FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE GEO GROUP, INC., *Plaintiff-Appellant*, and UNITED STATES OF AMERICA, *Plaintiff*, v. GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California, *Defendants-Appellees*, and STATE OF CALIFORNIA, *Defendant.*	No. 20-56172 D.C. Nos. 3:19-cv-02491-JLS-WVG 3:20-cv-00154-JLS-WVG

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, and THE GEO GROUP, INC., *Plaintiff*, v. GAVIN NEWSOM, in his official capacity as Governor of the State of California; ROB BONTA, in his official capacity as Attorney General of the State of California; State of California, *Defendants-Appellees.*	No. 20-56304 D.C. Nos. 3:19-cv-02491-JLS-WVG 3:20-cv-00154-JLS-WVG OPINION

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted En Banc June 21, 2022
Pasadena, California

Filed September 26, 2022

Before: Mary H. Murguia, Chief Judge, and Johnnie B. Rawlinson, Milan D. Smith, Jr., Sandra S. Ikuta, Jacqueline H. Nguyen, Paul J. Watford, John B. Owens, Ryan D. Nelson, Kenneth K. Lee, Danielle J. Forrest and Jennifer Sung, Circuit Judges.

Opinion by Judge Nguyen;
Dissent by Judge Murguia

SUMMARY*

Preemption / Intergovernmental Immunity / Supremacy Clause

The en banc court vacated the district court's denial of the United States' and The Geo Group, Inc.'s motion for preliminary injunctive relief, and held that California enacted Assembly Bill (AB) 32, which states that a "person shall not operate a private detention facility within the state," would give California a virtual power of review over Immigration and Customs Enforcement (ICE)'s detention decisions, in violation of the Supremacy Clause.

ICE has decided to rely almost exclusively on privately owned and operated facilities in California. Two such facilities are run by appellant The Geo Group, Inc. AB 32 would override the federal government's decision, pursuant to discretion conferred by Congress, to use private contractors to run its immigration detention facilities. The en banc court held that whether analyzed under intergovernmental immunity or preemption, California cannot exert this level of control over the federal government's detention operations. The en banc court remanded for further proceedings.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

California argued that appellants' claims were not justiciable. California contends that any future injury is speculative because ICE may choose not to extend its contracts, and that any such injury is not imminent because it would not occur until at least 2024. The en banc court held that appellants' future injuries are not conjectural or hypothetical. Virtually all of ICE's detention capacity in California is in privately owned and operated facilities. ICE expects profound disruptions to its California operations from AB 32 because it plans to continue relying on private facilities. Because ICE's plans are in the near future and would plainly violate AB 32, appellants' injuries are also sufficiently imminent. The en banc court concluded that appellants' claims are justiciable.

The en banc court held that AB 32 would breach the core promise of the Supremacy Clause. To comply with California law, ICE would have to cease its ongoing immigration detention operations in California and adopt an entirely new approach in the state. This foundational limit on state power cannot be squared with the dramatic changes that AB 32 would require ICE to make.

The en banc court also examined how AB 32 fits within modern Supremacy Clause cases, which discuss two separate doctrines: intergovernmental immunity and preemption. California argued that intergovernmental immunity never applies to a generally applicable state regulation of a federal contractor, even when the regulation would control federal operations. California also urged the court to apply the presumption against preemption and conclude that Congress did not speak clearly enough about privately run immigration detention facilities for AB 32 to be preempted. The en banc court held that California's argument failed at both steps. The en banc court was not

persuaded that AB 32 cannot implicate intergovernmental immunity, even assuming it was drafted as a generally applicable regulation of federal contractors. The en banc court likewise disagreed with California's contention that AB 32 was not preempted. While the court has applied the presumption against preemption when state regulations have incidental effects in an area of federal interest, the court has never applied the presumption to a state law that would control federal operations. The en banc court highly doubted that the presumption against preemption applied in this case. Without the presumption against preemption, there was little doubt that AB 32 would be preempted. The en banc court held that AB 32 is preempted.

The en banc court held that appellants are likely to prevail on their claim that AB 32 violates the Supremacy Clause as to ICE-contracted facilities. The panel remanded for the district court to consider in the first instance the remaining preliminary injunction factors in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Chief Judge Murguia, joined by Judges Rawlinson and Sung, dissented. She would hold that AB 32 is valid under the intergovernmental immunity doctrine because it neither regulates nor discriminates against the federal government. She wrote that the majority erred by extending intergovernmental immunity to nondiscriminatory, indirect regulation of the government. In addition, AB 32 is not preempted. Because AB 32 is entitled to a presumption against preemption, and Congress has not expressed a clear and manifest intent to overcome that presumption, the law is not preempted. She would hold that the majority erred by failing to apply the presumption against preemption. She

would affirm the district court's order denying preliminary injunctive relief.

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OPINION

NGUYEN, Circuit Judge, with whom IKUTA, OWENS, R. NELSON, LEE, and FORREST, Circuit Judges, join in full, and with whom M. SMITH and WATFORD, Circuit Judges, join except as to section V.B.2:

At the direction of Congress, Immigration and Customs Enforcement (ICE) carries out extensive detention operations, a substantial portion of which takes place in California. Due to significant fluctuations in the population of noncitizens who are detained, and other challenges unique to California, ICE relies almost exclusively on privately operated detention facilities in the state to maintain flexibility. But in 2019, California enacted Assembly Bill (AB) 32, which states that "a person shall not operate a private detention facility within the state." Cal. Penal Code § 9501. AB 32 would prevent ICE's contractors from continuing to run detention facilities, requiring ICE to entirely transform its approach to detention in the state or else abandon its California facilities.

The Supremacy Clause "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022). Private contractors do not stand on the same footing as the federal government, so states can impose many laws on federal contractors that they could not apply to the federal government itself. For example, although a state can tax a federal contractor, it cannot tax the federal government itself. *See United States v. New Mexico*, 455 U.S. 720, 733–34 (1982). But any state regulation that purports to override the federal government's decisions about who will carry out federal functions runs afoul of the Supremacy Clause. "[A state] may not deny to those failing to meet its own qualifications the right to perform the

functions within the scope of the federal authority." *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963).

AB 32 would override the federal government's decision, pursuant to discretion conferred by Congress, to use private contractors to run its immigration detention facilities. It would give California a "virtual power of review" over ICE's detention decisions, *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956) (per curiam), and allow the "discretion of the federal officers [to] be exercised . . . only if the [state] approves." *Pub. Utils. Comm'n*, 355 U.S. 534, 543 (1958). Whether analyzed under intergovernmental immunity or preemption, California cannot exert this level of control over the federal government's detention operations. AB 32 therefore violates the Supremacy Clause.

Accordingly, we vacate the district court's denial of preliminary injunctive relief and remand for further proceedings.

I

A

Congress has directed federal officials to detain noncitizens in various circumstances during immigration proceedings. *See* 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A), 1226(a), (c)(1), 1231(a)(6). The Immigration and Nationality Act provides that the Secretary of the 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); *see also* 6 U.S.C. § 557. Section 1231(g)(1) gives both "responsibility" and "broad discretion" to the Secretary "to choose the place of detention for deportable aliens." *Comm.*

of Cent. Am. Refugees v. INS, 795 F.2d 1434, 1440 (9th Cir.), *amended by* 807 F.2d 769 (9th Cir. 1986).

The Secretary also has general administrative powers to contract with private parties. The Secretary has "authority to make contracts . . . as may be necessary and proper to carry out the Secretary's responsibilities." 6 U.S.C. § 112(b)(2). Pursuant to federal procurement regulations, the Secretary has "authority and responsibility to contract for authorized supplies and services," and the Secretary "may . . . delegate broad authority to manage the agency's contracting functions to heads of such contracting activities." 48 C.F.R. § 1.601(a). ICE, a component of DHS, carries out immigration detention. As one option, ICE officials "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.

A few practical and legal constraints inform ICE's detention decisions. Congress has expressed that the Secretary should favor the use of existing facilities for immigration detention, whether through purchase or lease. 8 U.S.C. § 1231(g)(1)–(2). And there are "significant fluctuations in the number and location" of detained individuals, requiring ICE to "maintain flexibility."

For these reasons, ICE does not build or operate its own detention facilities. Instead, ICE contracts out its detention responsibilities to (1) private contractors, who run facilities owned either by the contractor or the federal government, and (2) local, state, or other federal agencies.

In California, ICE faces a further obstacle: a California statute preceding AB 32 prohibits local governments from entering into new agreements or expanding existing

agreements to house immigration detainees.[1] *See* Cal. Civ. Code § 1670.9(a)–(b); *see also* Cal. Gov't Code § 7310(a)–(b). Given all these constraints, ICE has decided to rely almost exclusively on privately owned and operated facilities in California. Two such facilities are run by appellant The GEO Group, Inc.

B

In 2019, California enacted AB 32. 2019 Cal. Legis. Serv. Ch. 739 (West). AB 32 provides that "a person shall not operate a private detention facility within the state." Cal. Penal Code § 9501. A "private detention facility" is defined as "a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity." Cal. Penal Code § 9500(b).

AB 32 also provides a "temporary safe harbor" to accommodate existing contracts. The safe harbor exempts facilities operating under a contract "in effect before January 1, 2020," but does not "include any extensions made to or authorized by that contract." Cal. Penal Code § 9505(a). ICE's contracts with private detention facilities in California run from December 2019 through December 2034, with two options to terminate at five-year intervals. Thus, if those options are interpreted as "extensions," AB 32 would make ICE's California operations unlawful as early as 2024.

From ICE's perspective, AB 32 leaves no good options. ICE owns just one facility in California, but that facility is occupied by another agency. Because California law prevents local governments from expanding or entering into

[1] Appellants do not challenge Cal. Civ. Code § 1670.9(a)–(b) here.

new agreements, *see* Cal. Civ. Code § 1670.9(a)–(b), ICE is limited to the 220 beds of actively used detention space under existing agreements with local governments. Constructing a new facility would not only be expensive and time-consuming, but it would also run up against Congress's preference to use existing facilities, *see* 8 U.S.C. § 1231(g)(1)–(2), and it would undercut ICE's desire for flexibility to meet fluctuating demand for detention capacity.

While ICE could house detainees outside California, that transition would not be easy. Securing new contract facilities in other states would take time—up to a year or even longer if construction is required. Regularly transferring detainees out-of-state would require a significant expansion of ICE's transportation capabilities. And the shift could cause crowding in out-of-state facilities.

AB 32 does not prohibit the federal government from leasing existing facilities owned by private companies. *See* Cal. Penal Code § 9503 (clarifying that AB 32 does not prohibit "any privately owned property or facility that is leased and operated by the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency"). But that would require private facility owners to agree to such an arrangement. It would also require ICE to develop the capacity to operate its own facilities, including hiring or reallocation of staff.

C

The United States and GEO filed suit to enjoin the enforcement of AB 32, and the district court consolidated the proceedings. The United States and GEO each moved for a preliminary injunction, and California moved to dismiss and for judgment on the pleadings. The district court dismissed the United States and GEO's claims as to ICE-contracted

facilities and denied the motion for a preliminary injunction as to those facilities because it found no likelihood of success on the merits.[2]

The United States and GEO timely appealed. A divided three-judge panel reversed. *See GEO Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021). The majority held that appellants were likely to succeed in their challenge to AB 32 under their theories of preemption and discrimination. *Id.* at 935–38. The majority declined to reach the direct regulation theory of intergovernmental immunity. *Id.* at 939. The dissent concluded that AB 32 was not preempted given the lack of clear congressional intent to overcome the presumption against preemption. *Id.* at 942–47. The dissent also disagreed with appellants' intergovernmental immunity arguments. *Id.* at 947–52.

We granted California's petition for rehearing en banc.

II

We have jurisdiction under 28 U.S.C. § 1292(a)(1). We review the denial of a preliminary injunction for abuse of discretion. *See Garcia v. Google, Inc.*, 786 F.3d 733, 739 (9th Cir. 2015) (en banc). "An abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation omitted).

To obtain a preliminary injunction, a plaintiff must establish (1) a likelihood of success on the merits, (2) a

[2] The district court granted preliminary injunctive relief as to facilities under contract with the United States Marshals Service. California has not appealed that decision.

likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities favors the plaintiff, and (4) that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24.

III

For the first time on appeal, California argues that appellants' claims are not justiciable. California contends that any future injury is speculative because ICE may choose not to extend its contracts, and that any such injury is not imminent because it would not occur until at least 2024.

Whether framed as standing or ripeness, California's injury arguments "boil down to the same question." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 n.5 (2014) (citation omitted). "An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent, not "conjectural" or "hypothetical."'" *Id.* at 158 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a '"substantial risk" that the harm will occur.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013)).

Appellants' future injuries are not conjectural or hypothetical. Virtually all of ICE's detention capacity in California is in privately owned and operated facilities. The United States represents that ICE intends to continue to rely on private detention facilities. ICE has explained that it contracts out detention responsibilities to give it flexibility in meeting fluctuating demand, and there is no reason to think demand will cease to fluctuate in the future. ICE

expects profound disruptions to its California operations from AB 32 precisely because it plans to continue relying on private facilities.[3] Because ICE's plans are in the near future and would plainly violate AB 32, appellants' injuries are also sufficiently imminent even though they will not occur for at least two years. *See Clapper*, 568 U.S. at 409 (explaining that the imminence requirement "ensure[s] that the alleged injury is not too speculative for Article III purposes" (quoting *Lujan*, 504 U.S. at 565 n.2)); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." (citation omitted)). Therefore, appellants' claims are justiciable.

IV

A

"[T]he Constitution guarantees 'the entire independence of the General Government from any control by the respective States.'" *Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (citation omitted). The Supremacy Clause states that "the Laws of the United States . . . shall be the supreme Law

[3] California argues that ICE's claimed future injury is speculative because a recent Executive Order directs the Attorney General "not [to] renew Department of Justice contracts with privately operated criminal detention facilities, as consistent with applicable law." *Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, 2021 WL 254321, at § 2 (Jan. 26, 2021). But the Executive Order mentions only "criminal detention facilities." *See id.* at §§ 1–2. It thus has little if any bearing on the federal government's intent with respect to immigration facilities.

of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted the Supremacy Clause "as prohibiting States from interfering with or controlling the operations of the Federal Government." *Washington*, 142 S. Ct. at 1984.

This foundational idea—embodied in the modern doctrine of intergovernmental immunity—traces its origin to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See id.* at 1983–84. *McCulloch* held that a Maryland tax that applied only to the Bank of the United States violated the Supremacy Clause. 17 U.S. at 436; *see United States v. Fresno County*, 429 U.S. 452, 457–60 (1977). As *McCulloch* explained, "[i]t is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." 17 U.S. at 427.

As part of its protection of federal operations from state control, the Supremacy Clause precludes states from dictating to the federal government who can perform federal work. A state may not "require[] qualifications" for those doing government work "in addition to those that the Government has pronounced sufficient." *Johnson v. Maryland*, 254 U.S. 51, 57 (1920). And "[a state] may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority." *Sperry*, 373 U.S. at 385.

In *Johnson v. Maryland*, for example, the Supreme Court held that a state could not enforce its law requiring driver's licenses against a federal postal employee acting within the scope of his duty. 254 U.S. at 57. The Court explained that a state cannot demand that federal employees "desist from

performance until they satisfy a state officer upon examination that they are competent." *Id.*

We recognize that a critical distinction exists between a state regulation like the one in *Johnson*, which was applied to a federal employee, and AB 32, which only applies to private contractors. The scope of a federal contractor's protection from state law under the Supremacy Clause is substantially narrower than that of a federal employee or other federal instrumentality. Federal contractors are not federal instrumentalities. *See New Mexico*, 455 U.S. at 736–38 (explaining that federal contractors are not "so assimilated by the Government as to become one of its constituent parts" (citation omitted)); *see also United States v. Muskegon Township*, 355 U.S. 484, 487 (1958) (observing that contractors have not been immune from taxes "even though they were closely supervised in performing these functions by the Government"). "The congruence of professional interests between . . . contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes." *New Mexico*, 455 U.S. at 740–41.

Absent federal law to the contrary, the Supremacy Clause therefore leaves considerable room for states to enforce their generally applicable laws against federal contractors. "[A] state law is [not] unconstitutional just because it indirectly increases costs for the Federal Government, so long as the law imposes those costs in a neutral, nondiscriminatory way." *Washington*, 142 S. Ct. at 1984. Thus, "a State can impose a nondiscriminatory tax on private parties with whom the United States . . . does business, even though the financial burden of the tax may fall on the United States." *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *see also United States v.*

City of Detroit, 355 U.S. 466, 469 (1958) (describing this point as "well settled"). Likewise, a state can impose a price control on federal suppliers, even if the federal government will ultimately pay more for goods. *See Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 270 (1943) ("[T]he government is affected only as the state's regulation may increase the price which the government must pay for milk.").[4]

But even when evaluating state regulations of federal contractors, courts distinguish regulations that merely increase the federal government's costs from those that would control its operations. That distinction goes back at least to *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). There, in considering the state's argument that the Bank of the United States was a private entity, *id.* at 748–49, the Court asked hypothetically what state laws could be applied to a contractor supplying goods to the military, *id.* at 867. The Court answered that "the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the Bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control." *Id.* Later cases have drawn this very distinction between "nondiscriminatory state taxes on activities of contractors," which "at most . . . increase the costs of the operation," and state laws that "place[] a prohibition on the Federal Government." *Pub. Utils. Comm'n*, 355 U.S.

[4] Although less well developed, the same principle would appear to hold for many generally applicable health and safety laws. For example, in *James Stewart & Co. v. Sadrakula*, the Supreme Court held that a state law that required planking of beams used as walkways on construction projects could be enforced against a federal construction contractor even though it "may slightly increase the cost of construction to the government." 309 U.S. 94, 104 (1940).

at 543–44; *see*, *e.g.*, *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014) (distinguishing "generally applicable state tax laws, which resulted in merely an increased economic burden," from state laws that "regulate what the federal contractors had to do or how they did it pursuant to their contracts.").[5]

The Supreme Court has already decided on which side of this distinction to place state laws that interfere with the federal government's contracting decisions, as AB 32 does. The Supreme Court has applied the principle of *Johnson*—that states may not control federal decisions about who is to carry out federal work—to private actors performing federal functions. *See*, *e.g.*, *Sperry*, 373 U.S. at 385 (holding that a state cannot enforce its attorney licensing requirements against individuals authorized to practice before the Patent Office). Crucially for this case, that includes regulations of federal contractors.

In *Leslie Miller, Inc. v. Arkansas*, the Supreme Court held that a state law requiring building contractors to obtain a state license could not be enforced under the Supremacy

[5] Even when upholding state regulations that merely increase the federal government's costs, the Supreme Court has specified that those regulations did not control or obstruct federal functions. *See New Mexico*, 455 U.S. at 735 n.11 ("It remains true, of course, that state taxes on contractors are constitutionally invalid if they . . . substantially interfere with [the Federal Government's] activities."); *Fresno County*, 429 U.S. at 464 ("There is no other respect in which the tax involved in this case threatens to obstruct or burden a federal function."); *City of Detroit v. Murray Corp. of Am.*, 355 U.S. 489, 495 (1958) ("There was no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property."); *Penn Dairies*, 318 U.S. at 270 (upholding a price control on federal suppliers because it "impose[d] no prohibition on the national government or its officers").

Clause against a contractor hired on a federal construction project. 352 U.S. at 189–90. Federal procurement law directed federal officials to choose a contractor who was "responsible" under several factors. *Id.* at 189. Although the state's licensing criteria were "similar" to the federal definition of responsibility, the Court reasoned that "[s]ubjecting a federal contractor to the [state] contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." *Id.* at 189–90. The Court quoted at length from *Johnson*, explaining that applying the state licensing requirement to a federal contractor would "require[] qualifications in addition to those that the Government has pronounced sufficient." *Id.* at 190 (quoting *Johnson*, 254 U.S. at 57); *see also Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437, 438–41 (9th Cir. 1991) (invalidating a similar state contractor licensing requirement as applied to federal contractors).

Likewise, in *Public Utilities Commission v. United States*, the Supreme Court held that it violated the Supremacy Clause for a state law to require common carriers to seek approval from a state agency for rates negotiated with the federal government to transport federal property. 355 U.S. at 544. The Court explained that the state law "place[d] a prohibition on the Federal Government" by allowing federal procurement officials to "exercise[]" the "discretion" to negotiate rates that federal law "entrust[ed]" to them "only if the Commission approves." *Id.* at 543–44. The Court identified a "conflict"—"as clear as any that the Supremacy Clause . . . of the Constitution was designed to resolve"—"between the federal policy of negotiated rates and the state policy of regulation of negotiated rates." *Id.* at 544; *see also United States v. Ga. Pub. Serv. Comm'n*,

371 U.S. 285, 292–93 (1963) (holding that a similar state regulation could not be applied to federal contractors).

Under *Leslie Miller* and *Public Utilities Commission*, when federal law gives discretion to a federal official to hire a contractor to perform federal work, a state cannot override the federal official's decision to do so. That is a level of control over federal operations that the Supremacy Clause does not tolerate. And while a state has greater power to apply neutral regulations to a federal contractor than a federal employee, interfering with the federal government's hiring decisions goes too far—regardless of whether the decision is to hire an employee or a private contractor.

B

Just as in these federal procurement cases, AB 32 would give California the power to control ICE's immigration detention operations in the state by preventing ICE from hiring the personnel of its choice. Given the fluctuating demand, Congress's preference for existing facilities, *see* 8 U.S.C. § 1231(g)(1)–(2), and California's limits on agreements with local governments, *see* Cal. Civ. Code § 1670.9(a)–(b), ICE has determined that privately run facilities are the most "appropriate" for California. 8 U.S.C. § 1231(g)(1).[6] AB 32 would take away that choice. AB 32

[6] We reject the argument by amici National Immigrant Justice Center and ACLU that no statutory authority exists for ICE to house detainees in private facilities. Section 1231(g)(1) empowers the Secretary to "arrange for appropriate places of detention," and that general grant plainly encompasses the use of private detention facilities. No provision limits that broad authority. That 8 U.S.C. § 1103(a)(11) authorizes agreements with state and local governments does not imply that Congress intended to exclude agreements with private detention operators given the "expansive phrasing" of § 1231(g)(1) and the

would instead give California a "virtual power of review over the federal determination" of appropriate places of detention, *Leslie Miller*, 352 U.S. at 190, and would effectively "require[] qualifications in addition to those that the Government has pronounced sufficient," *id.* (quoting *Johnson*, 254 U.S. at 57).

On a practical level, AB 32 cannot be reconciled with the holding of *Leslie Miller* that the Supremacy Clause prevents a state from enforcing its licensing requirements against federal contractors. A simple hypothetical makes this clear. If California had passed a licensing scheme requiring private detention operators in California to obtain a state license, there is no doubt that it would be struck down under *Leslie Miller*. But AB 32 goes much further. It is an outright ban on hiring any private contractor. If California could not prohibit ICE from hiring a particular private detention operator by imposing licensing requirements, it surely cannot regulate private detention operators out of existence through a direct ban. There is "no important difference" for Supremacy Clause purposes between a state "requir[ing] a permit" and "order[ing] compliance with state regulations." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 181 n.3 (1988). "In both settings the State is claiming the authority to dictate the manner in which the federal function is carried out." *Id.*

Simply put, AB 32 would breach the core promise of the Supremacy Clause. To comply with California law, ICE would have to cease its ongoing immigration detention operations in California and adopt an entirely new approach

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absence of any "series of terms from which an omission bespeaks a negative implication." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80–81 (2002).

in the state. But the Supremacy Clause protects against state laws that would "in any manner control . . . the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *McCulloch*, 17 U.S. at 436. This foundational limit on state power cannot be squared with the dramatic changes that AB 32 would require ICE to make.

V

A

While the outcome in this case is clear under basic Supremacy Clause principles and Supreme Court authority, how a statute such as AB 32 fits within the structure of modern Supremacy Clause doctrine is less certain. *See North Dakota v. United States*, 495 U.S. 423 (1990) (splitting four-to-four over how to analyze neutral state restrictions on a federal contractor).

Modern Supremacy Clause cases discuss two separate doctrines: intergovernmental immunity and preemption. *See United States v. California*, 921 F.3d 865, 878–79 (9th Cir. 2019). Intergovernmental immunity "prohibit[s] state laws that *either* regulate the United States directly *or* discriminate against the Federal Government or those with whom it deals (*e.g.*, contractors)." *Washington*, 142 S. Ct. at 1984 (cleaned up). Under the doctrine of obstacle preemption (the only preemption doctrine the parties discuss), a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California*, 921 F.3d at 879 (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). In light of the principles and case law discussed above, much of which precedes and confounds such a rigid distinction, either doctrine would lead to the same result.

B

California would have us hold that intergovernmental immunity never applies to a generally applicable state regulation of a federal contractor, even when the regulation would control federal operations. California would then have us apply the presumption against preemption and conclude that Congress did not speak clearly enough about privately run immigration detention facilities for AB 32 to be preempted. As explained below, California's argument fails at both steps.[7]

1

California first argues that AB 32 is a generally applicable regulation that operates only against private contractors rather than the federal government itself, and therefore intergovernmental immunity is inapplicable. In support, California relies largely on the plurality opinion in *North Dakota*.

The question in *North Dakota* was whether state reporting and labeling requirements for out-of-state liquor suppliers could be applied to suppliers of liquor to a military base. Justice Stevens, joined by three Justices, would have upheld both requirements because the federal government's Supremacy Clause arguments failed. 495 U.S. at 434–44 (plurality opinion). Justice Brennan, writing for three other Justices, would have upheld the reporting requirement but invalidated the labeling requirement because it substantially

[7] Because we hold that appellants are likely to prevail on their claim that AB 32 violates the Supremacy Clause by controlling the operations of the federal government, we do not consider whether it is generally applicable, or whether it unconstitutionally discriminates against the federal government.

interfered with federal procurement and discriminated against the federal government. *Id.* at 459–60 (Brennan, J., concurring in part and dissenting in part). Justice Scalia voted to uphold both requirements as authorized by the Twenty-First Amendment. *Id.* at 447–48 (Scalia, J., concurring in the judgment). Because there was "no rationale common to a majority of the Justices," only the result of *North Dakota* is binding.[8] *United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016) (en banc).

The Stevens plurality and Brennan dissent diverged over how the direct regulation theory of intergovernmental immunity applies to contractors. According to the Stevens plurality, the direct regulation theory of intergovernmental immunity is inapplicable when state regulations "operate against suppliers, not the Government." *North Dakota*, 495 U.S. at 437 (plurality opinion). Absent discrimination, "[c]laims to any further degree of immunity must be resolved under principles of congressional pre-emption." *Id.*

[8] We reject the dissent's claim that in *Washington*, "the Supreme Court unanimously rejected Justice Brennan's view that substantial interference with federal operations is sufficient to trigger [intergovernmental immunity]." Dissent at 36 (citing *Washington*, 142 S. Ct. at 1984). As the dissent acknowledges, *Washington* involved discrimination, not direct regulation. The Court cited *North Dakota* only in passing to describe how the discrimination theory evolved over time. The Supreme Court does not normally decide major doctrinal questions without saying so. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). Tellingly, *Washington* string-cited both Justice Stevens's plurality opinion *and* Justice Scalia's separate opinion, the latter to explain that "that 'all agree' with this aspect of the plurality opinion." 142 S. Ct. at 1984 (alteration omitted) (quoting *North Dakota*, 495 U.S. at 444 (Scalia, J., concurring in the judgment)). Since the Stevens plurality and Brennan dissent disagreed about how the direct regulation theory applies to government contractors, *see infra* at 25–27, *Washington*'s citation to the Stevens plurality did not bear on that issue.

at 435. According to the Brennan dissent, however, "the rule to be distilled from our prior cases is that those dealing with the Federal Government enjoy immunity from state control not only when a state law discriminates but also when a state law actually and substantially interferes with specific federal programs." *Id.* at 451–52.[9]

We are not persuaded that AB 32 cannot implicate intergovernmental immunity, even assuming it is drafted as a generally applicable regulation of federal contractors. When a state regulation of a contractor would control federal operations, "[e]nforcement of the substance of [the regulation] against the contractors would have the same effect as direct enforcement against the Government." *United States v. Town of Windsor*, 765 F.2d 16, 19 (2d Cir. 1985). Regardless of the object of enforcement, "there is obviously implicated the same interest in getting the Government's work done." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988); *see also Murray Corp.*, 355 U.S. at 492 ("[W]e must look through form and behind labels to substance" in assessing "constitutional immunity.").

Leslie Miller and *Public Utilities Commission* are direct counterexamples to California's position. In both cases, the

[9] At the heart of their disagreement was a much simpler dispute about how to understand procurement cases like *Leslie Miller* and *Public Utilities Commission*. The Stevens plurality saw those cases as relevant only to preemption, 495 U.S. at 435 n.7, and it therefore extrapolated from cases upholding taxes on federal contractors to a rule that no neutral regulation of federal contractors implicates intergovernmental immunity. *See id.* at 435 (citing *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937)). The Brennan dissent found the plurality's reading of those cases to be "at odds with the reasoning in the opinions themselves" and to "suggest[] a rigid demarcation between the two Supremacy Clause doctrines of federal immunity and pre-emption which is not present in our cases." *Id.* at 452.

Supreme Court held that neutral state laws imposed on the private conduct of federal contractors violated the Supremacy Clause. *See Leslie Miller*, 352 U.S. at 188 (state imposed a fine against a federal contractor); *Pub. Utils. Comm'n*, 355 U.S. at 535 (state statute applied to "[e]very common carrier"). While both cases discussed conflicts between federal and state law, they also undoubtedly drew on principles of intergovernmental immunity. *See Leslie Miller*, 352 U.S. at 190 (explaining that "the immunity of the instruments of the United States . . . extends to a requirement that they desist from performance until they satisfy a state officer" (quoting *Johnson*, 254 U.S. at 57)); *Pub. Utils. Comm'n*, 355 U.S. at 543–44 (describing the state statute as "plac[ing] a prohibition on the Federal Government," and as a "restraint or control on federal transportation procurement," and quoting at length from *McCulloch*).

As discussed above, beginning with *Osborn*, numerous cases distinguish for purposes of intergovernmental immunity between regulations of federal contractors that merely increase the federal government's costs, like taxes, and regulations that would control federal operations.[10] *See*, *e.g.*, *New Mexico*, 455 U.S. at 735 n.11; *Boeing*, 768 F.3d at 839. *Leslie Miller* and *Public Utilities Commission* fall on the latter side of the distinction. Both cases invalidated state statutes that would have impermissibly interfered with federal functions by overriding federal contracting decisions. And although the Stevens plurality in *North Dakota* spoke about neutral regulations of federal

[10] In light of this distinction, it is clear that we spoke too broadly in *United States v. California* when we said that "[f]or purposes of intergovernmental immunity, federal contractors are treated the same as the federal government itself." 921 F.3d at 882 n.7. Rather, states may impose some regulations on federal contractors that they would not be able to impose on the federal government itself.

contractors in categorical terms, it dealt only with regulations that increased the cost of liquor rather than regulations that would have negated the federal government's control over its own operations. *See United States v. Virginia*, 139 F.3d 984, 990 n.7 (4th Cir. 1998) (explaining that the restrictions in *North Dakota* "may have effectively altered the attractiveness of the bids placed by different suppliers through forced price increases," but they did not "enable the state to second-guess the federal government's judgment as to who should supply the federal enclave").

AB 32 clearly falls on the same side as *Leslie Miller* and *Public Utilities Commission*, controlling federal operations by interfering in the same way with ICE's contracting decisions. AB 32 gives California a "virtual power of review" over ICE's contracting decisions, *Leslie Miller*, 352 U.S. at 190, and effectively "places a prohibition on the Federal Government" from operating with its desired personnel, *Pub. Utils. Comm'n*, 355 U.S. at 544. Even assuming it is a neutral regulation of private conduct, *see* Cal. Penal Code § 9501, AB 32 prohibits ICE from exercising its discretion to arrange for immigration detention in the privately run facilities it has deemed appropriate.[11]

[11] We need not settle on a precise formulation of the test for immunity in this context. GEO asserts that a state law violates the Supremacy Clause if it "substantially interfere[s] with federal operations." We note that this standard may be difficult to apply in the context of non-discriminatory state taxes on federal contractors, which have been upheld under the Supremacy Clause. *See New Mexico*, 455 U.S. at 733–36. GEO's formulation could also lead to arbitrary line-drawing. *See McCulloch*, 17 U.S. at 430 ("We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power.").

Therefore, we reject California's argument that AB 32 does not implicate intergovernmental immunity.

2

We likewise disagree with California's contention that AB 32 is not preempted. California leans heavily on the presumption against preemption. When it applies, courts presume "that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona*, 567 U.S. at 400 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The presumption "applies when a state regulates in an area of historic state power even if the law 'touche[s] on' an area of significant federal presence," *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018), including immigration, *see Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016). While we have applied the presumption when state regulations have "incidental effects in an area of federal interest," *Knox*, 907 F.3d at 1177, we have never applied the presumption to a state law that would control federal operations.

We accepted in *California* that a state's historic police powers include "ensur[ing] the health and welfare of inmates and detainees in facilities within its borders." 921 F.3d at 886. We applied the presumption to a state law requiring state inspections of immigration detention facilities, and we held that the law was not preempted. *Id.* But we specifically recognized that the requirement did not "regulate whether or where an immigration detainee may be confined" or cause "active frustration of the federal government's ability to discharge its operations." *Id.* at 885. AB 32 goes much further, and *California* thus does not dictate that the presumption applies here.

To the contrary, we highly doubt that the presumption against preemption applies in this case. The Supreme Court has indicated that the presumption does not apply when a state law would interfere with inherently federal relationships. In *Buckman Co. v. Plaintiffs' Legal Committee*, the Court declined to apply the presumption to a state cause of action for fraud against the FDA. 531 U.S. 341, 347 (2001). The Court reasoned that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'" *Id.* (citation omitted). The Court explained that "the relationship between a federal agency and the entity it regulates is inherently federal in character." *Id.* Here, the same is true of the contractual relationship between a federal agency and its contractor. *See Boyle*, 487 U.S. at 504 (explaining that the "obligations to and rights of the United States under its contracts are governed exclusively by federal law").

Moreover, if it were not styled as a regulation of federal contractors, a state law that obstructs federal functions as thoroughly as AB 32 would normally be analyzed under intergovernmental immunity, and it would therefore be subject to precisely the opposite presumption. When a state law implicates intergovernmental immunity, courts presume that Congress did not intend to allow the state law to be enforced. "We will find that Congress has authorized regulation that would otherwise violate the Federal Government's intergovernmental immunity 'only when and to the extent there is a clear congressional mandate.'" *Washington*, 142 S. Ct. at 1984 (quoting *Hancock v. Train*, 426 U.S. 167, 179 (1976)); *see also id.* ("Congress must 'provid[e] "clear and unambiguous" authorization for' this kind of state regulation." (quoting *Goodyear Atomic*, 486 U.S. at 180)). In *Gartrell*, we applied that opposite presumption—and not a presumption against preemption—

when invalidating regulations of federal contractors under *Leslie Miller* in what we described as a preemption analysis. *See Gartrell*, 940 F.2d at 440–41 ("We do not find . . . the required 'clear Congressional mandate' and 'specific Congressional action' that unambiguously authorize state regulation of a federal activity." (quoting *Hancock*, 426 U.S. at 178–79)).

Without the presumption against preemption, there can be little doubt that AB 32 would be preempted. Obstacle preemption applies when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California*, 921 F.3d at 879 (quoting *Arizona*, 567 U.S. at 399). Congress sought to delegate to the DHS Secretary the responsibility to "arrange for appropriate places of detention." 8 U.S.C. § 1231(g)(1). AB 32 frustrates that congressional intent, creating a "conflict between [AB 32's] requirement . . . and the action which Congress and the Department [of Homeland Security] have taken to insure the" appropriateness of facilities to house detainees. *Leslie Miller*, 352 U.S. at 190; *see also Pub. Utils. Comm'n*, 355 U.S. at 544 (noting a "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates"). Such interference with the discretion that federal law delegates to federal officials goes to the heart of obstacle preemption. *See Arizona*, 567 U.S. at 409 ("By authorizing state officers to decide whether an alien should be detained for being removable, § 6 violates the principle that the removal process is entrusted to the discretion of the Federal Government."); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–76 (2000) (holding that a state Burma sanctions bill conflicted with a federal Burma sanctions bill because it undermined Congress's delegation to the President of "flexible and effective authority" to adjust all

sanctions in response to changing conditions); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) ("By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created 'an obstacle to the accomplishment and execution of the full purposes and objectives' of the due-on-sale regulation." (citation omitted)). Therefore, we reject California's arguments and hold that AB 32 is preempted.

VI

For the foregoing reasons, we hold that appellants are likely to prevail on their claim that AB 32 violates the Supremacy Clause as to ICE-contracted facilities. That leaves the three remaining *Winter* factors—likelihood of irreparable harm, balance of the equities, and public interest—which the district court did not reach. Because "[t]he grant of a preliminary injunction is a matter committed to the discretion of the trial judge," *Epona v. County of Ventura*, 876 F.3d 1214, 1227 (9th Cir. 2017) (citation omitted), we remand to allow the district court to reach the remaining *Winter* factors in the first instance. *See Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 747 (9th Cir. 2014) ("[D]espite Goldman's 'overwhelming likelihood of success on the merits,' we remand this case to the district court to consider the remaining *Winter* factors consistent with this opinion." (citation omitted)).

Accordingly, we **VACATE** the district court's denial of preliminary injunctive relief and **REMAND** for further

proceedings.[12] Appellants shall recover their costs on appeal. *See* Fed. R. App. P. 39(a)(4).

MURGUIA, Chief Judge, dissenting, with whom RAWLINSON and SUNG, Circuit Judges, join:

I respectfully dissent. Assembly Bill ("AB") 32 is valid under the intergovernmental immunity doctrine because it neither directly regulates nor discriminates against the federal government. The majority errs by extending intergovernmental immunity to nondiscriminatory, indirect regulation of the government. Nor is AB 32 preempted. Because AB 32 is entitled to a presumption against preemption, and Congress has not expressed "clear and manifest" intent to overcome that presumption, the law is not preempted. The majority errs by failing to apply the presumption against preemption.

I

In *North Dakota v. United States*, 495 U.S. 423 (1990), the Supreme Court offered competing interpretations of the intergovernmental immunity doctrine. All agreed that the doctrine prohibited a state from *discriminating* against the federal government. The justices disagreed, however, about the scope of the doctrine in the absence of discrimination. The plurality opinion, written by Justice Stevens, concluded that "[a] state regulation is invalid only if it regulates the United States *directly* or discriminates against the Federal

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[12] Because we conclude that appellants are likely to prevail on their Supremacy Clause claim, we need not reach GEO's claim that AB 32's temporary safe harbor protects its contracts until 2034.

Government or those with whom it deals. . . . Claims to any further degree of immunity must be resolved under principles of congressional preemption." *Id.* at 435 (plurality opinion) (emphasis added). Justice Brennan, by contrast, looked to the *effect* of the regulation on federal government operations: "[C]ontrary to the plurality's view, the rule to be distilled from our prior cases is that those dealing with the Federal Government enjoy immunity from state control not only when a state law discriminates but also when a state law *actually and substantially interferes* with specific federal programs." *Id.* at 451–52 (Brennan, J., concurring in the judgment in part and dissenting in part) (emphasis added). Justice Brennan would have extended federal immunity to nondiscriminatory state regulations that "substantially obstruct[] . . . affirmative federal policies." *Id.* at 452.

In the decades that followed, most courts—including ours—followed the plurality opinion, holding that the intergovernmental immunity doctrine is triggered only by discrimination or *direct* regulation of the federal government. *See e.g.*, *United States v. California*, 921 F.3d 865, 878 (9th Cir. 2019) (holding that "state laws are invalid if they 'regulate[ ] the United States directly or discriminate[ ] against the Federal Government or those with whom it deals'" (alterations in original) (quoting *North Dakota*, 495 U.S. at 435 (plurality opinion))); *Boeing Co. v. Movassaghi*, 768 F.3d 832, 840 (9th Cir. 2014) (under principles of intergovernmental immunity, "[i]t is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides clear and unambiguous authorization for such regulation" (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988))); *United States v. City of Arcata*, 629 F.3d 986, 991 (9th Cir. 2010) ("A state or local law is

invalid 'only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.'" (quoting *North Dakota*, 495 U.S. at 435 (plurality opinion))); *Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996) ("[U]nder the intergovernmental immunity component of the Supremacy Clause to the United States Constitution, states may not directly regulate the Federal Government's operations or property.").

Recent developments confirm that we were right to follow that course. In *United States v. Washington*, 142 S. Ct. 1976 (2022), the Supreme Court unanimously rejected Justice Brennan's view that substantial interference with federal operations is sufficient to trigger the doctrine and adopted Justice Stevens's view that only direct regulation will do so. The Court explained that, in *McCulloch v. Maryland*, 17 U.S. 316 (1819), it had "interpreted the Constitution as prohibiting States from interfering with or controlling the operations of the Federal Government." *Washington*, 142 S. Ct. at 1983–84. But

> [o]ver time this constitutional doctrine, often called the intergovernmental immunity doctrine, evolved. Originally we understood it as barring any state law whose "effect . . . was or might be to increase the cost to the Federal Government of performing its functions," including laws that imposed costs on federal contractors. *United States v. County of Fresno*, 429 U.S. 452, 460 (1977). We later came to understand the doctrine, however, as prohibiting state laws that *either* "regulat[e] the United States directly or discriminat[e] against the Federal Government *or* those with whom it deals"

> (e.g., contractors). *North Dakota v. United States*, 495 U.S. 423, 435 (1990) (plurality opinion) (emphasis added); *id.*, at 444 (Scalia, J., concurring in judgment) (noting that "[a]ll agree" with this aspect of the plurality opinion) . . . .

Id. at 1984.

Washington squarely resolves the question left unanswered in *North Dakota*. Before *Washington*, one could plausibly argue that the intergovernmental immunity doctrine extends to a state's indirect regulation that substantially interferes with federal operations. After *Washington*, such arguments are foreclosed.[1]

[1] Although *Washington* was concerned principally with the discrimination prong of the intergovernmental immunity doctrine, the Court's discussion of the direct regulation prong cannot be cast aside as dicta. The Court twice stated that direct regulation is required, 142 S. Ct. at 1982, 1984, took pains to describe the Court's evolution from an interference (or effects) test to a direct regulation test, cited the *North Dakota* plurality opinion with approval while making no mention of Justice Brennan's partial concurrence in *North Dakota*, and offered no suggestion that Justice Brennan's substantial interference test constitutes good law. Although *Washington* did not mention Justice Brennan's partial concurrence, this is unsurprising. *Washington* appears to have considered the *North Dakota* plurality's statement that intergovernmental immunity applies only to direct regulation or discrimination as binding precedent. *See id.* at 1984 (citing Justice Scalia's concurrence in *North Dakota* as a fifth vote for "this aspect of the plurality opinion"); *see also Marks v. United States*, 430 U.S. 188, 193 (1977). Having rejected Justice Brennan's proposed test in *North Dakota*, the Court had no reason to reject it anew in *Washington*. Hence, *Washington*'s failure to mention the Brennan concurrence is not a reason to conclude that Justice Brennan's view survives *Washington*. On the contrary, it confirms that Justice Brennan's view has long been rejected.

Today, however, the majority does precisely that which *Washington* forecloses. It does not hold that AB 32 directly regulates the federal government.[2] Instead, it holds that the intergovernmental immunity doctrine invalidates AB 32 because the law "would have the same *effect* as direct enforcement against the Government." Maj. Op. at 27 (emphasis added) (quoting *United States v. Town of Windsor*, 765 F.2d 16, 19 (2d Cir. 1985)). That approach is problematic, not only because it is contrary to *Washington*, but also because it makes a muddle of the intergovernmental immunity doctrine.

The majority justifies its resuscitation of the substantial interference test by relying heavily on *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam). Although *Leslie Miller* used the term "immunity" rather than the term "preemption," the decision can no longer be classified as an intergovernmental immunity case. In *North Dakota*, the plurality instructed us to treat the case as a preemption case,

[2] AB 32 directly regulates only federal contractors, not the federal government itself. The law states that "a person shall not operate a private detention facility within the state," Cal. Penal Code § 9501, and it defines a private detention facility as "a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity," *id.* § 9500(b). The legislation therefore directly regulates the actions of federal contractors that operate private detention facilities but not their contracting partners. The Seventh Circuit's recent decision in *McHenry County v. Raoul*, 44 F.4th 581, 585 (7th Cir. 2022), involving an Illinois law "prohibiting State agencies and political subdivisions from contracting with the federal government to house immigration detainees," is analogous. The Seventh Circuit rejected the argument that the law directly regulated the United States, because the law "impose[d] no direct regulation on any federal official or agency" and "directly regulate[d] only State and local entities and law enforcement—not the federal government." *Id.* at 593. The same is true here.

495 U.S. at 435 & n.7, and *Washington* implicitly adopted that view when it cited the plurality with approval and told us, unambiguously, that the doctrine applies only to direct regulation of the federal government, 142 S. Ct. at 1982, 1984. As these authorities recognize, *Leslie Miller* is a preemption case because it involved a direct "conflict" between state licensing requirements and "federal law regulating procurement." *Leslie Miller*, 352 U.S. at 188–90; *see California*, 921 F.3d at 885 (properly treating *Leslie Miller* as a preemption case). Even if the majority's reliance on *Leslie Miller* made sense before *Washington*, it makes no sense now.[3]

In short, the majority errs by holding that the intergovernmental immunity doctrine extends to nondiscriminatory, indirect regulation of the federal government. That view is foreclosed by *North Dakota* and *Washington*. To the extent that we are concerned with state laws that burden the federal government by regulating private parties, those concerns are more appropriately addressed by preemption. *See North Dakota*, 495 U.S. at 435 (plurality opinion) (noting that "[c]laims to any further degree of immunity [beyond discrimination or direct regulation] must be resolved under principles of congressional pre-emption"); *California*, 921 F.3d at 879–80 (cautioning against stretching the intergovernmental immunity doctrine "beyond its defined scope").

[3] To a lesser extent, the majority also relies on *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), to justify its holding that AB 32 violates intergovernmental immunity. But for the same reasons that *Leslie Miller* fails to support the majority's position, the majority also cannot rely on *Public Utilities*. *See North Dakota*, 495 U.S. at 435 & n.7 (instructing that, like *Leslie Miller*, the Court had decided *Public Utilities* based on preemption).

I acknowledge that AB 32 substantially interferes with important federal operations. Indeed, it may well be that the law *should* be invalidated under the intergovernmental immunity doctrine. As an intermediate appellate court, however, our obligation is to follow Supreme Court precedent. In this instance, the Supreme Court has made clear that the intergovernmental immunity doctrine immunizes the federal government only from state laws that "directly regulate" it. *Washington*, 142 S. Ct. at 1982. Because AB 32 does not directly regulate the federal government, the district court properly concluded that the intergovernmental immunity doctrine does not apply.[4]

II

"Federalism . . . adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *See Arizona v. United States*, 567 U.S. 387, 398 (2012). Accordingly, "when a state regulates in an area of historic state power," *Knox v. Brnovich*, 907 F.3d 1167, 1174 (9th Cir. 2018), we presume that the resulting state law has not been preempted unless that was the "clear and manifest purpose of Congress," *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). This presumption against preemption holds true even if the state law "'touche[s] on' an area of significant federal presence," such as immigration. *Knox*,

[4] The majority does not address the discrimination prong of the intergovernmental immunity doctrine. I therefore do not address it either. Were I to address the issue, I would hold that AB 32 does not discriminate against the federal government based on the grounds stated in my previous dissent. *See GEO Grp., Inc. v. Newsom*, 15 F.4th 919, 947–50 (9th Cir. 2021) (Murguia, J., dissenting), *reh'g en banc granted, opinion vacated*, 31 F.4th 1109 (9th Cir. 2022).

907 F.3d at 1174 (quoting *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 n.5 (9th Cir. 2016)).

States' historic police powers include regulation of health and safety. *Puente Arizona*, 821 F.3d at 1104; *Wyeth*, 555 U.S. at 565 n.3. And these historic powers extend to laws regulating health and safety in federal detention facilities located within a state. In *United States v. California*, we applied the presumption against preemption and rejected a preemption challenge to a state law providing for inspections of federal immigration detention facilities, noting that the United States "d[id] not dispute that California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders." 921 F.3d at 885–86.

Relying on *California*, the district court here determined that AB 32 regulated "conditions in detention facilities located in California." *GEO Grp., Inc. v. Newsom*, 493 F. Supp. 3d 905, 935 n.12 (S.D. Cal. 2020). The court took judicial notice of AB 32's legislative history, which supports the conclusion that the state law responds to concerns about the health and welfare of detainees within the state's borders. This legislative history included committee analysis referring to a 2016 Department of Justice report documenting higher rates of inmate-on-inmate and inmate-on-staff violence, as well as higher rates of use of force by staff, at private prisons. *See* Sen. Judiciary Comm., Bill Analysis of Assembly Bill 32, 2019–2020 Reg. Sess., at 7 (July 2, 2019) (citing Dep't of Justice, Off. of Inspector Gen., Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons (Aug. 2016), https://oig.justice.gov/rep

orts/2016/e1606.pdf)).[5] The court therefore concluded that AB 32 regulates health and safety, falls within California's historic police powers, and is entitled to the presumption against preemption. This result is consistent with our case law. To be sure, AB 32 goes further than the health-related inspection regulations at issue in *California*, but it remains an exercise of the state's historic power to regulate the health and welfare of its residents. AB 32 may have an impact on federal immigration operations, but it is not an immigration law or a law regulating the federal government. Indeed, the law mentions neither immigration nor the federal government. Under our caselaw, a state law's "effects in the area of immigration" do not negate the presumption against preemption. *Puente Arizona*, 821 F.3d at 1104.

The presumption against preemption is rebuttable: When the presumption applies, we must determine whether Congress has expressed "clear and manifest" intent to preempt the state law at issue. *Puente Arizona*, 821 F.3d at 1104. "[A] law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 972 (9th Cir. 2017) (as amended) (holding that an Arizona policy denying drivers' licenses to certain noncitizens was preempted). Here, however, Congress has not expressed a clear and manifest intent to preempt AB 32. The statute, therefore, is not preempted.

The United States and The GEO Group, Inc., argue that a handful of statutes and regulations establish Congress's "clear and manifest" intent to preempt AB 32. Among these

[5] Like the district court, we may take judicial notice of legislative history. *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).

federal enactments are 8 U.S.C. § 1231(g)(1), which allows the Secretary of Homeland Security[6] to "arrange for appropriate places of detention for aliens detained pending removal or a decision on removal," and 6 U.S.C. § 112(b)(2), which allows the Secretary to "make contracts, grants, and cooperative agreements." These provisions, however, do not mention private detention facilities. At most, therefore, they do not *forbid* the Department of Homeland Security from utilizing private detention facilities. But neither do they show that employing private detention facilities, in contravention of state law, is "the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Congress gave the Secretary the authority to determine "appropriate" places of detention, but it did not intimate that private detention facilities are appropriate where prohibited by state health and safety laws. Thus, even assuming Congress intended to permit the Secretary to utilize private facilities, the presumption against preemption is not rebutted.

In this respect, § 1231(g)(1) stands in sharp contrast to 18 U.S.C. § 4013, the statute authorizing appropriations for federal detention by the United States Marshals Service ("USMS"). Unlike § 1231(g), the USMS statute explicitly permits USMS to contract with private entities:

> The Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds

[6] Although § 1231(g) refers to the Attorney General, the statute predates the creation of the Department of Homeland Security. This authority now resides with the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

> 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*.

18 U.S.C. § 4013(a)(3) (emphasis added). The district court relied on this language in concluding that AB 32 was conflict-preempted as to the *USMS* facilities, explaining that "Congress clearly authorized USMS to use private detention facilities in limited circumstances," and citing additional provisions of § 4013 that outline specific eligibility requirements for "a private entity" housing USMS detainees. *GEO Grp., Inc.*, 493 F. Supp. 3d at 939 (citing 18 U.S.C. § 4013(c)(2)). By contrast, the immigration detention statute does not mention "private entities" at all; it explains only that the Secretary may spend funds to "acquire, build, remodel, repair, and operate facilities." 8 U.S.C. § 1231(g)(1). Another section of the immigration statute, 8 U.S.C. § 1103(a)(11), authorizes federal payments for, among other things, "housing, care, and security of persons detained" by the Department of Homeland Security "under an agreement with a State or political subdivision of a State." Again, unlike the USMS statute, this provision does not mention contracts with private entities. Accordingly, like the district court, I am unable to find "clear and manifest" congressional intent to displace AB 32's prohibition on private detention facilities.

Federal discretion, moreover, is insufficient to achieve preemption. Instead, our caselaw requires discretion in the context of a separate and comprehensive scheme with which a state law interfered. In *Crosby v. National Foreign Trade*

Council, for example, the federal statute provided a specific and "calibrated" scheme for imposing sanctions on the country then known as Burma, which included certain conditions and exemptions. 530 U.S. 363, 377–78 (2002) ("These detailed provisions show that Congress's calibrated Burma policy is a deliberate effort 'to steer a middle path.'" (citation omitted)). Therefore, a state statute preventing entities from doing business with Burma impermissibly interfered with this scheme. *Id.* at 379. And in *Gartrell Construction Inc. v. Aubry*, 940 F.2d 437, 439 (9th Cir. 1991), there were separate but "similar" federal licensing requirements with which a state licensing requirement conflicted. Neither of these cases establishes a bright-line rule that interfering with the federal government's discretion is impermissible. Rather, these cases stand for the unsurprising principle that when there is a comprehensive federal scheme in place, there is no room for states to impose regulations that conflict with specific provisions of that scheme.

The Supreme Court has warned us that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that pre-empts state law.'" *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992)). Therefore, I would uphold the district court's determination that the presumption against preemption has not been overcome by Congress's "clear and manifest" intent with respect to the ICE facilities at issue in this case.

* * *

The district court faithfully applied controlling precedent pertaining to intergovernmental immunity and preemption. I would therefore affirm the order denying preliminary injunctive relief. I respectfully dissent.