IMMIGRATION LAW — IMMIGRATION DETENTION — NINTH CIRCUIT STRIKES DOWN AS PREEMPTED CALIFORNIA LAW PROHIBITING PRIVATE IMMIGRATION DETENTION WITHIN THE STATE. — *GEO Group, Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021).

Over the past thirty-five years, the United States has developed the world's largest immigration detention machine.[1] These detention facilities are notorious for their horrific conditions, which have flashed across TV screens around the country.[2] While these inhumane conditions span all types of immigration detention facilities, they are particularly egregious in those that are privately run.[3] California sought to address this issue by passing AB 32,[4] which prohibits the use of private detention facilities in the state.[5] Recently, however, in *GEO Group, Inc. v. Newsom*,[6] the Ninth Circuit held that AB 32, as applied to federal immigration facilities, was obstacle preempted and violated the doctrine of intergovernmental immunity.[7] The Ninth Circuit's preemption analysis in this case disregarded the state's interests in protecting the health and safety of immigrants and was inconsistent with the Supreme Court's most recent immigration preemption decision. This method of analysis could lead to a one-way ratchet, placing more scrutiny on laws protecting the health and safety of immigrants than those imposing additional burdens on immigrants.

In 2019, the California legislature enacted AB 32, which implemented two amendments to the California Penal Code.[8] The first regulates the California Department of Corrections and Rehabilitation,

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[1] The first for-profit immigration detention facility opened in 1984. *See* Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody*," 48 U. MICH. J.L. REFORM 879, 899 (2015). The current machine spans over 200 facilities and costs billions of dollars each year. Emily Kassie, *Detained: How the United States Created the Largest Immigrant Detention System in the World*, MARSHALL PROJECT (Sept. 24, 2019, 1:30 AM), https://www.themarshallproject.org/2019/09/24/detained [https://perma.cc/S84Z-V799]; *United States Immigration Detention Profile*, GLOB. DET. PROJECT, https://www.globaldetentionproject.org/countries/americas/united-states [https://perma.cc/93YX-FXLR]. In 2020, the United States detained 182,869 immigrants. *United States Immigration Detention Profile*, *supra*.

[2] *See, e.g.*, CBS Mornings, *Separated Undocumented Families Held in Cages at Texas Facility*, YOUTUBE, at 2:37 (June 18, 2018), https://www.youtube.com/watch?v=3qMO7j-EFl8&t=2m37s [https://perma.cc/TY9T-NJRA].

[3] *See* Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html [https://perma.cc/W5AT-FY8X]; *The Problem*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/the-problem [https://perma.cc/BJ65-P9WT]; Torrey, *supra* note 1, at 900–01.

[4] 2019 Cal. Stat. 93.

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

[6] 15 F.4th 919.

[7] *Id.* at 924.

[8] 2019 Cal. Stat. 93.

stating that "the department 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."[9] The second prohibits any person or entity from operating a private "detention facility" in California pursuant to a contract with a governmental entity.[10] It includes those contracting with state, local, or federal government entities, and applies to criminal and immigration detention.[11] One effect of the second provision is to prevent the federal government from using private immigration detention centers in California.[12]

The law was challenged by the United States and the GEO Group, a private prison company operating two immigration and two criminal detention centers in California.[13] The challengers sought a preliminary injunction respecting U.S. Immigration and Customs Enforcement (ICE), U.S. Marshals Service (USMS), and Bureau of Prisons (BOP) facilities.[14] They argued that AB 32 was preempted because it undermined the congressionally authorized operations of federal agencies and also violated intergovernmental immunity by directly regulating and discriminating against the federal government.[15]

The District Court for the Southern District of California granted in part and denied in part the plaintiffs' motion for a preliminary injunction.[16] It held the law was preempted as to USMS contracts because federal criminal law explicitly authorized private USMS detention facilities.[17] But it dismissed all other claims.[18] Beginning its preemption analysis, the district court noted that a state law is invalid when "it stands as an obstacle to the accomplishment and execution of the full

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[9] CAL. PENAL CODE § 5003.1(a) (West 2022). This section contains some exceptions, allowing for the maintenance of existing contracts without the option to renew, as well as permitting the renewal of current contracts "to comply with the requirements of any court-ordered population cap." *Id.* § 5003.1(b), (e).

[10] *Id.* §§ 9500–9501. "Detention facility" is defined as "any facility in which persons are incarcerated or otherwise involuntarily confined for the purposes of execution of a punitive sentence imposed by a court or detention pending a trial, hearing, or other administrative proceeding." *Id.* § 9500. This section allows private detention facilities to complete their contracts without an option to renew and permits renewals to abide by court-ordered population caps. *Id.* § 9505.

[11] Appellees' Answering Brief at 5–6, *GEO Grp.*, 15 F.4th 919 (9th Cir. 2021) (No. 20-56172) (citing CAL. PENAL CODE §§ 5003.1, 9500 (West 2020)).

[12] *See id.*

[13] Complaint at 1, 12, 18, GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905 (S.D. Cal. 2020) (No. 19-CV-2491) [hereinafter GEO Complaint]; Complaint at 2, United States v. Newsom, 493 F. Supp. 3d 905 (S.D. Cal. 2020) (No. 20-CV-154) [hereinafter U.S. Complaint].

[14] GEO Complaint, *supra* note 13, at 30; U.S. Complaint, *supra* note 13, at 9–12, 15.

[15] GEO Complaint, *supra* note 13, at 25–28; U.S. Complaint, *supra* note 13, at 14–15.

[16] *GEO Grp.*, 493 F. Supp. 3d at 963.

[17] *Id.* at 939.

[18] *Id.* at 959–60.

purposes and objectives of Congress."[19] The court also noted that it must apply a presumption against preemption when states regulate in traditional areas of state power.[20] The district court found that this presumption applied because AB 32 primarily regulates health and safety, which are concerns of the states.[21] The court then looked to whether Congress had expressed a "clear and manifest purpose" sufficient to override this presumption.[22] Analyzing the federal laws authorizing immigration detention,[23] the court found that they did not reveal sufficiently "clear and manifest" congressional intent to use private detention facilities, as they do not explicitly discuss private detention, nor do they require private detention to carry out their objectives.[24] The plaintiffs appealed the district court's decision as to ICE facilities to the Ninth Circuit.

The Ninth Circuit reversed the district court's denial of a preliminary injunction and remanded.[25] Writing for the panel, Judge Lee[26] held that AB 32 was obstacle preempted and violated the doctrine of intergovernmental immunity.[27] The court first held that the presumption against preemption did not apply, because detention of immigrants is an area of "exclusive federal regulation," not of state police powers.[28] The panel then looked to federal immigration law, emphasizing statutory language allowing the Department of Homeland Security (DHS) to

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[19] *Id.* at 936 (quoting CTIA — The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 849 (9th Cir. 2019)). Obstacle preemption is one of two types of conflict preemption. The first type occurs when compliance with both state and federal law is impossible. The second, known as obstacle preemption, occurs when a state law would present an obstacle that frustrates the accomplishment of congressional intent. *Id.* The parties' arguments and the district court's decision focused solely on obstacle preemption. *Id.* at 937–39.

[20] *Id.* at 934.

[21] *Id.* at 934–35.

[22] *Id.* at 936 (quoting United States v. California, 921 F.3d 865, 885–86 (9th Cir. 2019)).

[23] The court focused on 8 U.S.C. § 1231(g), which states that "[t]he Attorney General shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." *Id.* at 937 (quoting 8 U.S.C. § 1231(g)). The court also examined 6 U.S.C. § 112(b)(2), which allows the Department of Homeland Security (DHS) to "make contracts, grants, and cooperative agreements, and to enter into agreements with other executive agencies, as may be necessary and proper to carry out the Secretary's responsibilities," and 28 U.S.C. § 530C(a)(4), which states that DHS's activities may "be carried out through any means, including . . . through contracts, grants, or cooperative agreements with non-Federal parties." *Id.* at 938 (quoting 6 U.S.C. § 112(b)(2); 28 U.S.C. § 530C(a)(4)).

[24] *Id.* at 937–38.

[25] *Id.* at 940.

[26] Judge Bade joined the opinion.

[27] *GEO Grp.*, 15 F.4th at 927, 937. As a preliminary matter, the court held that at minimum the United States had standing because AB 32 would deprive it of the option of contracting with the GEO Group, even if there was no guarantee the United States planned to renew its contracts. *Id.* at 926–27. The Ninth Circuit also rejected the appellees' claim that federal immigration statutes do not even permit ICE to contract with private immigration detention facilities as inconsistent with the text and legislative history of federal immigration law. *Id.* at 930–35.

[28] *Id.* at 927.

arrange for "appropriate" detention facilities for those in removal proceedings and to enter into contracts to the extent "necessary and proper" to carry out the agency's responsibilities.[29] The court concluded that this broad language revealed Congress's "clear and manifest" intent to allow DHS vast discretion in arranging immigration detention.[30] AB 32 was therefore preempted because it cabined this discretion.[31] The court held that the statute was also barred by the doctrine of intergovernmental immunity because it facially discriminated against the federal government.[32]

Then-Judge Murguia dissented, arguing that AB 32 was not obstacle preempted and did not violate intergovernmental immunity.[33] She first noted that the presumption against preemption may still apply even when a statute affects immigration.[34] She argued that the majority was primarily concerned with the law's potential effects on immigration detention and the "nagging suspicion that California was targeting the federal government's immigration detention facilities, . . . neither of [which] is relevant to the presumption against preemption."[35] She then argued that Congress had not expressed clear and manifest intent to preempt AB 32, as federal immigration statutes do not mention private detention.[36] She also challenged the majority's argument that the statute conflicts with Congress's intent to provide wide discretion to DHS, as this reasoning has only ever applied when federal law created a comprehensive scheme with which a state interfered.[37]

The majority's analysis in *GEO Group* failed to take seriously the state's interests in protecting the health and safety of immigrants within its borders. This disregard for the state's interests led the court to conduct a cursory preemption analysis, which relied heavily on the federal

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[29] *Id.* at 935 (quoting 8 U.S.C. § 1231(g); 6 U.S.C. § 112(b)(2)).

[30] *Id.* (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

[31] *Id.* at 936. The court stated that ICE currently relies entirely on private immigration detention centers in California due to a need for flexibility in detention at the border. *Id.* This claim is not entirely true. ICE currently has contracts with two state-run jails in California, although they use those contracts to house only a small number of immigrants. *See Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, https://www.freedomforimmigrants.org/map [https://perma.cc/WKY3-MKSX].

[32] *GEO Grp.*, 15 F.4th at 937. The court held that AB 32 discriminated against the federal government by allowing the state to renew contracts with private detention contractors in order to comply with court-ordered population caps, while the federal government is not subject to any such caps. *Id.* at 937–38.

[33] *Id.* at 940–52 (Murguia, J., dissenting).

[34] *Id.* at 943. Judge Murguia added that the majority's framing of AB 32 as a law regulating immigration is particularly strange given that this litigation began as a challenge to AB 32 as preempted by both federal immigration and criminal laws. *Id.* at 943–44.

[35] *Id.* at 944.

[36] *Id.* at 945–46.

[37] *Id.* at 946 (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377–79 (2000); Gartrell Constr. Inc. v. Aubry, 940 F.2d 437, 439 (9th Cir. 1991)).

government's plenary power and little other evidence. This analysis is so sweeping that its logical conclusion would be that all state laws having implications for federal immigration law are preempted, and it is inconsistent with the Supreme Court's most recent immigration preemption decision. This method of analysis risks creating a one-way ratchet, in which laws seeking to protect immigrants are more likely to be preempted than those seeking to criminalize immigrants.

The majority opinion did not take seriously the state's interests in protecting the health and safety of immigrants within its borders. In discussing the presumption against preemption, the court used language that suggests a suspicion of the state's motives, writing that California "has placed federal immigration policy within its crosshairs."[38] At no point did the court acknowledge that the state may have real reasons to be concerned about the health and safety of people incarcerated in private detention facilities.[39] In fact, the court claimed that the state had used the "mantra-like invocation of 'state police powers'" as a "shield[]" against preemption analysis.[40] The court did not appear to acknowledge that the purpose of the bill was to protect immigrants from documented health and safety concerns in private detention centers.[41] This framing of the state's interests led the court to conclude that the presumption against preemption did not apply.[42]

Because the majority minimized the state's interests, it conducted a cursory preemption analysis, relying heavily on the federal government's

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[38] *Id.* at 928 (majority opinion). The majority attempted to justify this suspicion by noting that the statute "purposefully" includes the federal government. *Id.* However, the court did not acknowledge that the choice to regulate all governmental entities could have been in recognition of the fact that people within the state face these health and safety risks at the hands of private prison companies contracting with all different levels of government. The majority also claimed that the statute favors the state because "the federal government does not enjoy any exceptions from AB 32." *Id.* However, the majority did not consider the fact that the state government must grapple with materially different circumstances — it is currently subject to court-ordered population caps, while the federal government is not. *See id.* at 949 (Murguia, J., dissenting).

[39] In fact, the court appeared to express some doubt that such an issue exists, or that the state is genuinely concerned about these dangers, stating, "[*i*]*f* federal detainees *might* face health and safety risks in private detention centers, then state detainees presumably endure the same dangers as well." *Id.* at 928 (majority opinion) (emphases added). This language is particularly remarkable given the well-documented dangers that exist in private detention facilities. *See, e.g.*, OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS (2016), https://oig.justice.gov/reports/2016/e1606.pdf [https://perma.cc/LD3E-5AEE].

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

[41] *See, e.g.*, *Hearing on A.B. 32 Before the S. Comm. on the Judiciary*, S. 2019–2020, Reg. Sess. 8 (Cal. 2019) ("AB 32 protects Californians from the serious harms to their safety and welfare in for profit detention centers . . . by abolishing for-profit run prison facilities in California."); *id.* ("The [California State] Auditor wrote about serious health and safety problems at private for-profit detention facilities and about suicide attempts, inadequate dental care, and cursory medical assessments.").

[42] *GEO Grp.*, 15 F.4th at 927–30.

plenary power and marshaling little additional support.[43] In finding clear and manifest intent, the panel repeatedly emphasized that the federal government has broad authority over immigration.[44] While the majority also discussed the words "appropriate"[45] and "necessary and proper,"[46] these words added little to the analysis.[47] Even if these words established congressional intent, they would not narrow the broad implications of the Ninth Circuit's analysis. The word "appropriate" appears over 100 times in the Immigration and Nationality Act alone,[48] and the words "necessary and proper" in 6 U.S.C. § 112(b)(2) apply to all of DHS's contracts.[49] Almost any immigration issue will involve statutory language using some of these terms, and the majority conducted no other analysis to support its conclusion.[50] The fact that these few words, combined with the plenary power, produce preemption suggests that essentially all state statutes that have implications for immigration are preempted.

The sparsity of this analysis is particularly striking in comparison to the methodology used in the Supreme Court's most recent immigration

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[43] When the presumption against preemption applies, the court must find that Congress expressed a "clear and manifest purpose" to preempt state law. *Id.* at 927 (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)) (explaining that, under the presumption against preemption, "courts should assume that federal law does not supersede the historic police powers of the states" absent clear and manifest intent to do so). While the majority still conducted the clear and manifest intent analysis here, *see id.* at 935, its finding that the presumption against preemption did not apply may have lowered the bar to a finding of preemption.

[44] *See id.* at 935 ("We are left with these simple facts: the Secretary may arrange for 'appropriate' detention facilities; he or she has the power to contract out detention operations 'as necessary and proper'; and *the federal government has sole authority over immigration*." (emphasis added) (citations omitted) (quoting 8 U.S.C. § 1231(g); 6 U.S.C § 112(b)(2))); *id.* ("AB 32 cannot stand because it conflicts with this federal power and discretion given to the Secretary *in an area that remains in the exclusive realm of the federal government*." (emphasis added)).

[45] *Id.* (quoting 8 U.S.C. § 1231(g)).

[46] *Id.* (quoting 6 U.S.C. § 112(b)(2)).

[47] The panel's reliance on the plenary power became clear when the majority discussed the dissent. The dissent argued that Congress did not express clear and manifest intent to utilize private immigration detention because, unlike the USMS statutes, the immigration detention statutes do not explicitly mention private detention. *Id.* at 945–46 (Murguia, J., dissenting). The majority rejected this argument because, unlike the USMS statutes, the immigration statutes were drafted under the backdrop of the plenary power. *Id.* at 930 n.4 (majority opinion).

[48] 8 U.S.C. §§ 1101–1178.

[49] *See* 6 U.S.C. § 112(b)(2).

[50] The majority opinion did conduct a more extensive analysis in the portion of its opinion addressing whether ICE has the authority to contract with private detention companies in the first place. *See GEO Grp.*, 15 F.4th at 930–35. However, it did not engage in a similarly rigorous analysis when it analyzed whether Congress expressed clear and manifest intent that DHS use private immigration detention. *See id.* at 935–37. These are two different questions, and the analysis of one does not translate to an analysis of the other. It could very well be that ICE is permitted to use private immigration detention, but that Congress had no clear and manifest intent that ICE use such methods of detention.

preemption decision. In *Arizona v. United States*,[51] the Court upheld a provision of SB 1070, an Arizona law placing new requirements on local law enforcement to track down undocumented immigrants.[52] In determining obstacle preemption, the Court engaged in a rigorous statutory analysis involving thorough investigation of federal statutory structure and legislative history. The Court found obstacle preempted section 5(C), which made it a state misdemeanor for an undocumented immigrant to work or attempt to work in the state, because Congress had considered such a law and rejected it.[53] The Court also found preempted section 6, which gave state officers the power to arrest anyone without a warrant who they have probable cause to believe "has committed any public offense that makes [him] removable from the United States."[54] The Court found that the provision would give state officials more power to arrest undocumented immigrants than federal law gives trained federal immigration enforcement.[55] Finally, the Court held that section 2(B), which required state officers to "make a 'reasonable attempt . . . to determine the immigration status' of any person" they stop or detain if they have reasonable suspicion that the person "is unlawfully present in the United States," was not preempted.[56]

The majority's preemption analysis in *GEO Group* bears little resemblance to the Court's methodology in *Arizona*. Even when the Court in *Arizona* held that provisions of SB 1070 were preempted, it did so by engaging in a rigorous analysis of the federal statutory structure and legislative intent. This analysis is consistent with the idea that "the purpose of Congress is the ultimate touchstone in every preemption case."[57] The Ninth Circuit, by contrast, rested its analysis on its acontextual reading of two phrases, as well as the general plenary power.[58] It referenced no legislative history, nor did it examine the larger statutory structure. While the Court's decision in *Arizona* is certainly not friendly to state laws involving immigration,[59] the Ninth Circuit's decision is even

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[51] 567 U.S. 387 (2012).

[52] *Id.* at 411, 416.

[53] *See id.* at 403–07.

[54] *Id.* at 407, 410 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (alteration in original)).

[55] *Id.* at 408.

[56] *Id.* at 411, 416 (quoting ARIZ. REV. STAT. ANN. § 11-1051(B)). The Court found that this law was consistent with the statutory scheme that Congress had enacted, which "encourage[s] the sharing of information about possible immigration violations." *Id.* at 412. The Court acknowledged the concern that this provision would permit prolonged detention but explained that the provision did not have to be interpreted in this way. *Id.* at 413–15.

[57] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

[58] *See GEO Grp.*, 15 F.4th at 935.

[59] *Arizona* has been characterized as a high-water mark in the development of immigration preemption doctrine, suggesting that the Court will strike down increasing numbers of state immigration laws as preempted going forward. *See, e.g.*, Lucas Guttentag, *Immigration Preemption and*

less so, suggesting that any law with implications for immigration is preempted.

The court's analysis in *GEO Group* runs the risk of creating a one-way ratchet in which state laws seeking to protect the health and safety of immigrants face higher burdens and therefore a higher likelihood of preemption than laws seeking to criminalize immigrants. The court's skepticism of the state's interests in protecting the health and safety of immigrants led to a sparse analysis that was quick to find preemption. If courts continue to follow this pattern, immigrants will face very real, negative consequences. In this case, California cannot fully eliminate private detention within its borders, despite legitimate concerns about health and safety. Unlike the federal government, which must balance cost-saving goals with other public policy concerns, private prisons, like other for-profit businesses, are incentivized to prioritize profit above all else.[60] This profit motive leads them to cut costs in ways that sacrifice health and safety. Private detention centers often have "inadequately trained guards, low guard to detainee ratios, food shortages, and poor sanitation," and have been accused of providing inadequate medical attention and inhumane living quarters.[61] Certain private prisons are also notorious for putting transgender detainees at risk of assault and failing to sufficiently investigate sexual assault complaints.[62] California recognized these dangers and sought to address them through AB 32.[63] The Ninth Circuit, however, has tied the state's hands. In doing so, this case will have real effects on the lives of thousands of people in California.[64]

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the Limits of State Power: Reflections on Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 2 (2013) ("On balance, the *Arizona* decision is a stunning setback for claims advanced by supporters of S.B. 1070 and similar state laws."); Kit Johnson, Debate, *Immigration Preemption After* United States v. Arizona, 161 U. PA. L. REV. ONLINE 100, 102 (2012) ("[W]hile the Court upheld one part of the Arizona law, the Court also affirmed the continuing viability of immigration preemption.").

60 A founder of Corrections Corporation of America, a for-profit prison company, famously stated that the company was founded on the belief that selling prisons was "just like . . . selling cars, or real estate, or hamburgers." Torrey, *supra* note 1, at 899 (quoting Matt Stroud, *"Just Like Selling Hamburgers": 30 Years of Private Prisons in the U.S.*, FORBES (June 21, 2013, 12:02 PM), http://www.forbes.com/sites/mattstroud/2013/06/21/just-like-selling-hamburgers-30-years-of-private-prisons-in-the-u-s [https://perma.cc/39XJ-UCQ2]).

61 *Id.* at 900–01.

62 *See* Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, CTR. FOR AM. PROGRESS (Dec. 18, 2015), https://www.americanprogress.org/article/how-for-profit-companies-are-driving-immigration-detention-policies [https://perma.cc/H9EG-2D43].

63 In advocating for AB 32, the bill's author stated: "We've all seen the current humanitarian crisis play out along the southern border. No human being deserves to be held in the horrific conditions we've been seeing in these for-profit, private facilities." *Hearing on A.B. 32 Before the S. Comm. on the Judiciary*, S. 2019–2020, Reg. Sess. 8 (Cal. 2019).

64 With over 1,600 detained noncitizens, California is the state with the fifth-largest ICE detention population. *Immigration Detention Quick Facts*, SYRACUSE UNIV. TRAC, https://trac.syr.edu/immigration/quickfacts [https://perma.cc/78NV-2YCC].