STATE RESTRICTIONS ON ICE DETENTION: NAVIGATING FEDERALISM AT THE INTERSECTION OF SUPREMACY AND COMMANDEERING

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I. INTRODUCTION

Though ostensibly civil, immigration enforcement's use of detention closely mirrors criminal incarceration.[1] Abuses in U.S. Immigration and Customs Enforcement (ICE) detention centers have prompted calls for the closure of individual detention facilities and an end to the overreliance on detention in immigration enforcement.[2]

During the COVID-19 pandemic, advocates, like Nafeesh Goldsmith and Carlos Sierra, have drawn attention to the failure of the New Jersey Department of Corrections and ICE to adequately respond to the spread of the virus within detention facilities, as well as the frequency of abuse that occurs within these facilities.[3] Many advocates protesting the unjust and undignified treatment of immigrant detainees call for the elimination of immigration detention itself.[4] They argue that detention is not necessary for immigration enforcement, pointing to the overwhelming compliance of the tens of thousands of immigrants released during the pandemic.[5] Ending

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[1] David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. 224, 234–35 (2019).

[2] *See, e.g.*, Nafeesah Goldsmith & Carlos Sierra, Opinion, *We Were Both Held in Cages. Our Goal Now Is to Free Others*, NJ.COM (Aug. 8, 2021, 9:18 AM), https://www.nj.com/opinion/2021/08/we-were-both-held-in-cages-our-goal-now-is-to-free-others-opinion.html.

[3] *Id.*

[4] *Id.*; Jessica Bansal, *Mass ICE Detention Is Unnecessary – and We Have Proof*, ACLU (June 9, 2021), https://www.aclu.org/news/immigrants-rights/mass-ice-detention-is-unnecessary-and-we-have-proof.

[5] During the pandemic, the number of detained immigrants fell to just over 13,000 people from more than 42,000. Bansal, *supra* note 4. The number of detainees has begun to rise again and is most recently at 27,723. *ICE Detainees*, TRAC IMMIGR.

detention would allow immigrants to retain liberty and dignity while their cases move forward.[6]

Immigration federalism refers to the overlapping federal, state, and local procedures that affect immigration policy.[7] Although immigration regulation is primarily reserved for the federal government, recent initiatives, both pro- and anti-immigrant, have demonstrated states' capacity to regulate in areas affecting immigration policy.[8] There are limits to states' abilities to influence federal immigration enforcement, but certain state laws implicating immigration policy have already survived Supremacy Clause challenges that invoked the doctrines of preemption and intergovernmental immunity.[9] Additionally, the federal government has increasingly relied on state and local jurisdictions to carry out immigration enforcement.[10] This system relies on the cooperation of the states since the anticommandeering doctrine prevents the federal government from conscripting states into enforcing federal regulations.[11] Within these doctrines of federal supremacy and anticommandeering, there is space for states to act—not to overtly express immigration policy preferences, but to further specific state interests, like the health and welfare of residents and fostering trust between immigrant communities and local law enforcement.[12]

Recently, some states have used their power as local regulators to limit state and local officials and private companies from entering into contracts with ICE to detain immigrants within the states' territories. California Assembly Bill No. 32 prohibits contracts with private, for-profit prison facilities.[13] New Jersey Assembly Bill 5207 bans state and local agencies and private companies from forming contracts with ICE for immigration detention within the state.[14] Considering the vulnerabilities immigrant detainees face in privately run facilities, states seeking to reduce immigration detention within their borders

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(Mar. 12, 2023), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html.

[6] Bansal, *supra* note 4; Goldsmith & Sierra, *supra* note 2.

[7] *See infra* Part II.

[8] *See infra* Part II.

[9] *See infra* Part II.A.

[10] *See infra* Part II.

[11] *See infra* Part II.B.

[12] *See infra* Part II.C.

[13] CAL. PENAL CODE §§ 5003.1, 9500–05 (West 2020).

[14] N.J. REV. STAT. §§ 30:4-8.15–16 (2021).

should prioritize eliminating the use of private detention facilities. While the California and New Jersey laws each include provisions aimed at private facilities, California's law applies broadly without specifically targeting federal detention, such that it comports with the Supremacy Clause.[15] In *GEO Group, Inc. v. Newsom*, the Ninth Circuit reached the opposite conclusion, failing to recognize the historic state interests that the law seeks to carry out, namely the maintenance of the health and welfare of those detained within the state's territory.[16] New Jersey's law targets private facilities and state and local agencies.[17] As applied to private actors, the New Jersey law appears more vulnerable to Supremacy Clause challenges because it solely targets immigration detention facilities, though as applied to state and local agencies, it should survive because of the anticommandeering doctrine.[18] Whether this prediction holds true will soon be tested. On February 17, 2023, CoreCivic, a private prison company, filed a complaint alleging that the New Jersey law violates the preemption and intergovernmental immunity doctrines.[19]

State laws prohibiting ICE detention contracts demonstrate a new area of cooperative federalism in immigration policy. States should be permitted to regulate in ways that touch on immigration issues when the law or regulation implicates important health and welfare concerns traditionally left to the states. Part II of this Comment provides an overview of the concept of immigration federalism and its implications for state and federal immigration policy. This Part will particularly focus on why immigration detention is a field where states are permitted to enact regulation, exercising their historic police powers in ways that touch on immigration issues. Part III will compare the California and New Jersey legislation through a discussion of current and potential judicial challenges to the laws. This Part will analyze recent litigation challenging California's law and lay out the flaws in the Ninth Circuit's holding that federal law preempts the legislation. This Part will also explore how litigation could affect the New Jersey law. Part IV argues that California's goal of eliminating private detention facilities should be the priority for states seeking to address

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[15] PENAL § 5003.1; *see infra* Part III.C.3.

[16] 50 F.4th 745, 761–62 (9th Cir. 2022); *see infra* Part III.C.

[17] N.J. REV. STAT. §§ 30:4-8.15–16 (2021).

[18] *See* § 30:4-8.16; *infra* Part III.D.

[19] Complaint at 2, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023). As of publication, only the complaint has been filed, so this Comment will not discuss the State of New Jersey's arguments.

ICE detention. This Part also recounts the effects of closures on detainees and what policies might mitigate issues in remaining facilities.

II. IMMIGRATION FEDERALISM IN PRO- AND ANTI-IMMIGRANT CONTEXTS

Cooperative federalism presumes that rather than the federal government and state governments having separate spheres of influence, these governments "share power over certain affairs," which thus allows cooperation among them.[20] Immigration law, unlike other policy areas, has taken longer to move towards cooperative federalism, largely because of judicial emphasis on the federal government's inherent power over immigration law as a national sovereign.[21] Immigration federalism has become more prominent, and more important, as immigration enforcement has expanded.[22] That enforcement system relies heavily on state and local actors.[23] The structure of American federalism means that states and localities have some power in an ostensibly federal policy sphere: immigration.[24]

Some state and local jurisdictions have sought either to limit their cooperation by passing "sanctuary" laws or to bolster enforcement through zealous cooperation with federal authorities.[25] There have also been conflicts between state and city governments over what level of cooperation is appropriate.[26] For instance, the Secure Communities Program engaged state and local law enforcement agencies in immigration enforcement through the submission of arrestees' fingerprints to a Department of Homeland Security (DHS) database and detainer requests from ICE to local jail or state prison facilities.[27]

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[20] Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1088 (2014).

[21] *Id.*

[22] *See* Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SEC. 509, 510–11 (2017).

[23] *Id.* at 513.

[24] *Id.* at 510.

[25] Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1344–46 (2019).

[26] *Id.*

[27] Secure Communities began under the Bush Administration in 2008, but widely expanded during the Obama Administration. Chacón, *supra* note 25, at 1343–44. The program was discontinued in 2014 and replaced by the Priority Enforcement Program. Memorandum from Jeh Charles Johnson, Dep't of Homeland Sec. Sec'y, on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov.

To induce states to cooperate with the Secure Communities Program and other enforcement measures, Congress enacted 8 U.S.C. § 1373, which forbids any "local government entity or official [from] . . . prohibit[ing] . . . any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."[28]

Through so called "sanctuary" laws, some cities and states have resisted becoming an arm of federal immigration enforcement.[29] Sanctuary measures typically consist of "declining to honor immigration detainers, precluding participation in joint operations with the federal government, and preventing immigration agents from accessing local jails."[30] During the Trump presidency, states like California began resisting harsh enforcement policies.[31] Jurisdictions that refused to cooperate argued that ICE partnerships undermined local interests like "community solidarity and efficacy in local crime governance."[32] Critics view "sanctuary cities" as a new type of nullification crisis, but rather than flouting federal law, these measures assert states' right to resist coercion by the federal government under the doctrine of anticommandeering.[33] Sanctuary laws are limited in scope, and few, if any, actually conflict with federal law; instead the laws typically either ban law enforcement from inquiring about

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20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; *Priority Enforcement Program*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/pep (last updated July 21, 2022). Trump's DHS restarted the program in 2017 pursuant to an executive order. Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017). When Biden took office, he ended the program with an executive order that repealed Trump's previous order. Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

[28] 8 U.S.C. § 1373.

[29] Chacón, *supra* note 25, at 1344–46; Rodriguez, *supra* note 22, at 510.

[30] Chacón, *supra* note 25, at 1344–46.

[31] Rodriguez, *supra* note 22, at 510; *see* United States v. California, 921 F.3d 865, 872 (9th Cir. 2019).

[32] Trevor George Gardner, *The Promise and Peril of the Anti-Commandeering Rule in the Homeland Security Era: Immigrant Sanctuary as an Illustrative Case*, 34 ST. LOUIS U. PUB. L. REV. 313, 322 (2015).

[33] *See, e.g.*, Trib. Ed. Bd., *When Cities Refuse to Enforce Immigration Laws: Is Chicago a Sanctuary for Nullification?*, CHI. TRIBUNE (Mar. 29, 2017, 5:38 PM), https://www.chicagotribune.com/opinion/editorials/ct-sanctuary-cities-sessions-edit-0330-jm-20170329-story.html; *see infra* Part II.B.

immigration status or prohibit keeping a person in jail past their release date to comply with federal immigration detainer requests.[34]

In contrast, states supportive of strict enforcement have embraced cooperation and sometimes even overstep into the federal government's sphere of authority over immigration policy.[35] Some states, like Arizona during the Obama presidency, enacted harsher immigration policies, partially in response to a more tempered federal approach.[36] Jurisdictions that support strong immigration enforcement can also enter into § 287(g) agreements, allowing state and local government officials to participate in immigration enforcement.[37] Some jurisdictions even attempted to enact legislation seeking harsher enforcement than that authorized by the federal government.[38]

A. *Preemption and Intergovernmental Immunity*

State laws that touch on immigration regulation often face preemption challenges.[39] These challenges allege either that the state

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[34] *See* CAL. GOV. CODE § 7284.6 (West 2018) ("[L]aw enforcement agencies shall not . . . use agency or department moneys or personnel to . . . inquir[e] into an individual's immigration status."); Lunn v. Commonwealth, 78 N.E.3d 1143, 1146 (Mass. 2017) (holding that Massachusetts court officers do not have authority under state law to make a civil arrest based solely on federal immigration enforcement); *see also* Michael Boldin, *Executive Order on Sanctuary Cities Is Unlikely to Threaten Their Federal Funding*, HILL (Jan. 27, 2017, 9:50 AM), https://thehill.com/blogs/congress-blog/judicial/316426-executive-order-on-sanctuary-cities-is-unlikely-to-threaten.

[35] Rodriguez, *supra* note 22, at 510.

[36] *See* Arizona v. United States, 567 U.S. 387 (2012); *see also* Rodriguez, *supra* note 22, at 510.

[37] Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g); *see* Chacón, *supra* note 25, at 1348–49.

[38] *E.g.*, League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 764–65 (C.D. Cal. 1996) (striking down the majority of California Proposition 187); *Arizona*, 567 U.S. at 403–07 (upholding part of and striking down part of Arizona Senate Bill 1070); Ga. Latino All. for Hum. Rts. v. Governor of Ga., 691 F.3d 1250, 1256 (11th Cir. 2012) (upholding part of Georgia House Bill 87 based on reasoning from *Arizona*).

[39] *E.g.*, *Arizona*, 567 U.S. at 400–03 (striking down a state alien registration law); *League of United Latin Am. Citizens*, 908 F. Supp. at 764–65 (invalidating portions of California Prop. 187, which impeded on federal immigration regulation); *Ga. Latino All. for Hum. Rts.*, 691 F.3d at 1269 (striking down state law offenses for immigration violations). Preemption occurs when a state law directly conflicts with a federal law or when the federal scheme is so extensive that there is no room for the state to regulate. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Whether there is preemption depends on Congress's purpose in enacting the federal law. *Id.*; Wyeth v. Levine, 555 U.S. 555, 565 (2009).

regulation directly conflicts with existing federal legislation[40] or that Congress has completely occupied the field of immigration regulation.[41]

Preemption has been invoked to strike down state laws adopting new punishments or violations of immigration policy.[42] For example, Arizona Senate Bill 1070 made it a state misdemeanor to "willful[y] fail[] to complete or carry an alien registration document," which already violates 8 U.S.C. § 1304.[43] The Supreme Court held that this was field preempted because Congress occupies the entire field of alien registration.[44]

Preemption has also been used to challenge state laws seeking immigrant integration.[45] Some states have defended these challenges by invoking the presumption against preemption, arguing that the limited regulations fall within traditional state police powers.[46] California Assembly Bill 103 (A.B. 103) allows the state attorney general to inspect and review the conditions of immigration detention

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[40] Conflict preemption occurs when it is impossible to comply with both federal and state regulations or when state law obstructs federal goals. *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); *Hines*, 312 U.S. at 67.

[41] Field preemption exists where a federal regulation scheme is so pervasive that it implicitly precludes state regulation or where a state seeks to regulate a field with a dominant federal interest. *See, e.g.*, Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

[42] *See League of United Latin Am. Citizens*, 908 F. Supp. at 764–65; *Ga. Latino All. for Hum. Rts.*, 691 F.3d at 1256.

[43] *Arizona*, 567 U.S. at 400–03.

[44] *Id.*

[45] United States v. California, 314 F. Supp. 3d 1077, 1091–92 (E.D. Cal. 2018); *see* Rubenstein & Gulasekaram, *supra* note 1, at 231–32.

[46] The canon of construction called the "presumption against preemption" provides that federal law is presumed not to preempt laws within the historic police powers of the states, "unless that was the clear and manifest purpose of Congress." Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). In 2016, the Supreme Court limited the application of this canon by holding that the presumption does not apply in express presumption cases. Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016). Additionally, the Court has not applied the presumption in some cases involving subjects outside the traditional police powers of the states. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347–48 (2001). Some courts have declined to apply the presumption in areas where the federal government has traditionally had a significant regulatory presence, but others have held that the presumption still applies. *Compare* United States v. Locke, 529 U.S. 89, 108 (2000) (holding that no presumption applied to state maritime commerce laws where the federal government historically played an important role), *with* Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009) (holding that the presumption applied to drug labeling despite history of federal regulation).

centers.[47] When the federal government challenged the law, California asserted that the presumption applied because the state traditionally has power to oversee health and safety in the detention facilities within its territories.[48] The federal government argued that the requirements of A.B. 103 interfered with its exclusive authority over immigration detention and that the California law created an obstacle to the administration of a federal immigration scheme.[49] California countered that the legislature passed A.B. 103 in response to growing concerns about the conditions of the civil detention facilities and was not asserting any role in determining whether an immigrant should be detained or removed from the country.[50] The Ninth Circuit agreed that there was no obstacle preemption because the collection of data did not interfere with immigration detention or removal proceedings.[51]

State immigration regulations also face challenges based on the intergovernmental immunity doctrine.[52] The intergovernmental immunity doctrine prevents states from enacting laws which directly regulate or discriminate against the federal government.[53] The federal government argued that A.B. 103 discriminated against the federal government.[54] The Ninth Circuit held that even a minimally burdensome regulation that discriminated against the federal government violated the doctrine, but that only one provision of A.B. 103, which had no equivalent in California's state prison inspection scheme, was discriminatory and therefore invalid.[55]

B. *Anticommandeering Doctrine*

The anticommandeering doctrine limits the federal government's ability to induce state action, including participation in

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[47] CAL. GOV. CODE § 12532 (West 2022).

[48] United States v. California, 314 F. Supp. 3d 1077, 1091–92 (E.D. Cal. 2018); *see* Rubenstein & Gulasekaram, *supra* note 1, at 231–32.

[49] *California*, 314 F. Supp. 3d at 1090.

[50] *Id.* at 1091–92.

[51] United States v. California, 921 F.3d 865, 885 (9th Cir. 2019).

[52] *See, e.g.*, *id.* at 882–85.

[53] Rubenstein & Gulasekaram, *supra* note 1, at 230. Laws are discriminatory when the federal government or its contractors are treated worse than an equivalent reference group. *Id.*; *see* North Dakota v. United States, 495 U.S. 423, 434–35 (1990) (opinion of Stevens, J.).

[54] *California*, 921 F.3d at 882–85.

[55] *Id.*

immigration enforcement.[56] Nevertheless, § 1373 prohibits state and local officials or entities from restricting the sharing of immigration status information with federal immigration officials.[57]

This statute has been challenged as impermissible commandeering,[58] but in *City of New York v. United States*, the Second Circuit held that the provision did not violate the anticommandeering doctrine after determining that federal interests in the provision outweighed state concerns.[59] In 2018, *Murphy v. NCAA* broke new ground by holding that a statute prohibiting state legislatures from authorizing sports gambling violated the anticommandeering doctrine.[60] Since *Murphy*, other courts have taken a different view of the statute and found it does constitute commandeering.[61]

In the field of immigration detention, there is no equivalent to § 1373. The statutory language is more permissive toward the federal government's dealings with the states rather than prohibitive on state legislatures.[62] This opening allows states to act more freely to limit detention within their borders. To comply with the anticommandeering doctrine, the federal government cannot coerce states into providing space for immigration detention.

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[56] Anticommandeering can be understood through the lens of "the right of refusal," meaning that states must have a meaningful opportunity "to decline to help implement a federal regulatory scheme" regardless of any inducement. Spencer E. Amdur, *The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism*, 35 YALE L. POL'Y REV. 87, 126 (2016). In *New York v. United States*, the Supreme Court held that the federal government "may not compel the States to enact or administer a federal regulatory program." 505 U.S. 152 (1992). *Printz v. United States* subsequently held that the federal government may not commandeer state and local police. 521 U.S. 898, 935 (1997). In *National Federation of Independent Business v. Sebelius*, the Supreme Court struck down a spending condition as unconstitutionally coercive for the first time, revealing limitations on Congress's ability to induce state cooperation with federal programs. 567 U.S. 519, 581 (2012); Amdur, *supra* note 56, at 90.

[57] 8 U.S.C. § 1373.

[58] Amdur, *supra* note 56, at 115–16.

[59] 179 F.3d 29, 36 (2d Cir. 1999).

[60] 138 S. Ct. 1461, 1481 (2018).

[61] City of Philadelphia v. Sessions, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018); City of Chicago v. Sessions, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018); City & Cnty. of San Francisco v. Sessions, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018). Another California district court acknowledged that the provision was constitutionally suspect but did not ultimately reach a definitive answer. United States v. California, 314 F. Supp. 3d 1077, 1101 (E.D. Cal. 2018).

[62] 8 U.S.C. § 1231(g); *see infra* Part II.C.

C. *Immigration Detention as an Area for Cooperative Federalism*

Immigration is ultimately a federal issue, but there are adjacent spheres in which states can, and do, act. In immigration policy, states act primarily through integration measures, seeking to connect immigrants with the communities in which they live; but integration is deeply affected by policies under the federal government's control.[63] Immigrants who lack lawful immigration status struggle to become fully integrated and participate in the community because of the precariousness of their legal status and the distrust of law enforcement which comes with that.[64] One way states can encourage integration is by ending ICE detention contracts within their borders because reducing detention demonstrates support for immigrant communities.

The unique nature of immigration federalism means there are certain areas in which states may act, although this is a presumptively federal sphere of law. Types of immigration regulation can be distinguished between that which takes place "at the borders" and that which occurs "between borders."[65] "Between borders" regulation typically involves education, housing, driver's licenses, and health care.[66] Detention is related to immigration regulation, and therefore not wholly akin to domestic state policies such as education. On the other hand, state laws prohibiting detention do not impact the removability or admissibility of a noncitizen. State prohibitions on immigration detention do not even prevent the noncitizen from being detained because ICE is free to transfer the noncitizen elsewhere or apply alternative monitoring techniques.[67] Just as states generally have control over education regulations, they also have control over incarceration and detention within their borders.[68]

The Federal Government's exclusive power over immigration policy suggests that states should not attempt to influence federal immigration detention practices, and it is possible to argue that the states' purpose here is to thwart federal objectives by eliminating ICE's

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[63] Rodriguez, *supra* note 22, at 530–31.

[64] *Id.*

[65] Chen, *supra* note 20, at 1091.

[66] *Id.*

[67] *See* AUDREY SINGER, CONG. RSCH. SERV., IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7–8 (2019), https://sgp.fas.org/crs/homesec/R45804.pdf.

[68] *See* Chen, *supra* note 20, at 1097.

ability to house immigrant detainees.[69] But given the language of 8 U.S.C. § 1231(g), which authorizes immigration detention, this does not seem plausible.[70] Instead, "[c]ourts applying preemption analysis should consider the possibility that Congress intended or was open to federal and state cooperation, rather than assuming at the outset that any state law will lead to conflict."[71] The Immigration and Nationality Act (INA) vests the power of arranging places for immigration detention in the Attorney General.[72] The language is broad, noting that other facilities may be used when federal facilities are not available, but not specifying whether private, state, or local facilities are to be used.[73] A later subsection of § 1231 refers to agreements with state and local officers for housing immigrant detainees.[74] Importantly, these agreements are voluntary on behalf of the state.[75] If the possibility to voluntarily collaborate is available, based on the anticommandeering doctrine, the opposite is also possible; states may affirmatively refrain from participating in detention.[76]

Although many activists focus on the larger goal of eliminating ICE detention,[77] states that enact laws prohibiting detention emphasize their local interests for pursuing the legislation: maintaining health and safety for those detained in their territories and fostering community integration for immigrants.[78] Neither of these purposes is contrary to federal immigration enforcement objectives. Thus, statutes that regulate ICE detention to protect the welfare of detainees constitute permissible state actions in the sphere of immigration policy.

III. STATE LEGISLATION PROHIBITING OR LIMITING IMMIGRATION DETENTION

Although the federal government generally presides exclusively over immigration policy, immigration detention is a unique area where there are strong state interests in regulating detention within states'

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[69] *See id.*

[70] 8 U.S.C. § 1231(g).

[71] *See* Chen, *supra* note 20, at 1093.

[72] § 1231(g)(1).

[73] *Id.*

[74] § 1231(i)(1).

[75] *Id.*

[76] *See supra* Part II.B.

[77] *See* Goldsmith & Sierra, *supra* note 2.

[78] *See* Rodriguez, *supra* note 22, at 521, 532.

borders. In enacting sanctuary policies, states pointed to their interest in promoting safety in their communities by encouraging positive relations with immigrants who may have hesitated before cooperating with police for fear of contacts with ICE.[79] Even more directly, states have an interest in protecting the health, safety, and civil rights of those detained within that state.[80] Significantly, protecting the health and welfare of those detained within their borders is part of the historic police powers of the states.[81] In addition, there is no statute similar to § 1373 requiring that states allow their officials to cooperate with ICE by detaining immigrants.[82] As discussed above, the federal statute on which ICE contracts are based, § 1231(g), provides that ICE may make agreements with existing detention facilities and should consider availability before constructing new facilities.[83] This statute is permissive, not requiring contracting with state, local, or private facilities, but allowing it. States have a strong interest in regulating detention within their territories, particularly in facilities run by private companies, where they have less oversight.[84]

These welfare interests and oversight concerns have motivated local actions and state laws limiting ICE detention. This Part briefly discusses resistance to ICE detention at the local level. Next, it outlines two state laws prohibiting ICE detention within their borders: California Assembly Bill No. 32 and New Jersey Assembly Bill No. 5207. This Part explores the strengths and weaknesses of these laws through a detailed discussion of actual and potential Supremacy Clause challenges to the statutes' constitutionality.

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[79] Amdur, *supra* note 56, at 101–02.

[80] *See, e.g.*, N.J. STAT. ANN. § 30:4-8.15 (2023) (The State's responsibilities include "ensur[ing] respect for . . . human rights and civil rights [and] . . . protect[ing] the health and safety . . . of individuals detained within New Jersey.").

[81] *See* United States v. California, 921 F.3d 865, 886 (9th Cir. 2019) ("California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders . . . .").

[82] *Compare* 8 U.S.C. § 1373 (prohibiting federal, state, and local governments from restricting the sharing of citizenship or immigration status), *with* 8 U.S.C. § 1231(g) (vesting the Attorney General with the power to arrange places of detention, including considering the use of existing prisons and jails, which could include state or local facilities); *see supra* Part II.B.

[83] 8 U.S.C. § 1231(g); *see supra* Part II.C.

[84] *See* Rubenstein & Gulasekaram, *supra* note 1, at 226.

A. *Local Resistance to Immigration Detention*

Resistance to immigration detention began in individual localities, including counties that cancelled their contracts with ICE.[85] ICE partnered with local governments to house immigrant detainees in unused jail beds or centers specifically for immigrant detainees, many of which are run by private prison companies, through Intergovernmental Service Agreements.[86] Some counties and cities modified or withdrew from these agreements due to liability concerns and public criticism.[87] Some of these withdrawals have led to the closures of detention facilities, but when a county stops working with ICE, private companies may take their place.[88]

Individual cities and counties will continue to face obstacles in withdrawing from housing immigrant detainees within their territories without supportive state laws because private prison companies can contract directly with ICE. For instance, the counties of Orange and Contra Costa, California ended their contracts with ICE.[89] Since these facilities were run by county sheriff's departments, ending the contracts closed the detention centers.[90] This is not necessarily the case with privately run centers. In June 2018, Williamson County, Texas, in the midst of protests motivated by outrage over the separation of immigrant children from their parents and allegations of abuse within the county's immigration detention center, voted not to renew its contract with ICE.[91] Following the vote, ICE independently extended the contract directly with CoreCivic, a private prison company which was party to the previous contract between Williamson County and ICE.[92] Similarly, in Adelanto, California, the city government withdrew from its ICE contract, but a private company,

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[85] Matt Clarke, *Counties Modify, Cancel Contracts for Privately Operated Immigration Detention Centers*, PRISON LEGAL NEWS (Mar. 5, 2019), https://www.prisonlegalnews.org/news/2019/mar/5/counties-modify-cancel-contracts-privately-operated-immigration-detention-centers.

[86] *Id.*

[87] *Id.*

[88] *See id.*

[89] Amy Taxin, *California Sees Shift in Immigration Detention Contracts*, AP NEWS (Apr. 8, 2019), https://apnews.com/article/immigration-north-america-santa-ana-local-governments-ca-state-wire-3a72b20196a648fe91896fa4d1c7ad04.

[90] *Id.*

[91] Clarke, *supra* note 85.

[92] *Id.*

GEO Group Inc., simultaneously planned to contract directly with ICE.[93]

States have recently started acting to end immigration detention statewide.[94] By refusing to contract with ICE and limiting private detention centers from doing so within state territory, advocates hope that more state and local governments will follow and, over time, reduce the number of immigrants detained during proceedings.[95]

B. *California Assembly Bill No. 32 and New Jersey Assembly Bill No. 5207*

On October 11, 2019, California Governor Gavin Newsom signed Assembly Bill No. 32 ("A.B. 32") into law.[96] Section 1 of the law amends California's Criminal Code to prohibit the California Department of Corrections and Rehabilitation (CDCR) from contracting with private, for-profit prison facilities in or outside California.[97] The law prohibits entering new contracts and renewing existing contracts on or after January 1, 2020.[98] The law also provides that after January 1, 2028, no state prison inmate or other person under the CDCR's jurisdiction may be incarcerated in a private, for-profit prison facility.[99] This section ends with an exception allowing the CDCR to renew or extend private prison contracts to house state prison inmates for the purpose of complying with any court-ordered population cap.[100] Section 2 includes several definitions as well as a general prohibition that "a person shall not operate a private detention facility within the state."[101]

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[93] Taxin, *supra* note 89.

[94] Though not the focus of this Comment, other recent statutes include the Illinois Way Forward Act, S.B. 0667, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021) and the Private Detention Facility Moratorium Act, 730 ILL. COMP. STAT. 141/15 (2019).

[95] *See* Sophie Murguia, *California Cities Are Ending ICE Detention Contracts, but Immigrants Might Not Go Free*, PAC. STANDARD (May 29, 2019), https://psmag.com/social-justice/california-cities-are-ending-ice-detention-contracts-but-immigrants-might-not-go-free.

[96] CAL. PENAL CODE §§ 5003.1, 9500–05 (West 2020); Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California (Oct. 11, 2019), 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.

[97] PENAL § 5003.1.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] PENAL §§ 9500–01.

The law defines "private detention facility," as "a detention facility that is operated by a private, nongovernmental, for-profit entity," which is "operating pursuant to a contract or agreement with a governmental entity."[102] The law then lists several exemptions, including juvenile rehabilitative, health, and medical services facilities.[103] Notably, although A.B. 32 does not specifically mention immigration detention nor the federal government, the law does apply to all governmental entities, not just state and local ones.[104] As such, the law prohibits contracts with private prison companies to detain immigrants within California.

New Jersey Assembly Bill 5207 ("A. 5207") prohibits state and local government agencies and private detention facilities from entering into, renewing, or extending any immigration detention agreement with a federal immigration authority.[105] Unlike the California bill, this law specifically addresses immigration detention. In addition to private actors, it also prohibits state and local government agencies from entering into ICE contracts.[106]

C. *Supremacy Clause Challenges to California's Law*

In the final days of 2019, "a for-profit prison company," GEO Group Inc. (GEO), and the Department of Justice brought actions challenging California's A.B. 32.[107] GEO operates over one hundred private prison facilities across the country, including six facilities in California.[108] Three of these are dedicated to ICE detention.[109] GEO alleged that it was facing a loss of $4 billion because of the California

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[102] PENAL § 9500(b).

[103] PENAL § 9502.

[104] *See* PENAL § 9500(b).

[105] Assemb. 5207, 219th Leg., Reg. Sess. (N.J. 2021); N.J. REV. STAT. §§ 30:4-8.15–16 (2021).

[106] § 30:4-8.16.

[107] Nadia Dreid, *Private Prison Co. Calls Calif. For-Profit Detention Ban Illegal*, LAW360 (Jan. 2, 2020, 7:34 PM), https://www.law360.com/articles/1230776; *Our Locations*, GEO GROUP, INC., https://www.geogroup.com/LOCATIONS (last visited Mar. 1, 2023); Kaitlyn Burton, *Feds Challenge Calif. Law Banning Private Prisons*, LAW360 (Jan. 27, 2020, 8:13 PM), https://www.law360.com/articles/1237808.

[108] Dreid, *supra* note 107; *Our Locations*, *supra* note 107.

[109] *Central Valley Annex*, GEO GROUP, INC., https://www.geogroup.com/FacilityDetail/FacilityID/42 (last visited Jan. 27, 2023); *Desert View Annex*, GEO GROUP, INC., https://www.geogroup.com/FacilityDetail/FacilityID/46 (last visited Jan. 27, 2023); *Golden State Annex*, GEO GROUP, INC., https://www.geogroup.com/FacilityDetail/FacilityID/196 (last visited Jan. 27, 2023).

law.[110] The Department of Justice, under the Trump Administration, argued that the relocation of immigrant detainees was costly, burdensome, and could potentially slow down immigration proceedings.[111] In arguing to strike down the law, the two plaintiffs' arguments relied on claims of preemption and intergovernmental immunity doctrines.[112]

On October 8, 2020, the United States District Court for the Southern District of California denied GEO and the United States' motions for a preliminary injunction enjoining enforcement of the law as to ICE detention facilities.[113] The court granted the motions as to the United States Marshal Service's private detention facilities within the state.[114]

The plaintiffs appealed this decision, and oral argument occurred on June 7, 2021.[115] A few days after oral argument, several House Democrats asked the Department of Justice to drop its suit against California in a letter to Attorney General Merrick Garland.[116] Representatives, including Norma Torres of California and Raul Grijalva of Arizona, argued that the lawsuit was antithetical to the Biden Administration's goals, including the goal of ending privatized incarceration.[117] But the Biden Administration continued with the suit, and neither the Department of Justice nor the White House have issued a comment on this case.[118] On October 5, 2021, a panel of Ninth Circuit judges reversed the district court's denial of a preliminary

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[110] Dreid, *supra* note 107.

[111] Burton, *supra* note 107.

[112] *Id.*; *see* Dreid, *supra* note 107.

[113] GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 960 (S.D. Cal. 2020).

[114] *Id.* at 941, 963.

[115] United States Court of Appeals for the Ninth Circuit, *20-56172 The Geo Group, Inc. v. Gavin Newsom*, YOUTUBE (June 7, 2021), https://www.youtube.com/watch?v=TUvhhfgL8IM.

[116] Letter from Norma J. Torres et al., Members of Cong., to Merrick Garland, Att'y Gen., U.S. Dep't of Just. (June 10, 2021), https://torres.house.gov/sites/torres.house.gov/files/documents/Letter%20to%20DOJ%20on%20AB32.pdf; Daniel Wilson, *Dems Call for DOJ to Drop California Private Prison Ban Suit*, LAW360 (June 11, 2021, 7:38 PM), https://www.law360.com/articles/1393343?scroll=1&related=1.

[117] Letter from Norma J. Torres et al., *supra* note 116; *see* Wilson, *supra* note 116.

[118] Wilson, *supra* note 116; Mike LaSusa, *9th Circ. Rejects Calif. Ban on Private Prisons*, Law360 (Oct. 5, 2021, 2:34 PM), https://www.law360.com/articles/1428452?e_id=c9172239-c4f4-43eb-b174-333d2defac01&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates.

injunction as to ICE detention facilities, holding that A.B. 32 obstructs federal immigration enforcement.[119]

On November 17, 2021, the Attorney General of California filed for rehearing en banc in defense of the law, arguing that federal law does not preempt A.B. 32 and that the law does not discriminate against the federal government.[120] The Biden Administration, along with GEO, argued in response briefs that the panel's decision should not be reheard.[121] The Ninth Circuit announced it would rehear the case en banc and vacated the three-judge panel opinion on April 26, 2022.[122] Oral argument occurred on June 21,[123] and on September 26, 2022, the Ninth Circuit affirmed the three-judge panel's decision.[124]

The following outlines the district court's holding that A.B. 32's application to immigration detention does not violate preemption or intergovernmental immunity doctrines and the Ninth Circuit's subsequent reversal. This subsection concludes that the Ninth Circuit erred by failing to apply the presumption against preemption and incorrectly analyzed the intergovernmental immunity issue.

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[119] GEO Grp., Inc. v. Newsom, 15 F.4th 919, 940 (9th Cir. 2021).

[120] Petition for Rehearing En Banc at 10, 16, GEO Grp., Inc. v. Newsom, 15 F.4th 919 (9th Cir. 2021) (Nos. 20-56172, 20-56304).

[121] Opposition to Petition for Rehearing En Banc at 4, GEO Grp., Inc. v. Newsom, 15 F.4th 919 (9th Cir. 2021) (Nos. 20-56172, 20-56304); Plaintiff-Appellant GEO Group, Inc.'s Opposition to Petition for Rehearing En Banc at 4, GEO Grp., Inc. v. Newsom, 15 F.4th 919 (9th Cir. 2021) (No. 20-56172, 20-56304); Jennifer Doherty, *Feds Urge 9th Circ. Not to Rehear Calif. Private Prison Row*, LAW360 (Dec. 20, 2021, 4:57 PM), https://www.law360.com/articles/1450056/feds-urge-9th-circ-not-to-rehear-calif-private-prison-row-.

[122] GEO Grp., Inc. v. Newsom, 31 F.4th 1109, 1110 (9th Cir. 2022); Lauren Berg, *En Banc 9th Circ. to Reconsider Calif. Private Prison Ban*, LAW360 (Apr. 26, 2022, 9:38 PM), https://www.law360.com/articles/1487676/en-banc-9th-circ-to-reconsider-calif-private-prison-ban.

[123] *See* Lauren Berg, *Calif. Asks En Banc 9th Circ. to Uphold Private Prison Ban*, LAW360 (June 21, 2022, 11:48 PM), https://www.law360.com/articles/1504838/calif-asks-en-banc-9th-circ-to-uphold-private-prison-ban.

[124] *See* GEO Grp., Inc. v. Newsom, 50 F.4th 745, 763 (9th Cir. 2022); Bonnie Eslinger, *Private Prison Ban Unconstitutional, En Banc 9th Circ. Says*, LAW360 (Sept. 26, 2022, 7:32 PM), https://www.law360.com/articles/1534023/private-prison-ban-unconstitutional-en-banc-9th-circ-says.

1. *GEO Group, Inc. v. Newsom*: Southern District of California

The district court dismissed the majority of the plaintiffs' claims challenging A.B. 32.[125] The district court held that the California law, as applied to contracts with ICE, was neither preempted nor did it violate intergovernmental immunity.[126]

The court began by determining whether the presumption against preemption applied.[127] As discussed above, the presumption against preemption applies to laws which fall within the historic police powers of the state.[128] The district court held that the presumption applied because protecting the health and welfare of detainees is a traditional state police power, even if the inmates and detainees are federal.[129] The court relied on both the Ninth Circuit's interpretation of California's traditional police powers in *United States v. California*, and the legislative history of A.B. 32.[130] In *United States v. California*, the Ninth Circuit recognized California's historic powers to ensure the health and welfare of detainees in facilities within its territory.[131] The legislative history of A.B. 32 focused on ensuring the health and welfare of detainees within the state by addressing the perverse incentives that arise in private prisons.[132] Because they are driven by profits, private companies' motivations to cut costs can negatively impact the health and safety of detainees in their facilities.[133]

The district court concluded that there was no conflict preemption after determining that Congress did not show clear and manifest intent to preempt this kind of state law.[134] In their arguments, the plaintiffs suggested that Section 1231(g) demonstrated Congress's intent.[135] The INA gives the Attorney General authority to arrange

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[125] GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 959–60 (S.D. Cal. 2020).

[126] *Id.* at 936–47, 948–59.

[127] *Id.* at 934–36.

[128] *See supra* Part II.A.

[129] *GEO*, 493 F. Supp. 3d at 934–36.

[130] *Id.*

[131] United States v. California, 921 F.3d 865, 885–86 (9th Cir. 2019); *see supra* Part II.A.

[132] *GEO*, 493 F. Supp. 3d at 935–36.

[133] *Id.*

[134] *Id.* at 938.

[135] *Id.* at 937.

detention facilities for noncitizen detainees.[136] The statute provides that before initiating any construction project for a new facility, "the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or comparable facility suitable for such use."[137] The court found this language insufficient to show that Congress clearly and manifestly intended that ICE house immigrant detainees in private facilities.[138] This analysis led the court to differentiate between the application of the law to ICE contracts and the application to U.S. Marshals Service (USMS) contracts.[139] The USMS statute specifically provides that the persons in custody of the USMS may be held in facilities under contracts with private entities.[140] The INA, in contrast, does not mention private entities, but instead allows the Attorney General to arrange for "appropriate places of detention."[141] For that reason, the district court granted the preliminary injunction as applied to the USMS but denied it as applied to ICE.[142]

The district court also held that A.B. 32 is not field preempted because the relevant field was not so pervasively occupied by the federal government such that preemption was implied.[143] The court reasoned that the field proposed by the plaintiffs, "contracting for federal prisoner and detainee housing," was too broad.[144] Defining this field required piecing together provisions from different Titles of the U.S. Code in order to encompass both civil and criminal detention.[145] The court concluded that the field was ICE housing detainees.[146] Pointing to the Ninth Circuit decision in *United States v. California*, which recognized the state's regulatory authority to ensure the health and welfare of individuals detained instate, the court held that the

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136 8 U.S.C. § 1231(g).

137 § 1231(g)(2).

138 *GEO*, 493 F. Supp. 3d at 937.

139 *See id.* at 939.

140 18 U.S.C. § 4013(c)(2).

141 8 U.S.C. § 1231(g).

142 *GEO*, 493 F. Supp. 3d at 963.

143 *Id.* at 946.

144 *Id.* at 943.

145 *Id.*

146 *Id.* at 944.

federal government had left room for the states to operate in this field.[147]

Additionally, the district court held that A.B. 32 did not violate intergovernmental immunity because it did not discriminate against the federal government or its contractors,[148] nor did it directly regulate the federal government.[149]

2. *Geo Group, Inc. v. Newsom*: Ninth Circuit

The Ninth Circuit reversed the decision below, finding that both preemption and intergovernmental immunity doctrines prevented the law from taking effect.[150] The panel was divided, with Judge Lee authoring the majority opinion and Judge Murguia dissenting.[151] The Ninth Circuit vacated this opinion when it chose to rehear the case en banc.[152] En banc, the Ninth Circuit affirmed the ruling that the law violated the Supremacy Clause.[153] Judge Nguyen authored the en banc opinion, joined by Judges Ikuta, Owens, R. Nelson, Lee, and Forrest.[154] Judges Smith and Watford concurred in part.[155] Chief Judge Murguia wrote a dissent joined by Judges Rawlinson and Sung.[156] The majority's reasoning, as well as the dissent's, is detailed below.

The circuit court first held that the presumption against preemption does not apply to A.B. 32, criticizing the district court's

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[147] *Id.* (citing United States v. California, 921 F.3d 865, 886 (9th Cir. 2019)); for a discussion of *United States v. California*, see *supra* Part II.A.

[148] The district court held that there was no discrimination in A.B. 32's exceptions because the federal government was not similarly situated: it had not contracted to run the types of facilities included in the exceptions. *GEO*, 493 F. Supp. 3d at 956–57.

[149] The district court determined that A.B. 32 did not directly regulate the federal government because GEO was not a contractor with immunity that was "so closely connected to the Government that the two [could not] realistically be viewed as separate entities, at least insofar as the activity being [regulated] is concerned." *GEO*, 493 F. Supp. 3d at 950 (quoting United States v. New Mexico, 455 U.S. 720, 735 (1982)). The government did not have direct supervision over GEO employees, nor were GEO's profit-making considerations connected with federal government interests. *Id.* at 952 (quoting United States v. Boyd, 378 U.S. 39, 44 (1964)).

[150] GEO Grp., Inc. v. Newsom, 15 F.4th 919, 924 (9th Cir. 2021).

[151] *Id.*

[152] GEO Grp., Inc. v. Newsom, 31 F.4th 1109, 1110 (9th Cir. 2022).

[153] GEO Grp., Inc. v. Newsom, 50 F.4th 745, 751 (9th Cir. 2022).

[154] *Id.* at 750.

[155] *Id.*

[156] *Id.* at 763.

broad recognition of California's power to adopt such a law.[157] Instead, the Ninth Circuit determined that the law aimed to impede federal relationships with private contractors, particularly private immigration detention centers, which is not a historic police power.[158] The Court distinguished this law from the inspection requirement at issue in *United States v. California* as "go[ing] much further."[159] The majority also noted that the law could be viewed as a regulation on the government itself, rather than on federal contractors, meaning it was not entitled to a presumption against preemption.[160]

In dissent, Judge Murguia pointed out flaws in the majority's characterization of the statute's scope. The law applies to the California Board of Prisons and USMS, but in analyzing the scope of the regulation, the majority focused only on immigration.[161] She reiterated the district court's argument that the statute is aimed at the regulation of health, safety, and welfare of detainees within the state's borders, which is a historic police power.[162]

The Ninth Circuit held that A.B. 32 posed an obstacle to the execution of Congressional objectives. The INA permits contracts with private facilities, which A.B. 32 expressly prohibits.[163] The Ninth Circuit took a broader view of the clear and manifest intent requirement, concluding that the federal law's permissive language means that A.B. 32 conflicts with Congress's intent to provide broad discretion.[164] The majority portrayed this as A.B. 32 preventing the agency from doing what federal immigration law permits.[165] But Judge Murguia argued in dissent that the cases relied upon, *Gartrell* and *Crosby*, do not create a rule that discretion alone is sufficient for preemption.[166] Instead, those cases involved separate comprehensive schemes of federal law with which state laws interfered.[167] In contrast,

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[157] *Id.* at 761–62.

[158] *Id.* at 761.

[159] *GEO*, 50 F.4th at 761.

[160] *Id.* at 762.

[161] *Id.* at 768 (Murguia, J., dissenting).

[162] *Id.* at 767.

[163] *Id.* at 762–63 (opinion of Nguyen, J.).

[164] *Id.*

[165] *GEO*, 50 F.4th at 762–63 (collecting cases).

[166] *Id.* at 768 (Murguia, J., dissenting) (citing Gartrell Constr. Inc., v. Aubry, 940 F.2d 437 (9th Cir. 1991); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)).

[167] *Id.* at 768–69 (Murguia, J., dissenting); Gartrell Constr. Inc., v. Aubry, 940 F.2d 437, 441 (9th Cir. 1991) (separate but similar state licensing requirement for federal

the INA provision does not create a comprehensive scheme for immigration detention but, rather, confers discretion.

The majority also concluded that the law violated intergovernmental immunity by providing exemptions for some state contractors with no comparable exceptions for the federal government.[168] Because it found the statute discriminatory, the majority did not address whether direct regulation occurred.[169]

3. The Error of *GEO Group, Inc. v. Newsom*

A.B. 32 should not be invalidated by the Supremacy Clause. The Ninth Circuit erred in its interpretation of the clear and manifest intent requirement, as well as its intergovernmental immunity analysis.

i. Preemption

A.B. 32 is not preempted because the statute is an exercise of California's historic police power to regulate the health and safety of those detained within its borders, and Congress has not acted with clear and manifest purpose to preempt this exercise. Nor has Congress so pervasively occupied the field of regulation over housing of ICE detainees.

The law is primarily focused on the health and welfare of detainees held in private prisons and detention facilities within California's borders. The Ninth Circuit's interpretation of A.B. 32 as an immigration regulation is incorrect. To determine the scope of the regulation, the language of the statute is usually considered conclusive.[170] The language of the statute never specifically mentions the federal government or immigration detention.[171] Instead of

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contractors was preempted by comprehensive federal licensing requirements); *Crosby*, 530 U.S. at 766 (holding that Congress's grant of authority to the President to enact sanctions on a foreign government was complete and Massachusetts law would interfere with this comprehensive grant of power).

[168] *GEO*, 50 F.4th at 760–61 (opinion of Nguyen, J.). The dissent argued that the relevant inquiry should be based on whether differences between the exempted facilities and immigration detention facilities justified different treatment. *See generally id.* at 763–66 (Murguia, J., dissenting).

[169] *Id.* at 761 (opinion of Nguyen, J.). The opinion does not address what test should be applied to determine what constitutes direct regulation. *Id.* Judge Murguia's dissent noted that the statute creates prohibitions on private actors, rather than directly regulating the federal government. *Id.* at 766 (Murguia, J., dissenting).

[170] GEO Group, Inc. v. Newsom, 15 F.4th 919, 927–28 (9th Cir. 2021) (opinion of Lee, J.) (citing City of Auburn v. United States Gov't, 154 F.3d 1025, 1029–30 (9th Cir. 1998).

[171] *See* CAL. PENAL CODE §§ 5003.1, 9500–05 (West 2020).

recognizing California's interest in protecting the health and welfare of detainees, the Ninth Circuit panel relied on the statute's use of the phrase "governmental entity" to determine that California was stepping outside of its historic police powers.[172] The phrase includes the federal government, rather than limiting the law's application to the state.[173] En banc, the Ninth Circuit focused on the effect on federal regulations, regardless of the language of the statute.[174] But that does not change the fact that this is a widely applicable statute, rather than a law specifically targeting immigration detention.

A.B. 32 does not obstruct federal goals because there is no clear and manifest congressional intent that ICE contract with private prison companies. The INA uses general and permissive language that allows ICE to enter contracts with private facilities, but it neither explicitly names private facilities nor otherwise expresses clear and manifest intent.[175] Both the district court and Judge Murguia's dissent argued that there is a distinction between what Congress permits and what Congress intends.[176] The district court drew this distinction when it granted the preliminary injunction against the law as applied to the USMS, where the related federal statute did express the required clear and manifest intent.[177]

For similar reasons, A.B. 32 is not field preempted. Congress created separate statutes to address immigration detention and criminal detention facilities, not a single statutory field which comprehensively regulates detention.[178] This fact, along with the Ninth Circuit's decision to uphold the regulatory statute in *United States v. California*, suggests that the operation of detention facilities is not a field that the federal government has so pervasively occupied as to preempt A.B. 32.[179] The standard suggested by Judge Murguia's dissent is superior to that of the majority because it prevents a far-reaching judicial inquiry into tensions between state and federal laws,

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[172] *GEO*, 15 F.4th at 928.

[173] *Id.*

[174] *See GEO*, 50 F.4th at 760 .

[175] 8 U.S.C. § 1231(g); *GEO*, 50 F.4th at 767–68 (Murguia, J., dissenting) (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

[176] *See GEO*, 50 F.4th at 767–68 (Murguia, J., dissenting); GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 938 (S.D. Cal. 2020).

[177] *See supra* Part III.C.1.

[178] *GEO*, 493 F. Supp. 3d at 943.

[179] *See supra* Part II.A.

which should be left to Congress.[180] If Congress so chose, it could amend the INA to explicitly include private entities, but it has not chosen to do so.

ii. Intergovernmental Immunity

Contrary to the Ninth Circuit's en banc majority opinion, A.B. 32 does not violate intergovernmental immunity by directly regulating the federal government or impermissibly discriminating against it. While true that A.B. 32 contains exceptions for certain state facilities, none of which apply to facilities currently run by the federal government,[181] that does not make the statute inherently discriminatory. Section 5003.1(e) allows for the extension of contracts if required to comply with a court-ordered population cap.[182] Section 2 of the law includes several exceptions, including juvenile rehabilitative facilities and residential care facilities.[183] California has valid justifications for singling out these types of facilities because they do not raise the same oversight concerns applicable to private prisons. Many of them also must comply with state licensing and health regulations.[184] Judge Murguia's dissent in the panel decision highlighted the fact that A.B. 32 also affects state facilities because CDCR is well under the court-ordered population cap.[185] At oral argument, counsel for California explained that although the statute does contain an exception based on court-ordered population caps, it has not been used to extend or renew contracts with privately run facilities holding state inmates.[186] Instead, the state cancelled those contracts.[187]

To be discriminatory, a state law must treat the government or its contractors worse than the comparable reference group.[188] Intergovernmental immunity challenges are particularly tricky in the

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[180] *See GEO*, 50 F.4th at 769 (Murguia, J., dissenting) (quoting Chamber of Com. v. Whiting, 563 U.S. 582, 607 (2011)).

[181] CAL. PENAL CODE §§ 5003.1(e), 9502 (West 2020).

[182] PENAL § 5003.1(e).

[183] PENAL § 9502.

[184] GEO Group, Inc. v. Newsom, 15 F.4th 919, 948 (9th Cir. 2021) (Murguia, J., dissenting).

[185] *Id.* at 949.

[186] Oral Argument at 36:42, GEO Group, Inc. v. Newsom, 15 F.4th 919 (9th Cir. 2021) (No. 20-56172), https://www.youtube.com/watch?v=TUvhhfgL8IM.

[187] *Id.*

[188] Rubenstein & Gulasekaram, *supra* note 1, at 230 (citing North Dakota v. United States, 495 U.S. 423, 434–435 (1990)).

immigration detention context, as there are no clear comparable reference groups; it is a civil system bearing many similarities to criminal detention.[189] Whether non-immigration civil detention, criminal jails, or some other equivalent is the best comparison remains unclear.[190]

A.B. 32 also does not directly regulate the federal government. Instead, it places a limitation on private actors.[191] GEO does not fit the requirements to receive immunity from regulation as a federal contractor because it is not under the supervision of the federal government.[192] Its primary goals, which are profit-driven, are also separate from federal interests.[193]

D. *Supremacy Clause Challenges to N.J. A. 5207*

New Jersey is the most recent state to address ICE detention. Advocates began pushing for the state to ban new immigration detention when ICE began requesting information on new detention sites in October 2020, which could have increased capacity by 900 beds.[194] Protests both inside and outside detention facilities drew attention to the abuse and, during the pandemic, the rampant spread of disease within.[195] On January 4, 2021, the State Assembly introduced A. 5207, a bill banning state and local agencies, and private entities, from entering into contracts with ICE.[196] In April 2021, Essex, Bergen, and Hudson counties, motivated by decreased immigration detention numbers during the pandemic, began discussing plans to end immigration detention.[197] In late June, the State Senate passed the bill, and Governor Phil Murphy signed it into law on August 20, 2021.[198] Legislative findings for the bill demonstrated a history of poor conditions in detention centers and correctional facilities, including inadequate medical care, isolated confinement, and incidents of

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189 *Id.* at 234–35.

190 *Id.*

191 CAL. PENAL CODE § 5003.1 (West 2020).

192 *See* GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 950–52 (S.D. Cal. 2020)

193 *Id.*

194 Jordan Levy, *Why ICE Is Leaving New Jersey County Jails*, NEW REPUBLIC: SOLD /SHORT (Aug. 27, 2021), https://newrepublic.com/article/163447/phil-murphy-bans-ice-new-jersey-county-jails.

195 *Id.*

196 Assemb. 5207, 219th Leg., Reg. Sess. (N.J. 2021).

197 Levy, *supra* note 194.

198 *Id.*

violence and retaliation.[199] Findings emphasized the state's responsibility to ensure respect for human and civil rights, as well as the health and safety of all detained within New Jersey's borders.[200]

Recently, CoreCivic filed suit challenging A. 5207.[201] Since the arguments in this case are still unfolding the subsequent sections explore potential arguments, as well as the actual arguments raised by the private prison company.[202]

1. Preemption

Unlike California's law, which applies only to private actors, New Jersey's law also restricts state and local agencies from contracting with ICE for immigration detention.[203] In contrast to private facilities, which are not specifically enumerated in the INA as a possible place of detention, the INA does specifically mention contracts with state and local governments for ICE detention facilities.[204] The INA allows the United States Attorney General to "enter into a contractual arrangement which provides for compensation to the state or a political subdivision of the state, as may be appropriate, with respect to the incarceration of the undocumented criminal alien."[205] At first glance, this seems like a strong opportunity for a preemption challenge to New Jersey's law. But the INA also states that this process is initiated by a request from a state or local official.[206] Even if the language of the statute were stronger, this portion of the New Jersey law would be protected by the anticommandeering doctrine.

As discussed above, the anticommandeering doctrine limits the federal government's ability to force states to carry out federal regulatory schemes.[207] By prohibiting states and local agencies form contracting with ICE, New Jersey is exercising its right of refusal. This argument would be even stronger if § 1373 were found unconstitutional according to the standard set out in *Murphy*: that both

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[199] N.J. REV. STAT. § 30:4-8.15 (2021).

[200] *Id.*

[201] Complaint at 2, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023).

[202] As of publication, New Jersey's answer has not yet been filed, so the following subsections discuss only CoreCivic's arguments.

[203] N.J. REV. STAT. § 30:4-8.16(b)(1) (2021).

[204] 8 U.S.C. § 1231(i)(1)(A).

[205] *Id.*

[206] § 1231(i)(1).

[207] *See supra* Part II.B; Amdur, *supra* note 56, at 126.

federal law commanding a state to act and federal prohibitions on state legislative activity violate the anticommandeering doctrine.[208] An analogous statute preventing states from prohibiting local officials and agencies from entering ICE contracts would violate anticommandeering by denying states their right to refuse involvement in immigration detention, which is more invasive than requiring the sharing of information.

The overlap between preemption and the anticommandeering doctrine was important in *County of Ocean v. Grewal* (consolidated with *Nolan v. Grewal*).[209] In New Jersey, Ocean and Cape May counties challenged the Immigrant Trust Directive issued by New Jersey State Attorney General Gurbir Grewal which limited the type of voluntary assistance New Jersey law enforcement officers could provide to federal immigration authorities.[210] The district court dismissed the case, finding that the Directive was not preempted by federal law, and that if viewed broadly enough to preempt, the federal provision would violate the anticommandeering doctrine.[211] The Third Circuit affirmed, holding that a restriction on state action could not be the basis of a preemption challenge.[212] If similar reasoning is applied to the New Jersey ICE detention statute, it cannot be preempted.

The portion of A. 5207 applicable to private prison companies faces similar preemption issues as California's A.B. 32.[213] The *CoreCivic* suit brings a preemption challenge specifically targeted at A. 5207's application to private actors.[214] This claim largely mirrors the challenge brought by GEO.[215] First, CoreCivic alleges that A. 5207 serves as an obstacle to the operation of federal law by interfering with ICE's discretion to determine "what immigration detention facilities are 'appropriate.'"[216] Next, the complaint claims that field preemption

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[208] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

[209] *See generally* 475 F. Supp. 3d 355 (D.N.J. 2020).

[210] *Id.* at 363–65.

[211] *Id.* at 355, 376–78.

[212] Ocean Cnty. Bd. of Comm'rs v. Att'y Gen. of New Jersey, 8 F.4th 176, 182 (3d Cir. 2021).

[213] *Compare* Complaint at 13–14, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023), *with* GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 933–38 (S.D. Cal. 2020).

[214] Complaint at 13–14, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023); N.J. REV. STAT. § 30:4-8.16(b)(2) (2021).

[215] *See* GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 934–36 (S.D. Cal. 2020).

[216] Complaint at 14, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023).

prevents the enforcement of A. 5207.[217] For the same reasons discussed in greater detail concerning A.B. 32,[218] this challenge should be dismissed. The presumption against preemption means that, unless there is clear and manifest Congressional intent, laws that constitute an exercise of the historic police powers of the states are presumed not to be preempted.[219] As the legislative findings noted, "[i]t is the responsibility of the State to protect the health and safety, including the physical and mental health, of individuals detained within New Jersey."[220] Protecting the health and safety of detainees falls within the historic police powers of the state, and federal law does not clearly and manifestly preempt exercise of that power.[221] The U.S. District Court for the District of New Jersey is not bound by the Ninth Circuit's reasoning, which held that there was a likelihood of success on this claim,[222] and should dismiss this claim.

2. Intergovernmental Immunity

Unlike A.B. 32, New Jersey specifically targets immigration detention in its statute, rather than applying to private facilities broadly.[223] This specificity means that an intergovernmental immunity claim may have more bite. It could be argued that since New Jersey's law specifically targets ICE detention, as opposed to all incarceration like the California law, the federal government is being unfairly discriminated against. Unlike California's law, which applies to state facilities as well, albeit with several exceptions,[224] A. 5207 only focuses on immigration, an area of federal law,[225] while New Jersey law continues to permit private prisons in other contexts.[226]

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[217] *See id.*

[218] *See supra* Part III.C.3.i.

[219] Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[220] N.J. REV. STAT. § 30:4-8.15(b) (2021).

[221] *See id.* The section of the INA authorizing immigration detention does not mention private entities. 8 U.S.C. § 1231(g). For a more detailed discussion of the interpretation of § 1231(g), see *supra* Part III.C.1.

[222] GEO Grp., Inc. v. Newsom, 50 F.4th 745, 761–62 (9th Cir. 2022).

[223] *Compare* CAL. PENAL CODE § 9501 (West 2020), *with* N.J. REV. STAT. § 30:4-8.16(b)(2) (2021).

[224] CAL. PENAL CODE §§ 5003.1, 9500–05 (West 2020).

[225] N.J. REV. STAT. § 30:4-8.16 (2021).

[226] *Id.* § 30:4-91.10 (2019); Complaint at 15, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023).

Because New Jersey's law targets only immigration detention, it may even be considered a direct regulation in violation of the intergovernmental immunity doctrine. This is exactly what CoreCivic argues in its complaint.[227] CoreCivic alleges that A. 5207 constitutes a "power of review over ICE's contracting decisions."[228] To counter this argument, the State will have to show that A. 5207 regulates private actors' interactions with the federal government by prohibiting contracts with ICE, rather than regulating the federal government itself.[229]

CoreCivic additionally argues that as a contractor for the United States, it is entitled to the protections of intergovernmental immunity.[230] The U.S. District Court for the District of Southern California held that GEO could not show that it acted as an instrumentality of the Federal Government.[231] This argument was not ultimately addressed by the Ninth Circuit in its review of A.B. 32 because the court decided that the statute sufficiently interfered with federal operations to implicate intergovernmental immunity.[232] Still, even if this does not rise to direct regulation of the federal government, the discrimination claim is much stronger here compared to the California law because of the explicit mention of immigration detention.

IV. STATE EFFORTS SHOULD FOCUS ON REDUCING RELIANCE ON PRIVATE PRISON COMPANIES AND INCREASING OVERSIGHT OF STATE AND LOCAL FACILITIES

Other states considering enacting restrictions on ICE detention must consider the strengths and weaknesses of laws like A.B. 32 and A. 5207. California's law does not specifically mention immigration detention, but instead prohibits contracts with private prison companies entirely.[233] New Jersey's law specifically prohibits state and

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[227] Complaint at 15, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023).

[228] *Id.*

[229] *See* Ariana Headrick, Note, *An End to Inhumane Detention: Washington Must Ban Private Detention Centers and Strengthen Protections for Detained Immigrants*, 19 SEATTLE J. SOC. JUST. 505, 542–44 (2021).

[230] Complaint at 15, CoreCivic, Inc. v. Murphy, No. 2:23-cv-00967 (D.N.J. filed Feb. 17, 2023).

[231] GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 952 (S.D. Cal. 2020).

[232] *See* GEO Grp., Inc. v. Newsom, 50 F.4th 745, 761 (9th Cir. 2022).

[233] CAL. PENAL CODE §§ 5003.1, 9500–05 (West 2020).

local agencies, as well as private agencies, from contracting with ICE for detention within the state's territory.[234] Given the Ninth Circuit's decision,[235] laws styled after the California law would apparently, if unjustifiably, appear vulnerable to invalidation by federal courts if other circuits adopt the same reasoning. But because of its broad scope, California's law creates a better path for preventing private immigration detention facilities from proliferating within a state's borders. The New Jersey statute presents a viable option for prohibiting state and local agencies from contracting with ICE but is vulnerable to an intergovernmental immunity challenge as applied to private actors. The results of the recently filed *CoreCivic* case will provide further insight to other states seeking to limit ICE detention within their borders.

It is important for states to consider their ultimate goals in seeking to limit ICE contracts within their borders. Addressing private immigration detention invokes a particularly strong state interest because there is less oversight over these facilities.[236] Additionally, private prisons create perverse incentives to extend incarceration periods and cut costs, which reduces the quality of life for those detained.[237]

A. *Effects on Current Detainees*

When passing ICE detention bans, states must consider the effect on current immigrant detainees. If bans overwhelmingly lead to the transfer of detained individuals rather than their release, states should consider alternative methods of supporting immigrant communities within their borders. This section will briefly discuss the immediate impact of the New Jersey and California laws on immigrant detainees.

1. New Jersey

Prior to A. 5207's passage and immediately after, concerns have flared over the future of the immigrant detainees housed in New Jersey

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[234] N.J. REV. STAT. § 30:4-8.16 (2021).

[235] *GEO*, 50 F.4th at 751 (holding that A.B. 32 violates the Supremacy Clause).

[236] *See* Rubenstein & Gulasekaram, *supra* note 1, at 226.

[237] Lauren-Brooke Eisen, *Breaking Down Biden's Order to Eliminate DOJ Private Prison Contracts*, BRENNAN CTR. FOR JUST. (Aug. 27, 2021), https://www.brennancenter.org/our-work/research-reports/breaking-down-bidens-order-eliminate-doj-private-prison-contracts.

facilities.[238] In the spring of 2021, before the bill passed, Essex County Jail announced that ICE would have to remove its detainees by August 23rd, and several were subsequently transferred out of state.[239] ICE's conduct caused some to worry that the bill would do more to harm detainees than help immigrant communities.[240] Notably, the New Jersey State Bar Association urged New Jersey Governor Phil Murphy to veto the bill out of concern for detainees' legal representation in the wake of transfers to out-of-state facilities.[241] The letter expressed concerns that "eliminating immigration detention facilities in this state will not stop detentions[,]" and that if immigrants cannot be detained in New Jersey, detainees will be transferred "to farther, less safe facilities with even less ability to see their families, retain attorneys, or address those issues that are specific to any New Jersey matters."[242] Many advocates argued that instead of transfer, detainees were seeking release.[243] After the bill's passage, members of the Abolish ICE NY-NJ coalition demonstrated outside the Essex County Correctional Facility to protest the transfer of immigrants to out-of-state jails, demanding their release.[244]

Following some of the transfers, the American Civil Liberties Union (ACLU) filed a class action petition as well as a motion seeking a temporary restraining order to prevent the transfer of immigrant detainees held at the Essex County Correctional Facility.[245] The ACLU's complaint included due process claims concerning the plaintiffs' right to counsel of choice if they were unable to confer with their counsel after the transfers.[246] On July 2, 2021, the district court denied the motion for a temporary restraining order, finding no evidence that ICE was trying to interfere with the client-attorney

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[238] Monsy Alvarado, *ICE Continues to Pull Its Detainees from NJ*, NJ SPOTLIGHT NEWS: IMMIGR. (Aug. 5, 2021), https://www.njspotlight.com/2021/08/numbers-nj-ice-detainees-decline-13-left-essex-county-jail-public-pressure-out-of-state-transfers; Levy, *supra* note 194.

[239] Alvarado, *supra* note 238.

[240] Letter from Domenick Carmagnola, President, N.J. State Bar Ass'n, to Phil Murphy, Governor of N.J. (July 1, 2021), https://www.scribd.com/document/518856056/Letter-to-Governor-Murphy.

[241] *Id.*

[242] *Id.*

[243] Levy, *supra* note 194.

[244] *Id.*

[245] Brief for Petitioner-Plaintiff at 1, Robles v. U.S. Dep't of Homeland Sec., 2:21-cv-13117 (D.N.J. June 30, 2021).

[246] *Id.* at 20–28.

relationships of the plaintiffs, but was exercising its discretion to transfer detainees.[247] ICE's discretion to transfer detainees under its jurisdiction means any similar claims that arise from transfers following the closures of detention facilities are unlikely to succeed.

In light of A. 5207's potential passage, private prison companies tried to take action to protect themselves from the effects of the bill.[248] Before the bill took effect, private prison operator CoreCivic was able to sign a new contract with ICE to hold immigrants at its New Jersey facility until 2023.[249] Governor Murphy faced criticism for his delay in signing the bill, which could have prevented CoreCivic from extending its contract.[250]

2. California

On December 19, 2019, three private prison companies took advantage of A.B. 32's exception for contracts entered prior to January 1, 2020, by entering into contracts with ICE with terms of up to fifteen years.[251] These contracts increased California's number of immigration detainee beds by more than 3,000.[252] This means that even before the legal challenge to A.B. 32, the law's application to immigration detention was being frustrated.

In contrast, in the months before and after the passage of A.B. 32, several county and city ICE contracts terminated.[253] The overall impact of these closures remains to be seen. Currently, there is not much data on how the closure of ICE detention facilities has impacted the number of immigration arrests in California. Some anecdotal stories

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[247] Order Denying Petitioner-Plaintiff's Motion for a Temporary Restraining Order, Robles v. U.S. Dep't of Homeland Sec., 2:21-cv-13117 (D.N.J. July 2, 2021); *Juan R. v. U.S. Dept. of Homeland Security*, ACLU N.J. (2021), https://www.aclu-nj.org/cases/juan-r-v-us-dept-of-homeland-security; Monsy Alvarado, *They Wanted ICE Contracts Stopped. Now Detainees are Being Shipped to Other States*, NJ SPOTLIGHT NEWS: IMMIGR. (July 8, 2021), https://www.njspotlightnews.org/2021/07/ice-detainees-nj-bergen-county-jail-hudson-county-jail-end-agreements-transfer-detainees-out-of-state.

[248] Grace Dixon, *NJ Is the Latest State to Phase Out Immigration Detention*, LAW 360 (Aug. 20, 2021, 7:15 PM), https://www.law360.com/immigration/articles/1414880/nj-is-the-latest-state-to-phase-out-immigration-detention.

[249] *Id.*

[250] *Id.*; *see* Alvarado, *supra* note 238.

[251] XAVIER BECERRA, CAL. DEP'T OF JUST., IMMIGRATION DETENTION IN CALIFORNIA 4 (2021), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2021.pdf.

[252] *Id.* at 5.

[253] *Id.* at 3–4.

from attorneys like Lisa Knox of Centro Legal de la Raza in Oakland, California, are hopeful.[254] Knox stated that her organization began receiving fewer calls about ICE arrests after detention facilities in Sacramento and the Bay Area closed.[255] Mario Martinez, a program coordinator at the California Collaborative for Immigrant Justice, "has been collecting data that suggests ICE is more likely to arrest people in counties with detention centers."[256] But if states are seeking to reduce detention of their residents, current available data is not conclusive as to whether closing local centers facilitates this goal.

B. *Abuse in Private Prisons*

The use of private prisons for immigration detention raises concerns about incentivizing the detention of more people and profit-driven entities cutting costs at the expense of the health and safety of those detained. This section outlines some of the issues arising in private detention, as well as the Biden Administration's purported goal to eliminate private incarceration generally.[257] Though abuse can occur in any prison, there are particular concerns in private prisons due to a lack of government oversight.[258]

1. Lack of Oversight in Private Immigration Detention

Private prisons in general have received much criticism since they proliferated in the 1990s, and since then, the number of immigrant detainees has also increased.[259] "In August 2016, the Justice Department's internal watchdog found that privately run federal prisons are more dangerous than those managed by the Bureau of Prisons[,]" and concluded these facilities needed more oversight.[260]

Private facilities not only enable, but encourage, increased detention by incentivizing ICE to fill all available bed space.[261]

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[254] Murguia, *supra* note 95.

[255] *Id.*

[256] *Id.*; *see* Mario Martinez & Roxana Shirkhoda, *The Big Opportunity: Increasing Data Capacity for Nonprofits*, TIDES (Sept. 22, 2020), https://www.tides.org/accelerating-social-change/innovation/increasing-data-capacity-for-nonprofits.

[257] *See* Lauren-Brooke Eisen, *Are Private Prisons in Trouble?*, BRENNAN CTR. FOR JUST. (Nov. 18, 2019), https://www.brennancenter.org/our-work/research-reports/are-private-prisons-trouble.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] Rubenstein & Gulasekaram, *supra* note 1, at 226 n.11.

Detention contractors are not subject to the same requirements as federal officials, including open records laws, civil service, administrative law, and constitutional requirements.[262] Contracts do contain operational, safety, and performance requirements, but this oversight is often limited by political incentives, dependence on private actors for detention space, and a lack of transparency.[263] Frequently, the oversight itself is contracted out to private entities, and contractual terms confer broad discretion to operators of private prisons.[264] Oversight is not available on the same scale when dealing with private prison companies, although California did try to address this before AB 32 with AB 103, allowing the state Attorney General to review and report on private detention facilities.[265]

The COVID-19 pandemic exacerbated many of these issues, and media attention increased awareness of the abuses and poor conditions in privately run ICE detention facilities.[266]

2. Federal Goals to Eliminate Privatized Incarceration

Targeting private prison companies may also appear more effective because of the Biden Administration's expressed goals of eliminating private criminal detention facilities.[267] On January 26, 2021, President Biden issued an executive order addressing concerns about the private prison industry;[268] however, the order is limited in scope, mostly replicating similar policies allowing contracts to expire without renewal, with the addition of now applying to USMS contracts.[269] Most importantly, the order does not apply to ICE detention, and companies have circumvented the order by forming intergovernmental service agreements with counties that contract directly with the federal government for immigration or USMS detention services.[270] Lauren-Brooke Eisen, Director of the Brennan Center's Justice Program, wrote that "[i]t's possible that the administration will also seek to reduce ICE's reliance on private

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[262] *Id.* at 226.

[263] *Id.* at 227.

[264] David S. Rubenstein, *Supremacy Inc.*, 67 UCLA L. REV. 1130, 1156–57 (2020).

[265] CAL. GOV'T CODE § 12532 (West 2022); Rubenstein & Gulasekaram, *supra* note 1, at 227–28.

[266] *See* Goldsmith & Sierra, *supra* note 2.

[267] Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 29, 2021).

[268] *Id.*

[269] Eisen, *supra* note 237.

[270] *See id.*

detention and improve oversight of those facilities, but there's been little hint from the administration as to whether they will focus on ICE contracts with for-profit firms."[271] The Administration's continuation with the *GEO* litigation dampens expectations for any sweeping reform of the government's use of private prisons.[272]

Although some contracts have expired, since Executive Order No. 14006 focuses on direct contracts with private companies, the order could increase the use of intergovernmental service agreements with counties which directly contract with ICE.[273] Overall, the order does not aim to reduce incarceration, but instead the order aims to shift incarceration from private to government-managed facilities.[274]

C. *Oversight in State-Run Immigration Detention*

It is important to highlight that abuse of immigration detainees is not limited to private prisons. Yuba County Jail, the last county jail in California to hold a contract with ICE, received complaints for years alleging woefully inadequate healthcare, particularly during the COVID-19 pandemic.[275] Contra Costa County ended its ICE contract after female inmates made allegations of sexual abuse.[276] The majority of the ICE facilities in New Jersey were run by counties contracting with ICE.[277] For this reason, while state and local lawmakers should consider whether it may be prudent to allow certain state or local facilities to contract with ICE, advocates must redouble efforts to reduce ICE detention on the federal level and improve oversight at all detention facilities.

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[271] *Id.*

[272] *See supra* Part III.C.

[273] Eisen, *supra* note 237.

[274] *Id.*

[275] YUBA LIBERATION COAL., DECADES OF VIOLATIONS AT THE YUBA COUNTY JAIL: AN URGENT CALL TO END THEIR CONTRACT WITH ICE 3, 7, 9 (2022), https://www.ccijustice.org/_files/ugd/733055_aba01b03417d4a9da681e83350f234a1.pdf. The Yuba Liberation Coalition's efforts finally came to fruition on December 8, 2022, when the DHS announced that the contract would be terminated. Press Release, Yuba Liberation Coal., Breaking: Last ICE Contract with a California County Jail Terminated (Dec. 9, 2022), https://www.ccijustice.org/post/breaking-last-ice-contract-with-a-california-county-jail-terminated. The Coalition's efforts turned to advocating for the release of the remaining detainees, rather than their transfer to a different ICE detention center. *Id.*

[276] Caroline Kutschera, Note, *Misguided Good Intentions: How Blue States' Opposition to ICE Contracts Hurts the Undocumented*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 649, 666 (2021).

[277] *See* Dixon, *supra* note 248.

V. CONCLUSION

Immigration detention is rife with abuses, and states like California and New Jersey have sought to address its inherent injustices through legislation restricting ICE detention contracts within their territories. Although federal supremacy limits how much state policies can affect immigration policy, immigration detention implicates strong state interests which allow them to enact policies aimed at protecting detainees' health and welfare.

California's A.B. 32 should have survived Supremacy Clause challenges, contrary to the Ninth Circuit's conclusions. The federal law allowing ICE to contract for detention facilities is not specific enough to show clear and manifest congressional intent that ICE contract with private facilities. Nor does A.B. 32 impermissibly discriminate against the federal government because the facilities excepted by the law are not similarly situated. The state has ended its own contracts with private, for-profit prisons following the legislation. California is authorized to exercise its historic police powers to ensure the health and welfare of those detained within its borders.

Though still in effect, New Jersey's A. 5207 faces a strong intergovernmental immunity claim from CoreCivic because it explicitly targets immigration detention. As applied to state and county agencies, this is likely permissible given recent interpretations of the anticommandeering doctrine, which would prevent the federal government from requiring New Jersey to allow its officials and agents to enter contracts with ICE. The same cannot be said of the restrictions on private actors. This type of ban has been found unconstitutional in California, and because of the express targeting of immigration detention, the New Jersey law may be even more vulnerable. The vulnerabilities in these laws demonstrate that states must creatively address the health and welfare concerns associated with private detention.

Other circuits should decline to follow the Ninth Circuit and should recognize that this type of restriction falls within a state's regulatory powers. In seeking reform, the targeting of private facilities is necessary because the lack of oversight makes it more difficult for states to protect detainees' health and welfare. Given the importance of curbing the abuses in private immigration detention facilities, laws like A.B. 32 show promise. Unfortunately, the Ninth Circuit's decision has roadblocked this important step in decreasing the use of private detention centers. If other circuits interpret similar laws, they should depart from the Ninth Circuit's holding that the Supremacy Clause

forbids a state's broad prohibition on private prisons aimed at important health and welfare concerns.

It is also essential to improve practices in state and county facilities holding immigrant detainees. As exemplified in Yuba County, abuse and mistreatment can be just as common in state-run facilities. Nevertheless, because ICE detention remains an unjust reality in the nation's immigration enforcement system, it is important to protect immigrants from being transferred away from their legal counsel and families to facilities where conditions are often worse and legal representation is less accessible. Laws that reduce or eliminate private immigration detention should be states' priority in fighting detention.


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