

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 23 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WASHINGTON DEPARTMENT OF
HEALTH,

Plaintiff - Appellee,

v.

THE GEO GROUP, INC.,

Defendant - Appellant.

No. 24-5880

D.C. No.

3:24-cv-05639-BHS

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted August 12, 2025
Seattle, Washington

Before: HAWKINS, McKEOWN, and WARDLAW, Circuit Judges.

The Washington State Department of Health (“Department”) sued The GEO Group, Inc. (“GEO Group”), seeking an injunction to restrain GEO Group from refusing the Department entry to the Northwest Immigration and Customs Enforcement Processing Center (“Immigration Center”), a private detention facility

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

that GEO Group owns and operates. Following numerous complaints about facility conditions, the Department sought to perform health-and-safety-related inspections of the Immigration Center, pursuant to its authority under state law. On July 18, 2024, Department employees were denied entry to the Immigration Center, catalyzing this suit.

GEO Group removed the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). The district court remanded the action to state court. GEO Group appeals that remand order, arguing that its federal defenses require that the action be heard in federal court. We have jurisdiction pursuant to 28 U.S.C. § 1447(d). *DeFiore v. SOC LLC*, 85 F.4th 546, 554 (9th Cir. 2023). We review de novo the district court’s order to remand. *Casola v. Dexcom, Inc.*, 98 F.4th 947, 953 (9th Cir. 2024). We reverse and remand for an evidentiary hearing regarding the derivative immunity defense and direct-regulation defenses, and affirm as to the discrimination, field preemption, and conflict preemption defenses.

The burden of establishing that a defense is colorable “rests upon the party asserting jurisdiction”—here, GEO Group. *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (citation omitted). For asserted defenses that are subject to factual as well as facial attack, GEO Group bears the burden of proving by a preponderance of the evidence that the defenses are factually supported. *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 684 (9th Cir. 2022); *see also Leite v.*

Crane Co., 749 F.3d 1117, 1121–22 (9th Cir. 2014) (distinguishing between facial and factual attacks). For those defenses that are subject only to facial attack, we ask whether each asserted defense is “wholly insubstantial and frivolous.”

DeFiore, 85 F.4th at 560 (citation omitted).

The Department raises several disputes of material fact, including the scope of its request for access; the scope of the authority of the relevant United States Immigration & Customs Enforcement (“ICE”) employee over access to the facility; the scope of GEO Group’s authority over access to the facility; and the mechanics of the denial itself—whether the ICE employee directly denied entry to the Department, or whether the ICE employee instructed GEO Group to deny entry. These issues are relevant to GEO Group’s asserted defenses of derivative sovereign immunity and the direct-regulation theory of intergovernmental immunity. Under the preponderance-of-the-evidence standard, we conclude that the record contains conflicting statements regarding the denial of access. Without clarity about what happened and who had authority to do what, it is difficult to say whether these two defenses are colorable. We therefore remand to the district court for an evidentiary hearing.

Derivative sovereign immunity requires that the government “specifically authorized” the actions in question. *Nwauzor v. GEO Grp., Inc.*, 127 F.4th 750, 770 (9th Cir. 2025). To confer immunity, informal direction must constitute

government direction. See *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 168 (2016), *as revised* (Feb. 9, 2016) (characterizing the relevant instructions as the government’s instructions). Otherwise, the “action of the agent” is not “the act of the government.” See *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 22 (1940). Similarly, a direct-regulation defense requires that the state law replace “federal . . . standards” or override “federal decisions as to necessary . . . measures.” *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014).

GEO Group’s argument rests on three purported federal directives: its written contract with ICE, a policy document governing its relationship with ICE, and the verbal directive of the ICE employee. The federal contract and policy document mandated GEO Group’s compliance with state law. State law required that all facilities be open to the Department’s inspections. These documents cannot support an argument that the denial of entry was mandated by the federal government.

The ICE employee’s verbal directive, however, is a different story. It is not clear from the record which GEO Group actions, if any, the ICE employee’s denial “specifically authorized.” *Nwauzor*, 127 F.4th at 770. The parties dispute the mechanics of the denial. The Department contends that the ICE employee instructed GEO Group to deny the Department employees access, or else that ICE and GEO Group denied access together. GEO Group counters that the ICE

employee himself denied the Department employees access. Even under the first version of events—which is, curiously, the Department’s—it is also not clear whether the ICE employee was acting within the scope of ICE’s authority when he instructed GEO Group to deny access to Department employees, or whether he was acting *ultra vires*, that is, beyond “the powers delegated to him by the sovereign.” *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 693 (1949); *see also* *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 157 (2007) (explaining that only “delegation of authority”—not “regulation”—can authorize removal under § 1442). Nor is it clear what authority ICE contracted away, what authority it retained, and for whom. These uncertainties implicate both the derivative immunity and direct-regulation defenses. The district court should consider them on remand.

We affirm the district court as to GEO Group’s other asserted defenses, which are subject only to facial attack. These defenses fail to clear the low bar of frivolity.

The discrimination defense was not argued with particularity below or on appeal and so has been forfeited. *See County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 763 n.23 (9th Cir. 2022).

The field-preemption defense is without merit. The presumption against preemption applies where, as here, the state regulation falls within an area of

historic state power. *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018). GEO Group has failed to demonstrate a “clear and manifest purpose of Congress” to supersede state law, as required to overcome the presumption. *United States v. California*, 921 F.3d 865, 885–86 (9th Cir. 2019) (citation omitted). The relevant contract and policy documents evince the intent of the federal government to require GEO Group’s compliance with state health-and-safety laws. *See GEO Grp., Inc. v. Inslee*, 2025 WL 2396498, at *7 (9th Cir. Aug. 19, 2025) (“The contract explicitly orders GEO [Group] to comply with obligations imposed under state law, even when those obligations are more demanding than those imposed under federal law.”).

The conflict preemption defense also fails. Compliance with the relevant federal contract and policy, as well as state law, was clearly possible. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). GEO Group has pointed to no authority suggesting that an ICE employee’s verbal directive carries preemptive effect in the absence of any indication of Congressional intent that it should.

The parties shall bear their own costs on appeal.

REVERSED and REMANDED in part; AFFIRMED in part.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d). The deadlines for seeking reconsideration of a non-dispositive order are set forth in 9th Cir. R. 27-10(a)(2).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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