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Missed Opportunities: State and Local Authority to Regulate the Northwest Detention Center

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An appendix to *COVID-19 and Health Standards at the Northwest Detention Center,* a report issued by the University of Washington Center for Human Rights

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TABLE OF CONTENTS

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INTRODUCTION

This memorandum supplements the University of Washington Center for Human Rights Report, *COVID-19 and Health Standards at the Northwest Detention Center*, and addresses the legal authority of state and local agencies to regulate the Northwest Detention Center (NWDC)[1] in Tacoma, WA, where thousands of Washingtonians are detained each year by Immigration and Customs Enforcement (ICE).

A range of state and local agencies in the State of Washington have long possessed legal authority to regulate the NWDC. The NWDC is owned and operated by the GEO Group, a publicly-traded corporation that contracts with ICE, a federal agency that is housed within the Department of Homeland Security, to incarcerate people facing potential deportation. The Office of the Governor and Tacoma-Pierce County Health Department (TPCHD) serve as two examples of agencies that have possessed the authority to regulate the NWDC under existing state law. Such powers are not unlimited. The law and doctrine governing the ability of state and/or local government agencies to regulate private companies engaging in conduct that arises out of contracts with the federal government is complex, changing, and at times unclear. However, no law, doctrine, or other authority has automatically prohibited either the Governor's Office or the local health authorities from regulating the NWDC pursuant to their existing powers. Agencies should avoid reflexively concluding that they lack the authority to fulfill their regulatory duties with respect to Washingtonians detained at the NWDC.

This memorandum does not, however, answer the more urgent question of *how* state and local authorities should now respond, given the agencies' past approaches to regulation and the extensive human and social costs of continuing to permit the NWDC to operate in the state. Those questions are left to elected officials, policymakers, and communities—especially directed impacted communities—to grapple with as the State of Washington maps out next steps.

The Governor's Office and Tacoma-Pierce County Health Department Have Long Had Broad Powers To Require the NWDC to Adhere to State and Local Law

A number of government agencies within the State of Washington have long possessed the ability to exercise their regulatory authority over the NWDC. This memo focuses on two entities: (1) the Office of the

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[1] In September 2019, the NWDC underwent a name change and now refers to itself as the Northwest ICE Processing Center (NWIPC). For the sake of consistency, this memo and the accompanying report continue to use the acronym "NWDC" to refer to the facility.

Governor and (2) the Tacoma-Pierce County Health Department. It is worth emphasizing that a number of such agencies with a wide range of powers exist, and that these agencies serve as two examples to illustrate that where the political will to regulate a private immigration prison is strong, the legal authority is likely available.

Office of the Governor: Broad Supervisory Power, Particularly During States of Emergency

The Constitution of the State of Washington establishes the Office of the Governor and describes a number of the Governor's powers. As the holder of the state's highest executive power, the Governor "shall see that the laws are faithfully executed." WA Const'n, Art. III, Sec. 5.

The State Legislature, through the Revised Code of Washington (RCW), has also set forth the authority of the Office of the Governor, and supplements the powers described in the State Constitution. These powers include, for instance, a broad supervisory power to manage the affairs of the state. *See* RCW § 43.06.010(1) (authorizing the Governor to "supervise the conduct of all executive and ministerial offices"); RCW § 43.06.010(2) (authorizing the Governor to "see that...the duties of" all offices "are performed"). In other words, the Governor has the power to ensure that nonfederal agencies within the State of Washington are performing their duties appropriately and, if not, to ensure that appropriate remedies are provided. *See generally* RCW § 43.06.010(2) (discussing remedies). Furthermore, as the chief supervisory officer of the state, the Governor "may require any officer or board to make, upon demand, special reports to the governor, in writing." RCW § 43.06.010(11). Consistent with general conceptions of executive power under U.S. law, the Governor has the authority to not only appoint heads of agencies, but can also exert meaningful control over how those agencies perform their duties.

The Legislature has also authorized the Governor to investigate the operations of private businesses located within the State. Specifically, section 43.06.010(6) of the RCW empowers the Governor to "require the attorney general or any prosecuting attorney to inquire into the affairs or management of any corporation existing under the laws of this state, or doing business in this state." If required to investigate a private corporation operating within the state, this provision calls for the state's attorney to report their findings to the Governor, to a grand jury designated by the Governor, or to the Legislature. *See id.* While the Governor has repeatedly requested that the federal government conduct an independent investigation into conditions at the NWDC, existing provisions appear to provide a basis upon which the state could conduct its own investigation. The mere fact that GEO holds a contract with the federal government does not, by itself, prevent the Governor from exercising this investigatory power, under either the statutes or legal doctrines such as preemption or intergovernmental immunity (which are discussed in more detail below).

The RCW also expands the authority of the Office of the Governor during states of emergency. *See* RCW § 38.52. The Governor has broad power to declare a state of emergency and to exercise emergency powers during such times. *See* RCW § 43.06.010(12); RCW § 43.06.220. On February 29, 2020, Gov. Inslee declared a state of emergency with respect to COVID-19. The Governor's emergency powers include the ability to issue orders prohibiting "activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace." RCW § 43.06.220(1)(h). The Governor's emergency powers also allow him or her, "in the event of disaster beyond local control," to "assume direct operational control over all or any part of the emergency management functions within this state." RCW § 38.52.050(1). COVID-19 appears to constitute a "disaster beyond local control," which gives the Governor the power to directly control WA state emergency management functions. The "'emergency management'" authority empowers the Governor to act with wide latitude to "mitigate, prepare for, respond to, and recover from emergencies and disasters, and to aid victims suffering from injury or damage, resulting from disasters caused by all hazards, whether natural, technological, or human caused . . .." RCW § 38.52.010(8). Indeed, the Governor has already invoked these provisions to take a number of steps aimed at preventing the spread of COVID-19 in the State and has been successful in litigation in

defending the scope of its authority. The rampant spread of COVID-19 in prisons, including ICE detention, has been well-documented throughout the nation. The Governor's emergency powers may well extend to the NWDC, such that the Governor could deploy emergency management functions directly to the NWDC and otherwise act to aid victims of COVID-19 in ICE detention.

The Governor's emergency powers are not unlimited. Indeed, the text of the RCW suggests that those powers should not conflict with the federal government's emergency management plans, consistent with principles emanating from federal preemption doctrine (discussed below). For instance, the Governor should give the federal government's plans "due consideration" and "cooperate with" the President of the United States and relevant federal agencies "in matters pertaining to the emergency management of the state and nation." RCW § 38.52.050(3)(a), (e). The Office of the Governor, and/or ICE, could take the position that because the federal government has its own "emergency plans" in place to manage the spread of COVID-19 in immigration detention, then the Governor should give them "due consideration." However, it is not entirely clear what "due consideration" means and whether federal emergency plans actually *limit* the Governor's authority. Furthermore, the relevant section of the RCW does not use the word "must" or other mandatory language, *see* RCW § 38.52.050(3)(a), and so even where federal emergency plans exist, the Governor arguably still has power to do *more* than what the federal government requires. Additionally, litigation challenging the constitutional adequacy of ICE's management of the COVID-19 pandemic in detention facilities across the country casts doubt on ICE's ability to properly manage the spread of the virus.

Tacoma-Pierce County Health Department: Broad Powers Under Statute to Regulate NWDC Rejected by Agency Leadership The Tacoma-Pierce County Health Department ("TPCHD") is one of nearly forty local health departments in the State of Washington. As a local government agency and partner to the Washington State Department of Health, the TPCHD's stated mission is to promote the health of *all* Washingtonians. Like other local health departments, the Legislature has empowered TPCHD with authority under the RCW. The TPCHD's power to enforce state and local regulations aimed at ensuring the health and well-being of people within the county is quite broad. *See generally* RCW § 70.05.060; RCW § 70.05.70. This authority is, however, limited to activity that falls within the physical boundaries of the county. *See* RCW § 70.05.010(1) (defining "local health department" as providing services to "persons within the area"); *see also* RCW § 70.05.030 ("[t]he jurisdiction of a county board of health shall be coextensive with the boundaries of said county"). The NWDC is located squarely within the territory of Tacoma, Pierce County, and thus appears subject to regulation by TPCHD.

Local health departments like the TPCHD exercise their functions through health boards, officers, and leaders. Local health boards' supervisory powers reach "all matters pertaining to the preservation of the life and health of the people within its jurisdiction." RCW § 70.05.060. Such responsibilities include, for instance, the power to enforce the state's public health laws, the ability to supervise the maintenance of all health and sanitary measures, the enactment of local rules necessary to improve public health, and the power to provide for the control and prevention of dangerous, contagious or infectious diseases. *See* RCW § 70.05.060. Health boards also supervise local health officers, who similarly have been granted authority by the state legislature to enforce public health laws, take steps necessary to maintain public health, and control the spread of diseases within the jurisdiction. *See* RCW § 70.050.070. Furthermore, local health agencies like TPCHD have fairly broad discretion to take "measures as he or she deems necessary in order to promote public health," RCW § 70.05.070(9), even if those measures are not described specifically in the RCW.

Along similar lines, state regulations codified in the Washington Administrative Code empower local health officers to take a range of steps necessary to ensure public safety. *See* WAC § 246-101-505(1) (providing that local health officers and departments shall "review and determine appropriate action" for each reported case

or suspected case of a notifiable condition, any disease or condition considered a threat to public health, and each reported outbreak or suspected outbreak of disease); WAC § 246-101-505(3) (empowering local health officers to require any person suspected of having a reportable disease or condition to submit to examinations required to determine the presence of the disease or condition; investigate any case or suspected case of a reportable disease or condition or other illness, communicable or otherwise, if deemed necessary; and require the notification of additional conditions of public health importance occurring within the jurisdiction of the local health officer).

State regulations also list a variety of measures available to local health officers for purposes of disease control. *See* WAC § 246-100-036(3) ("Local health officers shall, when necessary, conduct investigations and institute disease control and contamination measures, including medical examination, testing, counseling, treatment, vaccination, decontamination of persons or animals, isolation, quarantine, vector control, condemnation of food supplies, and inspection and closure of facilities. . ."). To the extent that medical service at the NWDC falls within the state regulatory definition of a "health care provider," WAC § 246-100-011, then they are also bound by state regulatory requirements, particularly with respect to communicable disease control requirements. *See* WAC § 246-100-186 (requiring health care providers to take various measures to prevent the transmission of communicable diseases, including compliance with applicable state laws); WAC § 246-100-021 (requiring health care providers to cooperate with public health authorities during investigation or cases of communicable diseases, outbreaks, or suspected outbreaks).

Despite ample state statutory and regulatory authorities that appear to provide TPCHD with wide latitude to regulate the NWDC, the TPCHD has chosen to interpret its powers extremely narrowly. TPCHD's stated mission includes the protection and improvement of health "of *all people* and *places in* Pierce County." (Emphasis added). This includes individuals who are detained and individuals who are under the custody of the federal government. Yet TPCHD's own website indicates that it believes that the GEO Group's compliance with relevant state laws and local health directives is "limited" and entirely "voluntary." TPCHD has taken minimal steps to ensure that the NWDC is abiding by relevant laws, as it has engaged in limited inspections of food preparation and service and infectious waste. For food safety, TPCHD performs three annual routine inspections. Despite evidence of ongoing complaints coupled with hunger strikes consistently denouncing the food quality at NWDC, TPCHD's reported inspections only show a minimal number of violations, in which no enforcement action has been required. Even when complaints have been directly submitted to TPCHD about rotten food and maggots, a UW Center for Human Rights report found that inspectors have followed-up with little more than a phone call to investigate the allegations. The agency gives little explanation as to why it believes that NWDC's relationship with county health authorities is voluntary, other than an oblique reference on its website to the fact that NWDC is a "federal facility." Tellingly, ICE's own Performance-Based National Detention Standards (PBNDS) from 2011 states that facilities like the NWDC "shall comply with…state or local authorities," with respect to the management of infectious and communicable diseases, as do ICE's current Pandemic Response Requirements. PBNDS Standard 4.3, at 261; Immigr. & Customs Enf., COVID-19 Pandemic Response Requirements at 8, 10, 20. As the following section describes, NWDC is not a federal facility, but a private prison that contracts with the federal government, and its federal contract does not shield it from regulatory authority by state or local agencies governing the jurisdiction within which it operates.

As a Privately Owned Facility, the NWDC is Not a Federal Facility, and the Fact that it has a Contract with ICE Does Not Prevent State and Local Authorities from Regulating it

The NWDC is owned and operated by the GEO Group, a private company that derives corporate profits from contracts with the federal government—including ICE—to incarcerate people. The physical building is

owned by GEO Group, as is the land occupied by the NWDC. Although ICE officials perform certain responsibilities with respect to people detained at NWDC, most of the prison guards and officials at the NWDC are employees of the GEO Group. Certain services are provided by ICE or third party vendors hired by ICE, such as medical and health care. Grievances at the facility appear to be reviewed by officers employed by both GEO and ICE, depending on the nature of the complaint, and has led to confusion over which entity is responsible for responding to certain grievances.

State and local authorities should not assume, as the TCPHD has done, that the NWDC is a "federal facility" and that they therefore lack the authority to require compliance with state and local laws from the facility. Washington state law recognizes that private detention centers—meaning detention facilities operated by private, nongovernmental entities pursuant to government contract—exist throughout the state, including the NWDC. Engrossed Substitute House Bill 2576, Sec. 2(4)(c). Moreover, federal immigration law does not define a "federal facility."[2] It is nonetheless apparent that the NWDC does not clearly fall within various other definitions of a "federal facility" due to its private ownership. In fact, ICE's description of the facilities in which it detains people acknowledges distinctions amongst (1) ICE-owned-and-operated facilities; (2) local, county or state facilities contracted through Intergovernmental Service Agreements, and (3) contractor-owned-and-operated facilities (as is the case with GEO). Furthermore, GEO has invoked its status as a private facility to avoid compliance with the Freedom of Information Act (FOIA), which would provide for greater transparency around conditions and practices at the facility.

The federal government nonetheless plays a critical role in the operation of the NWDC, and GEO could argue—and has argued in litigation—that its federal contracts insulate it from certain forms of state and local regulation, particularly new forms of regulation that are directed specifically at the NWDC. These claims rest on legal doctrines that are complex, and which do not pose clear or automatic barriers to state or local efforts to regulate the facility. Two doctrines have been particularly prominent in litigation: (1) intergovernmental immunity, and (2) preemption.[3] In recent years GEO has not been successful in raising these defenses against robust attempts by states and localities to include private immigration prisons within their regulatory authority. *See, e.g., GEO Group, Inc. v. City of Tacoma*, No. 3:18-cv-05233-RBL, 2019 WL 5963112 (W.D. Wa. Nov. 13, 2019); *GEO Group, Inc. v. Newsom*, 2020 WL 5968759 (S.D. Cal. Oct. 8, 2020); *United States v. California*, 921 F.3d 865, 882-83 (9th Cir. 2019). This section briefly addresses these doctrines, with the caveat that they are complex as applied to

[2] While a small number of federal statutes from unrelated fields do define a federal facility, those provisions illustrate that the definition of a "federal facility" is neither fixed nor simple. For instance, one statute that requires federal buildings to engage in certain energy conservation efforts defines a federal facility as "any building, structure, or fixture or part thereof which is owned by the United States or any Federal agency or which is held by the United States or any Federal agency under a lease-acquisition agreement under which the United States or a Federal agency will receive fee simple title under the terms of such agreement without further negotiation," and notes that "[s]uch term [federal facilities] also applies to facilities related to programs administered by Federal agencies." 42 U.S.C. § 8271. A federal law relating to metric conversion contains a multi-pronged definition of a "federal facility" that includes "lands used in connection with Federal prisons," 15 U.S.C. 205c(9)(G), but specifically excludes "any…building owned or controlled by…any private entity." *Id.* at 205c(9)(G)(ii). Along similar lines, a Department of Justice website defines "federal prisons" as "prison facilities run by the Federal Bureau of Prisons," and "excludes private facilities []."

[3] The derivative sovereign immunity doctrine—the idea that private entities may enjoy derivative immunity, similar to the qualified immunity that exists for federal entities—could also be invoked. However, because the intergovernmental immunity and preemption doctrines appear to have surfaced more frequently in recent litigation, this memo focuses on those two doctrines. *See also State of WA v. GEO Group*, No. 17-5806 RJB, 2019 WL 3565105 (W.D. Wa. Aug. 6, 2019) (rejecting GEO's derivative sovereign immunity arguments in litigation seeking to enforce state minimum wage laws to NWIPC). For further reading, see David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. ONLINE 224 (2019).

private entities that contract with the federal government, and—in the words of two legal scholars—have also become "muddled and confused."[4]

Intergovernmental Immunity. The intergovernmental immunity doctrine prohibits state and local governmental entities from meaningfully interfering with the federal government's activities. The doctrine arises out of the Supremacy Clause of the U.S. Constitution and the Supreme Court's 1819 decision in *McCulloch v. Maryland*, which stated that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

The courts typically use two tests to evaluate whether an intergovernmental immunity claim exists. First, the doctrine prevents states or localities from *directly* regulating the federal government in a manner that interferes with federal activities. *North Dakota v. United States*, 495 U.S. 423 (1990). Where a state or locality seeks to regulate a private entity that contracts with the federal government, the application of the intergovernmental immunity doctrine depends on the nature of the contract as well as the type of regulation at issue. In a lawsuit brought by GEO against the City of Tacoma in connection with the City Council of Tacoma's decision to enact an ordinance in 2018 that prevented the GEO group from expanding the NWDC, a federal district court rejected GEO's intergovernmental immunity defense, characterizing as "incorrect" GEO's "belie[f] that its relationship with ICE provides a complete shield against any [state or local] regulation." *GEO Group, Inc. v. City of Tacoma*, No. 3:18-cv-05233-RBL, 2019 WL 5963112 (W.D. Wa. Nov. 13, 2019). The court explained that GEO lacked evidence that the local restrictions on expansion of the facility would actually limit the federal government's activities, and that the intergovernmental immunity doctrine "does not automatically bar local regulation of a contractor's property that does not necessarily impede the federal operations going on there." *Id*. at *5. Furthermore, in litigation in the State of California, a district court has emphasized GEO's status as a private entity, noting that for intergovernmental immunity doctrine purposes, the mere fact that GEO has a contract with the federal government does not immunize the company from recently enacted state legislation that restricts the California Department of Corrections and Rehabilitation's ability to renew or enter into new contracts with GEO. *GEO Group, Inc. v. Newsom*, 2020 WL 5968759 (S.D. Cal. Oct. 8, 2020), at *30.

Second, the intergovernmental immunity doctrine applies where a state or local regulation, even when not doing so directly, nonetheless discriminates against the federal government. *Washington v. United States*, 460 U.S. 536, 544-45 (1983). The district court in *GEO v. City of Tacoma* rejected the discrimination claim raised by GEO because the city ordinance applied in the same manner to other prisons as it did to the NWDC. 2019 WL 5963112 at *6. State and local agencies can therefore avoid discrimination-based intergovernmental immunity doctrine challenges so long as they do not single out the NWDC for more burdensome regulation in comparison to similarly situated entities. *Cf. United States v. California*, 921 F.3d 865, 882-83 (9th Cir. 2019) (finding that the United States is likely to succeed in claim of discriminatory intergovernmental immunity challenge to California law that "imposes a specialized burden" on privately-owned immigration detention facilities).

Preemption. The doctrine of preemption prevents states and localities from engaging in certain forms of governance in areas in which the federal government is also engaged in legislation or regulation. Several different types of preemption exist. For instance, if a federal statute that explicitly seeks to prevent state or local governments from entering into a subject matter exists, then courts may explore "express" preemption claims. *Arizona v. United States,* 567 U.S. 387, 399 (2012). Where a concurrent scheme of federal legislation or regulation exists (but does not reference preemption outright), then courts may consider "implied" preemption claims, which fall under the categories of either "conflict" preemption or "obstacle" preemption. *CTIA-Wireless Ass'n v. City of*

[4] Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. (forthcoming 2021).

Berkeley, 928 F.3d 832, 849 (9th Cir. 2019). Courts may also consider whether entire fields of law that have generally been understood as committed to the federal government—including immigration—have been preempted by the federal government and therefore adjudicate "field" preemption challenges. *Arizona*, 567 U.S. at 401. Preemption is thus a wide-ranging, complex doctrine. It does not readily lend itself to easy, black-and-white answers and does not necessarily prevent states and localities from regulating in areas like immigration detention, particularly where private actors are involved.

The Ninth Circuit Court of Appeals has already recognized, in the context of a challenge to a California law that sought to regulate private immigration prisons, that the State of California "possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders," and that neither the federal immigration laws nor ICE's contracts with private entities demonstrate an intent on the part of Congress to remove the state's authority. *United States v. California*, 921 F.3d at 886. The Ninth Circuit's recognition of the State of California's authority over persons in immigration detention should extend to the State of Washington with equal force.

With respect to field preemption, a district court in California has recognized that no single field of immigration detention exists for field preemption purposes, and that federal contracts to detain immigrants do not preempt state law. *GEO v. Newsom*, 2020 WL 5968759 at *23. Furthermore, preemption claims that seek to undo the regulation of *private companies* providing immigration detention facility space, even if they impact immigration detention generally, are not likely to succeed on preemption grounds. This is the case particularly where the ultimate goal is to promote the health and safety of persons in those detention facilities. *See generally id*. at *16-26. To the extent the decisions at the NWDC are being made by GEO officials—such as whether to expand, or how COVID-19 protocols are carried out—then the actions of state and local regulators would appear to be safely beyond the ambit of a preemption challenge. *See GEO v. City of Tacoma*, 2019 WL 5963112 at *7 (emphasizing that "[t]here is no reason to believe that changes to NWDC would necessarily be ordered by the Federal Government.").

CONCLUSION

Whether state and local authorities in the State of Washington regulate GEO's administration of the NWDC appears to ultimately rest on questions of political will. Existing statutes and regulations have long provided entities like the Office of the Governor or the Tacoma-Pierce County Health Department with meaningful discretion to exercise their authority over the detention facility. While legal doctrines such as intergovernmental immunity and preemption may require the exercise of caution, they do not prohibit the state or localities from acting to promote the health and welfare of people subject to incarceration within their relevant territories.