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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

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

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

Table of Contents

TABLE OF AUTHORITIES

Cases

Constituional Provisions

Statutes

Regulations

Other Authorities

MOTION

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

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

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

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

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

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

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

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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

I. Federal Use of Private Detention Facilities

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

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

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

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

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

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

A. USMS Contracts in California

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

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

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

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

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

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

B. BOP Contracts in California

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

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

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

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

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

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

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

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

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

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

C. ICE Contracts in California

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

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

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

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

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

II. Assembly Bill 32

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

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

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

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

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

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

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

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

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

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

LEGAL STANDARDS

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. A.B. 32 is Field Preempted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. A.B. 32 is Conflict Preempted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE BALANCE OF THE EQUITIES FAVORS THE UNITED STATES

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

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

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

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

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

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

CONCLUSION

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

DATED: February 5, 2020

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT S. BREWER, JR.
United States Attorney

ALEXANDER K. HAAS
Director, Federal Programs Branch

JACQUELINE COLEMAN SNEAD
Assistant Director, Federal Programs Branch

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

Counsel for the United States

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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF JOHN SHEEHAN IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTION

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

I, JOHN SHEEHAN, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am the Assistant Director, Prisoner Operations Division, United States Marshals Service (USMS).

2. The Prisoner Operations Division establishes national strategies and programs that provide for the prisoner processing, housing, transportation, and care of federal prisoners in a safe, secure, and cost effective manner. As Assistant Director, I lead the Prisoner Operations Division by providing primary oversight of all detention management matters pertaining to the housing of federal prisoners remanded into USMS custody, including secure lodging and transportation, conditions of confinement, and prisoner medical care.

3. I began working for USMS in 1998 when I was sworn in as a Deputy United States Marshal for the Eastern District of New York. In 2004, I was promoted to Supervisory Deputy United States Marshal and assigned to oversee operations in the Eastern District of New York. In 2010, I was promoted to Assistant Chief Inspector at USMS Headquarters to lead the Threat Management Center within the USMS' Judicial Security Division. In 2012, I was promoted to Chief Inspector to oversee the USMS Office of Professional Responsibility's Compliance Review Program. In March 2017, I was selected to be the Deputy Assistant Director for Operations within the USMS' Prisoner Operations Division. In February 2019, I was selected as the Acting Assistant Director for the Prisoner Operations Division, and I was permanently selected as the Assistant Director in January 2020.

II. USMS Detention Practices

4. The USMS is the nation's oldest federal law enforcement agency with multiple missions: providing judicial security, apprehending fugitives and non-

compliant sex offenders, seizing and managing assets acquired through illegal means, assuring the safety of endangered government witnesses and their families, and securing and transporting prisoners remanded to our custody from the time of their arrest to incarceration or acquittal. The USMS receives approximately 250,000 federal prisoners a year, with the responsibility of housing over 62,000 prisoners daily.

5. The USMS does not own or operate any of its own detention facilities. Owning and operating its own facilities would require financial and personnel resources far beyond what the USMS is currently afforded. Instead, Congress has given the USMS the statutory authority to enter into inter- and intra-governmental agreements and private contracts for housing of prisoners.

6. Currently the Federal Bureau of Prisons (BOP) is the agency within the Department of Justice that is designated and budgeted for housing federal prisoners. As a result, the USMS must use space allocated to the USMS within BOP operated facilities, partner with state and local governments using Intergovernmental Agreements, or contract directly with private detention facilities, in that order. In other words, contracting directly with private detention facilities is a last resort for USMS when other options are unavailable.

7. Nationwide in Fiscal Year 2019, the USMS provided for the housing, subsistence, medical care, and transportation for an average daily population of 61,789 prisoners throughout 94 districts.

8. Per an agreement between the BOP and the USMS, the BOP provides the USMS a bedspace allocation in certain BOP facilities. The most recent allocation agreement in April of 2019 provided 10,804 beds, plus a non-permanent offering of an additional 1,042 beds. These beds are spread across 28 facilities in 17 different states. The USMS seeks to fill as many of these beds as is operationally feasible given the prisoner populations in the vicinity of the facilities. In Fiscal Year 2019, the USMS housed approximately 17% of its prisoners in BOP facilities.

9. In order to meet a large part of its remaining need, the USMS has historically used relationships with state and local law enforcement, which created a partnership whereby detention space was provided by those entities. The USMS has approximately 1,200 Intergovernmental Agreements with state and local governments (approximately 700 actively used at any given time) to house approximately 66% of all USMS prisoners. Intergovernmental Agreements are established on an "as available" basis, and the capacity offered to the USMS can be largely dependent on changes to local detention needs, laws, and other circumstances.

10. The Attorney General is authorized to fund USMS custody of individuals "under agreements with State or local units of government or contracts with private entities." 18 U.S.C. § 4013(a). Therefore, the USMS may "designate districts that need additional support from private detention entities." 18 U.S.C. § 4013(c); 28 C.F.R. §0.111(k); 28 C.F.R. §0.111(o). When the USMS is unable to meet its local detention space needs by other means, it exercises this authority and seeks contractual arrangements with private vendors. In the 1980s, the "war on drugs" began to significantly impact the prisoner population and available bedspace. Deputy U.S. Marshals were transporting prisoners further distances in order to secure the necessary additional detention space. In response to this crisis, the USMS began using private detention facilities in 1990 and secured its first private detention facility in the State of California in 2000.

11. In Fiscal Year 2019, the USMS held 13 contracts nationwide with private detention facilities, housing a total of 10,403 prisoners. This represents approximately 17% of the USMS' Fiscal Year 2019 nationwide average daily population of 61,489. Through Intergovernmental Agreements with state and local governments, the USMS currently utilizes 29 private detention facilities to house an additional 10,681 prisoners. This represents an additional 17% of the USMS population. In total, the USMS houses approximately 34% of its entire detention population in private detention facilities.

III. USMS Detention in California

12. In Fiscal Year 2019, USMS districts in California had custody of an average daily population of 5,050 prisoners. Of that number, 1,109 prisoners were housed within California in private detention facilities under direct contract with USMS, equating to approximately 22% of the USMS' California prisoner population. Another 438 USMS prisoners were housed outside the State due to unavailability of additional detention space in California.

13. USMS currently houses prisoners in California under two contracts with privately owned and privately operated detention facilities—Western Region Detention Facility and Otay Mesa Detention Center—and one contract with a federally owned and privately operated detention facility—El Centro Service Processing Center. All three facilities are in the San Diego area and, together, have the capacity to house over 1,800 prisoners. These private detention facilities in the Southern District of California account for almost 50% of USMS's prisoners in that district and nearly 30% of USMS's prisoners in California as a whole.

14. The Western Region Detention Facility provides the USMS with bedspace for 450 prisoners at a fixed monthly rate. The USMS may also utilize an additional 275 beds at the contract per diem rate. The current USMS population at the facility is in excess of 700 prisoners. The base period of this contract operated from November 14, 2017 to September 30, 2019, with four two-year option periods that may be exercised by USMS to maintain services at this facility until the contract expires on September 30, 2027. The current option period expires on September 30, 2021.

15. The USMS uses bedspace in the Otay Mesa Detention Facility under an Immigration and Customs Enforcement (ICE) contract. The Otay Mesa Detention Facility provides the USMS with bedspace for 350 prisoners at a fixed monthly rate. The USMS may also utilize approximately 250 additional beds at the contract per

diem rate. The current USMS population at the facility is in excess of 500 prisoners. The base period of ICE's contract operates from December 20, 2019 to December 19, 2024, with two five-year option periods that may be exercised to maintain services at this facility until the contract expires on December 19, 2034.

16. The El Centro Service Processing Center provides the USMS with bedspace for 250 prisoners at a fixed monthly rate. The USMS may also utilize an additional 262 beds at the contract per diem rate. The base period of this contract operates from December 23, 2019 to December 22, 2021, with three two-year option periods and a nine-month option period that may be exercised by USMS to maintain services at this facility until the contract expires on September 25, 2028. Although this contract was only recently awarded (and therefore USMS does not yet house any prisoners at El Centro), USMS has started to plan for the transfer of prisoners there.

17. Because USMS only pursues private detention facilities when no other available space exists, all option years are typically exercised.

18. Based upon current prosecutorial trends, the USMS' detention population in the four California judicial districts is projected to increase by approximately 25%, to around 6,300 in Fiscal Year 2023. The USMS is currently maximizing all available bedspace in California, as well as in surrounding districts, in order to meet the overwhelming bedspace need for the districts in California. And the USMS will need to contract with private detention facilities in order to meet this anticipated detention population increase.

IV. A.B. 32's Impact on USMS Operations

19. The USMS currently houses nearly 1,300 prisoners in California under direct contracts to operate private detention facilities. With the additional capacity from the recently awarded El Centro contract, the USMS will have a total available capacity for approximately 1,800 prisoners.

20. If A.B. 32 is enforced against the federal government and its contractors, USMS prisoner operations in California, especially in the Southern District of California, would be crippled. USMS would need to relocate nearly 50% of its prisoners in the Southern District of California and nearly 30% of its California prisoners when its contracts expire. These relocations pose significant harm to the USMS' prisoner-management mission.

21. Because USMS has maximized all available space in nearby BOP facilities, and is unable to obtain space in state and local facilities in California, its prisoners would need to be housed outside California. Such relocations would cost significant taxpayer dollars, and require USMS to compete for extremely limited detention space with other agencies, including ICE, due to A.B. 32.

22. This relocation would cause a ripple effect into other districts neighboring California, as detention space would be shared to accommodate displaced California prisoners. And those detention facilities could potentially experience overcrowding due to USMS' need to house prisoners in proximity to California's districts.

23. Relocation would also cause prisoners to be isolated from their families, who are usually located in California and may lack resources to visit the prisoner.

24. As USMS's prisoner population is generally pretrial, prisoners (some with very serious charges) must be frequently transported back and forth to California to meet the demands of the judiciary, defense attorneys, and any pretrial or probationary requirements. This increase in transportation would require a dramatic increase in coordination with the already-taxed Justice Prisoner and Alien Transportation System, as well as state and local transportation resources. Managed by USMS, the Justice Prisoner and Alien Transportation System is already one of the largest transporters of prisoners in the world, handling about 715 requests every day to move prisoners

between judicial districts, correctional institutions, and foreign countries. This constant transportation would also significantly increase USMS's cost per prisoner.

25. Additionally, the drastic increase in transportation for prisoners would heighten security and safety risks for prisoners, USMS personnel, and the public**.** Frequent, scheduled, movements of prisoners increase the amount of time prisoners are outside the heightened security of a detention facility. Such transportation also allows the public additional opportunities to gather intelligence on USMS operations and significantly increases adversarial opportunities during transport. And prisoners with medical or mobility concerns may be adversely affected by frequent travel.

26. USMS will also be competing for transportation with, for example, BOP, who would otherwise be using these transportation resources to transport sentenced prisoners to their designated BOP facility. This may delay prisoners from exiting USMS custody, concomitantly increase the number of prisoners in USMS custody, and further increase USMS's housing, medical, and funding needs.

27. Due to relocation and transportation from outside the State, A.B. 32 would also cause lengthy delays in judicial proceedings. Housing prisoners outside of their judicial district significantly decreases the ability of courts to properly interact with prisoners as they move through the judicial process. Transportation coordination would require approximately three to four weeks advance notice in order to move prisoners in and out of judicial districts in California for court proceedings.

28. Importantly, these effects could be felt imminently. If the USMS is forced to comply with A.B. 32, it would need to begin discussions with the affected courts in order to coordinate possible housing scenarios for federal prisoners. At that point, the USMS would need to identify out-of-state facilities with available capacity or, most likely, begin a competitive solicitation for new private contracts in other States to replace the lost capacity in California. An open solicitation of this nature would require a lead time of approximately one year after the USMS and judiciary have

coordinated the least disruptive operational scenario. The new vendor would also require at least three months after the contract award to hire and train staff to operate the facility.

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

30. None of the facilities that the USMS currently uses, or could use, in California meet the exceptions listed in A.B. 32 that could potentially apply to its facilities. The USMS does not contract, nor has it ever contracted with "school facilit[ies] used for the disciplinary detention of a pupil" in California. And the USMS does not "lease[] and operate[]" a detention facility in California that is "privately owned." Nor does the USMS contract for facilities in California "providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of" a federal "law enforcement agency."

Executed on this 24th day of January, 2020.

John Sheehan
Assistant Director
Prisoner Operations Division
United States Marshals Service

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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF PAMELA L. JONES IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTION

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

I, PAMELA JONES, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am a citizen of the United States. I am currently employed by the Federal Bureau of Prisons (BOP) of the United States Department of Justice, as the Administrator of the BOP's Privatization Management Branch (PMB) in Central Office, located in Washington, D.C.

2. PMB has overall responsibility for the administration of BOP's privately operated secure correctional facility contracts (as distinguished from contracts for non-secure adult correctional facilities like Residential Reentry Centers, which are the responsibility of a separate branch within BOP). As the Administrator of PMB, I oversee all of BOP's activities regarding contract management and operation of BOP's private secure facilities and I am responsible for the planning, coordinating, monitoring, and evaluating privatization efforts within the BOP. I also review contract monitoring (both from onsite BOP staff and from BOP's centralized Program Review Division) to determine BOP's recommended action. I possess thorough knowledge of the regulations that govern the control of both BOP and private institution operations and security.

3. I began working for the BOP in July 1991 and assumed my current position in December 2015. Before becoming the Administrator of PMB, I served as a Privatization Field Administrator in PMB from March 2014 through December 2015. In this role I provided managerial supervision of BOP's oversight activities for six BOP-contracted adult correctional facilities to ensure safe and secure environments and appropriate management and treatment of federal inmates. I served as an advisor on matters of policy, programs, and operations, to ensure sound correctional practice and contract compliance. From May 2012 through March 2014

I worked as a Senior Secure Institution Manager for the BOP at one of BOP's contract facilities in Texas. In this position I coordinated all BOP-related activities to ensure contract compliance at the facility and provided administrative direction to other on-site BOP staff.

4. Prior to May 2012, I held other positions within the BOP, including Unit Manager at the Federal Correctional Complex in Forrest City, Arkansas (May 2010 to May 2012); Intelligence Analyst, BOP Counterterrorism Unit (2006 to 2010); Intelligence Research Specialist, Federal Correctional Institution, Memphis, Tennessee (2003 to 2006); Special Investigative Technician, FCI Memphis (1994 to 2003); and Correctional Officer, FPC Millington (1991 to 1994).

II. BOP Detention Practices

5. BOP protects society by confining inmates in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure. BOP-operated facilities are assigned one of five security levels (minimum, low, medium, high, and administrative) and inmates are designated to an appropriate facility based on the level of security and supervision they require as well as their programming needs.

6. Between 1980 and 1989, BOP's inmate population more than doubled (from 24,000 to almost 58,000) due to various factors, including the passage of the Sentencing Reform Act of 1984 and enactment of several mandatory minimum federal sentencing provisions. Beginning in the mid-1980s, to help alleviate overcrowding caused by this rapidly expanding inmate population that exceeded available space in government-owned facilities, BOP began placing certain low-security inmates (such as sentenced criminal aliens) in contract facilities.

7. The benefit of contract facilities is that they can be activated relatively quickly or contracts can be cancelled in response to shifting population pressures. BOP has found that contracting with the private sector provides an effective means

of managing low security, specialized populations, and accommodating inmates' reentry needs.

III. BOP's Use of Private Secure Facilities Nationwide

8. In 1997, partially in response to a congressional mandate to privatize the management and operation of the only government-owned and contractor-operated facility (Taft Correctional Institution), BOP created the Privatization Management Branch to administer BOP's contracts with the private sector. Since 1997, when BOP had contracts for the operation of only two private, secure facilities, BOP's use of private facilities has increased.

9. Currently, BOP contracts with the private sector for the operation of twelve secure facilities. At all of these facilities, except Taft CI in California, the contractor owns the physical premises and provides care and custody of the inmate population. At Taft CI, the government owns the facility while a private company—the Management and Training Corporation (MTC)—operates it. BOP does not contract, and has never contracted, with "school facilit[ies] used for the disciplinary detention of a pupil" in California. Additionally, BOP does not "lease[] and operate[]" any detention facility in California that is "privately owned."

10. The majority of inmates designated to private secure detention facilities are sentenced criminal aliens with 90 months or fewer remaining to serve on their sentences who will be deported upon completion of their sentence.

11. BOP has a current national inmate population of 175,269 inmates. Of this population, 16,077 inmates (approximately 9.3 percent) are located in California. This California inmate population includes:

a. 13,945 inmates confined in 12 BOP-operated facilities, including inmates confined to federal prison camps connected to these facilities but that are not counted as stand-alone facilities themselves; and

b. 1,307 inmates confined at Taft CI, including both the main institution (1,056 inmates) and satellite prison camp (251 inmates).

12. Nationwide, BOP has 17,168 inmates (approximately 9.7% of BOP's total inmate population) designated to private, secure facilities.

IV. BOP's Use of Private Secure Facilities in California

13. Taft CI, located in Taft, California, is owned by the federal government and operated under a contract between BOP and MTC. Taft CI includes a low security correctional institution and a minimum security prison camp. The population in the low security facility consists of low security adult male inmates, primarily criminal aliens (non-U.S. citizens) with 90 months or less remaining to serve on their sentences. The population in the minimum security prison camp is an adult male population consisting of U.S. citizens.

14. The contract between BOP and MTC currently provides for MTC to operate the facility until March 31, 2020. Although BOP considered ceasing operations at Taft CI due to infrastructure issues, BOP has commissioned a study (and is awaiting its results) to examine the feasibility of making repairs to the Taft CI while inmates remain present and the facility remains operational. If Taft CI can remain operational, then BOP may seek to extend its current contract or award a new one.

15. BOP does not have any immediate plans for new contracts for private secure detention facilities in California but could pursue such contracts in the future, as BOP continually reassess its needs.

16. If BOP cannot contract with the private sector for the continued operation of Taft CI, BOP would be forced to stop accepting any new inmates at the facility and would transfer all of the inmates currently designated there.

17. BOP would re-designate many of the Taft CI inmates to other privately operated facilities outside of California. There is no single facility that could absorb

the entire Taft CI inmate population, so multiple transfers would likely be necessary. It is possible that some inmates, particularly those at the Taft CI satellite prison camp, would be re-designated to BOP-operated facilities in California, contingent on available space and security needs.

18. Relocating the more than 1,000 affected Taft CI inmates via bus or airlift through the Justice Prisoner and Alien Transportation System would come at a significant cost to the BOP. Although some inmates may be eligible for unescorted furlough transfers rather than transport via secure bus movement or airlift, payment of those inmates' transportation costs via commercial carrier are still the BOP's responsibility.

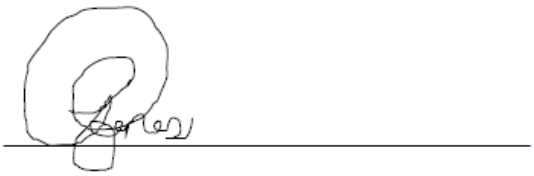
19. This mass re-designation could also result in some inmates being designated to facilities farther from their families and release communities. BOP is required by statute (18 U.S.C. § 3621(b)) to designate inmates to a facility as close as practicable to the inmate's primary residence, and to the extent practicable within 500 driving miles of that residence. The loss of an available facility in California makes it more difficult for BOP to comply with this statutory mandate, and could lead to overcrowding at other facilities, as well as the weakening of inmates' ties with their families.

20. Importantly, these effects will be felt imminently. If BOP is forced to comply with A.B. 32, it must relocate Taft CI prisoners by March 31, 2020 (when the current contract expires), even if BOP determines that Taft CI could otherwise remain operational. This would imminently cause deleterious effects on federal operations, as explained above.

21. BOP does not control the size of its inmate population, and contracting with the private sector provides the BOP with necessary flexibility in managing its inmate population. BOP already operates twelve secure institutions in California. Building and activating any additional institutions would require many years of site

assessment, planning, Congressional appropriations, staff hiring, and activation before the institutions would be ready to receive inmates.

Executed on this 24th day of January, 2020.



Pamela L. Jones, Administrator
Privatization Management Branch
Federal Bureau of Prisons
Washington, D.C.

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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF JON GUSTIN IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTION

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

I, JON GUSTIN, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am a citizen of the United States. I am currently employed by the Federal Bureau of Prisons (BOP) of the United States Department of Justice, as the Administrator of the BOP's Residential Reentry Management Branch (RRMB) in Central Office, located in Washington, D.C.

2. The Residential Reentry Management Branch develops and administers contracts for community-based programs, including Residential Reentry Centers and home confinement. As the Administrator of RRMB, I am responsible for the execution of BOP's residential reentry management priorities nationwide. I provide leadership and management oversight of the three Sector Management Teams (Eastern, Central, and Western) and 24 field office Managers in the development and administration of BOP's residential reentry centers, juvenile and adult boarding facilities, and non-residential home detention programs. I am responsible for the development and implementation of national policy for RRMB, providing technical assistance to managers at all levels within the BOP in interpretation and coordination of community-based correctional activities. I also provide guidance and direction in the operations of programs and services that are provided through intergovernmental agreements at the federal, state, county, and city levels, and through contracts with private entities.

3. I began working for the BOP in October 1997 as a Correctional Officer at the Federal Detention Center in SeaTac, Washington, and was promoted to positions of increasing responsibility before assuming my current position in June 2015. Immediately prior to becoming the Administrator of RRMB, I worked as a Privatization Field Administrator for the BOP's Privatization Management Branch

for one year, from June 2014 to June 2015. As a Privatization Field Administrator I provided oversight and guidance to BOP on-site staff at several of BOP's private contract facilities and was responsible for the overall monitoring of the operations of those private contract facilities within my geographic area of responsibility.

4. From May 2011 to June 2014 I served as the Assistant Administrator for the Residential Reentry Management Branch. I also previously served as a Program Review Examiner for BOP's Program Review Division (September 2006 to August 2009). In this position I performed program reviews (BOP internal audits) of BOP's residential reentry offices. I have also worked as a Correctional Programs Specialist in two of BOP's residential reentry field offices: Minneapolis (September 2006 to August 2009) and Seattle (March 2002 through September 2006). In this position I assisted in the administration of BOP's contracts for community-based programs within limited geographic areas and served as a liaison between BOP and various governmental agencies (federal, state, and local), courts, and other non-governmental entities.

5. In total I have over 18 years of experience in the Management and Oversight of contract facilities to include Private Correctional Facilities, Residential Reentry Centers, Home Confinement, Contract jails, prisons and juvenile detention facilities.

II. BOP's Residential Reentry Centers

6. The BOP has utilized and continues to utilize privately contracted Residential Reentry Centers to comply with its statutory mandate to facilitate inmates' reentry into the community following their terms of incarceration. *See* 18 U.S.C. § 3624(c). Residential Reentry Centers provide inmates with a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, drug and alcohol testing and counseling, and other programs and services as they transition back to the community. Residential Reentry Centers

help inmates rebuild their ties to the community and supervise offenders' activities during the community reintegration phase of BOP's reentry programming.

7. Residential Reentry Centers are staffed and managed by contractor employees. These contract employees are responsible for the appropriate supervision of federal offenders and the orderly running of the Residential Reentry Center, in compliance with their contractual obligations and other BOP guidance. The contractor's performance is monitored by BOP staff located in one of 24 Residential Reentry Management field offices throughout the United States.

III. BOP's Use of Residential Reentry Centers Nationwide

8. BOP has a current national inmate population of 175,269 inmates. BOP contracts with the private sector for the operation of more than 200 Residential Reentry Centers across the United States.

9. Nationwide, BOP has 7,825 inmates (approximately 4.5% of the total inmate population) designated to Residential Reentry Centers. Additionally, 2,450 inmates (1.4%) are designated to home confinement, with the vast majority under the supervision of a BOP-contracted Residential Reentry Center.

IV. BOP's Use of Residential Reentry Centers in California

10. BOP currently houses 16,077 inmates (approximately 9.3% of its national inmate population) in California. This California inmate population includes 728 inmates residing in Residential Reentry Centers; 97 inmates designated to home confinement under the supervision of a BOP-contracted Residential Reentry Center; and 42 inmates otherwise designated to home confinement, supervised by a United States Probation Office or a BOP-contracted day reporting center.

11. In soliciting and awarding contracts for Residential Reentry Centers, BOP's contracts consist of a base period of operations and one or more option periods that allow the BOP to unilaterally extend arrangements with the contractor for a specified period. When the options are exercised, the contractor is obligated to

continue providing services during the option period. Given BOP's need for Residential Reentry Centers, all option years are typically exercised.

12. BOP contracts with the private sector for the operation of ten Residential Reentry Centers in California.

13. Taylor Street Center, operated by GEO Reentry, Inc., is located in San Francisco. The contract between BOP and GEO provides for a base year of operation (April 1, 2017, through March 31, 2018) and four option years. Currently, operations are in the third option year, which expires March 31, 2020. The final option year expires March 31, 2021. The total inmate population in this Residential Reentry Center is 110 inmates, and the total inmate population on supervised home confinement is 8 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 140 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 20 inmates.

14. Oakland Street Center, operated by GEO Reentry, Inc., is located in Oakland. The contract between BOP and GEO is currently a 92-day bridge contract that provides for performance up to January 31, 2020. On November 1, 2019, BOP and GEO executed a subsequent contract with performance beginning February 1, 2020, that provides for a base year of operation and nine option years. The final option year expires January 31, 2030. The total inmate population in this Residential Reentry Center is 52 inmates, and the total inmate population on supervised home confinement is 8 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 59 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 12 inmates.

15. Orion Residential Reentry Center, operated by Behavioral Systems Southwest, Inc. (BSS), in Van Nuys. The contract between BOP and BSS provides

for a base year of operation (October 1, 2019, to September 30, 2020) and nine option years. Currently, operations are in the base year. The final option year expires September 30, 2029. The total inmate population in this Residential Reentry Center is 50 inmates, and the total inmate population on supervised home confinement is 15 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 70 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 14 inmates.[1]

16. Ocean View Residential Reentry Center, operated by Correctional Alternatives, Inc., is located in San Diego. The contract between BOP and Correctional Alternatives provides for a base year of operation (June 1, 2016 to May 31, 2017) and four option years. Currently, operations are in the third option year, which expires May 31, 2020. The final option year expires May 31, 2021. The total inmate population in this Residential Reentry Center is 203 inmates, and the total inmate population on supervised home confinement is 8 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 255 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 99 inmates.

17. Marvin Gardens Center, operated by GEO Reentry, Inc., in Los Angeles. The contract between BOP and GEO provides for a base year of operation (December 1, 2018, through November 30, 2019) and four option years. Currently, operations are in the first option year, which expires November 30, 2020. The final option year expires November 30, 2023. The total inmate population in this Residential Reentry Center is 63 inmates, and the total inmate population on supervised home confinement is 9 inmates. The maximum inmate population in this

[1] The number of BOP inmates in a Residential Reentry Center or on supervised home confinement can occasionally exceed the maximum provided for in the contract as inmates transition to and from institutions and home confinement.

Residential Reentry Center provided for in the contract is 73 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 12 inmates.

18. El Monte Center, operated by GEO Reentry, Inc., in El Monte. The contract between BOP and GEO provides for a base year of operation (October 1, 2019, through September 30, 2020) and nine option years. Currently, operations are in the base year. The final option year expires September 30, 2029. The total inmate population in this Residential Reentry Center is 53 inmates, and there are no inmates currently on supervised home confinement. The maximum inmate population in this Residential Reentry Center provided for in the contract is 70 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 35 inmates.

19. Garden Grove Residential Reentry Center, operated by Working Alternatives, Inc., is located in Garden Grove. The contract between BOP and Working Alternatives provides for a base year of operation (September 1, 2019, through August 31, 2020) and four option years. Currently, operations are in the base year. The final option year expires August 31, 2024. The total inmate population in this Residential Reentry Center is 44 inmates, and the total inmate population on supervised home confinement is 15 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 56 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 14 inmates.

20. Vinewood Residential Reentry Center, operated by Behavioral Systems Southwest, Inc. (BSS), in Los Angeles. The contract between BOP and BSS provides for a base year of operation (October 1, 2019, to September 30, 2020) and nine option years. Currently, operations are in the base year. The final option year expires September 30, 2029. The total inmate population in this Residential Reentry Center

is 75 inmates, and the total inmate population on supervised home confinement is 12 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 70 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 14 inmates.

21. Rubidoux Residential Reentry Center, operated by Behavioral Systems Southwest, Inc. (BSS), in Riverside. The contract between BOP and BSS provides for a base year of operation (October 1, 2019, to September 30, 2020) and nine option years. Currently, operations are in the base year. The final option year expires September 30, 2029. The total inmate population in this Residential Reentry Center is 36 inmates, and the total inmate population on supervised home confinement is 21 inmates. The maximum inmate population in this Residential Reentry Center provided for in the contract is 45 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 33 inmates.

22. Brawley Residential Reentry Center, operated by Working Alternatives, Inc., in Brawley. The contract between BOP and Working Alternatives provides for a base year of operation (October 1, 2019, through September 30, 2020) and nine option years. Currently, operations are in the base year. The final option year expires September 30, 2029. The total inmate population in this Residential Reentry Center is 42 inmates, and there is one inmate on supervised home confinement. The maximum inmate population in this Residential Reentry Center provided for in the contract is 55 inmates, and the maximum inmate population on supervised home confinement provided for in the contract is 15 inmates.

23. For the foreseeable future, BOP has a continuing need for Residential Reentry Center capacity in California.

24. BOP currently has one open solicitation and one potential solicitation it would like to open for Residential Reentry Centers in California: one in the San Francisco area (open) and one in the San Diego area (potential solicitation in an area

of need). Additionally, one solicitation for a Residential Reentry Center in the Eastern District of California recently closed in October 2019. These solicitations have anticipated performance dates in 2021. To the extent allowed by law, RRMB will continue to procure services when a need is identified in specific geographic areas.

25. The First Step Act of 2018 will expand BOP's use of Residential Reentry Centers by authorizing extended placement in Residential Reentry Centers for inmates who will earn time credits under the risk-and-needs-assessment system, which is a tool designed to predict the likelihood of general and violent recidivism and identify areas of programming need for BOP inmates. BOP therefore anticipates a significant increase in the need for California Residential Reentry Centers over the next few years as inmates begin earning time credits.

26. BOP also maintains capacity in its Residential Reentry Centers for use by federal courts as an intermediate sanction during supervision or probation. This function utilizes generally 15–20% of the total Reentry Center capacity nationally. Although individuals housed under this arrangement are not in BOP custody, BOP maintains available beds to meet the courts' needs.

V. A.B. 32's Impact on Residential Reentry Center Operations

27. All of BOP's Residential Reentry Centers in California are privately owned and operated. California Assembly Bill 32 (A.B. 32) would require BOP to re-designate all inmates assigned to California Residential Reentry Centers to other facilities or home confinement upon the expiration of BOP's current Residential Reentry Center contracts. To the extent that the Residential Reentry Center contracts' options are considered "extensions" under A.B. 32, these contracts will begin "expiring" in 2020.

28. Relocating the nearly 1,000 affected California Residential Reentry Center inmates would come at a significant cost to the BOP. The majority of

California Residential Reentry Center inmates would be eligible for unescorted furlough transfers, rather than requiring transport via secure bus movement or airlift. Nevertheless, payment of those inmates' transportation costs via commercial carrier are still the BOP's responsibility and would likely cost hundreds of thousands of dollars.

29. This re-designation could also result in many inmates being housed in facilities farther from their families and release communities. BOP is required by statute (18 U.S.C. § 3621(b)) to designate inmates to a facility as close as practicable to the inmate's primary residence, and to the extent practicable within 500 driving miles of that residence. Because of AB 32, BOP will need to house inmates further from their primary residences, frustrating Congress's express statutory objective. And because California inmates could no longer serve the final portion of their sentence in a California Residential Reentry Center, they would either remain in a secure BOP-operated facility (in California or elsewhere) until the very end of their sentences, or be transferred to a Residential Reentry Center outside of California far from their release communities. These inmates would therefore miss out on the opportunity to establish connections with the community in which they will be released, find employment in that community, finish drug treatment, and experience a lesser degree of supervision on their way toward fully reentering their communities, thereby eliminating the primary, reentry-driven purposes behind BOP's use of Residential Reentry Centers. These same opportunities are not available to the same extent in BOP's secure facilities.

30. Importantly, these effects will be felt imminently. If BOP is forced to comply with A.B. 32, it must stop designating inmates to California Residential Reentry Centers and begin relocating inmates before the above-mentioned Residential Reentry Center contracts expire (for purposes of A.B. 32), as early as March 2020.

Executed on this 24th day of January, 2020.

Jon Gustin, Administrator
Residential Reentry Management Branch
Federal Bureau of Prisons
Washington, D.C.

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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF TAE D. JOHNSON IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTION

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

I, TAE D. JOHNSON, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Office of Enforcement and Removal Operations (ERO), as the Assistant Director for the Custody Management Division at ICE Headquarters in Washington, D.C. I have held this position since January 2011.

2. The Custody Management Division in ERO provides policy and oversight for the administrative custody of ICE's highly transient and diverse population of immigration detainees. The Custody Management Division is composed of three divisions led by three Deputy Assistant Directors under my direct supervision: (1) the Alternatives to Detention Division; (2) the Detention Management Division; and (3) the Custody Programs Division. As Assistant Director for the Custody Management Division, I am responsible for the effective and proficient performance of these three Divisions and their various units, including the oversight of compliance with ICE's detention standards and conditions of confinement at ICE detention facilities generally.

3. Since 1992, I have worked in various other positions within ICE and the former Immigration and Naturalization Service. Throughout my career, I have served in operational and managerial positions in ERO Field Offices as a detention and deportation officer, a supervisory detention enforcement officer, and a supervisory immigration enforcement agent. Since 2007, I have been appointed to numerous policy and planning positions within ICE Headquarters, and I have provided general oversight and guidance to ERO Field Offices, ICE leadership, and other federal agencies in the implementation and administration of various detention

and removal statutes, regulations, policies, and programs. Specifically, I have served as a Unit Chief of the Detention Standards Compliance Unit, Chief of Staff for the Office of Detention Policy and Planning, Special Assistant to the Assistant Secretary for ICE, and Deputy Chief of Staff for the Executive Associate Director for ERO.

4. Due to my experience and the nature of my official duties, I am familiar with the contractual processes and detention space needs of ERO throughout the United States, including in California.

II. ICE's Detention Practices and Facilities Nationwide

5. ICE is charged with enforcement of more than 400 federal statutes, and its mission is to protect the United States from the cross-border crime and illegal immigration that threaten national security and public safety through enforcement of the federal laws governing border control, customs, trade, and immigration. To carry out this mission, ICE focuses on enforcing federal immigration laws, preventing terrorism, and combating transnational criminal threats.

6. As an operational program of ICE, ERO is responsible for the planning, management, and direction of broad programs relating to the supervision, detention, and removal of aliens from the United States under the U.S. immigration laws. ERO's statutory responsibilities include detention of aliens during the pendency of proceedings to determine whether they will be removed from the United States, as well as aliens subject to an administratively final removal order, pending their removal from the United States. The immigration laws also mandate detention of certain categories of aliens, including "arriving aliens" and certain categories of criminal and terrorist aliens.

7. The length of an individual alien's detention depends on a number of factors, including whether the alien is subject to mandatory detention under the U.S. immigration laws, the duration of any removal proceedings before the Department of Justice's Executive Office for Immigration Review, appeals before the federal courts

of appeals, and issues regarding execution of a final removal order. ERO also transfers aliens in its custody for a number of legal and operational purposes such as attendance at immigration court hearings, to facilitate removal, provide for appropriate medical care, and transfers between facilities for other reasons. In Fiscal Year 2019, ICE housed an average daily population of 50,165 aliens nationwide.

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

9. ICE coordinates the acquisition of detention bed space for removable aliens through: (1) Service Processing Centers; (2) Contract Detention Facilities; and (3) Intergovernmental Service Agreement (IGSA) facilities (collectively, "immigration detention facilities"). Service Processing Centers are owned by ICE and staffed by a combination of federal and contract employees. Contract Detention Facilities are owned by private companies that contract directly with the government and are predominantly staffed by contract employees. Dedicated IGSAs can be public facilities or privately owned, and can be operated by local governments or private companies operating under contracts with local governments.

10. Many IGSAs house a very small ICE population compared to the local inmate population, while others are almost exclusively committed to housing ICE detainees. Other facilities used by ICE under various contractual arrangements include: facilities used by ICE through a contract awarded by the U.S. Marshals Service (USMS), facilities operated by the Federal Bureau of Prisons (BOP), staging facilities for transportation, holding facilities for temporary detention, and hospitals

for emergency care, among other types of facilities. ICE does not have any federally owned and operated detention facilities.

11. ICE used about 30 dedicated (or largely dedicated) immigration detention facilities throughout the United States in Fiscal Year 2019. Of these facilities, 13 were privately operated Contract Detention Facilities that are typically privately owned, housing an average daily population of 9,387 alien detainees; five were Service Processing Centers owned by the federal government and privately operated through contractors, housing an average daily population of 3,799 alien detainees; and 14 were dedicated (or largely dedicated) IGSAs, housing an average daily population of 12,635 alien detainees.[1]

12. Ordinarily, when ICE needs private contractors or privately owned detention facilities to assist ERO in its detention of removable aliens, ERO begins by identifying a requirement (i.e., an approximate amount of detention space in a certain geographic area) and creates a written performance work statement that describes in detail the detention services ERO wants to acquire. ICE then creates a solicitation package that is publicly posted, inviting interested contractors to submit offers. ICE then evaluates the offers against the evaluation criteria that were included in the solicitation package. Based on the final evaluation, ICE awards the contract to the offeror that represents the best value to the government. It typically takes 9 to 12 months from the beginning of preparation for ICE to award a contract, but this time can be longer or shorter depending on the circumstances.

[1] The remaining average daily population (approximately 24,344 alien detainees) was housed in other facilities that are not entirely dedicated to immigration detention, namely: 143 non-dedicated IGSA facilities, 121 facilities under intergovernmental agreements with other federal agencies, and 20 other facilities, such as BOP facilities.

III. ICE's Detention Facilities and Contracts in California

13. In California, ICE does not operate any detention facilities; ICE currently uses four privately owned and privately operated Contract Detention Facilities: Mesa Verde ICE Processing Center, Adelanto ICE Processing Center, Imperial Regional Detention Facility, and the Otay Mesa Detention Center. In Fiscal Year 2019, these four Contract Detention Facilities housed an average of 3,721 ICE detainees each day, but they have a total capacity of approximately 5,000 detention beds, not including the additional beds that will become available in August 2020.

14. Although ICE currently owns a Service Processing Center in El Centro, California, ICE has not used this facility since October 2014. ICE recently agreed to allow the USMS to use the facility upon its renovation, which USMS completed in September 2019.

15. The Mesa Verde ICE Processing Center is owned and operated by The GEO Group, Inc. ICE awarded a contract for detention services at this Contract Detention Facility on December 19, 2019. The contract contemplates a total period of performance by the contractor extending from December 20, 2019 to December 19, 2034, with the base period of performance covering December 20, 2019 to December 19, 2024, and two subsequent five-year periods of performance that may be exercised by ICE at its option. The contract also contemplates that the contractor will provide detention services at two additional facilities, Golden State Modified Community Correctional Facility and Central Valley Modified Community Correctional Facility. The contract provides that up to 400 detention beds will be available at the Mesa Verde ICE Processing Facility. The contract further provides that up to 700 detention beds will be available at each of the Golden State Modified Community Correctional Facility and the Central Valley Modified Community Correctional Facility beginning on August 20, 2020. The detention services provided under this contract service the San Francisco area.

16. The Adelanto ICE Processing Center is also owned and operated by The GEO Group, Inc. ICE awarded a contract for detention services at this Contract Detention Facility on December 19, 2019. The contract contemplates a total period of performance by the contractor running from December 20, 2019 to December 19, 2034, with the base period of performance from December 20, 2019 to December 19, 2024, and two subsequent five-year periods of performance that may be exercised by ICE at its option. The contract also contemplates that the contractor will provide detention services at one additional facility, Desert View Modified Community Correctional Facility. The contract provides that up to 1,940 detention beds will be available at the Adelanto detention facility. The contract further provides that up to 750 detention beds will be available at the Desert View Modified Community Correctional Facility beginning on August 20, 2020. The detention services provided under this contract service the Los Angeles area.

17. The Imperial Regional Detention Facility is owned and operated by the Management and Training Corporation. ICE awarded a contract for detention services at this Contract Detention Facility on December 19, 2019. The contract contemplates a total period of performance by the contractor running from December 20, 2019 to December 19, 2034, with the base period of performance from December 20, 2019 to December 19, 2024, and two subsequent five-year periods of performance that may be exercised by ICE at its option. The contract provides that up to 704 detention beds will be available at the Imperial Regional Detention Facility. The detention services provided under this contract service the San Diego area.

18. The Otay Mesa Detention Center is owned and operated by CoreCivic. ICE awarded a contract for detention services at this Contract Detention Facility on December 19, 2019, which also provides that USMS may use the Otay Mesa Detention Center to house federal inmates. The contract contemplates a total period

of performance by the contractor running from December 20, 2019 to December 19, 2034, with the base period of performance from December 20, 2019 to December 19, 2024, and two subsequent five-year periods of performance that may be exercised by ICE at its option. The contract provides that ICE will have up to 1,994 detention beds available in the Otay Mesa Detention Center. The detention services provided under this contract service the San Diego area.

19. ICE does not lease and operate any detention facility in California that is privately owned. ICE also does not contract, and has never contracted, with school facilities used for the disciplinary detention of a pupil in California. Nor does ICE contract for facilities in California providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, ICE personnel. ICE houses only aliens subject to detention under its civil immigration detention authority in its immigration detention facilities. It does not house inmates in such facilities.

IV. Assembly Bill 32's Impact on ICE Contracts

20. On October 11, 2019, the Governor of California signed Assembly Bill 32 (A.B. 32). Under A.B. 32, no private detention facility may be operated in California. A.B. 32 further establishes that private detention facilities operating under a valid contract with a governmental entity that was in effect before January 1, 2020, such as the four contracts discussed above, may only continue operating for the duration of the contract, not to include any extensions made to or authorized by that contract. The prohibitions established by A.B. 32 will adversely impact ICE's efforts to successfully enforce federal immigration laws.

21. Due to A.B. 32, ICE has been impaired from strategically planning at a national level for the contracts required to ensure there is sufficient capacity in California to enforce our nation's immigration laws. Additionally, A.B. 32 prevents

ICE from quickly ramping up or down its bed-space requirements based on the actual need at any given time, costing ICE much needed flexibility in its operations.

22. A.B. 32's prohibition on privately operated immigration detention facilities in California will adversely affect ICE operations and could force ICE to relocate thousands of aliens to detention facilities outside of California. In Fiscal Year 2019, ICE arrested and detained 44,255 aliens in California. Without sufficient capacity in California, the transfer of thousands of aliens from California to detention facilities in other states throughout the year would strain capacity and resources in other locations. The required transfer of all such aliens from California to other states could also adversely impact conditions of detention, security for detained aliens across the United States, and create a greater strain on, and danger to, federal contractors and ICE personnel assigned to the facilities.

23. In addition, immigration detention facilities in other states could become overcrowded, which, in turn, would adversely impact case processing times and strain the federal resources of U.S. Citizenship and Immigration Services, the Department of Justice's Executive Office for Immigration Review, and ICE attorneys and officers assigned to adjudicate and manage these larger dockets.

24. Although A.B. 32 does not foreclose the *federal* operation of immigration detention facilities in California, this alternative is not a practical or legal possibility. ICE faces statutory requirements regarding the order in which it must consider detention options. *See* 8 U.S.C. § 1231(g)(2) ("Prior to initiating any project for the construction of any new detention facility for the Service, the Commissioner shall consider the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use."). Contracts are awarded for a specific number of detention beds because the population of detained removable aliens in the United States increases and decreases every day.

25. If ICE is unable to contract for detention space with private detention facilities, it would be forced to purchase or construct immigration detention facilities. Constructing and opening a new facility would almost certainly be more expensive and time-consuming than entering into a contract with a private company for an existing facility and staff. Requiring ICE to construct and operate its own facilities would also mean that, should capacity needs decrease prior to construction completion, ICE would then be paying for space it does not use. The potential result of such a scenario is that facilities would be constructed at taxpayer expense to accommodate for a projected demand that may never materialize due to natural migration flows or other circumstances. Those facilities could then become idle, fall into disuse, and remain vacant for an extended period. And, if the demand for detention beds later increases, ICE would likely need to invest significant taxpayer dollars to prepare these facilities for use.

26. Accordingly, a responsible and efficient administration of public resources and funds requires awarding contracts based on bed space needs because, when the demand for immigration detention space is reduced, or when other unforeseen factors require ICE to adjust its detention operations in a particular area, ICE can rescind a contract awarded to a Contract Detention Facility or reduce its use of beds afforded by federal contractors.

27. If A.B. 32 is permitted to remain in place, ICE would need to begin planning for a lack of detention space in California long before its contracts expire. ICE would likely need to begin a competitive solicitation for new private contracts in other states to replace the lost capacity in California. And, as noted above, it typically takes 9 to 12 months from the beginning of preparation for ICE to award a contract. The new vendor would also require at least three months after the contract award to hire and train staff to operate the facility. If new construction is

required as part of the solicitation, it could take nearly three years before ICE is able to gain access to the beds at the new detention facilities.

Executed on this 23rd day of January, 2020.

Tae D. Johnson
Assistant Director
ERO Custody Management Division

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

Attorneys for the United States

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

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

DECLARATION OF GREGORY J. ARCHAMBEAULT IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTION

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

Hearing Date: April 23, 2020
Hearing Time: 1:30 p.m.
Courtroom: 4D

I, GREGORY J. ARCHAMBEAULT, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO), as the acting Assistant Director for Field Operations at ICE Headquarters in Washington D.C. I have served in this position since September 2019.

2. ERO Field Operations provides guidance and coordination between ERO's Field Offices and their various sub-offices to ensure the efficient operation of numerous programs and initiatives through which ERO identifies, arrests, detains as appropriate, presents for prosecution, and removes aliens subject to final orders of removal. As acting Assistant Director for Field Operations, I direct and maintain oversight of 24 ERO Field Offices and their respective sub-offices, located throughout the United States, including ICE detention facilities.

3. Immediately prior to being appointed to my current position, I served as the Field Office Director for ERO's San Diego Field Office from February 2013 to September 2019, where I was responsible for all ERO operations in San Diego and Imperial Counties of Southern California, including the supervision of numerous ERO field officers and supervisors charged with the responsibility of identifying, arresting, detaining, pursuing for prosecution, and removing aliens in violation of federal immigration statutes and regulations.

4. I began my federal law enforcement career with the former U.S. Immigration and Naturalization Service (INS) in 1987. Since then, I served in numerous operational and managerial positions within ICE and the former INS. Specifically, I have served as an INS Special Agent, a Regional Liaison in the INS

Attaché Offices in Greece and India, a Supervisory Special Agent and a Resident Agent in Charge in the ICE Office of Investigations in Springfield, Illinois, a Unit Chief for ERO's Headquarters National Fugitive Operations Program, a Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and as the Assistant Director for Secure Communities and Enforcement for ERO Headquarters.

5. Due to my experience and the nature of my official duties, I am familiar with the operational needs of the 24 ERO Field Offices, including those located in California.

II. Assembly Bill 32's Impact on ICE Operations

6. ICE is legally charged with removing aliens who lack lawful immigration status or are otherwise removable from the United States under the immigration laws. Detention is an important and necessary part of immigration enforcement. Aliens who are in removal proceedings, including those with appeals pending before the Board of Immigration Appeals, are subject to detention in ICE custody, and certain categories of such aliens are subject to mandatory detention under the immigration laws. Aliens whose cases are pending before federal courts of appeals, as well as aliens with final orders of removal who are being processed for removal from the United States, are also detained in ICE custody. ICE detains aliens it apprehends, as well as aliens turned over from the custody of U.S. Customs and Border Protection.

7. In California, ICE has contracts with private companies that house removable aliens in privately owned and privately operated Contract Detention Facilities. ICE currently uses four Contract Detention Facilities, which have a total capacity of approximately 5,000 detention beds. The Imperial Regional Detention Facility and Otay Mesa Detention Center service the San Diego area. The Mesa Verde ICE Processing Center services the San Francisco area. And the Adelanto

ICE Processing Center services the Los Angeles area. The contracts provide for approximately 2,150 additional detention beds, which will become available at the Desert View Modified Community Correctional Facility, the Golden State Modified Community Correctional Facility, and the Central Valley Modified Community Correctional Facility in August 2020.

8. Assembly Bill 32 (A.B. 32) will prohibit ICE from extending current contracts or awarding new contracts for private detention facilities in California, including for facilities currently in use when those contracts expire. And due to A.B. 32's restrictions on the expansion of any future detention capacity in California, ICE will ultimately need to confront a lack of available bed space in California. As a result, ICE will not only need to relocate detainees to out-of-state facilities, but increase the number of out-of-state transfers daily since the amount of available bed space cannot be adjusted to accommodate need within California.

9. The transportation of aliens can only be effectuated through two avenues: ground or air transport.

10. Ground transport would limit detention options to the neighboring states of Arizona and Nevada, which are already experiencing a strain on their immigration detention capacity. Currently, ICE has two contracts for ground transportation that collectively cover the state of California; Las Vegas, Nevada; and Phoenix, Arizona. Furthermore, ICE would not be able to take advantage of current transportation contracts to transfer detainees to other locations because these contractors are limited to the transportation areas specified in their contracts. ICE would need to modify these contracts to include additional locations or geographic areas, and possibly alternative modes of transportation, such as air transport, resulting in increased costs and personnel for detainee transfers to out-of-state facilities. If ICE is unable to modify the contracts, and bed space cannot be secured

outside the state, ICE will be unable to continue to detain criminal aliens due to an inability to house them, increasing the risk to public safety.

11. Air transportation would also be problematic because aliens would need to be transferred on a daily basis from California—where they are apprehended—to out-of-state facilities where they will be detained. This increased daily transport to and from California would place an enormous strain on ICE Air Operations (IAO) and require significantly more frequent transport than IAO currently supports, causing increased costs and limits on availability of personnel to perform other operational duties.

12. Given the strain on ground and air transport, ICE may also be forced to utilize ICE personnel to conduct detainee transfers. Using ICE personnel to transport aliens outside of California would gravely affect ICE's daily enforcement operations because ICE would need to divert ERO staff to transportation duties, instead of administrative, arrest, detention, and removal functions. Due to ICE's finite staff and resources, diverting ICE personnel to conduct detainee transfers would likely result in fewer apprehensions of criminal aliens and therefore increase the risk to public safety.

13. The drastic increase in transportation would also heighten security concerns for detainees, federal personnel, and the public. Frequent transportation of detainees increases the amount of time these individuals are outside the heightened security of a detention facility. And because this frequent transportation may be regularly scheduled, the public could gain additional opportunities to gather intelligence on ICE operations, thus increasing the chances of an adversarial encounter during transport. Detainees with medical or mobility concerns may be further adversely affected by frequent travel.

14. Relocation to neighboring states could also cause other harm to ICE, its detainees, and the public. ICE facilities in neighboring states could become

overcrowded due to the influx of detainees from California. And the relocation outside California would also greatly reduce the ability of detainees, with families in California, to access their families and other visitors.

15. This out-of-state relocation and lack of family access for detainees with families in California would also slow immigration proceedings. Generally, an alien uses his or her family members to gather information needed in a removal proceeding. Because A.B. 32 would force aliens to be housed outside California—and possibly at great distances from their families—A.B. 32 may delay detainees' ability to gather evidence if they have family in California. And when evidence is not collected in a timely fashion, immigration bond hearings and removal proceedings may be delayed.

16. A.B. 32 will also pose a significant obstacle to ICE's compliance with federal court orders that limit or foreclose ICE's ability to transfer aliens outside of certain areas where they are originally encountered. For example, the permanent injunction issued in *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988), prohibits ICE from transferring unrepresented Salvadorian nationals from the district of their apprehension for at least seven days. If A.B. 32 is permitted to remain in place, it will result in ICE being unable to detain unrepresented Salvadoran nationals apprehended in California in the district of their apprehension for the time period required in the *Orantes* injunction.

Executed on this 24th day of January, 2020.

Gregory J. Archambeault
Acting Assistant Director
ERO Field Operations