

The Honorable Robert J. Bryan

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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

v.

THE GEO GROUP, INC.,

Defendant.

CIVIL ACTION NO. 3:17-cv-05806-RJB

STATE OF WASHINGTON'S
RESPONSE TO GEO'S MOTION
FOR RECONSIDERATION AND
UNITED STATES' STATEMENT
OF INTEREST

HEARING DATE:
September 12, 2019, at 9:30 a.m.

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Washington respectfully urges the Court to decline invitations by GEO and the United States to reconsider its rulings. In GEO’s case, its motion for reconsideration nowhere demonstrates “manifest error” in the Court’s recent summary judgment order on derivative sovereign immunity, preemption, and Washington’s Minimum Wage Act (MWA) claim. GEO merely disagrees with the Court’s conclusions, the binding Ninth Circuit and Supreme Court precedent the Court correctly applied to GEO’s immunity and preemption defenses, and the economic dependence test GEO itself argued applies to the MWA claim. The United States, in a separate “Statement of Interest,” asks the Court to reconsider and reverse its December 2018 ruling rejecting GEO’s attempt to invoke intergovernmental immunity—based on the same arguments GEO presented more than eight months ago. Even if the United States had submitted a timely brief, which it did not, its arguments nowhere demonstrate manifest error in the Court’s prior decisions sufficient to warrant reconsideration. The Court should deny GEO’s motion for reconsideration and reject again the arguments in the United States’ Statement of Interest.

II. ARGUMENT

Motions for reconsideration are “disfavored” and will ordinarily be denied absent a showing of “manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.” Local Rules W.D. Wash. LCR 7(h)(1); *see also Marlyn Natraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (“[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law.”). Manifest error is a “plain and indisputable” error that amounts to a “complete disregard of the controlling law or the credible evidence in the record.” *Casteel v. Charter Commc’ns, Inc.*, No. C13-5520 RJB, 2014 WL 6751219, at *1 (W.D. Wash. Dec. 1, 2014). As the Court has recognized, “[r]econsideration is an extraordinary remedy, to be used sparingly in the interests

1 of finality and conservation of judicial resources.” *Id.* (citing *Kona Enters., Inc. v. Estate of*
 2 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)). A request for reconsideration is not a proper method
 3 to seek a “second bite at the apple”—particularly when the request is based on “evidence and
 4 legal arguments that could have been presented at the time of the challenged decision.” *Id.*

5 Neither GEO nor the United States have identified any error, much less manifest error,
 6 in the Court’s prior summary judgment rulings. Each request for reconsideration should be
 7 rejected.

8 **A. GEO’s Motion for Reconsideration Should Be Denied Because Derivative Sovereign**
 9 **Immunity Does Not Apply and GEO Concedes That It May Pay More Than \$1 Per**
 10 **Day**

11 **1. Derivative sovereign immunity does not apply because GEO’s discretionary**
 12 **decision to pay detainees \$1 per day was not directed by the federal**
 13 **government, exceeded its authority, and violated ICE’s explicit instructions**

14 GEO’s motion for reconsideration does not argue that this Court actually erred, but that
 15 the *Ninth Circuit* manifestly erred in articulating the derivative sovereign immunity standard in
 16 *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 732 (9th Cir. 2015). *See* ECF
 17 No. 289 at 2. Even under the pre-*Cabalce* cases, however, GEO is not entitled to derivative
 18 sovereign immunity because it exceeded its authority under the plain terms of its federal contract.
 19 Moreover, the Court should decline GEO’s invitation to overturn binding Ninth Circuit
 20 precedent in *Cabalce*, which is in fact consistent with the Supreme Court’s prior precedent on
 21 derivative sovereign immunity. Each issue is addressed below.

22 First, setting aside GEO’s disagreement with *Cabalce*, GEO is liable for state law
 23 violations under *Yearsley* and *Campbell-Ewald*. In *Yearsley*, the Supreme Court recognized
 24 federal contractors are derivatively immune from liability unless the federal contractor
 25 “exceeded [its] authority” or that the authority “was not validly conferred.” *Yearsley v. W.A.*
 26 *Constr. Co.*, 309 U.S. 18, 21 (1940). Similarly, in *Campbell-Ewald*, the Supreme Court held
 derivative sovereign immunity does not shield a contractor from suit when the contractor violates

1 “the Government’s explicit instructions.” *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672
 2 (2016). Here, GEO does just that. While GEO is required to operate a VWP and ICE agrees to
 3 reimburse GEO \$1 per day for detainee work performed, the GEO-ICE contract also explicitly
 4 requires GEO perform in accordance with all applicable federal, state and local labor laws. *See*
 5 ECF No. 246-3 at 43-44; ECF No. 246-2 at 18-19. The contract also instructs GEO to comply
 6 with the “most stringent” of any conflicting federal, state, or local standards—an unambiguous
 7 directive that speaks to the precise circumstance here but which GEO (and the United States)
 8 entirely ignore in their briefing. ECF No. 246-3 at 52. *See Campbell-Ewald*, 136 S. Ct. at 673 n.7
 9 (“Critical [to the contractor’s avoidance of liability] in *Yearsley* was . . . the contractor’s
 10 performance in compliance with *all* federal directions.”) (emphasis added); *In re KBR, Inc., Burn*
 11 *Pit Litig.*, 744 F.3d 326, 345 (4th Cir. 2014) (“[S]taying within the thematic umbrella of the work
 12 that the government authorized is not enough to render the contractor’s activities ‘the act[s] of
 13 the government’”) (citation omitted). By refusing to pay detainees the minimum wage, GEO
 14 both exceeds the authority conferred to it and violates the federal government’s explicit
 15 instructions. In other words, even under the cases GEO cites, derivative sovereign immunity
 16 does not apply.

17 Second, there is no question that GEO is liable under *Cabalce*. ICE provides GEO broad
 18 discretion to operate and manage the VWP. *See* ECF No. 253-14 (PBNDS 5.8) (nowhere
 19 dictating the types of jobs detainee-workers must be assigned); ECF No. 91 (T. Johnson Decl.)
 20 ¶¶ 8, 12, 13 (affirming that the GEO-ICE contract “do[es] not designate *how* a contractor is to
 21 perform the work” and that GEO maintains discretion in developing and implementing the
 22 VWP). ICE nowhere authorizes or directs that GEO pay detainee-workers only \$1 per day for
 23 their labor. *Id.* That decision is made by GEO alone. As the State observed in its response to
 24 summary judgment, ECF No. 266 at 11, the record shows that GEO not only has the option to
 25 pay more than \$1 per day to detainee-workers for work performed, *see* ECF No. 253-15
 26 (RFA 67), but GEO has in fact paid detainees more than \$1 per day. ECF No. 253-15 (RFAs 56,

1 58-60, 71-72). Under *Cabalce*, these admissions are dispositive. 797 F.3d at 732 (“[D]erivative
2 sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor ‘had no
3 discretion in the design process and completely followed government specifications.’”) (quoting
4 *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir. 2008)).

5 Although GEO disagrees with *Cabalce*’s holding that *Yearsley* is limited to cases in
6 which a contractor “had no discretion in the design process,” the *Cabalce* decision simply
7 interprets *Yearsley*’s own language that immunity applies only if the private contractor’s conduct
8 was “authorized and directed by the Government.” *Cabalce*, 797 F.3d at 732. Neither the
9 Supreme Court nor any other circuit has overturned or distinguished *Cabalce*’s articulation of
10 derivative sovereign immunity. See *Campbell-Ewald*, 136 S. Ct. at 672 (reviewing a Ninth
11 Circuit derivative sovereign immunity decision post-*Cabalce* and nowhere suggesting *Cabalce*
12 was wrongly decided). Indeed, the Fourth Circuit, like the Ninth Circuit, also considers the
13 private contractor’s “discretion” important when conducting a *Yearsley* analysis. In *In re KBR*,
14 *Inc., Burn Pit Litigation*, the Fourth Circuit held derivative sovereign immunity would not apply
15 “if [the private contractor] enjoyed some discretion in how to perform its contractually
16 authorized responsibilities.” 744 F.3d at 346. Instead, immunity would shield the private waste
17 management contractor only if “the military dictated exactly how [the contractor] should
18 undertake its waste management and water treatment tasks.” *Id.*

19 Third, GEO’s suggestion that the *Cabalce* court erred by relying on a government
20 contractor defense case, *In re Hanford Nuclear Reservation Litigation*, overlooks the shared
21 origin of both defenses. The Supreme Court established the government contractor defense in
22 *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), based principally on *Yearsley*’s
23 holding that a contractor’s immunity should be derivative. See *Boyle*, 487 U.S. at 524 (Brennan,
24 J., dissenting) (criticizing the majority’s reliance on *Yearsley* as a “slender reed on which to base
25 so drastic a departure from precedent”); see also *Hilbert v. McDonnell Douglas Corp.*, 529
26 F. Supp. 2d 187, 197 n.8 (D. Mass. 2008) (“*Boyle* expands and elaborates *Yearsley* but does not

1 set forth a separate doctrine. The *Boyle* court simply extended immunity from performance
 2 contracts in *Yearsley* to procurement contracts (as in *Boyle*).”). Since derivative sovereign
 3 immunity and the government contractor defense overlap, *Cabalce*’s citation to *In re Hanford*
 4 *Nuclear Reservation Litigation* makes sense. The *Hanford* court also referred to “no discretion
 5 in the design process” while analyzing *Yearsley*, the exact case GEO asks the Court to apply
 6 here. 534 F.3d at 1001. The defenses are not “manifestly different,” as GEO argues.

7 Fourth, GEO’s citations to out-of-circuit case law do not save its argument.¹ ECF No. 289
 8 at 3. The D.C. Circuit case, in fact, *supports* the State’s claim for liability. In *In re U.S. Office of*
 9 *Personnel Management Data Security Breach Litigation*, 928 F.3d 42 (D.C. Cir. 2019), the D.C.
 10 Circuit refused to apply derivative sovereign immunity where, like here, the federal contractor’s
 11 contractual obligations required it to adhere to specific legal standards. In rejecting the claim of
 12 immunity where those standards were allegedly breached, the D.C. Circuit specifically noted the
 13 federal contractor’s “inability to point to a contractual provision or other [government] direction
 14 authorizing or directing [the conduct] over which [] [p]laintiffs [were] suing.” *Id.* at 70. The
 15 same is true here, as the ICE-GEO contract requires GEO to comply with applicable state labor
 16 laws, including the “most stringent” among competing standards. *See* ECF No. 246-3 at 43-44,
 17 52; ECF No. 246-2 at 18-19. Although GEO half-heartedly cites to two other contract provisions,
 18 one prohibiting GEO from using detainees to fulfill contractual obligations, ECF No. 246-3 at
 19 82, and another requiring to GEO employ only U.S. citizens or legal permanent residents as
 20 employees, *id.* at 63, neither provision authorizes or directs GEO to ignore state law generally
 21 or Washington’s Minimum Wage Act (MWA) in particular.

22 _____
 23 ¹ In *Butters v. Vance International Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), the Fourth Circuit extended
 24 derivative sovereign immunity to private agents of a foreign government after determining a private contractor’s
 25 discriminatory decision not to promote a female security guard stemmed from Saudi Arabia’s orders, not the private
 26 contractor’s own decision. Here, it is undisputed that neither ICE nor the GEO-ICE contract *ordered* GEO to violate
 Washington’s MWA. In *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009), the plaintiffs
 “attack[ed] the entire [federally-mandated dredging] project” and “d[id] not . . . allege that the [contractors]
 exceeded their authority or in any way deviated from Congress’s direction or expectations.” Here, the State does
 not challenge the existence of immigration detention, but only GEO’s violation of the MWA when it does business
 in Washington.

1 GEO's citations to pre-*Cabalce*, Ninth Circuit decisions fare no better. None suggests
2 *Cabalce* represents a departure from Ninth Circuit precedent. In *Myers v. United States*, 323 F.2d
3 580, 583 (9th Cir. 1963), derivative sovereign immunity applied only to the extent that the work
4 performed by the contractor was done "in conformity with the terms of said contract," but
5 liability attached for acts "over and beyond acts required to be performed" or acts "not in
6 conformity" with the contract. In *Agredano v. U.S. Customs Service*, 223 F. App'x 558, 559
7 (9th Cir. 2007), derivative sovereign immunity applied where there was no evidence the
8 contractor breached the terms of its contract. In *Gomez v. Campbell-Ewald*, the Ninth Circuit
9 found *Yearsley* inapplicable and "decline[d] the invitation to craft a new immunity doctrine or
10 extend an existing one." 768 F.3d 871, 880 (9th Cir. 2014). The Ninth Circuit specifically
11 cautioned that immunity "comes at a great cost" because, where immunity lies, "[a]n injured
12 party with an otherwise meritorious tort claim is denied compensation," which "contravenes the
13 basic tenet that individuals be held accountable for their wrongful conduct." *Gomez*, 768 F.3d at
14 882 (citing *Westfall v. Erwin*, 484 U.S. 292, 295 (1988)). While the Supreme Court later
15 disagreed with the characterization of *Yearsley* as a "narrow rule," it still emphasized that
16 derivative sovereign immunity is "not absolute" and refused to apply it to a contractor that did
17 not—as required for immunity—"simply perform[] as the [g]overnment directed." *See*
18 *Campbell-Ewald*, 136 S. Ct. at 672-73. Here, GEO did not simply perform as directed by the
19 government. To the contrary, GEO's conduct failed to conform to the explicit terms of the GEO-
20 ICE contract.

21 Finally, the silence of the United States' belated Statement of Interest on the topic of
22 derivative sovereign immunity is telling. Although the United States suggests in passing that
23 Washington's MWA is "invalid," *see* ECF No. 290 at 16, its brief focuses on intergovernmental
24 immunity. The United States is careful not to suggest that it directed, authorized, or instructed
25 GEO to violate Washington's MWA. *Cf. In re U.S. Office of Pers. Mgmt. Data Sec. Breach*
26 *Litig.*, 928 F.3d at 68 n.4 (observing the federal government had not endorsed defendant's

1 assertion of derivative sovereign immunity). Since the intergovernmental immunity argument
2 fails for reasons discussed below, and the GEO-ICE contract explicitly requires GEO to comply
3 with state labor laws, the Court correctly denied GEO’s motion for summary judgment. As the
4 Court succinctly stated in its order, “GEO has not shown that it was directed to pay participants
5 in the VWP only a \$1 for the relevant period.” ECF No. 288 at 9.

6 **2. Preemption does not bar the State’s claims because there is no actual conflict**
7 **between Washington’s MWA and IRCA**

8 GEO next argues the Court erred by “ignor[ing]” the “impossibility” of GEO having an
9 employment relationship with detainees under state law while complying with the Immigration
10 Reform and Control Act (IRCA), and by failing to discuss *Hoffman Plastic Compounds, Inc. v.*
11 *NLRB*, 535 U.S. 137 (2002). Neither argument is persuasive.

12 First, GEO’s IRCA argument is—and has always been—fundamentally flawed. Neither
13 this lawsuit nor Washington’s MWA seeks to require GEO to employ detainees at all.
14 Washington’s MWA only requires that, where GEO chooses to employ workers, whether
15 detainees or non-detainees from the surrounding Tacoma area, that GEO pay them at least the
16 minimum wage. In suggesting that it need not comply with state labor laws when relying on
17 unauthorized workers, GEO’s argument actually encourages the employment of unauthorized
18 workers, undermines IRCA’s purpose, and stands in direct conflict with Ninth Circuit law. *See*
19 *Incalza v. Fendi N. Am., Inc.*, 479 F.3d 1005, 1013 (9th Cir. 2007) (IRCA does not preempt a
20 California labor law forbidding employers from terminating an employee without good cause,
21 even an immigrant employee who temporarily lost legal work status).

22 As the Court correctly concluded, GEO’s payment of the minimum wage presents no
23 obstacle or conflict with IRCA. ECF No. 288 at 11; *see also Incalza*, 479 F.3d at 1013 (rejecting
24 conflict preemption argument because “it was possible for [defendant] to obey federal law . . .
25 without creating a conflict with state law” by suspending the employee as he adjusted his
26 immigration status instead of terminating him). GEO could undoubtedly comply with IRCA,

1 administer a Voluntary Work Program, and abide by Washington’s MWA by hiring work-
2 authorized detainees or Tacoma-area residents and paying them the minimum wage. As to the
3 detainees, they may be legal permanent residents, asylum seekers, grantees of Deferred Action
4 for Childhood Arrivals (DACA), or have other immigration statuses that similarly authorize
5 them to work or provide eligibility for work authorization. *See* 8 C.F.R. §§ 274a.12(c)(8), (9),
6 (10), (19). Not only did the State provide evidence of a NWDC detainee’s work authorization in
7 response to GEO’s summary judgment motion, *see* ECF No. 268-4, GEO admitted in reply that
8 some detainees at the NWDC, for example, are legal permanent residents (and therefore work
9 authorized). *See* ECF No. 273 at 3 (citing TRAC Immigration, Immigration and Customs
10 Enforcement Detainees (Dec. 2018), <https://trac.syr.edu/phptools/immigration/detention/> and
11 identifying at least eleven detainees at the time to be legal permanent residents). In other words,
12 it is possible for GEO to comply with all of its obligations simultaneously, and the Court was
13 correct when it concluded that GEO “has failed to show that paying the detainees minimum wage
14 ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives
15 of Congress.’” ECF 288 at 11.

16 To the extent GEO suggests preemption also bars the State’s unjust enrichment claim,
17 *see* ECF No. 289 at 6 (referencing unjust enrichment), GEO’s suggestion is flatly wrong. The
18 State’s unjust enrichment claim does not depend on whether detainees are deemed GEO
19 employees under state law. Three elements are necessary for unjust enrichment: (1) the
20 defendant receives a benefit; (2) the received benefit is at the plaintiff’s expense; and (3) the
21 circumstances make it unjust for the defendant to retain the benefit. *Young v. Young*, 191 P.3d
22 1258, 1262 (Wash. 2008). None of these elements require the workers to be employees. In fact,
23 courts routinely recognize unjust enrichment claims outside of any employment context at all.
24 *See, e.g., Columbia Cmty. Bank v. Newman Park, LLC*, 304 P.3d 472, 476 (Wash. 2013)
25 (ordering equitable subrogation to a lender in a loan transaction to prevent unjust enrichment);
26 *Wash. Dep’t of Revenue v. Puget Sound Power & Light Co.*, 694 P.2d 7, 15 (Wash. 1985) (Dore,

1 J., concurring) (recognizing an unjust enrichment if utility company were allowed to keep
2 dividends received from abandoned utility deposits). *Cf. Menocal v. GEO Grp., Inc.*, 882 F.3d
3 905, 926 (10th Cir. 2018) (upholding unjust enrichment class action brought by detainee workers
4 against GEO where Colorado Minimum Wage Act was found to be inapplicable).

5 Second, the Court's omission of *Hoffman Plastic* in its summary judgment order is
6 understandable. GEO itself nowhere cited *Hoffman Plastic* in its reply. *See* ECF No. 273.
7 Further, as the State argued previously, *Hoffman Plastic* does not support the argument that the
8 MWA stands as an obstacle to any federal objective. *See* ECF No. 266 at 16. In *Hoffman Plastic*,
9 the Supreme Court declined to award back pay for "work not performed," *i.e.*, from the date of
10 the workers' illegal termination for collectively bargaining under the National Labor Relations
11 Act to the date the employer discovered the workers were unauthorized to work. 535 U.S. at 149.
12 Every court that has considered the argument that *Hoffman Plastic* also bars minimum wage
13 claims for work actually performed has squarely rejected it. *See Lucas v. Jerusalem Café, LLC*,
14 721 F.3d 927, 935 (8th Cir. 2013) (recognizing unauthorized aliens' minimum wage claim and
15 noting that *Hoffman Plastic* does not exclude unauthorized workers from all statutory
16 protections); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1308 (11th Cir. 2013)
17 ("[E]ven after *Hoffman*, we maintain that '[b]y reducing the incentive to hire such workers the
18 [federal minimum wage act's] coverage of undocumented aliens helps discourage illegal
19 immigration and is thus fully consistent with the objectives of the IRCA."); *see also David v.*
20 *Signal Int'l, LLC*, 257 F.R.D. 114, 124 (E.D. La. 2009) ("*Hoffman Plastic* does not control
21 plaintiffs' claims for unpaid minimum and overtime wages for work already performed"); *id.* at
22 123 n.32 (listing cases holding that claims for work already performed did not conflict with
23 federal immigration law). Clearly, *Hoffman Plastic*, a case regarding the appropriate remedy for
24 National Labor Relations Act violations, does not preclude a State from seeking a declaration on
25 liability that its generally applicable labor laws apply to work performed in the state.

26 Since Washington's claims are not preempted, the Court did not commit manifest error.

1 **3. Analysis under Washington’s MWA is not altered just because GEO’s**
 2 **employees work in a detention setting**

3 GEO next argues the Court “manifestly err[ed]” in rejecting its contention that the MWA
 4 does not apply due to the “custodial nature of detention.” *See* ECF No. 289 at 6. GEO’s argument
 5 fails because it wholly duplicates arguments the Court has already considered and is inconsistent
 6 with GEO’s own argument that the economic dependence test (rather than some other detention-
 7 specific analysis) applies in this case. *See* ECF No. 245 at 18.

8 GEO’s entire argument on reconsideration rests on a single case that it has repeatedly
 9 cited in several of its failed dispositive motions: *Alvarado Guevara v. INS*, 902 F.2d 394, 396
 10 (5th Cir. 1990), which considered a different law’s application to a federally-owned and operated
 11 detention facility. As this Court previously recognized, *Alvarado* is not binding precedent. ECF
 12 No. 29 at 18 (Order on GEO’s Mot. to Dismiss). *Alvarado* nowhere addressed a privately-owned
 13 and operated detention facility, the Washington’s MWA, or the MWA’s broader purpose of
 14 preventing predatory labor practices to encourage maximum employment opportunities for state
 15 residents. *See* Wash. Rev. Code § 49.46.005(1). Indeed, the Fair Labor Standards Act—the
 16 statute at issue in *Alvarado*—itself recognizes state minimum wage laws will differ from its own
 17 provisions. *See* 29 U.S.C. § 218(a) (directing that “[n]o provision of [the FLSA] or any order
 18 thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance
 19 establishing a minimum wage higher than the minimum wage established under this chapter”);
 20 *Pac. Merch. Shipping Assoc. v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990) (affirming that “the
 21 purpose behind the FLSA is to establish a national *floor* under which wage protections cannot
 22 drop, not to establish absolute uniformity in minimum wage . . . standards nationwide”).
 23 “[E]xtending the logic of *Alvarado* to interpret [Washington’s MWA] . . . moves beyond
 24 interpretation to legislation” and this Court should again “respectfully decline the invitation to
 25 add to the statute.” ECF No. 29 at 18. Since GEO cites no case suggesting the Washington
 26 minimum wage analysis differs in the private detention context, the Court did not manifestly err.

1 In sum, GEO’s motion nowhere demonstrates manifest error or otherwise presents new
2 law or facts that could not have been presented before. The Court should accordingly deny
3 GEO’s motion for reconsideration.

4 **B. Intergovernmental Immunity Does Not Preclude Enforcement of Washington’s**
5 **Longstanding and Generally Applicable MWA**

6 The Court should likewise decline to reconsider its prior decisions holding that GEO is
7 not entitled to intergovernmental immunity. *See* ECF Nos. 162, 165. The Court correctly applied
8 governing law, and the United States’ brief adds no weight to the faulty arguments GEO
9 previously raised. Intergovernmental immunity does not bar Washington from enforcing its
10 longstanding and neutral MWA against GEO, a private, for-profit employer in Washington.

11 **1. The United States’ belated “Statement of Interest” should not be considered**
12 **because it is untimely and a procedurally improper request for**
13 **reconsideration**

14 As a threshold matter, the Court should decline to consider the United States’ filing at
15 all. The federal government’s brief is untimely and procedurally improper given that there is no
16 pending motion on the issue of intergovernmental immunity. Even worse, the United States fails
17 to address the requisite standard for motions for reconsideration, despite its explicit argument
18 (ECF No. 190 at 2) that the Court should “reconsider” its prior rulings. *See* Local Rules W.D.
19 Wash. LCR 7(h). Under the circumstances, the Statement of Interest provides no reason to
20 reconsider the Court’s prior rulings.

21 Even accepting that the United States may appear in cases to represent its interests
22 pursuant to 28 U.S.C. § 517, that authorization nowhere grants the federal government
23 permission to ignore case schedules or Local Rules. Nor does it authorize the federal government
24 to place an unnecessary burden on the Court by filing what is effectively an untimely second
25 motion for reconsideration that reiterates GEO’s previously rejected arguments. *Compare* ECF
26 No. 290 (United States’ Statement of Interest), *with* ECF Nos. 149 (GEO Mot. for Summ. J. re:
Intergovernmental Immunity), 161-1 (GEO Reply), 164 (GEO Mot. for Reconsideration). Cases

1 addressing other “Statements of Interest” make clear that the Court need not consider such filings
2 when they are belated or repetitive. *See, e.g., LSP Transmission Holdings, LLC v. Lange*, 329 F.
3 Supp. 3d 695, 703-04 (D. Minn. 2018) (declining to consider U.S. Statement of Interest filed
4 two and a half months after briefing was completed because Department of Justice’s delay was
5 “unjustified” and the parties had already “fully and thoroughly” briefed the issue); *United States*
6 *ex rel. Gudur v. Deloitte Consulting, LLP*, 512 F. Supp. 2d 920, 928 (S.D. Tex. 2007) (striking
7 Statement of Interest filed after the summary judgment briefing deadline had passed where
8 United States made “no attempt” to show “good cause for its untimely filing”).

9 Further, the Court is not obligated to reconsider interlocutory rulings anytime a party
10 files an untimely brief, to say nothing of a belated non-party filing that does not relate to a
11 pending motion.² While the Court has authority to reconsider interlocutory rulings, it has
12 simultaneously recognized that “[r]econsideration is an ‘extraordinary remedy, to be used
13 sparingly in the interests of finality and conservation of judicial resources.’” *Casteel*, 2014 WL
14 6751219, at *1 (citing *Kona*, 229 F.3d at 890). Local Rule 7(h) regarding motions for
15 reconsideration exists to address the appropriate circumstances for such an extraordinary
16 remedy. And that rule is clear: Motions for reconsideration are “disfavored” and subject to a
17 strict standard, requiring a showing of manifest error or presentation of law or facts that could
18 not have been presented earlier. *See* Local Rules W.D. Wash. LCR 7(h)(1). Requests for
19 reconsiderations are not intended to provide a “second [or, as here, third] bite at the apple” and
20 “should not be used to ask a court to rethink what the court had already thought through[.]”
21 *Casteel*, 2014 WL 6751219, at *1.

22 The United States’ filing disregards the Court’s case schedule, the fact that the United
23 States never sought to intervene and is not a necessary party, and well-established rules regarding
24

25 ² To this point, the Court has previously rejected GEO’s attempts to re-argue issues in subsequent briefing
26 on the ground that doing so constituted, in effect, an untimely motion for reconsideration. *See* ECF No. 202 at 10
(Order granting Washington’s Mot. for Partial Summ. J.) (rejecting GEO’s arguments, which merely recycled
assertions from previously denied motion to dismiss, as an untimely request for reconsideration).

1 motions for reconsideration. The United States knew of this lawsuit at the outset when GEO
 2 sought unsuccessfully to require Washington to join the United States as a “necessary party” and
 3 when it filed a declaration with regard to the ICE-GEO contract. *See, e.g.*, ECF No. 58 (Order
 4 denying GEO’s Mot. to Dismiss for Failure to Join, filed April 26, 2018); ECF No. 52, Ex. A
 5 (letter to Department of Justice, dated March 7, 2018, regarding litigation at issue); ECF No. 91
 6 (T. Johnson Decl., filed August 2018). For reasons only it can know, the United States declined
 7 to participate in GEO’s 2018 briefing on intergovernmental immunity. Now, having belatedly
 8 decided to become involved, the federal government does not attempt to show good cause for
 9 the untimeliness of its filing. Further, despite its explicit request for the Court to “reconsider” its
 10 prior denial of GEO’s summary judgment motion on intergovernmental immunity, the United
 11 States nowhere asserts that the Court committed manifest error or presents law or facts that could
 12 not have been presented earlier. *See* Local Rules W.D. Wash. LCR 7(h)(1). To the contrary, the
 13 United States presents the same arguments the Court previously, and correctly, rejected. Under
 14 these circumstances, the Court need not and should not reconsider its prior intergovernmental
 15 immunity ruling.

16 **2. The federal government exaggerates and ignores the record when it claims**
 17 **that GEO’s paying more than \$1 per day will “interfere with federal**
 18 **immigration enforcement”**

19 In addition to the improper nature of the federal government’s filing, its brief mistakenly
 20 contends that Washington’s enforcement of the MWA is an effort to “interfere with federal
 21 immigration enforcement.” ECF No. 290 at 2. Despite that alarmist contention, however, the
 22 federal government’s brief nowhere explains how requiring GEO to pay more than \$1 per day
 23 to detainee workers—as GEO admits it has the option to do and has done in the past—will
 24 interfere with federal immigration enforcement efforts.³ Tellingly on this point, the federal

25 ³ Instead, the United States makes vague references to its interests in countering what it believes to be
 26 “discriminatory state efforts to regulate federal contractors,” “the proper application of the Supremacy Clause,” and
 “the foundational principles that protect the Federal Government from unlawful state interference.” ECF No. 290
 at 1.

1 government nowhere asserts that GEO is in any way prohibited from paying more than \$1 per
2 day under any applicable authority or the ICE-GEO Contract. That silence is striking, but not
3 surprising.

4 The governing federal detention standards, the 2011 PBNDS (which the United States
5 cites), make clear that contractors can pay detainees more than \$1 per day. *See* ECF No. 290 at
6 2-3 (citing PBNDS 5.8, which requires contractors to pay “at least \$1” per day to detainees
7 participating in the contractor’s VWP, but nowhere citing provisions that limit payment to \$1
8 per day) (emphasis added); *id.* at 3 (citing T. Johnson Decl. (ECF No. 91) ¶ 13, which
9 acknowledges that GEO must pay detainees “no less than” \$1 per day per the PBNDS). The
10 federal government likewise carefully avoids asserting that the ICE-GEO Contract limits GEO
11 to paying only \$1 per day, arguing only that ICE requires GEO to have a VWP and that the
12 federal government is required to reimburse GEO for only \$1 per day of detainee work. *See* ECF
13 No. 290 at 2-3. This silence on the core question is telling, and consistent with ICE’s own
14 position that GEO can pay detainee-workers more than \$1 per day in operating the VWP. *See*
15 ECF No. 253-17. It is also consistent with GEO’s admission that it “has the option” of paying
16 detainees more than \$1 per day and has done so in the past. ECF No. 253-15 at (RFA 67
17 (admitting that GEO has the option to pay more than \$1 per day to detainee workers for work
18 performed in the VWP); *id.* (RFAs 58-59) (more than \$1 per day when detainees worked more
19 than one “detail” per day); *id.* (RFAs 56, 60) (payment of more than \$1 per day, including
20 payments of \$5 per day).

21 The record in this case renders the United States’ “interference” accusation meritless. It
22 is not credible to suggest that GEO’s compliance with the federal government’s own standards
23 and representations allowing payment of more than \$1 per day interferes with or burdens federal
24 immigration enforcement efforts. Washington’s enforcement of a neutral law against a private
25 company does not interfere with federal immigration enforcement efforts.

1 **3. Washington law does not discriminate against the federal government or its**
 2 **contractors**

3 While the Court need not consider it, the federal government’s expansive interpretation
 4 of intergovernmental immunity also fails on the merits. Washington’s MWA does not target or
 5 discriminate against the federal government or its contractors. GEO, like all other private
 6 contractors and employers, must pay the minimum wage. Washington’s brief argued that point
 7 last year, *see* ECF No. 155, and the Court recognized that the MWA neither discriminates against
 8 GEO based on its status as a federal contractor nor “meddles with” the federal government’s
 9 activities by singling out a federal contractor. ECF No. 162 at 6-9 (ruling that the Minimum
 10 Wage Act is imposed equally on other similarly situated Washington constituents and that there
 11 is no showing that the MWA is “imposed against Defendant on any basis related to its status as
 12 a Federal Government contractor”).

13 Nothing in the United States’ filing demonstrates error in the Court’s conclusion, much
 14 less “manifest error.” *See* Local Rules W.D. Wash. LCR 7(h)(1). To the contrary, the federal
 15 government relies on arguments the Court already addressed. Like GEO, the United States urges
 16 an expansive interpretation that seeks special treatment for GEO to allow it to avoid rules that
 17 apply to all similarly situated private companies. The Court should once again decline the
 18 invitation to re-write the law of intergovernmental immunity.

19 **a. The nondiscrimination rule does not bar enforcement of neutral laws**
 20 **imposed on a basis unrelated to one’s status as a federal contractor**

21 As a starting point, the Supreme Court has “decisively rejected the argument[,]” which
 22 the federal government implicitly presses here, “that any state regulation which indirectly
 23 regulates the Federal Government’s activity is unconstitutional.” *North Dakota v. United States*,
 24 495 U.S. 423, 434-35 (1990) (internal citation omitted). Courts take “a functional approach to
 25 claims of governmental immunity, accommodating of the full range of each sovereign’s
 26 legislative authority.” *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (quoting

1 *North Dakota*, 495 U.S. at 435). The Supreme Court has used restraint in applying
 2 intergovernmental immunity, recognizing that whatever burdens are imposed on the federal
 3 government by a neutral state law “are but normal incidents of the organization within the same
 4 territory of two governments.” *North Dakota*, 495 U.S. at 435 (citing *Helvering v. Gerhardt*, 304
 5 U.S. 405, 422 (1938)).

6 Consistent with these underlying principles, “[a] state regulation is invalid *only* if it
 7 regulates the United States directly or discriminates against the Federal Government or those
 8 with whom it deals.” *North Dakota*, 495 U.S. at 435 (citing *South Carolina v. Baker*, 485 U.S.
 9 505, 523 (1988)) (emphasis added); *United States v. County of Fresno*, 429 U.S. 452, 464 (1977).
 10 A “[s]tate does not discriminate against the Federal Government and those with whom it deals
 11 unless it treats someone else better than it treats them.” *Washington v. United States*, 460 U.S.
 12 536, 544-45 (1983). To this end, the Supreme Court has clarified that a state law does not
 13 implicate intergovernmental immunity where it “is imposed on some basis unrelated to the
 14 object’s status as a [federal] Government contractor” and is “imposed equally on other *similarly*
 15 *situated constituents* of the State.”⁴ *North Dakota*, 495 U.S. at 438 (emphasis added); *see also*
 16 *In re Nat’l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 903 (N.D. Cal. 2007)
 17 (citing *County of Fresno*, 429 U.S. at 462-64) (“Applying these principles, the [Supreme] Court
 18 has required that regulations be imposed equally on all similarly situated constituents of a state
 19 and not based on a constituent’s status as a government contractor or supplier.”).

20 Courts have thus stated succinctly: “The nondiscrimination rule prevents states from
 21 meddling with federal government activities indirectly by singling out for regulation those who
 22 deal with the government. The rule does not, however, oblige special treatment.” *In re Nat’l Sec.*
 23 *Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 903. Nor does it prohibit enforcement of

24 _____
 25 ⁴ This rule “finds its reason in the principle that the States may not directly obstruct the activities of the
 26 Federal Government.” *City of Arcata*, 629 F.3d at 991 (quoting *North Dakota*, 495 U.S. at 437-38); *see also United States v. California*, 921 F.3d 865, 881 (9th Cir. 2019) (“[T]he United States’ position that no obstruction is required in intergovernmental immunity cases ignores the origins of the doctrine and the occasions in which it has been applied.”).

1 neutral state laws against contractors “with whom” the federal government deals. *See North*
2 *Dakota*, 495 U.S. at 436-39 (rejecting intergovernmental immunity challenge to state liquor
3 control regulations that applied to out-of-state suppliers providing liquor to the federal
4 government in North Dakota because regulations did not discriminate against the federal
5 government or those with whom it deals); *In re Nat’l Sec. Agency Telecomms. Records Litig.*,
6 633 F. Supp. 2d at 904 (rejecting intergovernmental immunity claim where laws at issue
7 “regulate equally all public utilities, making no distinction based on the government’s
8 involvement” and rejecting attempt to focus on the individual investigation as “treat[ing] the
9 government differently” because “the regulatory regime as a whole treats any unauthorized
10 disclosure the same”).

11 As the Court recognized in its 2018 ruling, GEO is subject to a neutral state law
12 requirement to pay its employees a minimum wage. ECF No. 162 at 6 (“At its core, and by
13 design, the MWA protects employees and prospective employees generally, placing private
14 firms that contract with the Federal Government on equal footing with all other private
15 entities.”). That conclusion is correct. GEO must comply with that requirement like all other
16 private entities, regardless of their line of business, absent an applicable exception. Because
17 Washington’s MWA, either facially or as applied, does not single out GEO or federal contractors
18 for worse treatment, it is unlike the scenarios in which claims of intergovernmental immunity
19 have been upheld, where the challenged laws regulated the federal government directly, or
20 clearly “meddled with” its activities by singling its contractors out for special, and unfair,
21 treatment. *See, e.g., M’Culloch v. Maryland*, 17 U.S. 316, 436 (1819) (state effort to tax Bank
22 of the United States); *Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803, 814 (1989) (state tax on
23 federal retirements benefits discriminates against federal government); *California*, 921 F.3d at
24 882 (state regulation was targeted “exclusively to federal conduct,” because it applied only to
25 “facilities in which noncitizens were being housed or detained for purposes of civil immigration
26 proceedings”); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014) (state regulation

1 that imposed heightened environmental cleanup standards at a single location subjected to
 2 cleanup by federal contractor); *City of Arcata*, 629 F.3d at 991-92 (municipal ordinances that
 3 prohibited federal government employees or agents from recruiting minors for military service
 4 discriminates against the federal government).

5
 6 **b. The United States invites a false comparison in order to argue an
 7 overly broad view of intergovernmental immunity**

8 To avoid this straightforward conclusion, the United States invites the Court to engage
 9 in a false comparison of dissimilar entities: state government and its publicly run institutions,
 10 like prisons and treatment centers, with private companies that own and operate detention
 11 facilities for profit. That is a false comparison and one the Court properly rejected. Supreme
 12 Court precedent dictates that the relevant question is whether Washington law discriminates
 13 against GEO based on its status as a federal contractor and thereby meddles with or obstructs the
 14 federal government’s activities. *See North Dakota*, 495 U.S. at 436-39. That necessarily requires
 15 consideration of how the MWA treats private companies, like GEO—and whether there is
 16 discrimination based on their status as a federal contractor.⁵ There is not.

17 Here, GEO is treated like all other private companies subject to the MWA and is not
 18 entitled to the government-facility exemption at subsection (3)(k) of Washington Revised Code
 19 § 49.46.010 (subsection (3)(k)). *See* ECF No. 162 at 2 (“The NWDC is better characterized as a
 20 *private* facility that detains federal detainees under a contract with the Federal Government.”)
 21 (emphasis added); *see also infra* § B(3)(c). Whether the NWDC detains individuals for the
 22 federal government or others, or is used for any other purpose, GEO must comply with the MWA
 23 like any other private employer and contractor absent an applicable exception. There is no
 24 discrimination because GEO is not treated worse than other private businesses because of its

25 ⁵ To the extent the United States suggests that the Court should compare state institutions with institutions
 26 the federal government owns and operates, it proves Washington’s point. Those types of facilities are treated
 equally. All parties agree that the Minimum Wage Act does not apply to the federal government’s facilities and
 none are the subject of any enforcement action.

1 status as a contractor for the federal government—it is being treated the same. As the Court
2 previously recognized, this case is unlike those in which federal employees or contractors were
3 singled out and subject to heightened regulatory requirements. ECF No. 162 at 6-7
4 (distinguishing *Boeing* and *Davis*, which the United States relies upon).

5 Ultimately, the United States’ suggestion that GEO is being “discriminated against”
6 relies on an extreme and unsupported view of intergovernmental immunity. What the United
7 States proposes is an interpretation that conflates *discrimination* with the *lack of special*
8 *treatment* of its contractors. In other words, the United States seeks to exempt federal contractors
9 from neutral state laws even where similar private entities are not exempt. That is not what
10 intergovernmental immunity requires. *See In re Nat’l Sec. Agency Telecomms. Records Litig.*,
11 633 F. Supp. 2d at 903 (“The rule does not, however, oblige special treatment.”); *see also North*
12 *Dakota*, 495 U.S. at 436-39.

13 **c. The government institution exemption does not extend to private,**
14 **corporate operators and does not discriminate against GEO or other**
15 **private federal contractors**

16 The federal government, like GEO last year, also tries to escape the simple conclusion
17 that Washington in no way discriminates against it or GEO by focusing on subsection (3)(k)—
18 the MWA’s exemption for individuals in state and local government institutions. Its argument
19 distills to the assertion that the exemption does not treat private contractors that contract with
20 the federal government in Washington equally with private contractors that contract with state
21 or local governments. That interpretation of subsection (3)(k) is wrong and the Court properly
22 rejected it.

23 The language of the exemption clearly applies only to governmentally owned and
24 operated institutions—not privately owned and operated institutions. In particular, it applies to
25 detainees held in state, county, or municipal correctional, detention, treatment or rehabilitative
26 institutions. Wash. Rev. Code § 49.46.010(3)(k). On its face, the exemption does not apply to
privately owned and operated institutions, and the United States cites no Washington authority

1 supporting such a construction. Indeed, the United States makes no serious attempt to explain
 2 how its proposed construction of state law comports with the exemption’s plain language listing
 3 only government entities. Nor does it address how its view of the statute is consistent with
 4 Washington courts’ mandate that exemptions to the MWA must be construed “narrowly” and in
 5 favor of the employee. *See Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582, 587 (Wash.
 6 2000) (en banc) (“Exemptions from remedial legislation, such as the MWA . . . are narrowly
 7 construed and applied only to situations which are plainly and unmistakably consistent with the
 8 terms and spirit of the legislation.”). The plain statutory language and requirement of narrowly
 9 construed exemptions compel the conclusion that subsection (3)(k) applies only where the
 10 institution at issue is one run by the state, a county, or a municipality—not an institution owned
 11 and operated by a private, for-profit contractor merely doing business with a government entity.

12 The United States nonetheless asserts, erroneously, that “Washington state law expressly
 13 allows private contractors to operate ‘state, county or municipal correctional, detention,
 14 treatment or rehabilitative institution[s].” ECF No. 290 at 11 n.7. That point mistakes
 15 Washington law and is incorrect. The cited authorities at most support a point not in dispute—
 16 that Washington law allows units of government to contract with other units of government or
 17 private companies under specific statutorily authorized circumstances.⁶ None of the authorities,
 18 however, supports the broader conclusion that those private contractors’ institutions are deemed
 19 *state, county, or municipal* institutions for MWA purposes and would therefore be exempt from
 20 the minimum wage laws if they permitted detainees to work in the state.⁷

21 _____
 22 ⁶ Contrary to the United States’ generalized assertions, the Department of Corrections only has authority
 23 to contract with other units of government or “private companies *in other states*” to hold convicted felons in “an
 24 institution or jail operated by such entity” despite being sentenced to serve their term of incarceration in a “state
 25 correctional facility.” *See* Wash. Rev. Code § 72.68.040 (emphasis added). The relevant statutory provision nowhere
 26 authorizes the Department of Corrections to hold state inmates in private facilities *in* Washington. *Id.*; *see also*
 Wash. Rev. Code § 72.68.012 (“It is the legislature’s intent to clarify the law to reflect that the secretary of
 corrections has authority to contract with private corporations to house felons *out-of-state*...”) (emphasis added).

⁷ *See* Wash. Rev. Code § 72.09.015(6) (defining “correctional facility” for purposes of the chapter
 establishing the Department of Corrections, but not “state,” “county,” or “municipal” “correctional . . . institutions”
 as set forth under the MWA); Wash. Rev. Code § 70.48.210(4) (acknowledging that special detention facility can
 be operated by noncorrectional personnel under contract but nowhere referencing the MWA); Wash. Rev. Code §

1 To the contrary, these and related statutory provisions show that the Washington
 2 legislature is quite capable of saying “by contract” when it refers to facilities operated by
 3 contract, and referring to “private organizations” when referring to facilities operated under
 4 contract with private companies. The legislature has not deemed those institutions “state,”
 5 “county,” or “municipal” institutions, but has instead distinguished between government-run
 6 institutions and those operated under contract. *See* Wash. Rev. Code. §§ 72.68.040 (authorizing
 7 Corrections Secretary to contract with the federal government, other state governments, “private
 8 companies in other states,” or cities and counties for the detention of convicted felons in “an
 9 institution or jail operated by such entity” where the individual has been sentenced to a term in
 10 a “state correctional institution,” making clear that institutions run by “private companies in
 11 other states” are not “state correctional institutions”) (emphasis added); 72.09.015(6) (referring
 12 to facility operated “by contract”); 72.65.020(1)(c) (authorizing confinement of prisoners
 13 participating in work release program, when not at work, in *either* a “state correctional
 14 institution,” “county or city jail,” or “any *other* appropriate, supervised facility, after an
 15 agreement has been entered into ... for the housing of work release prisoners”) (emphasis added).
 16 It made no such reference or distinction in subsection (3)(k). Instead, that section is limited
 17 explicitly to state, county, and municipal institutions, which are different from institutions owned
 18 and operated by private companies—just as NWDC is not a “federal” facility merely because it
 19 contracts with ICE to detain individuals. A private contractor operating a facility in Washington
 20 would be subject to the requirements of the MWA.

21 To be sure, the exemption does not specify that “federal” facilities would also be exempt
 22 if operated by the federal government itself. NWDC is not a “federal” facility, however, and all
 23 parties agree that the MWA does not apply to the federal government directly. More importantly,
 24 that the exemption does not explicitly mention “federal” institutions makes sense in light of the

25 71.05.020(21) (defining “evaluation and treatment facility” but nowhere referencing the MWA); Wash. Rev. Code
 26 § 71.05.320(1)(a) (noting that as an alternative to detention, individuals may be remanded to custody of certified
 facility instead of Department of Social and Health Services, but nowhere referring to the MWA).

1 | Supremacy Clause and longstanding prohibition on states directly regulating the federal
2 | government. *See M’Culloch*, 17 U.S. at 436. Moreover, the United States’ brief identifies no
3 | instance where Washington has enforced its minimum wage law inside a federal detention
4 | facility within the state. On the contrary, Washington has acknowledged that such an
5 | enforcement action could not be maintained. This reality—the way Washington’s MWA has
6 | been applied to government operated facilities since the exemption was included in 1974—
7 | shows that the MWA in no way “discriminate[s] against the federal government.” *California*,
8 | 921 F.3d at 880. Instead, the distinction is a public/private one: all operators of private companies
9 | and institutions in the state, including GEO, must comply with the MWA absent an applicable
10 | exception.

11 | The United States’ heavy reliance on *Davis v. Michigan Department of Treasury*, a case
12 | cited in the parties’ prior briefing and addressed by the Court in its 2018 ruling, does not save its
13 | argument. *See* ECF No. 162 at 6-7 (holding that this case is not one in which the MWA meddles
14 | with federal government activities and distinguishing *Davis*). There, a state exempted some of
15 | its constituents—individuals who received state retirement benefits—from state income
16 | taxation, but did not exempt similarly situated individuals who received federal retirement
17 | benefits. *See Davis*, 489 U.S. at 805-06. It was “undisputed that Michigan’s tax system
18 | discriminates in favor of retired state employees and against retired federal employees.” *Id.* at
19 | 814. Significantly, though, the comparison at issue was one where the treatment of state
20 | constituents differed depending on whether they collected benefits from the federal or state
21 | government—*i.e.*, whether they dealt with the federal or state government. The underlying
22 | “similarly situated” entity was another private constituent.

23 | Unlike *Davis*, no discrimination exists here because subsection (3)(k) does not present a
24 | facial “state versus federal” distinction between state constituents. The MWA instead utilizes a
25 | distinction between government and private actors, with all private companies treated the same
26 | regardless of whom they deal with. Thus, *Davis* actually supports the Court’s and Washington’s

1 analysis, with the comparison being whether GEO (a private company) is treated differently from
2 other similarly situated constituents depending on whether it contracts with the federal
3 government. It is not. *Davis* thus provides no support to the federal government’s expansive
4 reading of intergovernmental immunity here.

5 Finally, the United States has not established any discriminatory treatment to support an
6 *as applied* challenge to the constitutionality subsection (3)(k) based upon this enforcement
7 action. All enforcement actions involve particular violations of the law, and the fact that the
8 “present investigation” happens to be of a federal contractor does not convert the MWA into a
9 statute that “treat[s] the government differently.” *In re Nat’l Sec. Agency Telecomms. Records*
10 *Litig.*, 633 F. Supp. 2d at 904 (quoting *North Dakota*, 495 U.S. at 435)). Further, even if there
11 did exist a comparable state-contracted (privately owned and operated) institution that failed to
12 pay the minimum wage in the state of Washington (which neither GEO nor the United States
13 identified), it would not defeat Washington’s claim. It would instead identify another entity that
14 may merit an enforcement inquiry under Washington law.

15 **d. The United States’ remaining arguments do not support**
16 **intergovernmental immunity**

17 Finally, the United States attempts to rely on the Department of Labor & Industries’
18 administrative policy regarding the MWA. ECF No. 290 (citing Department of Labor Industries
19 Employment Standards Administrative Policy: MWA Applicability (2014) (“Administrative
20 Policy”) 5, ECF 160-1)). This is the same argument GEO raised last year, and indeed, the United
21 States cites the docket entry from GEO’s prior summary judgment briefing. *See* ECF Nos. 149,
22 161-1. The Court properly rejected that argument, *see* ECF Nos. 162, 165, and the United States
23 does not suggest that the Court committed manifest error in doing so. The Court should decline
24 to reconsider the same argument for a third time.

25 Even if considered, the Labor & Industries administrative policy merely reiterates that
26 the statutory exemption in subsection (3)(k) exists for individuals in government-run facilities.

1 As the United States notes, the policy is explicit that “[r]esidents, inmates, or patients of *state,*
 2 *county or municipal* [*i.e.*, not private] correctional, detention, treatment or rehabilitative
 3 institution[s] [are] not . . . required to be paid minimum wage if they perform work *directly for,*
 4 *and at,* the institution’s premises where they are incarcerated, and remain under the direct
 5 supervision and control of the institution.” *See* ECF No. 160-1 at 5 (emphasis added). That
 6 guidance confirms Washington’s view of the proper interpretation of the exemption. The federal
 7 government makes much of the sentence referring to state inmates in state facilities who might
 8 be assigned to work with a private corporation (while nonetheless “on prison premises” and thus
 9 under the direct supervision of state officers) through certain Correctional Industries programs.
 10 But that again implicates nothing more than the plain language of subsection (3)(k), making clear
 11 that inmates in a state correctional facility are exempt from the MWA.

12 Ultimately, nothing in the administrative policy addresses the circumstance where a
 13 private contractor owns and operates a detention facility, like the NWDC, much less states that
 14 such a facility would be deemed a “state” institution for purposes of the MWA exemption. If
 15 anything, the policies show that Washington is uniform in its application of the plain terms of
 16 the statute: the MWA exemption applies only to individuals held in government-run facilities.

17 III. CONCLUSION

18 For the foregoing reasons, Washington respectfully urges the Court to (1) deny GEO’s
 19 motion for reconsideration and (2) decline to reconsider its prior rulings rejecting GEO’s claims
 20 of intergovernmental immunity. Neither GEO nor the United States have demonstrated any error,
 21 much less manifest error, in the Court’s prior rulings.

22 Dated this 6th day of September 2019.

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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 certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 6th day of September 2019 in Seattle, Washington.

s/ Caitilin Hall
Caitilin Hall
Legal Assistant

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