SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 3228 (Bonta)
Version: August 10, 2020
Hearing Date: August 13, 2020
Fiscal: No
Urgency: No
ME

SUBJECT

Private detention facilities

DIGEST

In line with California's interest in ensuring the safety and welfare of its residents and in order to protect incarcerated individuals from serious harm within our state border, this bill requires a private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations. This bill also provides a private right of action for an individual injured by noncompliance with the above standards, as specified, and allows the court to award a prevailing plaintiff reasonable attorney's fees and costs.

EXECUTIVE SUMMARY

For-profit prison corporations operate private detention facilities in California that hold Californians against their will pursuant to criminal and civil laws. There are numerous documented abuses of people held in for-profit run detention facilities in California. For-profit prison corporations have not limited their business ventures to profiting from the incarceration of Californians convicted of crimes. Private prison corporations also profit from the incarceration of Californians in civil detention. In line with California's interest in ensuring the safety and welfare of its residents, AB 32 (Bonta, Ch. 1739, Stats. 2019) was signed into law last year to phase in the abolition of the private for-profit prison industry from our state. Some facilities run by for-profit prison corporations that imprison criminal and civil detainees still exist in California, notwithstanding AB 32.

These for-profit private prison corporations benefit from incarcerating Californians and have no incentive to invest in their rehabilitation or mental and physical health. For-profit prison corporations owe a fiduciary duty to their shareholders. Their mission is to maximize profits for their investors. They are able to accomplish this by increasing their inmate population and cutting operational costs, which is dangerous and detrimental to the Californians who are held against their will. Every dollar spent in treating their prisoners and detainees in a way that promotes the health and welfare of

the prisoners and detainees is a dollar less in profit for shareholders. Indeed, these for-profit corporations have a documented history of operating in a manner that is detrimental to the health and welfare of those detained.

With the spread of COVID-19 in prisons and detention facilities, the health and welfare of those in detention is critical, not only to individuals detained, but to surrounding communities that may be impacted by decisions made by those operating these facilities. As a result, it is critical that for-profit prison corporations are held accountable and comply with strict regulations related to health, welfare, and safety.

Just last week, the Los Angeles Times reported that a California detention facility operated by a for-profit prison corporation has been letting COVID-19 run rampant by failing to test detainees.[1] This is the most recent public example of how detainees are harmed at detention facilities operated by profit motivated corporations. Earlier this year, it was reported that a for-profit prison corporation attempted to require detainees held in a San Diego facility to sign legal waivers holding the corporation harmless before providing them with masks to protect against COVID-19.[2] Detainees were reportedly pepper sprayed when they protested.

This bill requires for-profit prison corporations to comply with standards they agreed to in their contract for operations, provides an enforcement mechanism to ensure that the standards are adhered to, and allows the court to award a prevailing plaintiff reasonable attorney's fees and costs.

The bill is sponsored by Immigrant Defense Advocates, and is supported by various civil rights organizations, immigrant rights organizations, the Riverside County Sheriffs' Association, and Alameda County District Attorney Nancy O'Malley. The bill has no registered opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits the operation of a for-profit detention facility within the state, as specified. (Penal Code § 9501 &§ 9502 (a) – (g).)

2) Provides that the prohibition of the operation of a for-profit detention facility within the state does not apply to any privately owned property or facility that is

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[1] *ICE deliberately limited testing at Bakersfield immigration facility with COVID-19 outbreak,* Andrea Castillo, Los Angeles Times, (August 6, 2020) available at https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing (as of August 8, 2020).
[2] *Senators Want to Know if ICE Detainees Were Pepper Sprayed After Requesting Masks,* Tyche Hendricks, KQED, (April 17, 2020) available at https://www.kqed.org/news/11812701/senators-want-to-know-if-ice-detainees-were-pepper-sprayed-after-requesting-masks (as of August 8, 2020).

leased and operated by CDCR or a county sheriff or other law enforcement agency. (Penal Code § 9503.)

3) Provides that the prohibition of the operation of a for-profit detention facility within the state does not apply to those that operate pursuant to a valid contract with a government entity that was in effect before January 1, 2020, for the duration of that contract, not to include any extensions made to or authorized by the contract. (Penal Code § 9505 (a).)

4) Provides that on or after January 1, 2020, CDCR: (a) 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; and (b) shall not renew an existing contract with a private, for-profit prison facility located in or outside of the state to incarcerate state prison inmates. (Penal Code § 5003.1 (a) & (b).)

5) Provides that on or after January 1, 2028, a state prison inmate or other person under the jurisdiction of CDCR shall not be incarcerated in a private, for-profit prison facility. (Penal Code section 5003.1 (c))

6) Provides that a "private, for-profit prison facility" does not include a facility that is privately owned, but is leased and operated by CDCR. (Penal Code section 5003.1 (d))

7) Specifies that the detention facility ban will not get in the way of the state's required compliance with a specified federal court order. (Penal Code section 5003.1 (e))

This bill:

1) Declares that it is the intent of the Legislature, in keeping with its obligation to safeguard the humane and just treatment of all individuals located within California, to ensure that private actors in the State of California respect and adhere to detention standards set forth in their private contracts, thus ensuring the welfare of those detained in these facilities and protecting public health with respect to the threat posed by COVID-19.

2) Requires a private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations.

3) Provides that if a private detention facility operator, or agent, or person acting on behalf of a detention facility operator, commits a tortious action that violates the requirement to comply with detention standards of care and confinement, an

individual who has been injured by that tortious action may bring a civil action for relief.

4) Provides that the court, in its discretion, may award the prevailing plaintiff reasonable attorney's fees and costs, including expert witness fees, in these civil actions.

5) Defines "detention facility" as any facility in which persons are incarcerated or otherwise involuntarily confined for purposes of execution of a punitive sentence imposed by a court or detention pending a trial hearing or other judicial or administrative proceeding, with some exceptions, as specified.

6) Defines "private detention facility" as a detention facility that is operated by a private, nongovernmental, for-profit entity pursuant to a contract or agreement with a governmental entity.

7) Defines "private detention facility operator" as any private person, corporation, or business entity that operates a private detention facility.

8) Defines "detention standards of care and confinement" as any regulations, policies, or standards specified in the contract for services in the facility.

9) Defines "tortious action" as any act or willful misconduct that violates a duty of care, as specified in Section 1714 of the Civil Code.

10) Contains a severability provision that provides that if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

COMMENTS

1. Stated need for the bill

According to the author:

> AB 3228 seeks to provide accountability for health and safety in all private detention facilities in the state of California. In the wake of COVID-19 accountability in private detention facilities is an urgent issue to protect public health and human life. This bill would ensure that all detention facility operators in the state of California adhere to the minimum detention standards agreed upon in the contract for the facility. The bill provides for a cause of action in state court for any violations of the agreed upon standards and also ensure that detention facilities abide by and uphold basic human rights and standards in the treatment of civil detainees. The violations of standards by

> these operators not only endangers detainees, but also the staff and by extension the surrounding community. Our state sent a clear message with AB 32, a bill which I authored, to end the use of private prisons and detention facilities. We must now do what is necessary to ensure those facilities that remain open and in operation adhere to the highest standards, particularly at such a critical time for public safety.

Immigrant Defense Advocates, the sponsor of this bill, writes:

> In the case of civil detention facilities, both the federal agency and private contractors have agreed upon specific standards within their contracts, and any deviation from those standards, particularly those that result in negligence or harm, should create clear liability on behalf of the operator. However, ICE has shown little to no willingness to hold private operators accountable for violations of minimum standards, even when their negligence results in death.
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> Currently, an estimated 90% of those detained in California are in the care of for-profit institutions, whose duty is to shareholders as opposed to public safety. Despite these issues arising in many private facilities, ICE has been reluctant to terminate contracts with operators who routinely violate the standards set forth in their contracts, or to provide meaningful levels of oversight or enforcement. As a result, private operators are able to violate basic minimum standards with no consequences.
>
> This bill seeks to create accountability for private operators and ensure that there is a mechanism to ensure compliance and accountability in these facilities. This level of immediate oversight and accountability is more critical than ever given how many California lives are presently imperiled by federal inaction and the rapid spread of COVID-19 in immigration detention facilities.

2. Documented serious abuses at facilities operated by for-profit prison corporations, including facilities in California

The United States Department of Justice's Office of the Inspector General (USDOJ) conducted an investigation of private prisons and issued a report in 2016. (*Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, August 2016, available at https://oig.justice.gov/reports/2016/e1606.pdf (as of August 8, 2020)). The for-profit facilities inspected by the USDOJ were operated by the GEO Group, Inc., Management and Training Corporation, and Corrections Corporation of America. The GEO Group and the Corrections Corporation of America are for-profit prison corporations that operate detention facilities in California. The GEO Group currently operates for-profit detention facilities in California that hold people against their will under criminal and civil laws. As explained by the Assembly Public Safety Committee in their analysis for AB 32 (Bonta, 2019), the "investigation found that private prisons were less safe than

federal prisons, poorly administered, and provided limited long-term savings for the federal government." The analysis further noted that "[p]rivate prisons also had higher assaults, both by inmates on other inmates and by inmates on staff." Additionally, the USDOJ discovered that new inmates in the for-profit facilities were improperly housed in the Special Housing Units (SHU), which are supposed to be for disciplinary or administrative segregation purposes. Numerous other studies and reports document problems with private for-profit prison facilities including the following: Justice Policy Institute, *The Problem with Private Prisons*, February 2, 2018, Tara Joy, available at http://www.justicepolicy.org/news/12006 (as of August 8, 2020); American Civil Liberties Union, *Banking on Bondage: Private Prisons and Mass Incarceration*, November 2011, available at https://www.aclu.org/banking-bondage-private-prisons-and-mass-incarceration (as of August 8, 2020); and The Sentencing Project, *Capitalizing on Mass Incarceration: US Growth in Private Prisons,* August 2, 2018, Kara Gotsch & Vinay Basti, available at https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/ (as of August 8, 2020).

Disabilities Rights California (DRC), a supporter of this bill, has special access to and has documented serious abuses in facilities run by for-profit prison corporations. As explained by DRC in their letter supporting AB 3228, "DRC has broad authority to protect and advocate for the rights and interests of people with disabilities… That authority includes access to public and private entities providing services and supports to individuals with disabilities, and to information and records prepared or maintained by these entities pertaining to such individuals in carrying out their responsibilities." DRC released a report in March 2019 detailing dangers for people with mental illness and other disabilities at a California facility operated by a for-profit prison corporation.[3]

A 2019 report by the California Attorney General found general trends in detention facilities that included insufficient safety checks for individuals on suicide watch, inadequate mental health staffing, and untrained staff who play a role in whether or not an individual can access medical care.[4] It should be noted that there continues to be suicide at detention facilities operated by for-profit prison corporations and allegations that protocols to protect those at risk of suicide are not being followed.[5] Additionally, the Auditor of the State of California released the results of an audit of California civil detention facilities requested by the Joint Legislative Audit Committee. The Auditor wrote about serious health and safety problems at facilities operated by for-profit prison

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[3] Disability Rights California, *There Is No Safety Here: The Dangers for People with Mental Illness and Other Disabilities in Immigration Detention at GEO Group's Adelanto ICE Processing Center,* March 2019, available at https://www.disabilityrightsca.org/system/files/file-attachments/DRC_REPORT_ADELANTO-IMMIG_DETENTION_MARCH2019.pdf (as of August 8, 2020).

[4] Attorney General of California, *Immigration Detention in California,* (Feb. 2019), available at https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf (August 8, 2020).

[5] *'This death was preventable': Family asks state to probe 74-year-old's suicide in ICE detention,* Rebecca Plevin, Palm Springs Desert Sun, (August 7, 2020) available at https://www.desertsun.com/story/news/politics/immigration/2020/08/07/family-asks-newsom-probe-choung-woohn-ahn-suicide-ice-mesa-verde/5504694002/ (as of August 8, 2020).

corporations and about suicide attempts, inadequate dental care, and cursory medical assessments.[6] Several additional reports detail deplorable conditions of detainees.[7]

Just last week United States District Judge Vince Chhabria of the Northern District of California granted a temporary restraining order in favor of the detainees at the Mesa Verde Detention Center, a detention facility operated by a for-profit prison corporation. The detainees filed the motion due to a COVID-19 outbreak at the facility where detainees and staff tested positive for COVID-19.[8] The Judge found that detainees "have demonstrated a strong likelihood of success on the merits of their claim that the defendants have violated the due process rights…through deliberate indifference to the risk of an outbreak." The Judge wrote that "the documentary evidence shows that the defendants have avoided widespread testing of staff and detainees at the facility, not for lack of tests, but for fear that positive test results would require them to implement safety measures that they apparently felt were not worth the trouble." As described by Judge Chhabria:

> The defendants, having responded to the health crisis in such a cavalier fashion (even in the face of litigation and a string of court orders), have lost the credibility to complain that the relief requested by the plaintiffs is too rigid or burdensome. The defendants have also lost the right to be trusted that they will accomplish on their own what the plaintiffs contend requires a court order to ensure.

The judge ordered the implementation of numerous measures immediately at the Mesa Verde facility, including to administer COVID-19 testing, as specified, and maintain a dormitory to segregate detainees who test positive for COVID-19. The judge highlighted that the defendants jeopardized the safety of their own employees and endangered the community at large.[9]

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[6] Auditor of the State of California, *City and County Contracts with U.S. Immigration and Customs Enforcement: Local Governments Must Improve Oversight to Address Health and Safety Concerns and Cost Overruns*, (Feb. 2019), available at http://www.auditor.ca.gov/pdfs/reports/2018-117.pdf (as of August 8, 2020).

[7] *See:* Human Rights Watch, ACLU, National Immigrant Justice Center, Detention Watch Network, *Code Red, The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention,* (June 2018) available at https://www.aclu.org/report/code-red-fatal-consequences-dangerously-substandard-medical-care-immigration-detention (as of August 8, 2020); Los Angeles Times, *An immigrant detainee fell into a coma and died at 27, His family wants to know why,* Paloma Esquivel, (April 10, 2019) available at https://www.latimes.com/local/lanow/la-me-ln-adelanto-detainee-death-20190410-story.html (as of August 8, 2020).

[8] *Angel de Jesus Zepeda Rivas, et al. v. David Jennings, et al.*, United States District Court Northern District of California, August 6, 2020, Case 3:20-cv-02731-VC, Document 500, pages 1-4.

[9] *ICE deliberately limited testing at Bakersfield immigration facility with COVID-19 outbreak,* Andrea Castillo, Los Angeles Times, (August 6, 2020) available at https://www.latimes.com/california/story/2020-08-06/amid-coronavirus-outbreak-at-bakersfield-immigration-facility-emails-show-ice-deliberately-limited-testing (as of August 8, 2020); *'People Are Terrified': SF Judge Orders COVID-19 Testing at ICE Facility,* Farida Jhabvala Romero, The California Report KQED, (August 7, 2020) available at https://www.kqed.org/news/11832472/people-are-terrified-sf-judge-orders-covid-19-testing-at-ice-facility (as of August 8, 2020).

As reported by the legal publication, the Recorder[10]:

> The judge noted that one email he saw from facility administrators reflected a desire to avoid testing staff across the board, because that would result in more positive tests that ICE and GEO would have to deal with.
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> "It's becoming more and more obvious that we're dealing with institutions that really don't seem to care," he said. "They don't actually care about the thing they should be caring about, which is avoiding the spread of the virus."

AB 3228 protects Californians from serious harms, including harms to their safety and welfare, as described above, in facilities operated by for-profit prison corporations, by ensuring that these facilities adhere to the minimum detention standards agreed upon in the contract for the facility and providing a civil enforcement mechanism.

3. AB 3228 may be challenged in court and will likely survive the challenge

Since AB 3228 regulates private for-profit corporations that operate facilities that detain people who are held against their will under criminal and civil law, including immigrants, for-profit prison corporations may sue California in an effort to enjoin the bill's enactment under various theories. They will likely lose. The for-profit prison corporations will likely challenge AB 3228 by arguing that AB 3228 is preempted by federal immigration law, that AB 3228 violates the Intergovernmental Immunity Doctrine, and that AB 3228 interferes with existing contractual obligations. Relevant to the constitutional analysis, the bill provides for the following:

> The bill: defines a private detention facility as a detention facility operated by a private, nongovernmental, for-profit entity pursuant to a contract or agreement with a governmental entity; requires a private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations; provides that if a private detention facility operator commits a tortious action, as defined, that violates the requirement to comply with detention standards of care and confinement, an individual who has been injured by that tortious action may bring a civil cause of action for relief; and allows the court to award a prevailing plaintiff reasonable attorney's fees and costs.

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[10] *'Start Working on It Now': Federal Judge Orders ICE Detention Center to Procure Quick-Turnaround COVID-19 Tests*, Alaina Lancaster, The Recorder, (August 5, 2020) available at https://www.law.com/therecorder/2020/08/05/start-working-on-it-now-federal-judge-orders-ice-detention-center-to-administer-quick-turnaround-covid-19-tests/?kw=%27Start%20Working%20on%20It%20Now%27:%20Federal%20Judge%20Orders%20ICE%20Detention%20Center%20to%20Procure%20Quick-Turnaround%20COVID-19%20Tests&utm_source=email&utm_medium=enl&utm_campaign=weekendedition&utm_content=20200809&utm_term=ca (as of August 8, 2020).

a. California has the power to act to protect all within its borders

It is within the state's constitutional authority to regulate private companies and act to protect all within California. As explained by the 9th Circuit in *US v. State of California*, April 18, 2019, No. 18-16496; D.C. No. 2:18-cv-00490-JAM-KJN, "the Supreme Court noted that [i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" (citation omitted) The court further noted that in that case, the "United States [did] not dispute that California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders, and neither the provisions of the INA that permit the federal government to contract with states and localities for detention purposes, *see* 8 U.S.C. §§ 1103(a)(11), 1231(g), nor the contracts themselves, demonstrate *any* intent, let alone 'clear and manifest,' that Congress intended to supersede this authority." (*US v. State of California,* p. 36-37)

b. Not preempted by federal law

The question that will be before a court if an action is filed to enjoin enactment of provisions in AB 3228 is whether the bill is preempted by federal law. Federalism, central to the constitutional design, adopts the principle that both the federal and state governments have elements of sovereignty the other is bound to respect. [citations omitted] (*Arizona v. United States*, 567 U.S. ___ (2012) p. 7). From the existence of two sovereigns follows the possibility that laws can be in conflict or at cross-purposes. (*Id.*) The Supremacy Clause provides a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. (*Id.*) Under this principle, Congress has the power to preempt state law. [citations omitted] (*Id.*) There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. [citations omitted] (*Id.*). State law must also give way to federal law in at least two other circumstances.

First, the states are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. [citations omitted] (*Id.*) The intent to displace state law altogether can be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." [citations omitted] (*Id.* at 7-8) Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards. (*Id.* at 10) The basic premise of field preemption—that states may not enter, in any respect, an area the federal government has reserved for itself. (*Id.*)

Second, state laws are preempted when they conflict with federal law. [citations omitted] (*Id.* at 8) This includes cases where "compliance with both federal and state

regulations is a physical impossibility," [citation omitted] and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines, 312 U. S., at 67; see also Crosby, supra, at 373 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects"). (*Id.* at 8)

To determine whether obstacle preemption exists, "the Supreme Court has instructed courts to employ their judgement, to be informed by examining the federal statute as a whole and identifying its purpose and intended effect." [citations and quotations omitted] (*US v. State of California,* p. 22-23) A high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. [citations and quotations omitted] (*Id.* at 23) As explained by the 9th Circuit in *US v. California*, "it is a state's historic police power – not preemption—that [the court] must assume, unless clearly superseded by federal statute."

Obstacle preemption, "attaches to any state law, regardless of whether it specifically targets the federal government, but only if it imposes an obstructive, not-insignificant burden on federal activities." (*Id.* at 26) The provisions of this bill do not impose an obstructive burden on immigration law. The government of the United States has broad, undoubted power over the subject of immigration and the status of immigrants.[11] (*Arizona,* at 2) The enactment and enforcement of immigration laws relates to who may enter the country, who may become lawfully present, who may be deported, and who may be detained. AB 3228 does not interfere with any determinations regarding who may be lawfully present in the United States or who may be deported, or who may enter the country, or who may be detained. Congress has specified which immigrants may be removed from the United States and the procedures for doing so. Immigrants may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law. (*See* 8 U.S. Code §1227). A principal feature of the removal system is the broad discretion exercised by immigration officials. (*Arizona,* at 4) When the provisions of this bill are enacted, the federal government would still equally be able to determine who can enter this country, who may become lawfully present, who may be deported, who may be detained and who may be released from detention, for example through an immigration bond. AB 3228 simply requires for-profit private prison corporations to abide by the minimum standards enumerated in their contracts and creates a private right of action for individuals who are injured as a result of violations of the detention standards of care and confinement that were agreed upon in the for-profit detention facility's contract for operations.

The for-profit prison corporations may contend that the creation of a private right of action and requirement in state law that the facilities comply with the detention

[11] The term "immigrant" is substituted for the term "alien."

standards of care and confinement agreed upon in the facilities' contracts for operation, although applicable to facilities that incarcerate people pursuant to criminal and civil laws, intrudes on the field of immigration. However, AB 3228 does not regulate immigration. As stated above, the provisions of the bill do not interfere with the federal government's determinations regarding the immigration status of immigrants within California. Moreover, AB 3228 does not interfere with the federal government's determinations of who is detained and who is not detained. Whether a person is mandatorily or permissibly detained is determined through federal law and court decision. Accordingly, California's decision to codify that for-profit prison corporations must comply with the detention standards of care and confinement agreed upon in the facility's contract for operation and create a private right of action for those harmed by noncompliance, is not an "obstacle" to the United States making immigration decisions, is not in conflict with federal immigration law, and therefore AB 3228 is likely not preempted by federal immigration law.

c. *Does not violate the intergovernmental immunity doctrine*

"The doctrine of intergovernmental immunity is derived from the Supremacy Clause, U.S. Const., art. VI…" (*US v. State of California,* p. 22) As explained by the 9th Circuit in *United States v. State of California,* "simply put, intergovernmental immunity attaches only to state laws that discriminate against the federal government and burdens it in some way." *(Id.* at *25)* "Since the advent of the doctrine, intergovernmental immunity has attached where a state's discrimination negatively affected federal activities in some way. It is not implicated when a state merely references or even singles out federal activities in an otherwise innocuous enactment." (*Id.* at 26) The "Supreme Court has clarified that a state 'does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them.'" [citation omitted] (*Id.* at 27) AB 3228 does not treat someone else better than it treats the federal government. AB 3228 does not regulate the federal government; it regulates private, for-profit corporations that incarcerate people in California. That being said, even if a court analyzes the treatment of the federal government in comparison to the treatment of others, it would be clear that this bill does not treat someone else better than it treats the federal government. Specifically, the bill provides equal treatment of for-profit prison corporations that contract with the state to operate facilities that incarcerate detainees and for-profit prison corporations that contract with the federal government to operate facilities that incarcerate detainees. AB 3228 requires a for-profit prison corporation that operates a detention facility in California to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations. The bill applies to facilities that are operated by a private, nongovernmental, for-profit entity pursuant to a contract with a governmental entity. This provision applies equally to for-profit prison corporations that entered into a contract with any governmental entity regardless of whether the governmental entity is the state or the federal government. Accordingly, a for-profit prison corporation who challenges the enactment of AB 3228 will not be able to demonstrate that for-profit

prison corporations that operate facilities that house state detainees are treated better than for-profit prison corporations that operate facilities that house federal detainees. Therefore, a court will likely not find that AB 3228 violates the intergovernmental immunity doctrine.

d. Does not interfere with existing contractual obligations

The U.S. Constitution provides that no state shall pass any law impairing the obligation of contracts (U.S. Const. art. 1, § 10.), and the California Constitution specifies that a law impairing the obligation of contracts may not be passed. (Cal. Const. art. 1, § 9.)

This bill does not interfere with any contract. In fact, the bill requires that a for-profit detention facility operator comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations. This bill holds the for-profit detention facility operator accountable through a civil action if that operator commits a tortious action which violates the detention standards of care and confinement and that individual was harmed by the tortious action. To the extent that the private right of action and/or the requirement that the private detention facility operator comply with the detention standards of care and confinement agreed upon in the facility's contract for operations is challenged in court, it is important to understand that courts have not interpreted the Contracts Clause as imposing an absolute bar to the enactment of legislation that interferes with contracts (*Home Building & Loan Association v. Blaisdel* (1934) 290 U.S. 398, 428). Instead, courts examine "whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." (*Sveen v. Melin* (2018) ___U.S.___ [138 S.Ct. 1815]. Internal citations omitted.)

Under the bill, the for-profit run private prison companies can still operate under their current contracts with the government entities. However, if a court interprets this codification of their obligation to comply with the detention standards they agreed to in their contract for operations and that private right of action, as interference with an existing contractual obligation, the interference would be subject to the test described above. To the extent that this law affects existing contractual obligations, the Supreme Court has been clear that a state government may do so if its action serves a significant and legitimate public purpose and is reasonably related to achieving that goal. AB 3228 clearly meets this standard in that it is a reasonable way of protecting those in California detention facilities from documented harm in for-profit detention centers. These operators have a history of disregarding the humanity of detainees and operating in ways that imperil the health and welfare of the detainees. That history is documented above in Comment 2. Codifying that the operators must comply with standards they have agreed to comply with and codifying an enforcement mechanism is a reasonable way of achieving the goal of protecting the health and welfare of detainees, workers, and those in the community that will be exposed to COVID-19 due to the documented

indifference of for-profit operators. Accordingly, a court will likely find that this statute is an appropriate and reasonable way of protecting the health, safety, and welfare of detainees.

4. Attorney's fees

This bill contains a provision where the court, in its discretion, may award the prevailing *plaintiff* reasonable attorney's fees and costs. To be clear, the plaintiff is the only party that may be awarded attorney's fees and costs if they prevail in an action brought under this statute. Allowing any prevailing *party* to recover attorney's fees would deter an injured person, from bringing an action for relief for fear of being responsible for the for-profit prison corporation's attorney's fees. A recent example of another statute where the prevailing *plaintiff* may recover reasonable attorney's fees is the Legislative Employee Whistleblower Protection Act, which was enacted in 2018 to hold Legislators accountable for their misconduct.[12] The Legislative Employee Whistleblower Protection Act provides that the "prevailing plaintiff is entitled to recover reasonable attorney's fees and costs." (AB 403, Melendez, Stats. of 2018, Ch. 2) The California Legislature tends to favor attorney's fees provisions that solely allow prevailing plaintiffs to recover attorney fees and costs in situations where there is a power imbalance such as when a Legislative employee blows the whistle on a Legislator. It is hard to imagine a power imbalance more extreme than that of the for-profit private prison corporations over an individual this bill is designed to protect, especially during the COVID-19 pandemic and when a U.S. District Court Judge, Judge Chhabria, refers to the action of a for-profit prison corporation that currently operates detention facilities under state and federal contracts as institutions that really don't seem to care. Judge Chhabria states that "they don't actually care about the thing they should be caring about, which is avoiding the spread of the virus." AB 3228 will not make these for-profit prison corporations care about the welfare, health, and safety of detainees because of a moral obligation. Comment 2 above details how these for-profit prison corporations have done the opposite. What AB 3228 will do is make these for-profit prison corporations improve the welfare, health, and safety of detainees because the corporations otherwise will face civil liability that will impact the profits of the corporations.

SUPPORT

Immigrant Defense Advocates (Sponsor)
Alameda County District Attorney, Nancy E. O'Malley
Alianza Sacramento
American Civil Liberties Union of California

[12] The Legislative Employee Whistleblower Protection Act imposed criminal and civil liability on a member of the Legislature who interferes with, or retaliates against, a legislative employee's exercise of the right to make a protected disclosure. (AB 403, Melendez, Stats. 2018, Ch. 2)

American Friends Service Committee
Asian American Pacific Islander Christians for Social Justice
Asian Prisoner Support Committee
Asylum Sponsorship Project
Bay Area Asylum Support Coalition
Bay Area Resource Generation
California Coalition for Immigrant Justice
California Collaborative for Immigrant Justice
California Immigrant Policy Center
California Immigrant Youth Justice Alliance
California Partnership
California Pan-Ethic Health Network
California Public Defenders Association
California Rural Legal Assistance Foundation
California Sanctuary Campaign
Campaign for Immigrant Detention Reform
Center for Empowering Refugees and Immigrants
Center for Gender & Refugee Studies
Central American Resource Center of California
Central Valley Immigrant Integration Collaborative
Centro Legal de La Raza
Clergy and Laity United for Economic Justice
Coalition for Humane Immigrant Rights
Communities United for Restorative Youth Justice
Contra Costa Immigration Rights Alliance
Council on American-Islamic Relations – California
Desert Support for Asylum Seekers
Disability Rights California
Do No Harm Coalition
Dolores Street Community Services
Education and Leadership Foundation
Ensuring Opportunity Campaign to End Poverty in Contra Costa
Freedom for Immigrants
ICE Out of Marin
Immigrant Legal Defense
Immigrant Legal Resource Center
Immigration Task Force
Immigration Task Force (Monterey)
Indivisible Sausalito
Inland Coalition for Immigrant Justice
Jewish Action NorCal
Kehilla Community Synagogue
Legal Aid at Work
League of United Latin American Citizens

League of Women Voters of California
Long Beach Immigrant Rights Coalition
McGeorge Immigration Clinic
National Association of Social Workers – California Chapter
NextGen California
NorCal Resist
North Bay Rapid Response Network: Napa, Solano and Sonoma Counties
Oasis Legal Services
One Justice
Pacifica Social Justice
Pangea Legal Services
PICO California
Public Law Center
Rapid Response Network of Monterey County
Resilience Orange County
Riverside Sheriffs' Association
Sacramento Immigration Coalition
San Diego Immigrant Rights Consortium
San Francisco Rapid Response Network
San Joaquin College of Law – New American Legal Clinic
Santa Cruz Barrios Unidos
Secure Justice
Services, Immigrant Rights and Education Network
Shomeret Shalom Global Congregation
Stand Together Contra Costa
STEP UP! Sacramento
Tahirih Justice Center
The Multicultural Center of Marin
USF Immigration and Deportation Defense Clinic
VIDAS Legal Services and Committee VIDA
Wellstone Democratic Renewal Club

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SB 1222 (Durazo, 2020) imposes liability, auto, and umbrella insurance requirements on for-profit, private detention facilities that house criminal and civil detainees, and prohibits them from self-insuring workers' compensation coverage. This bill also provides that an insurer shall require the facility to comply with specified operating standards, to provide the insurer and Insurance Commissioner with an initial compliance report and quarterly updates, and requires the insurer to send a notice to

the facility and Commissioner that the contract will be canceled if identified deficiencies are not corrected within 60 days. This bill was held under submission in the Senate Appropriations Committee.
Prior Legislation:

AB 32 (Bonta, Ch. 739, Stats. 2019) abolishes, in line with California's interest in ensuring the safety and welfare of its residents, the private for-profit prison industry from our state in order to protect incarcerated individuals from serious harm within our state border.

AB 33 (Bonta, 2019) would have required the California Public Employees' Retirement System and the California State Teachers' Retirement System to divest from private prison companies, from making new or renewing existing investments in such companies, and to constructively engage with private prison companies to establish whether the companies are transitioning their business model to another industry, among other provisions. The bill died in the Assembly Public Employment and Retirement Committee.

AB 1320 (Bonta, 2017) would have prohibited CDCR from entering into a contract with an out-of-state, private, for-profit prison on or after January 1, 2018, and would have prohibited CDCR from renewing a contract with an out-of-state, private, for-profit prison on or after January 1, 2020. The bill would also have prohibited, after January 1, 2021, any state prison inmate or other person under the jurisdiction of the department from being housed in any out-of-state, private, for-profit prison facility. The bill was vetoed by Governor Jerry Brown.

SB 29 (Lara, Ch. 494, Stats. 2017) Established, after January 1, 2018, contracting restrictions and new notice and public hearing requirements, as specified, upon local governments and local law enforcement agencies with respect to contracts, building permits, and other official actions involving the federal government, federal agencies, or private corporations seeking to house or detain noncitizens for purposes of civil immigration detention.

AB 103 (Committee on Budget & Fiscal Review, Ch. 17, Stats. 2017) provided that the California Department of Justice must, until July 1, 2027, report on: conditions of confinement; the standard of care and due process provided to detainees; and the circumstances around the apprehension and transfer of detainees to facilities. The bill required the Attorney General, by March 1, 2019, to conduct a review of these facilities and to provide the Legislature and the Governor with a comprehensive report by March 1, 2019, outlining the findings of that review. It required the comprehensive report to be posted on the Attorney General's website and otherwise made available to the public upon its release to the Legislature and the Governor.

SB 1289 (Lara, 2016) would have prohibited local law enforcement agencies and local governments from contracting with for-profit entities to detain immigrants on behalf of federal immigration authorities. This bill would have required that immigrant detention facilities adhere to national immigration standards for the detention of immigrants. Further, this bill would have required that immigrants in detention be provided other legal rights, as specified. This bill would have authorized the Attorney General, district attorneys, and city attorneys to bring suits against detention facilities for violations of the national detention standards or violations of other legal rights created by this bill. The bill was vetoed by Governor Brown. Governor Brown subsequently signed SB 29 (Lara, Ch. 494, Stats. 2017).

PRIOR VOTES:

Assembly Floor (Ayes 61, Noes 14)
Assembly Appropriations Committee (Ayes 14, Noes 4)
Assembly Public Safety Committee (Ayes 7, Noes 1)

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