Nos. 20-56172, 20-56304

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

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-Appellees.

On Appeal from the United States District Court
for the Southern District of California

REPLY BRIEF FOR APPELLANT UNITED STATES

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INTRODUCTION AND SUMMARY

This case is not about the wisdom of the federal government's decisions, but about preserving its discretion to make decisions. The policy question as to whether the federal government should contract with private facilities to meet its immigration-detention needs is not the issue before the Court. The question, instead, is which government gets to make that decision: the federal government or a state. Under well-settled principles of intergovernmental immunity and obstacle preemption, authority to make that decision *for* the federal government resides *with* the federal government. As California notes (at 20), the President recently issued an Executive Order directing the Department of Justice not to renew contracts with "privately operated criminal detention facilities, as consistent with applicable law." Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, 2021 WL 254321 (Jan. 26, 2021). That was a discretionary determination of the President. To date, neither Congress nor the President has restricted the ability of the Department of Homeland Security (DHS) or the Department of Justice—or any other federal agency—to contract with private immigration detention facilities. And the Constitution prohibits California from unilaterally imposing such a restriction, as it has done through Assembly Bill 32 (AB 32).

The State's brief does not dispute that AB 32 takes federal contracting decisions out of the federal government's hands. It nevertheless urges that this

restraint does not contravene constitutional principles of intergovernmental immunity and obstacle preemption. The mistaken premise that underlies the State's discussion of both doctrines is that the Constitution permits states to impair—or in this case halt—federal operations by regulations imposed on private persons in the state. Unsurprisingly, the State identifies no decision decided under principles of either intergovernmental immunity or obstacle preemption that sanctions a state law that purports to negate the federal government's ability to enter contracts to perform services.

On the contrary, the Supreme Court and this Court have long made clear that a state cannot even restrict the federal government's choice of contracts by imposing qualifications on contractors different than those used by the federal government, and that is the case even when the state requirements apply generally to all contractors in the State. AB 32 does not merely limit the federal government's choice of contractors to those with approved state qualifications. AB 32 eliminates the federal government's choice altogether.

In the absence of relevant authority, the State relies on decisions concerning the imposition of state taxes on federal employees and contractors. And it urges that one decision in particular, *North Dakota v. United States,* 495 U.S. 423 (1990), marked a sea change, such that state laws may now preclude residents from contracting with the federal government. But for good reason, no court has endorsed that proposition. Cases such as *North Dakota* deal with the different question of when and to what

extent a state may subject federal employees or contractors to taxes identical or analogous to those imposed on other state residents. None suggests that a state could use its taxing power to prohibit employees or contractors from performing work for the United States, or that it could use its taxing power to impede the implementation of federal programs. California's reliance on the reasoning of these cases is particularly anomalous because their reasoning applies equally to federal employees and federal contractors, but even California recognizes that a state could not impose on federal employees the type of restrictions placed on federal contractors by AB 32.

As discussed in our opening brief, principles of intergovernmental immunity and obstacle preemption converge in this area, and decisions invoking one doctrine frequently rely on decisions invoking the other. For that reason, and because AB 32 is invalid under both doctrines for fundamentally the same reasons, we discuss the State's response regarding both doctrines together at point II A of this brief. Because the State's analysis also rests on several errors specific to preemption, we address those contentions at point II B. First, however, we address California's argument, advanced for the first time on appeal, that the challenges to AB 32 do not involve a justiciable question, and its related contention that a preliminary injunction should be denied for reasons separate from the merits.

ARGUMENT

I. California's New Assertion That the United States Lacks Standing to Challenge the Application of AB 32 to ICE facilities Is Without Merit as Is Its Related Assertion That an Injunction Is Not Necessary to Avoid Irreparable Injury.

California argues for the first time in this litigation that the appeals of the United States and The GEO Group, Inc. present no justiciable claims. In district court, California's only standing argument—raised for the first time in the reply brief in support of its motion for judgment on the pleadings—challenged the United States' standing only with respect to the application of AB 32 to facilities operated by the Federal Bureau of Prisons (BOP), not by DHS. And that argument was premised on circumstances entirely absent here: BOP's only facility in the state was being repaired, and the district court ultimately concluded, after supplemental briefing, that the United States lacked standing as to that claim because the government had acknowledged that "BOP d[id] not have any immediate plans for new contracts for private secure detention facilities in California." ER25. The court thus found no existing or imminent controversy, in light of the absence of any currently operational private BOP facility or concrete plans to use one in the future.

Unsurprisingly, California did not call into question the United States' standing to challenge the application of AB 32 to Immigration and Customs Enforcement (ICE) facilities. The declaration concerning ICE operations explained that nationwide ICE currently "neither constructs nor operates its own immigration detention

facilities," a practice that reflects the "significant fluctuations in the number and location of removable aliens apprehended by DHS and subject to detention." ER79 (Johnson Decl. ¶ 8). In California, ICE currently uses only privately owned and operated detention centers. ER81-83 (Johnson Decl. ¶¶ 13-18). All of these contracts have initial periods of performance ending in 2024, with two subsequent five-year periods that ICE may exercise at its option. ER81-83 (Johnson Decl. ¶¶ 15-18). There is no dispute that AB 32 purports to eliminate that option. But whether the United States wishes to exercise that option is a decision for the federal government, and California has no authority to eliminate that option and cabin the federal government's discretion.

California asserts that "[e]ven if the United States requires some amount of lead time" to effectuate alternative arrangements, "it submitted no evidence to the district court about how long that would take or why it would suffer immediate or irreparable harm now without provisional relief." Br. 62-63. This is simply incorrect. The government's declaration explained that exploration of new alternatives would need to begin long before the contracts initial period of performance expire in 2024, and that implementation of alternatives generally requires considerable lead time. ER85 (Johnson Decl. ¶ 27).

Moreover, as the district court recognized, the costs of relocation would impose "real and substantial burdens." ER 67. The district court concluded that those burdens should play no part in its analysis because the burdens were not the

result of discriminatory treatment. *See* ER 67-68. As discussed below and in our opening brief, the court erred in concluding that AB 32 is a neutral statute. As relevant here, however, the court's observation leaves no doubt that the court fully understood that AB 32 is causing concrete and imminent injury to the federal government. And California has never made any attempt to demonstrate that the government's explanation of the impact of the statute is incorrect, nor has California ever suggested how it believes that the federal government is to comply with AB 32 within its time frame, without having to incur potentially significant financial costs.

Indeed, it is only by disregarding these concrete injuries that the State can assert that its injury in not enforcing AB 32 would outweigh the statute's impact on the federal government, a proposition never endorsed by the district court. And, for the reasons discussed below, California will suffer no comparable injury if it is unable to bar the federal government from exercising its authority to enter into contracts, pursuant to its statutory discretion.

II. Principles of Intergovernmental Immunity and Obstacle Preemption Make Clear That California Cannot Bar Private Entities from Contracting with the United States with Regard to ICE Detention Facilities.

A. AB 32 impermissibly regulates the United States while creating a significant obstacle to implementation of the statutory scheme.

1. California's brief asks this Court to revisit first principles and hold that a state may preclude its residents from contracting with the federal government. The

State cites no instance in which a court has approved a state prohibition of this kind. Indeed, the State identifies no instance in which courts have sustained any state limitation on the federal government's ability to contract with private persons. On the contrary, this Court and other courts have repeatedly held that states cannot constitutionally limit the federal government's ability to contract with private individuals or entities even if the limitation results from an otherwise entirely valid state licensing requirement of general applicability. *See, e.g., Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 438 (9th Cir. 1991) (California's licensing requirements for construction contractors were preempted to the extent that they applied to federal contractors); *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); *United States v. Virginia,* 139 F.3d 984 (4th Cir. 1998) (Virginia licensing requirements for private security agencies could not be applied to bar unlicensed entities from contracting to perform background investigations for the FBI).

These cases emphasize principles summarized by the Supreme Court in *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187 (1956), holding that an Arkansas licensing requirement could not constitutionally be applied to federal contractors. *Leslie Miller* in turn cited the Court's decision in *Johnson v. Maryland,* 254 U.S. 51 (1920), which held that a state licensing requirement could not constitutionally be applied to federal employees. The Court quoted *Johnson's* emphatic declaration that states cannot

properly impose regulatory requirements on persons carrying out federal duties: "Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient." *Leslie Miller*, 352 U.S. at 190 (quoting *Johnson*, 254 U.S. at 57).

As noted in our opening brief, in this area principles of intergovernmental immunity and preemption converge, and decisions citing one doctrine rely on precepts set out in the other. Thus, for example, this Court's decision in *Boeing Co. v. Movassaghi*, 768 F.3d 832 (9th Cir. 2014), decided on grounds of intergovernmental immunity, relied on the Court's earlier decision in *Gartrell,* which invoked principles of preemption. In *North Dakota v. United States,* 495 U.S. 423 (1990), justices disagreed as to whether *Leslie Miller* was decided on grounds of intergovernmental immunity or preemption. Indeed, *Leslie Miller* cited principles of preemption but also relied on *Johnson*, a case that relied on the principles of intergovernmental immunity established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

This cross-referencing reflects the recognition that in this area there is a substantial overlap between the two doctrines. State statutes that preclude the federal government from contracting with private entities as authorized by federal law, or which establish criteria for their selection different or supplemental to those of federal law, offend principles of intergovernmental immunity. For the same reasons they

generally "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1297 (2016) (quoting *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000)).

The State's declaration that "*Leslie Miller* is not an intergovernmental immunity case at all, but a preemption case," Br. at 31, thus does not advance its argument. California similarly errs when it seeks to dismiss *Johnson* on the ground that it involved application of a license requirement to a federal employee whereas "AB 32 does not regulate government officials or federal employees, only private persons operating private detention facilities." Br. 29. The Supreme Court recognized no such distinction in *Leslie Miller* when it relied on *Johnson* to hold that licensing requirements could not be applied to federal contractors. And, as noted, California cites no case in which a court has upheld a licensing requirement as applied to a federal contractor.[1]

2. In the face of uniform case law rejecting state attempts to preclude or impede persons from contracting with the federal government, California seeks to

[1] California also suggests that the effects of the state regulation in *Boeing* "are more appropriately analyzed under the principle of conflict preemption, not intergovernmental immunity." Br. 28. This Court in *Boeing* explicitly held that a California statute violated principles of intergovernmental immunity by establishing standards for an environmental cleanup site for which the Department of Energy had accepted responsibility, emphasizing that "[t]he federal government's decision to hire Boeing to perform its cleanup work does not affect the legal analysis." *Boeing,* 768 F.3d at 839. The State's contention here is incompatible with the analysis in *Boeing,* and, in any event, it does not advance its argument.

rewrite the law in this area on the basis of principles of tax immunity discussed in *North Dakota,* which it portrays as having effected a sea change that casts doubt on all decisions holding that states cannot impede private persons from contracting with the federal government.

This argument fails in every respect. The holding and analysis of the plurality opinion in *North Dakota* have no bearing on the analysis here. *North Dakota* involved an extensive scheme of statewide regulation of the distribution of liquor. The scheme affected the federal government only insofar as the scheme might incidentally raise liquor prices at military bases. The Court observed, moreover, that "[i]n this system, the Federal Government is favored over all those who sell liquor in the State." *North Dakota,* 495 U.S. at 439. Whereas all other liquor retailers were required to purchase from state-licensed wholesalers, the federal government also had the option of purchasing from out-of-state wholesalers as long as the wholesalers complied with the labeling and reporting regulations. *Id.*

Nor did *North Dakota* break doctrinal ground in any respect relevant here. Well before *North Dakota,* the Supreme Court had established that tax immunity did not extend "to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government." *United States v. New Mexico*, 455 U.S. 720, 731–32 (1982) (quoting *James v. Dravo Contracting Co.*, 302 U.S. 134, 150 (1937)). In applying these

principles, the Supreme Court considers whether the "legal incidence" of the tax falls on government employees or whether it should be regarded as a tax on the United States itself. Thus, for example, in *United States v. Fresno County*, 429 U.S. 452, 464 (1977), the Court sustained a tax "imposed solely on private citizens who work for the Federal Government," that "threatens to interfere with federal [functions]" only insofar as it might cause the government "to reimburse its employees for the taxes legally owed by them." *Id.* at 464. The Court emphasized that "[t]here is no other respect in which the tax involved in this case threatens to obstruct or burden a federal function." *Id.*

The State cites no instance in which the analysis governing tax immunity has been applied to sustain a restriction that precludes persons from contracting with the federal government or threatens to interfere with its operations in any material respect. California thus seriously misunderstands relevant principles when it urges that the contracting bar should be sustained on the ground that "only private detention contractors bear the legal incidence of AB 32 because only they have any 'ultimate legal obligation' to the State under the law." Br. 25. If that analysis were correct, every state law affecting government contracts would be sustained as long as it was framed as restriction on the contractor rather than a restriction on the government.

That, however, appears to be the State's position. It notes, for example, that "[t]he Unite[d] States also cites dicta in the 1824 *Osborn* case suggesting that a state law

may not regulate private contractors that provide provisions to the military." Br. 30 n.8 (citing U.S. Opening Br. at 20). The statement quoted in our brief (which was, in fact, a citation to *Johnson* quoting *Osborn*) posed the question: "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." *Johnson,* 254 U.S. at 55-56 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 867).

California's brief, however, provides the affirmative answer that the Supreme Court regarded as self-evidently incorrect. The State declares that the statement in *Osborn* is "an example of the former, now-'rejected' rule 'that any state regulation which indirectly regulates the Federal Government's activity is unconstitutional.' *North Dakota*, 495 U.S. at 434 (plurality)." Br. 30 n.8. The State presumably believed it necessary to take this extraordinary position because AB 32 cannot be meaningfully distinguished from the state restrictions posited by the Supreme Court as incontrovertibly impermissible.

The State's contention that decisions invalidating restrictions on government contractors preclude private persons from contracting with the federal government reflect a "now-'rejected' rule," Br. 30 n.8, is incompatible with the many decisions regarding limitations on the federal government's ability to contract that have issued since *North Dakota*. It is also incompatible with this Court's analysis in *United States v.*

California, 921 F.3d 865, 885 (9th Cir. 2019), in which this Court considered a state statute authorizing inspections of federal detention facilities. In rejecting the federal government's preemption claim, the Court contrasted the inspection statute with the provisions at issue in cases such as *Leslie Miller* and *Gartrell,* which "prevented the federal government from entering into agreements with its chosen contractors until the states' own licensing standards were satisfied." *Id.* The Court noted that "[t]hese cases evinced states' active frustration of the federal government's ability to discharge its operations." *Id.* The inspection statute, by contrast, did not "regulate whether or where an immigration detainee may be confined, require that federal detention decisions or removal proceedings conform to state law, or mandate that ICE contractors obtain a state license." *Id.* The decision plainly does not contemplate that although California cannot mandate that contractors obtain a state license, it could preclude those contractors from entering into agreements with ICE entirely.

The Fourth Circuit's decision in *Virginia* explicitly rejected the argument that California has made here in reliance on *North Dakota*, and confirmed that under principles of both intergovernmental immunity and preemption, states may not impose restrictions on private persons that impede the federal government's ability to contract. There, the Fourth Circuit held "that Supreme Court precedent precludes the application of Virginia's licensing and registration requirements to private investigators working solely for the FBI." 139 F.3d at 987. The Fourth Circuit explained that "[r]ather than casting doubt on the continued validity of *Leslie Miller,*"

North Dakota confirmed *Leslie Miller's* continuing vitality. *Id.* at 989 n.7. The Fourth Circuit noted that "notwithstanding their disagreement over whether *Leslie Miller* was a preemption or an intergovernmental immunity case, both the plurality and the dissenters cited *Leslie Miller* approvingly and reaffirmed its holding." *Id.* The Fourth Circuit further noted that in *North Dakota* "the regulations did not attempt to alter the criteria under which the federal government made its decision." *Id.* Nor did they "otherwise enable the state to second-guess the federal government's judgment as to who should supply the federal enclave." *Id.* The court explained that "[t]he contrast between the incidental effect of the North Dakota regulations on the federal government's decisional processes and the direct interference of the Arkansas regulations in *Leslie Miller* (and the Virginia regulations in [the case before the Fourth Circuit]) with those processes is stark indeed." *Id.*

Finally, the inapplicability of *North Dakota* and other tax cases to the analysis here is also evident from the fact that those cases apply equally to taxes on federal employees as well as federal contractors. The State does not suggest that California could impose restrictions on federal employees that would prevent them from performing assignments for the federal government (and, as noted, it attempts to distinguish *Johnson* on the ground that the license requirement in that case was applied to a federal employee). And its attempt to differentiate contractors from employees finds no basis in tax immunity cases. Plainly, therefore, *North Dakota* and other tax cases do not provide the relevant analytical framework.

3. As the decisions discussed above make clear, restrictions on the federal government's ability to enter into agreements with the contractors of its choice cannot be sustained even if the restrictions are contained in statutes generally applicable to all persons in the state. AB 32 thus would not survive scrutiny even if California had not enacted the statute with the express intent of preventing the federal government from continuing its use of privately operated detention facilities. *See* Statement of Assemblymember Bonta (quoted in ER93 (Sen. Judiciary Comm., Bill Analysis of A.B. 32, 2019-2020 Reg. Sess. (Cal. 2019)) (noting that AB 32 had been extended to "includ[e] facilities used for immigration detention").

In addition, however, California is wrong to suggest that the statute is neutral. California seeks to analogize AB 32 to the scheme at issue in *North Dakota* on the ground that "AB 32 also does not single out federal contractors based solely on their 'status as a [federal] Government contractor or supplier.'" Br. 37 (quoting *North Dakota*, 495 U.S. at 438). As discussed, however, the North Dakota statute was one of general applicability that carved out a partial exemption for the federal government.

California elides this distinction on the ground that AB 32 applies (with many exceptions) to California itself. As noted in our opening brief (at 22), and as the State does not dispute, California cannot be said to have "regulated" itself; as applied to California, AB 32 simply constitutes a determination as to how the State and its subdivisions should spend money.

The structure of AB 32 underscores this distinction. Section 1 of AB 32 provides that the California Department of Corrections and Rehabilitation shall not (with exceptions) enter into or renew a contract with a private, for-profit prison to incarcerate state prison inmates. A.B. 32, 2019-2020 Leg., Reg. Sess. (Cal. 2019); Cal. Penal Code § 5003.1. The statute is not couched as a restriction on contractors, because there was no need to do so in a context where the state has plenary authority to determine who will run its own correctional facilities. Section 2, in contrast, provides that "a person shall not operate a private detention facility within the state," thereby making the statute applicable to facilities used by the federal government and the persons who contract to operate those facilities. A.B. 32, 2019-2020 Leg., Reg. Sess. (Cal. 2019); Cal. Penal Code § 9501. Because Section 1 already precludes state contracts with privately operated prisons, Section 2 is superfluous in this crucial respect, and the impact of Section 2 on the State, as opposed to the federal government, is relatively marginal. The State does not operate facilities for non-citizens awaiting removal proceedings, and it cites no analogous state facilities that are affected by Section 2. And the exceptions to Section 2 exempt the various facilities with which the State does wish to contract.

The statute also discriminates against the United States even with respect to imperatives created by court orders. While the legislature expressly provided that the self-imposed restrictions of Section 1 would not apply to the State's use of private contractors "in order to comply with the requirements of any court-ordered

population cap," ER64 (quoting Cal. Penal Code § 5003.1(e)), Section 2 makes no similar provision for the federal government although, as the federal government's declarations explain, AB 32 will "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." ER92 (Archambeault Decl. ¶ 16).

California asserts that the "exceptions for the facilities identified in section 9502 are 'directly related to' and 'justified by' significant differences between those types of facilities, on the one hand, and privately-operated prisons and immigration detention centers, on the other." Br. 38. But that statement only confirms that the principal, if not the sole, purpose of Section 2 is to address facilities that contract with the federal government. Section 1 fully addressed California's contracts with prisons, and there are no State facilities analogous to the facilities for detaining non-citizens prior to removal proceedings. As a practical matter, the "types of facilities" banned by Section 2 are exclusively those associated with the United States.

B. The State's discussion of preemption principles reflects additional fundamental errors.

As discussed, the Supreme Court, this Court and other courts of appeals have uniformly held that States cannot restrict the federal government's ability to enter into agreements with private contractors, citing related principles of intergovernmental immunity and obstacle preemption. Many of the errors underlying the State's

preemption analysis have already been addressed in the discussion of those cases and the principles that they apply. Insofar as the State advances contentions relating specifically to preemption doctrine, its arguments rest on additional serious misunderstandings of relevant principles.

California seeks to rely on a presumption against preemption that can be overcome only by "demonstrating that preemption was the 'clear and manifest purpose of Congress.'" Br. 47 (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). The presumption against preemption applies when the federal and state governments both regulate private parties. Therefore, as we noted in our opening brief, the presumption has never been invoked when a state seeks to regulate a private party to prevent it from engaging in primary conduct with the federal government. California identifies no instance in which that presumption has been applied in circumstances remotely resembling those here.

California urges that barring the use of privately operated facilities does not pose an obstacle to the scheme authorized by Congress because Congress "contemplated that only the federal government and states would operate these [detention] facilities." Br. 50. On the contrary, Congress not only contemplates the operation of such facilities by private contractors but appropriates funds for those contracts in annual appropriations legislation. These enactments not only authorize expenditures for privately operated facilities but also set a minimum requirement that the facilities must meet in order for the federal government to continue to contract

for their detention services. The ICE appropriation bill for fiscal year 2021, for example, states that none of the funds provided to ICE for Operations and Support in the appropriation bill may be used to "continue any contract for the provision of detention services if the two most recent overall performance evaluations received by the contracted facility are less than 'adequate' or the equivalent median score in any subsequent performance evaluation system." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. F, tit. II, § 215(a), 134 Stat 1182, 1457 (2020). Prior annual appropriations bills, including the bill in effect when AB 32 was passed, contained the same language. *See, e.g.*, Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 215(a), 133 Stat. 2317, 2507 (2019); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 210, 133 Stat. 13, 23 (2019); *see also* Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 386, 110 Stat. 3009 (1996) (contemplating detention facilities "operated directly by [ICE] or through contract with other persons or agencies").

California also recognizes that cases citing principles of preemption did not engage in the type of statutory inquiry they assert is necessary. It notes, for example, that the only basis for finding preemption of the contractor licensing requirement in *Leslie Miller* was that "specific federal contracting regulations that already governed contractors' qualifications." Br. 31. And it observes that in *Gartrell,* the application of general licensing requirements would effectively constitute an "attempt[] to review the federal government's responsibility determination." *Id.* (quoting *Gartrell*, 940 F.2d at

439). These and other cases make clear that state requirements may be preempted even without regard to whether statutes specifically speak to the federal determinations at issue.

The State is also quite wrong when it urges that there are no analogous "federal regulations governing private immigration detention companies." Br. 31. Such contracts are, in fact, governed by a host of regulations. The contracts are issued under the Federal Acquisition Regulations (FAR) and the contract with GEO Group, for example, incorporates FAR provisions including those for determining contractor "Responsibility," the contractor's fitness to be awarded a contract. *See, e.g.,* FAR clause 52.209-7 (2018) (Information Regarding Responsibility Matters). The contracts are more specifically governed by the Homeland Security Acquisition Regulations (HSAR), which are subject to notice and comment rulemaking, and, among other things, provide that ICE "may enter into contracts of up to fifteen years' duration for detention or incarceration space or facilities, *including related services*." *See* 48 C.F.R. § 3017.204-90; 71 Fed. Reg. 25759, 25770 (May 2, 2006) (emphasis added); *see also* 18 U.S.C. § 4013 note ("Notwithstanding any other provision of law, including section 4(d) of the Service Contract Act of 1965 . . . [now 41 U.S.C. § 6707(d)], the Attorney General hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration space or facilities, *including related services*, on any reasonable basis.") (emphasis added).

In any event, the State's argument would be unavailing even if federal regulations did not prescribe the standards and procedures that apply when the federal government contracts for operation of private detention facilities. In cases such as *Leslie Miller, Gartrell,* and *Virginia,* the only question was whether contractors needed to be licensed under state law, and the federal regulatory schemes confirmed that the state regulations infringed on the federal government's choice of contractors. Here, the State has decreed that the federal government has no choice of contractors, substituting its judgment for that of Congress, DHS, and ICE that the use of private contractors is an available means for housing non-citizens awaiting removal proceedings and/or removal. It is for the federal government, not the states, to determine whether and how to implement alternatives to the current use of these facilities.

In sum, the Supreme Court, this Court, and other courts have uniformly applied the constitutional principles of federal supremacy underlying intergovernmental immunity and preemption to hold invalid state statutes that limit—much less preclude—the ability of the United States to contract within their borders.

CONCLUSION

The denial of the preliminary injunction as applied to ICE contractors should be reversed and the preliminary injunction should be granted.

Respectfully submitted,

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March 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Ninth Circuit Rule 32-1(b) because it contains 5,234 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Katherine Twomey Allen
Katherine Twomey Allen