UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THE GEO GROUP, INC.,

Plaintiff,

v.

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

Defendants.

No. 3:21-cv-05313

THE GEO GROUP, INC.'S MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT NOT REQUESTED

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INTRODUCTION AND RELIEF REQUESTED

The GEO Group ("GEO") brought this suit seeking declaratory and injunctive relief against the enforcement of Washington Engrossed House Bill 1090 ("EHB 1090"). EHB 1090 states that "no person, business, or state or local governmental entity shall operate a private detention facility within the state or utilize a contract with a private detention facility within the state." RCW 70.395.030(1). GEO contracts with the Federal Government to operate federal immigration detention facilities. Through EHB 1090, Defendants asserted the power to shut down the Federal Government's only dedicated immigration detention facility in Washington, the Northwest ICE Processing Center ("NWIPC") operated by GEO in Tacoma. *See* GEO's Mot. for Prelim. Inj., Doc. 8, at 1 (Apr. 29, 2021). GEO challenged Washington's assertion of power over the Federal Government on Supremacy Clause grounds, including preemption and intergovernmental immunity. *See id.*; Compl., Doc. 1 (Apr. 29, 2021).

In *GEO Group, Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022) (en banc), GEO challenged a virtually identical California statute on the same grounds. The California statute, Assembly Bill 32 ("AB 32"), states that "a person shall not operate a private detention facility within the state." Cal. Penal Code § 9501. In this case, GEO filed a preliminary injunction motion and Defendants moved to dismiss, and this Court stayed these proceedings "pending issuance of the Ninth Circuit's mandate in *GEO Group, Inc. v. Newsom*, No. 20-56172." Order, Doc. 58, at 1 (Oct. 18, 2021).

The Ninth Circuit has since issued its opinion and mandate, making the disposition of this case indisputably clear. The Ninth Circuit's *en banc* holding was unequivocal: "[T]he outcome in this case is clear under basic Supremacy Clause principles and Supreme Court authority[.]" *Newsom*, 50 F.4th at 758. "Whether analyzed under intergovernmental immunity or preemption, California cannot exert this level of control over the federal government's detention operations. AB 32 therefore violates the Supremacy Clause." *Id.* at 751. Given the Ninth Circuit's clear

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mandate, and on joint stipulation of the parties, the district court on remand in the California case entered final judgment and a permanent injunction barring the enforcement of AB 32. *See* Ex. 1, Final Judgment and Permanent Injunction, Doc. 87, *GEO Grp., Inc. v. Newsom*, 19-CV-02491-RSH-LR (S.D. Cal. May 23, 2023) ("*Newsom* Permanent Inj.").

The Ninth Circuit's intergovernmental immunity and preemption holdings apply with equal force against Defendants' attempt to control federal operations through EHB 1090, which is indistinguishable in all material respects from the unconstitutional AB 32. Thus, the same permanent injunctive relief here that was granted in the AB 32 case is required here. *See* Ex. 2, Prop. Order. *Newsom* compels nothing less.

Defendants, for their part, *admit* that the en banc Ninth Circuit's unequivocal holdings in *Newsom* control this case. Defendants have stated that *Newsom* "*forecloses* Defendants from enforcing [EHB 1090] against GEO[.]" Defs.' Not. and Stip. of Enforcement Position, Doc. 65, at 2 (Aug. 23, 2021) (emphasis added) ("Defs.' Not."). Nevertheless, Defendants oppose entry of final judgment and a permanent injunction, instead filing a "Notice of Enforcement Decision" claiming an intent—subject to provisos and conditions—not to enforce EHB 1090 against GEO. *Id*. at 1–2.

Defendants' notice of enforcement decision does not change the fact that GEO is entitled to final judgment under *Newsom*. Defendants' unilateral, half-hearted assurance not to enforce an unconstitutional statute *for now* and under *certain conditions* is an ineffective attempt to undercut the Ninth Circuit's clear command and avoid an adverse judgment from this Court. Defendants' pledge is limited to only one facility (the NWIPC), only one federal agency (ICE), and only "as long as"—in the opinion of Defendants—"*Newsom* remains the law of the Ninth Circuit." *Id.* at 2. In each of these ways, Defendants' promise falls short of the more categorical holdings of *Newsom* and of the declaration and permanent injunction issued in the AB 32 case. *See* Ex. 1, *Newsom*

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Permanent Inj., at 2–3. Defendants' partial, conditional statement based on some unspecified, subjective determination of current law does not meet the Ninth Circuit's high bar for voluntary cessation of conduct to render a case moot. Under Defendants' stipulation, nothing would prevent them from later enforcing EHB 1090 against GEO—and forcing GEO to return to this Court under threat of the same penalties and sanctions sought by Defendants in this case—if Defendants believed (wrongly) that *Newsom* was no longer "the law of the Ninth Circuit," *id.*, if GEO contracted with another federal agency (such as U.S. Marshals) to operate NWIPC,[1] or if GEO began operating a facility in the State other than NWIPC.

But even if Defendants' assurance was more categorical, it amounts to just nothing more than a bare promise, effectively saying to GEO: "Trust us." That does not come anywhere close to "carr[ying] the heavy burden of making absolutely clear that [they] could not revert to [their] policy" of enforcing EH 1090. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 457 n.1 (2017). Indeed, it is telling that Defendants do not concede—apart from *Newsom*'s continuing validity—that EHB 1090 is unconstitutional; nor has the State repealed the statute. Defendants' notice fails to provide GEO complete relief and bears none of the permanence required for voluntary cessation of unlawful conduct. The Ninth Circuit's clear pronouncement in *Newsom* entitles GEO to more than this paltry assurance.

[1]EHB 1090, like AB 32, would forbid operation of private detention facilities on behalf of the U.S. Marshals as much as ICE, which is why GEO challenged AB 32's application to two GEO-operated U.S. Marshals facilities in California. *See GEO Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905, 920–22 (S.D. Cal. 2020). The district court held AB 32 invalid as applied to the U.S. Marshals facilities, and California chose not to appeal that decision to the Ninth Circuit. *Newsom*, 50 F.4th at 752 n.2.

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In sum, this case involves no dispute of fact, and all parties agree that *Newsom* dictates the outcome. GEO is entitled to judgment as a matter of law.[2]

ARGUMENT

III. GEO Is Entitled to Judgment As a Matter of Law Under the En Banc Ninth Circuit's *Newsom* Decision.

"The standard for summary judgment is familiar: Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact," *Zetwick v. Cnty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017) (internal quotation marks omitted), "and the movant is entitled to judgment as a matter of law," FED. R. CIV. P. 56(a). The "judge's function at summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 850 F.3d at 441 (internal quotation marks omitted). "The district court must not only properly consider the record on summary judgment, but must consider that record in light of the 'governing law.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Here, the governing law makes the outcome of this case exceedingly straightforward. In *Newsom*, the Ninth Circuit held that a California statute prohibiting operation of a private detention facility under a contract with the Federal Government violated principles of both intergovernmental immunity and preemption. The Court of Appeals explain that "AB 32 cannot be reconciled with the holding of *Leslie Miller* [*v. Arkansas*, 352 U.S. 187 (1956)] that the Supremacy Clause prevents a state from enforcing its licensing requirements against federal contractors." *Newsom*, 50 F.4th at 757. As to intergovernmental immunity, the Court held that AB 32 was unconstitutional because it "impermissibly interfered with federal functions by overriding

[2] Based on their concession that *Newsom* forecloses enforcement of EHB 1090, Defendants have voluntarily dismissed with prejudice their counterclaims seeking to enforce the statute. *See* Defs.' Not. of Dismissal of Counterclaims, Doc. 68 (July 24, 2023).

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federal contracting decisions." *Id.* at 760. States may not prohibit the Federal Government "from exercising its discretion to arrange for immigration detention in the privately run facilities it has deemed appropriate." *Id.* at 761. As to preemption, the Court held that "AB 32 frustrates … congressional intent, creating a conflict between [AB 32's] requirement … and the action which Congress and the Department [of Homeland Security] have taken to insure the appropriateness of facilities to house detainees." *Id.* at 762. "Such interference with the discretion that federal law delegates to federal officials goes to the heart of obstacle preemption." *Id.*

Washington's EHB 1090 is indistinguishable from California's AB 32. Both statutes ban private detention facilities in their respective states, including private facilities under contract with the Federal Government. AB 32 provides, in relevant part: "a person shall not operate a private detention facility within the state." EHB 1090 likewise declares: "no person, business, or state or local governmental entity shall operate a private detention facility within the state or utilize a contract with a private detention facility within the state." RCW 70.395.030(1). AB 32 defines "[p]rivate detention facility" as "a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity." Cal. Penal Code § 9500(b). And EHB 1090 similarly defines "[p]rivate detention facility" as "a detention facility that is operated by a private, nongovernmental for-profit entity and operating pursuant to a contract or agreement with a federal, state, or local governmental entity." RCW 70.395.020(7). Both statutes purport to ban the same federal contracting relationships at issue here and in *Newsom*—Immigration and Customs Enforcement (ICE) contracts with GEO to operate immigration detention facilities in each State. *See Newsom*, 50 F.4th at 750. Because AB 32 and EHB 1090 are substantively identical—banning the very same conduct and implicating the very same federal function—the Ninth Circuit's decision holding AB 32 unconstitutional as a violation of the Supremacy Clause applies with full force to EHB 1090.

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Recognizing this inescapable conclusion, Defendants have conceded that *Newsom* controls here. In their recent "Notice and Stipulation of Enforcement Position," Doc. 65, Defendants acknowledged that "[t]he Ninth Circuit's decision in *GEO Group, Inc. v. Newsom*, 50 F.4th 745, 763 (2022) (en banc), forecloses Defendants from enforcing RCW 70.395.030 against GEO for operating [its facility] as an ICE-contracted facilit[y]." *Id.* at 2; *see also* Defs.' Not. of Dismissal of Counterclaims, Doc. 68.

In sum, all parties agree that *Newsom* controls this case. The only thing left for this Court to do is to grant the final judgment that *Newsom* requires and enter a declaration and permanent injunction prohibiting Defendants from enforcing EHB 1090 against GEO.

II. Defendants' Conditional Notice of Enforcement Decision Does Not Undermine the Ninth Circuit's *Newsom* Decision Nor Render this Case Moot.

In an effort to avoid final judgment in GEO's favor, Defendants recently filed a "Notice and Stipulation of Enforcement Position," Defs.' Not., recognizing that *Newsom* controls and announcing their intent not to enforce EHB 1090 against GEO under certain conditions. Defendants' partial, conditional statement of non-enforcement does not meet the high bar for voluntary cessation of conduct to render this case moot.

The Ninth Circuit and the Supreme Court impose a high bar for voluntary cessation of challenged conduct to moot a case. "The voluntary cessation of challenged conduct does *not* ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (emphasis added); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. Inc.*, 528 U.S. 167, 189 (2000). Voluntary cessation can render a case moot only when a "stringent" standard is met: "A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of*

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the Earth, 528 U.S. at 189 (emphasis added). "An *incomplete response* to the plaintiff's demands does not moot the action." 13C WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3533.7 (3d ed.) (emphasis added). Thus, "[t]o establish mootness, a defendant must show that the court cannot order *any effective relief*." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002) (emphasis added). Defendants bear a "heavy burden" in meeting this standard. *Id.*; *see also Friends of the Earth*, 528 U.S. at 189. Defendants cannot meet their "heavy burden," *San Francisco BayKeeper*, 309 F.3d at 1159, to show that it is "absolutely clear" that EHB 1090 would not be enforced against GEO in the future, *Friends of the Earth*, 528 U.S. at 189. Indeed, Defendants' own notice of enforcement decision demonstrates this fact.[3]

First, even assuming that Defendants' unilateral notice of its current enforcement position were actually binding on Defendants, the notice only purports to bind the two Defendants in this case, not any other current or future actors who may also seek to enforce the unconstitutional EHB 1090 against GEO. This is a critical difference between Defendants' stipulation and the entry of permanent injunction which *Newsom* requires. *Compare* Ex. 1, *Newsom* Permanent Inj., at 2 (enjoining Defendants along with their "successors in office," and "their agents acting within the scope of their official duties").

Second, the stipulation is too narrow. It limits relief, by its terms, only to one facility (the NWIPC) and to one federal agency (ICE) charged with detention obligations. But *Newsom* is not so limited. *Newsom* broadly applies to *any* state ban on privately operated detention facilities under contract with the Federal Government. Any such ban "effectively places a prohibition on the

[3] The Defendants' notice of enforcement decision was entirely unilateral, so this is not a case where a complete settlement between the parties could potentially moot the dispute. *Compare Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1132 (9th Cir. 2005) ("There is no live controversy before us because the parties' settlement agreement has resolved all facets of their dispute and has thereby mooted this appeal.").

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Federal Government from operating with its desired personnel." *Newsom*, 50 F.4th 761. Thus, GEO is entitled to relief extending not only to the NWIPC contract with ICE, but also to any future GEO contracts with the U.S. Marshals or other federal detention agencies to operate the NWIPC or any other facility in Washington. *See Newsom* Permanent Inj. at 2–3 (not limiting relief to any particular facility and extending relief to "any other federal agency" besides ICE and the U.S. Marshals "acting pursuant to the authority and discretion to detain a person or persons pursuant to the Immigration and Nationality Act or 18 U.S.C. § 4013(a)(3)").

Third, the terms of the notice are both conditional and subjective. For one, Defendants only stipulate not to enforce EHB 1090 against GEO's operation of the NWIPC "as long as *Newsom* remains the law of the Ninth Circuit and as long as The GEO Group operates the NWIPC exclusively pursuant to a contract with ICE[.]" Defs.' Not. at 2. Whether a case remains "good law" is often a contested question subject to extensive briefing and debate. Under the terms of Defendants' notice, GEO and the Federal Government could be subject to enforcement of a law the Ninth Circuit has held to be unconstitutional in no uncertain terms should the Defendants—in their own subjective judgment—decide that *Newsom* is no longer good law. In other words, Defendants' notice would put the onus on *GEO* to *prevent* future enforcement of EHB 1090, rather than putting the onus on *Defendants* to obtain relief from the Court before enforcing EHB 1090. This has it exactly backwards. GEO secured a favorable decision of constitutional law from the en banc Ninth Circuit. If Defendants wish to upset the status quo in the future by claiming a change in law, they must come to this Court under Federal Rule of Civil Procedure 60(b) to seek relief from the injunction *before* enforcing a state statute already declared unconstitutional. *See Horne v. Flores*, 557 U.S. 433, 447 (2009) ("[T]he Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if a significant change either in factual conditions

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or in law renders continued enforcement detrimental to the public interest." (internal quotation marks omitted)). In sum, Defendants' temporary, conditional assurance is no assurance at all.

Finally, it bears emphasizing that even if all the foregoing limitations, caveats, and loopholes were not present, Defendants' pledge not to enforce EHB 1090 would still not meet their "heavy burden" of showing that it is "absolutely clear" that future enforcement cannot "reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. Defendants' notice is a unilateral decision not to enforce a statute that remains on the books—a statute that they continue to believe is constitutional and that the State has not repealed. Where a government continues to assert that a challenged policy is legal, that counts strongly against finding mootness. *See W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2607 (2022); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007). Likewise, although amendment or repeal of a challenged law does not necessarily moot a case, *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), it is a factor that could favor mootness, *see New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020). Yet, not even that much is present here. Where a state official's discontinued enforcement comes down to "trust us," that is not sufficient to moot the case.

Newsom establishes that EHB 1090 is unconstitutional. *See Newsom*, 50 F.4th at 758 ("Simply put, [the ban on privately-owned detention facilities] would breach the core promise of the Supremacy Clause."). Despite Defendants' apparent attempt to preempt GEO's relief by filing a partial non-enforcement assurance, the notice fails to provide full relief. This controversy will remain live until GEO receives the non-conditional declaration and permanent injunction that *Newsom* requires.

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CONCLUSION

Under *Newsom*, a state ban on private detention facilities under contract with the Federal Government violates the Supremacy Clause. Defendants agree that this decision forecloses their enforcement of EHB 1090 against GEO but seek to avoid the straightforward entry of permanent declaratory and injunctive relief against an unconstitutional statute through a partial, conditional non-enforcement notice. That will not do. GEO is entitled to an entry of final judgment in its favor, including a permanent injunction preventing Washington from unconstitutionally enforcing EHB 1090 against GEO. *See* Ex. 2 (proposed order).

For the foregoing reasons, the Court should grant GEO's motion for summary judgment and enter final judgment and permanent declaratory and injunctive relief consistent with the Ninth Circuit's decision in *Newsom*, 50 F.3d 745.

DATED this 7th day of August, 2023.

Respectfully Submitted,

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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 8th day of August, 2023.

/s/Michael W. Kirk
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