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 REPLY IN SUPPORT OF SUMMARY JUDGMENT AND RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

NOTING DATE: 10/13/2023

ORAL ARGUMENT NOT REQUESTED

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INTRODUCTION

The parties to this case agree on two things. We agree that these cross-motions for summary judgment constitute "unnecessary litigation," Defs.' Opp'n To GEO's MSJ & Cross MSJ at 1, Doc. 72 (Sept. 6, 2023) ("Wash. Br."), and we agree that the Ninth Circuit's en banc decision in *GEO Grp. Inc. v. Newsom* mandates the conclusion that EHB 1090 is unconstitutional. 50 F.4th 745 (9th Cir. 2022) (en banc). Defendants have admitted that *Newsom* "*forecloses* Defendants from enforcing [EHB 1090] against GEO[.]" Defs.' Not. and Stip. of Enforcement Position, Doc. 65, at 2 (June 22, 2023) (emphasis added).

But that is where the parties part ways. Defendants confuse the issues at the outset, mistaking mootness for standing. It is blackletter law that a changed circumstance *after* the outset of a suit that allegedly affects the justiciability of the plaintiff's claim is analyzed under mootness doctrine, not standing. This distinction is not academic. Under the law of mootness, Defendants face an exceedingly heavy burden to show that a unilateral, voluntary cessation of unlawful conduct means this Court can no longer enter any meaningful relief. Defendants cannot lessen their burden by shoehorning their mootness objections into inapposite standing doctrine. The entire section on standing in their brief is irrelevant to the objection Defendants raise.

Even if standing were the right question (and it emphatically is not), the answer to the standing question is clear. The *Newsom* Court already considered and rejected similar standing arguments to the ones Defendants make now. Were there any doubt about the threat of enforcement here, Defendants have *already* attempted to enforce the statute against GEO. GEO has standing to sue, and Defendants' contrary assertion is nothing more than a distraction.

Focusing on the right justiciability doctrine, this dispute is far from moot. Defendants' unilateral, half-hearted assurance not to enforce an unconstitutional statute *for now* and under

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certain conditions when met in their *subjective judgment* falls far short of the high bar required to overcome the voluntary cessation exception to mootness. Defendants' assurance is neither an official nor permanent policy change. It fails to bind successors in office and is far narrower than GEO's prayer for relief and *Newsom*'s holding. The notice amounts to nothing more than a bare promise—and a partial promise at that. Defendants' notice fails to provide GEO complete relief and bears none of the permanence required for voluntary cessation of unlawful conduct.

Newsom provides a clear and unequivocal constitutional holding that applies with full force to Washington's statute. 50 F.4th at 758 ("Simply put, [a ban on privately-owned detention facilities] would breach the core promise of the Supremacy Clause."). By establishing a proven constitutional violation, GEO has satisfied the remaining injunction factors and is accordingly entitled to permanent injunctive and declaratory relief.

ARGUMENT

I. Although Defendants' Objection Sounds In Mootness, Not Standing, GEO Has Standing to Challenge Defendants' Unconstitutional Ban on Private Detention Facilities.

Defendants attempt to reframe their mootness objection into a standing objection. But Defendants claim that "fact developments that post-date the complaint" render the controversy no longer live (or, put differently, no longer inflicting an injury on GEO), Wash. Br. at 3, n.4, so their objection sounds in mootness, not standing. *See Davis v. FEC*, 554 U.S. 724, 733–36 (2008) (holding that plaintiff had standing to bring a future-injury challenge based on facts as they existed at the time the complaint was filed and analyzing post-filing events under a mootness framework); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191–92 (2000) (distinguishing standing and mootness by reference to pre- and post-filing facts). "The existence of standing turns on the facts as they existed at the time the plaintiff filed the complaint." *Skaff v.*

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Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 838 (9th Cir. 2007). Accordingly, the entire first part of Defendants' argument (pages 4–10 of their brief) simply confuses the issues and should be disregarded.

To be sure, standing may be raised at any stage of litigation, and must be proven at the level of proof required by the particular stage, *see Jones v. L.A. Cent. Plaza LLC*, 74 F.4th 1053, 1058 (9th Cir. 2023), but the standing analysis itself is backwards looking to the time of the complaint. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571, & n.4 (1992) (emphasis in original) (citing *Newman–Green, Inc. v. Alfonzo–Larrain,* 490 U.S. 826, 830 (1989)). By contrast, the effect of *intervening* events goes to the question of mootness. *See Sea-Land Serv., Inc. (Pac. Div.) v. Int'l Longshoremen's & Warehousemen's Union, Locals 13, 63, & 94*, 939 F.2d 866, 869 (9th Cir. 1991); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 426 (2013) (Breyer, J., dissenting) (observing that facts arising after the complaint "are irrelevant, for we assess standing as of the time a suit is filed"); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 123 (6th ed. 2019) ("If events subsequent to the filing of the case resolve the dispute, the case should be dismissed as moot."). Even Defendants' cited cases make this clear: "A case may become moot after it is filed, when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010) (internal quotation marks omitted).

This "important difference between the two doctrines"—that standing focuses on preserving judicial resources at the outset of a case while mootness focuses on preventing, if possible, the waste of already-spent resources later in the case—explains why mootness, especially in the context of voluntary cessation of illegal conduct by the Defendant, places a heavy burden

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on Defendants, while the standing inquiry does not. *Friends of the Earth*, 528 U.S. at 191–92. The Court should decline the invitation to alleviate the Defendants of their substantial burden to prove mootness. *See Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 862 (9th Cir. 2017) ("The party asserting mootness bears the heavy burden of establishing that there remains no effective relief a court can provide."). And, as discussed in Part II below, Defendants cannot carry that burden.

In any event, GEO plainly has standing to sue over the unconstitutional state ban on private detention facilities. The en banc Ninth Circuit already considered and rejected a similar argument that GEO lacks standing in this context. The Court explained: "California contends that any future injury is speculative because ICE may choose not to extend its contracts, and that any such injury is not imminent because it would not occur until at least 2024." *Newsom*, 50 F.4th at 753. Analyzing whether GEO's future injury was "certainly impending," or if there was a "substantial risk that the harm will occur," *id.* (internal quotation marks omitted), the Court concluded that "[GEO's] future injuries are not conjectural or hypothetical." *Id.*

Just so here. A "plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (cleaned up) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)). A plaintiff need only show "a realistic danger of enforcement." *Arizona v. Yellen*, 34 F.4th 841, 847 (9th Cir. 2022). Standing is lacking when a plaintiff's alleged future harm is "wholly contingent upon the occurrence of unforeseeable events," such that he does not confront "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (en banc) (quotation omitted). Defendants cannot credibly claim that such an

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"extended chain of highly speculative contingencies," *Nelsen v. King Cnty.*, 895 F.2d 1248, 1252 (9th Cir. 1990), existed at the time the complaint was filed in this case. It was certainly credible to believe that GEO and ICE would continue to maintain at least one contractual relationship in Washington. And it was certainly realistic to believe that Defendants would seek to enforce EHB 1090 against GEO, especially since Defendants did not disavow enforcement of the statute at the outset of this litigation, only doing so *after Newsom*'s mandate and GEO's request for final judgment. *See Tingley v. Ferguson*, 47 F.4th 1055, 1068 (9th Cir. 2022) (We have . . . interpreted the government's failure to *disavow* enforcement of the law as weighing in favor of standing."); *see also Driehaus*, 573 U.S. at 164–67. Defendants confirmed the reasonableness of GEO's fear that they would seek to enforce the statute by filing counterclaims against GEO seeking to impose retroactive penalties. Simply put: GEO, an operator of a private detention facility in Washington, has standing to challenge a ban on private detention facilities in Washington already found unconstitutional by the en banc Ninth Circuit.

II. Defendants' Temporary, Conditional, and Subjective Litigation Statement Does Not Meet the High Bar for Voluntary Cessation of Illegal Conduct Necessary To 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" recognizing that *Newsom* controls this case 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.

"Courts are understandably reluctant to declare a case moot based on the defendant's voluntary cessation of the challenged activity." *Am. Cargo Transport, Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010). "The voluntary cessation of challenged conduct does *not*

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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*, 528 U.S. at 189; *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037 (9th Cir. 2018) ("*Fikre I*") (citing this "well-established" principle). Defendants bear the "heavy," "stringent," and "formidable" burden to show that it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of 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). Rather, "[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 make much of the solicitude owed to government actors when they disavow continuing illegal conduct. "The tendency to trust public officials is not complete, however, nor is it invoked automatically." 13C WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 3533.7 (3d ed.). An "incomplete response" or "temporary compliance" cannot moot a case. *Id.* Rather, courts require "a *permanent* policy change that is not likely to be abandoned[.]" *Id.* (emphasis added). It is "easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time." *Id.* True, the Court may assume that the government "acts in good faith." *Fikre I*, 904 F.3d at 1037–38. But "the government must still demonstrate that the change in its behavior is 'entrenched' or 'permanent.' " *Id.* (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015)).

Thus, when the government preserves a path to resume the challenged conduct, there can be no finding of mootness. For example, in *ASW v. Oregon*, the Ninth Circuit found no mootness

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where "Oregon explicitly left the mechanism in place whereby it can uniformly reduce adoption assistance payments at any time in the future." 424 F.3d 970, 974 (9th Cir. 2005). The Court explained that this posture "contrasts sharply" with "*Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir.1994), where the relevant statute had been *repealed* and the plaintiffs simply feared the possibility that the state would continue to discriminate under the new statute." *Id.* (emphasis added). Where the State has not taken permanent, official steps, "it [was] not a mere 'theoretical possibility" that the State would again adopt its challenged rule. "Oregon already has such a rule, *which it purposely chose not to repeal*." *Id.* Exactly so here.[1]

The key principle is *permanence*—both as to current government actors and their successors—and the official nature of the government's revocation. *See City of L.A. v. Lyons*, 461 U.S. 95, 101 (1983) ("[T]he case is not moot, since the moratorium by its terms is not permanent."). A disavowal that does not bind successors in office likewise cannot moot a case. *See Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) (reversing a district court's finding of mootness where the original government actor "no longer occupies the position of Secretary of State, and the current incumbent" could reinitiate the challenged conduct "at her discretion"). Defendants concede that, "regarding Defendants' successors-in-office," "the disavowal does not expressly bind them." Wash. Br. at 10.

The Ninth Circuit's "precedents illuminate the contours of such an inquiry." *Fikre I*, 904 F.3d at 1038. "First, the form the governmental action takes is critical and, sometimes, dispositive." *Id.* Repeal of a statute is often, though not always, sufficient. *See City of Mesquite v.*

[1] Defendants claim that "GEO suggests that RCW 70.395.030 must be 'repealed' in order for GEO's alleged injury to dissipate." Wash. Br. at 9. GEO has made no such suggestion. Whether a State has repealed its unconstitutional rule or statute is a key component of the voluntary cessation caselaw. But repeal is not necessary to provide GEO relief. Relief would be provided by the proposed order granting a permanent injunction and declaratory judgment.

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Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (denying a mootness claim despite a repeal because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision" and "[t]here is no certainty" that the government would not reenact the state). To the extent repeal of a statute is sometimes sufficient to moot a challenge to the statute, it is because "[t]he rigors of the legislative process bespeak finality and not for-the-moment, opportunistic tentativeness." *Fikre I*, 904 F.3d at 1038 (cleaned up).

"On the other hand, 'an executive action that is not governed by any clear or codified procedures cannot moot a claim.'" *Id.* (quoting *McCormack*, 788 F.3d at 1025). That rule of law is dispositive here. In a highly analogous case, the Ninth Circuit reversed a district court *twice* for finding mootness after the government filed notices in the district court stating that it had remedied Plaintiff's injury (removing Plaintiff from the no-fly list). *Fikre v. Fed. Bureau of Investigation*, 35 F.4th 762, 770 (9th Cir. 2022) ("*Fikre II*"); *Fikre I*, 904 F.3d at 1039. The Court explained: "Even accepting the government's argument that its notice constitutes a formal agency action, publicly made, and unequivocally expressed, the mere announcement that Fikre was removed from the list falls short of meeting the government's burden." *Fikre I*, 904 F.3d at 1039 (internal quotation marks omitted). The government's notice in litigation was insufficient, even assuming the government's good faith, because it was "an individualized determination," *id.* at 1039–40, "the government has not assured" Plaintiff "that he will not be banned . . . for the same reasons that prompted the government to add him to the list in the first place," and the government instituted no "procedural safeguards" to ensure permanence. The Court ultimately reversed the finding of mootness because the government's disavowal was "discretionary," and not "entrenched" or "permanent." *Fikre I*, 904 F.3d at 1040. These holdings are sufficient to resolve this case.

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Defendants' cited cases, meanwhile, are largely inapposite. For example, cases in which there *was* an official, permanent change in policy are of no help, except to emphasize the need for such permanence. *See, e.g., Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1324 (11th Cir. 2004) ("Before suit was even brought in this case, the old Sign Code was replaced by the City with an Amended Sign Code that eliminated most of the constitutionally infirm provisions[.]" (internal quotation marks omitted); *id.* ("[T]here is no hint the City of Sunrise has any intention of reenacting the old Sign Code"). In other cases cited by Defendants, it was impossible for the Court to afford any relief because the Plaintiff's challenge related to a single event which had already occurred. *See e.g.*, *Am. Cargo Transp., Inc.*, 625 F.3d at 1179 ("Because the shipment at issue has already been completed—the ship has in this case literally sailed—ACT's claim for injunctive relief is moot[.]"); *Faust v. Inslee*, No. C20-5356 BHS, 2021 WL 4288587, at *2 (W.D. Wash. Sept. 21, 2021) (claims were moot because the rally at the State Capitol Plaintiffs sought to host had already taken place). Here, by contrast, the disputed conduct, GEO's operation of private detention facilities in Washington, is ongoing.

Defendants' remaining cases are similarly easily distinguishable. In *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991), the Court rested its analysis on the unique context of habeas corpus. The petitioner sought "*only* the issuance of a writ of habeas corpus," *id.* at 775 (emphasis added), and "under the writ of *habeas corpus* [the Court] cannot do anything else than discharge the prisoner from the wrongful confinement." *Id.* The Court explained why the Government's release (although temporary) mooted the habeas claim: "By his petition for habeas corpus, Picrin–Peron has requested only release from custody. Because he has been released, there is no further relief we can provide." *Id.* at 776. In *Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006), the Court explained why the Plaintiff's own statements indicated no credible threat of prosecution: "It

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is no more than speculation to predict that Mr. Winsness will again face criminal proceedings . . . . Mr. Winsness has alleged neither an intent nor a desire to violate the flag-abuse statute in the future. According to the police report, he did so this time because he was 'bored,' and the Complaint states only that he 'may' choose to alter another flag in the future." *Id.* Further, the Court described the government's disavowals as "authoritative," *id.* at 737, and cited "no evidence" "that the prosecutors will change their policies if this lawsuit is dismissed." *Id.* at 736–37. In *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988), the Court rested its finding of mootness on at least five years of consistent non-enforcement of an unconstitutional statute. *Id.* Finally, in *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 71–72 (1983), the Court based its finding of mootness on "the effect of the voluntary acts of a third party non-defendant," *id.*, explaining that it was "not the typical case." *Id.* (citation omitted).

Applying the right standards, 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. Contrary to the Defendants' assertions, the Court need not assume bad faith by Defendants to reach this conclusion. The Court can take Defendants' word for it, as Defendants' *own* notice of enforcement decision demonstrates that EHB 1090 *could* be enforced against GEO in the future. And Defendants' conduct through this litigation drives the point home. *Porter*, 496 F.3d at 1017 (reversing a district court's finding of mootness where "Defendants have neither asserted nor demonstrated that they will *never* resume the complained-of conduct" (cleaned up)).

As explained in GEO's opening brief, even assuming that Defendants' unilateral notice of its current enforcement position were actually binding on Defendants, (1) the notice does not bind any other current or future actors who may also seek to enforce the unconstitutional EHB 1090

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against GEO; and (2) the terms of the notice are conditional and subjective. Defendants' assurance only lasts "as long as"—in the opinion of Defendants—"*Newsom* remains the law of the Ninth Circuit." GEO MSJ, Doc. 71 at 2 (Aug. 8, 2023). Defendants' assurance falls short of the more categorical holdings of *Newsom* and of the declaration and permanent injunction issued in the AB 32 case. *See* GEO MSJ Ex. 1, Final Judgment and Permanent Injunction, Doc. 71-1, *GEO Grp., Inc. v. Newsom*, 19-CV-02491-RSH-LR (S.D. Cal. May 23, 2023) at 2–3. Under Defendants' stipulation, nothing would prevent them from later enforcing EHB 1090 against GEO, forcing GEO to return to this Court under threat of the same penalties and sanctions sought by Defendants in this case. Defendants' notice is nothing more than 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).

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' 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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III. GEO Is Entitled to the Same Straightforward Entry of Summary Judgment and Permanent Injunction The Court Entered in *Newsom*.

The governing law makes the outcome of this case exceedingly straightforward.[2] 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 explained 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 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.* The Ninth Circuit's holding was unequivocal: "[T]he outcome in this case is clear under basic Supremacy Clause

[2] To the extent Defendants found GEO's opening brief "conclusory," Wash. Br. at 1, it is because the conclusion that GEO is entitled to relief here follows so clearly from the holding of *Newsom*. Indeed, *Newsom*'s command was so clear that district courts *outside* of the Ninth Circuit have applied it to hold analogous state bans on private immigration detention facilities unconstitutional. *See CoreCivic, Inc. v. Murphy*, No. CV 23-967 (RK) (TJB), 2023 WL 5556025, at *9 (D.N.J. Aug. 29, 2023). Of particular note, the district court there granted declaratory relief and entered broad permanent injunctive relief, as GEO requests here. *See id.*, Doc. 51 (D.N.J. Order) ("ORDERED that Defendants are permanently enjoined from enforcing AB 5207 against Plaintiff with respect to Plaintiff negotiating or contracting with the United States government to operate immigration detention facilities in New Jersey[.]").

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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.

Defendants have conceded that *Newsom* controls this case. 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. Defendants point to certain differences in the two bans on private detention facilities, for example, a grace period in the California statute, and what Defendants describe as an exception for the U.S. Marshals in the Washington statute, *see* Wash. Br. at 2–3. But Defendants do not argue that these "differences" change the application of *Newsom* here. Nor could they. Those facts were not relevant to *Newsom*'s holding or GEO's claim for relief here. The same permanent injunctive relief that was granted in the AB 32 case is required here. *See* GEO MSJ Ex. 2, Prop. Order, Doc. 71-2 (Aug. 8, 2023).

Defendants responses fail to upset that straightforward conclusion. First, Defendants claim that GEO faces a heightened burden in securing an injunction against state actors but cite no authority supporting that proposition in this context. Rather, Defendants' cited cases only state "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own *internal affairs*." *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001); *Rizzo v. Goode*, 423 U.S. 362, 378–79 (1976) (analyzing challenge to the internal procedures of the Philadelphia police department). That courts ordinarily do not enjoin the government's internal affairs has no bearing whatsoever on an injunction against the enforcement of an unconstitutional statute against private parties. Nor is it relevant that federal

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courts exercise restraint in enjoining state "*criminal laws* in the absence of irreparable injury." *Lyons*, 461 U.S. at 112 (emphasis added). Defendants have established no entitlement to heightened protection when they seek to engage in a proven violation of the Supremacy Clause.

Second, Defendants argue that GEO has not demonstrated an irreparable injury that cannot be adequately remedied at law. But there is no adequate remedy at law to be found here. GEO may not pursue a damages suit in federal court against Washington or its officers acting in their official capacities for the immense financial harm it will suffer if EHB 1090 is enforced against it. *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. Azar*, 911 F.3d 558, 581 (9th Cir. 2018). 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 millions of dollars in lost revenue if EHB 1090 were enforced against it. Martin Decl. ¶¶ 30–31, Doc. 9 (Apr. 29, 2021). "[B]ecause [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 not granted." *Cal. Pharmacists*, 563 F.3d at 852; *see also Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1113–14 (9th Cir. 2010) ("[T]o show a risk of irreparable harm, plaintiffs may show . . . that they will lose considerable revenue . . . that they will be unable to recover due to the State's Eleventh Amendment sovereign immunity."), *vacated on other grounds and remanded sub nom. Douglas*, 565 U.S. 606.

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Unlike the authorities on which Defendants rely, there is no ongoing administrative proceeding at which GEO could raise its constitutional defense before coming to the courts. *See McDermott v. Bradford*, 10 F. Supp. 661, 664 (W.D. Wash. 1935) (administrative proceeding). *See also* 11A WRIGHT & MILLER, AVAILABILITY OF INJUNCTIVE RELIEF—ADEQUACY OF THE LEGAL REMEDY, FED. PRAC. & PROC. CIV. § 2944 (3d ed.) (2023) (referencing "a defense in some other proceeding"). Indeed, Defendants proved as much when they came to *this Court* to enforce the statute in their countersuit against GEO. Defendants seem to believe that GEO should simply have to wait until the State enforces the unconstitutional statute against it, and then only invoke *Newsom*'s holding as a defense. Wash Br. at 16.[3] Defendants' position would require GEO to await a *second* enforcement suit by the State before challenging the State's unconstitutional statute. That is not how constitutional litigation works, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (a Plaintiff need not "expose himself to liability before bringing suit to challenge . . . the constitutionality of a law threatened to be enforced"), and places the onus on the wrong party. The party who secured a favorable constitutional holding from the en banc Ninth Circuit should not have to live in fear of a suit that could come down at any moment to enforce an unconstitutional statute—a suit potentially including, as Defendants' counterclaims demonstrate—severe retroactive penalties. The party who seeks to leave the door open to continue violating the Constitution should face the burden of arguing for a change in the governing law.

Third, Defendants argue that GEO has failed to make a sufficiently strong showing on the remaining injunction factors. But because GEO has shown a certain likelihood that EHB 1090 violates the Federal Constitution, it has necessarily "also established that both the public interest

[3] Here again, Defendants reveal their intention to enforce the statute against GEO in the future, further emphasizing that this dispute is not moot.

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and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014).[4] For this reason, courts routinely enter injunctive relief where a Supremacy Clause violation is established. *See, e.g.*, *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 366–67 (1989) (noting that irreparable harm may be established "by a showing that the challenged state statute is flagrantly and patently violative of . . . the express constitutional prescription of the Supremacy Clause"); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (finding irreparable harm where the Supremacy Clause was violated); *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (finding irreparable harm where the Supremacy Clause was violated), *aff'd in part, rev'd on other grounds*, 567 U.S. 387 (2012); *see also Valenzuela v. Ducey*, 329 F. Supp. 3d 982, 997 (D. Ariz. 2018) (collecting cases).[5]

Fourth, Defendants make the extraordinary argument that an order binding their successors not to enforce the unconstitutional statute would somehow violate the Eleventh Amendment. "The

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[4] Defendants claim that GEO "waived" discussion of the remaining injunction factors and cannot address them for the first time in reply. But these are *cross*-motions for summary judgment, as GEO agreed to amend the proposed briefing schedule, at Defendants' request, to allow for Defendants' motion for summary judgment. *See* Amended J. Status Report, Doc. 67 (July 13, 2023). Thus, this brief is both a response and a reply. In any case, GEO did not waive the remaining injunction factors because GEO established (and Defendants do not dispute) that *Newsom* renders the challenged statute unconstitutional.

[5] As to the scope of relief, Defendants object that the proposed order extends to all "Persons" who might be subject to the unconstitutional statute and argue that it is unclear whether such persons would satisfy the injunction factors, given that each actor might have a different safety record. As explained *infra*, such policy balancing is irrelevant when a constitutional violation has been proven.

Even if the permanent injunction should not extend to all persons, though, it should undoubtedly extend to GEO both as to its current facility and future facilities, consistent with the prayer for relief in GEO's complaint. *See* Compl., Doc. 1, at 17 (Apr. 29, 2021) (the requested relief includes "[p]reliminarily and permanently enjoining Defendants, as well as their successors, agents, employees, and all those under their supervision, from enforcing, whether prospectively or retroactively, Engrossed House Bill 1090 against GEO in its operation of detention facilities for ICE.").

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Eleventh Amendment bars federal jurisdiction where there is no legitimate 'connection between the *official* sued and enforcement of the allegedly unconstitutional statute.' " *Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir. 1992) (per curiam) (emphasis added) (citing *Ex Parte Young*, 209 U.S. 123 (1908)). Here, there is no question that there is a "legitimate connection" between the relevant "officials," the Attorney General and the Governor, and the unconstitutional statute. *Id.* Indeed, these very officials have already attempted to enforce the statute against GEO in their countersuit. Further, that different *individuals* might serve as the same official is irrelevant where GEO sued these officials in their official capacity. *See* Compl. at 1; *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."). And "an injunction against a public officer in his official capacity—which is what the plaintiffs seek here—remains in force against the officer's successors." *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1180 (9th Cir. 2012). It is under this principle that "[i]n an official-capacity action in federal court, death or replacement of the named official will result in automatic substitution of the official's successor in office." *Kentucky v. Graham*, 473 U.S. 159, 166, & n.11 (1985) (citing FED. R. CIV. P. 25(d)(1); FED. R. APP. P. 43(c)(1)). Under Defendants' view, these ordinary procedural rules would subvert the Eleventh Amendment. That is of course not the case, just as there is nothing at all unusual about enjoining an official-capacity defendant, rather than an individual-capacity defendant, from enforcing an unconstitutional statute.[6]

[6] The mootness caselaw discussed *supra* further establishes this point. Courts repeatedly express concern when a government's disavowal could be undone by a successor in office. Were it *unconstitutional* or otherwise improper for an injunction to bind a successor in office, that caselaw would make no sense.

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Finally, Defendants spill much ink on policy arguments about GEO and privately-operated detention facilities in general. Wash. Br. at 17–22. These arguments are simply irrelevant. Defendants admit that Washington's law conflicts with *Newsom*'s constitutional holding. And the violation of the Constitution is, by definition, never in the public interest, no matter that countervailing policy interests might swing the other way. *See Ariz. Dream Act Coal.*, 757 F.3d at 1069. The Ninth Circuit panel in *Newsom* put it well: "We profess no opinion on the wisdom of [the State] law banning private detention centers or the policy implications of so-called 'for-profit prisons.' [The State] can enact laws that it believes are best for its people. But [the State] cannot intrude into the realm of the federal government's exclusive powers to detain undocumented and other removable immigrants[.]" *GEO Grp., Inc. v. Newsom*, 15 F.4th 919, 940 (9th Cir. 2021), *reh'g en banc granted, opinion vacated*, 31 F.4th 1109 (9th Cir. 2022), *reh'g en banc*, 50 F.4th 745 (9th Cir. 2022).

GEO has shown a "100% probability of success on the merits," the legal nature of GEO's claims means "[n]o facts which might be adduced at a trial w[ould] change this result," and a proven constitutional violation necessarily satisfies the remaining injunctive factors. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998), *abrogated on other grounds, Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1002 (9th Cir. 2004); *see also Arizona Dream Act Coal.*, 757 F.3d at 1069. Permanent injunctive relief is proper. Defendants admit that *Newsom* controls this case, and this Court should enter the relief that *Newsom* requires.

CONCLUSION

For the foregoing reasons, the Court should grant GEO's motion for summary judgment, enter final judgment and declaratory and permanent injunctive relief consistent with the Ninth

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Circuit's decision in *Newsom*, 50 F.4th 745, and deny Defendants' cross motion for summary judgment.

Respectfully Submitted,

DATED this 27th day of September, 2023

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I certify that this memorandum contains 6,081 words, in compliance with the Local Civil Rules.

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Pursuant to Local Civil Rule 7(e)(3), the undersigned counsel hereby certifies that the foregoing document, contains 6,081 words as measured by Microsoft Office for Word 365.

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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.

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