

No. 26-71

In the
Supreme Court of the United States

THE GEO GROUP, INC.,

Petitioner,

v.

ROBERT W. FERGUSON, et al.,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Washington state is not a fan of federal immigration policy. Time and again, going back across multiple presidential administrations with varying immigration priorities, Washington has vented that displeasure by trying to intensively regulate the Northwest ICE Processing Center (NWIPC) located in Tacoma, saddling the federal facility with requirements Washington does not impose on its own detention facilities. And, time and again, the Ninth Circuit has blessed those efforts on the (woefully mistaken) premise that federal contractors performing federal functions at the federal government's request receive watered-down—if any—protection under the Supremacy Clause. The pending petition in *GEO Group, Inc. v. Nwauzor*, No. 25-828 (U.S.), involves Washington's effort to impose state minimum-wage requirements on a distinctly federal work program for federal detainees, while this case involves Washington's effort to micromanage virtually every aspect of day-to-day operations at NWIPC. Both cases present the Court with an opportunity to address the Ninth Circuit's approach, which the United States, across multiple presidential administrations with very different immigration priorities, has deemed deeply flawed and exceptionally important. *See Nwauzor*.Pet.3, 12-15.

Indeed, in response to this Court's call for the views of the Solicitor General in *Nwauzor*, the United States urged this Court to grant certiorari, explaining that the Ninth Circuit's decision is "irreconcilable" with the Third Circuit's approach and implicates issues of "exceptional importance."

Nwauzor.U.S.Br.19-22. That brief twice referenced this case as a logical companion that raises the same set of Supremacy Clause doctrines in challenging a different state law. Whether on its own or with *Nwauzor*, this case is a compelling vehicle for resolving that conflict and reaffirming that states cannot accomplish indirectly through regulation of contractors what the Supremacy Clause forbids them to do directly.

Washington’s brief in opposition confirms the need for this Court’s review. Washington ignores the Solicitor General’s assessment in *Nwauzor*, offers shifting formulations of the supposed consensus legal standard in an effort to paper over the circuit split, and endorses a legal standard that invites states to control how federal operations are conducted simply by directing their commands to the contractors who carry them out. The Court should grant certiorari and settle these recurring and exceptionally important questions of federal supremacy.

I. The Supremacy Clause Forecloses Washington’s Efforts To Regulate The Terms Of Immigration Detention At The NWIPC.

A. The Circuits Are Divided Over How the Intergovernmental-Immunity Doctrine Applies When States Regulate Federal Contractors.

As the United States explained in its amicus brief supporting certiorari in *Nwauzor*, the Ninth Circuit’s approach to intergovernmental immunity—exemplified by the decision below—is in “irreconcilable” conflict with “decisions of other circuits.” *Nwauzor*.U.S.Br.19-20; see Pet.21-26. The Ninth

Circuit affords federal operations “substantially narrower” protection from state regulation when the government carries them out through contractors. Pet.App.13. Other circuits hold that states cannot regulate indirectly through contractors federal operations that they could not regulate directly. *See* Pet.21-26. The state’s efforts to explain away that split are no more persuasive here than in *Nwauzor*. *Contra* BIO.18-22.

First, the state’s shifting account of the governing legal standard belies its claim that the circuits all apply the same test. In *Nwauzor*, the state described that supposed consensus as disallowing state laws that “control federal operations.” *Nwauzor*.BIO.15, 19. Here, however, it expands that formulation to encompass laws that “control *or* severely undercut federal operations.” BIO.18 (emphasis added). And just five pages later, it insists that immunity applies “only if” state law either “directly controls the federal government or effectively allows the State to prohibit a federal activity,” BIO.23, which *would* permit even severe undercutting so long as it stops short of direct control or a de facto prohibition. *Contra* BIO.18. The state cannot credibly argue that there is a consensus among the circuits when it cannot even maintain a consistent account of the supposed consensus position.

The state insists that *CoreCivic* applies “the same test” as the Ninth Circuit and “explicitly” aligns the Third Circuit with that court’s approach. BIO.18, 19. That would be news to the Third Circuit. One can search Judge Bibas’s majority opinion high and low without finding any endorsement of the premise that federal operations receive “substantially narrower”

protection against state interference simply because contractors execute them. On the contrary, the majority asked whether the regulation aimed at private contractors carried the “same sting” as direct regulation of the federal government, *CoreCivic, Inc. v. Governor of N.J.*, 145 F.4th 315, 322 (3d Cir. 2025)—a legal standard that affords the same degree of protection to federal contractors carrying out federal functions as the federal government would receive if it performed those functions itself. It was the dissent in *CoreCivic* that, like the decision below, embraced the opposite premise—positing that, when the federal government “enjoys the benefits” of private operations, “it must also suffer any reciprocal burdens” that arise from state regulation of those contractors. *Id.* at 333 (Ambro, C.J., dissenting). That is why the United States identifies the majority opinion in *CoreCivic* as “irreconcilable” with the Ninth Circuit’s approach. *Nwauzor*.U.S.Br.19-20.

The state’s remaining efforts to harmonize *CoreCivic* with the decision below likewise fail. Although *CoreCivic* did “align” with one Ninth Circuit case, that was the decision “striking down a state ban on private detention contracts,” 145 F.4th at 327 (citing *GEO Grp., Inc. v. Newsom*, 50 F.4th 745, 757-58 (9th Cir. 2022) (en banc)). There is zero alignment on the Ninth Circuit’s subsequent green-lighting of Washington’s efforts to regulate the NWIPC to a fare-thee-well, while stopping short of an outright ban. That is the issue where the Circuits are split.

As for the Second and Fourth Circuit decisions, Washington brushes them aside because they “involve *licenses or permitting* schemes that control the federal

government.” BIO.20 (emphasis added). But the state never explains why that matters for purposes of determining the applicable legal standard. As this Court has explained, regulatory regimes possess just as much potential to “control the federal government,” *id.*, as licensing and permitting schemes, *see Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). Indeed, if Washington imposed all the same requirements as a condition for licensing NWIPC, the case would be the same. Washington does not get a free pass because it imposes binding commands rather than licensing conditions.¹

At bottom, Washington does not and cannot reconcile the conflicting standards for protecting federal operations carried out through contractors. Those operations should not receive less constitutional protection in the Ninth Circuit than they receive elsewhere. But that is the law today. This Court’s intervention is needed to resolve that conflict.

B. The Ninth Circuit’s Decision Is Profoundly Wrong.

1. HB 1470 directly regulates federal operations by “dictat[ing] the manner in which” the federal government “carrie[s] out” immigration detention. *Goodyear*, 486 U.S. at 181 n.3; *see* Pet.26-32. Washington never disputes, and the decision below candidly admits, that HB 1470 seeks to “change the

¹ Although Washington tries to distinguish the Second Circuit’s decision on the ground that it “nowhere suggested that *any* state regulation of federal contractors would violate intergovernmental immunity,” BIO.21, GEO has never argued to the contrary, *see* Pet.27.

way GEO treats [federal immigration] detainees.” Pet.App.13; *see* Pet.30. But Washington insists that its regulation of that exclusively federal function is permissible because the federal government chose to carry it out through private contractors. *See* Pet.App.17; BIO.23. In effect, both the state and the Ninth Circuit treat the federal government’s decision to contract out federal operations as a waiver of the constitutional protection from state control that those federal operations would otherwise enjoy. The Supremacy Clause embodies a different view. *See* Pet.26-32.

Contrary to Washington’s argument, this Court has not “decisively rejected” the approach advanced by GEO and embraced by other circuits and multiple Ninth Circuit judges in en banc dissents. BIO.23. To be sure, this Court has retreated from invalidating “any state law whose ‘effect ... was or might be to increase the cost to the Federal Government of performing its functions.’” *United States v. Washington*, 596 U.S. 832, 838 (2022); *see also* BIO.24-25 (collecting cases). But though HB 1470 undoubtedly increases the federal government’s costs, that is not what makes it unconstitutional. What makes it unconstitutional is that it directly dictates how the federal government’s immigration detainees must be housed and treated. *See* Pet.27-32. The state has commanded that, if the federal government exercises its prerogative to run immigration detention through federal contractors, then it must resign itself to Washington’s efforts to “dictate nearly every facet of how the federal government must treat alien detainees.” Pet.App.39. Whatever cases like *Penn Dairies v. Milk Control Comm’n*, 318 U.S. 261 (1943),

and others say about generally applicable laws that incidentally increase the cost of federal operations, *see* BIO.24-25, they in no way insulate efforts to directly dictate how federal operations must be conducted.

Washington’s latest iteration of what standard it thinks should govern—i.e., that states can regulate federal functions carried out by contractors unless and until they “severely undercut” those functions, *see supra*, p.3—is not the test the Ninth Circuit adopted and is no more defensible. As this Court explained long ago, disputes about intergovernmental immunity turn not “upon any consideration of degree but upon the entire absence of power on the part of the States” to interfere with how the government has chosen to carry out its functions. *See Johnson v. Maryland*, 254 U.S. 51, 55-56 (1920). Washington’s test would force courts to conduct the “‘perplexing’ business, ‘so unfit for the judicial department,’ of attempting to delineate” when state regulation of federal contractors goes too far. *Dawson v. Steager*, 586 U.S. 171, 176 (2019) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819)). There was no de minimis exception to the Supremacy Clause when the Court decided *McCulloch* centuries ago, and there remains none today.

2. The Ninth Circuit’s discrimination analysis fares no better, as eight judges explained in en banc dissents. *See* Pet.32-33; Pet.App.38-43. As it has done before, Washington enacted a law that “appl[ies] *only* to the Northwest ICE Center” via a set of gerrymandered exceptions that exempt the state and its contractors from its burdensome provisions. *See* Pet.App.39-40 (Bumatay, J., dissenting from the

denial of rehearing en banc).² That is discrimination, plain and simple.

The state defends the Ninth Circuit’s holding that “private residential treatment facilities and civil commitment facilities”—rather than “prisons and detainment facilities”—are the appropriate comparators, Pet.App.40, 42; *see* Pet.App.20-22 (majority op.), principally on the basis that immigration detention serves civil rather than punitive purposes, *see* BIO.28-29. As Judge Bumatay explained in dissent, that is no distinction at all. *See* Pet.App.40-43 (Bumatay, J., dissenting from the denial of rehearing en banc). This Court’s precedents confirm that “immigration detention serves two security-related goals—‘preventing flight’ and ‘protecting the community.’” Pet.App.41. Those same security interests underlie detention in jails and prisons, whether to hold an accused pending trial—a form of detention that likewise is not punitive—or to protect the community by incapacitating a convicted offender. That is why “Congress instructed the government to consider using ‘existing prison[s], jail[s], detention center[s], or other comparable facilit[ies]’ before constructing new immigration detention facilities.” Pet.App.41-42. The Ninth Circuit’s holding disregards those dispositive similarities.

² Washington belatedly argues that “at least one state contractor is subject to the law as amended.” BIO.29. But the decision below found that, “as a practical matter, HB 1470 applies only to the NWIPC.” Pet.App.18.

3. On preemption, the state briefly addresses one of the statutes that preempt the field of immigration detention. BIO.31-32. It says nothing about the remaining statutes and regulations before declaring that the quintessential federal field of immigration enforcement is open for state meddling.

4. Attempting to justify the Ninth Circuit’s holding, the state invokes two of this Court’s recent cases—*GEO Group, Inc. v. Menocal*, 607 U.S. 438 (2026), and *Hencely v. Fluor Corp.*, 608 U.S. 31 (2026). But neither involved an intergovernmental-immunity claim. Nor did either hold that states may dictate how to carry out uniquely federal functions like housing immigration detainees any time the federal government enlists contractors to aid in that effort—let alone that states may discriminate against federal contractors performing that uniquely federal function. *Contra* BIO.23.

First, *Menocal* involved only whether the protection afforded federal contractors from lawsuits challenging their activities under a federal contract is better understood as an “immunity” or a “merits defense.” *See* 607 U.S. at 445-48. In accepting the federal government’s view that it is a defense, *see Menocal*.U.S.Br.31, the Court said nothing to undermine the federal government’s longstanding view that the decision below is wrong and threatens federal functions, *see, e.g.*, CA.Dkt.34 at 7-18. Nor did *Menocal* cast any doubt on centuries of precedent holding that “the federal function must be left free of state regulation” or discrimination even when it “is carried out by a private contractor.” *Goodyear*, 486 U.S. at 181.

Second, *Hencely* is likewise far afield. There, the Court assumed that the federal contractor’s conduct not only did not involve a federal function, but was “contrary to[] federal instructions.” 608 U.S. at 41. Here, by contrast, the whole point of HB 1470 is to force federal contractors—and federal contractors alone—to comply with state-law restrictions even when the federal contractor is adhering to the hundreds of federal regulations that govern its operations. *Hencely* says nothing about cases like that—other than that states of course cannot hold contractors liable for “accomplishing what the Federal Government requested.” *Id.*

In short, this “should have been [an] easy” case. Pet.App.42. Washington cannot directly target the operation of federal detention facilities by imposing restrictions on contractors who operate those facilities while exempting comparable detention facilities of its own. The Ninth Circuit’s contrary conclusion defies this Court’s cases and the Constitution.

II. The Question Presented Is Exceptionally Important, And This Is An Excellent Vehicle.

Washington does not and cannot deny that whether states can control federal functions by aiming regulations at the federal contractors through whom the federal government acts rather than the government itself is an “exceptionally important” and “recurring” question. Pet.33, 34. As the United States explained in its brief supporting certiorari in *Nwauzor*, “[t]he federal government has long relied on private contractors to fulfill its responsibilities,” and the legal standard applied by the Ninth Circuit “threatens to upend” its ability to do so—particularly

in the exceptionally important arena of immigration detention. *Nwauzor*.U.S.Br.22 (arguing the “question presented involves an issue of exceptional importance”). Unless and until this Court intervenes, states in the Ninth Circuit will remain free to continue their “crusade against the federal government’s use of federal contractors,” *GEO Grp., Inc. v. Inslee*, 166 F.4th 1188, 1191 (9th Cir. 2026) (Bumatay, J., dissenting from the denial of rehearing en banc), and the efficacy of federal programs will turn on the jurisdiction in which they are carried out.

There is no downplaying the importance of this case based on the federal government’s decision to take steps in response to the erroneous Ninth Circuit decisions, such as revising its detention standards to more explicitly prohibit immigration detention facilities from paying participants in the voluntary work program more than \$1 per day. *But cf.* Suppl. Br. Individual Respondents, *GEO Grp., Inc. v. Nwauzor*, No. 25-828 (U.S. Sept. 29, 2026). The felt-need to make those revisions only underscores the interference with federal operations. Moreover, this case well illustrates that the Ninth Circuit’s decisions in *Nwauzor* and below carry baleful consequences that extend well beyond the \$37 million judgment in *Nwauzor*, minimum-wage laws, or the multitudinous regulations at issue here. As GEO explained, and no respondent has disputed, states across the country have enacted or introduced a host of laws that seek to control federal operations by aiming burdensome regulations at federal contractors. Pet.34. Unless the Court repudiates the Ninth Circuit’s approach, those structural constitutional harms will persist.

Unable to dispute the importance of that question, Washington argues that this is a poor vehicle to resolve it. *See* BIO.33-35. That is wrong. First, the state ignores that the decision below denied preliminary relief not just on discrimination grounds, but also on the ground that “HB 1470 ... does not directly regulate the federal government” and is not preempted. Pet.App.17. And though the decision below remanded for further consideration on the discrimination claim, *see* BIO.34, its decision to do so rested on legal errors that this Court can and should correct now. Indeed, eight judges from the Ninth Circuit dissented from the denial of rehearing en banc precisely because they concluded that GEO’s discrimination claim presents “an open-and-shut case of intergovernmental immunity.” Pet.App.38, 42. The prospect of further proceedings under an erroneous legal standard is no reason to postpone this Court’s review. Moreover, the fact that the district court on remand rejected GEO’s discrimination claim under the legal standard established by the decision below *strengthens*, not weakens, the case for prompt review, as it confirms that GEO has a live claim for relief.

Nor does the fact that GEO entered a new contract with ICE pose any obstacle to granting certiorari. None of the claims on which GEO seeks review depends on contract interpretation; they involve straightforward legal questions about federal preemption and the intergovernmental-immunity doctrine. Under either contract, GEO performs the same federal function at the same facility, and the state asserts the same authority to regulate that function. So that development is immaterial.

Finally, Washington raises feeble opposition to GEO's suggestion in the alternative that the Court consolidate this petition with *Nwauzor* or hold it pending disposition of that petition. *See* BIO.36. But none of the state's factual or postural distinctions is material. Both involve the same petitioner asserting the same intergovernmental-immunity and preemption claims against Washington's regulation of immigration detention. And both decisions—authored by Judge Fletcher—rest on the same mistaken premise that federal operations receive diminished Supremacy Clause protection when carried out by contractors. *See* Pet.35-36.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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