THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

COWLITZ COUNTY, a political subdivision of Washington, and COWLITZ COUNTY YOUTH SERVICES CENTER, a department of Cowlitz Superior Court,

Plaintiffs,

vs.

UNIVERSITY OF WASHINGTON, a public education institution, and ANGELINA GODOY, Center of Human Rights of University of Washington,

Defendants.

and

UNITED STATES OF AMERICA,

Intervenor,

Case No. 3:19-cv-06250 RBL

UNITED STATES' OPPOSITION TO UNIVERSITY OF WASHINGTON AND DR. ANGELINA GODOY'S MOTION TO REMAND TO STATE COURT

Noted for Consideration: February 21, 2020

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COMES NOW, the United States by and through Brian T. Moran, United States Attorney, Western District of Washington, and Katie Fairchild, Assistant United States Attorney for said District, and hereby files this Opposition to the Motion to Remand to State Court, Dkt. 17, filed by University of Washington and Dr. Angelina Godoy (collectively "UW").

I. INTRODUCTION

Removal under the broad authority of 28 U.S.C. § 1442(a)(1) is appropriate under the facts of this case because the state court action brought by Cowlitz County and Cowlitz County Youth Services Center (collectively "Cowlitz") is effectively "against or directed to" the United States. The United States is the real party in interest and it is entitled to have these matters heard in federal court.

The central dispute in this case is over ownership and disclosure of federal records concerning minors detained by the U.S. Immigration and Customs Enforcement ("ICE") under the authority of the Immigration and Nationality Act ("INA"). ICE maintains these records and information as a part of performing its duties under the INA. Cowlitz only has access to them because Cowlitz has entered into an agreement with the federal government to house certain juvenile ICE detainees. While the minors are housed at Cowlitz facilities, they remain under the custody and control of ICE. So do records relating to their detention pursuant to federal law. In particular, 8 C.F.R. § 236.6 provides that all "information relating to" ICE detainees "shall be under the control" of the federal government, that this information "shall [not be] disclosed or otherwise permit[ed] to be made public" by "any state or local government entity," and "shall not be public records."

Nonetheless, UW submitted a state public records request to Cowlitz seeking the "complete jail file" related to ICE detainees. The United States informed Cowlitz that these records were federal records and that 8 C.F.R. § 236.6 provided that they could not be disclosed by Cowlitz in response to a state public records request. ICE asked Cowlitz to allow it time to seek authority to initiate a lawsuit in federal court seeking resolution of the dispute. Before this administrative process was complete, Cowlitz initiated its own lawsuit in state court seeking a declaration that it

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could disclose the records to UW. Cowlitz did not attempt to name the United States as a party. Cowlitz sued UW, a party with whom it agrees that the disputed records may be disclosed in response to a state public records act request. Consequently, the United States moved to intervene as of right in the state court proceeding for the express purpose of removing the action under 28 U.S.C. § 1442 and seeking protection of the federal records in federal court.

Initially, all parties consented to the United States' motion to intervene, but UW later argued that the United States should only be allowed to intervene if it is designated as a "plaintiff," presumably in an effort to try and prevent federal court jurisdiction. But the United States' right of removal is not so easily thwarted and 28 U.S.C. § 1442(a)(1) is not so begrudgingly interpreted to limit jurisdiction based on the form of the underlying action or the mere label attached to the United States. Removal under 28 U.S.C. § 1442(a)(1) is appropriate where, as here, the United States is the real party in interest. The disputed records belong to the United States, they relate to the United States' administration of immigration matters, and the state court order that Cowlitz seeks threatens to interfere with that administration. Consequently, any state court determination could have a potential significant federal impact, and this action must be understood as "against or directed to" the United States, giving it a right of removal. Federal courts have found removal under 28 U.S.C. § 1442(a)(1) warranted in a variety of procedural circumstances where the federal government is not a traditional defendant. Indeed, multiple courts have approved of removal where the United States is not a party at all to the underlying action. The United States' removal of this action under 28 U.S.C. § 1442(a)(1) is appropriate under the facts of this case. UW's motion to remand should be denied.

II. BACKGROUND

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012); U.S. Const. art. I, § 8, cl. 4 (granting Congress the power to "establish a uniform Rule of Naturalization"). "Federal governance of immigration and alien status is extensive and complex. Congress has specified categories of aliens who may not be admitted to the United States" and "has specified which aliens

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may be removed from the United States and the procedures for doing so." *Arizona*, 567 U.S. at 395-96. Through the INA, Congress granted the Executive Branch authority to enforce immigration laws and authorized it to investigate, arrest, and detain aliens who are suspected of being, or found to be, unlawfully present in the United States and to effectuate their removal. *See* 8 U.S.C. §§ 1182, 1225, 1226, 1231, 1357.

The INA contains detailed provisions regarding the detention of aliens pending removal proceedings, as well as after the issuance of a final order of removal. For example, the INA authorizes federal immigration officials to issue warrants through which "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). For aliens not subject to a final order of removal, federal officials generally have authority to detain the alien or to release the alien on bond. *Id.* However, certain aliens with a final administrative order of removal are subject to mandatory detention. *Id.* § 1231(a)(2). Additionally, detention is mandatory for certain categories of aliens, including certain aliens with criminal history who are subject to mandatory detention without bond upon their release from state or local custody. *See id.* § 1226(c). This provision may apply to both adult and juvenile aliens. *Id.* In addition, minors held by Cowlitz County are also detained in accordance with the Flores Settlement Agreement (FSA). The FSA sets forth a nationwide policy for the detention, release, and treatment of minors in DHS custody including procedures and timeframes for the processing, transport and detention of minors following apprehension, as well as for the confidentiality of their personal information.

The INA requires the federal government to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1). Congress expressly contemplated that some of those aliens may be housed in facilities operated by an entity other than the federal government. *Id.* § 1231(g)(1)-(2) (lease or rental facilities); *id.* § 1103(a)(11) (authorizing payment to states and localities for bed space for detainees). As a part of executing these responsibilities, the INA directs the federal government to "control, direct[], and supervis[e]" all of the "files and records" concerning ICE detainees, 8 U.S.C. § 1103(a)(2), and to arrange by

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1 contract with state and local governments "for necessary clothing, medical care, necessary guard
2 hire, and the housing, care, and security of persons detained by [ICE] pursuant to Federal law
3 under an agreement with a State or political subdivision of a State," 8 U.S.C. § 1103(a)(11)(A).
4 All facilities housing detainees, whether federal or nonfederal, are subject to federal regulations
5 that prohibit disclosure of "the name of, or *other information relating to*," federal immigration
6 detainees unless authorized by federal law. 8 C.F.R. § 236.6 (emphasis added).

7 Relevant here, in 2001, Cowlitz County entered into an IGSA for housing juvenile ICE
8 "Federal Detainees." *See* Dkt. 9, Ex. A. The purpose of the IGSA is to provide "detention and
9 care of [ICE] juveniles detained under the authority of the Immigration and Nationality Act, as
10 amended." *Id.* at 1. The IGSA provides that "[a]ll [ICE] juvenile detainees placed in a licensed
11 program remain in the legal custody of [ICE] and shall only be released under the authority of
12 [ICE]." *Id.* at 12. In particular, the agreement provides that Cowlitz County will house ICE
13 juvenile detainees with a criminal or otherwise violent history, categorized as a "List 1" detainee.
14 List 1 detainees include: "(1) juveniles classified criminal, chargeable as a criminal, and/or subject
15 to extant criminal proceedings, (2) escape risks, (3) adjudicated delinquents, (4) juveniles who
16 have committed a violent and/or threatening act toward self or another, and (5) juveniles who
17 engaged in disruptive behavior while in a licensed shelter program." *Id.* at 2. Under the IGSA,
18 ICE may only place List 1 detainees with Cowlitz County.

19 On or about July 18, 2018, Professor Angelina Snodgrass Godoy, the Director of the Center
20 for Human Rights at the University of Washington, ("the Requester"), submitted a records request
21 to Cowlitz County under the Washington State Public Records Act ("PRA"), RCW 42.56, *et seq*.
22 The Request asked for:

23 1) A copy of IGSA, MOU, or underlying agreement between Cowlitz County and
24 ICE that allows the detention of adults and minors for ICE in Cowlitz County
25 facilities.

26 2) The complete jail file (redacted to conceal personally-identifying information)
of all minors housed in Cowlitz County facilities for ICE from 1/1/2015-7/15/2018.
27 (Please note that under RCW 70.48.100, access to otherwise confidential potions

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of inmates' jail records is allowed to "higher education institutions of Washington state for the purpose of research in the public interest.")

See Dkt. 9, Ex. B. Cowlitz provided notice to ICE of the Requester's Request. In response to the first part of the Request, ICE notified Cowlitz that it did not object to release of the IGSA, but asked that the personal information of the contracting officer be redacted. Dkt. 13-1 at 61. However, in response to the Request for the "complete jail file" of ICE juvenile detainees, ICE informed Cowlitz that it may not release that information, *i.e.*, the Protected Information, because those records belong to ICE. ICE informed Cowlitz that the Protected Information is governed by 8 C.F.R § 236.6, which prohibits public disclosure of this information by any state or local government entity. *Id.*

Section 236.6 provides:

> No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the [ICE] (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of [ICE] and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

Id. Section § 236.6 was promulgated to ensure (1) that the privacy of federal detainees is protected; (2) that the disclosure of information related to federal detainees is subject to uniform treatment under the law; and (3) to prevent ongoing criminal or national security investigations from being adversely impacted. *See* Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508-01 (Apr. 22, 2002) (explaining interim rule); Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364-01 (Jan. 29, 2003) (adopting interim rule as final).

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For several weeks Cowlitz and the United States continued to communicate regarding the applicability of 8 C.F.R. § 236.6 to the Protected Information. *See* Dkt. 13-1 at 63-64, 149. Eventually, Cowlitz identified to the United States approximately 600 pages of documents that it asserted could be released to the Requester. *See* Chan Decl., ¶ 10. Upon review, it is clear to the United States that the documents that Cowlitz asserts may be released are protected by 8 C.F.R. § 236.6. All of the documents include "information relating to" juvenile ICE detainees in federal custody. The documents include minor mental health records, medical information, personally-identifiable information, third-party personally-identifiable information, ICE detainers, internal operation deliberations, and law enforcement sensitive information. *See* Chan Decl., ¶ 10.

Ultimately, Cowlitz and the United States were unable to reach an agreement as to the applicability of 8 C.F.R. § 236.6 to the Protected Information. The United States understands that Cowlitz's position is that it may release the Protected Information to the Requester because she works for the University of Washington, a state agency, either in full or with some personal information redacted at the discretion of Cowlitz. *See* Dkt. 15 at 12. The United States is not aware of any steps that Cowlitz has taken to notify ICE juvenile detainees or any third-parties identified in the Protected Information that their personal information may be released by Cowlitz. Cowlitz has not provided the United States with any assurances or authority that once it releases the Protected Information to the Requester that it will not be subject to further release at the Requester's discretion. Accordingly, the United States informed Cowlitz that it was seeking authority to initiate a lawsuit in federal court to enjoin release. Dkt. 13-1 at 149.

However, before the United States was able to complete the administrative process that would allow it to initiate a lawsuit in federal court, Cowlitz filed a declaratory judgment action in Cowlitz County Superior Court against UW on February 1, 2019. *See* Dkt. 1-1. Cowlitz sought a declaratory ruling that the Protected Information was not subject to the PRA, but could be released by Cowlitz pursuant to GR 31.1 if Cowlitz waived certain exemptions. *Id*. at pp. 6-7. The United States understands that UW, like Cowlitz, supports release of the Protected Information under state

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law.[1]

Subsequently, the United States filed a Motion to Intervene "for the purpose of removing this action to the United States District Court for the Western District of Washington, and defending this action in that court," citing 28 U.S.C. § 1442. Dkt. 13-1 at 174-93. On December 10, 2019, the Clark County Superior Court granted the United States' Motion.[2] The Clark County Superior Court's Order stated, "Pursuant to CR 24(a), the U.S. is permitted to intervene in this matter. The U.S. shall be joined as a Plaintiff." Dkt. 13-1 at 334. The United States removed this action to this Court on December 30, 2019. On January 29, 2020, UW filed a Motion to Remand action to state court.

III. ARGUMENT

UW's motion to remand is based on a flawed premise, namely, that "only defendants can remove civil actions." Dkt. 17 at 7. Whether or not that is true for the 28 U.S.C. § 1441 cases and authority on which UW relies, it is unequivocally not true for removal by the United States or a federal officer under 28 U.S.C. § 1442(a)(1). The United States removed this action pursuant to 28 U.S.C. § 1442.[3] *See* Dkt. 1. Federal courts broadly interpret 28 U.S.C. § 1442(a)(1) to allow the United States to remove to federal court in a variety of procedural circumstances where the United States is not a traditional defendant, especially where, as here, the United States seeks to protect federal records and is the real party at interest. Under the facts of this case, the United States is entitled to remove this action to federal court.

A. 28 U.S.C. § 1442(a)(1) Is Broadly Interpreted to Allow the United States to Remove to Federal Court in Cases where the United States is not a Traditional Defendant

28 U.S.C. § 1442(a)(1), often called the federal officer removal statute, provides in relevant

[1] It appears that while both Cowlitz and UW support release of the Protected Information under state law, they may disagree as to which state law dictates release. *See* Dkt. 17.

[2] The entire Cowlitz County Bench was recused from the state court action, and a visiting judge from Clark County was assigned to hear all proceedings. Dkt. 13-1 at 159.

[3] Accordingly, UW's arguments regarding interpretation of 28 U.S.C. § 1441 are neither relevant nor persuasive. The 28 U.S.C. § 1441 removal cases on which UW relies, such as *Smith v. St. Luke's Hosp.*, 480 F. Supp. 58 (D.S.D. 1979), are inapposite.

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part:

> **(a)** A civil action or criminal prosecution that is commenced in a State court and that is against *or directed to* any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or *relating to* any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Id. (emphasis added).

"[T]he right of removal conferred by § 1442(a)(1) is to be broadly construed." *Nationwide Inv'rs v. Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986). The Supreme Court instructs that, "[t]he federal officer removal statute is not 'narrow' or 'limited.'" *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969) (internal citation omitted). That is because it reflects a policy that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Id*. Accordingly, courts are directed that "[t]his policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Id*. Instead, the statute "should be construed with respect to the statute's purpose of protecting the federal government from state interference with its operations," and "should be interpreted to provide the government with federal forum when a ruling of significant 'potential federal impact [is] at stake.'" *Smith v. Hous. Auth. of Baltimore City*, No. CIV. WDQ-10-1806, 2011 WL 232006, at *2 (D. Md. Jan. 24, 2011) (quoting *Nationwide*, 793 F.2d at 1047). Consequently, when interpreting the reach of 28 U.S.C. § 1442(a)(1), "[t]he form of the action is not controlling." *Nationwide*, 793 F.2d at 1047.

Indeed, as the Ninth Circuit has explained, the 2011 amendments to 28 U.S.C. § 1442(a)(1) added the language "directed to" for the purpose of avoiding narrow interpretations by some courts, thereby removing any doubt that the United States need not be directly sued nor named a defendant in order to remove:

> The statutory history of § 1442 is instructive. For decades following the federal

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> officer removal statute's codification at 28 U.S.C. § 1442, it has provided that a "civil action"—a term which was previously undefined—"commenced ... *against*" any officer of the United States, or person acting thereunder, "*sued* in an official or individual capacity *for* any act under color of" federal office may remove the action to federal court. 28 U.S.C. § 1442 (2006) (emphases added). But in 2011, Congress passed the Removal Clarification Act to amend § 1442 because Congress felt that the courts were construing the statute too narrowly. Pub. L. No. 112-51, 125 Stat. 545; *see* H.R. Rep. No. 112-17(I) (2011); *In re Commonwealth's Motion*, 790 F.3d at 467 (noting that the amendments "intended to broaden the universe of acts that enable Federal officers to remove to Federal court" (citation omitted)). Congress expanded the language to allow removal of a "civil action ... that is against *or directed to*" a federal officer "for *or related to* any act under color of [federal] office," 28 U.S.C. § 1442(a) (emphases added)—removing altogether the requirement that the officer be "sued."

Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego, 865 F.3d 1237, 1250 (9th Cir. 2017). Thus, when considering a case with a "rare procedural posture" the Ninth Circuit will "pay heed to [its] duty to interpret Section 1442 broadly in favor of removal." *Id*. at 1244 (internal quotation omitted).

Federal courts have approved of removal under 28 U.S.C. § 1442(a)(1) in a variety of circumstances where the removing party was not named a defendant. For example, they have done so in situations where the United States was the "real party of interest" even though it was not named in the state court action. In *In re Lusk* a state court petitioner initiated an action alleging that a military lawyer was engaged in the unauthorized practice of law in California. No. SACV160930AGJCGX, 2016 WL 4107671 (C.D. Cal. July 30, 2016). The military lawyer, along with the United States—who was not a party to the state court proceeding—removed the action to federal court under 28 U.S.C. § 1442(a)(1). Petitioner moved to remand, which the court denied. The court held that despite not being a party to the state court action, the United States was the "real party in interest that has a right to a federal forum." *Id*. at 3. The court relied on the "general rule" that "a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Id*. (internal quotation omitted). The *Lusk* court explained:

> The Application here seeks to seize a law practice of a federally certified JAG. Such an action may interfere with the United States' operation of its federal JAG

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> program, which currently only requires trial or defense counsel practicing in military courts martial to be members of any state bar. *See* 10 U.S.C. § 827(b); *accord* Military Court Martial Rule 502(d)(1). As such, the Application is effectively "directed to" the United States and its military operation regarding the licensure requirements for its attorneys practicing in military courts martial. And because the United States has a right to a federal forum, it properly removed the Application to this court under Section 1442(a)(1)

Id. Likewise, in *Law Office of Mark Kotlarsky Pension Plan v. Hillman*, the court held that "the Government may remove [a] garnishment action [under 28 U.S.C. § 1442(a)(1)] because CMS is the real party of interest," even though a private contractor, and not CMS, was the named defendant. No. CIV.A. TDC-14-3028, 2015 WL 5021399, at *3 (D. Md. Aug. 21, 2015). In denying the plaintiff's motion to remand, the court rejected the argument that "removal is improper because the defendant . . . is not a federal agency." *Id.* at 2. The court stated that "[i]deally. . . the Government would formally enter the case, either through a motion for joinder . . . or a motion to intervene. However, such action is not necessary for the Government to be considered the real party of interest." *Id*. at 3.

Federal courts also interpret 28 U.S.C. § 1442(a)(1) to allow the federal government to remove state proceedings, where the federal government is not a defendant, where a subpoena implicates the government's interests and/or federal documents. *See e.g.*, *F.B.I. v. Superior Court of Cal.*, 507 F. Supp. 2d 1082, 1089 (N.D. Cal. 2007) (holding that FBI and federal officers could remove a state court subpoena challenge under 28 U.S.C. § 1442(a)(1), even though they were not parties in underlying state court proceeding, because the action "threaten[ed] [them] with the state's coercive power") (internal quotation omitted); *see generally Johnson v. Soc. Sec. Admin.*, No. 2:18MC5, 2018 WL 4677829, at *2-4 (E.D. Va. June 8, 2018) (collecting cases). Similarly, federal courts interpret 28 U.S.C. § 1442(a)(1) to allow the federal government or officer to remove state court proceedings, where they are not a defendant in the underlying state court action, in connection with garnishment proceedings and challenges to subrogation liens. *See e.g.*, *Nationwide*, 793 F.2d at 1047 ("With a ruling of such potential federal impact at stake, § 1442(a)(1) should be interpreted to provide the government a federal forum."); *Hous. Auth. of Baltimore City*,

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2011 WL 232006, at *2 ("A garnishment action may be 'commenced against' a federal agency for § 1442(a) purposes even if the agency is not named as a defendant or garnishee."); *Goncalves By & Through Goncalves*, 865 F.3d at 1250 ("We hold that the Blues' motion to expunge the lien is a "civil action ... commenced in a State court ... against or directed to" the Blues.").

Two cases involving removal under 28 U.S.C. § 1442(a)(1) to protect federal documents sought under a state public records law are particularly instructive. In *Miami Herald Media Co. v. Fla. Dep't of Transportation*, plaintiffs filed suit against the Florida Department of Transportation ("FDOT") seeking disclosure of records under a state public records law. 345 F. Supp. 3d 1349, 1358 (N.D. Fla. 2018). The United States was not named a party to the state court action nor did the United States move to intervene. Instead, pursuant to 28 U.S.C. § 517, the United States filed a statement of interest in state court in support of FDOT's motion to dismiss arguing that FDOT was prohibited from producing records by federal regulation. *Id*. at 1360. The state court, however, denied FDOT's motion to dismiss and directed FDOT to produce the requested documents. *Id*. at 1361. Two days later, the United States removed the action to federal court under 28 U.S.C. § 1442(a)(1) and moved to quash the state court's production order. *Id.* Plaintiffs moved to remand arguing that the state court action was "not 'against or directed to'" the federal government. *Id*. at 1363. The federal court denied the motion to remand and rejected this argument, holding that the United States was the real party in interest because "the [state court] judgment sought would . . . *interfere with the public administration*." *Id*. (internal quotation omitted; emphasis in original). In so holding, the court explained:

> In their lawsuit, Plaintiffs sought and received an order from the state court directing FDOT to produce certain documents, effectively overturning the NTSB's non-disclosure directive, thus interfering with the administration of the national government by undermining the NTSB's authority to control its investigative operations, including the authority to control the timing of the release of investigative information. *While Plaintiffs have attempted to ignore the very real and substantial interest of the United States by framing their lawsuit as a public records case against FDOT, the court finds that Plaintiffs' lawsuit is indeed "against or directed to" the NTSB*. As asserted by the Government . . . the United States is a real party in interest in the case at bar.

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1 *Id*. (emphasis added).

2 In *Golden v. New Jersey Inst. of Tech.*, records requesters also initiated suit in state court
3 seeking disclosure of records under a state public records act. 934 F.3d 302, 304 (3d Cir. 2019).
4 The requesters had submitted requests to a public university, the New Jersey Institute of
5 Technology ("NJIT"). Because many of the documents originated with the FBI "and were subject
6 to prohibitions on public dissemination," NJIT "asked the FBI to advise NJIT as to whether it
7 should allow access to the records." *Id*. The "FBI directed NJIT to withhold most of the records,"
8 and NJIT complied, and so the requesters filed suit against NJIT. *Id*. The FBI was not named a
9 defendant to the requesters' action and did not move to intervene. *Id*. at 308. NJIT, however, filed
10 a third-party complaint against the FBI for potential indemnification. *Id*. The FBI then removed
11 the case to federal court under 28 U.S.C. § 1442(a)(1) and "counterclaimed against NJIT, seeking
12 declaratory and injunctive relief to prevent NJIT from releasing responsive records." *Id*. No
13 motion to remand was filed, but the Third Circuit independently considered whether removal was
14 appropriate and found the requirements "easily satisfied" by the record. *Id*. Most relevant to the
15 dispute here, the Third Circuit found removal appropriate even though the FBI was not named a
16 defendant in the underlying action, and it was only a third-party defendant to an indemnification
17 action. *Id.* at 311 n.13.

18 In sum, the fact that Cowlitz did not sue the United States does not mean that the United
19 States may not remove this action under 28 U.S.C. § 1442(a)(1); nor is the label of "intervenor-
20 plaintiff" bestowed by the state court dispositive. The law is clear that neither the United States
21 nor a federal officer has to be a traditional defendant in order to remove a civil action under
22 28 § 1442(a)(1). As the Ninth Circuit instructs "[t]he form of the action is not controlling."
23 *Nationwide*, 793 F.2d at 1047. And, as the cases above amply demonstrate, removal under the
24 federal officer statute is warranted in a variety of procedural circumstances, especially where, as
25 here, the United States removed this action for the purpose of protecting its federal records
26 pursuant to federal law.

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B. 28 U.S.C. § 1442(a)(1) Removal is Appropriate Under the Facts of this Case

Removal is appropriate in this case because the United States is the real party in interest. The threatened release of federal records concerning ICE detainees in violation of federal law would have a significant federal impact and interfere with public administration. *See Nationwide*, 793 F.2d at 1047. "An entity seeking removal under § 1442(a)(1) bears the burden of showing that (a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a colorable federal defense." *Goncalves By & Through Goncalves*, 865 F.3d at 1244 (internal quotation omitted). Each requirement is satisfied by the record in this case.[4]

First, the United States removed this action, thereby fulfilling the first requirement. *See* 28 U.S.C.A. § 1442(a)(1) (permitting "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof," to remove a case under U.S.C.A. § 1442(a)(1)).

Second, there is a causal nexus between Cowlitz's claims and the United States' actions on the face of the pleadings. Cowlitz's suit for declaratory relief seeks a declaration that it may disclose the Protected Information to UW pursuant to a state public records request. *See* Dkt. 1-1. Cowlitz alleges that it filed the action because the United States asserted that Cowlitz could not release the Protected Information pursuant to federal law, and in particular 8 C.F.R. § 236.6. *See* Dkt. 1-1, ¶ 18-9, 23; *see also* Dkt. 15 at 3 (Cowlitz arguing that its review of the Protected Information "had to be halted before it began" due to the United States' position that the Protected Information are federal records that could not be disclosed). Additionally, Cowlitz only has access to the Protected Information through the IGSA it entered into with the federal government pursuant to the INA. *See* 8 U.S.C. § 1103(a)(11); Dkt. 9, Ex. A. As set forth in the pleadings, the central dispute in this litigation is whether the Protected Information are federal records that may only be disclosed by the federal government. *See Golden*, 934 F.3d at 310 (NJIT's claims are based on

[4] UW's motion to remand limits the issue to whether removal was "improper because this action is not 'against or directed at' any federal actor," Dkt. 17 at 6, however, the United State will address each requirement.

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1 FBI's conduct where "the FBI alleges that it directed NJIT to withhold certain records that 'contain
2 critical intelligence to detect and prevent violent crime and terrorism in the United States before
3 such acts occur.'").
4 Third, as set forth in the pleadings and in the United States' cross motion for summary
5 judgment, the United States asserts a colorable federal defense to Cowlitz's claims: (1) that release
6 of the Protected Information is prohibited by 8 C.F.R. § 236.6; (2) that the Protected Information
7 are federal property as matter of federal common law; and (3) that if state law is interpreted to
8 require release of the Protected Information, it would be preempted by 8 C.F.R. § 236.6. *See*
9 *generally* Dkt. 8; Dkt. 21. "Courts have imposed few limitations on what qualifies as a colorable
10 federal defense . . . . To be colorable, the defense need not be clearly sustainable, [because] the
11 purpose of the statute is to secure that the validity of the defense will be tried in federal court."
12 *Washington v. GEO Grp., Inc.*, No. 3:17-CV-05806, 2017 WL 6351831, at *2 (W.D. Wash. Dec.
13 13, 2017). Courts recognize both a claim that disputed records belong to the federal government
14 and preemption as colorable federal defenses. *See Golden*, 934 F.3d at 311 (finding a colorable
15 defense where "[t]he FBI alleges that the disputed records are federal records within the meaning
16 of 44 U.S.C. § 3301 and that, as such, these records are not subject to OPRA and cannot be
17 disclosed to Golden and Locke under that statute"); *GEO Grp., Inc.*, 2017 WL 6351831, at *2
18 (holding that preemption was a colorable defense).
19 UW's arguments that any alleged preemption issue is "irrelevant" to the United States'
20 right of removal are unavailing. *See* Dkt. 17 at 12. Initially, UW's claim that "[f]ederal law does
21 not preempt state disclosure statutes," is wrong. *Id.* Federal law can and does preempt state
22 disclosure statutes where there is sufficient conflict. Of particular relevance to this case, in *ACLU*
23 *of New Jersey, Inc. v. City of Hudson*, the court found an "operational conflict" between
24 8 C.F.R. § 236.6 and a lower court's interpretation of state disclosure laws. 352 N.J. Super. 44, 74
25 (App. Div. 2002). Because the court found that compliance with both was a physical impossibility,
26 it held that "the federal regulation must be seen as pre-empting State law bearing upon its subject
27 matter." *Id.* at 74-75, 89.
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1 UW's argument that "[s]tate courts can, and routinely do, decide federal preemption issues
2 when appropriately raised before them," is beside the point. Dkt. 17 at 12. Whether or not a state
3 court also has the ability to consider a federal issue like preemption does not detract from the right
4 of removal afforded by 28 U.S.C. § 1442(a)(1). Nor does is undercut the policy behind it, including
5 that "federal officers, and indeed the Federal Government itself, require the protection of a federal
6 forum." *Willingham*, 395 U.S. at 406-07.

7 UW's argument that this case does not raise any preemption issues is a red herring, and is
8 also undermined by UW's claims about state procedure that this federal Court allegedly must
9 follow. Dkt. 17 at 12-14. As to the first point, the United States agrees that this Court *may* not
10 need to reach the question of preemption if, for example, it finds that that the Protected Information
11 are the property of the United States pursuant to federal common law and/or 8 C.F.R. § 236.6. *See*
12 *United States v. City of Seattle*, No. 16-CV-889 (RAJ), 2017 WL 176541, at *1 (W.D. Wash. Jan.
13 17, 2017) (holding that information shared between the FBI and the City was "federal property,
14 subject to the FBI's right to control and prohibit the disclosure of the information by the City,
15 absent the express authorization of the FBI; and . . . expressly protected from disclosure by the
16 PRA). But the United States' arguments that the Protected Information is outside the scope of
17 state records laws because they are federal property are themselves colorable federal defenses
18 supporting the right of removal. *See Golden*, 934 F.3d at 311.

19 Moreover it is precisely because UW (and Cowlitz) are asserting that state law should be
20 interpreted to require disclosure of the Protected Information in response to a public records
21 request—despite the plain language of 8 C.F.R. § 236 that (1) all "information relating to" ICE
22 detainees "shall be under the control" of the federal government; (2) this information "shall [not
23 be] disclosed or otherwise permit[ed] to be made public" by "any state or local government entity"
24 and (3) if "shall not be public records"—that preemption analysis becomes necessary to avoid the
25 "operational conflict" that the court found in *ACLU of New Jersey*, 352 N.J. Super. at 74. Further,
26 UW's claim that preemption analysis is not required due to the "other statutes" exemptions in the
27 PRA, RCW 42.56.070, and GR 31.1(j), is undermined by UW's simultaneous assertion that the
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United States must *also* meet "the PRA's 'stringent' equitable requirements" under *Lyft, Inc. v. City of Seattle*, 190 Wash. 2d 769 (2018) in order to prevent disclosure. *See* Dkt. 17 at 12, 11. If UW's interpretation of state law is correct,[5] what UW is claiming is that under state law, the United States could establish through operation of an "other statute" exemption that the Protected Information is exempt from disclosure pursuant to 8 C.F.R. § 236, but that Cowlitz could nonetheless *waive that exemption* by declining to assert it and disclose the Protected Information to UW (or others) unless the United States also makes an additional "stringent" showing.[6] This interpretation of state law highlights a need for preemption analysis, because it describes a physical impossibility of compliance with both provisions. *See ACLU of New Jersey*, 352 N.J. Super. at 74.

Finally, the record is clear that Cowlitz's state court action, however artfully pled to avoid United States' involvement or federal court jurisdiction, is "against or directed to" the United States. There can be no dispute that the United States has a very real and substantial interest in the Protected Information. *See* Chan Decl.¶¶ 6-10. Pursuant to the INA, the federal government is responsible for maintaining files for ICE detainees. 8 U.S.C. § 1103(a)(2). And, there is a significant potential risk to ongoing criminal or national security investigation if this information is subject to release outside of federal law. *See* Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 67 Fed. Reg. 19508-01 (Apr. 22, 2002) (explaining interim rule); Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, 68 Fed. Reg. 4364-01 (Jan. 29, 2003) (adopting interim rule as final). Consequently, this is the quintessential case where the United States is the real party in interest, because the state court action threatens to interfere with public administration

[5] UW is not correct regarding the injunctive standard that may apply in this action, which is outside the scope of the Motion to Remand. *See generally Versaterm Inc. v. City of Seattle*, No. C16-1217JLR, 2016 WL 4793239, at *4 (W.D. Wash. Sept. 13, 2016). The United States reserves the right to assert arguments concerning the appropriate standard for injunctive relief at the appropriate point in this case.

[6] By making this argument UW is actually arguing for a different, and *higher*, standard than was applied in *Ameriquest Mortg. Co. v. Washington State Office of Atty. Gen.*, 170 Wash. 2d 418, 241 P.3d 1245 (2010), because *Ameriquest* did not apply the "stringent" requirements of *Lyft*, and was decided before it. Under UW's arguments, the PRA's "other statute" exemptions would not, in fact, be co-extensive with the protections of a federal regulation, making preemption analysis necessary. UW cannot have it both ways.

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1 related to immigration matters. The state court ruling sought by Cowlitz's claims threatens to have
2 a significant federal impact. *See Miami Herald Media Co.*, 345 F. Supp. 3d at 1363 (holding that
3 the federal agency was the real party in interest despite plaintiffs framing a lawsuit as a public
4 records case against a state agency because release of the records interfered with the administration
5 of the federal government).

6 The form of the removed action, or mere labeling of the United States as a plaintiff when
7 the state court granted the United States' Motion to Intervene does not change the analysis, because
8 the form of the action does not control interpretation of 28 U.S.C. § 1442(a)(1). *Nationwide*,
9 793 F.2d at 1047. Indeed, multiple federal courts have approved of removal where the United
10 States was not a party at all. *See e.g.*, *In re Lusk*, 2016 WL 4107671; *Miami Herald Media Co.*,
11 345 F. Supp. 3d at 1363. To the extent that UW is arguing the United States should not be allowed
12 to remove because it is akin to a plaintiff who *initiated* a state court action, that argument is belied
13 by reality. The United States filed a Motion to Intervene for the express purpose of removal. Dkt.
14 13-1 at 174-93; *cf. Roman Catholic Bishop of Monterey v. Cota*, 711 F. App'x 428, 430 (9th Cir.
15 2018) ("The United States did not waive its sovereign immunity or its right of removal by
16 participating in the state court action."). The fact that the United States may bear the burden of
17 proof for some of its arguments does not mean, as UW contends, that the United States *must* be
18 considered a plaintiff for purposes of removal. Dkt. 17 at 8-12. For example, a removing party
19 may assert counterclaims on which it bears the burden of proof, which is what the FBI did in
20 *Golden*, seeking declaratory and injunctive relief to prevent NJIT from releasing records that the
21 FBI claimed were federal property. 934 F.3d at 308.[7]

22 Interpreting 28 U.S.C. § 1442(a)(1) to allow the United States to remove under the facts of
23 this case is also the right result because "any other result would make the availability of a federal
24 forum dependent on the manner in which [a party seeking disclosure of federal records] chooses
25 to challenge [federal law]." *Goncalves By & Through Goncalves*, 865 F.3d at 1251. It would
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27 [7] And of course, as Plaintiff implicitly acknowledges, this Court could exercise its inherent authority to re-align the parties if it deemed that necessary. *See* Dkt. 8-9.
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allow for a requester and local government entity to effectively block the United States' right to remove by suing each other in state court, and leaving out the United States, even where the parties both agree as to disclosure of the documents that the United States asserts should be protected. This Court should "decline to create an incentive for forum shopping," though such a narrow begrudging interpretation of 28 U.S.C. § 1442(a)(1). *Id.* The United States is entitled to remove this action under the plain language and strong policy favoring removal in 28 U.S.C. § 1442(a)(1).

C. Removal is Appropriate, so Fees are not Warranted

UW's requests for fees "incurred as a result of removal," under 28 U.S.C. § 1447(c) should be denied because, for all of the reasons explained above, removal of this action is appropriate under 28 U.S.C. § 1442(a)(1). However, if this Court does not deny UW's Motion to Remand, fees should not be awarded because the United States removed this action in good faith, and had an objectively reasonable basis for doing so. The United States asserts that it may remove pursuant to 28 U.S.C. § 1442(a)(1) because it is the real party in interest and relies on numerous analogous cases to support its arguments. *See e.g.*, *Miami Herald Media Co.*, 345 F. Supp. 3d at 1363; *Golden*, 934 F.3d at 311; *In re Lusk*, 2016 WL 4107671; *Goncalves By & Through Goncalves*, 865 F.3d at 1251.

IV. CONCLUSION

For the foregoing reasons, UW's Motion to Remand, Dkt. 17, should be denied and no fees or costs should be awarded pursuant to 28 U.S.C. § 1447(c).

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DATED this 18th day of February, 2020.

Respectfully submitted,

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