The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE GEO GROUP, INC.,

Plaintiff,

v.

JAY R. INSLEE, in his official capacity as Governor of the State of Washington; ROBERT W. FERGUSON, in his official capacity as Attorney General of the State of Washington,

Defendants.

No. 3:23-cv-05626

GEO GROUP, INC.'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION OR CLARIFICATION AND MODIFICATION OF THE PRELIMINARY INJUNCTION ORDER

Noted on motion calendar:
April 12, 2024

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I. INTRODUCTION

Defendants' Motion for Reconsideration or Clarification and Modification of the Preliminary Injunction Order ("Motion") offers recycled arguments regarding Intergovernmental Immunity properly rejected by this Court, and seeks modifications of this Court's Preliminary Injunction that would effectively permit the State to resume its efforts to enter and disrupt federal immigration detention operations at the NWIPC.

For the reasons detailed below, this Court should deny Defendants' Motion for Reconsideration and its requests for the modification and/or clarification of this Court's Preliminary Injunction. However, if this Court deems that any modification or clarification is necessary, GEO requests that any modified order make clear that Defendants, including the Department of Labor and Industries of the State of Washington ("L&I") and State of Washington Department of Health ("DOH"), will be held in contempt for any actions in furtherance of the enforcement of HB 1470, including the dissemination of information used to support HB 1470 Section 5 actions by detainees.

II. ARGUMENT

A. This Court Properly Found HB 1470 Sections 2, 3, 5, and 6 Impermissibly Discriminate Against The Federal Government And Its Contractors In Violation Of The Intergovernmental Immunity Doctrine

1. Defendant's Motion Fails to Meet Rule 59 Standards

Federal Rule of Civil Procedure 59(e) offers "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *White v. Sabatino*, 424 F. Supp. 2d 1271, 1274 (D. Haw. 2006) (*quoting Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)). Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003). Courts have established three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1178–79 (9th Cir. 1998). Defendants have not shown any of these and instead merely recycle previous

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arguments and articulate disagreement with this court's analysis. Defendants' assertion that the court reached the wrong decision in its Order is not sufficient grounds for reconsideration, and the motion should be denied for that reason alone. LCR 7(h)(1) ("Motions for reconsideration are disfavored"); *see also Garcia v. Biter*, 195 F. Supp. 3d 1131, 1133 (E.D. Cal. 2016) ("The purpose of Rule 59(e) is not to 'give an unhappy litigant one additional chance to sway the judge. [A]rguments and evidence [that] were previously carefully considered by the Court, [ ] do not provide a basis for amending the judgment.'") (quoting *Kilgore v. Colvin*, No. 2:12–CV–1792–CKD, 2013 WL 5425313 at *1 (E.D. Cal. Sept. 27. 2013)); *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Az. 1998) (a motion for reconsideration "should not be used to ask the court to rethink what the court has already though through—rightly or wrongly") (citations and quotations omitted); *see also Hopwood v. Texas*, 236 F.3d 256, 272 (5th Cir. 2000) ("[m]ere doubts or disagreement about the wisdom of a prior decision" provides an insufficient bases for a Rule 59(e) motion). Further, as explained below, even if it were appropriate to seek reconsideration based on disagreement with the Court's ruling, the motion should be denied because Defendants' continue to misread the law on intergovernmental immunity.

2. The Doctrine of Discriminatory Intergovernmental Immunity Does Not Require the Court to Ignore Non-Textual Discriminatory Indicia

Defendants' Motion argues that this Court committed legal error in considering anything other than the explicit text of HB 1470, arguing that "the discrimination prong of intergovernmental immunity turns on the text of the statute itself." Motion p. 2. In support of this argument, Defendants cite *Dawson v. Steager*, 139 S. Ct. 698 (2019). As detailed in GEO's Opposition to Defendants' Motion to Dismiss (Dkt. 24 pp. 8-9), Defendants' reading of *Dawson* is erroneous.

In *Dawson* the Court considered whether a West Virginia statute that exempted from state taxation the pension benefits of state and local law enforcement officers but not the federal pension benefits of retired federal marshals violated 4 U.S.C. § 111. Steager, 139 S. Ct. at 702-03. As a result, the *Dawson* Court considered whether a state statute violated the federal statutory

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restrictions of 4 U.S.C. § 111-- not the more generally applicable principles of Intergovernmental Immunity. Additionally, the decision in *Dawson* plainly does not support Defendants' position. The Dawson Court found that under 4 U.S.C. § 111, a laudable intent did not save a discriminatory tax statute:

> We can safely assume that discriminatory laws like West Virginia's are almost always enacted with the purpose of benefiting state employees rather than harming their federal counterparts. Yet that wasn't enough to save the state statutes in *Davis*, *Barker*, or *Phillips*, and it can't be enough here. ***Under § 111*** what matters isn't the intent lurking behind the law but whether the letter of the law "treat[s] those who deal with" the federal government "as well as it treats those with whom [the State] deals itself." [citations omitted]

Id. at 704 (emphasis added). In other words, *Dawson* holds that a facially discriminatory statue cannot be "cleansed" of its discriminatory impact by looking at self-serving non-discriminatory statements in the legislative history. *Dawson* plainly does not, as the Defendants suggest, stand for the inverse proposition that this Court should ignore a legislative history replete with discriminatory intention when evaluating whether a resulting statute violates the IGI doctrine. *See U.S. v. Hynes*, 759 F. Supp. 1303, 1306-07 (1991) ("look[ing] solely at the apparent neutrality on the face of the amendment would be to elevate form over substance, which must be avoided" and noting legislative history reveals discriminatory intent). In short, a statute that discriminates in favor of the state and against the federal government cannot shield itself from the self-incriminating discriminatory statements contained in its legislative history by asking the Court not to "look behind the curtain." *See also Washington v. U.S.*, 460 U.S. 536 (1983) (Statutory provisions are most easily understood in light of their history). Accordingly, there is no error associated with this Court's recognition that "the statutory language of HB 1470 and its history indicate that it was designed to apply to only the NWIPC." Dkt. 35 ("Order") at 33. Thus, even if it were appropriate to seek reconsideration based on disagreement with the Court's ruling (it is not), the motion should be denied because the Court got it right the first time.

3. This Court Properly Evaluated Similarly Situated Comparators

Defendants next argue that this Court erred in concluding that state prisons and local jails are the proper "comparator" for evaluating whether HB 1470 discriminates against GEO in

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violation of the intergovernmental immunity doctrine. Motion pp. 2-3. While Defendants concede that in *U.S. v. California*, 921 F.3d 865 (9th Cir. 2019), state prisons and jails were identified as the similarly situated comparators, Defendants argue that such a comparator is improper in the present case because HB 1470 applies to "private detention facilities" and not "immigration detention facilities." Motion p.3.

Defendants have now advanced three conflicting and confused arguments regarding the proper comparator to be used when evaluating the discriminatory nature of HB 1470. In its Motion to Dismiss, Defendants previously claimed that HB 1470 was not discriminatory because it replicated "existing regulatory requirements for [Department of Corrections] facilities, including the provision of basic personal hygiene items." Dkt. 17 at 23. Accordingly, ***Defendants earlier* argued that *state prisons and local jails were the proper "comparator"*** for evaluating HB 1470. Defendants now identify as error this Court's acceptance of the State's previous argument regarding the proper comparator. Further, this Court accurately noted that the Department of Corrections standard identified by Defendants as analogous was not as strict as the corresponding standard imposed on the NWIPC by HB 1470. Order p. 38-39. As a result, this Court correctly held that HB 1470 discriminates against GEO as the operator of the NWIPC in violation of the intergovernmental immunity doctrine. *Id.*

In its Order, this Court also correctly rejected the Defendants' alternative contention that HB 1470 was not discriminatory because it largely replicated minimum health and safety standards found in the Washington Administrative Code applicable to residential treatment facilities. *Id.* at 33-37. As this Court noted, Immigration detention facilities like the NWIPC and residential treatment facilities are not similarly situated because "private immigration detention facilities and residential treatment facilities serve fundamentally different purposes, are authorized to exercise vastly different degrees of control over those who fall under their purview, and operate out of categorically different types of facilities." *Id.* at 37. Moreover, this Court correctly found that to the extent that any of the standards listed under HB 1470 § 2 replicate those that apply to residential treatment facilities, HB 1470 § 2 impermissibly discriminates against GEO as the operator of the

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NWIPC. *Id*.

Changing direction, ***Defendants now contend that there are no proper comparators or similarly situated facilities***, and HB 1470's health and safety requirements[1] cannot be discriminatory because they ***could*** apply to state contracted private detention facilities ***if*** HB 1090 were changed and the state was allowed to contract with private detention facilities. Motion p. 3; Dkt. 17 at 22. Defendants' linguistic sophistry and alternating and inconsistent arguments regarding proper comparators should be rejected by this Court.

This Court correctly observed that in *California* the Ninth Circuit determined that state prisons and jails were the proper similarly situated comparator for ICE detention facilities. The Washington Legislature also specifically cited approvingly this equivalency in the text of HB 1470 Section 8:

> The legislature finds that all people confined in ***prisons and detention facilities*** in Washington deserve basic health care, nutrition, and safety. As held in *United States v. California*, 921 F.3d 865, 886 (9th Cir. 2019), states possess 'the general authority to ensure the health and welfare of ***inmates and detainees*** in facilities within its borders.'"

(Emphasis added.)

Defendants' current argument that "HB 1470 applies to GEO solely and entirely because it is a private detention facility" (Motion p.4) is flatly belied the numerous exemptions the legislature included in HB 1470 Section 10 that were specifically designed to ensure that private detention facilities used by the state would not be subject to the statutory requirements. Contrary to Defendants' claims, ***there is nothing about HB 1470 that is generally applicable***. Through carefully drafted definitions and extensive detailed exemptions, the Washington legislature ensured that only GEO and the NWIPC would be subject to HB 1470: "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). Individual State Agency Fiscal Note, Office of Att'y

[1] Because HB 1470 Sections 5 and 6 explicitly exempt "the state and its agencies" from any liability thereunder, those Sections are facially and irreparably discriminatory and not subject to Defendants' current arguments regarding HB 1470 "health and safety" requirements.

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Gen. at 15 (Apr. 5, 2023) (emphasis added), https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=68477. As a result, "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*." *Id*., Dep't of Health, at 24 (emphasis added). Defendants should not be allowed to impose unique discriminatory and burdensome requirements on federal operations through crafty drafting and semantic gamesmanship.

Defendants have failed to meet their burden under Rule 59, and they have failed to identify any error in this Court's order enjoining enforcement of HB 1470. As a result, Defendants' Motion for Reconsideration should be denied.

B. No Modification or Clarification of this Court's Preliminary Injunction is Necessary

1. The Court Should Not Exclude HB 1470 Section 5 From Its Injunction

Defendants request Defendants request the modification of this Court's preliminary injunction to "omit Section 5 from its ambit". In support of this request, Defendants cite *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021). In *Whole Woman's Health* the Court considered, *inter alia*, whether enjoining the Texas Attorney General from enforcing a statute restricting abortion services was proper. *Id*. at 43-44. The Court noted that the Texas Attorney General had no enforcement authority under the relevant statutory sections, and there was "no rule or order" related to the subject statute "that the attorney general might enforce against [Plaintiffs]." *Id*. Accordingly, the Court affirmed the dismissal of the Texas Attorney General from that action. *Id*. at 51.

By contrast, in the present case the Washington Attorney General and Washington state agencies under the direction of the Governor are specifically empowered and charged with various authorities and responsibilities under HB 1470. HB 1470 Section 6 specifically provides "Any person who ***fails to comply with this chapter*** may be subject to a civil penalty in an amount of not more than $1,000 per violation per day," and "the attorney general may bring an action to recover the penalty." RCW 70.395.080. The "Chapter" referenced in Section 6 is RCW 70.395, which

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includes HB 1470 Section 5 (RCW 70.395.070). As a result, the attorney general has the authority to bring actions for penalties for any "failure to comply" with RCW 70.395, including a failure to comply with HB 1470 Section 5 (RCW 70.395.070). Moreover, the rules or standards against which any HB 1470 Section 5 "violation[s] [of] a provision of this chapter" will be judged are those rules and standards to be promulgated by DOH pursuant to HB 1470 Section 2. Thus, unlike the statutory scheme in *Whole Woman's Health*, HB 1470 includes numerous provisions that empower DOH and the Washington Attorney General to take actions connected with the enforcement of HB 1470 Section 5.

Accordingly, this Court's preliminary injunction appropriately enjoins the Washington Attorney General and Washington state agencies from enforcing Sections 2, 3, 5, and 6 of HB 1470 (codified as RCW 70.395.040, .050, .070, and .080) against GEO as the operator of the NWIPC. Moreover, even if this Court assumed the Washington Attorney General and state agencies have no impact on the operation of HB 1470 Section 5 so that no injunction was necessary, the portion of this Court's Order holding that HB 1470 Section 5 violates the intergovernmental immunity doctrine must stand, whether or not any injunction is entered against state officials or agencies.

2. This Court's Injunction Should Continue To Apply To All State Agencies

This Court's Order clearly states that "[t]he State and its agencies are preliminarily enjoined from enforcing [Sections 2, 3, 5, and 6 of HB 1470] against GEO as the operator of the NWIPC." Nonetheless, Defendants request "clarification" from this Court that "non-party state agencies [including DOH and L&] are not subject to the preliminary injunction." Motion pp. 5-6. In support of this bold attempt to exempt DOH and L&I from compliance with this Court's injunction, Defendants cite Federal Rule of Civil Procedure 65(d). *Id.*

Rule 65 was intended to embody "the common law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9,

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15 (1945). The text of Rule 65(d)(2) reflects this intent and provides:

> (d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER….
>
> (2) *Persons Bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:
>
> (A) the parties;
>
> (B) ***the parties' officers, agents, servants, employees, and attorneys*;** and
>
> (C) ***other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)***.

Fed.R.Civ.P. 65(d) (emphasis added). When an action challenging a state statute is brought against the governor and attorney general of the state in their official capacities, it is an action against the state and its agencies. *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n. 55 (1978) (observing that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent"). Both the secretary of health and the director of labor and industries are appointed by and serve at the pleasure of the governor.

RCW 43.17.020; RCW 43.70.030. Contrary to Defendants' suggestion, Fed.R.Civ.P. 65(d) and the cases construing the same clearly contemplate that all "officers, agents, servants, employees, and attorneys" of the Governor, including DOH and L&I, are bound by this Court's Injunction.

Defendants also cite a number of inapposite cases, none of which supports Defendants' request that DOH and L&I be allowed to continue with their efforts to enter[2] the NWIPC and perform inspections and investigations pursuant to HB 1470. Motion pp. 5-6; *see e.g., Trees v. Serv. Employees Int'l Union Local 503*, 570 F. Supp. 3d 954 (D. Or. 2021) (private suit against unions could not be used to impose temporary retaining order against state agency when state was

[2] These prior questionable attempts by DOH and L&I to circumvent this Court's consideration of GEO's challenge to HB 1470 and perform inspections and investigations pursuant to HB 1470 are the subject of the two related suits pending before this Court. No. 3:24-cv-05095-BHS; No. 3:24-cv-05029-BHS.

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not party and state agency was not legally identified with any Defendant and not accused of aiding or abetting any wrongful act). Defendants also argue that DOH and L&I should not be limited by this Court's Order in their ongoing efforts to enter and inspect the NWIPC pursuant to other statutes, citing *U.S. Commodity Futures Trading Com'n v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328 (S.D.N.Y. 2007).[3]

The State's actions in the recent past[4] lay bare its thinly veiled intentions here. Defendants seek this Court's approval for DOH and L&I to enter and inspect the NWIPC—ostensibly pursuant to other statutory authority—so that DOH and L&I can document alleged violations of HB 1470, publish that information,[5] and facilitate third parties' pursuit of actions under HB 1470 Section 5 against GEO and its employees. GEO respectfully requests that this Court's Injunction clearly remind Defendants that regardless of what authority DOH, L&I, or other State agents might assert to gain entrance to the NWIPC, any actions by the State in furtherance of the enforcement of HB 1470, including the inspection of the NWIPC for compliance and dissemination of any information used to support Section 5 actions by detainees, would place Defendants in contempt of this Court's Order.

3. This Court's Injunction Should Continue to Enjoin Defendants From Taking Any Actions to Enforce Sections 2, 3, 5, and 6 of HB 1470

As noted above, "[t]his Court's Order clearly states that "[t]he State and its agencies are preliminarily enjoined from enforcing [Sections 2, 3, 5, and 6 of HB 1470] against GEO as the operator of the NWIPC." This includes all "officers, agents, servants, employees, and attorneys" of the Governor, including DOH and L&I. *See* Fed.R.Civ.P. 65(d).

Defendants seek modification of this Court's Order to permit DOH to conduct an environmental justice assessment and continue to prepare for rulemaking under Section 2, "short

[3] To the extent Defendants are seeking approval of this Court to enter the NWIPC pursuant to statutory authority other than HB 1470, those issues are currently pending before this Court in cases No. 3:24-cv-05095-BHS and No. 3:24-cv-05029-BHS and should be decided in that context.

[4] As detailed in Case 3:24-cv-05095-BHS Dkt. 38, Defendants have repeatedly misled this Court regarding DOH and L&I's attempts to enter the NWIPC last year to perform inspections and investigations pursuant to HB 1470.

[5] As noted in this Court's Order, HB 1470 § 3 requires DOH to post inspection results in a place viewable by detained persons. The obvious intent of this provision was to facilitate actions under HB 1470 Section 5 against GEO and its employees.

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of adopting and enforcing those rules." Motion p. 6. GEO does not read this Court's Order as enjoining rulemaking activities "short of adopting and enforcing those rules," or conducting environmental justice assessment. As a result, GEO does not believe any modification or clarification is necessary. However, GEO requests that if any clarification is provided that it also note that it enjoins any actions by the State in furtherance of the enforcement of HB 1470, including the inspection of the NWIPC for compliance with HB 1470 and the dissemination of any information used to support Section 5 actions by detainees.

III. CONCLUSION

For the foregoing reasons, the State's motion to dismiss should be denied.

DATED this 5th day of April, 2024.

I certify that this memorandum contains 10 pages in compliance with Court Order at Dkt. No. 37

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