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Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 334 (Durazo)
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SUBJECT

Detention facilities: contracts

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 for-profit private detention facility to comply with the detention standards of care and confinement agreed upon in the facility's contract for operation and specified health, safety, and insurance requirements.

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, the Legislature passed SB 29 (Lara, Ch. 494, Stats. 2017) which provided, as of January 1, 2018, contracting restrictions and new notice and public hearing requirements 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. Additionally, AB 32 (Bonta, Ch. 1739, Stats. 2019) was signed into law to phase in the abolition of the private for-profit prison industry from our state. Nonetheless, some facilities run by for-profit prison corporations still exist in California.

For-profit prison corporations owe a fiduciary duty to their shareholders. Their mission is to maximize profits for their investors. 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 the individuals detained, but to the 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. To this end, the Legislature passed AB 3228 (Bonta, Ch. 190, Stats. 2020) last year. AB 3228 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 and provides a private right of action for an individual injured by noncompliance with these standards.

The bill currently before this Committee builds on these prior bills in an attempt to protect the health, safety and welfare of those detained in private for-profit facilities. The bill is sponsored by California Insurance Commissioner Ricardo Lara, who authored SB 29, the Coalition for Humane Immigrant Rights Los Angeles, and the California Immigrant Policy Center. The bill is supported by various civil rights organizations, immigrant rights organizations, and the Riverside County Sheriffs' Association. The bill passed out of the Senate Committee on Insurance with a vote of 8 to 1 and 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 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).)
- 8) 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 and provides a private right of action for an individual injured by noncompliance with these standards, as specified, and allows the court to award a prevailing plaintiff reasonable attorney’s fees and costs. (Gov. Code § 7320)
- 9) Provides, as of 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. (Civil Code § 1670.9).

This bill:

- 1) Codifies Penal Code section 9506 which requires a private detention facility to:
 - comply with all appropriate state and local building, zoning, health, safety, and fire statutes, ordinances, and regulations, and with minimum jail standards adopted by the Board of State and Community Corrections;
 - select and train its personnel in accordance with selection and training requirements adopted by the Board of State and Community Corrections;
 - comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility’s contract for operations, as specified;
 - maintain specified insurance coverages, including workers’ compensation, which shall be obtained from admitted insurers.
- 2) Provides that the insurance policy, described above, shall require the private detention facility to comply with the above requirements, provide the insurer

and Insurance Commissioner with an initial compliance report and subsequent quarterly compliance updates as required by Section 679.75 of the Insurance Code, and grant the insurer the rights of notice and termination if compliance is not maintained.

- 3) Requires that any governmental entity with which the private detention facility has a contract to provide detention services must be a named insured on the policy.
- 4) Provides that any insurer providing insurance coverage pertaining to a private detention facility, as defined, must require that the private detention facility: fully comply with all of the requirements of Section 9506 of the Penal Code; and provide the insurer and the Insurance Commissioner with an initial compliance report within 60 days of obtaining coverage, and quarterly updates thereafter.
- 5) Provides that if the private detention facility is not in compliance with the requirements of Section 9506 of the Penal Code, or with the above requirements, the insurer shall notify the director of the private detention facility and the Insurance Commissioner of the deficiencies and that the insurance contract will be canceled if the identified deficiencies are not corrected within 60 days.
- 6) Provides that if the insured has received the above notice of deficiencies and has not remedied the identified deficiencies within the statutory period, the insurer shall cancel the insurance contract.
- 7) Provides that this bill shall not create any additional authority or responsibility on the part of the Board of State and Community Corrections or Department of Corrections and Rehabilitation. Provides that the Board of State and Community Corrections and Department of Corrections and Rehabilitation shall neither be required, nor are authorized to, expend any funds, or incur any expenses as a result of this section.
- 8) Includes a severability clause.

COMMENTS

1. Stated need for the Bill

According to the author:

The poor health and safety standards in these facilities is documented in numerous investigations: a 2016 U.S. A.G. report, 2017 U.S Homeland Security Report, and 2019 USA Today report depicting sexual assault, physical and mental abuse, inadequate medical care, and solitary confinement. In turn,

California has taken a definitive stance to address the abusive and inhumane care towards detainees. Despite these efforts, operators' reluctance to adopt more rigorous standards raises alarms about the health and safety of people detained in these facilities which have been exacerbated by the COVID-19 pandemic.

According to USC researchers, continued violation of health and safety standards has been exacerbated by the COVID-19 pandemic, as deaths in immigration detention centers have skyrocketed across the U.S. due to delays in medical treatment and poor control of infectious diseases including lack of access to soap, sanitizer, medical supplies, PPE, and social distancing. Among the first outbreaks reported in these facilities was one in Otay Mesa when at least 111 people in custody and 25 staffers tested positive and the first COVID-19 related death of a detainee.

SB 334 (Durazo) offers a critical piece to the needed oversight of these private, for-profit facilities, ensuring they are adhering to all necessary health and safety standards. Insurance companies want to reduce risk to avoid losses and the control that insurance companies have over the availability and costs of coverage creates a financial incentive for private for-profit prisons and detention facilities to meet these standards if they are to continue to operate in California. The insurance requirements in this proposal ensure that coverage exists to protect and compensate persons who are harmed, while ensuring compliance with health and safety standards through insurance company risk management processes. This provides a powerful financial motivation for private prisons and detention facilities to adhere to local, state, and federal standards.

California Insurance Commissioner Ricardo Lara, sponsor of the bill, writes:

[P]oor medical treatment leading to deaths of people in detention, lack of access to legal services leading to violations of civil rights, and other substandard conditions continue to plague private for-profit facilities because they repeatedly fail to meet minimum health and safety standards. This continued violation of health and safety standards has only been exacerbated by the pandemic, as deaths in immigration detention centers have skyrocketed across the United States due to delays in medical treatment and poor control of infectious diseases.

Current standards are not being upheld in large part because there are no consequences if private for-profit prisons and detention centers fall below these standards. This failure creates unacceptable risk of loss for insurance companies that provide liability, medical malpractice, workers' compensation, and other coverage to these facilities. The lack of enforceable standards to protect human

rights could lead to facilities losing insurance coverage and harming state and local government finances. [. . .]

SB 334 (Durazo) would require insurance companies to monitor private for-profit prisons' and detention facilities' compliance with the detention standards of care and confinement agreed upon in the facility's contract for operations in addition to California's minimum jail standards and all appropriate local and state building, zoning, health, safety, and fire standards which doubles as an effective way for insurance companies to manage their own risks and losses. In addition, the control that insurance companies have over the availability and costs of coverage creates a financial incentive for private for-profit prisons and detention facilities to meet these standards. [. . .]

Ensuring that private for-profit prisons and detention centers are safe and humane aligns with the Department of Insurance's interest in managing risk to insurance companies' bottom line. SB 334 (Durazo) provides a powerful financial motivation for private for-profit prisons and detention facilities to adhere to local, state, and federal standards while additionally ensuring that these facilities maintain comprehensive insurance coverage. Most importantly, this bill will ensure that basic health, safety, and human rights are afforded to our most vulnerable populations, especially during this on-going pandemic.

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 2016.¹ 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. 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

¹ *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 April 6, 2021).

administrative segregation purposes. Numerous other studies and reports document problems with private for-profit prison facilities.²

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 SB 334, “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 corporations and about suicide attempts, inadequate dental care, and cursory medical assessments.⁶ Several additional reports detail deplorable conditions of detainees.⁷

² Justice Policy Institute, *The Problem with Private Prisons*, February 2, 2018, Tara Joy, available at <http://www.justicepolicy.org/news/12006> (as of April 6, 2021); 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 April 6, 2021); 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 April 6, 2021).

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 April 6, 2021).

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> (April 6, 2021).

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 April 6, 2021).

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 April 6, 2021).

In August 2020 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

As reported by the legal publication, the Recorder¹⁰:

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 April 6, 2021); 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 April 6, 2021).

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 April 6, 2021); *‘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 April 6, 2021).

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->

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.

“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.”

According to a February 22, 2021 CalMatters article, “571 people have tested positive for the coronavirus in California’s seven immigration detention centers, including 270 at the Adelanto facility in San Bernardino County.”¹¹ Since the publication of the CalMatters article, at least one other immigrant detainee died from COVID-19 in California.¹²

SB 334 protects Californians from serious harm, including harms to their safety and welfare, as described above, in facilities operated by for-profit prison corporations, by ensuring that these facilities comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility’s contract for operations and requiring detention facilities to comply with specified health, safety, and insurance requirements.

3. SB 334 may be challenged in court and will likely survive the challenge

Since SB 334 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 SB 334 by arguing that SB 334 is preempted by federal immigration law, that SB 334 violates the Intergovernmental Immunity Doctrine, and that SB 334 interferes with existing contractual obligations. Relevant to the constitutional analysis, the bill provides for the following:

The bill requires a private detention facility to: comply with all appropriate state and local building, zoning, health, safety, and fire statutes, ordinances,

[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=weekenedition&utm_content=20200809&utm_term=ca](https://www.calimmigrationdetentioncenter.com/news/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=weekenedition&utm_content=20200809&utm_term=ca) (as of April 6, 2021).

¹¹ *Immigration detention centers showcase California’s vaccine chaos*, Ana B. Ibarra, CalMatters, (February 22, 2021), available at <https://calmatters.org/health/coronavirus/2021/02/immigrants-detention-centers-vaccine/> (as of April 6, 2021).

¹² *Detainee who plead for release from California ICE immigration center dies from COVID-19*, Joe Nelson, Mercury News, (March 23, 2021), available at <https://www.mercurynews.com/2021/03/23/detainee-who-pleaded-for-release-from-ice-immigration-center-in-adelanto-dies-from-covid-19/> (as of April 6, 2021).

and regulations, and with the minimum jail standards established by specified regulations; select and train its personnel in accordance with selection and training requirements adopted by the Board of State and Community Corrections; comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations; maintain specified insurance coverages from an admitted insurer and place specified requirements on the insurer and private detention facility, including that the private detention facility provide the insurer and the commissioner with an initial compliance report within 60 days of obtaining the specified insurance coverage and provide quarterly updates thereafter. The bill also specifies that the insurance policy must require the private detention facility to comply with the above stated requirements and provide the insurer and Insurance Commissioner with an initial compliance report and subsequent quarterly compliance updates as required by Section 679.75 of the Insurance Code. The bill also requires that the insurer notify the director of the private detention facility and the commissioner of deficiencies if the insured is not in compliance with these requirements, requires the insurer to notify the detention facility that the insurance contract will be canceled if the identified deficiencies are not corrected within 60 days, and requires the insurer to cancel the insurance contract if the insured has received notice of deficiencies and has not remedied the identified deficiencies within the statutory period.

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 everyone in 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 SB 334, 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.¹³ (*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. SB 334 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. SB 334 simply requires for-profit private prison corporations to abide by the minimum standards enumerated in their contracts and adhere to specified health, safety, and insurance requirements.

The for-profit prison corporations may contend that the creation of insurance obligations and the requirements that the facilities comply with health and safety standards and the detention standards of care and confinement, although applicable to facilities that incarcerate people pursuant to criminal and civil laws, intrudes on the field of immigration. However, SB 334 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, SB 334 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 specified health, safety, and insurance requirements, is not an "obstacle" to the United States making immigration decisions, is not in conflict with federal immigration law, and therefore SB 334 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

¹³ The term "immigrant" is substituted for the term "alien."

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) SB 334 does not treat someone else better than it treats the federal government. SB 334 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. SB 334 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 also requires detention facilities to comply with specified health, safety, and insurance requirements. 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 SB 334 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 SB 334 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 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 requires the detention facility operators to comply with specified health and safety requirements and places specified insurance obligations on the detention facilities. To the extent that these requirements are 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, their obligation to comply with health and safety standards, and insurance requirements, 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. The requirements of SB 334 clearly meet this standard in that they are a reasonable way of protecting those in California detention facilities from documented harm. These for-profit detention facility 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 that the facilities must comply with specified health, safety, and insurance requirements 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 detention facility 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.

SUPPORT

California Insurance Commissioner Ricardo Lara (co-sponsor)
California Immigrant Policy Center (co-sponsor)
Coalition for Humane Immigrant Rights (co-sponsor)
American Civil Liberties Union of California
Clergy and Laity United for Economic Justice
Communities United for Restorative Youth Justice
Consumer Attorneys of California
Disability Rights California
Drug Policy Alliance
Immigrant Legal Resource Center
Inland Coalition for Immigrant Justice
Inland Equity Partnership
National Immigration Law Center
NorCal Resist
Oakland Privacy
Public Counsel
Riverside Sheriffs' Association
Voices for Progress
Wellstone Democratic Renewal Club

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 263 (Arambula, 2021) requires a private detention facility operator to comply with all local and state public health orders and occupational safety and health regulations. This bill is currently on the Assembly Floor.

Prior Legislation:

SB 1222 (Durazo, 2020) was substantially similar to this bill. The bill was held in the Senate Committee on Appropriations.

AB 3228 (Bonta, Ch. 190, Stats. 2020) 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.

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 made public, as specified.

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:

Senate Insurance Committee (Ayes 8, Noes 1)
