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 DECLARATION OF LEZLIE A. PERRIN IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Under penalty of perjury under the laws of the United States of America, I, Lezlie A. Perrin, certify that the below is true and correct:

1. My name is Lezlie A. Perrin. I am over the age of 18 and competent to testify in this matter.

2. I am the Senior Program Manager of DOSH Appeals, Audit, Discrimination, and Internal Training for the Washington Department of Labor & Industries. I have served in this position since 2010. My job duties include ensuring the resolution of all contested cases for DOSH.

3. The Department of Labor & Industries' Division of Occupational Safety & Health (DOSH) regulates all companies doing business in Washington State. Companies doing

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business in Washington must comply with our state's general health and safety laws, Washington's Industrial Safety and Health Act (WISHA). DOSH investigates workplace safety complaints when made against companies regardless of whether the company contracts with state or federal governments.

4. For example, DOSH investigates workplace safety complaints against private contractors or vendors that provide security services and other work at federal buildings such as the federal courthouse in Tacoma, as well as logging companies that perform logging operations in national forests under contract with the federal government. L&I's Board of Industrial Appeals, in fact, specifically affirmed L&I's jurisdiction over a private contractor providing court security services at the federal courthouse in Tacoma, reasoning that L&I "is not attempting to dictate, amend, review or obstruct the ability of either [the federal government] or [the private contractor] to fulfill [its] purpose [of protecting the people and property within a federal courthouse] and "there is a paucity of evidence showing that [federal oversight] extended to include the safety and health of the [security officers] within their workplaces at the federal courthouse." A copy of that decision is attached here as Exhibit A.

5. DOSH's practices with respect to state owned facilities and contractors are no different. For example, DOSH has historically treated inmates who participate in work programs as "employees" under the WISHA, and investigates workplace safety complaints in state correctional facilities. DOSH has issued citations to the Washington State Department of Corrections relating to inmate exposure to asbestos and the use of inmates to fight wildfires. DOSH has also investigated safety and health complaints by prison guards. Likewise, DOSH has jurisdiction to inspect DOC work-release facilities run with the assistance of private contractors.

6. In contrast, the federal government itself is not subject to WISHA. DOSH does not have jurisdiction to investigate workplace safety complaints filed against the federal government on property that it owns and operates itself.

7. I am aware, for example, that the United States Bureau of Prisons owns and operates the SeaTac Federal Detention Center, a federal prison located at 2425 South 200th Street in Seattle, Washington. DOSH does not inspect or investigate workplace safety complaints filed against the SeaTac Federal Detention Center.

8. If companies that contract with the federal government to provide immigration-related services were deemed to be exempt from generally applicable state laws, that would exempt The GEO Group, Inc., from complying with our state health and safety laws at the Northwest Detention Center located at 1623 East J Street in Tacoma, Washington. Such a ruling would reverse the longstanding practice of the Department, which has investigated and helped resolve workplace complaints at the NWDC in the past. For example, in 2014, DOSH handled a complaint related to the NWDC's improper disposal of contaminated sharps from used disposable razor blades, one of which hurt an employee; this unsafe practice, without the State's regulatory oversight and correction, could have resulted in the spread of infectious disease to GEO's employees and detainees, with much broader, and devastating, public health and safety ramifications.

9. In other words, if all businesses that contract with the federal government to provide immigration-related services were required to receive the same treatment under Washington law as the treatment received by the federal government, there would be *no* state health and safety regulation of those businesses, and the implications would be significant and damaging to the health and safety of Washingtonians. In addition to the Northwest Detention Center, I am aware, for example, that for-profit businesses provide ground and air transportation services, airplane cleaning services, and food and supplies sales to federal immigration officials.

10. A broader rule that all businesses that contract with the federal government must receive the same regulatory treatment as the federal government could have even more significant consequences. In Washington, I am aware that a myriad of for-profit businesses in

Washington (including The GEO Group) contract with the federal government and lease space or land from the government, including logging companies, stores, and restaurants. If treated the same as the federal government, all of these companies could be immune from our basic workplace safety protections.

11. At minimum, a rule that affords The GEO Group immunity from generally applicable state health and safety labor laws could result in additional claims by The GEO Group and other federal contractors for immunity. This could result in additional administrative and court costs to the state and the contractors in order to identify and apply the contours of the new immunity rule.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 3rd day of October 2019 in Tumwater, Washington.

Lezlie A. Perrin

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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*
CAITILIN HALL
Legal Assistant

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PERRIN DECLARATION

EXHIBIT A

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

IN RE: GENERAL SECURITY SERVICES CORPORATION	)	**DOCKET NOS. 96 W376 & 97 W463**
CITATION & NOTICE NOS. 115319824 & 115191728	)	**DECISION AND ORDER**

APPEARANCES:

Employer, General Security Services Corporation, by
Davis, Wright & Tremaine, per
Michael J. Killeen

Employees of General Security Services Corporation, by
Northwest Federal Court Security Officers Union, per
Edwin H. White, President

Department of Labor and Industries, by
The Office of the Attorney General, per
James M. Hawk, Assistant

Docket No. 96 W376 is an appeal filed on September 20, 1996, with the Board of Industrial Insurance Appeals by the employer, General Security Services Corporation, from Corrective Notice of Redetermination (CNR) No. 115319824, dated September 4, 1996. The CNR affirmed Citation and Notice No. 115319824, dated June 26, 1996, that cited the employer with one serious violation, containing four sub-parts, of regulations issued under the authority of the Washington Industrial Safety and Health Act with a total penalty assessed equal to $850. **AFFIRMED AS MODIFIED.**

Docket No. 97 W463 is an appeal filed on September 2, 1997, with the Board of Industrial Insurance Appeals by the employer, General Security Services Corporation, from Citation and Notice No. 115191728, dated August 14, 1997. The Citation and Notice cited the employer with three serious violations of regulations issued under the authority of the Washington Industrial Safety and Health Act (WISHA) with a total penalty assessed equal to $3,600. **VACATED.**

PROCEDURAL AND EVIDENTIARY MATTERS

On December 19, 1997, the Department moved to amend Item No. 1-3 of Citation and Notice No. 115191728 by changing the cited safety standard from WAC 296-24-007501(1)(a) to WAC 296-24-07501(2)(a). The Department's motion is granted.

The employer submitted, as Exhibit No. 10, a one-page "memorial" dated August 30, 1996, from a Department employee to an assistant attorney general, the Department's legal representative. The Department objected to the admission of Exhibit No. 10 on grounds of attorney-client privilege and relevance. The attorney-client privilege normally applies to prevent the discovery and use of such documents at trial. However, the Department waived this privilege by disclosing this document while complying with a public disclosure request. The waiver of the privilege occurs even when, as here, the disclosure of the document was accidental or due to a clerical error. Nonetheless, Exhibit No. 10 remains rejected pursuant to ER 402 inasmuch as its contents are irrelevant.

The September 23, 1997 deposition of compliance officer Don Lofgren was published without objection during the January 5, 1998 hearing. Pursuant to CR 32(a)(2), there are no restrictions on the usage of this deposition. It is in evidence for all purposes, not merely for impeachment of the deponent. Deposition Exhibit No. 2 is renumbered as Exhibit No. 22 and is admitted. Deposition Exhibit No. 1 is noted to be part of Exhibit No. 3 and has already been admitted under that number. Deposition Exhibit No. 3 is noted to be the same as Exhibit No. 10 and remains rejected under that number.

On November 16, 1998, we reopened the record of these appeals, pursuant to RCW 51.52.102, in order to obtain evidence necessary to the disposition of one of these appeals, Docket No. 97 W463. At the hearing held on November 16, 1998, a document previously marked for identification as Exhibit No. 12 that was withdrawn, was admitted as Exhibit No. 12. Thereafter,

the employer, employees and Department waived the presentation of additional evidence and the record was closed.

As part of its Petition for Review, the Department submitted declarations of Stephen M. Cant and John R. Spear with accompanying documents for inclusion in the hearing record. This proffered material is rejected as untimely.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer, General Security, its employees, and the Department of Labor and Industries, to a Proposed Decision and Order issued on May 27, 1998, in which CNR No. 115319824, dated September 4, 1996, and Citation and Notice No. 115191728, dated August 14, 1997, were vacated. We have granted review to consider a large number of issues, including the Department's jurisdiction and authority to enforce WISHA under the following circumstances.

On August 13, 1937, the United States purchased the 1010 5th Avenue property in Seattle, on which the federal courthouse was erected. In 1989, the United States acquired the Union Station Building at 1717 Pacific Avenue in Tacoma through a 30-year lease with an option to buy for a nominal amount at the end of the lease term. The purpose of this acquisition was to renovate and use the buildings thereon as a federal courthouse. In 1996 and 1997, the buildings at both of these locations were being used as federal courthouses.

General Security Services Corporation (GSSC) is a Minnesota corporation that employs Court Security Officers (CSOs) in federal courthouses in Tacoma and Seattle (including the bankruptcy courthouse in Seattle) and in other western states. GSSC has fewer than 50 employees in the State of Washington. GSSC contracts with the United States Marshal Service (USMS) to assist it in providing security in those federal facilities. CSOs monitor courthouse

entrances, a function that requires them to operate x-ray machines and metal detectors provided by the USMS. CSOs also conduct foot patrols throughout the courthouses, monitor trials held at the courthouses and assist the USMS with prisoners in transit within the courthouses and during trials. CSOs generally have considerable experience in law enforcement before they are hired by GSSC. General Security pays them, provides their uniforms and supervises them in a limited fashion. The CSOs are deputized by the USMS. Each CSO carries identification while on duty within the courthouses identifying him or her as a "Special Deputy U.S. Marshal Court Security Officer." The USMS requires them to go to a federal training school for orientation training. The USMS provides the weapons and equipment carried by CSOs while on duty. The USMS has a firearm or deadly force policy with which the CSOs must comply. The USMS requires that each CSO annually qualify on the shooting range with the firearm it assigns to him or her. The USMS determines the type and style of uniform that CSOs wear while on duty, the locations at which they are stationed and the hours they work. GSSC has the power to hire and fire CSOs, but they are subject to multiple background checks conducted by the USMS. The USMS can refuse to allow a CSO to work at the courthouses for disciplinary or other reasons. This is tantamount to firing the CSO inasmuch as the only GSSC workplaces within this state are federal courthouses.

The first issue we address is whether the Department has jurisdiction to enforce safety regulations promulgated under the authority of the Washington Industrial Safety and Health Act (WISHA) of 1973 upon a private company who contracts with the United States government to provide services solely within United States courthouses. This issue requires interpretation of the United States Constitution art. I, § 8, cl. 17.

United States Constitution art. I, § 8, cl. 17 of the Constitution of the United States confers upon the United States Congress the power:

> To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular

> states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings;

Exclusive "legislation" is the same thing as exclusive "jurisdiction." *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1884). This provision essentially is reiterated by Article XXV of the Constitution of the State of Washington.

The Washington State Supreme Court has interpreted this constitutional provision in the context of the Department's power to enforce WISHA upon the operations of a private contractor performing work solely within a federal enclave. The federal enclave in question was Mt. Rainier National Park, over which the state legislature ceded exclusive jurisdiction to the United States by enacting Rem. Rev. Stat. § 8110 (now codified as RCW 37.08.200). In *Department of Labor & Indus. v. Dirt & Aggregate, Inc.*, 120 Wn.2d 49 (1992), the Washington State Supreme Court determined that the federal government had obtained exclusive jurisdiction over the land within the boundaries of the national park. Because of the cession of exclusive jurisdiction, the State could not enforce safety and health regulations promulgated under WISHA within the park since the United States Congress had not granted the State such regulatory authority.

In the appeals before us, the Department has attempted to distinguish *Dirt & Aggregate* by noting that the federal enclave in that case, Mt. Rainier National Park, was ceded to the United States while the federal courthouses in Seattle and Tacoma were purchased and leased, respectively. However, the holding in *Dirt & Aggregate* was not dependent on the method by which the United States obtained the property, but instead upon the extent of jurisdiction over the property that was granted it by the state Legislature.

Mere ownership by the federal government and use for public purposes of lands within a state, by itself, does not withdraw the lands from the jurisdiction of the state. *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. Ed. 155, 58 S. Ct. 208 (1937). The two methods specified in art. I, § 8, cl. 17 of the Constitution of the United States by which the United States obtains jurisdiction over land within this and other states are cession (as in *Dirt & Aggregate*) and purchase by the consent of the legislature. Jurisdiction over property purchased by the federal government can be exclusive or concurrent. *Ryan v. State*, 188 Wash. 115 (1936). A state, by statute, may qualify its consent to federal jurisdiction by reserving for itself concurrent jurisdiction with the federal government over the land acquired. *Dravo Contracting Co*., 302 U.S. 134.

In our state, legislative consent for acquisition of property by the United States, along with the cession of jurisdiction over it, has been accomplished by statute. Initially, the jurisdiction acquired by the United States over property purchased in this state was exclusive. Rem. Rev. Stat. § 8108, adopted in 1891, stated:

> The consent of the state of Washington be and the same is hereby given to the acquisition by purchase or by condemnation, under the laws of this state relating to the appropriation of private property to public uses, by the United States of America, or under the authority of the same, of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, breakwaters, keepers' dwellings, and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, docks, navy yards, naval stations, or other needful buildings authorized by any act of congress, . . . the consent herein and hereby given being in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, and with the acts of congress in such cases made and provided; and the jurisdiction of this state is hereby ceded to the United States of America over all such land or lands as may have been or may be hereafter acquired by purchase or by condemnation, or set apart by the general government for any or either of the purposes before mentioned: Provided, that this state shall retain a concurrent jurisdiction with the United States in and over all tracts so acquired or set apart as aforesaid, so far as that all civil and criminal process that may issue under the authority of this state against any

> person or persons charged with crimes committed, or for any cause of action or suit accruing without the bounds of any such tract, may be executed therein, in the same manner and with like effect as though this assent and cession had not been granted."

The use of the term "concurrent" in Rem. Rev. Stat. § 8108 did not change the nature and extent of the federal government's jurisdiction from exclusive to concurrent. *See*, John N. Rupp, 14 Wash. L. Rev. 1, 23 (1939). A limited reservation by the state of jurisdiction to serve process does not remove or defeat the grant of exclusive jurisdiction. *State v. Lane*, 112 Wn.2d 464, 470 (1989).

The Legislature's consent to exclusive jurisdiction of the United States is dependent on the purchased property being used by the United States for a purpose enumerated in art. I, § 8, cl. 17 of the Constitution of the United States. *Ryan*, 188 Wash., at 126-127. One of these purposes is "for the erection of . . . 'needful buildings.'" A federal courthouse is a "needful building" within the meaning of art. I, § 8, cl. 17 of the Constitution of the United States. *Ryan*, 188 Wash. at 127-128; *Dravo Contracting Co.*, 302 U.S. 134. Inasmuch as Rem. Rev. Stat. § 8108 was in effect on August 13, 1937, the United States obtained exclusive jurisdiction over that property as provided by that statute.

In 1939, Rem. Rev. Stat. § 8108 was repealed and replaced with Rem. Rev. Stat. §§ 8108-1 through 8101-4 (Laws of 1939, ch. 126, §§ 1-4, effective June 7, 1939), that is now codified in Chapter 37.04 RCW. RCW 37.04.010 contains the State Legislature's consent to acquisition of land "by purchase, lease, condemnation, or otherwise" for the uses described by art. I, § 8, cl. 17 of the United States Constitution, including "needful buildings." RCW 37.04.020 defines the jurisdiction ceded to the United States as "concurrent jurisdiction with this state in and over any land so acquired by the United States . . .." Thus, the Washington State Legislature no longer granted exclusive jurisdiction to the federal government over property it purchased in this state.

This change in legislative consent did not change the grant of exclusive jurisdiction the United States had already obtained over the Seattle federal courthouse property. RCW 37.04.040

provides that "jurisdiction heretofore ceded to the United States over any land within this state by any previous act of the legislature shall continue according to the terms of the respective cessions," so long as the United States has affirmatively accepted the ceded jurisdiction and has not failed or ceased to use the land for the purpose for which it was required. There is no evidence in the record regarding an acceptance of jurisdiction over the Seattle federal courthouse property by the United States. Nonetheless, such acceptance of jurisdiction by the United States is presumed. *Ft. Leavenworth R. Co.*, *Silas Mason, Inc. v State Tax Comm'n.*, 302 U.S. 134, 82 L. Ed. 155, 114 A.L.R 318 (1937). This presumption is lent additional weight by the construction and continuous use for almost 60 years of a federal courthouse on the purchased premises. Absent evidence to the contrary, the presumption of acceptance has not been rebutted. Acceptance of exclusive jurisdiction over the property by the United States government is deemed established.

The establishment of exclusive jurisdiction by the federal government over the Seattle courthouse property does not mean that all state law is no longer valid there. State law that had applied to the property at the time of the transfer of ownership and jurisdiction to the United States is still applicable to the property, although the state no longer has the power to amend those laws or pass new ones applicable therein. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 84 L. Ed. 596, 60 S. Ct. 431, 127 A.L.R. 821 (1940); *Pacific Coast Dairy, Inc. v. Department of Agriculture*, 318 U.S. 285, 295, 87 L. Ed. 761, 63 S. Ct. 628 (1943). Since WISHA was not enacted until long after the United States purchased and obtained exclusive jurisdiction over the Seattle federal courthouse property, its enactment in and of itself does not permit it to be applied within the boundaries of that federal enclave.

Since the federal government has obtained exclusive jurisdiction over the Seattle courthouse property it acquired in 1937, many of the principles discussed by our state's Supreme Court in *Dirt & Aggregate* also apply to prevent the Department from enforcing WISHA within the

Seattle federal courthouse. Because the United States has exclusive jurisdiction over the courthouse property, the state may not resume regulation within it without the express permission of Congress. The Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 651 et seq., does not contain express congressional permission for the resumption of state regulation over safety and health on federal enclaves nor does it expand state regulatory power beyond its normal legislative limits. *Dirt & Aggregate*, 120 Wn.2d at 53-56. The inescapable conclusion is that the Department of Labor and Industries lacks jurisdiction to enforce WISHA within the Seattle Federal courthouse. Therefore, Citation and Notice No. 115191728, issued on August 14, 1997, (Docket No. 97 W463) must be vacated due to this lack of jurisdiction.

The remainder of this Decision and Order addresses only CNR No. 115319824, issued on September 4, 1996, (Docket No. 96 W376) involving the application of WISHA to the Tacoma federal courthouse.

The jurisdictional situation regarding the federal courthouse in Tacoma is materially different from that of the Seattle courthouse because of the date the United States acquired the Tacoma courthouse property. RCW 37.04.020, that was applicable in 1989, only ceded concurrent jurisdiction to the federal government over property it acquired in this state. That the federal government's acquisition of the property was by lease rather than purchase is not important. RCW 37.04.010 shows that the legislature consented to the acquisition of property by the federal government through lease as well as by purchase. Since the property in question is subject to the concurrent jurisdiction of both the federal and state government, instead of the exclusive jurisdiction of the federal government, it is subject to the jurisdiction of the state. *Ryan,* 188 Wash. 115; *State v. Williams*, 23 Wn. App. 694 (1979).

The extent of the state's jurisdiction is described by RCW 37.04.030. It states:

> The state of Washington hereby expressly reserves such jurisdiction and authority over land acquired or to be acquired by the United States as aforesaid as is not inconsistent with the jurisdiction ceded to the United States by virtue of such acquisition.

Inasmuch as our state legislature has consented to (granted) only concurrent jurisdiction to the federal government, art. I, § 8, cl. 17 of the United States Constitution does not prevent all state regulation at the Tacoma federal courthouse. Our review must now expand to consider whether the Department's attempt to enforce WISHA upon a private contractor at a worksite within the Tacoma federal courthouse is preempted by federal law pursuant to art. VI, cl. 2, of the Constitution of the United States, also known as the Supremacy Clause.

United States Const. art VI, cl. 2, states:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

Supremacy Clause questions often are referred to as questions of "preemption" by federal law of state regulation or action.

In *Inlandboatmen's Union of the Pacific v. Department of Transp.*, 119 Wn.2d 697 (1992), the Washington State Supreme Court considered whether the Department of Labor and Industries' power to enforce safety regulations promulgated under the authority of WISHA upon the Washington State Ferry System was preempted by federal law in the form of United States Coast Guard regulations. In discussing the case, the court provided an overview of the preemption law:

> State law can be preempted in two ways: field preemption or conflict preemption. If Congress indicates an intent to occupy a given field (explicitly or impliedly), any state law falling within that field is preempted; even if Congress has not indicated an intent to occupy a field, state law is still preempted to the extent it would actually conflict with federal law.

> Federal preemption is governed by the intent of Congress and may be expressed in the federal statute. Absent explicit preemptive language, Congress' intent to supersede state law in a given area may be implied if (1) a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, (2) if the federal act touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or (3) if the goals sought to be obtained or the obligations imposed reveal a purpose to preclude state authority. Federal regulations, within the scope of an agency's authority, have the same preemptive effect as federal statutes.
>
> Even if Congress has not occupied an entire field, preemption may occur to the extent that state and federal law actually conflict. Such a conflict occurs (1) when compliance with both laws is physically impossible or (2) when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.
>
> There is a strong presumption against finding preemption in an ambiguous case, and the burden of proof is on the party claiming preemption.

Inlandboatmen, 119 Wn.2d, at 701-702. Footnotes and citations omitted. *See also*, *Department of Labor & Indus. v. Common Carriers, Inc.*, 111 Wn.2d 586, 588 (1988); and *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 326-327 (1993).

There is no federal statute that expressly preempts the state's regulation of workplace safety and health. While OSHA appears to regulate the entire field of industrial safety and health, a provision of that act (29 U.S.C. § 667) actually removed federal preemption by allowing the states to adopt their own plans and standards to regulate this field in lieu of the federal government. *Inlandboatmen*, 119 Wn.2d, at 704. Our state took advantage of this federal "offer" to allow it to regulate this field itself by adopting WISHA through an exercise of the police power.

We do not conclude that the United States Congress implicitly intended to supercede state industrial safety and health regulation of private employers whose worksites are within federal courthouses. Courts are reticent to imply federal preemption of an entire field, such as industrial safety and health, without an unambiguous congressional mandate to that effect. *Inlandboatmen*, 119 Wn.2d, at 705. The historic police powers of a state to provide for the health and safety of its

citizens are not to be preempted absent a clear and manifest purpose of Congress. *Medtronic Inc. v. Lohr*, 518 U.S. 470, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996); Reece *v. Good Samaritan Hosp.*, 90 Wn. App. 574, 578 (1998). Great deference is given to state legislation such as WISHA where public health and safety are involved. *Inlandboatmen*; *Fisons.* Washington State's interest in protecting Washington workers' safety and health is strong and local in character, and WISHA was enacted pursuant to the state's police power. *Inlandboatmen*, 119 Wn.2d, at 706. Because of the subject matter of the legislation involved in this case and the use by the state of its police power to protect a strong, local interest, it is unlikely that any implicit intent to supercede WISHA exists.

The employer has not shown any pervasive scheme of federal regulation, dominant federal interest or any federal goal or obligation that reveals a purpose to preclude state authority. GSSC maintains that it is tightly controlled by the federal government in the form of the United States Marshal Service (USMS). The record clearly reflects that the USMS is integrally involved in the supervision and control of CSOs employed by GSSC. However, there is a paucity of evidence showing that such regulation extended to include the safety and health of the CSOs within their workplaces at the federal courthouses. Even if USMS policy such as the firearms policy could be construed as regulating the subject matter of workplace safety and health, the existence of such a policy is not sufficient to show that a pervasive federal regulatory scheme exists or that Congress intended to preempt state safety and health law. The fact that CSOs are expected to attend orientation training at a federal training center also does not establish congressional intent to preempt all training requirements contained in state regulations of workplace safety and health.

There is no evidence that state regulation of workplace safety and health actually conflicts with federal law since compliance with both is possible. There is very little applicable federal law in the field of workplace safety and health with which WISHA could conflict. Statutes related to the USMS, 28 U.S.C. § 561, *et seq*., do not address safety or health-related issues. The regulations

found in 29 C.F.R. § 1960.1, *et seq*. do not apply to CSOs since they are not federal employees. The regulations in 21 C.F.R., pt. 1925, regarding safety and health standards for federal service contracts, do not preclude states from setting additional safety and health standards, nor does compliance with those federal standards relieve a private contractor from compliance with stricter state or local safety and health standards. 21 C.F.R. § 1925.1 (d) & (e). These federal regulations refer to another regulation regarding personal protective equipment, located at 41 C.F.R. 50-204.7. However, that regulation does not conflict with the WISHA requirement for employer assessment of the need for personal protective equipment for its workers, since it does not contain or prohibit such a requirement.

The heart of GSSC's argument is that imposition of WISHA on their operation is a regulation of the activities of the United States government because it is performing a uniquely federal function. This is merely another way of stating that WISHA should be preempted as an obstacle to the accomplishment of the full purpose and objectives of Congress. The employer has contended that its case is not based upon a preemption argument. But such a contention is disingenuous inasmuch as many of the cases it cites are preemption cases and the "interference with a federal function" analysis has been used by the United States Supreme Court in deciding preemption cases. *See, e.g.*, *Hancock v. Train*, 426 U.S. 167, 48 L. Ed. 2d 555, 96 S. Ct. 2006 (1976); and *Goodyear Atomic Corp. V. Miller*, 486 U.S. 174, 100 L. Ed.2d 158, 108 S. Ct. 1704 (1988).

In *Goodyear Atomic Corp.*, the Supreme Court noted that state regulation may be invalidated under the Supremacy Clause when the state is claiming authority to dictate the manner in which the federal function (in that case, control over the production of nuclear material) is carried out. In *Leslie v. Miller*, 352 U.S. 187, 1 L. Ed. 2d 231, 77 S. Ct. 257 (1956), the Supreme Court invalidated a state licensing requirement for contractors that, in essence, gave the state the power of reviewing and approving contractors hired by the United States. In this case, the federal function

is the protection of people and property within a federal courthouse. The Department, when enforcing WISHA, is not attempting to dictate, amend, review or obstruct the ability of either the USMS or GSSC to fulfill that purpose. All that the Department has attempted to do is ensure that GSSC employees are adequately trained and protected in order to prevent and reduce injuries when job-related safety or health hazards are encountered. It is GSSC, not the USMS, that would be responsible to provide that training.

GSSC complains that meeting WISHA requirements will be inconvenient and/or costly. This is not a valid reason to conclude that WISHA should be preempted. In *Sadrakula*, the Supreme Court declared that the fact the federal government chose to accomplish its purpose by contracting with a private contractor did not enable that contractor to share the government's immunity from state regulation. The Court stated that the mere increase in the cost of a contract caused by compliance with state law was not enough of an interference with a federal purpose to require preemption of the state law.

Similarly, the additional burden of dual regulation does not mandate preemption of the state law so long as no actual conflict with federal law exists. *Inlandboatmen*, 119 Wn.2d, at 708-709. Certainly there are instances where an attempt to enforce certain WISHA regulations at a federal courthouse could conflict with federal law or the accomplishment of a federal purpose. However, the employer has not shown that such a conflict actually occurred in this case, and we will not presume that one exists. The Department did not attempt to "lock out" or "red tag" x-ray machines, metal detectors or other government-owned equipment. It did not attempt to issue an order of immediate restraint. There is no indication that this inspection by the Department prevented CSOs from performing their duties, inhibited any activities within the courthouse or compromised the safety of CSOs or others within the courthouse. As stated in *Inlandboatmen,* "The possibility of interference or the potential for future conflicts do not justify a finding of preemption."

To summarize thus far, we have determined that neither the operation of art. I, § 8, cl. 17, nor art. VI, cl. 2 of the Constitution of the United States operates to invalidate CNR No. 115319824, dated September 4, 1996, alleging violations of safety standards promulgated under the authority of WISHA at the GSSC workplace in the federal courthouse in Tacoma. Since CNR No. 115319824 has survived the constitutional attacks on it, we now look at the particulars of the violations it cited and the penalty it assessed.

The Department cited GSSC for violations of four safety regulations at its Tacoma courthouse work-site. The item cited as No. 1-1a is for a violation of WAC 296-24-040(2), that requires an employer to have an accident prevention program outlined in a written format. The item cited as No. 1-1b is for a violation of WAC 296-24-045(1) that requires an employer with 11 or more employees to have a safety committee (or at least periodic crew safety meetings). The item cited as No. 1-1c is for a violation of WAC 296-24-060(2) that requires that a person holding a valid first aid card (certificate of first aid training) be present or available at the work-site at all times. The item cited as No. 1-1d is for a violation of WAC 296-24-07501(2)(a) that requires an employer to assess a workplace to determine if hazards are present, or are likely to be present, that necessitate the use of personal protective equipment.

The Department has proved that the employer violated three of the four safety standards listed above. Donald Arnett, the employer's district supervisor since February 1994, admitted that in May 1996 the employer had no written accident prevention program, had no safety committee, and had not performed an assessment of the need to provide CSOs with body armor. These admissions are consistent with the information gathered by Don Lofgren, the compliance officer who conducted the inspection of the Tacoma work-site of the employer, and with the testimony of Edwin White, the only CSO who testified who was stationed in Tacoma in May 1996. Mr. Lofgren testified that Mr. Arnett told him that GSSC has 11 CSOs working at the Tacoma courthouse.

Although Mr. Arnett also admitted that in May 1996 the employer did not require any employee to hold a valid first aid card, we find that the employer was not in violation of WAC 296-24-060(2), and, therefore, vacate Item No. 1-1c.

WAC 296-24-060 states in relevant part:

> (1) In addition to RCW 51.36.030, every employer shall comply with the department's requirements for first aid training and certification.
>
> (2) There shall present or available at all times a person or persons holding a valid certificate of first-aid training. (A valid first-aid certificate is one which is less than three years old.)

This regulation is in direct conflict with RCW 51.36.030 that states:

> Every employer, who employs workers, shall keep as required by the Department's rules a first aid kit or kits equipped as required by such rules with materials for first aid to his or her injured workers. **Every employer who employs fifty or more workers**, shall keep one first aid station equipped as required by the department's rules with materials for first aid to his or her injured workers, and **shall cooperate with the department in training one or more employees in first aid to the injured**. The maintenance of such first aid kits and stations shall be deemed to be a part of any safety and health standards established under Title 49 RCW.

(Emphasis added.)

It is clear that the Legislature intended, with RCW 51.36.030, to exempt employers with fewer than 50 workers from the requirement for first aid training. Although it is also clear that the Department has broad rule-making authority under Title 49 RCW, the general provisions of Title 49, and the regulations promulgated under Title 49 cannot be read to repeal the specific exemption provided in RCW 51.36.030. Although the Department certainly has the authority to adopt rules and regulations regarding safety and health standards under Title 49, the Legislature did not give the Department the authority to repeal legislative enactments. Because the evidence demonstrates that GSSC had fewer than 50 employees at the time of the inspection, and because WAC 296-24-060 is therefore in conflict with the exemption provided by RCW 51.36.030, the statute must be

accorded more weight than the regulation with which it is in conflict and Item No. 1-1c must be vacated.

The employer notes that Exhibit No. 4, the WISHA interpretative memo regarding body armor as personal protective equipment had not been written as May 31, 1996, when the inspection occurred. Nonetheless, WAC 296-24-07501(2)(a) was in existence as of that date. Furthermore, personal protective equipment was described in WAC 296-24-07501(a) as including protective clothing and protective shields and barriers that would include body armor or bulletproof vests.

The Department grouped these four violations into one serious violation (with four subparts) for which a penalty of $850 was assessed. Mr. Lofgren acknowledged that the grouping of violations was discretionary. He testified that each of the first three violations, by itself, did not rise to the level of a serious violation. He stated that Item No. 1-1d, the failure to assess the need for personal protective equipment, helped considerably in raising the grouped violation to a rating of "serious," but he never testified that this violation alone was serious. Mr. Lofgren concluded that the four violations, when grouped, constituted a serious violation because together they increased the likelihood that serious injury or death could occur. Although we have vacated Item No. 1-1c, we conclude that the remaining three violations may reasonably be grouped in order to find one serious violation.

GSSC contends that the Department should not be allowed to group these violations when the only reason for grouping them is to allow the assessment of a penalty for a serious violation. This is a question of first impression in this state. We have suggested that grouping violations should occur when a logical relationship exists among the violations or when an articulated legal standard requires them to be grouped, *In re Berg Equipment & Scaffolding, Inc.*, Dckt. No. 93 W163 (September 6, 1994), but that statement does not foreclose grouping them for the purpose of producing a serious violation.

In order to reach a proper decision on this matter, we have examined OSHA case law for guidance. It is well established in federal administrative decisions that grouping of non-serious violations is permissible even if the only purpose for grouping them is to obtain one serious violation for penalty assessment purposes. Two or more non-serious violations may be grouped together to form a single serious violation if the combined violations create a substantial probability of death or serious physical injury or cause a condition that could result in death or serious injury. *Secretary of Labor v. CTM, Inc.,* 4 OSHC 1468 (1976), *vacated on other grounds by*, 572 F.2d 262 (10th Cir., 1978); *Secretary of Labor v. Harold A. Simpson & Assoc. Dev. Co.*, 4 OSHC 1894 (1976); *Secretary of Labor v. A.R.A. Mfg. Co.*, 9 OSHC 1271 (1981); and *Secretary of Labor v. A. R. Butler Constr. Co.*, 14 OSHC 2140 (1991).

In this case, the grouping of general (or non-serious) violations to create a single serious violation is appropriate. It is true that the job-related hazards to which the CSOs are exposed--physical assaults, often with deadly weapons--has nothing to do with the violations in question. However, it is easy to see how the lack of training and protection resulting from these violations when considered together, would make serious physical injury or death more likely to occur whenever a CSO is assaulted. Accident prevention programs include instructions on actions to take in case of emergencies, identification of hazards, escape routes and locations of first aid facilities. Safety committee responsibilities include the identification of unsafe conditions or acts and review of programs for safety improvement purposes. An assessment of the need for personal protective equipment may reveal situations where such gear or clothing, if provided, would lessen or even prevent injury or death. In the most likely hazard to confront a CSO, an armed assault at a courthouse entrance by an irate or mentally unstable person, there is no question that death or serious physical harm to a CSO could occur in a number of ways. Compliance by the employer with the three standards in question would reduce the chance and severity of injury.

For a violation to be rated as serious, the Department must show that the employer had knowledge of the hazardous conduct or condition and that there was a substantial probability that death or physical harm could result from the violation. RCW 49.17.180(6); *In re Erection Co. (II)*, BIIA Dec. 88 W142 (1990). The Department has met the burden of proof of both these elements in this case. All of the witnesses, including Mr. Arnett, testified that the CSOs are exposed to hazards while performing their duties. These hazards included bodily assaults with fists, knives or guns. Mr. Arnett stated that CSOs potentially are exposed to fatal injury each day they are on the job. He acknowledged that a few CSOs had been killed on the job during the past 14 years. Mr. Arnett also acknowledged the need for CSOs to have safety training. However, he felt it was the responsibility of the USMS to provide safety training and personal protective equipment to the CSOs.

Having determined that the Department correctly cited GSSC for one serious violation, consisting of a grouping of three non-serious violations, we turn to the appropriateness of the penalty that was assessed. An examination of Exhibit No. 5, the Department's penalty worksheet, reveals potential issues only regarding the Department's rating of the severity of the violation and the size and good faith of the employer. The Department rated the severity of the hazard as a "6" on a scale of 1 to 6, indicating an injury sustained likely could have the most severe consequences. Since the type of injuries that could be sustained (bullet wounds or knife wounds for example) could easily result in severe disability or death, the highest possible rating for severity is justified. The rating of the size of the employer is based on the statement of Mr. Arnett to Mr. Lofgren as well as Mr. Arnett's testimony that GSSC has between 40 and 50 employees in this state. Therefore, the Department's categorization of the employer's size is also correct.

We disagree with the Department's characterization of the employer's good faith as only "fair." Mr. Lofgren cited the lack of safety programs by the employer as well as his own "neutral" feelings about its cooperation with the inspection as his reasons for rating its good faith that low.

We believe that the evidence in the record supports a higher rating of "good" good faith on the part of the employer. Despite Mr. Lofgren's "neutral" feeling about the employer's cooperation, he testified that GSSC permitted and cooperated with the inspection. There is no indication in the record that GSSC's history of injuries or claims costs was higher than average. Furthermore, action evidently was taken to address the violations found during the May 31, 1996 inspection. Another inspection at the GSSC Tacoma courthouse worksite took place in early 1997 at which time no safety violations were found. (*See* Exhibit No. 21).

The effect of reclassifying the employer's good faith from "fair" to "good" is to reduce the base penalty for Item No. 1-1 by 20 percent. This results in a reduction of $340 from the $850 penalty assessed by the Department. Therefore, the total penalty for Item No. 1-1 should be $510.

Our disposition of the issues related to the contents of CNR No. 115319824, issued on September 4, 1996, regarding the Tacoma federal courthouse worksite of GSSC is as follows: The Department correctly cited the employer with non-serious (general) violations of three safety standards found within Chapter 296-24, WAC. The action by the Department of grouping these three violations into one serious violation for penalty purposes was permissible. The amount of the penalty assessed should be reduced from $850 to $510 based on a revision in the rating of the employer's good faith from "fair" to "good". CNR No. 115319824, as modified, is affirmed.

FINDINGS OF FACT

1. On May 31, 1996, the Department of Labor and Industries conducted an inspection of General Security Services Corporation at their place of business at 1717 Pacific Avenue in Tacoma, Washington. On June 26, 1996, the Department issued Citation and Notice No. 115319824 that alleged one serious violation, with four subparts, of safety regulations promulgated under the authority of the Washington Industrial Safety and Health Act (WISHA), with a total penalty assessed equal to $850. Following a timely appeal by the employer, the Department issued Corrective Notice of Redetermination (CNR) No. 115319824 on September 4, 1996 that affirmed the violations and penalty but changed the abatement dates. On September 20, 1996, the employer filed a

Notice of Appeal with Board of Industrial Insurance Appeals that assigned the claim Docket No. 96 W376.

2. On July 8, 1997, the Department of Labor and Industries conducted an inspection of General Security Services Corp. at their place of business at 1010 5th Ave. in Seattle, Washington. On August 14, 1997, the Department issued Citation and Notice No. 15191728 that alleged three serious violations of safety regulations promulgated under the authority of the Washington Industrial Safety and Health Act (WISHA), with a total penalty assessed equal to $3,600. On September 2, 1997, the employer filed a Notice of Appeal with Board of Industrial Insurance Appeals that assigned the claim Docket No. 97 W463.

3. On August 13, 1937 the United States purchased land at 1010 5th Ave. in Seattle, Washington upon which it built the federal courthouse that it currently occupies. By statute, the Washington State Legislature consented to the purchase of property and ceded jurisdiction over it to the United States. The United States accepted the cession of jurisdiction by the state.

4. In 1989 the United States acquired the Union Station Building located at 1717 Pacific Ave. in Tacoma, Washington by the means of a 30-year lease with an option to buy for a nominal sum at the end of the lease term. By statute, the Washington State Legislature consented to the purchase of property and ceded concurrent jurisdiction over it to the United States. The United States accepted the cession of jurisdiction by the state.

5. General Security Services Corp. (GSSC) is a Minnesota corporation that employs between 40 and 50 Court Security Officers (CSOs) in federal courthouses in Tacoma and Seattle (including the bankruptcy courthouse). GSSC contracts with the United States Marshal Service (USMS) to assist it in providing security in those federal facilities. CSOs monitor courthouse entrances, a function that requires them to operate x-ray machines and metal detectors provided by the USMS. CSOs also conduct foot patrols throughout the courthouses and monitor trials held at the courthouses as well as assist the USMS with prisoners in transit within the courthouses and during trials. CSOs generally have considerable experience in law enforcement before they are hired by GSSC. They are employees of GSSC, who pays them, provides their uniforms to them and supervises them in a limited fashion. The CSOs are deputized by the USMS. Each CSO carries identification while on duty at the courthouses identifying him or her as a "Special Deputy U.S. Marshal Court Security Officer." CSOs employed by GSSC in Western Washington do not work outside the boundaries of the federal courthouses in Seattle and Tacoma. The USMS requires all CSOs to go to a federal training school for orientation training. The USMS provides the weapons and equipment carried by CSOs while on duty. The USMS

has a firearm or deadly force policy with which the CSOs must comply. The USMS requires that each CSO annually qualify on the shooting range with the firearm it assigns to him or her. The USMS determines the type and style of uniform that CSOs wear while on duty, the locations at which they are stationed and the hours they work. GSSC has the power to hire and fire CSOs, but they are subject to multiple background checks conducted by the USMS. The USMS can refuse to allow a CSO to work at the courthouses for disciplinary or other reasons.

6. The safety inspection conducted by the Department at the Tacoma federal courthouse on May 31, 1996, did not interfere or obstruct the performance of the CSOs duties or the functioning of the courthouse itself.

7. CSOs employed at the Tacoma federal courthouse are exposed to hazards, including the possibility of physical assaults, and assaults by individuals armed with deadly weapons.

8. As of May 31, 1996, at the Tacoma federal courthouse, GSSC did not have an accident prevention plan outlined in a written format as required by WAC 296-24-040(2). This violation was cited by the Department as Item No. 1-1a.

9. As of May 31, 1996, eleven CSOs worked at the Tacoma federal courthouse.

10. As of May 31, 1996, at the Tacoma federal courthouse, GSSC did not have a safety committee or periodic crew safety meetings as required by WAC 296-24-045(1). This violation was cited by the Department as Item No. 1-1b.

11. As of May 31, 1996, at the Tacoma federal courthouse, GSSC did not have present or available at all times, at least one person holding a valid certificate of first aid training as required by WAC 296-24-060(2) This violation was cited by the Department as Item No. 1-1c.

12. As of May 31, 1996, GSSC had not assessed, as required by WAC 296-24-07501(2)(a), whether hazards present, or likely to be present at the Tacoma federal courthouse workplace, would necessitate use of personal protective equipment, including protective shields and barriers such as body armor and bulletproof vests. This violation was cited by the Department as Item No. 1-1d.

13. In CNR 115319824, the Department grouped or combined the safety violations cited by it as Item Nos. 1-1a, 1-1b, 1-1c, 1-1d into one violation, Item No. 1-1, that it labeled as serious. The lack of training and protection of CSOs, related to these safety violations grouped by the Department into Item No. 1-1, expose them to a substantial

probability of serious physical harm or death in view of the occupational hazards that they may encounter as part of their duties at the Tacoma federal courthouse. GSSC knew or should have known of this additional exposure of CSOs to serious physical harm or death caused by the lack of training and protection.

14. The severity of the potential effects to the CSOs of the safety violations grouped as Item No. 1-1 in CNR No. 115319824, is most accurately rated as a "6" on a scale of "1" to "6" where a "6" corresponds to very severe adverse effects of worker safety or health and a "1" corresponds to a very low severity of adverse effects.

15. In regard to Item No. 1-1, of CNR No. 115319824, the employer's good faith is best described as "good."

16. The employer has fewer than 50 employees.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to these appeals.

2. Federal courthouses are "needful buildings" within the meaning of art. I, § 8, cl. 17 of the United States Constitution.

3. The United States has exclusive jurisdiction over the property located at 1010 5th Ave. in Seattle, Washington, including the federal courthouse building.

4. The United States and the State of Washington have concurrent jurisdiction over the property located at 1717 Pacific Ave. in Tacoma Washington, including the Union Station Building where the federal courthouse is located.

5. Property leased, with an option to buy, is the equivalent of property purchased within the meaning of art. I, § 8, cl. 17 of the United States Constitution and RCW 37.04.010.

6. The Department of Labor and Industries does not have jurisdiction to enforce safety and health regulations, promulgated under the authority of Chapter 49.17 RCW (WISHA) within the federal courthouse located at 1010 5th Ave. in Seattle, Washington.

7. The Department of Labor and Industries has jurisdiction to enforce safety and health regulations, promulgated under the authority of Chapter 49.17 RCW (WISHA) within the federal courthouse located at 1717 Pacific Ave. in Tacoma, Washington.

8. The enforcement of industrial safety and health regulations by the Department at the federal courthouse in Tacoma upon a private employer, whose employees only work in federal courthouses, is not preempted, per se, by art. VI, cl. 2 of the United States Constitution or by any Act of Congress or federal regulation.

9. The state safety regulations that GSSC was cited for violating do not conflict with any federal statute or regulation, either expressly or impliedly, nor do they actually conflict with any federal law either by making it impossible for GSSC to comply with both or by standing as an obstacle to the accomplishment of federal purposes, objectives or functioning.

10. Item Nos. 1-1a, 1-1b, and 1-1d, cited in CNR No. 115319824, may be grouped by the Department for the purpose of establishing a single serious violation

11. The employer is not required, within the meaning of RCW 51.36.030, to cooperate with the Department's first aid training program. Item No. 1-1c, in CNR No. 115319824, citing a general violation of WAC 296-24-060(2), is vacated.

12. The penalty assessed by the Department for Item No. 1-1 in CNR No. 115319824 shall be reduced from $850 to $510.

13. CNR No. 115319824, dated September 4, 1996, is affirmed as modified herein, with a total penalty of $510.

14. Citation and Notice No. 115191728, dated August 14, 1997, is vacated.

It is so **ORDERED**.

Dated this 15th day of December, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member

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

DECLARATION OF KATHY OLINE IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Under penalty of perjury under the laws of the United States of America, I, Kathy Oline, certify that the below is true and correct:

1. My name is Kathy Oline. I am over the age of 18 and competent to testify in this matter.

2. I am the Assistant Director of Research and Fiscal Analysis for the Washington State Department of Revenue. I have held my current position since 2008 and have served in the Department of Revenue since 1988.

3. Under state law, the Department of Revenue taxes for profit companies differently than it taxes the federal and state governments. For profit companies doing business in Washington pay state and local property taxes, business and occupation tax, and sales tax.

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Civil Rights Division
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(206) 464-7744

The federal and state governments generally do not pay these taxes, with a few limited exceptions.

4. Based on information filed by The GEO Group, Inc. in this case, I understand that in 2005, The GEO Group, Inc. acquired a company named the Correctional Services Corporation.

5. If for-profit companies that contract with the federal government are exempt from all state and local taxes, then The GEO Group, Inc., would be exempt from state and local taxes related to its business operations at the Northwest Processing Center (formerly the Northwest Detention Center) located at 1623 E. J Street in Tacoma, Washington.

6. In tax year 2019, The GEO Group, Inc. paid $189,889 in state property tax and $750,967 in local property tax related to the facility located at 1623 E. J Street in Tacoma, Washington.

7. [redacted]

8. [redacted]

9. I am aware that the United States Bureau of Prisons owns and operates the Federal Detention Center, a federal prison in SeaTac, Washington located at 2425 S. 200th Street, Seattle, Washington.

10. In tax year 2019, the Bureau of Prisons paid $0 in state property taxes related to the Federal Detention Center in SeaTac.

11. The Bureau of Prisons does not have a tax registration to pay excise taxes in Washington State.

12. If all business that have immigration-services related contracts with the federal government are required to receive state tax treatment that is identical to the state tax treatment received by the federal government, the implications will be significant. In addition to the Northwest Detention Center and the specific detention context, I have been made aware that businesses in Washington (including The GEO Group) contract with the federal government to provide a variety of immigration-related services, including ground and air transportation; vehicle and airplane service and cleaning; and staffing and facility maintenance for U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services. Without a full list of the federal government contractors providing immigration-related services in Washington, the Department of Revenue cannot evaluate the full scope of that economic activity or the estimated tax implications if all such private contractors were immune from state taxes.

13. If a ruling were issued that all federal contractors must be treated the same as the federal government for purposes of state taxation, there would be major revenue impacts for Washington (and likely other states).

14. Based on data obtained from FedSpending.org, which aggregates data from the Federal Procurement Data System within the U.S. General Services Administration, private contractors performed $10,056,578,658 in contracts in Washington during federal Fiscal Year 2015, the last year for which data is available.

15. Assuming the effective date of a rule immunizing federal contractors from state taxation is January 1, 2020, the following table estimates the state tax impacts to the revenue from state retail sales tax and state business and occupation tax. The estimates in the table are based on the data in the paragraph above, Washington State excise tax returns, and Department of Revenue models.

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Fund - Source	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
GF-State - Retail Sales Tax	(27,770,000)	(66,670,000)	(66,670,000)	(66,670,000)	(66,670,000)
GF-State - Business and Occupation Tax	(29,300,000)	(70,330,000)	(70,330,000)	(70,330,000)	(70,330,000)
Fiscal Year Total	(57,070,000)	(137,000,000)	(137,000,000)	(137,000,000)	(137,000,000)

16. The estimates above assume zero growth in federal contracting dollars awarded in Washington since federal Fiscal Year 2015. The estimates would be affected by an increase or decrease in total federal contract awards.

17. The table above does not account for the estimated impacts to local retail sales taxes if federal contractors become immune from paying them. Those lost revenues would be in addition to the estimates identified above, and the Department of Revenue estimates they would be $28,980,000 per fiscal year.

18. The estimates above do not account for state property taxes, which also would be impacted by a rule prohibiting Washington from levying property taxes on otherwise-taxable federal government contractors. The Department of Revenue would need additional time to prepare an estimate of the impact of such a rule on state property tax revenue. The reason more time would be needed is that looking up this information by contractor is a very manual process and requires working directly with all of the counties in Washington.

19. In addition to the above forward-looking revenue impacts, a rule that federal contractors are immune from state and local taxing authority would likely result in the State's payment of tax refunds for taxes collected from federal contractors during the period covered by the statute of limitations (four years plus the current year which would allow contractors to go back to 2016). Based on the data, excise tax returns, and models identified above, the Department of Revenue estimates that Washington would owe $333,350,000 in refunds for state retail sales tax and $351,650,000 in refunds for state business and occupation tax. An estimated $144,900,000 would be owed in refunds of local government retail sales tax. The

Department of Revenue would need additional time to estimate the state and local property tax refunds.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 2 day of October 2019 in Tumwater, Washington.

Kathy Oline

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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*
CAITILIN HALL
Legal Assistant

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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

DECLARATION OF MARK MULLIN IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Under penalty of perjury under the laws of the United States of America, I, Mark Mullin, certify that the below is true and correct:

1. My name is Robert Mark Mullin. I am over the age of 18 and competent to testify in this matter.

2. I am the Assistant Director of the Legislation and Policy division for the Washington State Department of Revenue. Except for two brief periods lasting several months

each, I have served in the Department of Revenue since 1991, and in my current position since November 2017. My job duties include:

a. overall management of the Legislation and Policy division;

b. advising and collaborating with state government policy makers on emerging tax issues of statewide significance and in the development of state and local tax laws; and

c. collaborating with other members of the Department of Revenue's leadership team to resolve complex tax policy issues.

3. Washington's taxation statutes treat the federal government and state government differently than they treat private contractors. Private contractors (whether they contract with the federal government, state government, or both) are subject to tax statutes that the federal and state governments are not.

4. Property taxes are levied by the State under Revised Code of Washington § 84.52.065. Local governments also levy property taxes. *See, e.g.*, Wash. Rev. Code §§ 84.52.700–84.52.821. Real property and personal property are subject to property taxes, unless a specific exemption applies. Wash. Rev. Code § 84.40.020. Private entities, including private government contractors, that own taxable real property or personal property in Washington pay property taxes to the applicable county treasurer under the provisions of Chapter 84.56 of the Revised Code of Washington. However, neither the federal nor the state government is liable for taxes on property they own. Wash. Rev. Code § 84.36.010(1) and Washington Constitution Article VII, Section 1. The federal and state governments are treated the same.

5. "Business and occupation tax" is imposed under Chapter 82.04 of the Revised Code of Washington. Businesses are taxed according to the activity or activities engaged in. The tax is determined by the applicable tax rate or rates, multiplied by the gross proceeds of sales, gross income of the business, or value of products, as the case may be. Wash. Rev. Code §§ 82.04.220–82.04.299. Private entities, including private government contractors, that sell goods

or services or engage in other business activities taxed under Chapter 82.04 of the Revised Code of Washington must file tax returns with the Department of Revenue and pay the applicable tax due. Neither the federal nor the state government is subject to business and occupation taxes for the income from their business activities under Chapter 82.04 of the Revised Code of Washington. Wash. Admin. Code §§ 458-20-189(3)(b), 458-20-190(1), (3). Again, the federal and state governments are treated the same.

6. Washington State imposes a retail sales tax under Chapter 82.08 of the Revised Code of Washington. Various local governments also impose retail sales taxes under the authority of state law. See Chapter 82.14 of the Revised Code of Washington and Wash. Rev. Code § 81.104.170. Consumers pay the retail sales tax to the seller based on the selling price of a taxable product or service at the time of purchase. Wash. Rev. Code §§ 82.08.020, 82.08.050. When Washington State or its agencies, departments, or institutions purchase taxable goods or services at retail, Washington pays the retail sales tax. Wash. Rev. Code § 82.08.010 (defining "buyer," "purchaser," and "consumer" to include "the state, its departments and institutions"); Wash. Admin. Code § 458-20-189(5)(a) ("retail sales tax applies to retail sales made to the state of Washington, including its departments and institutions . . . ."). Private entities, including private government contractors, that buy taxable products or services at retail also pay retail sales tax in accordance with Chapter 82.08 of the Revised Code of Washington. The federal government, which is exempt from Washington's tax statutes, does not pay retail sales tax. In this way, the federal government is treated more favorably than Washington's government under the retail sales tax provisions of the state tax code.

7. Washington State imposes a use tax under Chapter 82.12 of the Revised Code of Washington. Various local governments also impose use taxes under the authority of state law. See Chapter 82.14 of the Revised Code of Washington and Wash. Rev. Code § 81.104.170. The use tax complements the sales tax and applies to a consumer's use of taxable products or services in this state when the consumer did not pay Washington's retail sales tax with respect to the

product or service. Wash. Rev. Code § 82.12.020. The use tax is based on the value of the product or service used, which is typically the purchase price paid by the consumer for the article or service. Wash. Rev. Code §§ 82.12.010, 82.12.020. Washington State agencies, departments, and institutions are subject to use tax on the use of taxable products or services acquired without the payment of retail sales tax. Wash. Rev. Code § 82.12.010 (defining "consumer" to include consumers as defined under Chapter 82.08 of the Revised Code of Washington) and Wash. Admin. Code § 458-20-189(7). Private entities, including private government contractors, that acquire taxable products or services also pay use tax in accordance with Chapter 82.12 of the Revised Code of Washington. The federal government, which is exempt from Washington's tax statutes, does not pay use tax. In this way, the federal government is treated more favorably than Washington's government under the use tax provisions of the state tax code.

8. I have been employed in the field of state tax policy for nearly 30 years. I am not aware of any state that, as a general rule, treats federal government contractors as part of the federal government for purposes of applying their state taxes. Given the number of federal contractors and the scope of their work, equating federal contractors with the federal government would have extremely significant and negative impacts on the taxing authority and annual revenue of states, including Washington.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 2nd day of October 2019 in Olympia, Washington.

Mark Mullin

Mark Mullin

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I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I 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*
CAITILIN HALL
Legal Assistant

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(206) 464-7744

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

DECLARATION OF DEBRA EISEN IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

ATTORNEY GENERAL OF WASHINGTON
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800 Fifth Avenue, Suite 2000
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Under penalty of perjury under the laws of the United States of America, I, Debra Eisen, certify that the below is true and correct:

1. My name is Debra Eisen. I am over the age of 18 and competent to testify in this matter.

2. I am the Contracts Administrator for the Washington State Department of Corrections (DOC). I have worked in this role since February 2018. My job duties include delegated authority from the Secretary to sign agency contracts, responsibility for coordination and administration of agency contracts and procurements, ensuring contracting compliance with applicable laws, regulations and policies and managing seven staff members. My team is responsible for drafting contracts and amendments, coordinating procurements and overseeing DOC's contracting function for goods and services between DOC and third-party vendors and other governmental entities. Prior to my promotion to Contracts Administrator, I worked as a Senior Contracts Attorney for DOC. I held that role from 2004 until February 2018.

3. DOC maintains contracts with many other government entities to confine state inmates. Pursuant to these contracts, DOC inmates may be confined at other states' prisons, tribal prisons or local county-run detention facilities.

4. DOC does not confine state inmates with private contractors in Washington. Indeed, DOC does not have statutory authority to do so. DOC only has statutory authority to

contract for detention services with private companies "in other states." *See* Wash. Rev. Code 72.68.040.

5. Currently, DOC does not have any contracts for detention services with private contractors at all. Previously, DOC did have a contract with The GEO Group, Inc. (GEO), from May 1, 2015 through August 31, 2018 for detention services in Michigan.

6. Even when in effect, however, DOC never actually sent state inmates to the GEO facility in Michigan. As a consequence, no DOC state inmate ever worked in an inmate work program run by GEO.

7. DOC executed its contract with GEO so that bed space would be available in the event that DOC's own in-state facilities or other government-contracted facilities were overcrowded. However, DOC never sought performance of the GEO contract because DOC was able to house inmates in DOC owned facilities or other government-contracted facilities.

8. In addition, DOC does not otherwise contract with private companies to provide even limited kitchen and/or laundry services within DOC's facilities. Any inmate work program operated within a DOC prison facility is run by DOC.

9. As a state correctional institution, DOC's inmate work programs are exempt from Washington's Minimum Wage Act. *See* Wash. Rev. Code 49.46.010.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 4th day of October 2019 in Tumwater, Washington.

Debra Eisen

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Dated this 4th day of October 2019 in Seattle, Washington.

s/ *Caitilin Hall*
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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

DECLARATION OF THEODORE LEWIS IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

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Under penalty of perjury under the laws of the United States of America, I, Theodore Lewis, certify that the below is true and correct:

1. My name is Theodore Lewis. I am over the age of 18 and competent to testify in this matter.

2. I am the Work Release Administrator for the Washington State Department of Corrections (DOC). I have worked in this role since October 1, 2015. My job duties include the administration, management, and oversight of the Washington State DOC work release programs.

3. Washington's work release institutions serve as a bridge between life in prison and life in the community for Washington inmates nearing the end of their sentence. In short, work release facilities are separate and apart from Washington state prisons. They exist to provide participating inmates the opportunity to engage in paid employment or vocational training programs in the community while remaining under DOC supervision at an appropriate facility when not at their job or other pre-approved activity. Allowing state inmates to participate in work release programs is authorized under RCW 72.65.020, which allows DOC to confine inmates outside of state correctional institutions and instead in certain other partial confinement institutions, including "any other appropriate, supervised facility, after an agreement has been entered into between the department and the appropriate authorities of the facility for the housing of work release prisoners."

4. Washington currently has twelve (12) work release institutions as part of its program. Of those, three (3) are fully state-run operations. The remainder are run with assistance from non-profit organizations, including The Transition House, Inc., Progress House Association, Community Work Training Association, and A Beginning Alliance. DOC does not use for-profit contractors in the operation any of its work release facilities, or any other correctional institutions in Washington. For the nine Washington work release facilities where non-profits are involved in operations, DOC contracts with the outside organizations to provide

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security and specific, limited services. DOC itself maintains operational control and manages the institutions and programming – including the work release programs.

5. Individuals that are allowed to participate in DOC work release programs focus on transition, including the finding and retaining of employment, education, training, treatment, re-connecting with family members, developing life skills, and becoming productive members of the community. The purpose of work release is to provide incarcerated individuals opportunities for self-improvement, while assisting them in creating a safe and productive lifestyle that can be sustained upon release. Work release is available only to incarcerated individuals 12 months prior to their earned release date. Participating individuals must have a record of good behavior and be assigned to "Minimum 1" custody level; also, there must be available bed space at a work release institution.

6. Once assigned to work release, participating individuals must search for and/or retain employment or another approved programming opportunity in the community. Participants in the state work/training release program do not work for the DOC facility or non-profit where they are assigned to reside, nor do they work within the institution itself generally. Instead, they seek and obtain paid employment with outside employers or engage in educational or vocational training during their time in the program. Participants in the program earn market rate wages (*i.e.*, at least the minimum wage, though sometimes more) and pay taxes. Employment may only be accepted upon approval by community corrections officers who verify that the employer is paying taxable wages, has a Tax Identification Number, and is a legal place of employment. In rare circumstances participants may work at these facilities where they have the opportunity to work in specific jobs, like food service, within the work release facility itself, but in those cases, participants are hired by and become employees of the contracted non-profit service agency, are paid market wages, and pay taxes.

7. In my experience, work release participants are employed by a wide range of employers. The most common positions are entry level jobs, though it is not uncommon to see

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participants working skilled labor jobs, welding, computer science, or even as clerks for attorneys.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 27th day of September 2019 in Tumwater, Washington.

Theodore Lewis

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I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I 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*
CAITILIN HALL
Legal Assistant

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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

DECLARATION OF BYRON EAGLE IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

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Under penalty of perjury under the laws of the United States of America, I, Byron Eagle, certify that the below is true and correct:

1. My name is Byron Eagle. I am over the age of 18 and competent to testify in this matter.

2. I am the Chief of Secure Residential Operations for the Washington State Special Commitment Center (SCC). I have worked for the SCC for 18 years. I began as an entry-level residential counselor and rose through the ranks, holding both security and residential positions. I have served as Chief of Secure Residential Operations for two years. In this position, I have executive management oversight over the SCC Residential Department, Security Department, and Program Services Department–which includes the Residential Vocational Program (RVP). I report directly to the Chief Executive Officer. Given my experience, I am familiar with all aspects of the SCC, its operations and programs.

3. The SCC is a government institution owned and operated by the State of Washington through its Department of Social and Health Services (DSHS). The SCC is a total confinement facility that provides housing and specialized mental health treatment for civilly committed sex offenders who have completed their prison sentences and are detained under Washington's Sexually Violent Predator Statute, RCW 71.09.

4. The SCC provides its residents with clinical treatment and rehabilitation programs with the goal of supporting eventual community transition. To fulfill that mission, each resident within the SCC has an individualized treatment plan developed and monitored by SCC clinical staff. These treatment plans include therapeutic treatment goals as well as rehabilitative programming goals. The SCC's Residential Vocational Program (RVP) is an integral component of residents' individualized treatment plans and most residents are provided opportunities to work within the SCC facility, through the RVP, as part of their rehabilitation. Additional

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Program Services available to SCC residents include educational services, recreational activities, resident business activities, and religious services.

5. As part of my job as Chief of Secure Operations, residential staff consults with clinical staff to understand each resident's particular needs and challenges, as well as their treatment objectives, in order to secure placements in vocational and educational programming that meet those particularized clinical requirements and recommendations. Because all resident educational and vocational program assignments at the SCC are components of individualized clinical treatment plans, the residents' treatment teams, the SCC therapists and clinical staff, are directly involved in the RVP: job interviews and placement; oversight and evaluation of work performed by resident; performance evaluations; and work-related disciplinary issues. This structure ensures that the work advances the residents' treatment and rehabilitation goals.

6. The RVP is designed to increase residents' readiness for eventual community transition and enhance or develop necessary skills for employment. For example, the RVP includes supporting residents in: obtaining gainful employment (including reviewing available job postings, filling out applications, participating in interviews, and accepting jobs); providing necessary training and certifications (industrial safety, food safety and sanitation); developing or deepening work skills on the job; developing time management skills and reliability in meeting a set work schedule; gaining work experience; engaging in performance evaluations. Through the RVP, residents develop or demonstrate their capacity to work and this supports their transition and reentry into the community and community-based employment opportunities.

7. SCC has a range of vocational activities available to residents within the RVP. The normal RVP opportunities are available to residents who are at level 2 or above, and include work in the residential unit (On-Unit) as well as work within the SCC but outside the residential unit (Off-Unit). On-Unit jobs are offered first to qualified residents who have been there the longest and include: cleaning day room twice a day; cleaning restrooms twice a day; dumping trash and collecting laundry (for level 3 above). Off-Unit positions are all posted, left up for 10

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days, require application, medical checks, recommendation by therapist, and interview. The Off-Unit jobs include: custodial and janitorial work; kitchen, cooking and food service; maintenance; seasonal landscaping and grass cutting; and clerical work. The SCC also provides residents with higher acuity needs (level 1) with vocational opportunities, but these are done directly under the supervision of a specialist.

8. The work of SCC residents within the RVP is tracked and residents are paid at rates generally between $1-3/hour. Washington's Minimum Wage Act does not apply because the SCC is a state government institution.

Dated this 3rd day of October 2019 in Steilacoom, Washington.

Byron Eagle

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Dated this 4th day of October 2019 in Seattle, Washington.

s/ *Caitilin Hall*
CAITILIN HALL
Legal Assistant

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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

DECLARATION OF KATHY OLINE IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Under penalty of perjury under the laws of the United States of America, I, Kathy Oline, certify that the below is true and correct:

1. My name is Kathy Oline. I am over the age of 18 and competent to testify in this matter.

2. I am the Assistant Director of Research and Fiscal Analysis for the Washington State Department of Revenue. I have held my current position since 2008 and have served in the Department of Revenue since 1988.

3. Under state law, the Department of Revenue taxes for profit companies differently than it taxes the federal and state governments. For profit companies doing business in Washington pay state and local property taxes, business and occupation tax, and sales tax.

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The federal and state governments generally do not pay these taxes, with a few limited exceptions.

4. Based on information filed by The GEO Group, Inc. in this case, I understand that in 2005, The GEO Group, Inc. acquired a company named the Correctional Services Corporation.

5. If for-profit companies that contract with the federal government are exempt from all state and local taxes, then The GEO Group, Inc., would be exempt from state and local taxes related to its business operations at the Northwest Processing Center (formerly the Northwest Detention Center) located at 1623 E. J Street in Tacoma, Washington.

6. In tax year 2019, The GEO Group, Inc. paid $189,889 in state property tax and $750,967 in local property tax related to the facility located at 1623 E. J Street in Tacoma, Washington.

7. [redacted]

8. [redacted]

9. I am aware that the United States Bureau of Prisons owns and operates the Federal Detention Center, a federal prison in SeaTac, Washington located at 2425 S. 200th Street, Seattle, Washington.

10. In tax year 2019, the Bureau of Prisons paid $0 in state property taxes related to the Federal Detention Center in SeaTac.

11. The Bureau of Prisons does not have a tax registration to pay excise taxes in Washington State.

12. If all business that have immigration-services related contracts with the federal government are required to receive state tax treatment that is identical to the state tax treatment received by the federal government, the implications will be significant. In addition to the Northwest Detention Center and the specific detention context, I have been made aware that businesses in Washington (including The GEO Group) contract with the federal government to provide a variety of immigration-related services, including ground and air transportation; vehicle and airplane service and cleaning; and staffing and facility maintenance for U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services. Without a full list of the federal government contractors providing immigration-related services in Washington, the Department of Revenue cannot evaluate the full scope of that economic activity or the estimated tax implications if all such private contractors were immune from state taxes.

13. If a ruling were issued that all federal contractors must be treated the same as the federal government for purposes of state taxation, there would be major revenue impacts for Washington (and likely other states).

14. Based on data obtained from FedSpending.org, which aggregates data from the Federal Procurement Data System within the U.S. General Services Administration, private contractors performed $10,056,578,658 in contracts in Washington during federal Fiscal Year 2015, the last year for which data is available.

15. Assuming the effective date of a rule immunizing federal contractors from state taxation is January 1, 2020, the following table estimates the state tax impacts to the revenue from state retail sales tax and state business and occupation tax. The estimates in the table are based on the data in the paragraph above, Washington State excise tax returns, and Department of Revenue models.

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Fund - Source	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025
GF-State - Retail Sales Tax	(27,770,000)	(66,670,000)	(66,670,000)	(66,670,000)	(66,670,000)
GF-State - Business and Occupation Tax	(29,300,000)	(70,330,000)	(70,330,000)	(70,330,000)	(70,330,000)
Fiscal Year Total	(57,070,000)	(137,000,000)	(137,000,000)	(137,000,000)	(137,000,000)

16. The estimates above assume zero growth in federal contracting dollars awarded in Washington since federal Fiscal Year 2015. The estimates would be affected by an increase or decrease in total federal contract awards.

17. The table above does not account for the estimated impacts to local retail sales taxes if federal contractors become immune from paying them. Those lost revenues would be in addition to the estimates identified above, and the Department of Revenue estimates they would be $28,980,000 per fiscal year.

18. The estimates above do not account for state property taxes, which also would be impacted by a rule prohibiting Washington from levying property taxes on otherwise-taxable federal government contractors. The Department of Revenue would need additional time to prepare an estimate of the impact of such a rule on state property tax revenue. The reason more time would be needed is that looking up this information by contractor is a very manual process and requires working directly with all of the counties in Washington.

19. In addition to the above forward-looking revenue impacts, a rule that federal contractors are immune from state and local taxing authority would likely result in the State's payment of tax refunds for taxes collected from federal contractors during the period covered by the statute of limitations (four years plus the current year which would allow contractors to go back to 2016). Based on the data, excise tax returns, and models identified above, the Department of Revenue estimates that Washington would owe $333,350,000 in refunds for state retail sales tax and $351,650,000 in refunds for state business and occupation tax. An estimated $144,900,000 would be owed in refunds of local government retail sales tax. The

Department of Revenue would need additional time to estimate the state and local property tax refunds.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 2 day of October 2019 in Tumwater, Washington.

Kathy Oline

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Dated this 4th day of October 2019 in Seattle, Washington.

s/ *Caitilin Hall*
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CHIEN DECLARATION

EXHIBIT A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

STATE OF WASHINGTON, Plaintiff, v. THE GEO GROUP, INC., Defendant.	C17-5806-RJB TACOMA, WASHINGTON September 12, 2019 9:30 a.m. Motion Hearing

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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THE COURT: Good morning. Okay. This is cause number 17-5806, State of Washington versus the GEO Group. And it comes on this morning for oral argument regarding the pending motion for reconsideration and also on the continuing issue of intergovernmental immunity.

Let me get your appearances first, here. For the plaintiff?

MS. CHIEN: Marsha Chien for the State of Washington.

MR. POLOZOLA: Lane Polozola also for the State of Washington, Your Honor.

MS. BRENNEKE: I'm Andrea Brenneke for the State of Washington.

THE COURT: Okay. And for the defense?

MR. BARNACLE: Colin Barnacle on behalf of GEO Group.

THE COURT: Mr. Barnacle.

MS. MELL: And Joan Mell on behalf of GEO Group.

THE COURT: First, before we start argument here, I'm mindful that the plaintiffs, particularly, have objected to the United States' statement of interest or I should say statements of interest. I think the court should consider those statements of interest for a number of reasons.

First, the government has the right to show the court its interests, pursuant to 28 United States Code Section 517. And they can do that without appearing as a party. Second, the United States' statement of interest cited at least two

cases in their statements of interest that are relevant and were not cited to the court in their final forms at our first go-around on intergovernmental immunity, that's simply because they were finally decided after the court's rulings last December on that subject. And those cases, *Dawson v. Steager* and *United States v. California*, helped to clarify the law on intergovernmental immunity. And I think it's important for the court to consider them.

Third, I am mindful that the statement of interest is outside the court's planned schedule for the case. It raises something late that we thought was put to bed early. But the parties have had due process notice and an opportunity to be heard on that subject. And if there was an error it should be fixed as soon as possible.

So, in other words, neither the court nor the plaintiffs, at least, like the timing, but there's no harm and no foul by raising these issues again later in the case.

Fourth, the current reconsideration of the intergovernmental immunity question is not consideration of a motion by a non-party. The government did not make a motion. And I think you should consider the court's concern about that issue as being raised sua sponte by the court. And it's raised out of concern for the accuracy of the law and the law's interpretation as applied here. That's a long way of saying that I don't want to hear more about the propriety of

further consideration of intergovernmental immunity. We'll get to that.

Now, this started out with the motion for reconsideration filed by the defendants, or defendant, under Docket 289. So I think the defense should go first.

MR. BARNACLE: Thank you, Your Honor. The motion for reconsideration, as well as the reply, focus on three primary things. Number one, derivative sovereign immunity. The motion for reconsideration highlights what it believes is a fundamental flaw in the Ninth Circuit's decision in the *Cabalce* case. We believe it was decided upon two cases, *Hanford*, and then the Supreme Court's decision in *Boyle*, that sort of introduced the idea of discretion in the design process in the government contractor defense discretionary function exemption context.

And by catapulting those concepts into the derivative sovereign immunity discussion in this case, via *Cabalce*, it introduced a concept of discretion that has no place under the law. And so by introducing this concept of discretion in the design process, the state has latched onto that, and basically said because GEO could pay more than one dollar, they are no longer entitled to derivative sovereign immunity. That's the argument they're making.

At the end of the day, the contract says at least one dollar. So under *Yearsley* and *Campbell-Ewald*, as long as you

follow the contract, which is at least one dollar, paying one dollar follows that directive in the contract.

By introducing this concept of discretion, what they've done is kind of taken the argument away from what they're actually seeking in this lawsuit, which is a declaration -- their complaint is very clear, they want a declaration that these detainees are statutory employees under the Minimum Wage Act. That's very different than a lawsuit saying that they can pay more than one dollar. If this lawsuit was about paying more than one dollar, and that's what they said, we wouldn't be here today because we would have had that dismissed, because there's no law that says you have to pay more than one dollar.

The law that they're trying to impose here is they are employees entitled to minimum wage. If you focus on that argument, which we must, that runs afoul of the contract. The contract says you pay at least one dollar. And because of federal law, you cannot treat the detainees as employees. They cannot be employees.

So, GEO has followed those two very explicit directions in its contract, and introducing the concept of discretion to pay more than one dollar takes us away from what we're actually arguing about in this case.

So why have they done that? I think they've done it for a couple reasons. One, they understand that it poses this

issue for derivative sovereign immunity, and they're trying to meander their way out of that issue. It also creates the incredible preemption issue. And that's kind of the second point of our motion for reconsideration.

If you look at the Minimum Wage Act up against the IRCA, which says you cannot employ people who are not work-authorized, you cannot have those two together. They are asking in this lawsuit that we employ these people pursuant to the Minimum Wage Act. That runs directly against the IRCA, which says you cannot employ this classification of individuals.

So by saying we're not talking about employing the detainees, that's not what this is about, that's a red herring, Your Honor. I think we have to focus in on what the Minimum Wage Act, in calling these people employees, in how that is preempted by the IRCA.

Then finally, through these arguments, the state has effectively made a proposal for how GEO can meander through all of these laws and still comply with everything. They have come up with a proposal for how they can comply with the Minimum Wage Act, how they can operate a Voluntary Work Program, and how they can comply with the IRCA, all in one fell swoop. And that is simply employ those who are work-authorized, and/or employ people in the City of Tacoma.

By making that proposal they are effectively directly

regulating the ICE contract. The ICE contract and the PBNDS say: GEO, you will have this Voluntary Work Program, it's for all detainees, it is for the purposes of reducing idleness, for increasing morale, and for lessening disciplinary actions against detainees. By saying no, we're going to create a Voluntary Work Program that's limited to this set of people, that is directly saying, federal government, your PBNDS, they don't matter. We're going to say what this Voluntary Work Program is, and it's not going to be what you say it is. It's going to be this limited purpose.

So I think by making that argument they walk themselves into a direct regulation intergovernmental immunity issue as well.

Thank you.

THE COURT: Okay. You may want to comment on this. It seems to me that the state has a burden of proof in this case, under their theories, that, in fact, members of -- well, I should say some detainees are being used as employees, contrary to the contract, and that also they would, in proving that, have the burden of proving that GEO violates the law that says they can't employ aliens that are not qualified to be employed.

If they can prove those two things to a jury, doesn't your argument go away? In other words, I don't -- I doubt that

GEO can treat people as employees under the Minimum Wage Act standards and then say, well, they can't be employees because federal law says that we can't employ them. I mean, if GEO is doing it, then, you know -- but the state would have to prove those two things, that you're using them inappropriately, and that that's a violation of IRCA.

MR. BARNACLE: Understood, Your Honor. And you're actually articulating some arguments that they did not make, which in response to our summary judgment on derivative sovereign immunity and preemption, their response talked about discretion in the design process and how GEO could have paid more than one dollar; and they argued on that point. And in their reply brief they took another approach, which basically said they do comply with derivative sovereign immunity standards because the word "applicable law" is something that injects the Minimum Wage Act into the contract.

So they do not argue or raise the issue that GEO is not complying with its contract because it is, in fact, using detainees in the role of employees and performing functions as employees. They don't have that factual record before us on this motion. So I believe that's not before the court as we sit here for this motion for summary judgment. The facts aren't in the record.

THE COURT: Okay. Do you want to respond on the

motion for reconsideration first here, Ms. Chien?

MS. CHIEN: Your Honor, my name is Marsha Chien, and I represent the State of Washington. I'll be addressing GEO's arguments regarding derivative sovereign immunity, preemption, and the Minimum Wage Act, which counsel did not mention in the oral arguments but brought up in his papers. And my colleague, Lane Polozola, will be arguing and responding to the U.S.'s statement of interests.

First, regarding derivative sovereign immunity, GEO argues that in *Cabalce* the Ninth Circuit confused the law. No Supreme Court decision, no Ninth Circuit decision, no other circuit court has distinguished, considered *Cabalce* or identified *Cabalce* as bad law. It is inappropriate for this court to, district court, to overturn Ninth Circuit precedent. That is inappropriate.

Even setting aside *Cabalce*, GEO fails to meet the standard for derivative sovereign immunity under *Campbell-Ewald*. *Campbell-Ewald* states that immunity applies when the contractor simply performs as directed. That's the exact language from *Campbell-Ewald*. GEO would have you ignore that language, because the fact of the matter is ICE has never directed GEO to pay a dollar a day. ICE has stated in e-mails to GEO that there is no maximum to the dollar a day, specifically suggesting that it does not direct GEO in terms of its payments to detainees.

GEO in this case, in discovery, has agreed it has the option to pay more than a dollar a day. And it has done so in the past.

Regarding GEO's argument that the Minimum Wage Act is not an applicable state labor law, that is completely false. It is clearly an applicable state labor law. The Minimum Wage Act is general applicable law that applies to all private contractors, including GEO. None of the GEO ICE contract provisions that GEO has cited directs GEO to do otherwise.

To the extent that GEO argues the contract's "no detainee as employee" provision conflicts with state law, the state notes that a contract provision cannot preempt state law. And regardless if there were any conflict, the GEO ICE contract specifically states that the most stringent standards should apply, i.e., the Minimum Wage Act, not a lower standard, which is just at least a dollar a day.

Regarding GEO's argument, which -- and I just want to make this point, because counsel reiterated it, it was in its papers and counsel reiterated it in its oral arguments, blurring the lines between derivative sovereign immunity and intergovernmental immunity. Those doctrines are separate. They're based on two separate bodies of law. They stem from separate Supreme Court case law.

And in blurring the lines and arguing that GEO has whatever sovereign immunity that the federal government has,

it undercuts basic tenets of both doctrines. But independent of derivative sovereign immunity is that GEO only gets immunity if it simply performed as directed. It does not just get any immunity the federal government has.

Similarly, intergovernmental immunity allows for direct regulation of federal contractors. So to the extent that GEO dislikes the federal contractors, the quote-unquote direct regulation, the state is allowed to directly regulate federal contractors in a non-discriminatory manner, which is what we've done here, and which my colleague will continue with that conversation.

Regarding GEO's argument on preemption. I think Your Honor hit exactly the point that we were discussing, when you were asking your questions of GEO. There are work-authorized detainees within the detention facility. Counsel is incorrect that there's nothing in the record suggesting there are work-authorized detainees. On our motion for summary judgment we submitted documentation that there are work-authorized detainees within the Northwest Detention Center. And GEO responded and admitted there are green card holders, i.e., people with work authorization, within the Northwest Detention Center. So when they operate with all 5,075 detainees, or 1,000, or 200 work-authorized detainees, the VWP will still exist. So there is no conflict.

I also wanted to, again, reiterate the point on this

preemption, because GEO's repeated reference back to the contract is inappropriate, also in the preemption context. Again, GEO stated in its oral argument, I believe, that the state's minimum wage law runs afoul of the contract. That is not enough for preemption. It is law, not contract, that can preempt state law. ICE -- neither GEO nor ICE can preempt state law by the contract.

I also want to address one argument made in GEO's papers, and highlight. GEO states that the state's case declares -- is problematic or conflicts with the contract and precludes it from operating a VWP. I just want to emphasize the state does not seek to eliminate the Voluntary Work Program, it seeks only to require GEO to pay the minimum wage, if it chooses to use detainees to complete work within the facility.

If Your Honor has no further questions.

THE COURT: No, that's fine. We haven't got into the intergovernmental immunity. Let's confine our arguments at this point to the motion for reconsideration.

MS. MELL: Thank you, Your Honor. Joan Mell on behalf of the GEO Group. We're going to divide the issues. He's going to address the two cases on intergovernmental immunity addressed in the Department of Justice briefing, and I want to hit on your two policy questions.

You have said that the state carries the burden of proof

of proving that some detainees are being used as employees, contrary to the contract. Another way of framing your issue is whether the state may control how the federal government, through its contractors, uses detainees within their facilities, and/or cares for their health, safety and welfare. The Voluntary Work Program is an established policy decision by the federal government as how to care for its detainees to ensure that the chores are taken care of and accomplished in a way that is applicable to a detention facility.

So you necessarily invade the public-policy decisions of the federal government when you allow the state to come in and apply, discriminately, its Minimum Wage Act to a federal detention facility where the detainees are within its custody and control. Because there's no way to drill down to this dollar-a-day issue, and decide what's a fair rate, without first deciding that they are employees, which removes the federal government's capacity to operate a federal facility, according to detention standards. And detention standards are established in the same way that the state has.

Very telling are the depositions recently taken of the Office of the Governor and of the Department of Labor and Industries. The department has conceded that were a federal government employee to call and complain about minimum wages, they would close the claim and say, sorry, we don't look into

the way the federal government treats its employees. And in 2014 they said that extended to detainees, because they are their instrumentalities.

It is the duty and responsibility of the federal government to protect these people and care for them under a policy umbrella that has the greatest federal preemption protections in the universe, i.e., immigration. So there is no way to not violate sovereign immunity by allowing the state to put before a fact finder whether or not GEO has been taking the detainees within the facility and allowing them to participate in a Voluntary Work Program, in a way that that means they're actually employees.

The very fact that they're detainees in a Voluntary Work Program means the federal government gets to decide how to use them. And the state has done the same whole analysis. So the state came up with a constitutional amendment and applied it and let private contractors use detainees at subminimum wages. They had a whole entire graph we got that shows there's very little money paid to those entities.

And the Governor's office acknowledged that every step of the way in this decisionmaking are policy choices, how to secure the facility. If you suddenly elevate an argument to a fact finder that you're going to invade this Voluntary Work Program and oversee it and make sure that they're not actually employees, you are then putting at risk, if decided

that they are, that now the facility must employ them if they're going to have them engage in these particular activities.

And if they are then employed, there's only so much activity that can go on there. So then GEO and the federal government has to address the corruption issues that necessarily come with a limited few being able to participate in a limited number of activities.

Or alternatively, that now you have to run a hotel-model program down there where nobody but a limited few have to do any particular activity, or have the opportunity to do any activity. And those activities that are done then benefit all of the rest of the individuals who are down there who no longer have to do any chores. Or they can just pay off the people, and there's a whole internal barter system.

Detention is a whole unique animal. The fact that it's detention, and that it's federal detention, and these are people within the federal government's jurisdiction and control, on immigration issues, necessarily means you cannot allow the state to come in and try to establish that their program is something it's not. That's why sovereign immunity applies on that question.

The second question. They have the burden of proving GEO violates the federal law -- I think is what you were saying -- and is violating by actually employing these

people. That presupposes, from its inception, that there is an issue that may be decided as to the legal status of detainees, which invades, again, the same analytical reasons I just scrolled through, that these people within the federal jurisdiction and control actually are being employed in violation of the federal law.

On its face you're invading the policy choices and decisionmaking of the federal government, how to enforce its own laws. It necessarily, up front, gets us into this question of sovereign immunity. And I'm going to sidestep and let him argue those cases.

Thank you, Your Honor.

THE COURT: Just a minute. Are we through with the motions regarding reconsideration of the earlier order?

MR. BARNACLE: Yes, Your Honor.

MS. CHIEN: I'm happy to respond to the arguments that were just presented.

THE COURT: Well, let me deal with the motion for reconsideration.

First, I think *Cabalce* is good law. I don't think it matters much if we follow that case or *Yearsley* or the *Ewald* case. You have to keep in mind that this was a motion for summary judgment. And it seems to me that the defendant's arguments basically ignore the plaintiff's proof going into the summary judgment phase. I think there are issues of fact

all over the place in regard to these defenses of, not intergovernmental immunity, but the other kinds of immunity that are urged here. There are just issues of fact on those things when you consider the plaintiff's positions and showing.

I'm not going to change the earlier ruling on the motion for reconsideration. And the motion for reconsideration filed under Docket 289 is denied.

Now, let's turn our attention to the question of intergovernmental immunity that we thought we had put to rest back in December.

MR. BARNACLE: Thank you, Your Honor. In addition to my colleague's comments, I just want to give a brief discussion of the two cases that you referenced, *Dawson v. Steager* and *U.S. v. California*. *Dawson*, which was decided just this year, specifically states that for the purposes of intergovernmental immunity, the question isn't whether the federal entities are similarly situated to state entities who don't receive the benefit, the relevant question is whether they are similarly situated to those who do.

So if we think about that question, that question is who receives the benefit? Who is exempted from minimum wage? We know that state-run facilities are exempted from minimum wage by the statute itself. We know that despite the fact that the statute does not exempt federally run facilities. The

state has admitted in its briefing that they do not apply this to federally run facilities, because of intergovernmental immunity concerns.

And we now also know that state-contracted facilities, in many instances, receive the benefit as well. In fact, GEO itself -- so GEO has a contract with the federal government for the Northwest Detention Facility. GEO also has a contract with the State of Washington DOC for the detention of state detainees. And in that contract they're required to pay $2 a day. So we know that the state itself does not apply the minimum wage to GEO.

THE COURT: Is there some institution that GEO runs for the state?

MR. BARNACLE: We included, in our reply brief, a contract between the Washington DOC and GEO, and it's for the detention of state inmates that GEO takes and detains them in other states. So they physically reside in other states, but these are state detainees. And the state law that allows this is -- these are for prisoners.

THE COURT: Wait a minute. Wait a minute. My question is, does GEO run a facility with State of Washington prisoners in it?

MR. BARNACLE: It has, yes.

THE COURT: Where is that?

MR. BARNACLE: The contract is between Washington DOC

and GEO from 2015 to 2018, and the GEO facility was in the state of Michigan, detaining Washington State inmates, and not paying them minimum wage for the work they performed.

THE COURT: Are those inmates subject to a Voluntary Work Program?

MR. BARNACLE: Yes, Your Honor, they have a similar program arranged.

THE COURT: Those are people that are in prison or jail?

MR. BARNACLE: Yes, Your Honor.

THE COURT: Not just detained?

MR. BARNACLE: Yes, these are prisoners, state prisoners.

So we know that this law favors three classifications of detention facilities. State run, federally run, and state contractors. So the only difference between GEO itself in the two circumstances is one is with the federal government and one is not.

In discussing the *U.S. v. California* case, I think this case is really poignant, in this context, because *U.S. v. California* talks specifically about federal immigration policies, and the fact that private contractors contracting with ICE perform a federal function. And *U.S. v. California* very importantly says, in the intergovernmental immunity context, the federal government and federal contractors are

treated the same.

So the comments in the briefing earlier that the state itself will not apply its Minimum Wage Act to federally run facilities because they understand and they know that they don't have jurisdiction to do so, because of intergovernmental immunity, that is an admission under *U.S. v. California* that a federal contractor in the immigration context is performing a federal function. And the court said they are treated the same.

So there's no reason, under that precedent, to treat them differently here.

Thank you.

THE COURT: Okay. Ms. Chien or Mr. Polozola.

MR. POLOZOLA: Good morning, Your Honor. Thank you for taking the time this morning. We appreciate it. And the United States' view of intergovernmental immunity to which GEO has belatedly latched onto, is an extraordinary and frankly unprecedented expansion of this doctrine, that if accepted would result in federal contractors being exempted entirely from neutral and generally applicable state laws. That is not proper and that is not the purpose of intergovernmental immunity.

And GEO is not the federal government and it is not running a federally owned facility. And it is not exempt from all regulations, which as I understand counsel's

argument a moment ago, GEO cannot be regulated, because the federal government cannot be regulated. That is unquestionably not the case, and that is longstanding Supreme Court precedent.

Now, there are a few key points to take head on. One, the court correctly decided previously, or correctly compared GEO -- excuse me -- to other similarly situated private entities, all of which are subject to the Minimum Wage Act. This is necessarily required under governing precedent, because the question is whether Washington law discriminates against GEO based on its status as a federal contractor, or has singled GEO out for worse treatment, and thereby meddled in the federal government affairs. That's a Supreme Court case, Your Honor.

An example of this, which Your Honor is aware of and cited correctly in the prior order, is the *National Security Agency Telecommunications* case from California. There, all unauthorized disclosures that were at issue were treated the same, regardless of who the contractors were. And the fact that they were dealing with the federal government, there were no heightened standards in that case. And the court correctly recognized that the non-discrimination rule prevents states from meddling with federal government activities by singling out, for regulation, those who deal with the government. It does not oblige special treatment,

which is what GEO seeks here.

And point two, you know, counsel has referenced today and the United States references in its brief, that the Subsection 3(k) exemption does not exempt federal contractors, and therefore there is discrimination because it treats state and federal institutions differently. A few points, Your Honor.

As counsel noted, all parties agreed that the federal government cannot and is not directly regulated in this case. And it's the wrong question. Because this is not a situation which the law is regulating the federal government directly, it's about a contractor, and in that case the question is whether the contractor is treated differently based on its status as a federal contractor.

Just like in *Dawson*, which counsel has referenced -- and Your Honor's certainly, I understand, to be curious about -- the question was whether the taxpayer was treated differently based on the source of his benefits. The court looks to how that taxpayer would be treated if that same taxpayer was dealing with the state versus the federal government. It was not to find any exemption anywhere and give that benefit to the federal government or its contractors.

And certainly I think the key point here, Your Honor, is that states can regulate federal contractors or suppliers, and if done in a non-discriminatory manner. And that's a

point that counsel I think ignores, but it's crucial here, because the Supreme Court in *North Dakota* was clear on this point. There's no direct regulation where the regulation applies to the contractor or supplier. And no duties are imposed directly on the federal government through that contractor.

Here, for the reasons that we've discussed earlier today, the Minimum Wage Act applies to GEO. It is not applying to the federal government. GEO has admitted that it can pay more, and that it would have no effect on the federal government, Your Honor.

On *California*, I will point out that counsel has relied on this. That court rejected all but one intergovernmental immunity challenge. And in doing so, recognizes that those contractors running those facilities can, in fact, be regulated. If counsel was correct that because the federal government cannot be regulated, any contractor running a facility for the federal government cannot be regulated, there would be no reason to have the non-discrimination rule in the first place. You would stop at direct regulation in every case. And that can't be the case, in light of the case law as it exists.

And ultimately what the United States has argued for, Your Honor, is a vast expansion. And they're essentially asserting that the Intergovernmental Immunity Doctrine bars

enforcement of any state law against a federal contractor, if the state government -- not similarly situated constituents -- but the state government is not subject to that same law.

Consider what that would mean in practice, Your Honor. Large federal contractors in Washington, like Boeing, GEO, or even Microsoft, could not be subject to neutral state taxes that the state doesn't pay. An example of those are the B&O tax, property tax, and sales tax. That's where you get, with the United States and GEO's reading of intergovernmental immunity.

And I'll briefly address, Your Honor, the exemption at 3(k). It does not apply to private contractors like GEO. The court has recognized that in its prior order, regardless of whether that exemption included the words "federal" or not, the treatment of GEO would remain the same. And that proves here that there is no discrimination. GEO would remain subject to that law.

And I do want to take on one issue counsel has raised, the GEO Washington contract from 2015 to 2018, which counsel agrees applies only to individuals outside of Washington. Certainly Washington does not take the position that it has the authority to enforce its Minimum Wage Act for work done in Michigan. But I do want to point out one additional issue, which is counsel represented that prisoners are actually held there, or were. There is nothing in the record

to suggest that's the case. And it's my understanding that the contract was, in fact, never utilized. So it was essentially a contingency plan for overflow, that was not used. To clarify that issue.

And, Your Honor, one additional point on the direct regulation argument. I certainly understand the court's position which you started with this morning, that you don't want to hear about procedural issues. I understand that. The one point I will make, if Your Honor will allow it, is to note that the direct regulation argument they raise was raised in reply. This is an argument they conceded they were not making in summary judgment. So it has not been fully briefed, with all due respect, Your Honor.

To the extent the court does wish to consider it and reject it now, which the state believes is appropriate, I would direct the court's attention to the *North Dakota* case. There's no direct regulation, again, as I noted earlier, where the regulations operate against the suppliers and not the government. Merely being an entity with whom the government deals does not automatically equate to direct regulation.

And in language that is applicable here, the Supreme Court cannot have been clearer in that case, when it explained then that over 50 years ago the court decisively rejected the argument that any state regulation which indirectly regulates

the federal government's activity is unconstitutional. In that case it was reporting and labeling requirements for liquor suppliers. Certainly if the federal government had undertaken that activity itself, it would have been exempt, it would be a direct regulation if the laws ran to the federal government itself. For the suppliers, they were not covered. That was not a direct regulation.

You know, Your Honor, if you would like additional briefing on this issue, we're happy to provide it. But I think the case law is quite clear that contractors are not automatically exempt, merely because they do business with the federal government. And that's what GEO seeks in this case. Thank you, Your Honor.

THE COURT: I've got some questions for you, but let me ask the defense for any comments in rebuttal.

MR. BARNACLE: Thank you, Your Honor.

Just one quick additional comment on *U.S. v. California*. Again, that case was directly relevant to our circumstances here. The court -- we were talking about the immigration context, they're talking about the application of federal immigration laws to a private contractor. In that case the court specifically said any direct or indirect regulation of the private contractor, a federal contractor in that case, could run afoul of the Intergovernmental Immunity Doctrine.

They specifically said, in the intergovernmental immunity

context, a federal contractor and the federal government are treated the same. So I'll let my colleague add one other thing.

MS. MELL: Your Honor, the record contains specific information about Washington State detainees, not convicted felons, doing work at subminimum wages without the state enforcing minimum wages. The best example is that in the early pleadings in this matter, all the photography and all of the articles and all of the factual information pertaining to the jail right up the street, there are individuals in that jail who are working for private contractors to prepare meals and to operate the facility and keep it clean, and they are not paid minimum wage. In fact, they are required to participate in the programs up there, and they are not paid anything.

The second piece of evidence that was introduced in my declaration that provides testimony from the Governor's office, the specific question was asked by the speaking agent of his staff to brief him on, does DOC contract with private entities for detention treatment or rehabilitation services? And it delineates three separate instances where that is the case. People who have served their confinement and are on release are working in programs at subminimum wages.

And importantly, the other record that exists in this court, is the sex offenders' litigation. The sex offenders

are on McNeil Island doing subminimum-wage work. And they are not confined based on any conviction history. They have sued and adopted the same reasoning here to say, well, if it's true for GEO detainees, it was certainly true for us. We should not have to be laboring in this manner. They also have transition programs out into the community where they're similarly not competing at minimum wages and the state has chosen to ignore them.

This is a particularized discriminatory action on behalf of the State of Washington that impairs the federal government's ability to apply its programs evenly under the policy objectives it has under its immigration laws, as well as its budgeting and management of the health, safety and welfare of the citizens it's responsible for, as well as those individual detainees who they are caring for as they pass them out of the country.

Thank you, Your Honor.

THE COURT: Well, I am curious about a number of things. One is the case law refers to a functional approach to the claim of immunity: Going back to the *North Dakota* case. What do you believe that the functional approach is as applied here, if you believe anything at all?

MR. POLOZOLA: Your Honor, I think the functional approach here is the recognition that the state has the authority to use generally applicable and neutral

regulations, and that this analysis must account for that authority. Private contractors cannot be given special treatment merely because they do business with the federal government. And I think that's what the functional approach -- that language, I think that's the point that the court was trying to account for, was to recognize that it's not that they can be regulated in no way. The question is whether they are regulated in a discriminatory way.

Thank you, Your Honor.

MR. BARNACLE: Your Honor, I believe analysis of the functional approach is something that you would analyze if there was a question of the application of the neutral law. The argument here is this is a neutral law, that's applied as such. And I believe that is flatly wrong here. It's not a neutral law. It's not applied in a neutral manner. GEO itself has a contract with ICE. The state is trying to apply the state minimum wage to GEO under that contract.

GEO also has had a contract with the State of Washington DOC for the running of a -- having state prisoners, Washington State prisoners in one of its facilities. And that particular contract did not -- they did not apply the minimum wage. In fact, they had a Voluntary Work Program that dictated two dollars a day. So we're not talking about a neutral application of a state law. We're talking about a discriminatory treatment where GEO itself is treated one way

dealing with ICE, and another way when it's dealing with the state.

So I think fundamentally we're not talking about a functional approach to this issue, when at its core we have a discriminatory application of the law.

THE COURT: Well, I guess in regard to the functional approach, I guess what it means to me is we need to look at what's actually happening and not just be limited to the papers. I think that's a lesson that teaches us that we have to look at exactly what's happening on the ground, not just what the papers might indicate.

Let me inquire of the state further about state-run facilities, detention facilities for non-criminals. Counsel referred to the Special Commitment Center. This record is so thick it's a little hard to pinpoint things in it. But is that part of the facts in this case, that the state runs a Voluntary Work Program at the Special Commitment Center that houses people that are civilly committed there?

MR. POLOZOLA: Your Honor, it is my understanding that there are work programs in state institutions. And I would need to confirm specifically for SCC, for fear of overrepresenting. But the point to note on this, Your Honor, is that these are state institutions. So even assuming there is, in the state's view it does not affect this analysis.

THE COURT: Counties and cities run jails. Do any

counties and cities have Voluntary Work Programs?

MR. POLOZOLA: I'm not aware specifically, Your Honor, of what programs they do or do not have.

THE COURT: Do you know, counsel?

MS. MELL: Yes, Your Honor. And the Pierce County Jail, right up the street, they have --

THE COURT: You're talking about the Pierce County Jail?

MS. MELL: The Pierce County Jail, yes, Your Honor. And that information is in the record. I put photographs of the jail, and I lined them up side-by-side.

THE COURT: Where in the record is that?

MS. MELL: Your Honor, I will give you a specific citation. And I can't give it to you off the top of my head. But it would be in the very early motion practice that was done. With my first declaration I attached it, and I had the photographs up here and was showing them. I actually displayed them on the viewer.

Your Honor, I did want to touch down on this functional application. The court is drilling down to the contention that it needs a factual recitation in order to know how to apply the intergovernmental immunity. But the court doesn't need any additional factual information where it understands that the health, safety and welfare of immigration detainees, during processing, to include mitigating their idle time with

programs like a Voluntary Work Program, is necessarily the functional issue at stake here.

The jurisdictional control over the health, safety and welfare of those detainees belongs to the federal government, just like the federal government has to ensure that their employees are fairly paid. The state can't come in and take over its supervisory authority or protective authority for detainees who are outside their jurisdiction.

And the other thing that is in the record, that's in the deposition testimony of the Governor's speaking agent, is that in -- there was a concession that in the prisons there were private contractors helping, that are contracted for the meal preparation, and the detainees work for them, if I didn't get that clear before.

THE COURT: Question to the state.

Doesn't the law require, in this analysis, that GEO be treated the same as the government itself?

MR. POLOZOLA: Your Honor, I don't think that's the proper analysis. I think the question is whether GEO is discriminated against based on its status as a federal contractor. In this case there is no such discrimination. If GEO in every circumstance was automatically equated with the federal government, there would never be a question of discrimination, because the federal government cannot be directly regulated.

So to the extent -- I think the case law you may be thinking of, Your Honor, is the statement that you cannot discriminate against the federal government or those with whom it deals. And certainly that is true. So GEO -- the state is not disputing that intergovernmental immunity could apply if there were, in fact, discrimination. But that's not the case here. So I don't think you should automatically equate the two, Your Honor.

And if I may, I'll just reiterate -- to reiterate one point, Your Honor. The examples just given are all state and county facilities. The dispute here isn't whether those facilities exist or use inmate labor. That's never been a disputed factual issue in this case, Your Honor. The question is what private contractor facilities in Washington are doing what GEO does? And counsel has not identified any others.

So for that, I would kind of encourage the court to imagine this in a situation where you have government actors on one side, private contractors on the other. In this case private contractors under the Minimum Wage Act, as properly construed, are treated the same. Both the state and the federal government would likewise --

THE COURT: Well, that's a question. Are they being treated the same by the state?

MR. POLOZOLA: "They" being, Your Honor...

THE COURT: They being anyone -- well, this goes to the question of what do we compare? But does the state treat itself differently than it wants to treat the federal government here in regard to the Minimum Wage Act application to detainees?

MR. POLOZOLA: Your Honor, the state and the federal government are treated the same. There's no dispute the federal government is not subject to the Minimum Wage Act. The question then becomes, are contractors treated differently? And this is to my point a moment ago, Your Honor, it's a legal question of how contractors are to be treated under the Minimum Wage Act. And Your Honor has rightfully recognized in the past that there is nothing in that exemption that exempts private contractors, regardless of whom they are dealing with. Under those circumstances, contractors are to be treated the same. They are not treated differently.

THE COURT: Well, are they treated differently than the state treats itself? For example, if the state says that the Minimum Wage Act applies to detainees on the tide flats, don't they have to, to be even, to apply the law evenly, don't they have to apply it to detainees at the Special Commitment Center over on the island?

MR. POLOZOLA: Your Honor, no. I think the exemption on its face is allowed. And this gets to the point I raised

right out of the gate, Your Honor. If the suggestion is that the state must confer every exemption or benefit that the government enjoys to any contractor that deals with the federal government, that's what I understand the argument to be. I think that is far too broad.

And the tax example I think here is telling. The question is if the federal government doesn't have to pay taxes, like the state government doesn't have to pay taxes, are federal contractors likewise to be exempted from state taxes? I think the answer is unquestionably, no. They can still be subjected to neutral and generally applicable laws, which is the case we have here.

THE COURT: Well, let me ask the defense here. What are we comparing? The case law is pretty clear that there has to be some comparison made. And exactly what is the appropriate comparison here? And another way to put that, I guess, is how does the Minimum Wage Act treat the state better than it treats the defendant in some way? In other words, where is the prejudice to the defense here?

MS. MELL: The prejudice to the defense is that the federal government would be precluded from allocating its resources in a way -- in the same way that the state does, because the state in 2007 passed a constitutional amendment that specifically authorized the use of private corporations, specifically authorized private corporations to use detainee

labor, period.

The Department of Labor and Industries then applied that and developed its ESA1, which is in the record. And the ESA1 explains Subsection K. And Subsection K describes the exemption for people under state custody. And it also adds an express sentence that the Department of Labor and Industries testified, if its an enforceable provision, that private contractors are treated the same as the state, with regard to detainees employed by a private contractor, when that employment is with the Department of Corrections, meaning while they're in detention.

So you can compare the state-to-state, or federal-to-state, and you can compare federal and state private corporation contractors, and you come up with the same discriminatory application, by analysis, with the premise in this lawsuit.

And, again, you have to return back to the issue of, you are discriminating against the federal government's ability to protect the health, safety and welfare of people in detention. Detention is the functional analysis, because that is the point in time when you have removed these individuals from the free market.

THE COURT: I think you're afield from my question.

MS. MELL: Okay.

THE COURT: Let's assume the state is right and that

the evidence might show that GEO is misusing the Voluntary Work Program and is basically running its program on labor that shouldn't be, you know, a-dollar-an-hour labor for work that should be done by other employed people that are not detainees.

MS. MELL: There's no place in the State of Washington where state detainees are subject to the Minimum Wage Act. So there would be no comparator to contend that the state may invade federal detainees' activities and decide that they would be subject to the federal Minimum Wage Act, whether participating in a program that's overseen by a private contractor, or whether participating in a program that's directly operated by a government entity.

The interesting issue is that prior to the Northwest Detention Center and that contract, the individuals held in the Northwest Detention Center were held in local jails. They were participating in those activities. The trustee programs. It's a matter of maintaining the facility. It's chores. It's what needs to be done to run the program.

So the whole concept of Voluntary Work Programs is outside the scope of the Minimum Wage Act, at its inception. So there is discrimination. And the representation that I have not stood before you and represented and cited to the record where private corporations are the contract entity with the state, using the detainee labor, is incorrect. Not only does

it happen in the state, it happens in the jails, it happens at the SCC. It happens everywhere.

THE COURT: You know -- go ahead, counsel, but this double-teaming is ordinarily not allowed.

MR. BARNACLE: Understood, and I apologize. Just tying back to your question and applying the two cases that I believe are at issue, *U.S. v. California* and *Dawson v. Steager*. Who are we comparing? I think that was your original question.

And I think under either the state's formulation or a broader formulation, which I think the statement of interest is arguing for, the same result is necessary. So, if we look at those cases, and I think those cases stand for the proposition that in the immigration context -- we're talking about *U.S. v. California* -- in the immigration context, intergovernmental immunity, if you have a contractor performing those functions, they stand in the same shoes as the federal government.

We're not talking about a broad application, like the state is arguing, that now the state can't regulate any federal activity at all. That's not what we're talking about. We're talking about *U.S. v. California,* which limits itself to the immigration context, and saying in this context the United States and the federal contractor stand in the same shoes.

So if that's the case, then comparing -- we have to compare how is the federal government, how is GEO being treated in this situation, in comparison to the state? And there's no question that in that context they are treated less favorably. They're applying minimum wage to GEO, which in the immigration context is the United States, according to *U.S. v. California*, and the state is exempted.

Or if you look at a more narrow approach, which I think the state is arguing, they're arguing state contractors are treated the same as federal contractors. That's what their argument is. And I don't think that's supported by *Dawson v. Steager*. I don't think that's supported by *U.S. v. California* in the immigration context.

But even if you look at that, again it says the relevant question is whether they are similarly situated to those who do, those who get the favorable treatment, those who are exempted from minimum wage. We know the state-run facilities are exempted. We know because they said it. Federal-run facilities are exempted. And we also know that state-contracted facilities, GEO itself in its DOC contract with Washington, was exempted.

So we've got all three of those circumstances where they're treated better. The only time that they're not treated favorably is when GEO is contracting with ICE. So I think under either comparison model we come to the same

result.

THE COURT: At least one of the cases spoke of an additional economic burden on the federal government. Is there some economic discrimination against the government here?

MR. BARNACLE: Absolutely. I think if we play out what the state is seeking in this circumstance, how this really works is if the pricing -- the pricing of the contract that GEO has with the federal government is based on assumptions. One of those assumptions is that the Voluntary Work Program is going to be a dollar a day, because that's what the contract says it's going to be. So if all of a sudden we have to pay minimum wage, GEO is ordered to pay minimum wage for this work, these chores, these details, the pricing of that contract would be entirely different. GEO would have built that assumption into its contract pricing proposal with ICE. And the cost to ICE, in that circumstance, is going to be considerably greater.

In addition to that, when GEO prices labor, they have a more significant markup when they actually profit off of labor. People they hire at minimum wage or higher, they profit off of that. They do not profit off of the Voluntary Work Program. It's a pass-through. It's a one-to-one reimbursement.

So if GEO all of a sudden has a minimum wage requirement

on the Voluntary Work Program, they're going to pass that cost, and it's going to be significant, to the federal government. And they're going to pay a more significant profit kicker on top of that. So the economic burden is inestimable. It would change the entire nature of the contract and the pricing.

MR. POLOZOLA: A few points, Your Honor, on the last question -- we can take them in reverse order -- on the economic burden. I respectfully disagree with counsel's representations. I think the United States filings in this case are telling in that regard. The United States was very clear that it will reimburse a dollar, and only a dollar, regardless of what else happens, and make no further statements in that way. It doesn't dispute that GEO could pay more, but it would still reimburse the dollar.

And so on that issue --

THE COURT: Well, I don't think we know if the government would reimburse them at a higher rate.

MR. POLOZOLA: Well, the statements from the government in this case were that the contract requires reimbursement of one dollar, but GEO could pay more. There is no corresponding --

THE COURT: GEO could pay more. But they wouldn't necessarily get it back from the government. That would have to be negotiated in a new contract provision.

MR. POLOZOLA: Exactly, Your Honor. And that's a speculative argument. Even accepting counsel's representations that it might result in some incidental economic burden, this is the exact argument that the Supreme Court in *North Dakota* is very clear on. Incidental effects such as this, when you're dealing with a general neutral regulation, do not constitute an improper direct regulation. To put it in the facts of the *North Dakota* case for Your Honor, the fact that it was going to be more expensive for the federal government to purchase liquor from suppliers who had to comply with that regulatory scheme, did not support the intergovernmental immunity challenge.

So I think to that point, Your Honor, the answer, regardless of what it is, doesn't save GEO's or the United States' argument.

And if I may, Your Honor, I want to turn back to *United States v. California* and this assertion that a federal function is being regulated. Again, *United States v. California* rejected intergovernmental immunity challenges, except for one. What that means is that there were numerous regulations that applied to these facilities at issue. They were allowed. It's not the case that if you happen to operate an immigration facility, that's a federal function, therefore you are exempt from all regulations.

So to the point here. What is regulated is an employment

relationship and a neutral state law. This says nothing about immigration, who may come, who may go, how the federal government must decide those questions. That is not what's at issue here. So we do fundamentally disagree with counsel on that point.

The reference that GEO continues to make to *U.S. v. California* comes from footnote 7. It's not a crucial part of the holding. I recognize that it does say that contractors can be treated like the government. But, again, it's a recognition of this discrimination principle, that if they're discriminated against, they may benefit from this doctrine. But it is not a blanket immunity.

On the factual questions that Your Honor has discussed with counsel a moment ago about other facilities, what this distills to, as I understand it, Your Honor, is GEO saying they're the only ones violating the law, therefore the law may not be enforced against them, because that would be discriminatory. They have not identified other privately run facilities that are doing what they do, and that is not a protection for GEO. That can't trigger the Intergovernmental Immunity Doctrine.

Finally, on the ESA1, the L & I policy that counsel has referenced, this is in our briefing, Your Honor, this is the exact argument that Your Honor rejected the first time on GEO's first motion for reconsideration. What that policy is

discussing is what is clear in the exemption. Individuals in state institutions receive the benefit of that exemption. They are not deemed employees in the exemption. If a private contractor is working in a state institution, the exemption on its face still applies.

It is not analogous to the circumstances here where you have a privately owned, privately operated facility that chooses to do business with a governmental entity.

That's all I have, Your Honor. I'm happy to answer any questions.

THE COURT: Let me look at my notes here.

The South Correctional Entity Regional Jail came to my attention, they call it SCORE, it's a cooperative effort by a number of cities that run this jail. I don't know if you're familiar with it, but I'm curious whether they have a Voluntary Work Program.

MR. POLOZOLA: Your Honor, I'm not familiar with that specific facility, so I'd be hard pressed to give guaranteed answers on that.

MS. MELL: As a matter of fact, one of the former chiefs from that department was going to be one of my expert witnesses in this case. Yes, SCORE has a similar type of program. And it's inherent in any kind of detention facility, you need to have something to keep people busy. And they do. And these are private contractors who work with

the detainees.

THE COURT: Okay. That's probably not part of the record of the case. But I was curious about it. Okay. Well, you've given me a lot to think about, which I will think about and write an order on. I know lawyers are always anxious. It's on the top of my pile. So hopefully early next week I'll have an answer on this remaining issue.

Okay. Thank you.

(Adjourned.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debbie Zurn

DEBBIE ZURN
COURT REPORTER

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

DECLARATION OF MARSHA CHIEN IN SUPPORT OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Pursuant to 28 U.S.C. § 1746(2), I, Marsha Chien, hereby declare as follows:

1. I am over the age of 18 and competent to testify.

2. I am an Assistant Attorney General in the Wing Luke Civil Rights Division of the Washington State Attorney General's Office and I represent the State of Washington in this matter.

3. Attached hereto as Exhibit A is a true and correct copy of the transcript of the September 12, 2019 oral argument in the above captioned case.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

Dated this 4th day of October 2019 in Seattle, Washington.

s/ *Marsha Chien*
MARSHA CHIEN, WSBA No. 47020
Assistant Attorney General

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*
CAITILIN HALL
Legal Assistant

ATTORNEY GENERAL OF WASHINGTON
Civil Rights Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

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 DECLARATION OF ANDREA BRENNEKE IN SUPPORT OF STATE OF WASHINGTON'S RESPONSE TO THE COURT'S PROPOSED ORDER GRANTING SUMMARY JUDGMENT OF DISMISSAL (ECF NO. 306)

Pursuant to 28 U.S.C. § 1746(2) I, Andrea Brenneke, state and declare as follows:

1. I am over 18 years of age, have personal knowledge of and competent to testify about the matters contained herein

2. I am an Assistant Attorney General for the State of Washington, and make this declaration as a representative of the State of Washington in support of Washington's Response to the Court's Proposed Order.

3. To develop Washington's unjust enrichment claim, Washington diligently sought to obtain evidence of the financial benefit to defendant The GEO Group, Inc., of its use of detainee workers in the operation of the Northwest Detention Center, and its practice of paying detainee workers $1 per day, instead of paying a fair wage to work-eligible detainees or Tacoma-area residents who also could do the work.

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4. Despite Washington's diligent and exhaustive efforts, GEO has not yet produced full financial information or documents and much information about the full amount of financial benefit GEO has received from detainee labor at the NWDC is unavailable.

5. Throughout the discovery period, Washington expounded written discovery and engaged in deposition practice based upon the information available. Washington also sought the necessary missing information by filing and largely prevailing on a motion to compel, ECF No. 126 (Joint LCR 37 Motion); ECF No. 133 (Order granting in part Washington Motion to Compel), and overcame subsequent efforts by defendant in the trial court to reverse that order. *See* ECF No. 144 (Order denying GEO's Motion for Reconsideration of Order Compelling Discovery of its Confidential Financial Documents); ECF No. 157 (Order Denying Defendant The Geo Group, Inc.'s Motion for Certification of Interlocutory Appeal).

6. Defendant sought to avoid production of the financial evidence of its benefit from detainee labor at the NWDC by petitioning for a Writ of Mandamus at the Ninth Circuit Court of Appeals. Washington diligently defended against Defendant's petition and prevailed when the Ninth Circuit denied the Writ of Mandamus on September 3, 2019. ECF No. 296.

7. Washington diligently pursued production of the missing infromtion and documents after the appellate proceedings concluded. Attached hereto as **Brenneke Declaration Exhibit A** is a true and correct copy of a letter from me to counsel for GEO, requesting that GEO's financial information and documents be produced on or before September 18, 2019.

8. GEO did not produce the information despite the Ninth Circuit's Order. Instead, GEO's counsel sent an email requesting to meet and confer after he completed another trial. Washington agreed to a meet and confer conference on the requested date, but GEO's counsel never followed up. A true and correct copy of the email communications between Colin Barnacle, counsel for GEO, and me are attached as **Brenneke Declaration Exhibit B**.

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9. Defendant GEO still has not produced any of the financial information or documents compelled by the trial court, as affirmed by the Court of Appeals on September 3, 2019. Instead, it has pursued yet another round of motions practice to dismiss the case. As a result, Washington is unable to present all relevant evidence that would support its unjust enrichment claim prior to the Court dismissing that claim on summary judgment.

I declare under penalty of perjury that the foregoing is true and accurate.

Executed this 4th day of October, 2018, in Mount Pleasant, South Carolina.

s/ Andrea Brenneke
Andrea Brenneke, WSBA No. 22027

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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*
Caitilin Hall
Legal Assistant

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BRENNEKE DECLARATION

EXHIBIT A

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Civil Rights Division
800 Fifth Avenue • Suite 2000 • MS TB 14 • Seattle WA 98104
(206) 442-4492

September 4, 2019

Sent via E-Mail

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RE: *Washington v. The GEO Group, Inc.*, 17-cv-05806-RJB

Dear Counsel,

We received the Ninth Circuit's Order denying GEO's Petition for a Writ of Mandamus yesterday. We look forward to receiving GEO's remaining financial documents and discovery and ask that you please complete the document production on or before September 18, 2019.

Very truly yours,

Andrea Brenneke

ANDREA BRENNEKE
Marsha Chien
Lane Polozola
Patricio A. Marquez
Assistant Attorneys General
Wing Luke Civil Rights Division
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

BRENNEKE DECLARATION

EXHIBIT B

Hall, Caiti (ATG)

From: Brenneke, Andrea (ATG)
Sent: Thursday, September 19, 2019 8:50 AM
To: colin.barnacle@akerman.com
Cc: Chien, Marsha (ATG); Polozola, Lane (ATG); Hall, Caiti (ATG)
Subject: RE: GEO

Dear Colin,

Thanks for getting back to us. Yes, next week sounds good for a call.

Here are some windows of availability, all Pacific Time:

Monday: 11:30-12:30, 1:30 - 4:30
Tuesday: 1 - 2:30

Please let us know what is best for you!

Andrea Brenneke
Assistant Attorney General
Civil Rights Unit
Washington State Attorney General
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
Direct: (206) 233-3384
Fax: (206) 464-6451
Andrea.Brenneke@atg.wa.gov

-----Original Message-----
From: colin.barnacle@akerman.com <colin.barnacle@akerman.com>
Sent: Thursday, September 19, 2019 5:23 AM
To: Brenneke, Andrea (ATG) <andrea.brenneke@atg.wa.gov>
Subject: GEO

Good morning Andrea —

I am in trial this week in another matter in Kansas City. Are you free for a call on Monday or Tuesday to discuss GEO's production of the financial records pursuant to the Mandamus order? Let me know.

Thanks.

Colin

Sent from my iPhone

https://gcc02.safelinks.protection.outlook.com/?url=www.akerman.com&data=02%7C01%7CCaiti.Hall%40atg.wa.gov%7C7e6c4b9b1586487d1bb908d73d190910%7C2cc5baaf3b9742c9bcb8392cad34af3f%7C0%7C0%7C637045050045047335&sdata=KQjh%2FmfzvIP%2BWU96nY%2BIrL8vRyooFd%2BBrAeU%2FS3OOXE%3D&reserved=0