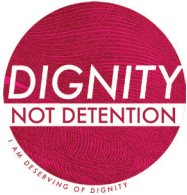


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AB 32 *EN BANC* DECISION, AT A GLANCE



This legal breakdown was composed by the California **Dignity Not Detention Coalition**, with special thanks to **NIPNLG** and **Pangea Legal Services**.

BACKGROUND

AB 32 (People Not Profit)¹ signed in 2019 and effective January 2020, outlaws criminal and civil private incarceration in California, with some exceptions. Some brief months after AB 32 was signed, private prison company GEO Group Inc. and the Trump administration sued California aiming to strike down this momentous law. Federal District Court Judge Sammartino largely upheld AB 32, after which GEO and the Biden administration appealed to the Ninth Circuit. On October 5, 2021, the Ninth Circuit regrettably ruled to strike down AB 32. California then appealed to defend AB 32 to an *en banc* eleven member panel of the Ninth Circuit. In defense of the law, the California Dignity Not Detention coalition helped [hold an action on June 21, 2022](#) during the Ninth Circuit *en banc* oral argument, in addition to filing several amici briefs.² On September 26, 2022, the Ninth Circuit *en banc* panel held that GEO group was likely to succeed in their lawsuit to find AB 32 unconstitutional, and could continue seeking a preliminary injunction to block the law pending further proceedings at the lower court level. This summary provides a review of the Ninth Circuit Court of Appeals' *en banc* decision.

WHAT IS A PRELIMINARY INJUNCTION?

- Lawsuits can take many years to resolve. Sometimes, people or groups challenging laws or policies can ask the court to issue a “preliminary injunction” which blocks a law temporarily while the case gets fully decided.
- When the court decides whether or not to grant a preliminary injunction, the court considers whether it thinks the person asking for it will ultimately win the case. While the court does not actually decide who wins, deciding whether someone is likely to win is a strong signal. For that reason, parties (the different sides of a case in court) sometimes decide whether or not to keep fighting a case based on a court’s judgment at the preliminary injunction stage.
- Here, GEO and the Trump administration asked for a preliminary injunction and the district court (first court to look at the issue) denied it, reasoning that California would probably win the case. The Trump administration then appealed the lower court’s ruling, and the Biden administration chose to continue the appeal. The Ninth Circuit panel disagreed with the lower court, holding that GEO and the Biden administration would probably win the case. The Ninth circuit *en banc* panel agreed with the Ninth Circuit’s decision against AB 32. While technically no one has won or lost yet, AB 32 will likely be blocked for the rest of the case. Because the higher court (the Ninth Circuit) signaled that it thinks GEO and the Biden administration will probably succeed in their arguments, it also makes it harder for AB 32 to ultimately be upheld.

1. Cal. Pen. Code § 5003.1, § 9500 et seq.

2. The following amici briefs were submitted in support of California: Amicus by American Civil Liberties Union Foundation of Southern California and National Immigrant Justice Center, re [ICE lacking authority to enter into private prison contracts](#); Amicus by Collaborative for Immigrant Justice, Center for Gender & Refugee Studies, Immigrant Defense Advocates, and Immigrant Legal Defense, re [GEO’s unclean hands and violation of open competition requirements](#); Amicus by the Immigrant Legal Resource Center, Human Rights Watch, and Freedom for Immigrants re [the risk to the health, safety, and welfare of detained people in these facilities](#).

WHAT DOES THE DECISION SAY?

- Eight Ninth Circuit judges on the *en banc* panel held that GEO will likely succeed on its claim that AB 32 violates the Supremacy Clause doctrine, and therefore asked the district court to determine whether AB 32 will be blocked while litigation continues. Under the Supremacy Clause doctrine, federal laws generally override state laws that directly conflict with federal laws. The judges misread AB 32 to hold that it impermissibly tries to control DHS' (questionable) legal authority to contract with private companies for the purposes of immigration detention. The judges also cited the "intergovernmental immunity doctrine" and the "preemption doctrine" — both of which courts use to block state actions that they see as intruding on areas of federal control — as additional bases to strike down the law.
- In signaling that AB 32 can be blocked on this basis, the judges wrongly viewed AB 32 as a law that aims to control the federal government. In fact, AB 32 is about the health and safety of Californians, as the dissenting judge described and as California state officials have repeatedly stated.
- The decision lacks depth in its reasoning, which even the Court seems to acknowledge at points. The Court concedes in footnote 4, page 19, that states typically *do* have the power to regulate health and safety within their state. AB 32 is based on securing the health and safety of Californians. Similarly, in footnote 11, page 29, the Court refuses to define the type of impact or "interference" on federal functions that would instruct courts to strike other state laws under this new ruling.
- The majority misstated key facts, claiming that AB 32 requires the federal government to cease all immigration detention in the state, which is not true. In fact one government-run contract remains in Yuba County, and many others have existed in recent history. The error shows that judges redefined the scope of AB 32 in order to achieve the outcome they wanted — siding with for-profit prison companies.
- Chief Judge Murguia dissented, joined by Judges Rawlinson and Sung, reasoning that AB 32 is valid under the intergovernmental immunity doctrine because it neither regulates nor discriminates against the federal government. The dissent also emphasized that AB 32 is not preempted (blocked) by federal law because Congress has not expressly forbidden states from making laws about for-profit detention. Not only that, Judge Murguia also emphasized that Congress has not made any express laws about private immigration detention of any kind, so the majority erred in finding that AB 32 conflicts with any federal laws.
- The dissent points out that the panel's decision goes against earlier court decisions, which said that courts should not block state laws unless a law more directly attempted to control the federal government. Chief Judge Murguia said the majority's "approach is problematic, not only because it is contrary to *Washington*³ (a recent Supreme Court case), but also because it makes a muddle of the intergovernmental immunity doctrine." In other words, Judge Murguia points out that not only is the majority opinion in conflict with older precedent, but their analysis is foreclosed by the recent Supreme Court decision in *Washington*.
- Chief Judge Murguia also emphasized that in passing AB 32, California was relying on its traditional powers to regulate health and safety, and that the district court rightly looked at what the California legislature considered in passing AB 32, including reports of violence and neglect in ICE detention centers.

WHAT DOES THIS MEAN?

- The *en banc* panel "remanded" (returned) the case to District Court Judge Sammartino. This means that AB 32 will almost certainly be subject to a "preliminary injunction," which means blocking the law from going

3. *United States v. Washington*, 142 S. Ct. 1976 (2022).



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into effect — possibly for years — as the other parts of the case continue to be litigated in court. The lower court had also dismissed some of GEO’s claims against AB 32 and under this order, those claims will also likely go forward. Because the Ninth Circuit signaled that it thinks GEO should win in deciding on the preliminary injunction, it now may be very difficult to find a way to convince that court that AB 32 is lawful and may be enforced.

WHAT’S NEXT?

- The CA Department of Justice and Attorney General Bonta will be making decisions about how to advocate at the District Court based on whether they think there is a chance of defending the law under this ruling.
- Advocates, including members of the [California Dignity Not Detention Coalition](#) who fought to pass laws like AB 32, [SB 29](#), and [AB 103](#), will continue to fight for the liberation of our communities. This is a setback, not a defeat, in our larger battle to abolish all cages, nationwide.
- Other laws such as AB 103 (Attorney General oversight of detention facilities) and SB 29 (prohibiting California localities from entering into new detention contracts) remain good law.
- Follow the Dignity Not Detention Coalition on [Twitter](#) and [Facebook](#) for future calls to action. #FreeThemAll

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