JOSEPH H. HUNT
Assistant Attorney General
ROBERT S. BREWER, JR.
United States Attorney
ALEXANDER K. HAAS
Director, Federal Programs Branch
JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch
STEPHEN EHRLICH
Trial Attorney (N.Y. Bar No. 5264171)
United States Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Tel.: (202) 305-9803
Email: stephen.ehrlich@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GAVIN NEWSOM, in his Official Capacity as Governor of California; XAVIER BECERRA, in his Official Capacity as Attorney General of California; THE STATE OF CALIFORNIA,

Defendants.

Case No. 3:20-cv-00154-JLS-WVG

THE UNITED STATES' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION & MEMORANDUM OF POINTS AND AUTHORITIES

[Motion; Memorandum in Support; Declarations of John Sheehan, Pamela L. Jones, Jon Gustin, Tae D. Johnson, and Gregory J. Archambeault]

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
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MOTION

California recently passed Assembly Bill 32 (A.B. 32), which prohibits anyone from "operat[ing] a private detention facility within [California]" under a contract with a governmental entity made or extended after January 1, 2020, even if extensions are authorized by the contract. Cal. Penal Code §§ 9501, 9505(a). California, of course, is free to decide that it will no longer use private detention facilities for its own state prisoners and detainees. But it cannot dictate that choice for the United States, especially in a manner that discriminates against the Federal Government and its contractors.

The Constitution, numerous acts of Congress, and various implementing regulations give the United States both the prerogative and the authority to house individuals in federal custody, including in private detention facilities. Exercising that authority, the Federal Government has long contracted with private detention facilities to house federal prisoners and detainees, and it intends to continue that practice for the foreseeable future in order to address serious needs for detention space in California and elsewhere. The Federal Government must be allowed to make these policy choices without interference from the several States.

The United States therefore seeks to enjoin the enforcement of A.B. 32 against the Federal Government and its contractors. To obtain a preliminary injunction, the moving party must establish that it is "likely to succeed on the merits," that it is "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [its] favor," and that "an injunction is in the public interest." *CTIA v. City of Berkeley*, 928 F.3d 832, 841 (9th Cir. 2019) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Court should issue a preliminary injunction because the United States satisfies these elements, and the Court should enter a permanent injunction because no facts could change that result. The U.S. Marshals Service (USMS), Immigration and Customs Enforcement (ICE), and the Bureau of

Prisons (BOP) all contract with private detention facilities in California to house individuals in federal custody, and all three agencies would be imminently and irreparably harmed if A.B. 32 is allowed to impede federal operations.

First, A.B. 32 violates the Federal Government's intergovernmental immunity because it "regulates the United States directly" by restricting the Federal Government's contracting decisions. *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion). The Supremacy Clause forbids such state regulation because "[i]t is of the very essence of supremacy, to remove all obstacles to [the Federal Government's] action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819) (Marshall, C.J.). A.B. 32 flouts these foundational principles.

Second, A.B. 32 violates intergovernmental immunity by discriminating against the United States and its contractors. California has granted itself nine exemptions to A.B. 32 for its own private detention facilities, while simultaneously providing only three exemptions that could even facially apply to the Federal Government's private detention facilities, and that in actuality do not.

Third, A.B. 32 is field preempted, both by multiple dominant federal interests and by an integrated scheme of federal regulation. The United States has sovereign authority to house those in its custody, including foreign nationals, and this authority implicates the Federal Government's plenary power over foreign relations and immigration. The United States also has the sovereign prerogative to control rights and obligations under its own contracts. These dominant federal interests are manifested in a pervasive scheme of federal statutes and regulations authorizing USMS, BOP, and ICE to contract for private detention facilities, precluding any concurrent state regulation in that area.

Fourth, A.B. 32 is conflict preempted because it would frustrate Congress's goal in allowing USMS, BOP, and ICE to contract for private detention facilities. It would defeat Congress's purpose in mandating that BOP house federal prisoners as close to their primary residence—including their families and communities—as possible. It would thwart Congress's purpose in allowing USMS to contract for private detention facilities as a last resort when other detention options are unavailable. And it would nullify Congress's purpose in allowing ICE to rent detention facilities as a first resort before building and operating its own facilities.

Each of these Supremacy Clause doctrines is independently sufficient to invalidate A.B. 32. But taken together, these doctrines leave no doubt that A.B. 32 is unconstitutional. And although A.B. 32's unconstitutionality alone should suffice for a preliminary injunction, its damage goes far beyond that legal injury. As a result of this unconstitutional law, the United States and the public will suffer irreparable harm, including costly out-of-state relocation of federal prisoners and detainees, frequent and costly transport of prisoners and detainees after relocation, and obstruction of federal proceedings. These injuries could cripple federal law enforcement operations in California.

The United States therefore moves the Court to enjoin A.B. 32 as applied to the Federal Government and its contractors. This motion is based on the following Memorandum of Points and Authorities; the Declarations of John Sheehan (Sheehan Decl.), Pamela L. Jones (Jones Decl.), Jon Gustin (Gustin Decl.), Tae D. Johnson (Johnson Decl.), and Gregory J. Archambeault (Archambeault Decl); any oral argument that may be heard; and all pleadings and papers filed in this action.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

I. Federal Use of Private Detention Facilities

"[P]ublic entities enjoyed a near monopoly in the business of incarceration" for only "a relatively brief period from about the 1940s through the 1970s." Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 Am. Crim. L. Rev. 111, 134 (2001). At the federal level, Congress has explicitly delegated to the Executive Branch full authority over federal prisoner and detainee housing. *See* 8 U.S.C. § 1231(g)(1) ("The [Secretary of Homeland Security] shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal.") [1]; 18 U.S.C. § 4001(b)(1) ("The control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General . . . ."); *id.* § 4086 ("United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.").

And federal agencies have long exercised this authority to contract for private detention facilities. For example, BOP's inmate population more than doubled between 1980 and 1989 due to the Sentencing Reform Act of 1984, the proliferation of mandatory minimum sentences, and other factors. Jones Decl. ¶ 6. "Beginning in the mid-1980s, to help alleviate overcrowding caused by this rapidly expanding inmate population," BOP began contracting with private detention facilities. *Id.* USMS faced similar pressures. Due to the drastic increase of federal prisoners in the 1980s, "Deputy U.S. Marshals were transporting prisoners further distances in order to secure the necessary additional detention space." Sheehan Decl. ¶ 10. "In

[1] Following the Homeland Security Act of 2002, many references in the INA to the "Attorney General" are now read to mean the Secretary of Homeland Security. *See* 6 U.S.C. § 557; *Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

response to this crisis, the USMS began using private detention facilities in 1990 and secured its first private detention facility in the State of California in 2000." *Id.*

Together, USMS, BOP, and ICE house about 60,000 prisoners and detainees in private detention facilities nationwide. Sheehan Decl. ¶ 11 (more than 21,000 USMS inmates in private detention facilities in Fiscal Year 2019); Jones Decl. ¶ 12 ("Nationwide, BOP has 17,168 inmates . . . designated to private, secure facilities."); Gustin Decl. ¶ 9 (more than 7,800 BOP inmates in Residential Reentry Centers run by federal contractors); Johnson Decl. ¶ 11 (more than 13,100 ICE detainees in private detention facilities in Fiscal Year 2019, not including more than 12,600 ICE detainees held in private detention facilities under Intergovernmental Service Agreements). In California alone, these agencies house about 7,000 prisoners and detainees in private detention facilities. Sheehan Decl. ¶ 12 (more than 1,100 USMS prisoners housed within California in private detention facilities in Fiscal Year 2019); Jones Decl. ¶ 11 (more than 1,300 BOP inmates in privately operated detention facilities); Gustin Decl. ¶ 10 (about 900 BOP inmates in Residential Reentry Centers run by federal contractors); Johnson Decl. ¶ 13 (daily average of more than 3,700 ICE detainees in private detention facilities in Fiscal Year 2019). Private detention facilities account for almost 18% of housing for all federal prisoners and detainees, and almost 25% of housing for federal prisoners and detainees in California. *See* Sheehan Decl. ¶¶ 11–12; Jones Decl. ¶¶ 11–12; Johnson Decl. ¶¶ 7, 11, 13.

In procuring private detention facilities, the agencies generally negotiate contracts with a base period of operations (usually spanning several years) and one or more option periods that allow the United States to unilaterally extend arrangements with the contractor for a specified period. *See* 48 C.F.R. § 17.208(f)–(g); *id.* § 52.217-8; *id.* § 52.217-9; Gustin Decl. ¶ 11. When the Federal Government exercises these option provisions, the contractor is obligated to continue its services for the duration of the option period. *See* Gustin Decl. ¶ 11.

A. USMS Contracts in California

USMS, the nation's oldest federal law enforcement agency, is part of the U.S. Department of Justice under the supervision of the Attorney General. *See* 28 U.S.C. § 561(a); Sheehan Decl. ¶ 4. It has many critical responsibilities, including providing judicial security, apprehending fugitives, and assuring the safety of government witnesses. Sheehan Decl. ¶ 4. As relevant here, USMS is also responsible for housing and transporting federal prisoners from the time of their arrest to the time of their incarceration or acquittal. *Id.* The agency receives about 250,000 federal prisoners a year, with the responsibility to house more than 62,000 prisoners daily. *Id.*

All of USMS's private detention facilities in California are located in the Southern District of California. Sheehan Decl. ¶ 13. USMS currently has contracts with two privately owned and privately operated detention facilities: Otay Mesa Detention Center and Western Region Detention Facility. *Id.* These two facilities currently house almost 1,300 inmates. *Id.* ¶¶ 14–15. The agency also uses one federally owned detention facility—El Centro Service Processing Center (El Centro SPC)—that is privately operated. *Id.* ¶ 13. This facility will house more than 500 inmates. *Id.* ¶ 16.

USMS's Otay Mesa and El Centro contracts are currently in their base period of operations. USMS recently awarded a contract to operate the federally owned El Centro facility. *Id.* The base period for the El Centro contract will expire in December 2021, with the contract expiring in September 2028 if all options are exercised. *Id.* USMS also houses prisoners in the Otay Mesa facility under a recently awarded ICE contract. *Id.* ¶ 15. The base period for ICE's Otay Mesa contract will expire in December 2024, with the contract expiring in December 2034 if all options are exercised. *Id.*

For the Western Region contract, the United States previously exercised an option period, extending this contract beyond its base period of operation. *Id.* ¶ 14.

The current option period for the Western Region contract will expire in September 2021, with the contract expiring in September 2027 if all options are exercised. *Id.* Because USMS only pursues private detention facilities when no other available space exists, all option years are typically exercised. *Id.* ¶ 17.

USMS anticipates housing up to 1,800 inmates in these three Southern District of California facilities, accounting for almost 50% of USMS's inmates in that district and nearly 30% of USMS's inmates in California. *Id.* ¶¶ 19–20. Based on current prosecutorial trends, the detention population in California is projected to increase by about 25% by Fiscal Year 2023. *Id.* ¶ 18. USMS is currently maximizing all available facilities in California, as well as surrounding States, in order to meet the overwhelming need for detention space in California. *Id.*

B. BOP Contracts in California

Like USMS, BOP is part of the U.S. Department of Justice under the supervision of the Attorney General. *See* 18 U.S.C. § 4041. BOP is responsible for confining federal inmates "in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure." Jones Decl. ¶ 5. Residential Reentry Centers (commonly called halfway houses) are one type of community-based facility used by BOP. Gustin Decl. ¶ 6. These Residential Reentry Centers—none of which is operated by BOP—provide "inmates with a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, drug and alcohol testing and counseling, and other programs and services as they transition back to the community."[2] Gustin Decl. ¶¶ 6–7.

BOP uses one federally owned and privately operated detention facility in California, Taft Correctional Institution (Taft CI), which houses about 1,400 inmates.

[2] Reentry Centers also supervise inmates on home confinement. *See* Gustin Decl. ¶¶ 6, 12–22.

Jones Decl. ¶¶ 9, 13. This contract will expire in March 2020. *Id.* ¶ 14. Although BOP previously considered not renewing the Taft CI contract due to infrastructure issues, BOP is currently awaiting the report from a feasibility study to determine if the facility could remain operational while repairs are made. *Id.* If Taft CI can remain operational, then BOP may seek to extend its current contract or award a new one. *Id.* BOP does not currently have plans to contract for other private prisons in California, but it is evaluating its needs and may pursue contracting for such facilities in the future. *Id.* ¶ 15.

BOP also has contracts with ten privately owned and privately operated Residential Reentry Centers throughout the State that house and supervise about 900 BOP inmates. Gustin Decl. ¶¶ 10, 12. These Reentry Centers are located as follows: one in Riverside, one in Oakland, one in San Francisco, one in San Diego, one in Garden Grove, one in El Monte, one in Brawley, one in Van Nuys, and two in Los Angeles. *Id.* ¶¶ 12–22. The current periods for these contracts will expire in: September 2020 for the Riverside facility; February 2021 for the Oakland facility[3]; March 2020 for the San Francisco facility; May 2020 for the San Diego facility; August 2020 for the Garden Grove facility; September 2020 for the El Monte facility; September 2020 for the Brawley facility; September 2020 for the Van Nuys facility; and September 2020 and November 2020 for the Los Angeles facilities. *Id.* If all options are exercised, the contracts will expire in: September 2029 for the Riverside facility; January 2030 for the Oakland facility; March 2021 for the San Francisco facility; May 2021 for the San Diego facility; August 2024 for the Garden Grove facility; September 2029 for the El Monte facility; September 2029 for the Brawley

[3] Although BOP's current contract with the Oakland Reentry Center expires in January 2020, BOP executed a new contract for this facility in December 2019. The new contract has a base period of operation from February 2020 through February 2021, with the contract expiring in January 2030 if all options are exercised. Gustin Decl. ¶ 14.

facility; September 2029 for the Van Nuys facility; and November 2023 and September 2029 for the Los Angeles facilities. *Id.* "Given BOP's need for Residential Reentry Centers, all option years are typically exercised." *Id.* ¶ 11.

BOP also recently closed one solicitation for a Reentry Center in the Eastern District of California in October 2019, and it has one open solicitation for a Reentry Center in the San Francisco area. *Id.* ¶ 24. Based on its need for Reentry Centers, BOP intends to open another solicitation for a Reentry Center in the San Diego area. *Id.* Absent A.B. 32, BOP anticipates that these three Reentry Centers would begin operations in 2021. *Id.*

BOP maintains capacity in Reentry Centers for use by federal courts as an intermediate sanction during supervision or probation. *Id.* ¶ 26. This function uses about 15–20% of the total Reentry Center capacity nationwide. *Id.* Although individuals housed under this arrangement are not in BOP custody, BOP maintains available beds to meet the courts' needs. *Id.*

The First Step Act of 2018 also expanded BOP's use of Reentry Centers, authorizing extended placement in Reentry Centers for inmates who have earned time credits under the risk-and-needs-assessment system.[4] *See* 18 U.S.C. §§ 3621, 3624(g); Gustin Decl. ¶ 25. So BOP anticipates a significant increase in the need for California Reentry Centers within the next few years. Gustin Decl. ¶ 25.

C. ICE Contracts in California

As part of the Department of Homeland Security, ICE "is charged with enforcement of more than 400 federal statutes, and its mission is to protect the United States from the cross-border crime and illegal immigration that threaten national security and public safety." Johnson Decl. ¶ 5.

[4] The risk-and-needs-assessment system is a tool designed to predict the likelihood of general and violent recidivism and identify needed areas of programming for BOP inmates. Gustin Decl. ¶ 25.

ICE neither constructs nor operates its own detention facilities. *Id.* ¶ 8. Due to significant fluctuations in the number and location of aliens, it is important for ICE to maintain flexibility for its detention facilities. *Id.* Otherwise, ICE could invest heavily in its own facilities only to have them stand idle if a particular area later experiences a drastic decrease in demand for detainee housing. *Id.*

ICE currently houses detainees in California under four contracts with the operators of four private detention facilities: Mesa Verde ICE Processing Center (owned and operated by The GEO Group, Inc.), Adelanto ICE Processing Center (owned and operated by The GEO Group, Inc.), Imperial Regional Detention Facility (owned and operated by the Management and Training Corporation), and Otay Mesa Detention Center (owned and operated by CoreCivic). *Id.* ¶¶ 15–18. Two of those contracts—executed in December 2019—additionally provide for the future housing of ICE detainees at three other private detention facilities operated by The GEO Group. *Id.* ¶¶ 15–16.

The base periods for all four contracts will expire in December 2024, with the contracts expiring in December 2034 if all options are exercised. *Id.* ¶¶ 15–18. The four current facilities housed an average of about 3,700 detainees per day in Fiscal Year 2019, and the three additional facilities will provide space for an additional 2,150 detainees beginning in August 2020. *Id.* ¶¶ 13, 15–16.

II. Assembly Bill 32

In December 2018, when A.B. 32 was originally introduced in the California legislature, it prohibited only the California Department of Corrections and Rehabilitation from entering into a new contract, or renewing an existing contract, with a "private, for-profit prison facility located in or outside [California] to provide housing for state prison inmates." A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2018); *see* Cal. Penal Code § 5003.1(a). Similar to laws in other States, the bill restricted only *California itself* from contracting with "private, for-profit prison" facilities. *See* Iowa

Code § 904.119; 730 Ill. Comp. Stat. 140/3; N.Y. Correction Law §§ 2, 121. In May 2019, A.B. 32 was amended to add an exception for "facilit[ies] that [are] privately owned, but [are] leased and operated by the department," A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019); Cal. Penal Code § 5003.1(d). This addition was presumably intended to exclude the California City Correctional Center—the only facility matching that description—from A.B. 32's ambit.[5] Later, A.B. 32 was amended again to add an exception to allow the Department of Corrections and Rehabilitation "to comply with the requirements of any court-ordered population cap." Cal. Penal Code § 5003.1(e).

It was not until June 2019, six months after introduction of A.B. 32, that the bill was revised to restrict *civil* detention facilities, notably including the Federal Government's immigration-related detention facilities. *See* A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019). This was purposeful. *See* Senate Judiciary Committee, A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019) (noting that the amendment "expands the scope of the bill to . . . includ[e] facilities used for immigration detention" and that "[i]t's clearly not enough to focus our legislation solely on criminal detention facilities"). California's Senate Judiciary Committee even provided a five-page legal analysis, explaining that "[t]he Federal Government will likely challenge AB 32 by arguing that AB 32 is preempted by federal immigration law" and "that AB 32 violates the Intergovernmental Immunity Doctrine." *Id.* And when Governor Newsom signed A.B. 32 into law, he touted the enactment as "phas[ing]

[5] *See* California Department of Corrections and Rehabilitation, California City Correctional Center, https://www.cdcr.ca.gov/facility-locator/cac/ (last visited February 5, 2020) (stating that the California City Correctional Center "is owned by CoreCivic, leased, staffed and operated under the authority of the California Department of Corrections and Rehabilitation").

out the use of all private, for-profit prisons, including both prisons and immigration detention facilities, in California."[6]

At the same time it expanded A.B. 32 to reach the United States' civil immigration-related facilities, California also added various exceptions that removed its *own* private, civil detention facilities from A.B. 32's prohibition on private detention. *See* A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019). Five of these exceptions apply only to California's own contracts and are facially inapplicable to the Federal Government's contracts: an exception for facilities "providing rehabilitative, counseling, treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court pursuant to [California law]"; an exception for facilities "providing evaluation or treatment services to a person who has been detained, or is subject to an order of commitment by a court, pursuant to [California law]"; an exception for "residential care facilit[ies] licensed pursuant to [California law]"; an exception for facilities "used for the quarantine or isolation of persons for public health reasons pursuant to [California law]"; and an exception for facilities "used for the temporary detention of a person detained or arrested by a merchant, private security guard, or other private person pursuant to [California law]." Cal. Penal Code § 9502(a)–(b), (d), (f)–(g).

Only three exceptions conceivably apply to contracts of both California *and* the Federal Government: an exception for facilities "providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency"; an exception for school facilities "used for the disciplinary detention of a pupil"; and an exception for "any privately owned

[6] *See* Office of the Governor, *Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California*, https://www.gov.ca.gov/2019/10/11/governor-newsom-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california/.

property or facility that is leased and operated by the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency." Cal. Penal Code § 9502(c), (e); § 9503.

Absent an enumerated exception, A.B. 32 prohibits *anyone* from "operat[ing] a private detention facility within [California]" under a contract made or extended after January 1, 2020, even if extensions are authorized by the contract.[7] *Id.* §§ 9501, 9505(a). The law broadly defines "detention facility" as "any facility in which persons are incarcerated or otherwise involuntarily confined for purposes of execution of a punitive sentence imposed by a court or detention pending a trial, hearing, or other judicial or administrative proceeding." *Id.* § 9500(a). And it defines "private detention facility" as a "detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity." *Id.* § 9500(b). These broad definitions sweep in both the Federal Government's civil immigration-related detention facilities *and* the private detention facilities used by USMS and BOP to house federal prisoners.

LEGAL STANDARDS

To obtain a preliminary injunction, the moving party must establish that it is "likely to succeed on the merits," that it is "likely to suffer irreparable harm in the absence of preliminary relief," that "the balance of equities tips in [its] favor," and that "an injunction is in the public interest." *CTIA*, 928 F.3d at 841 (quoting *Winter*, 555 U.S. at 20). Generally, where the United States has demonstrated a likelihood of success on the merits of a Supremacy Clause claim, the other factors similarly favor an injunction. *See, e.g. Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013); *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part, rev'd in part*, 567 U.S. 387 (2012).

[7] For purposes of this motion, the United States assumes, but does not concede, that option periods are considered extensions within the meaning of A.B. 32.

ARGUMENT

I. THE UNITED STATES IS LIKELY TO SUCCEED ON THE MERITS

A. A.B. 32 Violates Intergovernmental Immunity by Regulating the United States' Contracts and Operations.

By attempting to eliminate one category of contracts (and contractors) for the Federal Government, California has violated the Supremacy Clause. Under the doctrine of intergovernmental immunity, "activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943); *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991) ("[T]he states may not directly regulate the Federal Government's operations or property."). This foundational principle means that California cannot regulate, much less abolish, the United States' contracts for private detention facilities.

As the Supreme Court explained long ago, "[t]he sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission," but it does not "extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States[.]" *McCulloch*, 17 U.S. at 429. That is why the Supreme Court has, for centuries, distinguished between *property* of the Federal Government's contractors—which States may regulate on equal terms as other property—and *operations* of the Federal Government and its contractors—which States cannot regulate at all.[8] *Weston v. City Council of Charleston*, 27 U.S. 449, 469 (1829) (Marshall, C.J.) (holding that although "property acquired by [the bank of the United States] in a state was supposed to be placed in the same condition with property acquired by an individual," a "tax on government stock is thought by this Court to be a tax on the contract . . . and

[8] Although many intergovernmental-immunity cases concern state taxation, "the principles of the intergovernmental tax immunity doctrine apply to the general intergovernmental immunity doctrine." *United States v. California*, 921 F.3d 865, 883 (9th Cir. 2019).

consequently to be repugnant to the constitution"); *Osborn v. Bank of U.S.*, 22 U.S. 738, 866–67 (1824) (Marshall, C.J.) ("It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the Bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.").[9]

This well-settled principle has been consistently applied to invalidate state laws that impose requirements on federal contractors.[10] In *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189–90 (1956) (per curiam), and *Gartrell Construction Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991), States sought to prevent the Federal Government from entering into agreements with its chosen contractors until the States' own licensing standards were satisfied. The Supreme Court and the Ninth Circuit, respectively, struck down these state laws because they "evinced [S]tates' active frustration of the Federal Government's ability to discharge its operations." *United States v. California*, 921 F.3d 865, 885 (9th Cir. 2019).[11] Similarly, in *Boeing Co. v. Movassaghi*, 768 F.3d

[9] *See also United States v. Fresno Cty.*, 429 U.S. 452, 462 (1977) (canvassing prior cases and explaining that "a State may, in effect, raise revenues on the basis of property owned by the United States" if the property "is being used by a private citizen or corporation" and the tax is nondiscriminatory); *James v. Dravo Contracting Co.*, 302 U.S. 134, 155 (1937) (quoting *Union Pac. R. Co. v. Peniston*, 85 U.S. 5, 41 (1873)) (explaining that "so long as [a federal contractor's] contract and its execution are not interfered with," "[h]ow much he may be taxed by, or what duties he may be obliged to perform towards[] his State is of no consequence to the [federal] government"); *Union Pac. R. Co. v. Peniston*, 85 U.S. 36–37 (1873) (recognizing the "distinction, so clearly drawn in the earlier [Supreme Court] decisions, between a tax on the property of a governmental agent, and a tax upon the action of such agent," and explaining that "[a] tax upon their operations is a direct obstruction to the exercise of Federal powers").

[10] As the Ninth Circuit has observed, "[f]or purposes of intergovernmental immunity, federal contractors are treated the same as the Federal Government itself." *California*, 921 F.3d at 882 n.7 (citations omitted); *see North Dakota v. United States*, 495 U.S. 423, 438 (1990) (plurality opinion) ("[A] regulation imposed on one who deals with the Government has as much potential to obstruct governmental functions as a regulation imposed on the Government itself.").

[11] *See also Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334, 1340 (Fed. Cir. 2005) (holding that "California has no authority to require that attorneys practicing before the [Merits Systems Protection] Board obtain a state license or to regulate the award of fees for work before federal agencies"); *United States v. Virginia*, 139 F.3d 984,

832 (9th Cir. 2014), California attempted to impose more stringent environmental-cleanup standards on a federal contractor than those imposed on the contractor by the federal Department of Energy. *Id.* at 834–37. The Ninth Circuit rejected the State's effort, holding that California violated intergovernmental immunity by "overrid[ing] federal decisions as to necessary decontamination measures" and "regulat[ing] not only the federal contractor but the effective terms of federal contract itself." *Id.* at 840; *see also California*, 921 F.3d at 880 (noting that intergovernmental immunity is implicated when state laws "directly or indirectly affect[] the operation of a federal program or contract").

A.B. 32 goes much further than the state laws invalidated in those cases. Rather than placing certain requirements on the United States' chosen contractors, A.B. 32 bans the United States' chosen contractors *altogether*; it prevents the Federal Government from employing private companies to house federal prisoners and detainees when its current contracts expire. But if a State cannot enforce "license requirements [that] would give the State's licensing board a virtual power of review over the federal determination," *Leslie Miller*, 352 U.S. at 190, or "mandate[] the ways in which [a federal contractor] renders services that the Federal Government hired [the contractor] to perform," *Boeing*, 768 F.3d at 840, then California certainly cannot surpass those measures and eradicate federal contractors altogether.

A.B. 32's constitutional infirmity is most obvious when the United States *owns* a detention facility and contracts with a private company to *operate* the facility, as with El Centro SPC and Taft CI. *See* Sheehan Decl. ¶ 13; Jones Decl. ¶ 13. A.B. 32 bars even this arrangement. *See* Cal. Penal Code § 9500(b) (defining "Private detention

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987–88 (4th Cir. 1998) (holding that the Virginia Criminal Justice Services Board could not require private investigators under contract with the FBI to obtain state private investigator licenses); *Taylor v. United States*, 821 F.2d 1428, 1431–32 (9th Cir. 1987) (noting that California could not require an army hospital or its health care providers to be licensed under state law).

facility" as "a detention facility that is *operated* by a private, nongovernmental, for-profit entity" (emphasis added)); *id.* § 9503 (exempting "*privately owned* property . . . that is *leased and operated*" by a law enforcement agency (emphasis added)). But the United States has constitutional control of its own property. U.S. Const., art. IV, § 3, cl. 2 ("Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States."). So it is difficult to imagine a more straightforward violation of the Constitution than a State attempting to dictate allowable personnel and activities in federally owned facilities. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 (1988) ("[A] federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation.").

It makes no difference that A.B. 32 does not expressly mention the Federal Government. *See United States v. California*, 2018 WL 5780003, at *4 (E.D. Cal. Nov. 1, 2018) (explaining that a state law "may not expressly name the Federal Government as its intended object of regulation, but that does not mean the law does not directly regulate the United States"). Nor does it matter that California restricts both its own ability to contract with private detention facilities and the United States' ability to do so. Indeed, "no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere [with federal operations] has been regarded as established since [1819]."[12] *Johnson v. Maryland*, 254 U.S. 51, 55–56 (1920) (Holmes, J.) (citing *McCulloch*, 17 U.S. 316). "[E]ven the most unquestionable and most universally applicable of state laws . . . will not be allowed to control the

[12] As explained below, A.B. 32 is far from "universal and undiscriminating" and it also violates intergovernmental immunity by discriminating against the United States and its contractors.

conduct of" individuals "acting under and in pursuance of the laws of the United States." *Id.* at 56–57.

If States could regulate—or outright ban—certain contracts with the United States, the Federal Government would grind to a halt. Chief Justice Marshall recognized, and dismissed, this notion almost two centuries ago:

> Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.

Osborn, 22 U.S. at 867. Modern examples only further demonstrate this absurdity. Could a State thwart Department of Defense contracts (and national security) by prohibiting any person from manufacturing fighter jets, missiles, and submarines under a contract with the Federal Government? Could a State hamper contracts (and critical research) of the Environmental Protection Agency and the Department of Health and Human Services by forbidding any person from operating a research laboratory under a contract with the Federal Government? Surely not. Federal powers "are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme," and "the people of a single state cannot confer a sovereignty which will extend over them." *McCulloch*, 17 U.S. at 429.

A.B. 32 contravenes bedrock principles of our constitutional system. California can freely decide that it will no longer use private detention facilities for its own prisoners and detainees. But it cannot unilaterally apply its policy preference to the United States because "a concurrent power in the [S]tates" to regulate federal operations "would bring back all the evils and embarrassments, which the uniform rule of the [C]onstitution was designed to remedy." 2 J. Story, COMMENTARIES ON THE CONSTITUTION § 1099 (3d ed. 1858).

B. A.B. 32 Violates Intergovernmental Immunity by Discriminating Against the Federal Government and its Contractors.

A.B. 32 also violates intergovernmental immunity because it discriminates against the United States and its contractors. State laws are invalid if they "discriminate against the Federal Government or those with whom it deals." *California*, 921 F.3d at 878 (citations and alterations omitted) (quoting *Boeing*, 768 F.3d at 839). This "nondiscrimination rule prevents states from meddling with Federal Government activities indirectly by singling out for regulation those who deal with the government." *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 892, 903 (N.D. Cal. 2007). Intergovernmental immunity is therefore violated when a State "treats someone else better than it treats" the United States or its contractors. *Washington v. United States*, 460 U.S. at 544–45. With A.B. 32, California has done exactly that.

Most prominently, California carved out an exception in A.B. 32 that allows the State to "renew or extend a contract with a private, for-profit prison facility to provide housing for state prison inmates in order to comply with the requirements of any court-ordered population cap." Cal. Penal Code § 5003.1(e). But no comparable exception exists for the Federal Government to cope with overcrowding in *its* facilities under a court order or otherwise. This presents a serious problem, as A.B. 32 may cause overcrowding in federal facilities both in California and neighboring States. Sheehan Decl. ¶ 22; Jones Decl. ¶ 19; Archambeault ¶ 14. So by allowing only itself—not the Federal Government—to combat overcrowding by contracting with private detention facilities, California has plainly "treat[ed] someone else better than it treats" the United States and its contractors. *Washington,* 460 U.S. at 544–45.

California's discrimination does not stop with criminal detention. During the legislative process, California simultaneously expanded A.B. 32 to prohibit *all* private

detention facilities—including those under contract with the United States—while exempting the State's own private, civil detention facilities from A.B. 32's prohibition. *See* A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019). In doing so, California added five exceptions that apply to its own contracts but are facially inapplicable to the Federal Government's contracts: facilities "providing rehabilitative, counseling, treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court pursuant to [California law]"; facilities "providing evaluation or treatment services to a person who has been detained, or is subject to an order of commitment by a court, pursuant to [California law]"; "residential care facilit[ies] licensed pursuant to [California law]"; facilities "used for the quarantine or isolation of persons for public health reasons pursuant to [California law]"; and facilities "used for the temporary detention of a person detained or arrested by a merchant, private security guard, or other private person pursuant to [California law]." Cal. Penal Code § 9502(a)–(b), (d), (f)–(g). Only three exceptions potentially apply to contracts of both the United States *and* California: facilities "providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency"; school facilities "used for the disciplinary detention of a pupil"; and "any privately owned property or facility that is leased and operated by the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency." *Id.* § 9502(c), (e); § 9503.

Of the nine exceptions in A.B. 32, California can (and likely will) use all nine to continue contracting with private detention facilities, while the Federal Government can conceivably apply only three. This alone should invalidate A.B. 32. *Washington*, 460 U.S. at 544–45 (explaining that a State violates intergovernmental immunity

when it "treats someone else better than it treats" the United States or its contractors).

And of the three exceptions that might conceivably apply to the United States' contracts, the Federal Government cannot currently use any of them. The Federal Government does not contract, and has never contracted, with "school facilit[ies] used for the disciplinary detention of a pupil" in California. Cal. Penal Code § 9502(e); Sheehan Decl. ¶ 30; Jones Decl. ¶ 9; Johnson Decl. ¶ 19. Nor does any federal law enforcement agency "lease[] and operate[]" a detention facility in California that is "privately owned." Cal. Penal Code § 9503; Sheehan ¶ 30; Jones Decl. ¶ 9; Johnson Decl. ¶ 19. In fact, the only facility in the State that would currently meet this exception is the California City Correctional Center, which is owned by a private company and conveniently "leased and operated" by the California Department of Corrections and Rehabilitation.[13]

The Federal Government also does not contract for facilities in California "providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of" a federal "law enforcement agency." Cal. Penal Code § 9502(c); Sheehan Decl. ¶ 30; Johnson Decl. ¶ 19. The Reentry Centers used by BOP come closest to meeting this exception. But although the Reentry Centers provide employment counseling, job placement, financial management assistance, and other programs to inmates nearing release, they are not exempted from A.B. 32, because inmates in Reentry Centers are not "in the custody of, and under the direct supervision of" BOP. Gustin Decl. ¶ 7 ("Residential Reentry

[13] *See* California Department of Corrections and Rehabilitation, California City Correctional Center, https://www.cdcr.ca.gov/facility-locator/cac/ (last visited February 5, 2020) (stating that the California City Correctional Center "is owned by CoreCivic, leased, staffed and operated under the authority of the California Department of Corrections and Rehabilitation").

Centers are staffed and managed by contractor employees."). The only facilities in the State that would seemingly meet this exception are in California's Alternative Custody Program (roughly equivalent to the Reentry Centers used by BOP), which are directly operated by the California Department of Corrections and Rehabilitation.[14]

The result is a statutory scheme where nearly all of California's contracts for private, civil detention facilities (and its contracts for private prisons needed to address overcrowding) are permitted, while the Federal Government's contracts for private detention facilities are not. Intergovernmental immunity precludes this result. *See North Dakota*, 495 U.S. at 438 (citing *Washington*, 460 U.S. at 544–45).

C. A.B. 32 is Field Preempted.

A.B. 32 is field preempted because Congress has occupied the field of contracting for federal prisoner and detainee housing. Field preemption occurs where "Congress, acting within its proper authority, has determined" that a field "must be regulated by its exclusive governance." *Arizona v. United States*, 567 U.S. 387, 399 (2012); *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018). Congress's "intent to displace state law altogether can be inferred" from a "federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or where there is "a framework of regulation so pervasive that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 399 (citations omitted); *Valle del Sol Inc.*, 732 F.3d at 1022. Both iterations of field preemption are satisfied here.

[14] *See* California Department of Corrections and Rehabilitation, Alternative Custody Program, https://www.cdcr.ca.gov/adult-operations/acp/ (last visited February 5, 2020) ("ACP participants remain under the jurisdiction of the California Department of Corrections and Rehabilitation (CDCR) and are supervised by parole agents while in the community.").

1. Multiple dominant federal interests preclude state regulation of contracts for federal prisoner and detainee housing.

At least three dominant federal interests preclude A.B. 32: (1) the Federal Government's prerogative to provide for those in its custody, (2) the federal power over foreign relations and immigration, and (3) the United States' authority to control rights and obligations under its contracts.

Most straightforwardly, federal prisoners and detainees are held by the United States only because they have violated (or may have violated) federal law, so the Federal Government has both the unquestionable power and the unflinching obligation to house those in its custody. *See* 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."); *id.* § 4086 ("United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution."); *United States v. Comstock*, 560 U.S. 126, 137 (2010) (explaining that Congress "possesses broad authority" to "criminalize conduct," to "imprison individuals who engage in that conduct," and to "enact laws governing prisons and prisoners"). Congress has not only recognized this responsibility, but has explicitly delegated it to the Executive Branch. *See* 8 U.S.C. § 1231(g)(1); 18 U.S.C. §§ 3621(b), 4001(b)(1), 4086. Allowing States to regulate in this field would impermissibly encroach on the United States' sovereign prerogative to house *its own* prisoners and detainees—here, by nullifying the Executive Branch's decision to use a congressionally authorized housing option.

This is particularly troubling because the Federal Government maintains custody of its own citizens as well as foreign nationals, implicating the United States' foreign-relations and immigration powers. "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and

expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 567 U.S. at 395. The Supreme Court has described it as "fundamental" that "foreign countries concerned about the *status, safety, and security* of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States." *Id.* (emphasis added). The Federal Government can neither adequately control the safety and security of aliens in its custody, nor communicate effectively with foreign countries as "one national sovereign," if States like California are allowed to dictate how and where the United States may house such individuals.

Indeed, this would contravene the Supreme Court's repeated admonition that "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the [S]tate also acts on the same subject," the state law must give way. *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941); *see Arizona*, 567 U.S. at 401 (concluding that the Federal Government "has occupied the field of alien registration"); *Hillsborough Cty., Fla. v. Automated Med. Labs.*, Inc., 471 U.S. 707, 719 (1985) (recognizing "the dominance of the federal interest" in immigration and foreign affairs as the paradigmatic example of field preemption); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (acknowledging that States "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization *and residence* of aliens in the United States or the several states" (emphasis added)). This dominant federal interest applies doubly to A.B. 32 because the United States is not merely regulating foreign nationals on American soil, but is regulating the detention of aliens in federal custody—a vital part of the deportation process. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (explaining that Congress's "considerable authority over immigration matters" includes the "power to detain aliens in connection with removal").

A.B. 32 also interferes with (in fact, eliminates) the United States' sovereign authority to control obligations to and rights of the United States under its contracts for federal prisoner and detainee housing. As "an incident to the general right of sovereignty," the United States has inherent authority to "enter into contracts not prohibited by law[] and appropriate to the just exercise of [its] powers." *United States v. Tingey*, 30 U.S. 115, 128 (1831). The Supreme Court has unequivocally held that "obligations to and rights of the United States under its contracts are governed exclusively by federal law," because they involve "uniquely federal interests." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("[T]he Government enjoys the unrestricted power to . . . determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."). And where, as here, "the federal interest requires a uniform rule, the entire body of state law applicable to the area" should be preempted. *Boyle*, 487 U.S. at 507–08; *see, e.g.*, *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943) (rights and obligations of the United States with respect to commercial paper must be governed by uniform federal rule). Were it otherwise, States like California could supplement or eliminate contractual terms negotiated between the national sovereign and a federal contractor executing sovereign prerogatives.

Individually or combined, these dominant federal interests preempt the field of contracts for federal prisoner and detainee housing.

2. Congress enacted a framework of regulation so pervasive as to preclude state regulation of contracts for federal prisoner and detainee housing.

A.B. 32 is also field preempted because there is "a framework of regulation so pervasive that Congress left no room for the States to supplement it." *Arizona*, 567 U.S. at 399. This framework precludes state regulation of contracts for federal prisoner and detainee housing.

To begin, Congress has explicitly delegated to the Executive Branch full authority over federal prisoner and detainee housing. *See* 8 U.S.C. § 1231(g)(1) ("The [Secretary of Homeland Security] shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal."); 18 U.S.C. § 4001(b)(1) ("The control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General . . . ."); *id.* § 3621(b) ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment."); *id.* § 4086 ("United States marshals shall provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution."); 28 C.F.R. § 0.111(k) (delegating to USMS responsibility for the "[s]ustention of custody of Federal prisoners from the time of their arrest . . . until the prisoner is" ordered to serve a sentence, released from custody, or "returned to the custody of the U.S. Parole Commission or the [BOP]"). And expenses for federal detention are paid out of the U.S. Treasury. 18 U.S.C. §§ 4007, 4008, 4009.

Congress also contemplated the custody of federal prisoners and detainees in facilities not operated by the Federal Government, and it provided a pervasive framework for doing so. The Attorney General is congressionally authorized to use his "reasonable discretion" to carry out "the activities of the Department of Justice" through "any means, including . . . through contracts, grants, or cooperative agreements with non-Federal parties." 28 U.S.C. § 530C(a)(4); *see also id.* § 530C(b)(7). And in "support of United States prisoners in non-Federal institutions," Congress

specifically authorized the Attorney General to fund USMS custody of individuals "under agreements with State or local units of government or contracts with private entities." 18 U.S.C. § 4013(a). USMS may therefore "designate districts that need additional support from private detention entities" based on its consideration of "the number of Federal detainees in the district" and "the availability of appropriate Federal, State, and local government detention facilities." 18 U.S.C. § 4013(c)(1); 28 C.F.R. § 0.111(o) (giving USMS the authority to acquire "adequate and suitable detention space . . . to support prisoners under the custody of the U.S. Marshal who are not housed in Federal facilities").

Similarly, Congress not only codified the Executive Branch's broad authority to detain aliens under various circumstances, *see* 8 U.S.C. §§ 1226, 1231; *see also id.* §§ 1222, 1225, 1226a, but Congress also "placed the responsibility of determining where aliens are detained within the discretion of the" Secretary of Homeland Security, *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1440 (9th Cir. 1986); 8 U.S.C. § 1231(g)(1). And the Secretary of Homeland Security is congressionally authorized to provide appropriate detention facilities for detainees, including by renting "facilities adapted or suitably located for detention" and by entering cooperative agreements with States and localities. 8 U.S.C. §§ 1103(a)(11)(B), 1231(g)(1). The Secretary of Homeland Security may also "acquire, build, remodel, repair, and operate facilities . . . necessary for detention," but must first "consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use." *Id.* § 1231(g)(1)–(2).

Congress also gave BOP the authority to "designate the place of . . . imprisonment" for persons sentenced to incarceration. 18 U.S.C. §§ 3621, 4042. And BOP "may designate" as a place of confinement "any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau [of Prisons], whether maintained by the Federal

Government or otherwise." *Id.* § 3621(b); 28 C.F.R. § 500.1(c) (defining "inmate" to mean "all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities"). This plain language "gives BOP open-ended authority to place federal prisoners in 'any available penal or correctional facility' that meets minimum standards of health and habitability without regard to what entity operates the prison." Statutory Authority to Contract with the Private Sector for Secure Facilities, 16 Op. O.L.C. 65, 67 (1992); *see* 28 U.S.C. § 530C(a)(4) ("[T]he activities of the Department of Justice . . . may, in the reasonable discretion of the Attorney General, be carried out through any means, including . . . through contracts, grants, or cooperative agreements with non-Federal parties."); *see also* 18 U.S.C. § 4002 (allowing contracts with "any State, Territory, or political subdivision thereof"). In making such determinations, Congress directed BOP to consider numerous factors, such as "bed availability," the "prisoner's security designation," the "prisoner's programmatic needs," the "prisoner's mental and medical health needs," the "resources of the facility contemplated," and most importantly, "the prisoner's primary residence." *Id.* § 3621(b).

Congress has also expressly directed that BOP "shall, to the extent practicable," ensure that a federal prisoner "serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." *Id.* § 3624(c).[15] BOP has long used privately

[15] Many other statutes and regulations also contemplate housing individuals in federal custody outside of federal facilities. *See, e.g.*, 18 U.S.C. § 3142(i) (providing for commitment of pretrial detainees to the custody of the Attorney General for "confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal"); *id.* § 3563(b)(10)–(11) (allowing prisoners to reside in "a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation"); 18 U.S.C. §§ 4241–47 (providing for civil commitment of persons for examinations of competency, restoration of competency, and insanity);

contracted Reentry Centers to comply with this statutory directive, which was even further expanded by the First Step Act of 2018, authorizing extended placement in Reentry Centers for inmates who earned time credits under the risk-and-needs-assessment system. *See* 18 U.S.C. §§ 3621, 3624(g); Gustin Decl. ¶¶ 6, 25.

Undergirding this pervasive framework governing federal prisoner and detainee housing is another pervasive framework: the Executive Branch's uniform regulations governing federal agencies' procurement. Congress established the Office of Federal Procurement Policy within the Office of Management and Budget to "promote economy, efficiency, and effectiveness in the procurement of property and services by the [E]xecutive [B]ranch." 41 U.S.C. § 1101(b). Under this authority, the Executive Branch has promulgated more than 2000 pages[16] of uniform policies and procedures governing acquisition by all federal agencies, spanning everything from contractor qualifications and acquisition planning to contract financing and contract provisions. *See* 48 C.F.R. § 1.101. These regulations explicitly provide for contractual provisions—called "Option[s] to Extend Services" and "Option[s] to Extend Term of Contract"—that allow the United States to unilaterally extend arrangements with its contractors for a specified period. *See id.* § 17.208(f)–(g); *id.* § 52.217-8; *id.* § 52.217-9. If these provisions are included in the negotiated contract, the federal contractor is obligated to continue its services when the Federal Government exercises these provisions. *See id.* Nearly all USMS, BOP, and ICE

id. § 4248 (providing for civil commitment of sexually dangerous persons); *id.* § 5039 ("Whenever possible, the Attorney General shall commit a juvenile to a foster home or community-based facility located in or near his home community."); 28 C.F.R. § 523.13 (contemplating good-time credit for inmates in "a Federal or contract Community Corrections Center").

[16] *See* General Services Administration, Federal Acquisition Regulation, https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf.

contracts at issue contain one, or both, of these option provisions. *See* Sheehan Decl. ¶¶ 14–16; Gustin Decl. ¶¶ 12–22; Johnson Decl. ¶¶ 15–18.

These comprehensive statutory and regulatory regimes cover the field of contracting for federal prisoner and detainee housing by "provid[ing] a full set of standards" for USMS, BOP, and ICE.[17] *Arizona*, 567 U.S. at 401. Congress struck a "careful balance" governing contracts for private detention facilities by allowing the Executive Branch to contract for these facilities after considering enumerated statutory factors. *See id.* at 400 (noting field preemption where Congress has struck a "careful balance"); *see, e.g.*, 8 U.S.C. § 1231(g)(1)–(2); 18 U.S.C. §§ 3621(b), 4013(c)(1). And the universally applicable contracting regulations were "designed as a harmonious whole," *Arizona*, 567 U.S. at 401, to determine the appropriate provisions for Executive Branch contracts, including option provisions that allow the United States to unilaterally extend arrangements with its contractors for a specified period. *See* 48 C.F.R. § 1.101 ("The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies."); *id.* § 17.208(f)–(g); *id.* § 52.217-8; *id.* § 52.217-9. The "full set of standards," *Arizona*, 567 U.S. at 401, and delegation of authority to federal agencies only reinforce Congress's determination that the Executive Branch, not any individual State, is responsible for weighing the enumerated factors and contracting for federal prisoner and detainee housing. *See United States v. Alabama*, 691 F.3d 1269, 1287 (11th Cir. 2012) (finding a state law preempted because, among other reasons, it "undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration").

[17] "In determining field preemption, federal regulations have no less pre-emptive effect than federal statutes." *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 733 (9th Cir. 2016) (alterations omitted) (quoting *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)).

In fact, courts have found that state laws are not preempted specifically because those laws did *not* intrude on the Federal Government's ability to contract for federal prisoner and detainee housing. In *Geo Group, Inc. v. City of Tacoma*, for example, the court found that a state zoning ordinance limiting modifications or expansions of ICE detention facilities was not field preempted because it did "not impact the Attorney General's ability to rent 'facilities adapted or suitably located for detention,' [under 8 U.S.C. §] 1231(g)." *Geo Group, Inc. v. City of Tacoma*, 2019 WL 5963112, at *7 (W.D. Wash. Nov. 13, 2019).[18] Here, in stark contrast, A.B. 32's very purpose is to interfere with the Federal Government's ability to house its prisoners and detainees by "requir[ing] that federal detention decisions conform to state law." *California*, 921 F.3d at 885–86; *see* Senate Judiciary Committee, A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019) (explaining that A.B. 32 was expanded to "includ[e] facilities used for immigration detention").

If A.B. 32 were valid, "every State could give itself independent authority to" eliminate federal contracts for prisoner and detainee housing, "diminishing the [United States'] control over enforcement and detracting from the integrated scheme of regulation created by Congress." *See Arizona*, 567 U.S. at 401–02 (alterations omitted) (quoting *Wisc. Dep't of Ind. v. Gould Inc.*, 475 U.S. 282, 288–289 (1986)). Because there is "a framework of regulation so pervasive that Congress left no room for the States to supplement it," federal law "makes a single sovereign responsible for" contracting with private entities to house federal prisoners and detainees. *Id.* at 399, 401. A.B. 32 is therefore field preempted.

[18] Similarly, in *United States v. California*, the Ninth Circuit upheld a state law imposing inspection requirements on immigration detention facilities because it did not "regulate whether or where an immigration detainee may be confined [or] require that federal detention decisions conform to state law." *California*, 921 F.3d at 885–86.

D. A.B. 32 is Conflict Preempted.

For similar reasons, A.B. 32 is also conflict preempted. This type of preemption prohibits state laws that make "compliance with both federal and state regulations [ ] a physical impossibility" or that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *CTIA*, 928 F.3d at 849 (citations omitted). A.B. 32 violates these prohibitions.

As explained above, Congress delegated the Executive Branch full authority to house federal prisoners and detainees. *See* 8 U.S.C. § 1231(g)(1); 18 U.S.C. §§ 3621(b), 4001(b)(1), 4086. And it directed federal agencies to consider various factors in exercising their discretion to contract for private detention facilities. *See, e.g.*, 8 U.S.C. § 1231(g)(2); 18 U.S.C. §§ 3621(b), 4013(c)(1). But with A.B. 32, California seeks to eliminate congressionally authorized contracts for private detention facilities and jettison the Executive Branch's congressionally delegated discretion. *See* Cal. Penal Code §§ 9501, 9505(a).

This defeats the purpose of Congress's pervasive statutory framework. As the Ninth Circuit has explained, "[w]hen Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize those objectives." *CTIA*, 928 F.3d at 849. "Allowing a state law to impose a different standard"—or, worse, obviating the need for congressionally prescribed balancing by eliminating an option altogether—violates the Supremacy Clause. *CTIA*, 928 F.3d at 849 (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010)); *see Arizona*, 567 U.S. at 406 (noting that "a conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy" (alterations and quotation omitted)); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376–77 (2000) (finding preempted a state law that "impos[ed] a different, state system" that "undermines the President's intended statutory authority").

In making designations of confinement under 18 U.S.C. § 3621(b), for example, Congress directed BOP to consider numerous factors, such as "bed availability," the "prisoner's security designation," the "prisoner's programmatic needs," the "prisoner's mental and medical health needs," and "the resources of the facility contemplated." But the key consideration identified by Congress for housing federal prisoners is "the prisoner's primary residence." *Id.* In no uncertain terms, Congress ordered that BOP shall "place the prisoner in a facility as close as practicable to the prisoner's primary residence, and to the extent practicable, in a facility within 500 driving miles of that residence," and shall "transfer prisoners to facilities that are closer to the prisoner's primary residence even if the prisoner is already in a facility within 500 driving miles of that residence." *Id.*

But A.B. 32 would force BOP to relocate about 1,300 inmates from Taft CI (if BOP determines Taft CI could otherwise remain operational), and about 900 inmates from California Reentry Centers, to other BOP facilities or Reentry Centers outside California. Jones Decl. ¶¶ 11, 16–18; Gustin Decl. ¶¶ 27–29. This would defeat Congress's express purpose in housing prisoners as close to their primary residence—including their families and communities—as possible. That is especially harmful for inmates in Reentry Centers. Congress explicitly directed that BOP "shall, to the extent practicable," ensure that a federal prisoner "serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." 18 U.S.C. § 3624(c); *see id.* § 3563(b)(10)–(11). If BOP were forced to relocate inmates to other BOP facilities, the inmates would be unable to create the community ties necessary to support their successful reentry into society, frustrating Congress's objective to facilitate the opposite. Gustin Decl. ¶ 29.

A.B. 32 poses similar obstacles to accomplishing USMS's and ICE's statutory objectives. USMS is congressionally authorized to "designate districts that need additional support from private detention entities" based on its consideration of "the number of Federal detainees in the district" and "the availability of appropriate Federal, State, and local government detention facilities." 18 U.S.C. § 4013(c)(1). Because USMS is unable to obtain space in state and local facilities in California and has maximized all available space in nearby BOP facilities, A.B. 32 would force USMS to relocate nearly 50% of its inmates in the Southern District of California and nearly 30% of its California inmates to facilities outside California. Sheehan Decl. ¶ 20. So California will have nullified Congress's purpose in allowing USMS to contract for private detention facilities as a last resort when other options are unavailable.

California will also have nullified Congress's purpose in allowing ICE to rent "facilities adapted or suitably located for detention" as a first resort before "acquir[ing], build[ing], remodel[ing], repair[ing], and operat[ing] facilities . . . necessary for detention." 8 U.S.C. § 1231(g)(1)–(2). This congressional decision makes sense because it is important for ICE to maintain flexibility due to significant fluctuations in the number and location of aliens. Johnson Decl. ¶ 8. Otherwise, ICE could invest heavily in its own facilities only to have them stand idle if an area later experiences a significant decrease in demand for detainee housing. *Id.* ¶¶ 8, 21. Unfortunately, ICE has no access (or very limited access) to housing capacity in California prisons, so detainees—both current detainees at the time of contract expiration and future detainees—would need to be relocated outside California to neighboring States, placing an enormous strain on ICE operations. Johnson Decl. ¶ 22; Archambeault Decl. ¶¶ 8–13.

California's obstruction of congressional objectives is perhaps best illustrated by A.B. 32's prohibition on extending any contracts for private detention facilities, even when extensions are "authorized by th[ose] contract[s]." Cal. Penal Code.

§ 9505(a). Federal regulations specifically authorize option provisions that allow the United States to unilaterally extend arrangements with its contractors for a specified period.[19] *See* 48 C.F.R. § 17.208(f)–(g); *id.* § 52.217-8; *id.* § 52.217-9. These option provisions are pre-negotiated and specified as terms of the awarded contract, meaning that the contractor is bound to perform during the "option period" if exercised by the Federal Government. *See id.*; Gustin Decl. ¶ 11. So it would be impossible for federal contractors providing private detention services to comply with both their obligations under the pre-negotiated contract (authorized by federal law) and California's attempt to ban contract extensions.

These effects are especially alarming because Congress did not legislate against the backdrop of the States' "historic police powers" when it authorized contracts with private detention facilities. *See Arizona*, 567 U.S. at 400 (alterations omitted) ("In preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." (quotations and citations omitted)). To the contrary, the United States "enjoys the unrestricted power to . . . determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases," *Perkins*, 310 U.S. at 127, so "obligations to and rights of the United States under its contracts are governed exclusively by federal law," *Boyle*, 487 U.S. at 504; *see also Buckman Co.*, 531 U.S. at, 347 ("[T]he relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law."). Put differently, it is not the United States usurping state prerogatives, but California intruding on an area of "uniquely federal interests." *Boyle*, 487 U.S. at 504.

[19] The United States assumes for purposes of this motion that option periods are considered extensions within the meaning of A.B. 32.

That is why "[c]ourts have consistently held that any state law that impedes the Federal Government's ability to contract . . . [is] preempted." *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 62 (D.D.C. 2018); *see Sperry v. Florida*, 373 U.S. 379, 385 (1963) ("A State may not enforce licensing requirements which . . . impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress."); *Leslie Miller*, 352 U.S. at 190 ("Subjecting a federal contractor to the Arkansas contractor license requirements would . . . frustrate the expressed federal policy of selecting the lowest responsible bidder."); *United States v. Virginia*, 139 F.3d 984, 987–88 (4th Cir. 1998) (holding that the Virginia Criminal Justice Services Board could not require private investigators under contract with the FBI to obtain state private investigator licenses); *Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir. 1991) (holding that "California may not exercise a power of review by requiring [a federal contractor] to obtain state licenses" because "[t]o hold otherwise would interfere with federal government functions and would frustrate the federal policy of selecting the lowest responsible bidder"). Because California has frustrated Congress's full purposes and objectives in allowing the Executive Branch to contract for private detention facilities, this Court should likewise hold A.B. 32 conflict preempted.

II. THE UNITED STATES' IRREPARABLE HARM AND THE PUBLIC INTEREST FAVOR AN INJUNCTION FOR THE FEDERAL GOVERNMENT AND ITS CONTRACTORS

Because the United States will suffer irreparable harm if A.B. 32 is applied to the Federal Government's operations and contracts, the public interest favors a preliminary injunction. *Cf. Nken v. Holder*, 556 U.S. 418, 435 (2009) (stating that "harm to the opposing party" and "the public interest" "merge when the Government is the opposing party" because the Government represents the public interest). As the Supreme Court and Ninth Circuit have explained, irreparable harm necessarily results from the enforcement of a preempted state law. *See New Orleans*

Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366-67 (1989) (noting that irreparable injury may be established "by a showing that the challenged state statute is flagrantly and patently violative of . . . the express constitutional prescription of the Supremacy Clause"); *Valle del Sol*, 732 F.3d at 1029 (finding irreparable harm where Supremacy Clause violated); *Arizona*, 641 F.3d at 366 (same). The unconstitutionality of A.B. 32 alone therefore suffices to establish irreparable harm.

But A.B. 32's damage goes far beyond that legal injury. As a result of this unconstitutional law, the United States and the public will suffer three principal harms: (1) costly relocation of prisoners and detainees and attendant consequences, (2) frequent and costly transport of prisoners and detainees, and (3) obstruction of federal proceedings. These injuries could cripple federal law enforcement operations in California.

First, prisoners and detainees in current facilities would have to be relocated at great cost to the Federal Government. USMS would need to relocate nearly 50% of its inmates in the Southern District of California and nearly 30% of its inmates in California as a whole. Sheehan Decl. ¶ 20. Because USMS is unable to obtain space in state and local facilities in California and has maximized all available space in nearby BOP facilities, its prisoners would likely have to be housed outside California. *Id.* ¶ 21. These relocations would cost significant taxpayer dollars. *Id.* Similarly, ICE has no access (or very limited access) to housing capacity in California prisons, so all current detainees would need to be relocated outside California to neighboring States. Johnson Decl. ¶ 22; Archambeault Decl. ¶ 8. Likewise, A.B. 32 would require relocation of about 1,300 inmates from Taft CI (if BOP determines Taft CI could otherwise remain operational), and about 900 inmates from California Reentry Centers, to other BOP facilities or Reentry Centers outside California. Jones Decl. ¶¶ 17–18; Gustin Decl. ¶¶ 28–29.

Apart from these harms to the Federal Government, such relocation would also injure the public by isolating prisoners and detainees from their families, who are usually located in California and may lack resources to visit them. Sheehan Decl. ¶ 23; Jones Decl. ¶ 19; Gustin Decl. ¶ 29; Archambeault Decl. ¶ 14. Relocation could also force federal agencies to share detention facilities in close proximity to California, potentially causing overcrowding. Sheehan Decl. ¶ 22; Jones Decl. ¶ 19; Archambeault Decl. ¶ 14. That overcrowding, in turn, would place an even greater strain on federal operations and increase the danger to federal contractors' personnel.[20] Johnson Decl. ¶ 22.

A.B. 32's forced relocations also would hinder BOP's ability to provide community placement for offenders. Reentry Centers provide reentry services to inmates by assisting them in obtaining a suitable residence in the community to which they will be released, structured programs, job placement, and counseling. Gustin Decl. ¶ 6. If BOP were forced to relocate inmates to other BOP facilities or Reentry Centers outside California, inmates would be unable to make the community ties needed in order to support their reentry efforts, potentially increasing the recidivism of released offenders. *Id.* ¶ 29.

Second, A.B. 32 would require frequent and costly transport of prisoners and detainees by USMS and ICE. USMS's prisoner population is mainly pretrial. Sheehan Decl. ¶ 24. So inmates (including those with serious charges) would have

[20] A.B. 32 may also cause tension with ICE's other obligations under existing court orders and settlements. *See, e.g.*, *Gonzalez v. Sessions*, 325 F.R.D. 616 (N.D. Cal. Jun. 5, 2018); *Franco-Gonzalez v. Holder*, 2013 WL 8115423 (C.D. Cal. 2013). For example, the permanent injunction issued in *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), prohibits ICE from transferring unrepresented Salvadorian nationals from their district of apprehension for at least seven days. Archambeault Decl. ¶ 16. If ICE's contractors are forced to comply with A.B. 32, ICE would have no place to house removable Salvadoran nationals for the time period required in the *Orantes* injunction. *Id.*

to be frequently transported to and from California to meet the demands of the Judiciary, defense attorneys, and any pretrial or probationary requirements. *Id.* This increase in transportation would not only require a dramatic increase in coordination with the Justice Prisoner and Alien Transportation System,[21] as well as state and local transportation resources, but would significantly increase USMS's cost per inmate. *Id.* For ICE, any aliens apprehended in California—more than 44,000 in Fiscal Year 2019—would need to be transported to out-of-state facilities. Johnson Decl. ¶ 22. This would require ICE to transfer detainees daily, using costly air and ground transportation. Archambeault Decl. ¶¶ 9–12. Ground transportation would be problematic because ICE would be forced to renegotiate its transportation contracts and/or divert a large percentage of ICE personnel to transportation duties. *Id.* ¶¶ 10, 12. Air transportation would also be problematic because daily transport to and from California would place an enormous strain on ICE Air Operations (IAO) and require significantly more trips than IAO currently runs. *Id.* ¶¶ 11–12. Both options would be extremely costly and burdensome, and would increase the risk to public safety. *See id.* ¶¶ 10, 12.

The drastic increase in USMS and ICE transportation would also heighten security concerns for inmates, federal personnel, and the public. Frequent transportation of prisoners and detainees increases the amount of time these individuals are outside the heightened security of a detention facility. Sheehan Decl. ¶ 25; Archambeault Decl. ¶ 13. And because this frequent transportation may be regularly scheduled, individuals could gain additional opportunities to gather intelligence on USMS and ICE operations, thus increasing the chances of an adversarial encounter during transport. Sheehan Decl. ¶ 25; Archambeault Decl.

[21] Managed by USMS, the Justice Prisoner and Alien Transportation System is one of the largest transporters of prisoners in the world, handling about 715 requests every day to move prisoners between judicial districts, correctional institutions, and foreign countries. Sheehan Decl. ¶ 24.

¶ 13. Prisoners and detainees with medical or mobility concerns may be further adversely affected by frequent travel. Sheehan Decl. ¶ 25; Archambeault Decl. ¶ 13.

Third, federal proceedings would be delayed and impaired by A.B. 32. For pretrial prisoners in USMS custody outside California, A.B. 32 would cause lengthy delays in judicial proceedings. Sheehan Decl. ¶ 27. USMS estimates that transportation coordination would require about three to four weeks' advance notice in order to move prisoners in and out of the judicial districts in California. *Id.* Out-of-state detention by ICE—and detainees' concomitant lack of access to their families—would also slow immigration proceedings. Archambeault Decl. ¶ 15. Generally, an alien uses his or her family members to gather information needed in a removal proceeding. *Id.* Because A.B. 32 would force aliens to be housed outside California (likely at great distances from their families), detainees' ability to collect evidence in a timely fashion could be affected. *Id.* And when evidence is not collected in a timely fashion, immigration bond hearings and removal proceedings may be delayed. *Id.*

Importantly, these effects would be felt immediately. BOP has ten contracts expiring in 2020, two of which expire (for purposes of A.B. 32) at the end of March 2020. Jones Decl. ¶ 14 (Taft CI); Gustin Decl. ¶ 13 (Taylor Street Center). So if BOP's contractors were forced to comply with A.B. 32, BOP would have to start preparations to relocate affected inmates right away and "stop designating inmates to California Residential Reentry Centers." Jones Decl. ¶ 20; Gustin Decl. ¶ 30.

Similarly, if USMS's contractors are forced to comply with A.B. 32, USMS would need to "begin discussions with the affected courts in order to coordinate possible housing scenarios for federal prisoners." Sheehan Decl. ¶ 28. At that point, USMS would most likely need to "begin a competitive solicitation for new private contracts in other States to replace the lost capacity in California," which would require "a lead time of approximately one year," plus "at least three months after the

contract award to hire and train staff to operate the facility." *Id.* USMS would also need to begin operational and logistical coordination to either (a) continue taking prisoners to facilities with expiring contracts and later transfer all prisoners as the expiration date approaches; or (b) discontinue prisoner intake at facilities with expiring contracts—especially the Western Region and El Centro SPC contracts expiring (for purposes of A.B. 32) in 2021—thus diminishing the population at those facilities through natural attrition. *Id.* ¶ 29. "While both choices would be costly and burdensome, the latter could imminently cause deleterious effects on federal operations." *Id.*

ICE faces similar issues. If ICE's contractors are forced to comply with A.B. 32, ICE would need to begin planning for a lack of detention space in California long before its contracts expire. Johnson Decl. ¶ 27. Like USMS, ICE would ultimately need to begin a competitive solicitation for new private contracts in other States to replace the lost capacity in California, which "typically takes 9 to 12 months from the beginning of preparation for ICE to award a contract," plus "at least three months after the contract award" for the contractor "to hire and train staff to operate the facility." *Id.* If new construction is required as part of this process, it could take nearly three years before ICE is able to gain access to detention space at the new detention facilities. *Id.*

These serious harms do not even contemplate that, if A.B. 32 is allowed to impede federal operations, other States could be emboldened to impose similar restraints. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (noting that allowing a State to set a requirement that conflicts with federal law "would allow other States to do the same"). This could in turn create a "patchwork" system of laws, *id.*, severely undermining both the United States' ability to provide for those in its custody and the "'integrated scheme of regulation' created by Congress," *Arizona*,

567 U.S. at 400 (quoting *Gould*, 475 U.S. at 289); *see also id.* at 395 (characterizing immigration as the province of "the national sovereign, not the 50 separate States").

III. THE BALANCE OF THE EQUITIES FAVORS THE UNITED STATES

In contrast to the irreparable harm suffered by the United States and the public, California has no legitimate interest in thwarting the Federal Government's contracts. *See Cal. Pharmacists Ass'n v. Maxwell–Jolly*, 563 F.3d 847, 852–53 (9th Cir. 2009) (explaining that "it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law" when "there are no adequate remedies available" because "[i]n such circumstances, the interest of preserving the Supremacy Clause is paramount"). So California "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). In any event, California would not be harmed by an injunction.

For starters, California is free to implement A.B. 32 for itself and its localities, as originally intended, before the legislature purposefully (and unlawfully) expanded A.B. 32 to impede the Federal Government's operations. *See* Senate Judiciary Committee, A.B. 32, 2019–20 Cal. Leg., Reg. Sess. (Cal. 2019) (noting that amendment "expands the scope of the bill to . . . includ[e] facilities used for immigration detention" and that "[i]t's clearly not enough to focus our legislation solely on criminal detention facilities"). California may prohibit private detention facilities for those in its own custody, but it has no lawful interest in imposing that choice on the United States.

And the Federal Government's continued operation of private detention facilities should be no problem for California because private detention facilities will be operating in California anyway. As discussed above, A.B. 32 exempts whole swaths of California's own private detention facilities from its reach. *See* Argument Section I.B., *supra*. So California may have private detention facilities within its

borders indefinitely. But even absent an exemption, A.B. 32 would not impact existing contracts (notwithstanding any contract extensions). Cal. Penal Code §§ 9501, 9505(a). The gradual phasing out of non-exempt private detention facilities pales in comparison to the irreparable, and imminent, harm to the United States and the public. *See* Argument Section II., *supra*.

IV. THE COURT SHOULD AWARD A FINAL JUDGMENT AND PERMANENT INJUNCTION

For the reasons explained above, the United States is entitled to a preliminary injunction barring enforcement of A.B. 32. But because "[n]o facts which might be adduced at a trial w[ould] change this result," the Court should also enter a final judgment awarding a permanent injunction and declaratory relief. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102 (9th Cir. 1998), *abrogated on other grounds Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1002 (9th Cir. 2004).

CONCLUSION

For the reasons explained above, the Court should preliminarily enjoin A.B. 32 as it applies to the Federal Government and its contractors. And because there are no genuine disputes of material fact, the Court should also convert its preliminary injunction into a permanent injunction and enter final judgment.

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Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT S. BREWER, JR.
United States Attorney

ALEXANDER K. HAAS
Director, Federal Programs Branch

JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch

/s/ Stephen Ehrlich
STEPHEN EHRLICH
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Tel.: (202) 305-9803
Email: stephen.ehrlich@usdoj.gov

Counsel for the United States