United States of America v. Newsom et al

2020 | Cited 0 times | S.D. California | October 8, 2020

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

THE GEO GROUP, INC.,

Plaintiff, v. GAVIN C. NEWSOM, in his official capacity as Governor of the State of California; XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendants. AND ALL CONSOLIDATED CASES

Case No.: 19-CV-2491 JLS (WVG)

ORDER (1) GRANTING IN PART AND DENYING IN PART PRELIMINARY INJUNCTION, AND (2) GRANTING IN PART AND MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

This Order addresses motions concerning the constitutionality of California .B. The GEO Group, Inc. v. Newsom, No. 19-CV- GEO United States v. Newsom, No. 20-CV- U.S. Specifically before the Court are Plaintiff The GEO Group, Inc. , and the United

GEO ECF No. 15, .S. U.S. ECF No. 8, respectively), as well as Defendants Gavin Newsom and GEO ECF Nos. 20, 22)

the Pleadings of the United States U.S. ECF No. 13). Also before the

Court are briefs of Amici Curiae Immigrant Legal Resource Center, Human Rights Watch, Amici filed in support of Defendants in both Amici B GEO ECF No. 26 & U.S. ECF No. 19), as well as the brief of Amici Curiae Immigrant Defense Advocates and Immigrant Legal Defense (the Amici filed in support of Defendants in the GEO Amici GEO ECF No. 40). The Court held a hearing on the above-enumerated matters on July 16, 2020. 1

See GEO ECF Nos. ; U.S. ECF No. 33. Having carefully arguments, pleadings and evidence, and the applicable law, the Court GRANTS IN PART AND DENIES IN PART the GEO and U.S. Motions and GRANTS IN PART AND DENIES IN PART Defendants Judgment on the Pleadings, as follows.

BACKGROUND 2 I. A.B. 32

On December 3, 2018, California Assembly Member Rob Bonta introduced A.B. 32 in the California Legislature. GEO Newsom signed A.B. 32 into law on October 11, 2019. GEO Compl. ¶ 33.

1 Because of the COVID-19 pandemic, see, e.g., Order of the Chief Judge No. 24 (S.D. Cal. filed Apr. 17, 2020); Executive Order N-33-20, Executive Department of the State of California (Mar. 19, 2020), the hearing was held by video and telephone. See GEO ECF No. 42; U.S. ECF No. 32. 2 On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), the Court may take into account the therein, and any documents properly subject to judicial notice. See, e.g., Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 999 (9th Cir. 2018) (judicial notice and incorporation by reference); Harris v. Cty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012) (Rule 12(c) motion); Vasquez v. Los Angeles Cty., 487 F.3d 1246, 1249 (9th Cir. 2007) in deciding a motion for preliminary injunction unlike a motion to dismiss the Court is not limited solely to the pleadings and may consider affidavits or declarations along with other evidence submitted by the parties. Walker v. Woodford, 454 F. Supp. 2d 1007, 1024 (S.D. Cal. 2006) (citing Fed. R. Civ. P. 65; Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); Flynt Distrib. Co. v. Harvey, 734 F.2d 1389, 1394 (9th Cir.1984)), , 393 F. Appx 513 (9th Cir. 2010). The Court is guided by these legal principles in its Analysis. See infra pages 21 69.

A.B. 32 contains three sections. See 2019 Cal. Legis. Serv. Ch. 739 (A.B. 32) (2019). Section 1 generally prohibits the California Department of Corrections and

-profit prison facility located in or outside [California] to provide housinSee A.B. 32 § 1; Cal. Penal Code § 5003.1(a). There also is an exception allowing California to renew or extend a contract with a private, for-profit detention facility to comply with any court-ordered population cap. 3

See A.B. 32 § 1; Cal. Penal Code § 5003.1(e). In its entirety, Section 1 of A.B. 32 provides:

(a) On or after January 1, 2020, [CDCR] shall not enter into a

contract with a private, for-profit prison facility located in or outside of the state to provide housing for state prison inmates. (b) On or after January 1, 2020, [CDCR] shall not renew an

existing contract with a private, for-profit prison facility located in or outside of the state to incarcerate state prison inmates. (c) After January 1, 2028, a state prison inmate or other

person under the jurisdiction of [CDCR] shall not be incarcerated in a private, for-profit prison facility. (d) - does not include a facility that is privately owned, but is

leased and operated by [CDCR]. (e) Notwithstanding subdivisions (a) and (b), [CDCR] may

renew or extend a contract with a private, for-profit prison facility to provide housing for state prison

inmates in order

3 currently subject to a court-ordered population cap, pursuant to which its 26 (citing Brown v. Plata, 563 U.S. 493 (2011); Coleman v. Brown, 952 F. Supp. 2d 901 (E.D. Cal. 2013)). As of of design capacity. GEO Compl. ¶ 27.

to comply with the requirements of any court-ordered population cap. Cal. Penal Code § 5003.1. Section 2 of A.B. 32 contains several provisions codified at California Penal Code sections 9500 through 9505. See A.B. 32 § 2; Cal. Penal Code §§ 9500 9505. Section See generally Cal. Penal Code § ily confined for

purposes of execution of a punitive sentence imposed by a court or detention pending a

y that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with

Section 9501 contains a general prohibition on the operation of a private detention

This provision is followed by three additional provisions containing exceptions. See Cal.

Penal Code §§ 9502, 9503, 9505. Section 9502 excepts several, specific types of facilities, namely:

(a) Any facility providing rehabilitative, counseling,

treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court pursuant to Part 1 (commencing with Section 100) of Division 2 of the Welfare and Institutions Code. (b) Any facility 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 Section 1026, or pursuant to Division 5 (commencing with Section 5000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code. / / /

(c) Any facility 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. (d) A residential care facility licensed pursuant to Division 2

(commencing with Section 1200) of the Health and Safety Code. (e) Any school facility used for the disciplinary detention of a

pupil. (f) Any facility used for the quarantine or isolation of persons

for public health reasons pursuant to Division 105 (commencing with Section 120100) of the Health and Safety Code. (g) Any facility used for the temporary detention of a person

detained or arrested by a merchant, private security guard, or other private person pursuant to Section 490.5 or 837.

Cal. Penal Code § 9502. Section 9503 exempts facilities that are leased from private parties but operated by owned property or facility that is leased and operated by the [CDCR] or a county sheriff or

The last exception, appearing in Section 9505, exempts contracts in existence before January 1, 2020, and contracts renewed pursuant to Section 5003.1(e):

Section 9501 does not apply to either of the following: (a) A private detention facility that is operating pursuant to a

valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract, not to include any extensions made to or authorized by that contract. / / /

(b) A private detention facility contract renewed pursuant to

subdivision (e) of Section 5003.1. Cal. Penal Code § 9505.

Finally, Section 3 of A.B. 32 contains a act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or ap II. Plaintiff A. The United States Bureau of Prisons 1. Detention Facilities -agency of the United States Department of Justice (U.S. .S. id.

¶ 15 (citing 18 U.S.C. §§ available penal or correctional facility that meets minimum standards of health and

habitability established by [BOP], whether maintained by the Federal Government or Id. (quoting 18 U.S.C. § 3621(b)). Nationwide, BOP houses nearly 25,000, or approximately 14 percent, of its over 175,000 inmates in private detention facilities. Id. ¶ 40. Roughly the same proportion of in private detention facilities. Id. that is privately operated. Id. ¶ 41. Taft houses 1,300 inmates. Id. for the private operation of Taft was due to expire in March 2020. Id. ¶ 41. BOP considered

not renewing the contract because of infrastructure issues at Taft, although BOP may seek to award a new contract if it determines that Taft could remain open while repairs are being made. Id. Although BOP currently does not have plans to contract with other private facilities in California, it may in the

future depending on its needs. Id. ¶ 43.

2. Residential Reentry Centers

Congress also expressly has provided that a federal prisoner may serve a limited including in a community correctional facility. U.S. Compl. ¶ 17 (quoting 18 U.S.C.

§ 3624(c)) (citing 18 U.S.C. §§ 3563(b)(10) R extended placement in RRCs of inmates who have earned time credits under the risk-and-

needs-assessment system. U.S. Compl. ¶ 47. BOP therefore anticipates that the need for RRCs in California will increase significantly over the next few years. Id.

Currently, BOP contracts with four private contractors to operate ten RRCs located throughout California that house and supervise approximately 900 inmates. 4

Id. ¶ 44. These RRCs supervise inmates on home confinement and also provide assistance to inmates who are nearing release by providing a supervised environment and several programs, including employment counseling, job placement, and financial management assistance. Id. Current contracts expire between March 2020 and February 2021, or, if all option periods are exercised, as they usually are, between March 2021 and January 2030. Id. ¶ 45.

BOP also has one open solicitation and one solicitation it would like to open for additional RRCs in San Francisco and San Diego, respectively. Id. ¶ 46. The anticipated performance dates are in 2021. Id.

Finally, BOP maintains about 15 to 20 percent of available beds in RRCs nationally for use by federal courts as an intermediate sanction during supervision or probation, although these individuals are not in BOP custody. Id. ¶ 48. / / /

4 One RRC is located in each of Riverside, Oakland, San Francisco, San Diego, Garden Grove, El Monte, Brawley, and Van Nuys, and two are in Los Angeles.

B. The United States Marshals Service the supervision of the Attorney General. GEO Compl. ¶ 34 (citing 28 U.S.C. § 561(a));

U.S. Compl housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government or contracts with see also U.S. Compl. ¶ 16 (quoting 18 U.S.C. § detention facilities but partners with state and local governments using intergovernmental agreements to house prisoners. Additionally, the agency houses prisoners in Federal

U.S. Marshals Serv., Fact Sheet: Prisoner Operations 2 (2019), https://bit.ly/2Yi5RED). U.S. Compl. ¶ 16 (quoting 18 U.S.C. § 4013(c)) (citing 28 C.F.R.

§ 0.111(k); 28 C.F.R. § 0.111(o)).

The average daily populatio Appropriation 2 (2019), https://bit.ly/2SnzdAx [

id. (quoting USMS 2020 Budget at 30), and the USMS estimates that, in Fiscal Year 2020, it will have an average daily population of 62,159 detainees, which is the highest level in more than a decade. Id. (citing USMS 2020 Budget at 4). Based on current prosecutorial trends, USMS anticipates that the detention population in California will increase by approximately 25 percent by Fiscal Year 2023. U.S. Compl. ¶ 31.

Nationwide, USMS houses approximately 62,000 inmates, over 21,000 of whom (or approximately 34 percent) are housed in private detention facilities. Id. ¶ 28; see also GEO

Compl. ¶ 41 (citing USMS 2020 Budget at 19). In California, USMS houses approximately 1,100 of its 5,000 inmates (or approximately 22 percent) in private detention facilities. U.S. Compl. ¶ 28. Because all the private USMS facilities contracted in California are located in the Southern District of California, id., that percentage is even higher in this of 2019. See GEO Compl. ¶ 41. Approximately 1,100 of the approximately 2,900 USMS

inmates in this District are housed in private detention facilities, with an additional 450 inmates housed outside of California because of the unavailability of detention space in the state. U.S. Compl. ¶ 28. 1. ities

There are currently only two USMS facilities located in San Diego, California. GEO Compl. ¶ 47. One, , is a BOP facility with an ADP of 779 detainees as of April 2019. Id. (citing U.S. Marshals Serv., USMS Detention .

The other the County of San Diego originally built as a maximum-security correctional facility with 725 beds. Id. ¶ 42. In 1999, GEO leased WRDF from the County. Id. GEO began housing USMS detainees at WRDF in 2000. Id. ¶ 43. As of April 2019, WRDF had an ADP of 676 detainees. Id. ¶ 42 (citing USMS Detention Population at 2). USMS renewed its contract with GEO on November 14, 2017, for a base period of approximately two years, with four two-year September 30, 2027. Id. ¶ 44. USMS exercised its first option under the contract on October 1, 2019, continuing its contract with GEO through September 30, 2021. Id. ¶ 45. Because USMS only pursues private detention facilities when there is no other available space, all option years are generally exercised. U.S. Compl. ¶ 30. / / / / / /

2. The next closest USMS facility outside San Diego is the Otay Mesa Detention Id.; see also

infra Section II.C.4. ornia, GEO Compl. ¶ 51, is owned by ICE, which has authorized USMS to house USMS detainees there. Id. ¶ 52. USMS is authorized to house over 1,800 inmates in the El Centro facility in 2020. U.S. Compl. ¶ 29. On December 23, 2019, USMS awarded GEO a contract to operate El Centro for a base period of two years, with USMS having the right to exercise three two-year options and one nine-month option. GEO Compl. ¶ 53. The next closest, non-private USMS facilities to San Diego are located approximately 90 miles away in Santa Ana, California. Id. ¶ 50. These two facilities had a combined ADP of approximately 213 in April 2019. Id. (citing USMS Detention Population at 2).

C. U.S. Immigration and Customs Enforcement In November 2002, Congress assigned the border-enforcement functions of the former Immigration and Naturalization Service to the newly created Bureau of Immigration and Customs Enforcement, which is housed within the Department of Homeland Security GEO Compl. ¶ 56 (citing U.S. https://bit.ly/35Jas68). Congress has authorized ICE to detain aliens, id. ¶ 57 (citing 8

U.S.C. §§ 1225(b)(1)(B)(ii), 1225(b)(2)(A), 1226(a), 1226(c); Jennings v. Rodriguez, 583 U.S. ___, 138 S. Ct. 830, 836 38 (2018)); U.S. Compl. ¶ 20 (citing 8 U.S.C. §§ 1187, 1222,

appropriate places of detention for aliens detained pending removal or a decision on 1231(g)(1)). Consequently, DHS is congressionally authorized to provide appropriate detention facilities for detainees,

cooperative agreements with States and localities. U.S. Compl. ¶ 21 (quoting 8 U.S.C. §§ 1103(a)(11), 1231(g)) facilities . . or lease of any existing prison, jail, detention center, or other comparable facility suitable f Id. (quoting 8 U.S.C. § 1231(g)(1)); see also GEO Compl. ¶ 58 (quoting 8 U.S.C. § 1231(g)(2)).

-enforcement efforts are usually aimed at the interior of nforces immigration law have been overburdened by the record numbers of CBP apprehensions at the southwest

Id. ¶ 61 (quoting Statement of Matthew T. Albence, Acting Dir., U.S. (July 25, 2019), https://bit.ly/2Bllfp9 [hereinafter, Albence Stmt.]).

there [were] approximately 8,000 single adults in CBP custody awaiting processing or Id. ¶ 62 (quoting Albence Stmt. at 3). As of July 2019, there had been a 79 percent increase in intakes resulting from CBP apprehensions for the fiscal year to date over the same period for Fiscal Y detention system. Id. ¶ 63 (quoting Albence Stmt. at 3). Indeed, whereas capacity was approximately 45,700 beds as of July 12, 2018, nearly 400,000 detainees were

Fiscal Year 2018. Id. ¶ 64 (quoting Audrey Singer, Cong. Research Serv., R45804, Immigration: Alternatives to Detention (ATD) Programs 14 (July 8, 2019), https://bit.ly/2ojQNsE [hereinafter, ATD Programs]). In Fiscal Year 2019, ICE arrested and detained over 44,000 aliens in California. U.S.

Compl. ¶ 57.

Because of safety concerns, ICE aims to fill approximately 85 to 90 percent of total facility capacity; however, ICE meets or exceeds that target capacity in nearly all of the

2020 Congressional Justification

ICE-O&S-119 (2019), https://bit.ly/336G3g3 [hereinafter, ICE 2020 Budget Overview]). id. ¶ 66 (quoting Caitlin Dickerson, ICE Faces Migrant Detention Crunch as Border Chaos Spills Into Interior of the Country, N.Y. Times (Apr. 22, 2019), https://nyti.ms/2BEKvGS), ICE has determined that additional detention capacity is necessary. Id. ¶ 67 (quoting Dickerson, supra).

ICE neither constructs nor operates its own detention facilities because significant fluctuations in the alien population require ICE to maintain flexibility. U.S. Compl. ¶ 52. Of the average population of approximately 50,000 aliens ICE housed in Fiscal Year 2019, an average of about 9,300 were housed in privately owned and operated facilities. Id. ¶ 53. ICE has housing for 5,000 detainees in private detention facilities in California, which space in California. Id.

Currently, there are four dedicated ICE detention facilities in California, GEO Compl. ¶ 69; U.S. Compl. ¶ 54, all of which are privately run. GEO Compl. ¶ 70; U.S. Compl. ¶¶ 53, 54. These four facilities can house approximately 5,000 detainees. U.S. Compl. ¶ 54. ICE also has entered into contracts to convert three other facilities, or into dedicated ICE detention centers, GEO Compl. ¶ 71; U.S. Compl. ¶ 54, all of which are owned by GEO or a GEO subsidiary and are operated by GEO under contracts with ICE. GEO Compl. ¶ 72; U.S. Compl. ¶ 54. These annexes can house approximately 2,150 additional detainees beginning in August 2020. U.S. Compl. ¶ 55. In addition to the four privately owned, dedicated ICE facilities and their annexes, which have a combined capacity of 7,188 beds, GEO Compl. ¶ 106; U.S. Compl. ¶ 54, there are two non-dedicated ICE facilities in California shared with local entities housing non-ICE detainees. GEO Compl. ¶ 103. 1. The Adelanto ICE Processing Center and Annex

California, and was originally built as a correctional facility by the City of Adelanto. GEO

Compl. ¶¶ 69, 73. GEO purchased the eastern portion of the facility from the City of Adelanto in 2008, and it built the western portion of the facility in two phases in 2010 and 2015. Id. ¶ 73. Currently, Adelanto has a capacity of 1,940 beds. Id. ¶ 69.

In May 2011, ICE entered into an Intergovernmental Service A with the City of Adelanto to house detainees, and the City of Adelanto in turn contracted with GEO to carry out the IGSA. Id. ¶ 74. On March 27, 2019, the City of Adelanto informed ICE and GEO that it would terminate its contract with ICE effective June 2019. Id. ¶ 75. On June 25, 2019, ICE therefore contracted directly with GEO to continue operating the Adelanto facility. Id. ¶ 76. That contract was due to expire on March 25,

2020. Id. Consequently, on December 19, 2019, ICE entered into a new contract with GEO to continue running the Adelanto facility, with a period of performance starting December 20, 2019, and ending December 19, 2034. Id. ¶ 77; see also U.S. Compl. ¶ 55. ICE has the option to terminate the contract every five years, with the first such option occurring on December 20, 2024. GEO Compl. ¶ 77; see also U.S. Compl. ¶ 55.

prison owned and operated by GEO in Adelano, California, with a capacity of 750 beds. GEO Compl. ¶¶ 71, 79. Although GEO had been operating Desert View under a contract with CDCR, CDCR terminated its contract with GEO effective March 31, 2020. Id. ¶ 79. On September 20, 2019, ICE executed a modification to its Adelanto contract with GEO Id. ¶ 80. 2. The Imperial Region Detention Facility

California, and has a capacity of 704 beds. GEO Compl. ¶ 69. It is owned by Management

between ICE and the City of Holtville, California, which in turn contracted with MTC to

operate the facility. Id. ¶ 100. ICE terminated the IGSA effective September 21, 2019, and entered into a contract directly with MTC on September 22, 2019, effective / / /

December 20, 2019. Id. ¶ 101. The base period of performance runs through December 19, 2024, with two five-year options. Id.; see also U.S. Compl. ¶ 55. 3. The Mesa Verde ICE Processing Center and Annexes

California, and has a capacity of 400 beds. GEO Compl. ¶ 69. It was originally constructed

as a minimum-security correctional facility and has been owned and operated by GEO since 2015. Id. ¶ 84.

In January 2015, ICE entered into an IGSA with the City of McFarland to house ICE detainees, and the City of McFarland contracted with GEO to carry out the IGSA. Id. ¶ 85. On December 19, 2018, the City of McFarland informed ICE and GEO that it would terminate its contract with ICE effective March 2019, as a result of the passage of Assembly Bill 103. Id. ¶ 86. Consequently, on March 5, 2019, ICE contracted directly with GEO to continue operating Mesa Verde, with the contract set to expire on March 18, 2020. Id. ¶ 87. On December 19, 2019, ICE entered into a new contract with GEO with the same period of performance and option periods as the Adelanto contract. See id. ¶ 88; see also U.S. Compl. ¶ 55.

The Central Valley Modified Community Correctional Facility and Golden State Modified Community Correctional Facility

located in McFarland, California, are annexes to Mesa Verde, and each has a capacity of 700 beds.

GEO Compl. ¶ 71. Both are owned and operated by GEO and were under contracts with CDCR. Id. ¶¶ 90, 95. CDCR terminated its contract with GEO for Central Valley on July 10, 2019, effective September 30, 2019. Id. ¶ 90. On September 20, 2019, ICE executed a modification to the Mesa Verde contract to incorporate Central Valley as id. ¶ 91, with the same period of performance and option periods as the Mesa Verde contract. Id. ¶ 92. Similarly, CDCR notified GEO that it would terminate its Golden State contract with GEO effective June 30, 2020, id. ¶ 95, so ICE executed a modification to the Mesa Verde contract on September 20, 2019, to incorporate Golden Valley as an id. ¶ 96, with the same period of performance and options periods as the Mesa

Verde and Central Valley contracts. Id. ¶ 97. 4. The Otay Mesa Detention Facility

and has a capacity of 1,994 beds. GEO Compl. ¶ 69. USMS and ICE jointly use OMDF,

which is owned and operated by CoreCivic. Id. ¶ 102. ICE entered into a new contract with CoreCivic that became effective December 20, 2019. Id. Like the contract with MTC for Imperial, the OMDF contract has a base period of performance through December 19, 2024, with two five-year options. Id.; see also U.S. Compl. ¶ 55. 5. Non-Dedicated ICE Detention Facilities

There are also two non-dedicated ICE detention facilities in California, which are also are shared with local governmental entities housing non-ICE detainees. GEO Compl. ¶ 103. One is the Glendale Police Department, located in Glendale, California, and owned and operated by the Glendale Police Department. Id. The second is the Yuba County Jail, located in Marysville, California, with a capacity of 220 beds. Id. ¶¶ 103, 106. The Yuba County Jail is owned by Yuba County a Id. ¶ 103. ICE Fiscal Year 2020, id. ¶ 104 (quoting Bradley Zint, Glendale Police Vow Not To Enforce

Federal Immigration Laws, L.A. Times (Apr. 1, 2017), https://lat.ms/31skq8o), and it is unclear whether Yuba County will maintain its contract with ICE. Id. ¶ 105 (citing Don Thompson & Amy Taxin, California to End Its Use of Private, For-Profit Prisons, Assoc. Press (Oct. 11, 2019), https://bit.ly/2Pgb6C6). III. Impact of A.B. 32 on Plaintiffs

A. Impact on GEO GEO alleges that, if it must close its USMS and ICE detention facilities in California as a result of A.B. 32, it will lose approximately $250 million per year in revenue over the next fifteen years. GEO Compl. ¶ 108. GEO has invested over $300 million in acquiring, constructing, outfitting, and otherwise making ready for use its USMS and ICE detention

facilities in California. Id. ¶ 109. The replacement cos facilities in California is approximately $500 million. Id. Consequently, GEO alleges that

it could lose over $4 billion in capital investment and revenue over the next fifteen years if A.B. 32 forces GEO to close its USMS and ICE detention facilities in California. Id. ¶ 110.

B. Impact on the U.S. 1. BOP

The United States alleges that A.B. 32 would require BOP to transfer 1,300 inmates housed at Taft and 900 inmates housed in RRCs to other BOP facilities or to facilities outside California, which would cost significant taxpayer dollars and result in inmates being incarcerated further from their residences, families, and other visitors. U.S. Compl. ¶¶ 42, 49. In the case of RRCs, this would also result in inmates being placed further from the communities in which they are to be released, id. ¶ to provide community placement and develop community ties for offenders facing reentry.

Id. ¶ 50. The relocation of those housed in RRCs would also prove problematic for federal

supervision or probation. Id. ¶ 51. 2. USMS

If A.B. 32 were to force private detention facilities in California to close, the United States claims that USMS would have to relocate nearly 50% of its inmates in the Southern District of California and nearly 30% of its inmates in California, U.S. Compl. ¶ 32, with many of them likely to be housed out of state. Id. ¶ 33. Such relocations would cost taxpayers a significant amount and require USMS to compete with other agencies for limited detention space. Id. The displacement of these inmates also could result in overcrowding in additional facilities, id. ¶ 34, and the isolation of inmates, whose families are often in California and may lack the resources to visit their loved ones. Id. ¶ 35.

ers may require frequent transportation, requiring a dramatic increase in transportation coordination and Id. ¶ 36. The increase in transportation also may heighten

security and safety risks for inmates, USMS personnel, and the public and adversely affect prisoners with medical or mobility concerns. Id. ¶ 37. Competition for transportation with other agencies, including BOP, may delay judicial proceedings and increase the length of time prisoners are in USMS custody, id. ¶¶ 38, 39, concomitantly increasing the number

funding needs. Id. ¶ 38. 3. ICE

Because ICE has very limited access to housing capacity in California prisons, the United States alleges that A.B. 32 would require ICE to relocate nearly all its detainees outside California to neighboring states. U.S. Compl. ¶ 57. In Fiscal Year 2019, ICE arrested and detained over 44,000 aliens in California. Id. Such a large number of relocations would necessitate daily transfers, which would be burdensome and costly, see id. ¶ 58, as well as heighten safety and security risks. See id. ¶ 59. Relocating California detainees to out-of-state facilities may also cause overcrowding in those facilities, id. ¶ 60, and reduce detainees access to their families and other visitors, id., which in turn may slow collect evidence on their behalf. Id. ¶ 61.

obligations under existing court orders and settlements. Id. ¶ 61 n.3 (citing Gonzalez v. Sessions, 325

F.R.D. 616 (N.D. Cal. Jun. 5, 2018); Franco-Gonzalez v. Holder, No. 10-cv- 02211-DMG-DTB, 2013 WL 8115423 (C.D. Cal. 2013); Orantes-Hernandez v. Meese, 685 F. Supp. 1488 (C.D. Cal. 1988)); see also infra pages 66 67. IV. Procedural Background

GEO filed its Complaint for declaratory and injunctive relief against Governor Newsom and Attorney General Becerra, in their official capacities, on December 30, 2019, alleging that A.B. 32 is unconstitutional (1) for violating the Federal G intergovernmental immunity both (a) as a direct regulation of the Federal Government, and (b) by discriminating against the Federal Government; and (2) as conflict preempted by

federal law. See generally GEO Compl.; see also id. ¶¶ 111 34. GEO also asks the Court for a declaration that its current contracts with the Federal Government are valid for their entire periods of performance, including all option extensions. See generally id. ¶¶ 135 44. GEO filed its Motion for Preliminary Injunction on January 7, 2020, see generally GEO Mot., which the Court deemed filed as of December 31, 2019, see GEO See GEO ECF No. 13. Defendants filed their Motion to Dismiss on March 5, 2020. See generally MTD.

The United States filed its Complaint for declaratory and injunctive relief against Governor Newsom and Attorney General Becerra, in their official capacities, and the State of California on January 24, 2020. See generally U.S. Compl. Like GEO, the United States sought to have A.B. 32 declared unconstitutional as preempted and as violating the United See generally id.; see also id. ¶¶ 62 69. Although

United States filed a notice of related case requesting that the action be transferred to this Court as related to GEO. See generally U.S. ECF No. 2. The case was transferred on January 31, 2020, see U.S. ECF No. 6, following which the United States filed its Motion for Preliminary Injunction. See generally U.S. Mot. After filing an answer on February 14, 2020, see generally U.S. ECF No. 9, Defendants filed their Motion for Judgment on the Pleadings. See generally MJP. The Court ordered additional briefing regarding the United see generally U.S. ECF No. 27, .S. U.S. ECF No. 28) and U.S. ECF No. 29) filed responses.

see GEO ECF Nos. 25, 39; U.S. ECF No. 18, the Detention Amici filed briefs in support of Defendants in both actions, see generally Detention Amici Br., and the Procurement Amici filed a brief in support of Defendants to the GEO action. See generally Procurement Amici Br. The Court held a videographic and telephonic hearing on July 16, 2019, see GEO ECF No. 43; U.S. ECF No. 33, at which the Parties agreed to consolidation of the GEO

and U.S. actions. See Tr. at 18:15 19:8 (GEO), 32:13 18 (U.S.), 40:15 22 (Defendants). Accordingly, the Court ordered the cases consolidated. Tr. at 91:2 5; see also GEO ECF Nos. 43 44; U.S. ECF Nos. 33 34. The Court also requested additional briefing from all hether A.B. 32 is a direct regulation of the United States

GEO ECF No. 45 at 1. GEO and the United States filed their additional briefs on August 4, 2020, see GEO 2020. See GEO .

MOTIONS TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS I. Legal Standards

A. Federal Rule of Civil Procedure 12(b)(6) Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the generally referred to as a motion to dismiss. The Court evaluates whether a complaint

states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil

ctual -defendant-unlawfully- harmed- Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly obligation to Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)). A

Iqbal, 556 U.S. at 677 (citing Twombly, 550 U.S. at 557).

al matter, Id. (quoting

Twombly, 550 U.S. at 570); see also Fed. R. Civ. P. 12(b)(6). A claim is facially plausible inference that the defendant is Iqbal, 556 U.S. at 677 (citing Twombly, 550 U.S. at

sheer possibility that a defendant has acted Id Id. (quoting Twombly, 550 U.S. at 557). This review requires context-specific analysis involving the Id the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged entitled to relief. Id.

Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to

DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)).

B. Federal Rule of Civil Procedure 12(c) the pleadings are closed on the pleadings attacks the legal sufficiency of the claims alleged in the complaint. See

Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d Cir. 2001). The -moving party as contained in the pleadings as true, and [construe] the pleadings in the light most favorable to the [non- , 158 on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 the facts alleged Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012).

II. Analysis 5

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Const. art. V, cl. 2. Both GEO and the United States allege that A.B. 32 violates the Supremacy Clause because it is preempted by federal law and violates the intergovernmental immunity of the United States and its contractors. See generally GEO Compl.; U.S. Compl. A. Justiciability of the BOP Claims 6

Federal courts are courts of limited jurisdiction and, as such, have an obligation to dismiss claims for which they lack subject-matter jurisdiction. Demarest v. United States, e burden of In re Dynamic Random Access Memory Antitrust

5 Chavez, 683 F.3d at 1108, and because the Parties arguments are similar in both actions, compare GEO ECF Nos. 15, 22, 30, 31; with U.S. ECF Nos. 8, 13, 22, 23, the Court analyzes Defendants Rule 12(b)(6) and Rule 12(c) Motions together. 6 Although originally framed as a challenge to standing, see MJP Reply at 8; see also U.S. ECF No. 27; U.S. Supp. Br.; Defs See, e.g., Coons v. Lew, 762 F.3d 891, 897 (9th Cir.), as amended (Sept. 2, 2014) When addressing the sufficiency of a showing of injury-in-fact grounded in potential future harms, Article III standing and ripeness issues often boil down to the same question.) (quoting Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 n.5 (2014)); Thomas v. Anchorage Equal Rights Comm n, 220 F.3d 1134, 1138 (9th Cir. 2000) The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standings injury in fact prong.

Litig., 546 F.3d 981, 984 (9th Cir. 2008) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Stock W., Inc. v. Confederated Tribes of Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989)). Whether the question is viewed as one of standing or ripeness, the Constitution mandates that prior to exercise of jurisdiction there exist a constitutional case or controversy, that the issues presented are definite and concrete, not hypothetical or abstract. Thomas, 220 F.3d at 1139 (quoting Ry. Mail Ass n v. Corsi, 326 U.S. 88, 93 (1945)). challenge AB 32 as applied to [Taft Specifically, Defendants contend BOP-contracted facility in California, are no imminent plans to resume

operations Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). additional briefing on the issue. See U.S. ECF No. 27.

injury-in- fact, see id.; see also Tr. at 34:3 35:24, but that the harms it will suffer if A.B. 32 is more than suffice to satisfy the usual injury-in- U.S. Supp. Br. at 8 (citing Rivas v. Rail Delivery Serv., Inc., 423 F.3d 1079, 1082 83 (9th

Cir. 2005)). Defendants Moe v. Confederated Salish & Kootenai

Tribes of Flathead Reservation, 425 U.S. 463, 475 n.13 (1976); United States v. City of Arcata, 629 F.3d 986, 989 90 (9th Cir. 2010); United States v. Mattson, 600 F.2d 1295, 1297 1301 (9th Cir. 1979); , 584 F.2d 668, 676 (5th Cir. 1978)), and that reopen Taft and the lack of a genuine threat of prosecution as to the RRCs. See id. at 5 6.

As an initial

See Tr. at 66:16 17. Although it is true that standing is claim specific, the question is whether the Unit configuration see id. at 66:20, controls. The Court concludes that it does not. The United States could have broken its claims out by agency, or BOP could have brought suit in its own right. That the United States happens to have presented its claims in one form over another does not confer standing (or ripeness) where none exists. See Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996) proper focus is not on the legal theories as arranged by the United States, but rather on the injury-in-fact suffered by it. See, e.g., Gilmore v. Gonzales, 435 F.3d 1125, 1134 35 (9th Cir. 2006) (concluding that the plaintiff lacked standing to challenge other security programs stemming from challenged policy beyond the one security program giving rise to his injury in fact); Friends of Columbia Gorge, Inc. v. Schafer, 624 F. Supp. 2d 1253, 1278 (D. Or. 2008) (concluding that one claim alleged by the plaintiffs was ripe as to certain guidelines but not as to others); see also 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3531.16 (3d ed.). Consequently, to the extent the United States fails to establish that BOP is likely to suffer a concrete injury as a result of A.B. 32, the Court lacks jurisdiction over

The Court concludes that the United States has failed to establish the requisite justiciable case or controversy concerning the constitutionality of A.B. 32 as applied to its BOP facilities. As an initial matter, the United States see U.S. Supp. Br. at 3 nonetheless must establish justiciability, including standing. See, e.g., City of Arcata, 629 F.3d at 989 90. Defendants contend that the United States therefore must establish that there under A.B. 32, 7 Thomas, 220 F.3d at 1139 (quoting Babbitt v. United Farm

7 The threatened state action need not necessarily be a prosecution. Lopez v. Candaele, 630 F.3d 775, 786 (9th Cir. 2010) (citing Meese v. Keene, 481 U.S. 465, 472 73 (1987); Canatella v. California, 304 F.3d 843, 852 53 (9th Cir. 2002)).

Worke , 442 U.S. 289, 298 (1979))), requiring an examination of the [United States] ha[s] articulated the prosecuting authorities have communicated a specific warning or threat to initiate

proceedings, and the history of past prosecution or enforcement under the challenged Id. (quoting Thomas, 220 F.3d at 1139). The United States contends, without elaboration, that these factors do not apply. See Tr. at 68:1 4. The Court sees no reason why they should not. These factors have been

applied to assess the standing of the United States. See City of Arcata, 629 F.3d at 989 90 (analyzing threatened enforcement of ordinance against United States). They have also been applied in Supremacy Clause cases. See, e.g., id.; Valley View Health Care, Inc. v. Chapman, 992 F. Supp. 2d 1016, 1031 35 (E.D. Cal. 2014). prisons, the Court concludes that the United States has failed to meet its burden. When it

filed its Complaint, 8

the United States BOP may seek to award a new contract or a contract extension infrastructure repairs were being made. 9

U.S. Compl. ¶ 41 (emphasis added); see also Jones Decl. 10

¶ 14 If Taft CI can remain operational, then BOP may seek to extend its

8 as they exist when the complaint is filed. Lujan, 504 U.S. at 571 n.4 (quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989)) (emphasis in original). When asked at the hearing, counsel for the United States indicated its view that post-filing developments were relevant and could properly be considered in determining a motion for preliminary injunction. See Tr. at 33:10 34:2. Those post-filing developments, however, do not Taft has since closed for repairs and relocated its inmates. See Tr. at 33:14 19; see also Supp. Decl. of Supp. 22-1) ¶¶ 3 . . . to ultimately return Taft CI to operational status id. ¶ 5, there is no indication as to how or when that may happen. 9 The contract with MTC to operate Taft was to expire on March 31, 2020. See U.S. Compl. ¶ 41; Decl. -2) ¶ 14. 10 The Jones Declaration was signed on January 24, 2020, see id. at 7, the same day that the United States filed its Complaint. See generally U.S. Compl. It was also filed on January 24, 2020, along with the Complaint, as an exhibit to an ex parte motion seeking leave to file the U.S. Motion in excess of the See ECF No. 4-3.

current contract or award a new one. (emphasis added). 11

d[id] not have any immediate plans for new contracts for private secure detention facilities

Jones Decl. ¶ 15. Whether BOP intends to violate A.B. 32 therefore hinges on several contingencies, including whether Taft can remain operational while repairs are made (it could not), whether BOP decides to continue housing inmates at Taft while repairs are made (it did not), and whether BOP can extend or award a new contract for the private S without any description of concrete plans, or indeed even any specification of when the some day will be do not support a Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 690 (9th Cir. 2010) (quoting Lujan, 504 U.S. at 564); see also Texas v. United States, 523 U.S. 296, 300 (1998) claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580 581 (1985)) (internal quotation marks

omitted); , 905 F.2d 1287, 1291 (9th Cir. 1990) (holding that action challenging land use ordinances was not ripe where the new ordinances would only be applied if leases of federal waters off the California coast for oil and gas exploration and development were to be offered for sale in the future). The United States therefore fails to demonstrate a concrete facilities in California. See, e.g., Thomas A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan. The United States fares no better as to its RRCs. Although the United States has

11 Although generally limited to the pleadings, see supra evaluating a motion for judgment on the pleadings in which a party challenges subject-matter jurisdiction, the Court may look beyond the Innovative Sports Mgmt., Inc. v. Robles, No. 13-CV-00660- LHK, 2014 WL 129308, at *2 (N.D. Cal. Jan. 14, 2014) (citing Maya v. Centx Corp., 658 F.3d 1060, 1067 68 (9th Cir. 2011); In re Seizure of One Blue Nissan Skyline Auto., 683 F. Supp. 2d 1087, 1089 (C.D. Cal. 2010)).

concrete plans to continue operating its RRCs in California, see, e.g., Decl. of Jon Gustin in Support of U.S. No. 8-3) ¶ 23, it has failed to establish a

See Virginia v. Am. Booksellers , 484 U.S. 383, 393 (1988). Indeed, Defendants have gone so far as to represent § establish Article III standing as See, e.g., Yoshioka v. Charles Schwab

Corp., No. C-11-1625 EMC, 2012 WL 5932817, at *9 (N.D. Cal. Nov. 27, 2012) only is there no history of [agency] enforcement, [but] the [agency] has taken an affirmative stance that it will not consider potential prohibited transactions created by such language

representation

. U.S. Supp. Br. at 8 (citing Lopez, 630 F.3d at 788; Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 383 (2d Cir. 2000); Am.- Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 507 08 (9th Cir. 1991); Valley View Health Care, Inc., 992 F. Supp. 2d at 1033). First, the binding authorities cited by the United States all involved First Amendment challenges, see, e.g., Lopez, 630 F.3d at 785; Thornburgh, 970 F.2d at 504, to which the Ninth Circuit applies a Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010), and analysis. See Protectmarriage.com-Yes on 8 v. Bowen, 752 F.3d 827, 839 (9th Cir. 2014).

Specifically, in First Amendment pre-enforcement cases, an actual threat of government prosecution, see id. (citing Wolfson, 616 F.3d at 1059 60),

but rather merely Lopez, 630 F.3d at 785 (quoting Babbitt, 442 U.S. at 298), which requires only that See id. at

786. the [standing] inquiry tilts dramaticall Ital. Colors

Restaurant v. Becerra, 878 F.3d 1165, 1172 (9th Cir. 2018) (quoting LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000)). Because this case is not a First Amendment case, the United States faces a higher standard to bring its pre-enforcement claim.

Second, the United States involve situations in which the plaintiff was already being investigated or prosecuted before filing suit, but the defendant ceased enforcement efforts after filing as a litigation tactic. See, e.g., Lopez, 630 F.3d at 783 84, 788, 791

where party respons

. Thornburgh, 970 F.2d at 508 (concluding that the plaintiffs established standing where were dropped, not because they were considered inapplicable, but for tactical reaso Here, by contrast, Defendant have taken no pre- (or post-)filing enforcement action against

the United States with respect to the RRCs and, to the contrary, explicitly have indicated no intent to do so in the future. Should Defendants change their mind regarding the applicability of the Section 9502(c) exception to the RRCs, the United States may be able to establish standing in the future, see Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 774 Because [the plaintiff] fails to allege a concrete and imminent injury-in-fact caused by the [challenged] Restrictions, this claim is not justiciable both for lack of standing and ripeness. Of course, should [the defendant] take action to penalize [the plaintiff] for violating the [challenged] Restrictions at a later date, he would then have standing to challenge their legitimacy. ; however, at present, the United States Thomas, 220 F.3d at 1140 (quoting Babbitt, 442 U.S. at 298).

The Court therefore concludes that the United States has failed to establish a concrete and imminent injury-in-fact caused by A.B. 32 as applied to its BOP facilities. Consequently, those claims are not justiciable, and the Court DISMISSES WITHOUT PREJUDICE

B. Preemption

- empts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no CTIA , 928 F.3d 832, 849 (9th Cir. 2019). GEO contends that A.B. 32 is preempted under the second category (conflict preemption), see GEO Compl. ¶¶ 130 34, while the United States contends that A.B. 32 is preempted by both the second and third (field preemption) categories. See U.S. Compl. ¶¶ 63 65.

In both conflict and field preemption cases, see Puente Ariz. v. Arpaio, 821 F.3d 1098, 1104 (9th Cir. 2016), the - Wyeth v. Levine, 555 U.S. 555, 565 -emption Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (citing Retail Clerks v. Schermerhorn,]n all pre-emption cases, police powers of the States were not to be superseded by the Federal Act unless that was

Id. (quoting Medtronic, Inc., 518 U.S. at 485) (first, second, and third alterations in original). 1. Presumption Against Preemption

[has] noted that [i]n preemption analysis, courts should clear and manifest United States v. California, 921 F.3d 865, 885 86 (9th Cir. 2019) (quoting Arizona v. United States, 567 U.S. 387, 400 (2012)), cert.

denied, ___ S. Ct. ___, 2020 WL 3146844 (2020). Defendants contend that, because and detainees i California, 921 F.3d at

885 86) (citing Medtronic, Inc., 518 U.S. at 475; Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 719 (1985); Puente Ariz., 821 F.3d at 1104); MJP at 15 (quoting California, 921 F.3d at 885 86) (citing Puente Ariz. at 15; MJP at 15.

Plaintiffs contend that the presumption against preemption is inapplicable here. See generally GEO 15; U.S. .S. 11 14. Specifically, GEO argues that California exceeded its traditional police powers by

enacting a law purporting to regulate facilities and detainees subject to the jurisdiction of the Federal Government, see also id. at 14, as well as Id. at 13.

is no presumption against pr (3) the fede U.S.

, 531 U.S. 341, 347 48 (2001)) (citing Stengel v. Medtronic Inc., 704 F.3d 1224, 1235 (9th Cir. 2013) (Watford, J., concurring); U.S. Mot. at 8). Defendants respond that

GEO Knox v. Brnovich, 907 F.3d 1167, 1174 (9th Cir. 2018)); U.S. Knox, 907 F.3d at 1174).

The Court agrees with Defendants. The Supreme Court has long recognized that orically, a matter of local

Hillsborough, 471 U.S. at 719 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). As Defendants note, see MTD at 15; MJP at 15, the Ninth Circuit eral authority to ensure the health 12

California, 921 F.3d at 886. The statute in question, Assembly Bill 103, authorized the California Attorney county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration

California, 921 F.3d at 882. It therefore appears that the Ninth Circuit inmates and detainees within its borders extends to federal inmates and detainees.

As confirmed by its legislative history, 13

A.B. 32 appears to be a regulation ensuring . See Tr. at

12 California as dicta, see at 15, or as distinguishable on the grounds that the law at issue in California California, 921 F.3d at

885). Even if dicta, California alogous guidance on the presumption against preemption. The portion of California from which the United States quotes served to distinguish that case from In re Tarble, 80 U.S. 397 (1871). See California, 921 F.3d at 885. In Tarble, the issue the Supreme Court confronted was issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer Tarble, neither this case nor California involve habeas corpus or a state ordering the release of a person held in federal custody; rather, both A.B. 32 and A.B. 103 address conditions in detention facilities located in California. In any event, cf. California, 921 F.3d at 885, or federal detainees, officials, or contractors, see 11 See Cal. Penal Code § 9501. 13 In each case, Defendants request that the Court take judicial notice of six exhibits, each part of the legislative history of A.B. 32. See generally GEO ECF No. 20-1; GEO ECF No. 23; U.S. ECF No. 13-1; U.S. RJN . Specifically, Defendants request that the Court take judicial notice of the following: (1) Assem. Comm. on Public Safety, Bill Analysis of Assembly Bill 32, 2019- 2020 Reg. Sess. (Feb. 26, 2019); (2) Assem. Comm. on Appropriations, Bill Analysis of Assembly Bill 32, 2019-2020 Reg. Sess. (March 6, 2019); (3) Assem. Floor Analysis, Bill Analysis of Assembly Bill 32,

88:23 89:89:8. 2019 analysis of A.B. 32 reveals that Assemblyman Bonta the author of A.B. 32 -profit company that is traded on Wall Street will

inherently be incentivized to maximize profits and minimize costs including the nvestments in programs, services and rehabilitation efforts for RJN prisons, poorly administered, and . . . had higher rates of assaults, both by inmates on other

Id. at 4; see also RJNs Ex. 5 at 6 (Senate Committee on Public Safety analysis discussing same DOJ OIG investigation). Similarly, p, Inc.,

operates private facilities in McFarland and Adelanto that house Immigration and Customs Enforcement (ICE) detainees in arguably unsafe and unhealthy facilities with no city, RJNs Ex. 2 at 2. Such health and safety concerns were

the safety and welfare of its residents, this bill abolishes the private for-profit prison industry from our state in order to protect incarcerated individuals from serious harm within RJNs Ex. 4 at 1; accord RJNs Ex. 6 at 1. Consequently,

2019-2020 Reg. Sess. (May 21, 2019); (4) Sen. Judiciary Comm., Bill Analysis of Assembly Bill 32, 2019-2020 Reg. Sess. (July 2, 2019); (5) Sen. Public Safety Comm., Bill Analysis of Assembly Bill 32,

2019-2020 Reg. Sess. (July 9, 2019); (6) Sen. Floor Analyses, Bill Analysis of Assembly Bill 32, 2019-2020 Reg. Sess. (Sept. 9, 2019). See RJNs at 2. As Defendants note, see id. (citing Tan v. GrubHub, Inc., 171 F. Supp. 3d 998, 1004 (N.D. Cal. 2016); Zephyr v. Saxon Mortg. Servs., Inc., 873 F. Supp. 2d 1223, 1226 (E.D. Cal. 2012) he legislative history of California statutes is judicially noticeable so long as the documents are readily available public records. cannot take judicial notice of disputed facts contained in such public records see Khoja, 899 F.3d at 999 (citing Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)), the Court therefore GRANTS Requests for Judicial Notice.

even though A.B. 32 may affect areas of federal concern, including federal detention and contracting, it also regulates the health and safety of detainees held within California. See, e.g., Puente Ariz. have effects in the area of immigration, the text of the laws regulate for the health and

Medtronic, Inc., 518 U.S. at 475).

The Court therefore concludes that the presumption against preemption applies and the considerable burden of overcoming the starting presumption that see Stengel, 704 F.3d at 1227 28 (quoting De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997)) (internal quotation m purpose of California, 921 F.3d at 885 86 (quoting Arizona, 567 U.S. at 400). 2. Conflict Preemption

re is CTIA, 928 F.3d at 849 (quoting McClellan v. I-Flow Corp. ical

impossibility . . . or when state law stands as an obstacle to the accomplishment and Id. (alteration in original) (quoting McClellan, 776 F.3d at 1039).

According to GEO, A.B. 32 is conflict preempted both by federal criminal law and immigration law, see GEO Compl. ¶¶ 125 34; see also 24, while the

Executive Branch agencies authority to house federal prisoners and detainees. See U.S. Compl. ¶ 64; see also U.S. 25. a. GEO

-32 is preempted because it denies to both federal immigration and criminal law- to carry out Id. at 29 30 (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)) (alteration in original).

i. Federal Immigration Law GEO does not appear to argue that it is impossible to comply with both A.B. 32 and federal law and regulations concerning the housing of immigration detainees; the relevant inquiry, therefore, is whether A.B. 32, as applied to GEO in its contracts with ICE as an obstacle to the accomplishment and execution of the full purposes and objectives of

CTIA, 928 F.3d at 849 (quoting McClellan, 776 F.3d at 1039); see also Tr. at 55:5 9. obstacle is a matter of judgment, to be informed by

law is preempted to the extent it actually interferes with In re Nat Litig., 633 F. Supp. 2d 892, 907 (N.D. Cal. 2007) (quoting , 479

U.S. 481, 494 (1987)) (citing Verizon N., Inc. v. Strand, 309 F.3d 935, 940 (6th Cir. 2002)).

Here, the immigration statutes on which GEO relies do not reveal a clear and manifest congressional objective that ICE contract with private detention facilities to house immigration detainees. GEO relies predominantly on 8 U.S.C. § 1231(g), which provides:

(g) Places of detention (1) In general The Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for detention are unavailable for rental, the Attorney General may expend from -- to section 6101 of Title 41, amounts necessary to acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for

detention. (2) Detention facilities of the Immigration and

Naturalization Service 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. While Section 1231(g) articulates certain congressional objectives, such as purchasing or leasing available and existing facilities prior to the construction of new facilities, it does not express a clear intent that ICE lease private detention facilities in particular or, much less, contract with private parties to operate such facilities. Further, where appropriate ruction of new detention facilities. See 8 U.S.C. §§ 1231(g)(1), (2). Consequently, even if the application congressional objectives nonetheless can be fully accomplished through the construction

of new facilities (or the lease of existing facilities that can no longer be operated by the [courts] should not] out conflicts between state and federal regulation where none clearly , 870 F.3d 1140, 1153 (9th Cir. 2017) (quoting English v. Gen. Elec. Co., 496 U.S. 72, 90 (1990)) (second alteration in original); see also Puente Ariz.

Wyeth, 555 U.S. at 565).

The additional statutes cited by GEO are no more availing. GEO notes, for example,

agreements, and to enter into agreements with other executive agencies, as may be neces Case 3:20-cv-00154-RSH-WVG Document 35 Filed 10/08/20 PageID.763 Page 34 of 75 encompass the authority to make contracts with private detention companies, that intention

provided otherwise by law, the activities of the Department of Justice (including any bureau, office, board, division, commission, subdivision, unit, or other component thereof) 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 y clear and manifest congressional intent that ICE house detainees in private detention facilities. GEO also cites to a Department of Justice Appropriations Act passed in 2000, which provides, tary] hereafter may enter into contracts and other agreements, of any reasonable duration, for detention or incarceration

17 18 (second and third alterations in original) (emphasis omitted). Again, this does not clearly and manifestly reveal a congressional intent that ICE detainees be housed in private detention facilities.

Although A.B. 32

might at times be in tension with . . . [the] federal desire [to use private detention facilities,] . . . the question to be answered by the Court is not what preemption holding will produce the smoothest path for government. The Court is not a general ombudsman, at liberty to fashion a preemption ruling that accommodates priorities that appear to be important. The key question the touchstone is the intent of Congress. Puente Ariz. v. Arpaio, No. CV-14-01356-PHX-DGC, 2016 WL 6873294, at *15 (D. Ariz. Nov. 22, 2016) (citing Wyeth, 555 U.S. at 565; Medtronic, Inc., 518 U.S. at 485). Because GEO has failed to establish a clear and manifest congressional intent that ICE house immigration detainees in private detention facilities, the Court concludes that A.B. 32 is

ii. Federal Criminal Law - Case 3:20-cv-00154-RSH-WVG Document 35 Filed 10/08/20 PageID.764 Page 35 of 75 interest in enforcing federal criminal law. GEO Mot. at 34. with ICE, the Court must analyze whether A.B. 32, as applied to GEO in its contracts with

CTIA, 928 F.3d at 849 (quoting McClellan, 776 F.3d at 1039).

Section 4013 of Title 18 of the United States Code, inquiry, provides:

The Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds appropriated for Federal prisoner detention for . . . the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government or contracts with private entities. e may designate districts that need additional support from private detention entities under [18 U.S.C. § 4013](a)(3) based on--(A) the number of Federal detainees in the district; and (B) the availability of appropriate Federal, State, and local governmen Id. § persons held in custody of the United States Marshals pursuant to Federal law and funding

under [14 U.S.C. § 4013](a)(3), a private a district that has been designated as needing additional Federal detention facilities

id. § State and local laws and re Id. § 4013(c)(2)(C).

The Court agrees with GEO that A.B. 32 stands as an obstacle to the execution of the full purposes of Congress reflected in Section 4013. Congress clearly authorized USMS to use private detention facilities in limited circumstances, such as where the number of USMS detainees in a given district exceeds the available capacity of federal, state, and local facilities. Although Congress plainly required private detention facilities

contract with USMS in such districts, A.B. 32 would render no private detention facilities

eligible to contract with USMS. A.B. 32 therefore forecloses USMS from contracting with private detention facilities in those districts in which there does not exist sufficient

manifest objective that the option be available. Accordingly, the Court concludes that A.B. 32 is obs b. The United States

.S. Mot. at 32 (citing Cal. Penal Code §§ 9501,

, it

intends the agency to use its reasoned judgment to weigh the relevant considerations and Id. (quoting CTIA, 928 F.3d at 849). or, worse, obviating the need for congressionally prescribed balancing by eliminating an option altogether violates the Id. (quoting CTIA, 928 F.3d at 849) (citing Arizona, 567 U.S. at 406; Crosby, 530 U.S. at 376 77).

i. BOP For the reasons discussed above, see supra Section II.A, the Court concludes that the United States has failed to establish a justiciable case or controversy as to whether A.B. 32 is preempted with respect to BOP privately contracted facilities. Even if the United States did have standing, however, the Court would conclude that A.B. 32 is not obstacle preempted as to those facilities.

With regard to Taft, the United States relies primarily on Section 3621(b), which instructs:

T imprisonment, and shall, subject to bed availability, . . . place the primary residence, and to the extent practicable, in a facility

within 500 driving miles of that residence. 18 U.S.C. § 3621(b). Although the United States is correct that this provision reveals a their primary residence, it is not clear from the statutory text that Congress intended for

BOP to accomplish that objective through the use of private detention facilities. Further, limi

authorized imprisonment at facilities further away.

The additional sources on which the United States relies are unavailing. Like Section 3621, Section 530C(a)(4) fails to reveal a clear congressional intent that BOP use private detention facilities. That statute provides:

Except to the extent provided otherwise by law, the activities of the Department of Justice (including any bureau, office, board, division, commission, subdivision, unit, or other component thereof) 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. 28 U.S.C. § 530C(a)(4). Not only does Section 530(C) make no references to detention, - private detention facilities.

from the Office of Legal and recently reiterated:

In all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress. There is no federal preemption in vacuo, without a constitutional text, federal statute, or treaty made under the authority of the United States. Kansas, 140 S. Ct. at 801 (quoting P.R. Dep t of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 503 (1988)) (citing Va. Uranium, Inc. v. Warren, 587 U. S. ___, 139 S. Ct.

1894, 1901 (2019); U.S. Chamber of Comm. v. Whiting contracting history extensive as it may be and the opinion of the Office of Legal

Counsel do not fit into any of these categories and, therefore, cannot establish congressional intent, see, e.g., id. Laws of the United States, not the . . -

Medtronic, Inc., 518 U.S. at 485. Accordingly, the Court concludes that federal criminal law does not facilities.

As for the United States relies primarily on two statutes, neither of which reveals a clear and manifest congressional intent that BOP use private detention facilities for RRCs. The first statute on which the United States relies provides:

The Director of the Bureau of Prisons shall, to the extent practicable, ensure that a 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. Such conditions may include a community correctional facility. 18 U.S.C. § 3624(c)(1). The statute does not reveal a clear and manifest congressional intent that the Director of BOP use privately operated detention facilities to achieve the . . prisoner[s] a reasonable opportunity to adjust to and prepare for See id. Further, such opportunities are to be made See id.

conditio

the fact that

[t]he court may provide, as further conditions of a sentence of probation, . . . that the defendant . . . remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of

imprisonment authorized for the offense, during the first year of the term of probation or supervised release, id. § 3563(b)(10), facility (including a facility maintained or under contract to the Bureau of Prisons) for all

or part of the term of pro Id. § 3563(b)(11). This statute applies to the courts, not See generally id. § 3563(b). In any event, to the extent that it does reveal a congressional intent that BOP may maintain community corrections facilities under contract with others, it does not clearly and manifestly reveal a congressional intent that those facilities be under contract with the operators of private detention facilities. Consequently, the Court concludes that A.B. 32 also is not obstacle RCs.

ii. USMS Like GEO detention facilities. U.S. Mot. at 34 (quoting 18 U.S.C. § 4013(c)(1)). For the reasons

set forth above, see supra Section II.B.2.a.ii, the Court agrees. Accordingly, the Court concludes private detention centers pursuant to Section 4013(c)(1).

iii. ICE Again, like GEO, t

facilities . . . necessary for detention. U.S. Mot. at 34 (quoting 8 U.S.C.

§ 1231(g)(1) (2)) (second through sixth alterations in original). For the reasons discussed / / / / / /

above, see supra Section II.B.2.a.i, the Court disagrees. 14

The Court therefore concludes centers.

iv. Contract Options objectives is perhaps best

contract[s]. U.S. Mot. at 34 35 (quoting Cal. Penal Code § 9505(a)) (alterations in

original). The United States argues this is so authorize option provisions that allow the United States to unilaterally extend arrangements

the . Id. at 35 (citing 48 C.F.R. § 17.208(f) (g); 48 C.F.R. § 52.217-8; 48 C.F.R. § 52.217-9). This renders for federal contractors providing private detention services to comply with both their obligations under the pre- Id.

In the absence of clear and manifest congressional intent that BOP or ICE contract with private detention facilities, A.B. 32 does not unconstitutionally impede the United agrees with Defendants that the federal contract procurement regulations which nowhere require contracts with private detention facilities to house BOP or ICE detainees or extensions of such contracts do not conflict preempt A.B. 32. 3. Field Preemption

The United States additionally contends that A.B. 32 is field preempted. See U.S.

14 The additional authorities cited by the United States, consisting mainly of regulations promulgated by DHS, do not reveal a clear and manifest congressional intent that ICE use private detention facilities to mulgated numerous regulations predicated on [its see 25, does not mean that the Court should find a clear and manifest congressional intent where one is lacking.

Compl. ¶ Arizona, 567 U.S. at 399 (citing 505 U.S. 88, 115

(1992) (Souter, J., dissenting)). The Supreme Court has instructed:

The intent to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Id. (alterations in original) (quoting Rice, 331 U.S. at 230) (citing English, 496 U.S. at 79). See Garcia, 140 S. Ct. at 804.

a. The Relevant Field

in a particular field, [a court] must first identify the field in which this is said to have Kansas that Knox, 907 F.3d at 1174 (quoting , 326 U.S. at 97;

of the Blind v. United Airlines Inc., 813 F.3d 718, 734 (9th Cir. 2016)). The Parties agree See MJP at 16 (citing Knox, 907 F.3d at 1173 74); U.S. , 813 F.3d at 734, 737; Martin ex rel. Heckman v. Midw. Express Holdings, Inc., 555 F.3d 806, 812 (9th Cir. 2009); Novoa v. GEO Grp., Inc., No. EDCV 17-2514 JGB (SHKx), 2018 WL 3343494, at *4 (C.D. Cal. June 21, 2018); Bernstein v. Virgin Am., Inc., 227 F. Supp. 3d 1049, 1071 (N.D. Cal. regulatory field have tailored Helicopters for Agric. v. Cty. of Napa, 384 F. Supp. 3d 1035, 1041 (N.D. Cal. 2019) (citing Martin, 555 F.3d at 811). / / /

Not surprisingly, given the importance of the inquiry, the United States and Defendants advocate for different definitions of the relevant field. Defendants argue that immigration detention f at 16; see

also MJP Reply at 6. The United States, on the other hand, contends that the

15 See MJP Reply at 6 uture

Id. at 6 (citing

both immigration and criminal detention facilities, ress has created separate statutory schemes to regulate them in Titles 8 and 18, respectively, because they serve Id. at 6 7. Defendants urge that the United States should not be allowed to merge Id. at 7 (quoting , 813 F.3d at

734).

On balance, the Court concludes that Defendants have the better argument. First, although the Court agrees with the United States that the relevant field must be determined based on federal statutes, not A.B. 32, see Tr. at 63:23 64:5; cf. MJP Reply at 6 (citing Knox, 907 F.3d at 1174), 15

emphasis on contracting is misplaced. See

argument], a federal agency could argue that any state regulation is preempted merely because the federal government may wish to enter into a contract that is [in] any arguable way affected by the regulation 15

Indeed, Knox instructs that the Court must determine Congress intended to occupy by 907 F.3d at 1177 (emphasis added) (citing of the Blind, 813 F.3d at 734).

proposed field would have the Court comb through various provisions of Titles 8, 18, and 28 to the United States Code. 16 preemption judicial inquiry into whether a state See Whiting, 563 U.S. at 607. By defining the field broadly enough to encompass both civil and criminal detention statutes and regulations, the United States invites the Court to engage in such an erroneous and freewheeling inquiry. Consequently, the Court concludes that the pertinent fields are (1) prisoners.

b. Dominant Federal Interest

Arizona, 567 U.S. at 399 (quoting Rice,

in its custody, (2) the federal power over foreign relations and immigration, and (3) the U.S. at 15 (citing U.S. Mot. at 23 25). The United States urges that, combined, these dominant federal interests preempt the field of contracts for federal

Id. at 17.

i. Federal Custody As for its first purportedly dominant interest, the United States contends that A.B. rogative to house

16 ld goes across how you 9. Specifically, the United States cited United States v. Locke, 529 U.S. 89 (2000), which regulated oil tankers, and Knox, 907 F.3d 1167, which concerned a single statute codified across different Titles about the postal monopoly. See Tr. at 64:9 17. That other courts have looked across Titles of the United States Code in defining a relevant field, however, does not mean that doing so would be appropriate here, where there are two distinct legislative fields.

.S. .S. Mot. at 23). Defendants respond that there can be no preemption as to USMS-contracted detention

17

MJP Reply at 8 (citing 18 U.S.C. § 4013(c)(2)(C)). While the federal interest in the housing of prisoners and detainees is undeniably substantial, the Court cannot conclude that it is to the exclusion of the states. Indeed, in discussing ICE detention facilities in California, the Ninth Circuit recently eneral authority to ensure the health and See California, 921 F.3d at 886. Further, as Defendants note, see MJP Reply at 8, this conclusion is bolstered by that private detention facilities holding those in USMS custody could be subject to further state and local regulations. See 18 U.S.C. § 4013(c)(2)(C). Accordingly, the Court concludes that the federal interest in housing its prisoners and detainees does not impliedly preempt A.B. 32.

ii. Foreign Relations/Immigration

.S. .S. Mot. at 24 it can neither adequately control the safety and security of aliens in its

if States like California are allowed to dictate how and where the United States may house s Id. (citing U.S. Mot. at 24 (quoting Arizona, 567 U.S. at 395)). Reply

at 7 (quoting Puente Ariz., 821 F.3d at 1103) (citing California, 921 F.3d at 875 76). In

17 Because its BOP facilities, see supra Section II.A, they raise no substantive argument as to BOP. See MJP Reply at 8.

Federal G immigration power relating to who may enter and remain in the country]; it merely

Id.

The Court agrees with Defendants. It is clear from the face of A.B. 32 that it does not regulate either foreign relations or immigration it regulates only the operation of private detention facilities in

California. See Cal. Penal Code § 9501. In any event, as discussed above, see supra Section II.B.3.b.i, the United Sta operation of detention facilities does not preclude California from enacting any legislation in that area. See California, 921 F.3d at 886. Accordingly, the Court concludes that the federal interest in foreign relations and immigration does not preempt A.B. 32.

iii. Federal Contracting

U.S.

oes Id. at 6.

Again, the Court agrees with Defendants. A.B. 32 does not regulate federal contracting, but rather the operation of private detention facilities within California, see Cal. Penal Code § 9501, and any incidental effect on the Federal Government contracting interests does not suffice to establish field preemption. See, e.g., Knox, 907 F.3d at 1177 78. Accordingly, the Court concludes contracting does not preempt A.B. 32.

c. Pervasive Regulation

Arizona, 567 U.S. at 399

(alteration in original) (quoting Rice, Outside of the[] areas [of immigration, air safety, labor disputes, and pension disputes], field preemption In

re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prod. Liab. Litig., 295 F. Supp. 3d 927, 1001 (N.D. Cal. 2018). comprehensive is insufficient for a finding of field preemption, which arises only in Valentine v. NebuAd, Inc., 804 F. Supp. 2d 1022, 1029 (N.D. Cal. 2011) (quoting In re NSA Telcomms. Records Litig., 483 F. Supp. 2d 934, 938 (N.D. Cal. 2007) (quoting Wayne v. DHL Worldwide Express, 294 F.3d 1179, 1184 (9th Cir. 2002))) (internal quotation marks omitted).

The

of regulation so pervasive that Congress left no room for the States to supplement U.S. Arizona framework could not be any clearer: Congress explicitly delegated to the Executive Branch

full authority over federal prisoner and detainee housing and provided a full set of standards Id. (citing U.S. Mot. at 26 31).

i. ICE The United States relies primarily on 8 U.S.C. § 1231 to support its argument that Congress has occupied the field of contracting for immigration detainee housing. In

for appropriate places of detention for aliens detained pending removal or a decision on U.S. at 18 (quoting 8 U.S.C. § sider

the availability for purchase or lease of any existing prison, jail, detention center, or other Id. (quoting 8 U.S.C. § 1231(g)(1) (2)) (alteration in original). clearly and manifestly

handful of statutes that merely provide federal agencies with the general authority to

operate their own detention facilities and to contract with states to operate (and regulate)

id. (quoting Rice., 331 U.S. at 230; , 813 F.3d at 7 Id. (quoting U.S.

The Court agrees with Defendants that Congress has not occupied the field of housing immigration detainees. Section 1231 can hardly be said to set forth a framework See Arizona, 567

places of see 8 U.S.C. § 1231(g)(1), and expresses a preference that existing facilities be rented or purchased before new facilities are built. See id. §§ 1231(g)(1) (2). No mention is made of who should operate such facilities, in what manner they should be operated, or any number of additional details. The authorities cited by the United States not detainees. See Parver v. Jet Blue Airlines Corp. 9th Cir. 2016) (citing Gilstrap v. United Air Lines, 709 F.3d 995, 1006 (9th Cir. 2013)); see also Trishan Air, Inc. v. Dassault Falcon Jet Corp., No. CV 08-7294-VBF(JTLX), 2011 WL 13186258, defendant] do not sufficiently show such pervasive federal regulation in the area of flight training so as to preempt all claims based on negligent instruction under state standards of (citing Martin, 555 F.3d 806; 14 C.F.R. §§ 142.35 142.39); Hitt v. Ariz. Beverage Co., LLC, No. 08 CV 809 WQH (POR), 2009 WL 449190, at *5 (S.D. Cal. Feb. 4, 2009)

Act], its implementing regulations or its legislative history to suggest that Congress intended to exclusively occupy the field of labeling beverages that purport to contain fruit. The Court finds that this scheme of regulation is not so pervasive as to make reasonable the inference that Congress left no room for the S quotation marks omitted). Accordingly, the Court concludes that A.B. 32 is not field

immigration detainees.

ii. BOP The United States

Government or .S. Congress set forth several factors that BOP was to consider in making such determinations,

id. (citing U.S. designat

.S. Mot. at 28 (quoting 18 U.S.C. § 3621(b)). Further, Congress

explicitly commanded 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

U.S. federal statutory directives provide a full set of

Id. (quoting Arizona, 567 U.S. at 401) (second alteration in original).

The Court has concluded that there currently is no justiciable controversy as to the United States , see supra Section II.A; nonetheless, preemption arguments concerning BOP fare no better than those pertaining to ICE: the

United States has failed to identity legislation or regulations relating to the detention of federal BOP prisoners that are so pervasive that Congress left no room for the states to supplement them. Accordingly, the Court concludes that A.B. 32 is not field preempted by existing statutes and regulations concerning the detention of BOP prisoners.

iii. USMS Finally, as to USMS, the United States relies primarily on 18 U.S.C. § 4013. The -Federal

of indi .S. Mot. at 26 27 (quoting 18 U.S.C. § 4013(a)). Consequently, USMS ties under subsection (a)(3) based on . . . the number of Federal detainees in the district; and . . . Id. at 27 (quoting 18 U.S.C. § 4013(c)(1)); see also, e.g., U.S.

Although the Court already has concluded that A.B. 32 is conflict preempted as to see supra Section II.B.2.b.ii, the Court agrees with Defendants that there is no field preemption in this area. As Defendants note, see MJP Reply at 8, the primary statute on which the United States relies expressly contemplates that state and local governments may legislate and regulate such private detention facilities. See 18 U.S.C. § 4013(c)(2)(C). This would tend to suggest that Congress did not intend to occupy the field of the private detention of USMS detainees. See, e.g., In re Rader incorporating the Bankruptcy Code thoroughly to occupy the field related to the claims allowance

Familias Unidas por la Justicia v. Sakuma Bros. Farms, Inc., No. C14-737- -2A workers,

numerous federal courts have rejected the notion that [the Immigration Reform and Control Act of 1986] occupies the entire regulatory field of immigrants and/or immigrant In any event, the United States again fails to identify statutes or regulations so pervasive as to imply that Congress left no room for supplemental state regulation. Accordingly, the Court concludes that A.B. 32 is not field preempted by

existing statutes and regulations concerning the detention of USMS prisoners. C. Intergovernmental

Immunity

Under the doctrine of intergovernmen only if it regulates the United States directly or discriminates against the Federal

North Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality opinion) (citing South Carolina v. Baker, 485 U.S. 505, 523 (1988); United States v. Fresno Cty., 429 U.S. 452, 460 (1977)). GEO and the United States allege that A.B. 32 violates intergovernmental immunity principles on both grounds. See GEO Compl. ¶¶ 111 24; see U.S. Compl. ¶¶ 66 69. 1. Direct Regulation

Both GEO and the United States allege that A.B. 32 directly regulates the United States in contravention of intergovernmental immunity. See GEO Compl. ¶¶ 114 18; U.S. Compl. ¶ 67. Defendants contend that A.B. 32 does not directly regulate the Federal G it is a regulation of private persons in California, , and any indirect regulation of or burden on the Federal Government does not constitute direct regulation. See MTD at 10 11, 12 (citing North Dakota, 495 U.S. at 435); MJP at 10 (citing North Dakota, 495 U.S. at 435). Plaintiffs counter that A.B. 32 is a direct regulation of the United States because it directly regulates federal contractors and federal operations. See 6; U.S. 8.

Following the hearing, the Court requested additional briefing on the issue, in (1) on whom the legal incidence of A.B. 32 falls[and] (2) whether GEO (or any other private contractor with whom the Federal Government contracts for detention services) is a federal instrumentality

18 ECF No. 45 at 1. Relying heavily on the Ninth

18 The Court also requested addition facilities whether privately or federally owned GEO ECF No. 45 at 1 2 (footnote omitted). Because a federal installation is a federal function, Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181 (1988), this inquiry is relevant only to the two federally- See U.S. Compl. ¶¶ 29, 41; Tr. at 32:19 33:9. Because the Court has concluded that there is no justiciable controversy as to Taft,

Boeing Company v. Movassaghi, 768 F.3d 832 (9th Cir. 2014), Plaintiffs express skepticism that the legal incidence test applies outside the tax context, see 6 7, but nonetheless contend that the legal incidence of A.B. 32 falls on GEO and the United States. See 7; U.S. even relevant, federal contractors operating private detention facilities for the Federal Government are federal instrumentalities for purposes of A.B. 32. See n.5. Defendants counter that the legal incidence of A.B. 32 is borne only by private

detention contractors, see 4, and that private detention contractors such as GEO are not federal instrumentalities. See id. at 7 11.

As an initial matter, although Plaintiffs contend that tax cases are not applicable here, see 7, this

distinction does not appear to be borne out by Supreme Court precedent. See, e.g., 1 Laurence H. Tribe, American Constitutional Law § 6 34, 1225 ng North Dakota, 495 U.S. at 454 n.3 (Brennan, J., concurring in the judgment in part and dissenting in part)) (citing North Dakota, 495 U.S. at 435; Mayo v. United States, 319 U.S. 441, 445 (1943)); David S. Rubenstein, Supremacy, Inc., 67 UCLA L. Rev 4, at 74 n.361 (2020) ([T] laws and state regulations [for purposes of intergovernmental immunity]; the Court cites the cases interchangeably Mayo, 319 U.S. at 446 48). Because there is a greater wealth of intergovernmental immunity authority concerning state tax regulations, the Court / / /

see supra Section II.A, and that A.B. 32 is conflict preempted as to USMS facilities, see supra Sections II.B.2.a.ii, II.B.2.b.ii, the Court declines to wade into the quagmire of federally owned facilities. Further, see Tr. at 43:8 14, any challenge to federally owned facilities. See supra Section II.A.

therefore looks to those cases to supplement state regulation cases in determining whether A.B. 32 is a direct regulation of the United States.

In addressing direct-regulation immunity, the United States Supreme Court has recogniz immunity of the national government from state taxation and from state regulation of the Penn Dairies , 318 U.S. 261, 269 (1943) (collecting cases). However, the Supreme Court has also cautioned that

those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions . . . , and the mere fact that non- discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. Id. at 269 70 (citations omitted) (collecting cases). Rather, to enjoy the benefits of such immunity, the c Government that the two cannot realistically be viewed as separate entities, at least insofar See United States v. New Mexico, 455 U.S. 720, 735 (1982); accord North Dakota if it regulates the United States directly or discriminates against the Federal Government

South Carolina, 485 U.S. at 523; Fresno Cty., 429 U.S. at 460).

Under the legal incidence test, the wording of A.B. 32 is significant: Constitution . . . does not forbid a [regulation] whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the [regulation] United States v. Boyd, 378 U.S. 39, 44 (1964); see also United States v. Nye Cty., 178 F.3d 1080, 1084 (9th Cir. 1999) Nye Cty. II [T]he wording of a [state regulation] is significant. quoting United States v. Nye Cty., 938 F.2d 1040, 1042 (9th Cir. 1991) Nye Cty. I).

therefore inconsequential. See Tr. at 50:24 51:6

with a private for-profit entity for the operation of a detention facility in California. That would

reword the prohibition to focus directly on the Federal Governmen change its impact one bit, and so that would be a very direct regulation. ; see also Nye

Cty. II., 178 F.3d at 1085; see also id. at 1084 86, 1089 (concluding that statute previously found unconstitutional as a direct tax on federal property was constitutional when rewritten . .

As GEO itself recogn See Tr. at 50:20 21. In other words, the legal incidence of A.B. 32 is on those operating private detention facilities, such as GEO, rather than directly on the United States. Consequently, the only way that A.B. 32 can be a direct regulation of the United States is if those operating detention facilities under contract with the United States qualify as instrumentalities of the Federal Government.

The Court concludes that Plaintiffs have not carried their burden to establish this. To meet their burden, Plaintiffs must demonstrate that federal contractors operating detention facilities are realistically be viewed as separa New Mexico, 455 U.S. at 735. In other words,

GEO (and its compatriots) id. at 736 (quoting City of Detroit v. Murray Corp., 355 U.S. 489, 491 (1958) (Frankfurter, J.)), or Id. (quoting Boyd, 378 U.S. at 47 (quoting United States v. Muskegon Twp., 355 U.S. 484, 486 (1958))); see also id. at 736 3

essential original) (citation omitted) (quoting , 385 U.S. 355, 359 Case 3:20-cv-00154-RSH-WVG Document 35 Filed 10/08/20 PageID.783 Page 54 of 75 60 (1966); Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942)). Although GEO is c related to government activity as to become a tax- Br. at 8 (quoting , 385 U.S. at 358 59), Defendants identify several factors

used by the Supreme Court and Ninth Circuit in prior cases. See 9 (collecting cases).

Although decided in a different context, Logue v. United States, 412 U.S. 521 (1973), is illuminating. In Logue, the plaintiffs sued the United States under the Federal

himself while incarcerated in a county jail that had contracted with BOP to house federal prisoners. Id. at 522 23. To be liable under the FTCA, the employees of the county jail See id. at 526 (quoting

28 U.S.C. §

Government in Id. In so concluding, the Court reasoned that, undertakes to provide custody in accordance with the Bureau of

. . . [, b]ut the agreement gives the United States no authority to physically supervise the Id. at 530. Ultimately, employees of a contractor with the Government, whose physical performance is not subject

simply because they are performing tasks that would otherwise by performed by salaried See id. at 531 32.

As in Logue, GEO contends that it is an instrumentality of the Federal Government because it houses federal detainees and is subject to specific rules and regulations,

including the Federal Performance-Based Detention Standards, see 9; however, under Supreme Court precedent, this does not suffice. See Logue, 532 U.S. at 526, 531 32. see generally GEO Compl., nor the relevant contracts, 19

Logue, 412 U.S. at 530.

Boyd is also instructive. In Boyd, Tennessee imposed sales and use taxes on purchases made by two companies contracting with the Atomic Energy Commission. See 378 U.S. at 40 id. at 41 construction services relating both to new facilities and to the modification of the existing

Id. at 42 43. The contractors and the United States contended that the contractors should be entitled to immunity from See id. at 44. The Court

its constituent parts, id. at 47 (quoting Muskegon Twp., 355 U.S. at 486), noting:

No one suggests that either [contractor] has put profit aside in contracting with the Commission[;] that the fee of either company is not set with commercial, profit-making considerations in mind[;] or that the operation of either company at [the federal nuclear facility] were not an important part of their regular business operations.

Id. Id. (quoting Muskegon Twp., 355 U.S. at 486). The Court added: / / /

19 GEO attached excerpts of the relevant contracts to its Complaint. See generally GEO ECF No. 15-5 Exs. A Court, see Tr. at 20:4 22:3, and on September 25, 2020, the Court issued an order requesting the unexcerpted contracts. See ECF No. 52. The Court has reviewed the full contracts that were electronically on October 1, 2020.

Should the Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. [The Court] cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity. Id. at 48. Ultimately, the Court concludedde upon the business of the Nation, it is for Congress, in the valid exercise of its powers, not this Court, Id. at 51.

So, too, here USMS detention facilities does not transform those contractors into instrumentalities of

the

Federal Government. Ultimately, GEO and other private detention facility operators are in connection with commercial activities carried on for See id. at 44; see also id. at 48. The Court therefore concludes that A.B. 32 does not directly regulate the United States in violation of the intergovernmental immunity doctrine. Rather, A.B. 32 ate meaning that the legal incidence of A.B. 32 falls only on government contractors, and Plaintiffs have failed to show that those contractors are so closely connected to the Federal Government as to be instrumentalities of the United States. 2. Discriminatory Regulation

the federal government and California, 921 F.3d at 880 (emphasis added); see also id.

inst the Federal Government and those with Id. at 881 (quoting Washington v. United States, 460 U.S. 536, 544 45 (1983)). The Ninth Circuit also has clarified that there is no de minimis exception to intergovernmental immunity; rather,

[a]ny economic burden that is discriminatorily imposed on the federal government is Id. at 883 84 (emphasis in original); see also Tr. at 46:3 5. Even if a state law does discriminate against and burden the Federal Government, it may nonetheless survive Davis v. , 489 U.S. 803, 816 (1989) (quoting Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376, 383 385 (1960)). Consequently, Plaintiffs must clear two hurdles with respect to intergovernmental immunity, showing that (1) A.B. 32 discriminates against the Federal Government (or its contractors) by treating somebody similarly situated better, and (2) that discrimination in some way burdens the Federal Government (or its contractors). See, e.g., California, of the doctrine, intergovernmental tion

a. Discrimination

The Court must first determine whether A.B. 32 discriminates against the United States and its contractors, i.e. California, 821 F.3d at 881 (quoting Washington, 460 U.S. at 544 45). Although within the s see Cal. Penal Code §§ 5003.1, 9501, Plaintiffs allege that the various

exceptions contained in Sections 5003.1(e), 9502, 9503, and 9505(b) discriminate against them to the benefit of California and its contractors. See, e.g., GEO Compl. ¶¶ 121, 123; U.S. Compl. ¶ 68.

preliminary considerations. Initially, the Court rejects

U.S. Travis v. Reno, 163 F.3d 1000, 1002 (7th Cir. 1998); United States v. Kernen Constr., 349 F. Supp. 3d 988, 994 (E.D. Cal. 2018)). Not only is neither authority binding on this Court, but the rationale on which those cases relied does not apply here. In Kernen Construction, for example, the district court concluded that the underlying statute

still discriminated against the Federal G agencies, state and federal. 349 F. Supp. 3d at 993. The court reasoned that important that burdens also fall on private parties to ensure that there is a broad state authority. See id. at 944 (citing Fresno Cty., 429 U.S. at 463; United States v. Lewis Cty.,

175 F.3d 671, 676 (9th Cir. 1999)). This is so because have a direct voice in state legislatures, [so] states can unfairly burden its operations by Id. (citing Washington, 460 U.S. at 545). That reasoning does not apply here for several reasons.

First, there are private parties that may provide a political check here. Although GEO and other private detention facility operators are government contractors, they also are private parties. There are also a significant number of California residents employed

See id.

Second, the authorities on which Kernen Construction relied were largely tax cases, in which the state government profits by imposing a discriminatory tax on the Federal Government. See, e.g., Fresno Cty., 429 U.S. at 453, 455 56, 467 68 (upholding property tax on possessory interests of improvements on tax-exempt land imposed on Forest Service employees living in federally owned houses located in national forests); Lewis Cty., 175 F.3d at 673, 675 76 (upholding tax on farm property owned by the federal Farm Service ll See, e.g.,

Lewis Cty., 175 F.3d at 675 76. Here, by contrast, the profit motive is lacking there is detention facilities in California; rather, the Assembly Committee on Appropriations

sts in the hundreds of See RJNs Ex. 2 at 1.

Third and finally, as Defendants note, see MTD Reply at 4; MJP Reply at 4, this is an area in which there can be no burden imposed on non-government contractors given that there simply are no truly private actors that legally can detain others in detention facilities. Consequently, it is appropriate for the Court to consider whether A.B. 32 treats California and its contractors better than the Federal Government and its contractors. See, e.g., South Carolina, 485 U.S. at 527 (concluding that federal law was nondiscriminatory and did not

the same registration requirement on itself that it has effec

This brings the Court to the second preliminary consideration: Although GEO urges

scheme as a whole (emphasis in original) (citing Dawson v. Steager, 586 U.S. ___, 139 S. Ct. 698, 705 (2019);

Washington, 460 U.S. at 541 contains a series of exemptions, some of which favor the federal

government, others of which favor the state, most of which are unconcerned with the federal/state distinction, [the Court should] focus on the individual exemption to determine whether each taken on its own terms discriminates between state and federal interests to the detriment of the federal Nye Cty. II, 178 F.3d at 1088. GEO urges that Nye County II is inapplicable none of AB- l Government (emphasis in original). Certain provisions of A.B. 32, however, apply only to CDCR, such as Section 5003.1, which, among other things, enter[ing] into a contract with a private, for-profit prison facility located in or outside of the state Code § 5003.1(a) (emphasis added). These provisions, which are more restrictive than

those imposed on Plaintiffs, would favor the Federal Government u Other provisions, as discussed below, are facially neutral.

The Court therefore concludes that Nye County II applies here. Accordingly, the Court analyzes each of the three groups of exceptions in A.B. 32 that Plaintiffs contend

discriminate in favor of California and its contractors: (1) the Section 9502 exceptions, (2) the Section 9503 exception, and (3) the Sections 5003.1(e) and 9505(b) exception.

i. The Section 9502 Exceptions Section 9502 exempts seven specific types of facilities from the blanket ban on operating private detention facilities found in Section 9501, namely:

(a) Any facility providing rehabilitative, counseling,

treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court pursuant to Part 1 (commencing with Section 100) of Division 2 of the Welfare and Institutions Code. (b) Any facility 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 Section 1026, or pursuant to Division 5 (commencing with Section 5000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code. (c) Any facility 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. (d) A residential care facility licensed pursuant to Division 2

(commencing with Section 1200) of the Health and Safety Code. (e) Any school facility used for the disciplinary detention of a

pupil. (f) Any facility used for the quarantine or isolation of persons

for public health reasons pursuant to Division 105 (commencing with Section 120100) of the Health and Safety Code. (g) Any facility used for the temporary detention of a person

detained or arrested by a merchant, private security guard, or other private person pursuant to Section 490.5 or 837.

Cal. Penal Code § 9502.

(b) and 9502(d) (f) describe detention activity that is only carried out by the State, specifically referencing parts of the California similarly contends that five of the exceptions those contained in subsections 9502(a) (b),

(d), and (f) (g) cts but are facially inapplicable to the .S.

t]he Federal Government does not contract, and has

vocational, medical, or other ancillary services to an inmate in the custody of, and under .S. Mot. at 20 21 (quoting Cal. Penal Code §§ 9502(c), (e)).

Defendants counter that, even if certain of these exceptions describe only state

11 (quoting Nye Cty. II, 178 F.3d at 1088); MJP at 12 (quoting Nye Cty. II, 178 F.3d at 1088). Further, the covered by the [the Section 9502] exceptions MTD at 12; MJP at 12, which do not give

rise to the same health and safety concerns as immigration and criminal detention facilities, see MTD Reply at 4 (citing Cal. Penal Code §§ 9502(a) (g)); MJP Reply at 4 (citing Cal. Penal Code §§ 9502(a) (g)), rendering . . . 12 (citing Davis, 489 U.S. at 815 16); MJP at 12 (citing Davis, 489 U.S. at 815 16).

To the extent that neither GEO nor the United States operates any of the facilities enumerated in the Section 9502 exception, the Court concludes that they are not similarly situated to California and, consequently, that the exception does not discriminate against

the Federal Government and its contractors. This leaves only one of the Section 9502 exceptions: the exception appearing in subsection (c), 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 See Cal. Penal Code § 9502(c). But as explained above, see supra Section II.A, the Court concludes that it lacks jurisdiction over challenges to A.B. 32 Accordingly, based on the current record, 20

the Court concludes that the Section 9502 exceptions do not impermissibly discriminate against the

Federal Government.

ii. The Section 9503 Exception Section 9503 exempts from the general provision in Section 9501 facilities that are does not apply to 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 .S. facility in the State that would currently meet this exception is the California City

d and [CDCR] Id.

Although the United States currently does not operate any facilities falling under the exception in Section 9503, nothing in the text of Section 9503 prohibits the United States from operating such facilities in the future. See also Tr. at 44:24 45:3 (conceding that

20 Court related to the RRCs, the date of this Order. The Court notes, however, that if California were to enforce A.B. 32 against the e Custody Program, it would appear that California is treating itself and its contractors better than the Federal Government and its contractors, which would be constitutionally impermissible.

Because Section 9503 does not treat California better than the United States, the Court

concludes that Section 9503 does not render A.B. 32 discriminatory in violation of intergovernmental immunity.

iii. The Sections 5003.1(e) and 9505(b) Exception Section 9505(b) provides that the general rule against those operating private detention facilities private detention may 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- § 5003.1(e).

private detention facilities under con

to cope with overcrowding in its .S. Mot. at 19 (quoting Washington, 460 U.S. at 544 45) (emphasis in

original).

generally rela , []

[CDCR] (citing Brown, 563 U.S. at 539 21

; MTD at 13 (citing Brown, 563 U.S. at 539). On the

21 The Court may sua sponte take judicial notice of the population cap imposed by Brown v. Plata. See, e.g., Reyn s Pasta Bella, LLC v. Visa USA, Inc. 442 F.3d 741, 746 n.6 (9th Cir. 2006); United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (a court may take judicial notice

litigation, Davis, 489 U.S. at 815 16); MTD at 13 (citing

Davis, 489 U.S. at 815 enables California to comply with an existing federal court order while it transitions its

inmate population away from private operators, not a permanent, discriminatory loophole

The Court concludes that CDCR and its contractors are not similarly situated to the Federal Government and its contractors, given that the former must comply with a court-

nature of the two classes, see GEO Op Dawson See 139 S. Ct. at 705 (citing

Davis, 489 U.S. at 817). The favored class for purposes of the Section 9505(b) exception, however, explicitly is defined as CDCR to the extent that it would violate a court-ordered population cap. See Cal. Penal Code §§ 5003.1(e), 9505(b). This serves to distinguish the instant cases from Dawson and Davis, in which the defendant attempted to justify the discrimination based on an implicit distinction between the classes not expressed in the statute. See, e.g., Dawson, 139 S. Ct. at 706 (state could not claim that discrimination between taxation of state and federal pensions was based on generosity of pensions where statute defined favored class on basis of job responsibilities); Davis, 489 U.S. at 816 17 (state did not demonstrate significant differences between classes where statute provided for different tax treatment based on source of income, not its amount). Because this distinction is explicit in the particular exception to A.B. 32 that Plaintiffs challenge, the Court may consider whether the existence (or absence) of a court-ordered population cap is a significant difference between CDCR, on the one hand, and local and Federal law enforcement agencies, on the other. / / /

The Court concludes that this is a significant difference between the two classes that renders them not similarly situated for purposes of intergovernmental immunity. Neither the United States nor GEO has identified any court-ordered population cap affecting their detention facilities, whether operated for USMS, BOP, or ICE, within the State of California. W 22

see U.S. Mot. at 19, that is not relevant to the distinction drawn between the two classes by A.B. 32. The relevant difference is that California has been ordered by a court not to exceed 137.5% of design capacity, whereas the Federal Government has not. See Brown, 563 U.S. at 539. Should the Federal

Government face a court-ordered population cap in the future, it may find itself similarly situated to California and seek to renew its challenge.

see U.S. Mot. at 38

n.20 (citing Gonzalez, 325 F.R.D. 616; Franco-Gonzalez, 2013 WL 8115423), none of these cases involve population caps. In Gonzalez, the district court preliminarily enjoined [8 U.S.C. §] 1231(a)(6) for more than 180 days without [] providing each a bond hearing before an [immigration judge] as required by Diouf[v. Napolitano, 634 F.3d 1081 (9th Cir. 325 F.R.D. at 629. In Franco-Gonzalez, the district court enjoined the Federal Government from (1) pursuing immigration proceedings against immigration detainees with serious mental disorders who are facing deportation and are unable adequately to represent themselves, unless those detainees are appointed a qualified representative; and (2) holding immigration detainees with serious mental disorders for more than 180 days

22 Indeed, it appears that California and the Federal Government may be similarly situated in this regard, 4,252 inmates currently held in four private, for- RJNs Ex. 2 at 1.

their release on conditions of supervision, unless the Government shows by clear and 2. The United States also Orantes-

Hernandez . . . prohibits ICE from transferring unrepresented Salvadorian nationals from .S. Mot. at 38 n.20. Because none facilities, however, they are not material to the issue before the Court.

In light of the foregoing, the Court concludes Sections 5003.1(e) and 9505(b) does treat CDCR differently than Federal or local law

enforcement agencies, it does not discriminate because CDCR is not similarly situated to the extent that it is subject to a court-ordered population cap. Accordingly, that particular

b. Burden Whether California has discriminated against the Federal Government and its contractors is not the end of the inquiry, however, because Plaintiffs must also demonstrate that they would be burdened as a result of the discrimination. See, e.g., California, 921 F.3d at 880; see also Tr. at 24:25 25:12, 36:6 13, 45:18 46:6 - 32 forces GEO to close its USMS and ICE detention facilities in California, GEO could GEO Compl. ¶ 110. The United States contends that A.B. 32 would require it to transfer

1,300 inmates housed at Taft, 900 inmates housed in RRCs, 50 percent of USMS inmates in California, all of which would cost significant taxpayer dollars. U.S. Compl. ¶¶ 32 33,

36, 42, 49, 57 58.

These are real and substantial burdens; however, to the extent that the Federal Government and its

contractors are not similarly situated and therefore face no discrimination under A.B. 32, see supra Section II.C.2.a, they cannot establish the requisite causal connection to the burden. For example, the relocation of ICE detainees is not the

result of the Federal Government and its contractors not being able to use the exemption in Sections 5003.1(e) and 9505(b). Like California, GEO and the United States have to relocate their privately detained prisoners to the extent that they are not exempted by a population cap fornia cannot currently use, see GEO Compl. ¶ 27). In other words, the relocation is happening as a result of the generally applicable prohibition appearing in Section 9501, not as a result of the challenged exceptions. 23

The Court therefore concludes that Plaintiffs have failed to establish the requisite causal connection between any alleged discrimination and the resultant burden. III. Conclusion

In light of the foregoing, the Court GRANTS IN PART AND DENIES IN PART Def regarding the Motion to Dismiss, the Court DISMISSES

preemptio Pleadings, the Court DISMISSES they relate to BOP facilities for lack of subject-matter jurisdiction. Additionally, the Court

DISMISSES preemption and to the extent that it claims obstacle preemption as to its contracts for private detention facilities on behalf of BOP and ICE. Finally, the Court DISMISSES the United

/ / /

23 The one exception would be RCs with regard to Section 9502(c). Although the Court has to its BOP facilities, including the RRCs, see supra Section II.A, Section 9502(c) likely discriminates against the RRCs. See supra note 20. This discrimination also would directly result in the United States having to relocate the 900 inmates in that program. See U.S. Compl. ¶¶ 42, 49. Consequently, although not yet ripe for adjudication, the Section 9502(c) exception would appear unconstitutionally to violate the if enforced against the RRCs.

are DENIED. Any dismissals are WITHOUT PREJUDICE so that Plaintiffs may file amended complaints addressing the deficiencies outlined above.

MOTIONS FOR PRELIMINARY INJUNCTION I. Legal Standard

A preliminary injunction is an equitable remedy aimed at preserving the status quo and preventing the occurrence of irreparable harm during the course of litigation. See Fed. preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction

is in Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). A preliminary injunction Winter, 555 U.S. at 22. II. Analysis

Both GEO and the United States request that the Court preliminarily enjoin Defendants from enforcing A.B. 32 against their privately operated facilities within the State of California. See, e.g., GEO Compl. ¶ 145(b); U.S. Compl. ¶ 71; see also GEO Mot. at 40 41; U.S. Mot. at 43. A. Likelihood of Success on the Merits

Because the Court concludes that both GEO and the United States have failed to ly operated detention facilities, obstacle preemption as to BOP and ICE, field preemption, or intergovernmental immunity, see generally supra pages 21 69, the Court concludes that they are unlikely to succeed on the merits as to those claims. Accordingly, the Court DENIES the Motions for Preliminary Injunction as to those causes of action. See, e.g., Sports Form, Inc. v. United , 686 F.2d 750, 753 (9th Cir. 1982). The Court therefore analyzes only (1) the constitutionality of A.B. 32 as applied solely , and (2) that the Court enjoin Defendants from enforcing A.B. 32 against their facilities through the end of their contractual terms.

1. USMS

For the reasons discussed above, see supra pages 35 37, 40, the Court concludes that both GEO and the United States have demonstrated a likelihood of succeeding on the

with privately operated detention facilities.

2. Applicability of Safe Harbor Through End of Contractual

Terms

detention facility that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract, not to include

alleges that this provision exempts its current contracts entered into before January 1, 2020 from Section 9501 through their full periods of performance, including any option extensions. 24

See GEO Compl. ¶¶ 135 44. GEO therefore requests that the Court enjoin Defendants from enforcing A.B. 32 against those contracts for their full periods of performance. See id. ¶¶ 145(c) (e); see also GEO Mot. at 40 41.

As an initial matter, the Procurement Amici decline to exercise jurisdiction he validity of the contracts in dispute is subject to the Contract Disputes Act of 1978, and thus any relief with respect to these contracts must be obtained through that statute, or alternatively through the United States

Court of Federal Claims. Procurement Amici Br. at 22 (citing 41 U.S.C. §§ 7101 7109). Because the Court has an

independent obligation to address sua sponte whether [it] ha[s] subject matter jurisdiction

24 through September 30, 2021, with options extending through September 30, 2027. See GEO Compl. ¶¶ 44 45. El Centro contract with USMS ends on December 22, 2021, with options extending through September 25, 2028. Id. ¶ 53. Finall Valley, and Golden State have option periods beginning December 20, 2024, with periods of performance through December 19, 2034. Id. ¶¶ 77 78, 80 81, 88, 92, 97. GEO therefore seeks to have the Court declare that A.B. 32 does not apply to its WRDF contract until September 30, 2027, its El Centro contract until September 25, 2028, and its ICE contracts until December 19, 2034. See id. ¶¶ 135 44, 145(c) (e).

Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1093 (9th Cir. 2004) (citing Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999)), the Court may properly address a jurisdictional question first raised by amici. See, e.g., Swan v. Peterson, 6 F.3d 1373, 1383 (9th Cir. 1993) (citing Miller- ., 694 F.2d 203, 204 (9th Cir. 1982)); see also Tr. at 31:6 23.

fourth cause of action following the hearing. See GEO ECF No. 45 at 1 2. The Parties all agreed that the Court has jurisdiction. See Br. at 13. The Court continues to harbor some doubts although styled as a claim against the seeks a declaration of contract rights against the government, sdiction. See N. Side Lumber Co. v. Block, 753 F.2d 1482, 1485 86 (9th Cir. 1985).

cause of action because, assuming it has jurisdiction, the Court nonetheless concludes that GEO cannot demonstrate the requisite likelihood of success on the merits. Section 9505(a) See Cal. Penal Code § 9505(a). It appears unlikely that GEO will succeed in arguing that the options are not such extensions. Accordingly, the Court concludes that GEO is unlikely to succeed on as to A.B. 32 ely contracted facilities.

B. Likelihood of Irreparable Harm

Plaintiffs must make a clear showing that irreparable harm will occur absent the preliminary injunction. This clear showing requires a plaintiff to prove more than a s i os Angeles a finding of irreparable harm, because such injury can be remedied by a damage Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597,

603 (9th Cir. 1991).

GEO contends that it would suffer irreparable harm if forced to close its facilities during this litigation, because GEO Mot. at 38 (quoting ,

530 F.3d 865, 882 (9th Cir. 2008), , 562 U.S. 134 (2011)), and GEO Id. at 38 39 (citing U.S. CONST. amend. XI; Kentucky

v. Graham, 473 U.S. 159, 169 (1985)). The United States similarly contends that .S. Mot. at 36 37 (citing New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 366-67 (1989); Valle del Sol Inc. v. Whiting, 732 F.3d 1006, 1029 (9th Cir. 2013); Arizona, 641 F.3d at 366), and that 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) Id. at 37. Defendants respond that Plaintiffs

are not threatened by imminent harm such that a preliminary injunction is necessary, 30, 2021, at the earliest. See .S. Mot. at 31. The United States rejoins that, gin planning for A.B. .S.

Defendants do not contest the irreparability of the harm Plaintiffs may suffer. In addition to the irreparable harm caused by the likely violation of the Supremacy Clause should A.B. 32 b see, e.g., California, 921 F.3d at 893 (collecting authorities), it appears that the United States and GEO may face further imminent, irreparable injury in the form of disrupted operations and the incurrence of incompensable damages, respectively. Accordingly, the Court / / /

concludes that this factor weighs in favor of preliminarily enjoining enforcement of A.B.

C. Balance of Equities

Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009) (quoting Winter to balance the interests of all League, 634 F.2d 1197, 1203 (9th Cir. 1980).

GEO Mot. at 39 (quoting Az. Dream Act Coalition v. Brewer, 757 F.3d 1053, 1069 (9th

rm from .S. Mot. at 42 (citing Rodriguez v. Robbins, 715 F.3d 1127, 1145 (9th Cir. 2013) Id. preliminary injunction

enjoining the enforcement of AB 32 would lead to significant, concrete harm to the public,

recognized) that private prisons are a critical, ongoing public policy concern and that .S. Mot. at 32.

The Court recognizes that California has a legitimate interest in safeguarding the health and safety of USMS detainees within its borders, see California, 921 F.3d at 886; privately operated USMS detention facilities, see supra pages 35 37, 40, the Court

ultimately concludes that the equities tip in favor of Plaintiffs. D. Public Interest

regard for the public consequences in employing the extraordinary remedy of

Winter, 555 U.S. at 24. GEO contends that it has established that the public interest favors a preliminary injunction for the same reasons that it has established that the equities favor issuing an injunction, see GEO Mot. at 39 40; see also supra Section II.C, while the United States contends that it has established this factor because the United States .S. Mot. at 36 (citing Nken v. Holder, 556 U.S. 418, 435 (2009)). Defendants also reiterate their arguments concerning the balance of the equities in support of the public interest. See .S. Mot. at 32 33; see also supra Section II.C. For the reasons discussed above, see supra Sections II.B C, the Court concludes that the public interest also favors issuance of a preliminary injunction. E. Permanent Injunction

Relying on Baby Tam & Company v. City of Las Vegas, 154 F.3d 1097, 1102 (9th Cir. 1998), abrogated on other grounds by Dream Palace v. County of Maricopa, 384 F.3d 990, 1002 (9th Cir. 2004), both GEO and the United States request that the Court enter final judgment awarding a permanent injunction. See, e.g., GEO Mot. at 41; U.S. Mot. at 43. Although the Court may have the authority to issue a permanent injunction at this stage, it declines to do so here, particularly given that several claims have been dismissed and leave to amend has been granted. III. Conclusion

In light of the foregoing, the Court GRANTS IN PART AND DENIES IN PART Plaintiffs Motions for Preliminary Injunction. Accordingly, the Court PRELIMINARILY ENJOINS privately contracted detention facilities within the State of California. Plaint

are otherwise DENIED.

CONCLUSION In light of the foregoing, the Court GRANTS IN PART AND DENIES IN PART Dismiss (GEO ECF Nos. 20, 22) and for Judgment on the Pleadings (U.S. ECF No. 13), as set forth above. See supra pages 68 69. Plaintiffs MAY

FILE amended complaints within twenty-one (21) days of the electronic docketing of this Order. Should Plaintiffs elect not to file amended complaints, this action will proceed on their surviving causes of action.

The Court also GRANTS IN PART AND DENIES IN PART United States GEO ECF No. 15 and U.S. ECF No. 7,

respectively), as set forth above, see supra page 74, and PRELIMINARILY ENJOINS facilities within the State of California.

IT IS SO ORDERED. Dated: October 8, 2020