The Honorable Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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-BHS

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OR CLARIFICATION AND MODIFICATION OF THE PRELIMINARY INJUNCTION ORDER

NOTE ON MOTION CALENDAR: APRIL 12, 2024

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

I. INTRODUCTION

The Court committed legal error when concluding HB 1470 impermissibly discriminates against the federal government. Binding precedent makes clear that, even where the state legislature singles out federal contractors, there is no intergovernmental immunity problem if the state law is neutral on its face. If the Court declines to vacate its preliminary injunction, the Court should still modify its order to make clear that it does not enjoin Section 5 of HB 1470, does not enjoin state agencies that GEO did not sue, and that the Department of Health's internal rulemaking and environmental justice assessment activities can continue.

II. ARGUMENT

A. HB 1470 Does Not Discriminate Against the Federal Government

The Court should vacate its preliminary injunction. The Court (and now GEO) principally rely on a single quote from an out-of-circuit, district court case to justify looking behind the curtain of HB 1470's plain text to find impermissible discrimination. Dkt. #35 at 30; Dkt. #38 at 7. But *United States v. Hynes*, 759 F.Supp. 1303 (N.D. Ill. 1991), was reversed on appeal, 20 F.3d 1437 (7th Cir. 1994). The Seventh Circuit recognized that the state law targeted two federal properties purchased with installment contracts for state and local taxes; however, it concluded that the law was "not discriminatory on its face" because the "difference in tax treatment . . . d[id] not depend on the identity of the governmental body acquiring the property[.]" *Hynes*, 20 F.3d at 1443. Tellingly, the Seventh Circuit held the state law did not impermissibly discriminate against the federal government even after assuming there were no similarly-situated comparators, i.e., that there were no state and local governments paying the same tax because they were not similarly purchasing property with installment contracts. *Id.* at 1441.

The Court should reconsider its order and conclude similarly here. While there are no similarly situated comparators (because state and local governments are prohibited from contracting with private detention centers), HB 1470 is not discriminatory on its face. That is enough to survive intergovernmental immunity. As the Seventh Circuit surmised and today's

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

binding Supreme Court makes clear, it is "the letter of the law" that matters. *Dawson v. Steager*, 139 S. Ct. 698, 704 (2019). GEO attempts to minimize *Dawson* in two ways—neither of which should be persuasive. First, GEO argues *Dawson* is somehow confined to 4 U.S.C. § 111. But the Supreme Court explicitly read Section 111 to be one and the same as intergovernmental immunity. *Id.* at 702-03 ("Section 111 codifies a legal doctrine almost as old as the Nation."). Second, GEO observes that the state law in *Dawson* had a non-discriminatory purpose. But *Dawson* nowhere suggests that its holding is so limited. In fact, the *Dawson* Court itself declared that it "granted certiorari to afford additional guidance" in cases involving intergovernmental immunity. *Id.* at 703. And that guidance is clear: "what matters isn't the intent lurking behind the law[,]" *id*. at 704, but "the law as written[,]" *id.* at 706.

Indeed, a legislature's discriminatory intent alone cannot, as GEO suggests, create an intergovernmental immunity problem. The Court need look no further than *Washington v. United States* and *United States v. California* to confirm this basic point. In *Washington*, the Supreme Court upheld a state tax that explicitly targeted those " 'engaged in the business of constructing, repairing . . . or improving new or existing buildings . . . of or for the United States.' " 460 U.S. 536, 539 n.3 (1983). There, the Supreme Court looked at " 'the whole tax structure of the state,' " *id.* at 542 (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)), and reasoned Washington "ha[d] not singled out contractors who work for the United States for discriminatory treatment," but instead "merely accommodated for the fact that it may not impose a tax directly on the United States as the project owner," *id.* at 546. In *United States v. California*, 921 F.3d 865 (9th Cir. 2019), the Ninth Circuit upheld three different state laws that were "expressly designed to protect its residents from federal immigration enforcement," *id.* at 872, reasoning that "the mere fact that the actions of the federal government are incidentally *targeted* . . . does not mean that they are incidentally *burdened*." *Id.* at 872.

Here, even if HB 1470 targeted the federal government, it does not "incidentally burden" any federal activity. Again, HB 1470's plain text applies broadly to any private detention facility

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

regardless of the sovereign it contracts with, and exempts facilities under "similarly applicable federal law." *See* RCW 70.395.100(1)-(4). Even if the Court were to look to the practical burdens imposed, HB 1470 does not impermissibly discriminate. While the Court observed HB 1470 exempts facilities used "for residential substance use disorder treatment," *see* Dkt. #35 at 34, that exemption shows how HB 1470 actually treats NWIPC *better* than other facilities. *See Washington*, 460 U.S. at 546 (upholding state tax that discriminated against the federal government but still left both the federal government and its contractors "*better off* than other taxpayers"). HB 1470 only duplicates *some* of the regulations that apply to residential treatment facilities. *Compare* RCW 70.395.040 *with* WAC 246-337 (including regulations for the management of service animals, electrical outlets, parent-infant visitations). In other words, the exemption ensures NWIPC is *better off* than residential treatment facilities that must continue to comply with a full panoply of regulations. Finally, to the extent the Court observed the Department of Corrections only provides the initial issuance of hygiene items at no cost, and not their replenishment, that provides a reason to enjoin RCW 70.395.040(d)—and not HB 1470 writ large. *See California*, 921 F.3d at 885 (upholding AB 103 except for a single provision that unduly burdened the federal government).

B. Alternatively, the Court Should Modify and Clarify the PI Order

If the Court denies reconsideration, three aspects of the preliminary injunction should be modified and clarified.

First, because the Governor and Attorney General cannot enforce Section 5 of HB 1470, they cannot be enjoined from enforcing it. GEO contends that Section 6 would give authority to the Attorney General to enforce violations of Section 5. *See* Dkt. #38 at 10–11. But GEO does not explain how the Attorney General could enforce against GEO a provision that merely sets out a cause of action for aggrieved detainees when he remains enjoined under Section 6. And GEO's follow-up argument that the Court's holding on Section 5 must stand, even if the Attorney General and other state agencies have no role under Section 5, runs into a redressability problem.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Any purported harm under Section 5 must be traced to "'conduct' of the defendant[s], not to the provision of law that is challenged." *Collins v. Yellen*, 141 S. Ct. 1761, (2021); *see also Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021) (federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves).

Second, GEO sued only the Governor and Attorney General in their official capacities. GEO cites no case where—consistent with *Ex parte Young*, and Rule 65—suing the Governor suffices to sue and enjoin unnamed state agencies. Indeed, the Supreme Court expressed concern about *Ex parte Young* being applied in an overbroad manner against governors and attorneys general. *See Ex parte Young*, 209 U.S. at 157 (observing that, if the governor and attorney general could be sued "'for the purpose of testing the constitutionality of the statute, . . . then the constitutionality of every act passed by the legislature could be tested" and that would conflict "with the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons'"); *David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998) (cautioning against treating the state and its agents as "fungible"; instead, "plaintiffs must sue the particular public official whose acts violate federal law"). Likewise, courts must exercise caution in ordering injunctive relief as to non-parties to an action. *See* Fed. R. Civ. P. 65(d)(2) (enumerating persons who can be bound); *Allen v. Brown*, No. 96-CV-1599 (RSP/GJD), 1998 WL 214418, at *3 (N.D.N.Y. Apr. 28, 1998) (denying a request for injunctive relief against a state agency and correctional facility because they were not parties to the action). And while it is true the Governor appoints agency heads, including for the Departments of Health and Labor and Industries, GEO does not otherwise argue how this is sufficient for a principal-agent relationship under HB 1470 or that the agencies are in privity with the Governor. Instead, both agencies have their own statutory powers to ensure safe workplaces and safeguard against public health threats separate from HB 1470. *See* RCW 49.17.070; RCW 43.70.170.[1]

[1] GEO calls DOH's and L&I's pending motions for preliminary injunction as seeking "this Court's approval." Dkt. #38 at 13. That is a nice veneer for GEO's obstinacy in blocking state inspection of any kind—and

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

Third, and finally, GEO does not read the Court's preliminary injunction order to constrain agencies from rulemaking activities short of adoption and enforcement or undertaking environmental justice assessments. Thus, Defendants respectfully ask the Court to so clarify.

GEO, however, asks the Court to enjoin "the State" from disseminating information that may be used to support Section 5 actions by detainees. Dkt. #38 at 14. But GEO's remarkable request not only lacks any basis in law, it could conflict with agencies' obligations under other statutes, such as the Public Records Act, RCW 42.56. GEO's request may block agencies from disclosing records mandated for disclosure by state law and could also force agencies to violate a prohibition against "distinguish[ing] among persons requesting records . . . ." RCW 42.56.080(2); *Green v. Lewis County*, No. 77746-7-I, 2018 WL 3434937 (Wash. App. 2018) (unpublished) ("This prohibition is to prevent agencies from denying PRA requests based on the requestor's identity or purpose." (citing *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 377 P.3d 214, 227 (Wash. App. 2016))). GEO cannot convert its objections to HB 1470 into a ban prohibiting Defendants from communicating public information.

If the Court modifies the preliminary injunction, Governor Inslee and Attorney General Ferguson respectfully request that the injunction be as follows:

> Defendants Inslee and Ferguson, and their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them from the date of this Order, are preliminarily enjoined from enforcing §§ 2, 3, and 6 of House Bill 1470 (2023). This preliminary injunction does not apply to nonparty agencies' internal management and operation of duties under and relating to HB 1470, including preparing for rulemaking and conducting environmental justice assessments.

III. CONCLUSION

This Court should grant the State's motion for reconsideration. Alternatively, the Court should clarify and modify the preliminary injunction.

---

the necessity of having to file state court actions to ensure GEO's compliance with longstanding and generally applicable state laws.

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200

DATED this 12th day of April 2024.

I certify that this memorandum is 5 pages, in compliance with the Court's order at Dkt. #37.

ROBERT W. FERGUSON
Attorney General

s/ Marsha Chien
MARSHA CHIEN, WSBA 47020
CRISTINA SEPE, WSBA 53609
Deputy Solicitors General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-6200
Cristina.Sepe@atg.wa.gov
Marsha.Chien@atg.wa.gov

ANDREW R.W. HUGHES, WSBA 49515
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Andrew.Hughes@atg.wa.gov

Attorneys for Defendants Governor Jay R. Inslee and Attorney General Robert W. Ferguson

CERTIFICATE OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System, which will serve a copy of this document upon all counsel of record.

DATED this 12th day of April 2024, at Olympia, Washington.

s/ Leena Vanderwood
Leena Vanderwood
Paralegal
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 753-4111
Leena.Vanderwood@atg.wa.gov