Nos. 20-56172, 20-56304

In the United States Court of Appeals for the Ninth Circuit

THE GEO GROUP, INC.,
Plaintiff - Appellant,

vs.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Defendants - Appellees.

UNITED STATES OF AMERICA,
Plaintiff - Appellant,

vs.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF THE STATE OF CALIFORNIA, *et al.*,
Defendants - Appellees.

ON REHEARING *EN BANC* ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NOS. NOS. 3:19-CV-02491 JLS-WVG, 3:20-CV-00154-JLS-WVG, HON. JANIS L. SAMMARTINO, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLEES IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: May 31, 2022

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Immigration Law Reform Institute ("IRLI") files this brief pursuant to the accompanying motion for leave to file.[1] IRLI is a nonprofit 50l(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in important immigration cases, including *Trump v. Hawaii*, 138 S.Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); and *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has a direct interest in the issues here.

STATEMENT OF THE CASE

Under the federal Immigration and Nationality Act, 8 U.S.C. §§1101-1537

[1] Pursuant to FED. R. APP. P. 29(b)(4) and 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity—other than *amicus*, its members, and its counsel—contributed monetarily to this brief's preparation or submission.

("INA"), the U.S. Department of Homeland Security ("DHS") "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. § 1231(g)(1).[2] In addition to authorizing the expenditure of funds for detention facilities, the INA requires consideration of "the availability for purchase or lease of any existing prison, jail, detention center, or other comparable facility suitable for such use." *Id.* § 1231(g)(2). U.S. Immigration and Customs Enforcement ("ICE") is a constituent DHS agency that, by regulation, "without delegation, may enter into contracts of up to fifteen years' duration for detention or incarceration space or facilities, including related services." 48 C.F.R. § 3017.204-90. In sum, the INA and implementing regulations contemplate the use of leased detention facilities to meet DHS's obligation for detention and removal of aliens under the INA. Appellant GEO Group operates such facilities in California for DHS.

With exceptions applicable to state facilities, but not to federal facilities, California Assembly Bill 32, 2019 Cal Stat. ch. 739 ("AB 32"), prohibits the operation of private detention facilities in California. AB 32 prohibits operating "a private detention facility within the state" unless otherwise exempted by AB 32. CAL. PENAL. CODE § 9501. AB 32 includes exemptions for facilities that serve

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[2] Although the statute mentions the "Attorney General," *id.*, DHS is substituted for the Attorney General. *See* 6 U.S.C. § 557; *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

California. *See*, *e.g.*, *id.* § 9502(a) (juveniles under the jurisdiction of California courts); 9502(b) (mental-health detainees under the California law); 9502(d) (residential-care facilities under the California Health and Safety Code); 9502(e) (disciplinary detention of students); 9502(f) (quarantine facilities under the California Health and Safety Code); 9502(g) (facilities for certain California-law detentions). AB 32 grandfathers existing contracts in effect before 2020, but prohibits extending contracts, CAL. PENAL. CODE § 9505(a), with an exception allowing renewal of contracts if needed for California to comply with court-ordered population limits. CAL. PENAL. CODE §§ 9505(b), 5003.1(e).

SUMMARY OF ARGUMENT

The presumption against preemption does not apply because the presumption requires a history of state involvement in the regulated federal field—here, immigration detention—not in the state bases for regulation such as health and safety (Section I.A). Indeed, the presumption should not apply to states' deliberate efforts to regulate federal actions, especially not in areas—such as immigration—where the federal government has plenary authority (Section I.B). Simply put, the presumption against preemption shields states from inadvertent federal intrusion. It is not a sword for intentional state nullification of federal law.

Shorn of the presumption against preemption, AB 32 cannot survive challenge as an obstacle to the full purposes and objectives of the INA. In addition to the

appellants' arguments, this Court should also consider that preemption law does not allow states to do indirectly via purportedly neutral health-and-safety laws what states could not do directly to regulate the federal government (Section II). Finally, AB 32 is not even neutral *vis-à-vis* state and federal actors because it provides state actors with exemptions not available to federal actors, in violation of the intergovernmental immunity doctrine (Section III).

ARGUMENT

I. THE PRESUMPTION AGAINST PREEMPTION DOES NOT APPLY.

California argues that AB 32's focus on health and safety implicates the presumption against preemption under *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947), and its progeny. Although courts sometimes apply a presumption against preemption in fields traditionally occupied by states, that presumption does not apply here to GEO's and the United States' conflict-preemption claim.[3]

A. The presumption focuses on the specific regulated *federal* field, not on the general field regulated by the state.

For conflict preemption, the presumption applies only if "the field which

[3] Courts have identified three forms of federal preemption: express, field, and conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). The presumption against preemption does not apply to express-preemption or field-preemptive statutes, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (express); *Aguayo v. U.S. Bank*, 653 F.3d 912, 921 (9th Cir. 2011) (field), but the parties here argue only conflict preemption.

Congress is said to have pre-empted has been traditionally occupied by the States" and "not … when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 107-08 (2000) (interior quotation marks omitted); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1004 (9th Cir. 2008). Moreover, where it applies, the presumption applies to the *federal* field (*i.e.*, immigration detention here), *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 910 (2000) (applying presumption to "common-law no-airbag suits" and not to tort law generally), not to the state or local interest. *See Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373-74 & n.8 (2000) (declining to address presumption's application to Burma trade sanctions for state spending). *Crosby* makes this point: Massachusetts obviously has discretion on *how to spend state funds*, but the Court analyzed the federal field of *Burma trade sanctions*, not state spending. *Id.* Similarly here, when California purports to regulate immigration detention, California must show a history of action in that field before a presumption against preemption would apply.

B. California's purporting to regulate the plenarily federal field of immigration makes AB 32 an inappropriate vehicle for extending the presumption against preemption.

Although the presumption against preemption does not apply by its terms to California's attempt to regulate a field—federal immigration detention—in which California lacks a historical presence, this Court also should not extend presumptions

in favor of AB 32 without considering the context of a state's regulating the federal government. Two facets of AB 32's context compel the conclusion that a presumption against preemption cannot apply here.

First, the presumption should not apply when the federal and state laws are working at *cross purposes*. This is the flipside to the rule that the "presumption against federal pre-emption … has special force when it appears … that the two governments are pursuing 'common purposes.'" *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666-67 (2003) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973)). As the United States points out, California has not identified a single instance in which the Supreme Court or a Court of Appeals has found a presumption against preemption in this context:

> But the State cites no case in which the Supreme Court or any court of appeals has ever invoked a presumption against preemption in analyzing the application of such state statutes to the United States. Decisions on which the State seeks to rely (Pet. 12-13) are cases in which both the federal and state governments regulated private entities.

United States' Opp'n to Pet. for Rehearing, at 10. Indeed, even in the "special-force" context of the two governments' *working together*, the special force arises only if "the Secretary has not decided to the contrary." *Walsh*, 538 U.S. at 666. To be sure, the presumption against preemption can tolerate "a nonfederal obstacle" that does not rise to the level of "possible conflicts with the federal program," *Id.* at 667 (citing *Dublino*, 413 U.S. at 422-23), but the presumption against preemption does not and

cannot apply if the two governments are affirmatively at odds. *Id.* at 666. "[I]f there is a conflict of substance as to eligibility provisions, the federal law of course must control." *Dublino*, 413 U.S. at 423 n.29. This Court should reject a presumption against preemption for state laws that purport to regulate federal action in conflict with federal laws and policy.

When a state sets out to regulate federal action, none of the arguments for a presumption applies. The core concern underlying the presumption is to reject the view that "Congress [would] cavalierly pre-empt" state law, especially in areas of traditional regulation. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). For example, *Santa Fe Elevator,* 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under the new federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* That concern goes out the window when a state intentionally acts to restrict longstanding federal action.

Second, even if this Court contemplates a presumption against preemption in the scenario where a state seeks to regulate federal action, the Court should reject applying that new presumption in the immigration context. Because Congress has plenary power to regulate immigration, U.S. CONST. art. I, §8, cl. 4, the "[p]ower to

regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica,* 424 U.S. 351, 354 (1976). Because of that exclusivity, no state lawfully could have the requisite presence in the field for the presumption against preemption to apply.

II. AB 32 IS CONFLICT PREEMPTED.

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Although Congress has plenary power over immigration, U.S. CONST. art. I, §8, cl. 4; *DeCanas,* 424 U.S. at 354, not every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power," *id.* at 355. As relevant here, state law is conflict-preempted when "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 406 (2012) (interior quotation marks omitted). Here, AB 32 conflicts with the federal laws giving federal immigration authorities discretion over immigrant detention. AB 32 is preempted on that basis.

In addition to considering the argument that GEO and the United States raise in support of the conflict that AB 32 imposes on the INA and the federal regulations,[4]

[4] Given that California does not and cannot challenge the delegated authority that underlies the relevant federal regulations, those regulations are every bit as much "federal law" as acts of Congress. *New York v. FERC*, 535 U.S. 1, 17-18 (2002).

this Court should also consider that California cannot rely on AB 32 to accomplish indirectly what the Supremacy Clause and the United States' plenary authority over immigration would prohibit California from accomplishing directly. This principle answers California's claim merely to regulate health and safety neutrally.[5]

Both the Supreme Court and this Court have recognized that states cannot "do indirectly what they could not do directly." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). "We are skeptical that [a federal law] would allow the State to do directly what it cannot do indirectly." *BNSF Ry. Co. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 770 (9th Cir. 2018). While both *International Paper* and *BNSF Railway* are conflict-preemption cases, the principal comes up in other contexts as well.

> It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be … indirectly denied or manipulated out of existence.

Harman v. Forssenius, 380 U.S. 528, 540 (1965) (citations and interior quotations omitted, alteration in original); *Frost v. R.R. Comm'n of State of California,* 271 U.S. 583, 593-94 (1926); *cf. Rust v. Sullivan,* 500 U.S. 173, 175 (1991) (unconstitutional

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[5] Of course, because AB 32 also violates the intergovernmental immunity doctrine by discriminating against the federal government, *see* Section III, *infra*, this Court should reject the premise that AB 32 is merely a neutral health-and-safety regulation.

to "condition the receipt of a benefit … on the relinquishment of a constitutional right"). If the Supremacy Clause is to mean anything, states may not rely on indirection to nullify federal law.

III. AB 32 VIOLATES INTERGOVERNMENTAL IMMUNITY.

In addition to standing as "an obstacle to the full purposes and objectives of Congress," *Arizona*, 567 U.S. at 410, AB 32 also impermissibly discriminates against federal interests. *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) ("state … law is invalid … if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals) (internal quotations omitted); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 842-43 (9th Cir. 2014) ("state … law discriminates against the federal government if it treats someone else better than it treats the government") (internal quotations omitted); *United States v. County of Fresno*, 429 U.S. 452, 462-64 (1977) (burdens imposed on federal interests must be imposed equally on similarly situated constituents). By giving itself—but not federal facilities—exemptions from AB 32's restrictions, AB 32 impermissibly discriminates against federal interests.

More than 100 years ago, the Supreme Court prefigured—and rejected—state legislation like AB 32 in another case from California:

> The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court

> may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. *No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it*.

In re Neagle, 135 U.S. 1, 61-62 (1890) (interior quotation marks omitted, emphasis added). Nothing has changed in the ensuing 100-plus years to allow California to obstruct authorized federal officers from accomplishing their federal mission.

Significantly, without federal officers—including contractors—the Executive Branch could not function:

> The federal government relies on its officers to implement federal law and policy; federal officers' authority to carry out federal objectives is inherent in the federal government itself, and necessary to its proper functioning.

Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2236 (2003) (discussing *Neagle*). This Court has the constitutional obligation to recognize that

California lacks the constitutional authority to regulate federal activities through discriminatory laws.

CONCLUSION

For the foregoing reasons and those argued by Appellants and their other *amici*, the *en banc* Court should reverse the denial of the preliminary injunction as applied to GEO, and grant the preliminary injunction.

Dated: May 31, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(a)(5) and Circuit Rule 299-2(c)(3) because:

This brief contains 2,757 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, I electronically submitted the foregoing motion for leave to file—together with the accompanying *amicus curiae* brief—to the Clerk via the Court's CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users. In addition, because one counsel shows as not having ECF service, I also served one copy of the motion and accompanying brief on the following counsel via U.S. Priority Mail, postage pre-paid:

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