The Honorable Robert J. Bryan

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 THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

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I. INTRODUCTION

Washington submits this response to the Proposed Order and the Court's invitation to the parties to "respond to point out errors" in the Proposed Order, including issues "regarding the record." ECF Nos. 306; 306-1. Respectfully, the Court's Proposed Order contains important errors of law, relies on alleged facts not in the record, and is premised on an overbroad view of intergovernmental immunity that is unsupported by the cases cited. If issued, the Proposed Order will have significant ramifications that extend far beyond this case: It stands to exempt government contractors from neutral, generally applicable laws and taxes to which they have long been subject, and that, like Washington's Minimum Wage Act (MWA), are in no way discriminatory. It also would dismiss the stand-alone unjust enrichment claim in this case on grounds that are contrary to well-established law and overwhelming record evidence, effectively eliminating the only mechanism available to remedy the injustice to detainee workers at the NWDC. The Proposed Order should not be entered and the case should remain set for trial in March 2020.[1]

II. ARGUMENT

In 2018, the Court rejected dismissal based on intergovernmental immunity after properly comparing GEO with similarly situated entities, i.e., other private contractors. *See* ECF No. 162 at 9. The Court correctly concluded that intergovernmental immunity cannot bar Washington's neutral and generally applicable MWA because the treatment of private contractors under Washington's MWA is the same, regardless of whether those contractors deal with the federal or state government. *Id*. There is no discrimination or unfair treatment against the federal government or its contractors under the MWA, as both the federal and Washington governments face the same choice: use government facilities and be exempt from Washington's

[1] Because the Proposed Order reflects the Court's reliance on extra-record facts that are not accurate, *see* ECF No. 306-1 at 8 n.3, and because the Court explicitly seeks "to give the parties more opportunity for input," ECF No. 306 at 1, Washington concurrently submits declarations it was able to secure in this short briefing window that are intended to address the Court's newly raised factual questions.

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MWA, or use private contractors and comply with it. None of the cases issued since the Court's 2018 order, nor the selective facts GEO raised during and after oral argument, change that analysis.

The Court's proposed dismissal of the entire case, including Washington's unjust enrichment claim, also constitutes manifest error because *no* party sought such relief or set forth the elements of the unjust enrichment claim in any briefing regarding intergovernmental immunity. The one sentence dismissing it contains legal and factual errors and inadequate specificity to constitute proper notice or enable Washington to formulate a considered response. Accordingly, the Court should decline to issue the Proposed Order and should allow both claims to proceed to trial.

A. The Court's Proposed Ruling Dismissing Washington's MWA Claim Contains Significant Errors of Law

A proper analysis compels the result the Court reached the first time it considered intergovernmental immunity: Washington's MWA does not discriminate against the federal government or its contractors. ECF No. 162 at 9. The Court's Proposed Order, in contrast, contains multiple errors of law, including: (1) the inaccurate application of the Supreme Court's "functional approach," as set forth in *North Dakota v. United States*, 495 U.S. 423 (1990); (2) the use of an improper comparator under *Dawson v. Steager,* 139 S. Ct. 698 (2019), and other authority, when analyzing whether treatment of GEO is discriminatory; and (3) a misapplication of *United States v. California*, 921 F.3d 865 (9th Cir. 2019), which squarely held that federal contractors like GEO can lawfully be subject to neutral and generally applicable state laws—even in the operation of an immigration detention facility. Each error is addressed below.

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1. *North Dakota*'s "Functional Approach" Forecloses the Overbroad View of Intergovernmental Immunity Articulated in the Court's Proposed Order

First, the Court references the "functional approach" to intergovernmental immunity but does not cite or address the key case that explained that approach, *North Dakota v. United States*, 495 U.S. 423, 434-35 (1990). *See* ECF No. 306-1 at 5. Instead, the Proposed Order misapprehends the "functional approach" and fails to appreciate that the Supreme Court explicitly authorizes states to enforce neutral, non-discriminatory laws against private contractors that do business with the federal government.

The Supreme Court in *North Dakota* recognized that the correct approach to claims of intergovernmental immunity is a "functional approach" that "accomodate[s] the full range of each sovereign's legislative authority." 495 U.S. at 434-35. In contrast to prior modes of analysis, the Supreme Court's "functional approach" recognizes that state laws may impose burdens on the federal government without raising constitutional concerns as long as they regulate federal suppliers or contractors in a non-discriminatory manner. *Id.* Such burdens, the Supreme Court explained, "are but normal incidents of the organization within the same territory of two governments." *Id.* at 435 (internal citations omitted). *North Dakota* described the required approach as "functional" in the course of rejecting a more absolute rule: that any regulation that implicates the federal government is unconstitutional. *Id.* at 434.

Properly understood, the functional approach recognizes that (1) neutral, generally applicable laws apply to private businesses like GEO even when they deal with the federal government; and (2) the fact such laws impose costs on the contractor and, indirectly, the United States, does not make them discriminatory or otherwise unconstitutional—even where an economic burden may result. Indeed, the *North Dakota* Court made clear: A state law does not run afoul of intergovernmental immunity merely because a generally applicable state regulation "make[s] it more costly for the Government to do its business." 495 U.S. at 434 (describing that theory as "thoroughly repudiated") (citing cases). Likewise, the Court explained that a law does

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not implicate intergovernmental immunity where it "is imposed on some basis unrelated to the object's status as a [federal] Government contractor" and is "imposed equally on other similarly situated constituents of the State." *Id*. at 438.

Applying these principles, the *North Dakota* Court upheld state laws that regulated federal government suppliers (and all other liquor retailers in the state) as part of a statewide regulatory regime that served legitimate state interests. *Id.* at 438-39. The state laws placed no discriminatory burdens upon the federal government by requiring its out-of-state suppliers to comply with the labeling requirements. *Id.* Other courts applying this approach have correctly recognized the same essential aspects of the functional approach, rejecting overbroad intergovernmental immunity claims that sought exemptions for private companies or others with whom the federal government dealt based on their relationship with the federal government rather than the discriminatory nature of the regulatory regime. *See*, *e.g.*, *Washington v. United States*, 460 U.S. 536, 545 (1983) (upholding state tax law where "[t]he tax on federal contractors is part of the same structure, and imposed at the same rate, as the tax on the transactions of private landowners and contractors"); *U.S. Postal Serv. v. City of Berkeley*, No. C16-04815 WHA, 2018 WL 2188853, at *3 (N.D. Cal. May 14, 2018) (finding no discriminatory treatment of the federal government or those with whom it dealt (potential buyers of a post office building) where city's historic district designation, which was "imposed equally on other similarly situated constituents of the State," limited government's options for selling or renovating an old post office); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d 892, 904 (N.D. Cal. 2007) (rejecting intergovernmental immunity claim where laws at issue "regulate equally all public utilities, making no distinction based on the government's involvement").

Here, the Proposed Order misunderstands the analysis required by *North Dakota*, which directs courts to focus on the terms of the challenged state law. Instead of doing that, the Proposed Order applies the "functional approach" by selecting one GEO facility and one State facility and purporting to inquire about what is "actually happening" at each of them.

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ECF No. 306-1 at 7.[2] That is not the correct mode of analysis. Courts applying the functional approach ask whether the state law itself is discriminatory—they do not conduct a selective comparison of what is "actually happening" on the ground at two dissimilar institutions. *See*, *e.g.*, *North Dakota*, 495 U.S. at 435 (courts must examine "the entire regulatory system" for discrimination and not focus on particular claims "in isolation"); *California*, 921 F.3d at 872-73 (analyzing what requirements relevant legal provisions imposed upon facilities holding immigration detainees and other facilities); *Berkeley*, 2018 WL 2188853, at *4 (rejecting United States' reliance on fact that Postal Service was only entity currently affected by neutral ordinance as basis for asserting that ordinance was discriminatory, calling such a "sweeping theory" unsupported and explaining that under that theory, "it would be virtually impossible to impose any regulation—no matter how objective or sincerely neutral—on a group of constituents that happened to include the federal government or those with whom it deals"); *In re Nat'l Sec. Agency Telecomms. Records Litig.*, 633 F. Supp. 2d at 904 (rejecting attempt to focus on the individual investigation as "treat[ing] the Government differently" because "the regulatory regime as whole treats any unauthorized disclosure the same"). The Court's Proposed Order, therefore, conflicts with the analysis that the Supreme Court requires. The Proposed Order should not issue.

2. The Proper Comparator Under *North Dakota* and *Dawson* Is a Similarly Situated Private Contractor—Not the State Government

The second fundamental flaw in the Proposed Order is its assumption that the proper comparison for intergovernmental immunity purposes should be between the State and GEO. *See* ECF No. 306-1 at 7-8. That is incorrect as a matter of law.

For intergovernmental immunity purposes, the proper comparator for GEO, a private contractor that deals with the federal government, is a similarly situated private contractor that

[2] Additional facts regarding programming at the Special Commitment Center, the comparator offered by the Proposed Order, ECF No. 306-1 at 8 nn.2-3, are provided in Section II(B).

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deals with the state government. Another way to consider this point is set forth in the following chart showing to whom the Washington MWA applies:

Does the Washington State Minimum Wage Apply?

	Government Institution	**Private Contract Facility**
Federal Detainees	No	Yes
State Detainees	No	Yes

As the chart illustrates, the treatment under the MWA is the same for the federal and state governments (MWA does not apply); and for private contractors regardless of with whom they deal (MWA does apply). There is no difference based on one's status as a federal contractor.

North Dakota, Dawson, and other authority analyzing claims of intergovernmental immunity confirm that the analysis must focus on whether GEO, a private contractor that deals with the federal government, is treated differently than a similarly situated private contractor that deals with the state government—not whether a private contractor is treated differently than the State itself. In particular, *North Dakota* makes clear that the question is whether the state regulation is imposed on a basis unrelated to the entity's status as a federal contractor. *North Dakota*, 495 U.S. at 438. There is no intergovernmental immunity issue if the entity would be subject to the regulation, or if the burden is the same, regardless of its status as a federal contractor. *Id*.

Here, that is unquestionably the case. The MWA applies to GEO based on its status as an employer in Washington, not its status as a federal contractor. There are no heightened requirements or specialized burdens imposed upon GEO because of its relationship with the federal government. In other words, it is not "more expensive" for GEO to run a private detention facility for the federal government than it would be to run a private detention facility for Washington's state government. *Cf.* ECF No. 306-1 at 8. Instead, both governments face the same choice: Use their own facilities to hold detainees and avoid the application of the MWA,

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or use a contractor's facility in Washington to hold detainees and *comply with the MWA*. In arguing to the contrary, GEO and the United States conflate the lack of special treatment with discrimination.[3] But intergovernmental immunity does not oblige the Court to confer special treatment upon GEO, treatment which other private businesses in Washington—even those who deal with *state* government—do not receive.

The Supreme Court's recent decision in *Dawson v. Steager* supports Washington's position about the appropriate comparator to GEO. In *Dawson*, a state exempted some of its constituents—retirees who received state retirement benefits—from certain state income taxation on those benefits, but did not exempt from taxation *similarly situated retirees* who received federal retirement benefits. 139 S. Ct. at 703-04. The treatment of retirees differed depending on whether they collected benefits from the federal or state government—the "similarly situated" entity to Mr. Dawson, a former U.S. Marshal, was another retiree who had performed the same or similar job for the state government. *Id.* ("[e]veryone accepts the trial court's factual finding that there aren't any 'significant differences' between Mr. Dawson's former job responsibilities and those of the tax-exempt state law enforcement retirees. Given all this, we have little difficulty concluding that West Virginia's law unlawfully 'discriminate[s]' against Mr. Dawson 'because of the source of [his] pay or compensation'") (citation omitted). *See also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 817 (1989) (holding the Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees). In both cases, the proper comparison was between an individual who dealt with the federal government and an individual who dealt with the state government. Nowhere did the Supreme Court in *Dawson* or *Davis*

[3] Washington reiterates both its objection to the United States' Statement of Interest and Supplemental Statement of Interest, which were untimely, and its objection to GEO's argument made only in reply that Washington's enforcement of the MWA constitutes "direct regulation" for intergovernmental immunity purposes *See* ECF Nos. 290, 298, 299.

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suggest that the proper comparison is between an individual taxpayer and the *state government itself*.

Dawson's focus on the scope of any legislative exemption further supports Washington here. In analyzing the scope of the tax exemption at issue in that case, the Supreme Court recognized that the "breadth or narrowness of a state tax exemption" is relevant to determining the scope of any corresponding immunity. *Dawson*, 139 S. Ct. at 704. The Court explained that "if a State exempts from taxation all state employees, it must likewise exempt all federal employees. Conversely, if the State decides to exempt only a narrow subset of [state employees, i.e.,] retirees, the State can comply with [intergovernmental tax immunity principles] by exempting *only* the comparable class of federal retirees." *Id.* Thus, under *Dawson*'s straightforward analysis, there is no intergovernmental immunity problem here. As Washington explained (and the Court appears to agree), private contractors dealing with Washington are not exempt under Washington's MWA; therefore, they need not be exempt when they deal with the federal government. The scope of the exemption corresponds to any potential immunity here—and there is no basis to extend the scope of immunity beyond the scope of the MWA's exemption for *government* institutions. Unlike *Dawson*, no discrimination exists because GEO, as a private company doing business in Washington, is treated the same under state law whether it deals with the federal or state government (or any other government entity). *See* ECF No. 155 (Washington's brief addressing MWA exemption for government institutions in detail).

In short, the Proposed Order is incorrect where it states that the "lesson" from *Dawson* is that the Court "must determine whether the State is treating a similarly situated federal entity differently than it is treating itself, and if it is doing so, whether the difference is discriminatory against the federal governments and its contractors." ECF No. 306-1 at 6. Instead, *Dawson* supports Washington's analysis and the Court's original ruling, requiring the comparison to focus on whether GEO (a private company doing business with the federal government) is

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treated differently from other similarly situated entities (private companies doing business with the state). Since it is not, *Dawson* provides no support to the Court's Proposed Order.

3. The Ninth Circuit's Decision in *United States v. California* Also Shows that Intergovernmental Immunity Does Not Apply Here

Respectfully, the Court additionally errs by relying on *United States v. California* to hold that private contractors are equivalents of the federal government. ECF No. 306-1 at 7. That decision is clear that neutral and generally applicable rules, like Washington's MWA, apply to federal contractors—even if they run an immigration facility that holds federal detainees.

In *California*, the Ninth Circuit analyzed the United States' intergovernmental immunity challenges to three separate California statutes: AB450, which established employer notice requirements before federal inspections; AB103, which imposed inspection requirements on facilities that house federal civil immigration detainees; and SB54, which limited cooperation between state/local law enforcement and federal immigration officials. 921 F.3d at 872-73. The Ninth Circuit rejected the United States' claims of intergovernmental immunity as to all three statutes, with the single exemption of one subsection in AB103, and even then, only to the extent that it "d[id] not merely replicate" the generally applicable inspection requirements for all other detention facilities. *Id.* at 883. The only intergovernmental immunity issue existed where that subsection imposed unique, heightened, and specialized requirements on "federal operations—and *only* federal operations." *Id*. at 882-83.

The Court's holding exemplifies the "functional" approach required by *North Dakota*. Specifically, the Ninth Circuit *rejected* the United States' intergovernmental immunity challenge to the whole of AB103, which imposed regulatory inspection requirements on all facilities housing immigration detainees, because most of those requirements were the same as the requirements placed on other detention facilities under California law. In other words, to the extent the state's inspection requirements were neutral and generally applicable—not specialized and heightened burdens placed only on the institutions housing federal immigration detainees—

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they posed no intergovernmental immunity problem, even if those facilities were run by federal contractors. *California*, 921 F.3d at 882-83. The only portion of AB103 the Court struck down was a single subsection that imposed heightened requirements *only* on institutions holding federal detainees—requirements above and beyond the general inspection scheme for other facilities, or in other words, a "specialized burden" on those facilities holding federal detainees. *Id. California's* analysis is therefore no different from the Ninth Circuit's decision in *Boeing*, which this Court previously distinguished, where the Ninth Circuit struck down specialized and heightened requirements imposed on a specific federal cleanup project being completed by a contractor. *See Boeing Co. v. Movassaghi*, 768 F.3d 832, 842 (9th Cir. 2014) (state regulation that imposed heightened environmental cleanup standards at a single location subjected to cleanup by federal contractor).

The *California* holding, like the holding in *Boeing*, shows why intergovernmental immunity does not apply here. Unlike those cases, Washington's MWA applies equally to all private employers in Washington. It imposes no specialized or heightened burden solely on federal contractors based on their status as federal contractors. It is accordingly like the portions of AB103 that the Ninth Circuit upheld in *California*. The fact that the Ninth Circuit recognized that federal contractors may benefit from the doctrine of intergovernmental immunity when faced with a targeted, discriminatory law—a point not in dispute—does not change this fundamental principle. Courts have long recognized that contractors may benefit from an intergovernmental immunity challenge where the subject law is discriminatory and imposed based on one's status as a federal contractor. *See North Dakota*, 495 U.S. at 434-45; *Boeing*, 768 F.3d at 842. That point, however, does not support the Court's conclusion here that federal contractors are equivalent to the federal government and exempt from even non-discriminatory laws.

In fact, the Ninth Circuit's suggestion that "federal contractors are treated the same as the federal government itself" for purposes of intergovernmental immunity is expressly limited

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by the supporting citation, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988). *California*, 921 F.3d at 882 n.7. In *Goodyear*, a "direct state regulation" case, regulation of the federal contractor was deemed to be regulation of the federal government directly because the contractor was performing a federal function *within* a federally owned facility. 486 U.S. at 180-81 (contractor performed at a "federally owned nuclear production facility"). That is certainly not the case here, where GEO alone owns the NWDC. ECF No. 253-1 at 5 (RFA 1). To hold otherwise would misread *California* and contravene well-established Supreme Court authority, including *Goodyear* and *North Dakota*. Indeed, such a ruling is foreclosed by *California*'s binding holding that a state properly regulated institutions where federal civil immigration detainees were held so long as it did not impose a specialized and unique burden on those facilities.

B. The Court's Proposed Order Dismisses Washington's MWA Claim Without a Sufficient Factual Record

1. The Proposed Order, Like GEO, Relies on Incomplete and Inaccurate Facts About State-Contracted Detention

In proposing to dismiss Washington's MWA claim, the Court assumes facts not in evidence and rules without the benefit of critical facts; specifically, the fact that similarly situated private contractors in Washington must—and do—comply with Washington's MWA.

As an initial matter, the Court's reliance on allegations contained in complaints filed in other actions—apparently to conclude that "facts are not in issue" in this case, ECF No. 306-1 at 8 n.3—respectfully, is improper. Allegations in *Malone v. Ferguson*, No. 19-5574 (W.D. Wash. June 24, 2019), and *Lough v. Ferguson*, No. 19-5543 (W.D. Wash. June 14, 2019), are no substitute for facts that the record in this case may or "may not reflect." *Cf.* ECF No. 306-1 at 8 n.3. GEO's counsel inexplicably filed the *Malone* complaint after oral argument and the Court correctly declined to consider it. Regardless, neither complaint suggests Washington's MWA discriminates against the federal government. Both *Malone* and *Lough* are at the pleading stage and challenge the state government's failure to pay the minimum wage at its Special

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Commitment Center. Even if the facts alleged in *Malone* and *Lough* are true, the Special Commitment Center is a government owned and operated facility that provides mental health treatment and rehabilitation for civilly committed sex offenders in Washington, and is statutorily exempt from Washington's MWA. Declaration of Byron Eagle in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Eagle Decl.) ¶ 3; Declaration of Sean Murphy in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Murphy Decl.) ¶ 4. The Special Commitment Center is not a proper comparator to the Northwest Detention Center, a facility privately owned and operated by GEO.[4]

A proper comparison for purposes of the intergovernmental immunity analysis would be privately owned and operated facilities with which the State contracts, such as facilities where residents are sent *after* their commitment at the Special Commitment Center. The Assistant Secretary of the Department of Social and Health Services (DSHS) explains that, after completing required treatment and being deemed safe to house outside of the Special Commitment Center, DSHS places residents in residential facility programs, operated either directly by DSHS or by a private contractor. Murphy Decl. ¶ 4. Where the facility is run by a private contractor, residents have vocational opportunities that the contractor provides support in finding and maintaining. *Id.* ¶¶ 8, 12-13. Washington's MWA applies when residents work in community-based jobs while housed in a facility run by a private contractor. *Id.* ¶¶ 11-13. In other words, Washington's MWA treats private detention providers the same—requiring that their residents make minimum wage for work performed—regardless of whether the contractor deals with the federal or state government.

[4] Even more, if the Court could properly compare private contractors to the state government, the Special Commitment Center, which provides mental health treatment and rehabilitation to sex offenders, is still not similarly situated to GEO, which provides no such services. *See Hernandez v. Sessions*, 872 F.3d 976, 990 (9th Cir. 2017) (observing that the purpose of immigration detention is to protect the public and to ensure the immigrant's appearance at hearings, nowhere referring to rehabilitation).

Similarly, when the Washington Department of Corrections (DOC) relies on private contractors in Washington for services, those private contractors must also pay the minimum wage. As DOC's Work Release Administrator submits in his declaration, state inmates nearing the end of their sentence may be assigned to work-release facilities, three of which are state-run and nine of which are run with assistance from private contractors. Declaration of Theodore Lewis in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Lewis Decl.) ¶ 4. If the state inmate is assigned to a private facility and works within that private work-release facility, such as in food service, state inmates are employed by the contractor and paid the minimum wage, and sometimes more. Lewis Decl. ¶ 6.

Neither GEO's citation to its own contract with DOC, or vague reference to other private contracts with DOC in oral argument, render GEO immune. DOC contracted with GEO pursuant to its authority under Wash. Rev. Code. § 72.68.040, which authorizes the detention of state inmates *outside* the State of Washington. DOC never relied on GEO's services in Michigan pursuant to that contract. Declaration of Debra Eisen in Support of State of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Eisen Decl.) ¶¶ 5-6. The GEO-DOC contract was executed so that DOC may have access to extra bed space in the event that both DOC was not able to place inmates in their own facilities or other governmental facilities, which never transpired. Eisen Decl. ¶ 7. Although the never-used GEO-DOC contract contemplated the payment of wages below Washington's minimum wage, that makes sense as Washington's MWA could not apply in Michigan. And just as Washington cannot enforce the MWA outside of Washington for state detainees, it also cannot enforce the MWA outside of Washington for federal detainees, with the result that treatment of out-of-state contractors is exactly equal:

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Does the Washington State Minimum Wage Apply?

	Government Institution	Private Contract Facility In-State	Private Contract Facility Out-of-State
Federal Detainees	No	Yes	No
State Detainees	No	Yes	No

2. The Proposed Order Will Have Significant Consequences that the Court Fails to Consider

Finally, the problem with providing private contractors the exact same intergovernmental immunity defense as the federal government, as the Court proposes to do here, is evident through real-world examples. Given the clear differences between government institutions and private businesses, a myriad of generally applicable state laws treat government entities differently than private businesses.

For example, the Washington Department of Labor & Industries (L&I) enforces the Washington Industrial Safety and Health Act of 1973 (WISHA). Declaration of Lezlie A. Perrin in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Perrin Decl.) ¶ 3. Although the federal government is exempt from WISHA, L&I's Department of Occupational Safety and Health routinely inspects private contractors operating businesses on federal land or in federal buildings.[5] Perrin Decl. ¶ 4, Ex. A (observing that L&I's authority to investigate federal contractors on federally owned or leased land for failure to comply with WISHA regulations has long been recognized, including the example of private security contractors at the federal courthouse in Tacoma). In suggesting that federal contractors must be treated exactly the same as the federal government, the Court's Proposed Order undermines the applicability of such basic regulations and could exempt private businesses from a myriad of laws designed to protect Washington residents in the workplace.

[5] L&I also reviews complaints of workplace safety within state DOC facilities, including of state inmates in their work programs. Perrin Decl. ¶ 5.

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Consideration of Washington's generally applicable tax statutes leads to the same conclusion. Washington's tax statutes treat governments (both federal and state) differently than private contractors. Declaration of Kathy Oline in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Oline Decl.) ¶ 3; Declaration of Mark Mullin in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Mullin Decl.) ¶ 3. As the Assistant Director of Legislation and Policy for the Washington Department of Revenue explains, private contractors (whether they contract with the federal government, state government, or both) are subject to tax statutes that the federal and state government are exempt from. Mullin Decl. ¶ 3 For example, private contractors that own taxable real property, like GEO or Boeing, are subject to real estate taxes—unlike state and federal governments that own real property and are exempt. *Id.* ¶¶ 3-4. Private contractors are also subject to other taxes that, again, the state and federal governments do not pay. *Id.* ¶¶ 5-7. Given the number of for-profit companies performing federal contracts in Washington, a rule that equates some or all of them with the federal government, and thereby exempts them from generally applicable tax statues, could implicate hundreds of millions of dollars in annual state revenue. Oline Decl. ¶¶ 5-18.

In sum, the implication of the Court's proposed analysis is that private businesses could be rendered exempt from all generally applicable state laws and taxes simply by virtue of a contract with the federal government, with devastating consequences. *Id.* at ¶¶ 13-19. Under *North Dakota*, this cannot be. Intergovernmental immunity simply prohibits Washington from discriminating against private businesses because they are in contract with the federal government, but it does not require Washington to treat private businesses with federal contracts better than other private businesses that do business in the state. Because similarly situated private businesses in Washington must comply with Washington's MWA whether they contract with the state or not, so too must GEO.

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C. The Court's Proposed Order Would Improperly Dismiss Washington's Unjust Enrichment Claim

The Court's Proposed Order summarily proposes to dismiss Washington's unjust enrichment claim, as a result of its intergovernmental immunity analysis, despite GEO never seeking such relief. In so doing, the Court mistakenly conflates the State's separate and alternative claims and treats unjust enrichment as if it were dependent on, or derivative of, the MWA. *See* ECF No. 306-1 at 8. It is not. Washington's retrospective unjust enrichment claim involves entirely different elements than the standards at issue in its future-looking, statutory, MWA claim. *Sua sponte* dismissal of Washington's unjust enrichment cause of action on the sole basis that its MWA claim is purportedly barred by intergovernmental immunity would constitute reversible error.

1. The Court's Proposed Dismissal of Washington's Unjust Enrichment Claim Would Constitute Procedural Error

A Court commits procedural error in dismissing a claim on summary judgment in the absence of a motion from the defendant if there is not sufficient notice or opportunity to be heard on the relevant evidence and law. *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014); Fed. R. Civ. P. 56(f). That rule applies in three ways here.

First, there has been no motion, or briefing, applying intergovernmental immunity to Washington's unjust enrichment claim. GEO moved for summary judgment in 2018 on grounds of intergovernmental immunity *with regard to Washington's MWA claim only*. *See* ECF No. 149 at 1, 15 ("Defendant GEO's Motion for Summary Judgment on Plaintiff's First Cause of Action" explicitly sought "summary judgment on the Complaint's First Cause of Action"). As such, all of the briefing filed by the parties in relation to that motion, as well as the order denying the motion, pertained exclusively to the MWA claim. *See id.*; Washington's Resp. to GEO's Mot. for Summ. J., ECF No. 155 at 7 ("Intergovernmental immunity is no bar to Washington's minimum wage claim…"); GEO's Reply in Supp. of Mot. for Summ. J. on Pl.'s First Cause of

Action, ECF No. 160; Order Denying Def. The GEO Group, Inc.'s Mot. for Summ. J. on Pl.'s First Cause of Action, ECF No.162 ; GEO's Mot. for Recons. of Order Denying Mot. for Summ. J. on First Cause of Action, ECF No. 164 ; Order Denying GEO's Mot. for Recons. of Order on First Cause of Action, ECF No. 165.

Although the United States recently filed a Statement of Interest asserting intergovernmental immunity, the United States likewise only claimed that defense precluded Washington's MWA claim against GEO. ECF No. 290 at 2 ("The United States accordingly submits that the doctrine of intergovernmental immunity precludes application of Washington's Minimum Wage Act . . . to the GEO Group, Inc. . . ."). Thus, the subsequent briefing on intergovernmental immunity focused on the MWA claim alone. *See* Washington's Resp. to GEO's Mot. for Recons. and United States' Statement of Interest, ECF No. 297 at 11-24; United States' Suppl. Statement of Interest in Reply to Washington's Resp., ECF No. 298. *But see* GEO's Reply Supporting Recons. of Summ. J. Order, ECF No. 299 at 9.

Only on Reply in the most recent round of briefing did GEO even reference "unjust enrichment," and then only in a heading and two off-hand references to the "fair-market wage." ECF No. 299 at 9 (titling Section III of its brief as "The State's Application of the MWA and State Unjust Enrichment Laws is a Prohibited 'Direct Regulation' Pursuant to Intergovernmental Immunity"); ECF No. 299 at 10-11 (twice referencing the "fair-market wage" in an argument that "the MWA . . . cannot be applied to GEO"). GEO advanced no argument for the application of intergovernmental immunity to the actual elements of Washington's unjust enrichment claim at oral argument, nor did the Court ask any questions about it. *See* Declaration of Marsha Chien in Support of Washington's Response to the Court's Proposed Order Granting Summary Judgment (Chien Decl.) ¶ 3, Ex. A (transcript of September 12, 2019 oral argument). Because GEO only suggested, for the first time on reply and without actual briefing, that intergovernmental immunity applies to the State's unjust enrichment claim, the State has not had a meaningful opportunity to respond.

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Second, the Court has not provided the State sufficient notice to dismiss the unjust enrichment claim. Under Federal Rule of Civil Procedure 56(f), "the court may . . . consider summary judgment on its own," but it may do so only "after identifying for the parties material facts that may not be genuinely in dispute," and "[a]fter giving notice and a reasonable time to respond." "Where the district court grants summary judgment in the absence of a formal motion," the Ninth Circuit will "review the record closely to ensure that the party against whom judgment was entered had a full and fair opportunity to develop and present facts and legal arguments in support of its position." *Portsmouth Square Inc. v. S'holders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985) (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir. 1982)); *see also Albino*, 747 F.3d at 1176 (quoting *Buckingham v. United States*, 998 F.2d 735, 742 (9th Cir. 1993)) ("Reasonable notice implies adequate time to develop the facts on which the litigant will depend to oppose summary judgment."); *Norse v. City of Santa Cruz*, 629 F.3d 966, 971-72 (9th Cir. 2010); *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981).

Here, the Court provided the State only ten days to respond to a Proposed Order that provides little to no reasoning for dismissing the unjust enrichment claim. In its entirety, the Proposed Order declares, without legal citation, that Washington's unjust enrichment claim "is based on the failure to pay" the minimum wage, "so the unjust enrichment claim fails as well." ECF No. 306-1 at 8. The analysis for dismissal is likely sparse because the Court has not benefited from full briefing by the parties. Under these circumstances and until the Court more completely gives notice of its factual and legal basis for proposing to dismiss the unjust enrichment claim, Washington has not had reasonable notice or opportunity to be heard. *Compare* ECF No. 306-1 at 8, *with* Fed. R. Civ. P. 56(a), (f)(3) (specifying that summary judgment rules apply to "each claim," and requiring court considering summary judgment on its own to first "identify[] for the parties material facts that may not be genuinely in dispute" as to each claim).

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Third and finally, the Ninth Circuit recently denied GEO's Petition for Mandamus, ECF No. 296, and GEO must now provide the State all of the financial documents and information compelled by this Court as relevant to the unjust enrichment claim. ECF No. 133. Thus, at a minimum, the Court should correct its procedural error and decline to enter judgment on Washington's unjust enrichment claim until after GEO produces the additional evidence that Washington may use to prove unjust enrichment and avoid summary judgment. *See* Fed. R. Civ. P. 56(d) (allowing the court to defer consideration of a dispositive motion so that a nonmovant can take discovery); Declaration of Andrea Brenneke in Support of State of Washington's Response to the Court's Proposed Order Granting Summary Judgment of Dismissal (Brenneke Decl.) ¶¶ 3-9 (confirming GEO's failure to produce evidence regarding unjust enrichment ordered by this Court and the Ninth Circuit).

2. The Court's Proposed Order Substantively Errs in Conflating the Unjust Enrichment and MWA Claims

Even assuming *arguendo* that it is procedurally proper to dismiss Washington's entire case, the only "material fact" the Court noted in its single-sentence explanation for dismissing the unjust enrichment cause of action—that "[t]he State's demand for damages for unjust enrichment is based on the failure to pay the State of Washington's Minimum Wage act wages," ECF No. 306-1 at 8—is incorrect as a matter of law and factually disputed.

a. The unjust enrichment and statutory MWA claims are legally distinct

First, Washington's common law cause of action for unjust enrichment is a well-established, stand-alone claim, independent of any state statute or contract; indeed, unjust enrichment "is founded on notions of justice and equity." *Young v. Young*, 191 P.3d 1258, 1263 (Wash. 2008). In Washington, unjust enrichment occurs "when one retains money or benefits which in justice and equity belong to another." *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 18 (Wash. Ct. App. 1991). "Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and

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justice require it." *Young*, 191 P.3d at 1262. Three elements must be established in order to sustain a claim based on unjust enrichment: (1) the defendant receives a benefit; (2) the received benefit is at the plaintiff's expense (or stated alternatively, there is "an appreciation or knowledge by the defendant of the benefit"; and (3) the circumstances make it unjust for the defendant to retain the benefit. *Id*. (*citing Bailie Commc'ns, Ltd.*, 810 P.2d at 18).

Washington pleaded its unjust enrichment claim separate and apart from the MWA claim. In its Complaint, Washington set forth its Second Cause of Action, unjust enrichment, and its related prayer for disgorgement to request that this Court use its equitable powers on behalf of the public interest to divest GEO of the amount by which it has been unjustly enriched as a result of utilizing detainee labor to operate the NWDC without paying adequate compensation. *See* ECF No. 1-1 (Compl. ¶¶ 6.1-6.6, 7.5-7.6). While Washington's Complaint also alleges facts and claims related to the MWA and its first cause of action, the State need not succeed on a MWA claim as a condition precedent to, or element of, its unjust enrichment claim and second cause of action. *Id*. The Court itself has recognized that the State's unjust enrichment claim, and the disgorgement remedy it seeks, are separate and distinct from its MWA claim and injunctive relief remedy. After extensive motions practice, this Court granted Washington's Motion to Compel GEO's financial records that were sought specifically because the *financial benefit* GEO received from detainee labor is relevant to the State's unjust enrichment liability claim, as well as the disgorgement remedy. *See* ECF No. 133 (Order); ECF No. 126 (Joint LCR 37 Motion); ECF No. 142 (Mot. for Recons.); ECF No. 145 (Mot. for Certification of Interlocutory Appeal); ECF No. 146 (Resp. to Mot. for Certification of Interlocutory Appeal); ECF No. 157 (Order Denying Mot. for Certification of Interlocutory Appeal). The Ninth Circuit Court of Appeals, after briefing and argument, upheld that ruling and denied GEO's Petition for Mandamus. ECF No. 296 (Order).

In the Ninth Circuit, because a plaintiff may bring alternative claims and causes of action arising out of a common nucleus of facts, courts should not dismiss claims brought for unjust

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enrichment as duplicative or superfluous of other claims. *Astiana v. Hain Celestial Grp., Inc*., 783 F.3d 753, 762-63 (9th Cir. 2015) (citing Fed. R. Civ. P. 8(d)(2)). In fact, courts routinely recognize that claims for unjust enrichment exist separate and apart from minimum wage act or other statutory claims. For example, the district court that addressed similar claims brought by Colorado immigration detainees against GEO, and dismissed the GEO detainees' Colorado minimum wage act claim because of the narrow purpose of the Colorado statute, refused to dismiss Plaintiffs' unjust enrichment claim. *Menocal v. GEO Grp., Inc*., 113 F. Supp. 3d 1125, 1133 (D. Colo. 2015). In so doing, the court noted that, though the minimum wage act claim "is dismissed and not available," "Plaintiffs are permitted to plead in the alternative," as "the remedies sought by the [minimum wage] claim and the unjust enrichment claim are different, and the unjust enrichment claim is not duplicative." *Id.*; *see also Menocal v. GEO Grp., Inc*., 882 F.3d 905, 925-26 (10th Cir. 2018) (upholding unjust enrichment class action brought by detainee workers against GEO); *Astiana*, 783 F.3d at 762 (reversible error to construe "quasi-contract" cause of action as "duplicative or superfluous to [plaintiff's] other claims").

Of course, it makes sense that neither the United States nor GEO briefed that Washington's unjust enrichment claim should be barred by intergovernmental immunity. Intergovernmental immunity cannot apply to Washington's common law claim of unjust enrichment as it is generally applicable and has no defined categories capable of discriminatory application. Indeed, as the Court has noted, civil detainees of Washington's Special Commitment Center have brought unjust enrichment claims against the State challenging their pay for work inside that government institution. ECF No. 306-1 at 8 n.3. Even if the Court continues to improperly compare GEO to State institutions, instead of similarly situated private contractors, intergovernmental immunity does not apply. There can be no claim of discrimination with regard to the application of the unjust enrichment cause of action.

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b. The unjust enrichment claim relies on different facts than the MWA claim—facts that are either disputed or have been resolved in favor of Washington

Because none of the elements of an unjust enrichment claim requires proof of a MWA violation, it would be an error of law for the Court to dismiss Washington's unjust enrichment claim on the mistaken grounds that its claim is "*based on* the failure to pay the State of Washington's Minimum Wage Act wages." *Cf.* ECF No. 306-1 at 8 (emphasis added). GEO's decision to pay $1 per day and not statutory minimum wages is an undisputed fact that *supports* the State's unjust enrichment claim, but the claim itself is *based on* completely different facts. Namely, the State's unjust enrichment claim is based on the facts that GEO utilizes detainee labor to operate NWDC, a for-profit business; does not pay a fair wage to detainees for their work; benefits by retaining the difference between the $1 per day that it pays detainees and the fair wage that it should pay for work performed at NWDC; and that it is unjust for GEO to retain the benefit gained from its practice of failing to pay adequate compensation to detainees for the work they perform at NWDC. ECF No. 1-1 (Compl. ¶¶ 6.1-6.6).

Record evidence, most of which is undisputed, supports each of the elements of unjust enrichment. GEO benefits from detainee labor at the NWDC, both operationally and financially. GEO staffs its kitchen, laundry, janitorial, and barbershop with detainee-workers, who work shifts throughout the day and the evening. *See* ECF No. 251 at 3-16. Hundreds of detainees work in the NWDC every day, at specific locations and in assigned shifts that last from half an hour to six hours at a time. ECF No. 251 at 3; ECF No. 253-10 (GEO 30(b)(6) Dep. 150:2-24, 157:6-9); ECF No. 253-25 (table of daily jobs and hours worked broken down by pod/living area and the locations outside the housing units where detainees work). GEO gains an operational benefit by using detainee-workers to complete its own contractual duties under the GEO-ICE contract and meet its audit standards. *Compare* ECF No. 246-3 (GEO-ICE Contract) at 57-58, 83 (listing GEO's contract responsibilities of ensuring the facility is "clean and vermin/pest free;" laundering, changing, and distributing linens; and preparing meals), *with* ECF No. 253-15 (RFAs

23-44) (confirming the VWP jobs are the same work as GEO's contract responsibilities of cleaning common areas, doing laundry, and preparing food).

Given its practice of leveraging relatively large numbers of detainee workers, and paying them $1 per day, instead of paying a prevailing wage to work-eligible detainees or Tacoma-area residents who also could do the work, GEO benefits financially from detainee labor. Although Washington still lacks complete information about the full amount of financial benefit GEO has received from detainee labor at the NWDC, *see* ECF Nos. 133, 296, the undisputed evidence in the record is that NWDC has been exceptionally profitable from 2005-present, exceeding the margin of profit built into the ICE-GEO contract. Critically, the undisputed evidence shows that GEO would have profitted even if GEO had paid the minimum wage or a fair wage to detainee workers. *See* ECF No. 268-5 (Washington's expert report and supplemental expert report with appendices). In addition, there is record evidence that GEO benefits at the expense of detainee workers who earn less than fair wages, only $1/day, but perform work anyway because it provides the only opportunity to earn money needed to stay in touch with loved ones and to supplement the limited food and personal hygiene rations they receive. *See* ECF Nos. 268-6 to 268-11.

In sum, Washington's unjust enrichment claim is separate and apart from its MWA claim and requires the parties to present evidence that addresses the core questions posed by the Court and that lie at the heart of this litigation: "But what of GEO's detainees? . . . Is GEO unfairly profiting by misuse of the Voluntary Work Program?" ECF No. 306-1 at 9. This Court, sitting in equity in *this* litigation, has the authority to answer these questions, determine if GEO has benefitted from detainee labor, and if so, decide if it is unjust for GEO to keep that benefit without disgorgement. Rather than summarily dismiss the unjust enrichment claim, the Court should properly adjudicate it following the presentation of evidence at trial.

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III. CONCLUSION

The Court should decline to enter its Proposed Order. It contains important errors of law and improperly dismisses the case. Instead, the Court should leave its prior order denying GEO summary judgment based on intergovernmental immunity undisturbed. In the alternative, the Court should decline to reach the unjust enrichment claim.

Dated this 4th day of October 2019.

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 4th day of October 2019 in Seattle, Washington.

s/ *Caitilin Hall*
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