explicitly exempting Washington State and any of its agencies from the burdens, risks, and potential liability imposed by this private right of action. Similarly, while Section 6 creates a new regime of civil penalties of $1,000 per violation per day applicable to any person who fails to comply with this chapter, it explicitly exempts Washington State and any of its agencies. Section 8 of HB 1470 states that "it is the intent of the legislature to prohibit the use of private, for-profit prisons and detention facilities [NWIPC] in the state."

2. HB 1470 Purports to Regulate all NWIPC Operations and Conflicts with the PBNDS and the Current Contract

HB 1470 Section 2 provides the DOH broad authority to create rules solely applicable to the NWIPC, including rules regarding sanitation, laundry, the temperature in each room, the number of windows, and much more. Section 3 similarly grants broad new rule making, inspection, investigation, and testing powers over the NWIPC to the DOH and L&I. HB 1470 Section 4 also includes numerous mandates regarding clothing, food, telephone access, computer access,

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visitation, health services etc. that must be provided at the NWIPC.

Specific requirements in HB 1470 conflict with various portions of the PBNDS and the NWIPC Contract. These conflicts include, but are not limited to, the following:

(1) HB 1470 § 2(1)(g) requires both heating and air conditioning equipment that can be adjusted by room while the NWIPC split HVAC system is compliant with the NWIPC contract and ICE unique physical and operational requirements applicable to immigrant detention pending removal, including 2005 Health Services Design Standards, 2006 Executive Office for Immigration Review ("EOIR") Standards, and the 2000 International Building code. *GEO v. Inslee,* Dkt. #9 ("Korrell Ex. 7") ¶¶ 8-13.

(2) HB 1470 § 2(1)(e) requires that detainees must be provided fresh fruits and vegetables "not including any processed, canned, frozen, or dehydrated fruits or vegetables" while PBNDS Section 4.1 specifically allows "canned fruit." Martin Ex. B at 243.

(3) HB 1470 § 2(1)(a) requires that a detained person be allowed to possess and use personal belongings, but PBNDS § 2.5 limits personal property and prohibits possession of various categories of personal property. Martin Ex. B at 97.

(4) HB 1470 § 4(e) prohibits "solitary confinement," but "segregation" is permitted and mandated by various sections of PBNDS. Martin Ex. B at 60, 210, 275, 282, 315-316, 454.

As DOH promulgates additional rules and requirements pursuant to Section 2 of HB 1470, this list of conflicting requirements will certainly expand.

3. DOH Attempted to Enter NWIPC Pursuant to HB 1470, and ICE Denied DOH Access

On May 31, 2023, DOH contacted GEO and asserted that HB 1470 provided "authority for our agency to be involved with the [NWIPC]" and requested a meeting to discuss the scope of HB 1470. *See GEO v. Inslee,* Dkt. #1, Complaint ("Korrell Ex. 8") at p. 29. On November 14, 2023, two representatives of the DOH arrived at the federal NWIPC unannounced and demanded unlimited access to the facility under the authority of HB 1470 to investigate complaints about alleged violations of HB 1470. ICE explicitly directed GEO to deny DOH representatives access

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to the facility on November 14, 2023. Scott Decl. ¶¶ 7-8. On November 27, 2023, three individuals from the DOH arrived at the federal NWIPC unannounced and demanded unlimited access to the facility to investigate complaints related to Medical, Food Service, and Laundry pursuant to HB 1470. ICE explicitly directed GEO to deny DOH representatives access to the facility on November 27, 2023. *Id*. at ¶¶ 9-10.

Plaintiff now asserts in its brief that in November of 2023 it was actually seeking access to the NWIPC pursuant to RCW 43.70.170.[3] However, the sworn declarations provided by the Plaintiff do not support this support this assertion. For example, the sworn Declaration of Wendy Yomiko "Miko" Nanto ("Nanto Decl."), the Public Engagement Manger for the DOH Office of the Assistant Secretary (OAS), states:

> I have attempted to enter the facility on two separate occasions to conduct investigations as the Department is required to do by ***RCW 70.395 [a/k/a HB 1470] *** I let him know we were at the facility due to the passing of HB 1470 that allows DOH to conduct investigations and inspections*** regarding health and safety complaints. *** The second attempted entry was November 27, 2023. ***Soleil ***discussed the passing of HB 1470*** and [Facility Administrator Scott] said he needed to speak with the ICE representatives. ****We have not been able to enter the facility to investigate the complaints about violations of RCW 70.395 [a/k/a HB 1470]*** we have received from detainees. The second attempted entry was November 27, 2023.*** [Facility Administrator Scott] informed us we were being ***denied entry due to his discussion with the ICE representatives***.

(emphasis added) ECF 1-1 at 34-38, Nanto Decl. at ¶¶ 12-16. Similarly, in the sworn Declaration of Amanda Soleil Maria Muniz ("Muniz Decl."), the Federal Complaint Enforcement Lead for the DOHOAS, acknowledges that ***DOH only asserted authority to enter the NWIPC pursuant to HB 1470*** and GEO denied entry after discussing with the ICE representatives:

> On November 14, 2023, I went to the NWIPC with my supervisor Miko Nanto.*** [NWIPC staff] were unaware of HB 1470 and did not seem to know anything about DOH coming to enter the facility based upon complaints.*** ***Miko spoke to him and let him know we were at the facility due to the passing of HB 1470 that allows DOH to conduct investigations and inspections regarding health and safety complaints.***** The second attempted entry was November 27, 2023.*** Miko

[3] RCW 43.70.170 addresses investigations of "threats to public health," including "outbreaks of communicable diseases, food poising, and contaminated water supplies." Plaintiff has made no showing whatsoever that a statutory "threat to public health" motivated its attempts to gain unlimited access to the NWIPC in November 2023. While the declaration of Ms. Muniz vaguely asserts that in Paragraph 12 that she attempted to enter the NWIPC pursuant to RCW 43.70.170, this assertion is directly contradicted by other statements in her own declaration at Paragraphs 13-15 and the sworn declarations of Ms. Nanto and Mr. Scott.

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> again clarified that we were with the Washington State Department of Health and were there to investigate complaints. Once again there seemed to be no knowledge of HB 1470 and DOH investigating complaints. *** [Facility Administrator] Scott then said they were not used to DOH coming to their facility and ***I talked a little about the passing of HB 1470.*** He said these types of inspections hadn't happened in previous years, and ***I explained that HB 1470 was just recently passed this year*** and ***he said he needed to go upstairs and speak with the ICE representatives***.*** He returned …and let us know we were being ***denied entry after discussing with the ICE representatives*** due to the ongoing litigation

(emphasis added) ECF 1-1 at 26-30, Muniz Decl. ¶ 13-16 (emphasis added).

Notwithstanding these sworn declarations from DOH's own employees, DOH's current Motion states: "***DOH relies on separate authority to investigate public health threats under RCW 43.70.170***" (Motion at 7) and "***GEO now refuses*** the agencies' entry in violation of clear and long-standing state authority to conduct workplace inspections and investigate public health threats." Motion at 8. What DOH argues in its brief is simply not what is described in its supporting declarations.

4. DOH Complaint

On January 31, 2024, Plaintiff filed a Complaint against GEO seeking an injunction "enjoining The GEO Group, Inc. from refusing entry for the purposes of inspections and investigation." ECF 1-2. Although the Complaint generally asserts that DOH has "authority to investigate public health threats and to enter buildings to do so [pursuant to] RCW 43.70.170," (*Id.* at ¶ 2.2), it only alleges that GEO refused DOH entry to the NWIPC ***when DOH attempted to enter to pursuant to HB 1470*** [RCW 70.395] for the purpose of ***investigating complaint and conducting unannounced inspections under HB 1470***. *Id.* at p. 3.

5. GEO Notice of Removal

On February 2, 2024, GEO filed a Notice of Removal pursuant to 28 U.S.C.A. §§ 1442 and 1446. [ECF 1]. That Notice of Removal alleged sufficient facts to establish (1) GEO is a "person" within the meaning of the federal officer removal statute; (2) it was "acting under" the United States, its officers, or its agencies; (3) the actions for which it is being sued were performed under color of federal authority; and (4) it has a colorable federal defense to the plaintiff's claims. *Id.*

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6. DOH Subsequent Filings

On February 8, 2024, Plaintiff filed a Motion for Remand [ECF 10].

On February 26, 2024, Plaintiff moved to consolidate this case with *Dept. of Labor and Industries v. The GEO Group, Inc.*, Case No. 3:24-cv-05095-BHS ("*L&I v. GEO*"). [ECF 16].

On February 29, 2024, Plaintiff filed this current Motion for Preliminary Injunctive relief apparently abandoning its motion to remand this case to state court. [ECF 24].

7. This Court's March 9, 2024, Order in *GEO v. Inslee*

On March 8, 2024, this Court entered an Order finding GEO had plausibly claimed that Sections 2, 3, 5, and 6 of HB 1470 are unconstitutional and granting GEO a preliminary injunction enjoining the enforcement of those sections of HB 1470.

III. ARGUMENT

The Court should deny DOH's Motion because DOH is not likely to succeed on the merits of its claims, GEO will suffer irreparable harm if the Motion is granted, and the balance of the equities favor denying the motion.

A. DOH Cannot Succeed On The Merits

For the reasons previously detailed in *GEO v. Inslee*, Dkt. #8, 22, 24 and further summarized below, DOH cannot succeed on the merits of its complaint.

1. Derivative Sovereign Immunity Protects GEO from Suit

The doctrine of derivative sovereign immunity ("DSI") recognizes that the United States lacks the personnel, facilities, and expertise to do everything in-house. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). When the federal government enlists a contractor to perform its governmental functions and the contractor does what it is authorized and directed to do under the terms of its contract, that contractor enjoys "'derivative sovereign immunity,' *i.e.*, the blanket immunity enjoyed by the sovereign." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). That "blanket" immunity is "a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery . . . ." *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996) (quotations and modifications omitted). As a result, courts across the country "treat the *Yearsley*

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doctrine as derivative sovereign immunity that confers jurisdictional immunity from suit." *Cunningham v. Gen. Dynamics Info. Tech., Inc*., 888 F.3d 640, 650 (4th Cir.), *cert. denied*, 139 S. Ct. 417 (2018).

As outlined above, the Contract PWS notes that "Pre-clearance approvals are required for access to ICE field staff, facilities and information," (Martin Ex. A at 45) and the Contract makes clear that "ICE will exercise full control over granting, denying, withholding or terminating unescorted government facility and/or sensitive Government information access… based upon the results of a background investigation." *Id*. at 70. Consistent with these requirements, ICE exercises exclusive control over all access to secure portions of the NWIPC. Scott Decl. ¶¶ 5-6.[4]

On November 14, 2023, two DOH representatives demanded unlimited access to the facility under the authority of HB 1470 to investigate complaints about alleged violations of HB 1470. ICE explicitly directed GEO to deny DOH representatives access to the facility on November 14, 2023. Scott Decl. ¶¶ 7-8. ***Plaintiff's own sworn declarations confirm these facts***. Nanto Decl. at ¶¶ 12-16; Muniz Decl. ¶ 13-16. Similarly on November 27, 2023, three individuals from the DOH arrived at the federal NWIPC unannounced and demanded unlimited access to the facility to investigate complaints related to Medical, Food Service, and Laundry pursuant to HB 1470. ICE explicitly directed GEO to deny DOH representatives access to the facility on November 27, 2023. Scott Decl. at ¶¶ 9-10. ***Plaintiff's own sworn declarations confirm these facts.*** Nanto Decl. at ¶¶ 12-16; Muniz Decl. ¶ 13-16.

A government contractor is not subject to suit if (1) the government authorized the contractor's actions and (2) the government validly conferred that authorization. *Yearsley*, 309 U.S. 18; *Campbell-Ewald Co. v. Gomez*, 577 U.S. at 167. GEO has identified facts sufficient to establish that is immune from any suit for carrying out the sovereign's will and denying Plaintiff access to the federal NWIPC at the explicit direction of ICE.

In its Motion, Plaintiff advances several erroneous arguments in response to GEO's

[4] Notably, the exhibits to DOH's Notice of Praecipe and Request to Strike (ECF 15-1, ECF 15-2) confirm that, as far back as 2021, Plaintiff was advised and understood that ICE exercises control over access to secure portions of the NWIPC.

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assertion of DSI, but these are not likely to succeed. First, Plaintiff argues that DSI does not provide a defense to a claim for injunctive relief. Motion at 10. Plaintiff cites *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 506 (N.D. Ill. 1985), claiming that case stands for the proposition that DSI does not apply to "declaratory and injunctive relief . . . [because it has] no impact on the public fisc." *Id*. at 11. That case involved a ***state governmental unit*** declaratory judgment action under ***federal copyright law***, and whether or not the ***initiation of such an action by the state in federal court waived state immunity under the 11th Amendment to potential counterclaims.*** *Woelffer*, 626 F. Supp. at 501. That case has nothing to do with the application of DSI to federal contractors like GEO, who simply performed in accordance with ICE's explicit directions. DSI covers declaratory and injunctive relief as it provides absolute "jurisdictional immunity from suit." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d at 650; *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. at 166 (describing federal sovereign immunity as immunity from suit). [5]

Next, Plaintiff advances a tortured interpretation of GEO's Contract with ICE, arguing the Contract and the PBNDS paradoxically mandate that GEO follow HB 1470 rather than conflicting specific Contract requirements, conflicting requirements in the PBNDS, and conflicting explicit directions received directly from ICE. Motion at 11-12. Plaintiff constructs this argument by extracting words or phrases from the Contract and the PBNDS, removing them from any context, and then stringing them together in a misleading manner. *Id.* at 12-13. When the Contract language cited by Plaintiff is viewed in context, it is unmistakable that the Contract commands that the ***PBNDS supersedes any conflicting "applicable" state law, codes, regulations, or policies***:

> The following constraints comprise the statutory, regulatory, policy and operational considerations that will impact the contractor….Constraints include, but are not limited to:
>
> * * *
>
> j) ***The ICE/OHS Performance Base[sic] Detention Standards*** - A copy is obtainable on the ICE Internet website

[5] Plaintiff's reliance on *Childs v. San Diego Hous. LLC*, 22 F.4th 1092 (9th Cir. 2022) is similarly misplaced as that case considered only the application of the collateral order doctrine to rulings regarding DSI.

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* * *

p) Applicable federal, state facility codes, rules, regulations and policies;
q) Applicable federal, state and local labor laws and codes

* * *

t) Pre-clearance approvals are required for access to ICE field staff, facilities and information

* * *

In cases where other standards conflict with DHS/ICE policy or standards, DHS/ICE policy and standards prevail.

Martin Ex. A at 44-45 (emphasis added).[6]

Similarly, a section of the PWS entitled "Performance" provides:

E. Performance
The Contractor shall perform all services in accordance with ICE 2011 Performance-Based National Detention Standards (PBNDS)(http://www.ice.gov/detcntion-standards/201l/) optimals and enhanced recreation, Prison Rape Elimination Act (PREA), American Correctional Associate (ACA), Standards for Adult Local Detention Facilities (ALDF), and Standards Supplement, Standards for Health Services in Jails, latest edition, National Commission on Correctional Health Care (NCCHC), and state and local laws on firearms at all times. Some ACA standards are augmented by ICE policy and/or procedure. ***In cases where other standards conflict with OHS/ICE Policy or Standards, OHS/ICE Policy and Standards prevail***.

Id. at 46 (emphasis added). Accordingly, when the language cited by Plaintiff is viewed in context, it confirms that the PBNDS supersedes any conflicting "applicable" state law, codes, regulations, or policies.[7]

The United States addressed and rejected this exact argument regarding references to "applicable state law" in the Contract in an *Amicus Curiae* brief filed with the Ninth Circuit:

> Imposing that reading of the contract would be particularly anomalous because, as this Court has explained, such contract provisions [requiring GEO to follow "applicable" state law generally] cannot render applicable a state-law requirement that impermissibly interferes with federal operations. *See Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 440-41 (9th Cir. 1991).

Korrell Ex. 2 at 25.

Plaintiff's similar attempts to distort the PBNDS and references therein to "applicable state

[6] GEO uses the page numbers of the originally filed documents, Martin Ex. A and Martin Ex. B, actually assigned to this filing, as referenced *supra*, rather than referencing the page numbering of partial reproduced documents filed in conjunction with the Chien Declaration (ECF 14).

[7] Because Plaintiff's equally misguided argument regarding directions from the "ICE representative" and authority to alter the Contract (Motion at 13) is premised on Plaintiff's erroneous Contract interpretation, that argument fails as well.

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laws" fare no better, as those arguments also ignore the contractual mandate that GEO must follow the PBNDS when it conflicts with otherwise applicable state laws. Motion at 12. Simply stated, there is no merit to Plaintiff's argument that boilerplate references to compliance with "applicable state laws"—whether found in the Contract or the PBNDS—magically waive federal sovereign immunity and compel ICE to yield to L&I's dictates regarding federal operations. *See Gartrell Constr. Inc. v. Aubry*, 940 F.2d at 440-41.

Finally, Plaintiff incorrectly contends that inspections conducted by the Tacoma-Pierce County Health Department at the NWIPC disprove "that ICE requires some sort of 'pre-clearance'" before state and local inspections can occur. Motion at 12. As noted above, the Contract explicitly provides that "Pre-clearance approvals are required for access to ICE field staff, facilities and information," (Martin Ex. A at 45) and "ICE will exercise full control over granting; denying, withholding or terminating unescorted government facility and/or sensitive Government information access…" *Id*. at 70. As noted in the declaration filed by Plaintiff, ***GEO requested*** that the Tacoma-Pierce County Health Department conduct annual food safety inspections at the NWIPC. GEO made this arrangement to satisfy contractual and ACA requirements. *See* ECF 19 at ¶¶ 3, 4. ICE is aware of and has approved this arrangement. Moreover, each time Tacoma-Pierce County Health Department inspectors arrive at the facility to conduct food safety inspections, GEO collects personal data from the inspectors and confirms with ICE that the inspectors have ICE clearance and approval to enter the NWIPC. *Id.* at ¶¶ 4, 5. These inspections offer no support for Plaintiff's arguments.

Most importantly, Plaintiff's arguments are wholly irrelevant[8] to GEO's immunity under DSI. GEO alleges (and Plaintiff's own declarations show) that ***ICE explicitly directed GEO to deny DOH representatives access*** to the facility in November 2023. As a result, Plaintiff has no chance of succeeding on the merits, regardless of what the Contract or the PBNDS may say

[8] DSI applies regardless of which statutory authority DOH now claims. Even if it was assumed DOH attempted to enter the NWIPC in November of 2023 under the authority of RCW 43.70.170, GEO is immune from suit because it simply performed in accordance with ICE's explicit directions. As a result, it is not necessary to address Plaintiff's lengthy discussion of DOH authority under various statutes other than HB 1470.

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regarding compliance with "applicable state laws" or what statutory authority DOH now claims it was exercising. Moreover, because GEO is entitled to immunity from suit under DSI, DOH's complaint should be dismissed.

2. Intergovernmental Immunity-Direct Regulation

As detailed in *GEO v. Inslee*, Dkts. #8 ("Korrell Ex. 9") at 11-14; #24 ("Korrell Ex. 10") at 4-8, Plaintiff has no chance of succeeding on the merits because its attempts to enter, inspect, and enforce HB 1470 are unconstitutional under the doctrine of Intergovernmental Immunity due to direct regulation. When DOH attempted to enter the NWIPC in November 2023, it claimed it was acting under the authority of HB 1470 to investigate complaints about alleged violations of HB 1470. *See* Nanto Decl. at ¶¶ 12-16; Muniz Decl. ¶ 13-16.

HB 1470 purports to override and replace various physical and operational requirements contained in GEO's federal contract with ICE. Like the state statutory standards discussed in *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014), HB 1470 constitutes an impermissible direct regulation of federal activities by "mandat[ing] the ways in which [GEO] renders services that the federal government hired [GEO] to perform"; it "replaces the federal [detention] standards that [GEO] has to meet to discharge its contractual obligations to [the Federal Government] with the standards chosen by the state"; and it "regulates not only the federal contractor but the effective terms of federal contract itself." *Id.* at 840. For the reasons detailed in *Boeing*, HB 1470, including the grant therein of unlimited access to the NWIPC to conduct inspections and investigations, is unconstitutional because it only serves to facilitate the direct regulation of federal activities in violation of the Intergovernmental Immunity Doctrine.

In its Motion, Plaintiff recycles the same arguments it used in GEO's underlying challenge to HB 1470 by selectively pulling language from a series of inapposite tax cases. *See* Korrell Ex. 1. For the reasons detailed in GEO's Opposition to Plaintiff's Motion to Dismiss in that case, GEO has established that HB 1470, including any inspections and investigations thereunder, constitute an impermissible direct regulation of federal activities in violation of the Intergovernmental Immunity doctrine. *See* Korrell Ex. 10 at 10-14.

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The United States recently addressed a nearly identical attempt by the State of Washington to directly regulate operations at the NWIPC and impose the Washington minimum wage statute on detainees at the NWIPC. In an *Amicus Curiae* brief filed with the Ninth Circuit, the United States noted:

> ***Federal immigration detainees are in the custody of the United States***. GEO and other contractors are permitted to house individuals in immigration detention—and to permit them to work under the Program in the facility—***only because the United States has granted GEO that authority.*** That the detainees participate in the Program in a ***facility operated by a contractor does not alter the analysis***. Application of the state minimum wage law (or other ***state-imposed conditions of participation that deviate from those Congress established) to the persons in federal detention is equally inimical to the structure created by Congress whether or not the federal government operates the program directly***.
>
> A state acquires no greater authority to regulate the terms on which federal detainees may participate in the Program simply because the federal government structures its implementation of the immigration laws to include detention of persons in DHS custody in contractor-operated facilities. ***As this Court reaffirmed in GEO Group, even a generally applicable state law applied to contractors is impermissible where it "would control federal operations" because "[e]nforcement of the substance of [the regulation] against the contractors would have the same effect as direct enforcement against the Government***." 50 F.4th at 760 (quoting *United States v. Town of Windsor*, 765 F.2d 16, 19 (2d Cir. 1985)); *see also id*. (collecting cases); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014).

Korrell Ex. 2 at 28-29 (emphasis added). Plaintiff has no chance of success on the merits because its attempts to enter, inspect, and enforce HB 1470 at the NWIPC are clearly unconstitutional under the doctrine of Intergovernmental Immunity due to direct regulation.

3. Intergovernmental Immunity-Impermissible Discrimination

As detailed in *GEO v. Inslee*, DOH has no chance of succeeding on the merits because its attempts to enter, inspect, and enforce HB 1470 are unconstitutional under the doctrine of Intergovernmental Immunity due to impermissible discrimination. See Korrell Ex. 9 at 14-17; Korrell Ex. 10 at 8-13. On March 8, 2024 this Court entered an Order finding GEO had plausibly claimed that Sections 2, 3, 5, and 6 of HB 1470 are unconstitutional and granting GEO a preliminary injunction enjoining the enforcement of those sections of HB 1470. Korrell Ex. 3. The legislative history and the express language of HB 1470 unmistakably demonstrate that it was crafted and specifically amended to impose unique burdens on a single facility—the federal

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NWIPC—while expressly exempting any similarly situated Washington State facilities or those of state contractors.

In its Motion, Plaintiff repeats the same arguments used in GEO's underlying challenge to HB 1470. *See* Korrell Ex. 1 at 13-16. This Court rejected those arguments in its recent order in *GEO v. Inslee*. Korrell Ex. 3. For the reasons detailed in GEO's Opposition to Plaintiff's Motion to Dismiss in *GEO v. Inslee*, GEO has demonstrated the defense of Intergovernmental Immunity due to impermissible discrimination. *See* Korrell Ex. 10 at 14-19. As detailed therein, a comparison of the actual requirements in HB 1470 to those applicable to a variety of other state-regulated facilities demonstrates that HB 1470 imposes significantly more restrictive and more burdensome requirements on the single federal facility it was intended to regulate—NWIPC. *Id.* at 18-19. This is not surprising in light of HB 1470's stated legislative goal of "prohibit[ing] the use of private, for-profit prisons and detention facilities in the state." HB 1470 § 8. HB 1470 plainly violates the Intergovernmental Immunity Doctrine because it impermissibly discriminates against the federal government and its contractors, and Plaintiff cannot prevail in its quest for an injunction to allow it inspect and enforce compliance with HB 1470.

4. HB 1470 is Field Preempted

As detailed in *GEO v. Inslee*, DOH cannot succeed on the merits because HB 1470 is field preempted. *See* Korrell Ex. 9 at 17-19; Korrell Ex. 10 at 13-17. Plaintiff cites the decision in *United States v. California*, 921 F.3d 865 (9th Cir 2019), in support of its claim that HB 1470 is not field preempted. Motion at 16-17. However, the decision in *California* did not include any arguments, opinions, or discussion regarding ***field*** preemption. To the extent Plaintiff relies on *California* to support its arguments regarding ***conflict*** preemption, those arguments are addressed in Section 5 below.

In its *Amicus Curiae* brief filed with the Ninth Circuit the United States correctly explained that immigration detention is an area where federal interests are dominant and the ***states have not historically exercised police powers***:

Plaintiffs' invocation of the "presumption against preemption" is similarly

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> misplaced. State Br. 43-46; Class Br. 45, 48. As this Court has explained, "the presumption does not apply when a state law would interfere with inherently federal relationships." *GEO Grp*., 50 F.4th at 761. Thus, for example, in *Gartrell Construction*, this Court held that a generally applicable statute that required contractors to be licensed under state law was preempted as applied to a contractor with the federal government. The Court instead applied the opposite presumption, emphasizing the lack of a "'clear Congressional mandate' and 'specific Congressional action' that unambiguously ***authorize state regulation of a federal activity.***" 940 F.2d at 440-41 (*quoting Hancock v. Train*, 426 U.S. 167, 178-79 (1976)); see *GEO Grp*., 50 F.4th at 762. *** And in any event, the presumption could apply only in an area of traditional state regulation. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 565 (2009). ***Regulation of federal immigration detention—including the allowance and other terms of any work programs Congress and DHS may authorize for those federal detainees—is not an area in which states have historically exercised their police powers***.

Korrell Ex. 2 at 26 (emphasis added). Immigration detention is unquestionably a field where federal interests are dominant. The federal government has "plenary or near plenary power over immigration issues," *Steinle v. City & Cnty. Of San Francisco*, 919 F.3d 1154, 1165 (9th Cir. 2019), and detention of removable aliens is part and parcel of that power. *See Wong v. United States*, 163 U.S. 228, 235 (1896).

In every preemption case, the intent of Congress is the "ultimate touchstone" of preemption analysis. *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted). It is widely accepted that Committee Reports are an "authoritative source for finding the Legislature's intent." *See Garcia v. United States*, 469 U.S. 70, 76 (1984); *see also Samantar v. Yousuf*, 560 U.S. 305, 316 n.9, 323 (2010). The FY 2017 Joint Explanatory Statement and Committee Report cited above unmistakably expresses Congressional intent that the PBNDS should uniformly govern the health and welfare of detainees in ICE custody pending removal. That expression, combined with the federal immigration statutes noted above, provide a comprehensive and unified system for the detention of aliens pending removal which reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. *See Silkwood v. Kerr–McGee Corp*., 464 U.S. 238, 249 (1984). To find otherwise would disregard Congress' express direction to use the PBNDS for the care and custody of immigration detainees and undermine the uniform detention system commanded by Congress and implemented by ICE. Plaintiff has no chance of succeeding on the merits because its attempts to

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enter, inspect, and enforce HB 1470 are unconstitutional under the doctrine of field preemption.

5. HB 1470 is Obstacle and Conflict Preempted

As detailed in *GEO v. Inslee*, DOH has no chance of success on the merits because HB 1470 is obstacle and conflict preempted. *See* Korrell Ex. 9 at 19-22; Korrell Ex. 10 at 17-20. Plaintiff argues that *California* is "dispositive" because the Ninth Circuit has already rejected GEO's argument that state health and safety laws stand as an obstacle to the federal government's detention scheme. Motion at 18. Apparently, the State mistakenly reads the decision in *California* as permitting the imposition of any state law concerning "health and safety" on any federal immigration detention facility. Plaintiff is wrong.

In *California*, the court considered, *inter alia*, the constitutionality of a California statute ("AB 103") "which requires the California Attorney General to conduct 'reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California.'" *Id*. at 875. In its briefing, California noted the limited nature of the mandated "reviews" or "inspections" under AB 103 and pointed out that ***"AB 103 does not impose standards on the conditions of facilities, nor does it mandate any policies and procedures***." Additionally, and perhaps most tellingly, California highlighted that AB 103 includes "***no enforcement mechanism***." As a result, California noted "***there is no conflict with the national detention standards promulgated by ICE***," and that there is no evidence that AB 103 intrudes on the operations of facilities. Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, *U.S. v. California*, 2018 WL 3350892 (E.D. Cal. May 4, 2018), Dkt. #74 ("Korrell Ex. 11") at 29-30 (emphasis added). In reaching its decision the *California* court correspondingly noted that AB 103 did not regulate confinement or impose mandates on ICE contractors, but merely required access for inspections and the production of data. *California* 921 F.3d at 885. Equally important, the *California* court found that, because the United States[9] failed to "even plead that the statute imposes an economic or operational burden," it was not preempted.

[9] Because Plaintiff has not included ICE as a defendant in this case, it is unknown what economic or operational burdens might be imposed directly on ICE if its Health Services Corps (HSC) program at the NWIPC is subjected to unlimited and unannounced state inspections and investigations.

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Id. at 894.

In stark contrast, HB 1470 purports to effectively override and replace the Congressionally mandated PBNDS with a new detailed regime of state-mandated standards, policies and procedures that regulate virtually every aspect of the operation of the federal NWIPC. In addition, unlike AB 103, HB 1470 imposes a regime for assessing civil penalties for non-compliance with these state-imposed standards, and purports to create a private right of action for detainees to enforce the state-imposed standards through monetary damages, injunctive relief, and the recovery of attorneys' fees and costs. Moreover, as noted in Section B below, HB 1470 would impose significant burdens and costs on the operation of the NWIPC. Simply stated, the burdensome and costly set of operational requirements, enforcement mechanisms, and state-developed standards imposed by HB 1470 on the NWIPC bear no resemblance whatsoever to AB 103.

Plaintiff has no chance of succeeding on the merits because its attempts to enter, inspect, and enforce HB 1470 are unconstitutional under the doctrine of field preemption.

6. GEO will Suffer Irreparable Harm if the Requested Injunction is Granted

As detailed in GEO's brief and in this Court's recent order granting a preliminary injunction in *GEO v. Inslee*, will suffer irreparable harm if DOH is allowed to inspect, investigate, and enforce HB 1470. *See* Korrell Ex. 9 at 23-24; *Geo v. Inslee*, Dkt. #22 ("Korrell Ex. 12") at 4-10; Korrell Ex. 3. The Ninth Circuit has long maintained that a "constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009); *see also Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013).

Even if this Court does not presume irreparable harm from HB 1470's conflict with the Constitution, GEO's harm is irreparable under the standard for non-constitutional injuries. "[I]rreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Az. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017) (amended opinion). GEO has no adequate legal remedy for one obvious reason: it may not pursue

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a damages suit in federal court against Washington for the financial harm it will suffer if HB 1470 takes effect. *See* U.S. CONST. amend. XI; *Kentucky v. Graham*, 473 U.S. 159, 169 (1985).

The Ninth Circuit regularly holds that monetary harms that cannot be compensated because of sovereign immunity are irreparable. *See, e.g., California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 431 (9th Cir. 2019) *judgment vacated on other grounds by Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. ——, 140 S. Ct. 2367, 207 L.Ed.2d 819 (2020). Where, as here, plaintiffs show that a state law violates the Supremacy Clause, any resulting monetary harm is irreparable because the Eleventh Amendment "bars the [plaintiff] from ever recovering damages in federal court." *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852 (9th Cir. 2009) (*per curiam*), *vacated on other grounds and remanded sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012). Here, GEO would suffer anywhere from $3,000,000 to $160,000,000 in monetary harm. *See* Korrell Ex. 12 at 7-9; Korrell Ex. 7 at ¶ 8; Martin Decl. ¶ 17. Therefore, "because [GEO] . . . will be unable to recover damages against the [State] even if [it is] successful on the merits of [its] case, [it] will suffer irreparable harm if the requested injunction is granted." *Cal. Pharmacists*, 563 F.3d at 852.

7. The Balance of Equities and Public Interest Favor GEO

As detailed in *GEO v. Inslee*, the public interest and balance of equities necessarily weigh in GEO's favor. *See* Korrell Ex. 9 at 25; Korrell Ex. 12 at 10-12. GEO has demonstrated a likelihood that HB 1470 violates the Constitution and would cause irreparable injury. Although "district courts must give serious consideration to the balance of equities" and consider "all of the competing interests at stake," *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) (internal quotation marks and citation omitted), if the Court concludes that GEO is likely to succeed on the merits and will be irreparably harmed, then it must find these factors also weigh against the requested injunction. "It … would not be equitable or in the public's interest to allow the state … to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir.2014).

There is no question there is a public interest in the health and safety of federal immigration

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detainees. However, the State's reliance on twenty-plus years of politically charged newspaper articles and allegations[10] regarding abuses and deficiencies in private prisons and detention facilities at large does little to illuminate the considerations in this case. Motion at 19-22.[11] Moreover, the State fails to explain how its oversight, albeit unconstitutional, would serve the public interest.[12] Just last year a federal judge held Washington State in contempt and ordered it to pay more than $100 million in fines for the continuing violation of the constitutional rights of pretrial criminal detainees in city and county jails. *Trueblood v. Wash. Dep't of Soc. & Health Servs*., No. 2:14-cv-1178-MJP (W.D. Wash. July 7, 2023) (Doc. 1009). In its order this Court noted that Washington had been violating the constitutional rights of pretrial detainees since 2015, and that from September 2022 through May 2023, Washington continued to violate detainees' constitutional rights, the court's permanent injunction in the suit, and the contempt settlement agreement when it "knowingly and inexcusably" denied detainees timely mental health care. *Id*. The State's underlying claim that it is somehow better suited than the federal government to ensure the health and safety of federal immigration detainees is—in light of recent history—questionable at best.

More fundamentally, DOH's argument regarding the public interest and the balance of

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[10] The State asserts "[***b]etween April and December 2023, DOH received 277 complaints from detainees at NWIPC***, detailing unsafe and unsanitary conditions." Motion at 7 (emphasis added). However, the media has reported that these complains were actually filed by an advocacy group: "La Resistencia, a group led by undocumented immigrants calling for the closure of the facility, has filed 287 complaints with the Department of Health as of Jan. 22. Maru Mora Villalpando, who heads the group, said they file the complaints on behalf of detainees…" https://washingtonstatestandard.com/2024/01/24/state-inspectors-denied-entry-to-privately-run-immigration-detention-center-in-tacoma/. Equally concerning, many of the allegations the State asserts were filed by detainees in 2023 appear to be verbatim copies of allegations reported in the media more than 10 years ago. *Compare* Range Decl., Ex. 11 with https://jsis.washington.edu/humanrights/2020/03/27/nwdc-sanitation-of-food-laundry/ and https://jsis.washington.edu/humanrights/2020/04/16/nwdc-medical/.

[11] To the extent DOH is asking, it is inappropriate to take judicial notice of these documents. The documents and the "facts" contained therein "[are] subject to reasonable dispute," "[not] generally known within trial court's territorial jurisdiction" and "[cannot] be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FRE 201(b); *see also Del Puerto Water Dist. v. U.S. Bureau of Reclamation*, 271 F.Supp.2d 1224, 1234 (E.D.Cal.2003) (refusing to take judicial notice of contents of public and quasi-public records where such contents were in dispute).

[12] DOH cites three cases regarding "health and safety risks" to immigration detainees, but unlike DOH's current complaint, all of those cases included ICE as a party–the entity that actual controls custody of detainees and the conditions of immigration detention. *Roman v. Wolf*, 977 F.3d 935 (9th Cir. 2020); *Francisco v. U.S. Citizenship & Immigr. Servs*., 981 F.3d 742, 762 (9th Cir. 2020); *U.S. v. California*, 921 F.3d 865 (9th Cir. 2019).

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equities incorrectly frames the issue. Rather than a referendum on the general merits of private prison and detention facilities, the question is whether or not the public interest and balance of equities favor replacing the operational and performance requirements of a federal contract, as expressed in the Congressionally mandated 475 pages of the PBNDS developed specifically for federal immigration detention, with the requirements developed by the State and contained in HB 1470. The balance of equities and the public interest should consider *who* gets to *dictate* and *enforce* the requirements and standards applied to federal contracts for immigration detention. In a recent similar case before the Ninth Circuit, the United States noted:

> This case is not about the wisdom of the federal government's decisions, but about preserving the discretion to make decisions. The policy question as to whether the federal government should contract with private facilities to meet its immigration detention needs is not the issue before the Court. The question, instead, is which government gets to make that decision; the federal government or a state.

Reply Br. For Appellant United States, *United States v. Newsom,* 50 F.4th 745 (9th Cir. 2022) Dkt. No. 45 at 1 (Mar. 15, 2021). In much the same way, the issue before this court is not the policy question of whether the federal government can or should contract with private facilities to meet its immigration detention needs. Rather, the question is which government gets to dictate and enforce the standards governing the detention of individuals in ICE custody, the federal government, or Washington State. The Supremacy Clause of the Constitution provides a clear answer.

IV. CONCLUSION

For the reasons detailed above, DOH's Motion for Preliminary Injunction should be denied.

DATED this 18th day of March, 2024.

I certify that this memorandum contains 8,222 words, in compliance with the Local Civil Rules.

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