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An End to Inhumane Detention: Washington Must Ban Private Detention Centers and Strengthen Protections for Detained Immigrants

Ariana Headrick*

I. INTRODUCTION

Washington can propel the United States toward a system that uplifts its immigrants rather than continuing to support the present system that injures them. Detainees in Washington State's private, for-profit Northwest ICE Processing Center experience abysmal living conditions and few protections. To improve the lives of immigrants and protect those within its borders, Washington should enact legislation that bans privately run, for-profit prison companies from engaging in the business of detention and implement significant regulations and standards for facilities that detain immigrants. This legislation would ensure that immigration detainees in Washington State maintain their safety and personal dignity throughout the duration of their time in a detention center. Such legislation would likely be found to be in accordance with United States constitutional limitations on state laws. Moreover, its implementation is essential to the integrity of Washington as a guardian of all individuals within its borders.

II. THE HISTORY AND CONDITIONS OF PRIVATELY RUN, FOR-PROFIT DETENTION CENTERS IN THE UNITED STATES

Privately run for-profit detention centers present an urgent issue of human rights violations.¹ The prospect of banning private detention centers

* J.D. 2021, Seattle University School of Law. The author would like to thank Molly P. Matter, who inspired the author to investigate strategies to end privatized immigration detention.

¹ See generally Kimberly R. Hamilton, *Immigration Detention Centers in the United States and International Human Rights Law*, 21 BERKELEY LA RAZA L.J. 93 (2011).

provides an opportunity for legislators to shift immigration policies toward providing immigrants with more compassionate and safe experiences. To curtail inhumane treatment of immigrants within its jurisdiction, Washington has recently taken some steps toward protecting the rights of immigrants. This section will provide an overview of privately run, for-profit detention operations, the potential outcomes of banning private detention centers, the conditions at the Northwest ICE Processing Center in Tacoma, Washington, and Washington’s current climate for providing legal protection to immigrants.

A. Operations of Privately Run, For-Profit Detention Centers

At any given time, after having presented themselves at the United States border for asylum, tens of thousands of migrants are held alongside immigrants without legal U.S. status in privately run detention centers while they await their day in court.² Conditions at private detention centers are often egregious because “detention contractors are not subject to federal open records laws, civil service requirements, administrative law, constitutional requirements, and other legal checks that would otherwise apply to federal officials doing the same work.”³ For example, in 2018, the Office of the Inspector General found that conditions at the Adelanto

² *California, Rights Groups Seek Greater Control of Immigrant Detention Centers*, CBS SF BAY AREA (Sept. 29, 2017), <https://sanfrancisco.cbslocal.com/2017/09/29/california-rights-groups-seek-greater-control-of-immigrant-detention-centers/> [https://perma.cc/7663-DCDY] [hereinafter *California, Rights Groups Seek Greater Control of Immigrant Detention Centers*]; Steve Gorman, *California Set to End Private Prisons and Immigrant Detention Camps*, REUTERS (Oct. 9, 2019), <https://www.reuters.com/article/us-california-prisons/california-set-to-end-private-prisons-and-immigrant-detention-camps-idUSKBN1WO2OZ> [https://perma.cc/83BV-J8AH].

³ David S. Rubenstein & Pratheepan Gulasekaram, *Privatized Detention & Immigration Federalism*, 71 STAN. L. REV. 224, 226 (2018-2019); Li Cohen, *California Bans Private Prisons and Detention Centers*, CBS NEWS (Oct. 11, 2019), <https://www.cbsnews.com/news/california-california-bans-private-prisons-and-detention-centers-law-signed-today-2019-10-11/> [https://perma.cc/Y58D-FVQB].

Detention Facility, a private detention center in California, posed “significant health and safety risks, including nooses in detainee cells, improper and overly restrictive segregation, and inadequate detainee medical care.”⁴ Detainees there are kept in complexes surrounded by barbed wire and are often severely beaten and assaulted by guards.⁵ When Adelanto detainees organized a hunger strike in 2017, guards retaliated by dousing them in hot water, pepper spraying them, and beating them.⁶ The detainees who participated in the hunger strike were then placed into disciplinary segregation—*i.e.*, solitary confinement—for ten days.⁷

Further, detainees can be held in detention centers for extended periods of time while they await the processing of their case. For example, one immigrant was trapped in detention for nine years.⁸ Even after they are no longer legally required to remain in detention, the government has continued to hold immigrants in detention facilities, prolonging the time they spend in the centers.⁹ And the longer an individual is detained, the more profit is generated by the facility in which they are held.

Operated by corporations, the primary purpose of private detention centers is to maximize shareholder profits.¹⁰ Because the facilities are private, they lack the oversight and regulations that public detention centers must follow.¹¹ They also do not have to comply with public records laws, so

⁴ Cohen, *supra* note 3.

⁵ *California, Rights Groups Seek Greater Control of Immigrant Detention Centers*, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Mandatory Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/mandatory-detention> [<https://perma.cc/D5NU-TEB4>].

¹⁰ Gorman, *supra* note 2.

¹¹ *Id.*

United States taxpayers are unaware of how much of their tax money is spent on private detention centers.¹²

Private prison stocks increased by one hundred percent when Donald Trump was elected to be the President of the United States.¹³ The rate of detention also increased significantly over the course of the Trump administration.¹⁴ Immigrations and Customs Enforcement (ICE) pays private detention centers an average of over \$200 per day per detainee.¹⁵ Though the detainees themselves perform most of the labor the centers require, they receive just a dollar each day for their work.¹⁶

In 2009, Congress endeavored to close the most inhumane detention facilities by requiring ICE to discontinue future contracts with detention facilities that failed two consecutive inspections.¹⁷ However, this rule has since only led to inadequate, cursory, and meaningless inspections.¹⁸ ICE has simply given its facilities a one hundred percent pass rate, and no facility has closed.¹⁹

¹² *California, Rights Groups Seek Greater Control of Immigrant Detention Centers*, *supra* note 2.

¹³ Max Rivlin-Nadler, *Bill to Ban Private Lockups Would Impact Immigrant Detention in San Diego*, KPBS (Sept. 13, 2019), <https://www.kpbs.org/news/2019/sep/13/california-legislature-passes-bill-ban-all-private/> [<https://perma.cc/53WD-SB4L>].

¹⁴ *Id.*

¹⁵ Rachel Shaheen, *Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention*, NAT'L IMMIGR. F. (Feb. 22, 2019), <https://immigrationforum.org/article/fact-sheet-electronic-monitoring-devices-as-alternatives-to-detention/> [<https://perma.cc/DJL9-FXYN>].

¹⁶ *California, Rights Groups Seek Greater Control of Immigrant Detention Centers*, *supra* note 2.

¹⁷ *Detention Oversight*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-oversight> [<https://perma.cc/LT7B-DF9W>].

¹⁸ *Id.*

¹⁹ *Id.*

B. Potential Implications of Banning Private Detention Centers

On October 11, 2019, California Governor Gavin Newsom signed Assembly Bill No. 32, banning new contracts and contract renewals with private, for-profit detention centers and prisons in California.²⁰ The GEO Group and CoreCivic, two major private prison companies in the United States, operate centers that will be impacted by the bill.²¹ In California, there are four private immigrant detention centers that hold nearly 4,000 detainees,²² less than one tenth of the 52,000 detainees held nationwide by ICE.²³ Because California detention centers will no longer be privately run, any future detention centers in California will be public.²⁴ Rob Bonta, a California assemblyman who sponsored the bill, hopes that the bill will encourage ICE to detain fewer immigrants.²⁵

While banning private detention centers is a key step in the fight for immigrants' rights, many issues have yet to be resolved. For example, once a state bans private detention centers, ICE may simply transfer detainees in that state to detention centers in another state.²⁶ If detainees are transferred to another state, their friends and families will have to travel far greater distances to visit them.²⁷ Detainees will also have a much more difficult

²⁰ Jeremy Hobson & Samantha Raphelson, *California Bans Private Prisons and Immigrant Detention Centers*, WBUR (Oct. 11, 2019), https://www.wbur.org/hereandnow/2019/10/11/california-set-to-ban-private-prisons?utm_term=nprnews&utm_source=facebook.com&utm_campaign=npr&utm_medium=social&fbclid=IwAR2yiFXkzbe_zqZEqdid2Lk5gfsLRaUQ0Hh5NaHwVOLuZVUCm1GnK01S-X4 [<https://perma.cc/D2LD-Z9RJ>]; see also Gorman, *supra* note 2.

²¹ Hobson & Raphelson, *supra* note 20.

²² *Id.*

²³ Gorman, *supra* note 2.

²⁴ *Id.*

²⁵ Hobson & Raphelson, *supra* note 20.

²⁶ *Id.*

²⁷ Gorman, *supra* note 2.

time meeting with their current attorneys or finding new ones in a more remote location.²⁸

The United States government could instead choose alternatives to detention to ensure that people appear for court. One possible alternative is the use of electronic monitoring devices, or ankle monitors.²⁹ When compared to confinement in a detention center, restriction via an ankle monitor affords increased freedom to individuals waiting for immigration court proceedings.³⁰ Further, people wearing ankle monitors could live at home and avoid the harsh practices that are widespread within detention centers.³¹ Ankle monitors are already becoming common as an alternative to detention: in July 2018, forty-five percent of the individuals in ICE’s primary Alternatives to Detention program (more than 38,000 of 84,500 people) were fitted with ankle monitors.³² While each individual in detention costs an average of over \$200 per day, electronic monitoring programs can cost as little as \$4.50 per day.³³

However, ankle monitors are not a perfect solution. They can cause bleeding, sores, inflammation, numbness, and severe cramps.³⁴ Moreover, ankle monitors, while less restrictive than detention, still require the wearer to charge them twice daily, each time for hours, remaining near a power source to do so; the monitors only retain a charge for about six hours.³⁵ They cause significant stigma to the wearer, who is “marked” like a criminal in shackles, which also further restricts the wearer’s job

²⁸ Sophie Murguia, *California Cities Are Ending ICE Detention Contracts, but Immigrants Might Not Go Free*, PAC. STANDARD (May 29, 2019), <https://psmag.com/social-justice/california-cities-are-ending-ice-detention-contracts-but-immigrants-might-not-go-free> [<https://perma.cc/4UE2-URGK>].

²⁹ *Id.*

³⁰ See Shaheen, *supra* note 15.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

prospects.³⁶ Finally, the geographic location information collected by ankle monitors is data that ICE (and perhaps other entities) may use in ways they have not disclosed, raising potential privacy concerns.³⁷

Ideally, instead of fitting immigrants with ankle monitors and treating them like criminals, ICE will significantly reduce the arrests it makes and release former detainees on parole to stay with their families and communities in the United States until their cases are heard. Outright parole without ankle monitors would allow immigrants the freedom to live their lives as they wait for their cases to go through court proceedings.³⁸ This is not an unattainable goal. For example, existing policies already provide that parole could apply to asylum seekers who pass the initial credibility interview as well as to members of certain populations.³⁹

The act of banning private detention centers has the potential to make a powerful, positive impact on the rights of immigrants in the United States. With the enactment of Assembly Bill No. 32, California has demonstrated that the state will not tolerate the harmful conditions immigrants currently experience in private detention centers for the benefit of prison shareholders.⁴⁰ Other states, such as Washington, should follow suit and enact their own statutes against privately run detention centers.⁴¹ With enough pressure from such pioneering states, the United States federal government may change its policies, perhaps ultimately banning immigrant detention altogether.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Alternatives to Detention*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/alternatives> [https://perma.cc/XST3-YSQZ].

³⁹ *Id.*; *Fact Sheet: The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL, <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law> [https://perma.cc/WTE4-BSFZ].

⁴⁰ Cohen, *supra* note 3.

⁴¹ Hobson & Raphelson, *supra* note 20.

The fight to protect the rights of immigrants does not end with a ban on private detention centers. However, a ban on private detention centers can pressure the current detention system to reform, and it will make a powerful statement about what the citizens of the United States will accept when it comes to the treatment of people who do not yet possess the privilege of citizenship in the United States. Furthermore, data collected by Mario Castillo Martínez, Program Coordinator for the Northern California Rapid Response and Immigrant Defense Network in San Francisco, indicate that ICE is more likely to arrest people in the counties where detention centers are located.⁴² It is possible, then, that reducing the number of detention centers will in turn reduce the number of ICE arrests overall, and more immigrants in the United States will remain free.

C. Stories from Washington's Northwest ICE Processing Center

The Northwest ICE Processing Center (NWIPC) in Tacoma, Washington, formerly named the Northwest Detention Center, has conditions that are similarly egregious to those described generally above. It is privately owned and operated by the GEO Group and contracted for by ICE.⁴³ Its location, one of the nation's most toxic areas due to hazardous waste dumping, has significant water and soil contamination and is barred from residential development.⁴⁴ The Northwest ICE Processing Center has a capacity of 1,575 detainees, making it one of the largest immigration

⁴² Murguia, *supra* note 28.

⁴³ *About the NW Detention Center*, NW IMMIGR. RTS. PROJECT, <https://www.nwirp.org/resources/about-the-nw-detention-center/> [https://perma.cc/LWB7-WNB2].

⁴⁴ Bob Ortega, *Migrants Describe Hunger and Solitary Confinement at For-Profit Detention Center*, CNN INVESTIGATES (Jul. 11, 2018, 1:58 PM), <https://www.cnn.com/2018/07/11/us/northwest-immigrant-detention-center-geo-group-invs/index.html> [https://perma.cc/P7X3-ANSZ]; see also Melissa Hellmann, *Incarcerated and Infirm: How Northwest Detention Center Is Failing Sick Inmates*, SEATTLE WKLY. (Oct. 10, 2018, 1:30 AM), <https://www.seattleweekly.com/news/incarcerated-and-infirm-how-northwest-detention-center-is-failing-sick-inmates/> [https://perma.cc/XW3T-V5Z9].

detention centers in the United States.⁴⁵ In the past few years, hundreds of detainees have participated in over a dozen hunger strikes in opposition to inadequate food, inadequate healthcare, inadequate COVID-19 safeguards, and other concerns.⁴⁶ In recent years, the Northwest ICE Processing Center received more complaints alleging physical and sexual assaults committed against detainees than any other detention center in the United States.⁴⁷ One man's story provides an example of the inappropriate treatment of detainees and inadequate nutrition there: after organizing a hunger strike to protest inedible food, Manuel Abrego was held in solitary confinement for eight months.⁴⁸ Aside from being taunted by guards, he was alone for twenty-three hours a day with virtually no access to any form of outside communication to quell the isolation and solitude he experienced.⁴⁹ He described the experience as "psychological torture."⁵⁰

Conditions in the Northwest ICE Processing Center have been problematic for years, but calls for change have yet to generate meaningful improvements. *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* is a 2008 report written by the Seattle University School of Law's International Human Rights Clinic and OneAmerica that highlights multitudes of inadequate and concerning conditions at the Northwest ICE Processing

⁴⁵ NW IMMIGR. RTS. PROJECT, *supra* note 43.

⁴⁶ See Ortega, *supra* note 44; see also Sharon H. Chang, *We'll Never Flatten the Curve if People Are Behind Bars*, S. SEATTLE EMERALD (Apr. 22, 2020), <https://southseattleemerald.com/2020/04/22/well-never-flatten-the-curve-if-people-are-behind-bars> [<https://perma.cc/7XNG-KY8V>].

⁴⁷ Ortega, *supra* note 44.

⁴⁸ Renée Feltz, *Hunger for Justice: Immigrant Detainees Are Being Punished for Refusing to Eat*, PROGRESSIVE (Dec. 4, 2020), <https://progressive.org/magazine/hunger-for-justice-feltz/> [<https://perma.cc/7Z3J-NVHG>].

⁴⁹ *Id.*

⁵⁰ *Id.*

Center.⁵¹ The facility has been the focal point of several investigations, which have led to accusations of inhumane treatment. This section will focus on key complaints against the detention center, including: (1) physical and sexual abuse; (2) inadequate and ineffective health care; (3) inadequate mental health care; (4) poor nutrition; (5) unhealthy and restrictive living conditions; (6) due process violations; and (7) poor COVID-19 response.

The 2008 Seattle University report revealed that detainees were verbally and physically abused by officers. One in three detainees reported experiencing verbal abuse by officers, such as being derided as a “cucaracha,” or cockroach.⁵² Detainees also reported overtly sexual comments and actions, including being touched sexually by the officers and being subjected to strip searches, which caused prolonged emotional harm.⁵³ More recently, Human Rights Watch reported that in 2014, several guards coerced a detainee participating in a hunger strike into drinking electrolytes; the ICE guards told the detainee that they had obtained a court order to force feed him if he did not submit to their demands.⁵⁴ In 2018, a guard “known to be aggressive and abusive with detainees” shoved multiple detainees, choked another, and punched a third detainee in the eye for joining a hunger strike to protest the center’s conditions.⁵⁵ A guard told the detainees that their immigration cases would be negatively prejudiced if they continued to refuse food.⁵⁶ The detainee who was punched, Jesus Chavez Flores, was placed in solitary confinement twenty-three hours per

⁵¹ SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER IN TACOMA, WASHINGTON (July 2008).

⁵² *Id.* at 42–43.

⁵³ *Id.* at 43–44.

⁵⁴ Letter from Nicole Austin-Hillery, Executive Director, U.S. Program at Hum. Rts. Watch, to Ronald Vitiello, Acting Director, U.S. Immigr. & Customs Enf’t (Oct. 2, 2018), <https://www.hrw.org/news/2018/10/02/hunger-strikers-ice-detention-risk> [<https://perma.cc/6Q8U-9C4A>].

⁵⁵ Third Amended Complaint at *8–*10, *Jesus Chavez Flores v. U.S. Immigr. & Customs Enf’t* (2019) (No. 3:18-CV-05139), 2019 WL 266473.

⁵⁶ *Id.* at *10.

day for twenty days.⁵⁷ Despite his requests, he did not receive adequate medical treatment for subsequent blurry vision and difficulty opening his eye.⁵⁸ An ICE review of the assault stated that the guard's violent actions were "'appropriate' and 'carried out in a professional manner' because Mr. Chavez's 'own actions created the opportunity for his eye to accidentally be poked.'"⁵⁹ In November of 2020, detainees reported they witnessed six guards forcibly subdue a nineteen-year-old Black detainee by throwing him on the floor and pressing a knee against his neck.⁶⁰ For attempting to defend him, guards placed four other detainees, including a sixty-two-year-old with tuberculosis, cancer, and diabetes, in solitary confinement.⁶¹ In yet another form of abuse and manipulation, guards reportedly placed one detainee in isolation and directed her to sign a document for her release; she later learned she had unwittingly signed a deportation order.⁶²

The 2008 report also criticized medical care in the Northwest ICE Processing Center.⁶³ About eighty percent of the detainees who had sought medical care were dissatisfied with the care they received.⁶⁴ National standards require that detention facilities provide twenty-four-hour emergency healthcare and are capable of adequately responding to emergencies within four minutes.⁶⁵ However, detainees reported several

⁵⁷ *Id.* at *15.

⁵⁸ *Id.* at *10–*11.

⁵⁹ *Id.* at *12.

⁶⁰ La Resistencia, *Eight People on Hunger Strike as More COVID-19 Cases Surge at the Northwest Detention Center*, FACEBOOK (Nov. 24, 2020), <https://www.facebook.com/LaResistenciaNW/posts/3624729847587869> [<https://perma.cc/4E3W-9DDA>].

⁶¹ *Id.*

⁶² La Resistencia, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/LaResistenciaNW/posts/3532982676762587> [<https://perma.cc/LQT4-FZ8Y>].

⁶³ See SEATTLE UNIV. SCH. OF L. INT'L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 45–47.

⁶⁴ *Id.* at 45.

⁶⁵ U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NAT'L DETENTION STANDARDS § 4.3 (PERFORMANCE-BASED NAT'L DETENTION STANDARDS 2011)

instances in which these standards were not met; for example, when over 300 detainees experienced severe abdominal cramps and diarrhea as a result of food poisoning, they were told to wait until the clinic opened in the morning.⁶⁶ Furthermore, a detainee who experienced extreme stomach pain was merely given Pepto-Bismol, which reportedly did nothing to relieve his pain.⁶⁷ Detainees reported waiting up to two weeks between the time they requested medical attention and the time they received it.⁶⁸ Finally, detainees with conditions that required outside medical care were required to remain shackled during the entirety of their stay at the hospital, even if it impeded their ability to receive adequate care; this policy applied even to detainees who were not considered dangerous.⁶⁹

In a 2018 article by the Seattle Weekly, detainees continued to report inadequate medical care.⁷⁰ One detainee, like many others, merely received ibuprofen and anti-inflammatories for excruciating, chronic pain that he reported was a “10/10.”⁷¹ Another detainee claimed that they received only aspirin and vitamins upon release from the hospital after experiencing a heart attack in January 2020.⁷² Detainees also report months-long delays in access to medical supplies and surgeries.⁷³ They experience incorrect diagnoses and a lack of proper medication even when they provide the

(revised 2016), <https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf> [<https://perma.cc/ERJ7-3NUS>].

⁶⁶ SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 45.

⁶⁷ *Id.* at 46.

⁶⁸ *Id.* at 47.

⁶⁹ *Id.*

⁷⁰ *See* Hellmann, *supra* note 44.

⁷¹ *Id.*

⁷² Inter-American Commission on Human Rights Resolution 41/2020: Northwest Detention Center Regarding the United States of America, INTER-AM. COMM’N ON HUM. RTS. at 2 (Jul. 27, 2020), <https://www.oas.org/en/iachr/decisions/pdf/2020/41-20MC265-20-US.pdf> [<https://perma.cc/A2LL-LSPR>].

⁷³ Hellmann, *supra* note 44.

center with medical records of their needs from before their detention.⁷⁴ The facility is also ill-equipped to manage contagious diseases; since 2017, detainees at the facility have experienced outbreaks of both mumps and varicella.⁷⁵

Furthermore, the Northwest ICE Processing Center's mental health care is severely lacking. Detainees with mental health issues are often subjected to punitive procedures such as solitary confinement and are not offered any mental health support.⁷⁶ Detainees with mental health issues are also often misdiagnosed and "overmedicated to the point of sedation," which severely impairs their functioning and does not serve to treat them.⁷⁷ As of 2017, the Northwest ICE Processing Center employed one psychiatrist, one psychologist, and one mental health social worker to serve the needs of the entire facility, which can hold 1,575 people.⁷⁸ This lack of adequate mental health care is a significant issue because many immigration detainees have experienced intense trauma that causes or contributes to mental health

⁷⁴ Kristin Kyrka & Adam Boyd, *PR Tour Masks Inhumane Treatment of ICE Detainees*, SEATTLE TIMES (Oct. 11, 2019), <https://www.seattletimes.com/opinion/pr-stunt-masks-inhumane-treatment-of-ice-detainees/> [<https://perma.cc/2UNA-N8NN>].

⁷⁵ Press Release, La Resistencia, With NWDC a "Tinderbox" for COVID-19 Outbreak, Detained People Begin Mass Hunger Strike to Highlight Their Plight: 80+ People Refuse All Food Amidst Coronavirus Exposure Fears (Mar. 28, 2020), <http://laresistencianw.org/wp-content/uploads/2020/03/Hunger-Strike-Press-Release.pdf> [<https://perma.cc/ASD8-CGD5>] [hereinafter La Resistencia Press Release].

⁷⁶ See SEATTLE UNIV. SCH. OF L. INT'L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 48–49.

⁷⁷ Kyrka & Boyd, *supra* note 74; see Katherine Ponte, *That Time in the Psych Ward*, NAT'L ALL. ON MENTAL ILLNESS (MAR. 11, 2019), <https://www.nami.org/Blogs/NAMI-Blog/March-2019/That-Time-in-the-Psych-Ward> [<https://perma.cc/PQM4-5GXG>].

⁷⁸ NW. IMMIGRANT RTS. PROJECT, A GUIDE TO THE NORTHWEST DETENTION CENTER 1 (2017), <https://www.nwirp.org/wp-content/uploads/2018/02/NWIRP-Guide-to-NWDC-Feb.-2017-ENG-FINAL.pdf> [<https://perma.cc/XQH8-XYHB>]; *Our Locations: Northwest ICE Processing Center*, GEO GROUP, INC. (Feb. 2, 2017), <https://www.geogroup.com/FacilityDetail/FacilityID/71> [<https://perma.cc/LJ3X-QG3L>].

problems; poor conditions of confinement, like the conditions at NWIPC, can also trigger or exacerbate mental health concerns.⁷⁹

Nutrition is also inadequate at the Northwest ICE Processing Center. Detainees have reported the food to be rotten, tasteless, overcooked, repetitive, cold, and less abundant and of worse quality than the food provided in prison.⁸⁰ Recently, detainees have even found maggots in their food.⁸¹ Poor nutrition over an extended period of time can result in ongoing health issues and hunger, and some detainees remain in the detention center for years.⁸² One detainee reported that he lost fifty pounds in his two years at the Northwest ICE Processing Center; the doctor at the center told him to stop exercising because he was not receiving adequate nutrition to sustain it.⁸³ Another detainee who could not eat lactose eventually gave up on trying to acquire a lactose-free meal after guards repeatedly refused to provide her with one.⁸⁴ Detainees interviewed in 2020 reported that diabetic individuals did not receive meals appropriate for their medical needs.⁸⁵

Three-quarters of the detainees interviewed in 2008 criticized the living conditions at the Northwest ICE Processing Center due to overcrowding, nighttime noise and light, lack of privacy, and unsanitary bathrooms.⁸⁶ Toilets have no doors, some showers lack curtains, and toilet paper and paper towels frequently run out without timely replacement.⁸⁷ A detainee

⁷⁹ See SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 48.

⁸⁰ *Id.* at 50.

⁸¹ Kyrka & Boyd, *supra* note 74.

⁸² See SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 50; CTRS. FOR DISEASE CONTROL & PREVENTION, POOR NUTRITION (2020).

⁸³ SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 51.

⁸⁴ *Id.* at 52.

⁸⁵ INTER-AM. COMM’N ON HUM. RTS, *supra* note 72.

⁸⁶ See SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 55.

⁸⁷ *Id.* at 56.

reported that toilet water can spray onto food at the nearby dining table.⁸⁸ One of the pods designed to house eighty men was holding 120, and the bathrooms became filthy very quickly.⁸⁹ In another case, over eighty detainees shared four showers, six toilets, and two microwaves.⁹⁰ In interviews in January 2020, detainees reported a two-week lice outbreak, rashes from communally-laundered clothes, and poor ventilation.⁹¹

The Northwest ICE Processing Center's visitation policies are inhumane as well. While visitors are permitted, they remain separated from detainees by a glass partition and must communicate using a phone.⁹² Contact visits are not permitted.⁹³ Visitors are not allowed to carry any of their personal belongings, including cell phones or photographs.⁹⁴ Although the Detainee Handbook states that visitors are normally permitted to stay for one hour, in practice most visits are no longer than thirty minutes, and they may be as short as ten to fifteen minutes.⁹⁵ These brief, distanced visits can be so depressing to detainees that some request that their loved ones not even visit them at all.⁹⁶

Detainees' living conditions are further severely restricted in their access to recreation and use of telephones.⁹⁷ Detainees are permitted to be outdoors in a yard for one hour per day.⁹⁸ However, if they go outside, they are not

⁸⁸ *Id.*

⁸⁹ *Id.* at 55.

⁹⁰ *Id.*

⁹¹ INTER-AM. COMM'N ON HUM. RTS, *supra* note 72.

⁹² See SEATTLE UNIV. SCH. OF L. INT'L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 57; see also NW. IMMIGRANT RTS. PROJECT, *supra* note 78, at 6.

⁹³ *Visiting Restrictions at Tacoma Northwest Detention Center*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-facility/tacoma-northwest-detention-center> [<https://perma.cc/PHQ2-RHAX>].

⁹⁴ *Id.*; NW. IMMIGRANT RTS. PROJECT, *supra* note 78, at 5.

⁹⁵ See SEATTLE UNIV. SCH. OF L. INT'L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 57.

⁹⁶ *Id.*

⁹⁷ *Id.* at 60–61.

⁹⁸ *Id.* at 60.

permitted to return inside until that hour has ended.⁹⁹ Thus, they must remain outside, even in bad weather.¹⁰⁰ Furthermore, they often do not have access to replacement clothing if theirs becomes wet.¹⁰¹ Many detainees avoid outdoor recreation for fear of being forced to stay outside in bad weather.¹⁰² Sometimes, “outdoor” recreation time takes place indoors, and even when detainees are able to go outside, they can barely see the sky.¹⁰³ Detainees are also restricted in their use of phones because the calls are expensive in comparison to their wages: phone calls cost ten to fifteen cents a minute, while detainees with jobs earn only one dollar per day.¹⁰⁴ Additionally, detainees have to wait a long time to use the phones because there simply are not enough available to serve the needs of the large number of people who would like to use them.¹⁰⁵ To make matters worse, phones are often broken and can take a long time to be repaired, increasing wait times.¹⁰⁶

Finally, detainees experience violations of due process rights, including a lack of access to legal representation; for example, reasonable access to attorneys is restricted because attorneys are often expected to wait for hours before they are able to meet with their clients.¹⁰⁷ Confidential mail between detainees and their lawyers has historically been tampered with or not sent or delivered.¹⁰⁸ It is difficult to access a phone that does not monitor calls between detainees and their attorneys.¹⁰⁹ Detainees do not have access to

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Kyrka & Boyd, *supra* note 74.

¹⁰⁴ NW. IMMIGRANT RTS. PROJECT, *supra* note 78, at 6, 10.

¹⁰⁵ SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 61.

¹⁰⁶ *Id.*

¹⁰⁷ Kyrka & Boyd, *supra* note 74.

¹⁰⁸ See SEATTLE UNIV. SCH. OF L. INT’L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 37.

¹⁰⁹ *Id.* at 37.

the internet, and they are restricted to five hours per week in the law library, severely limiting their access to essential information when self-representing in court.¹¹⁰ Additionally, guards pressure detainees to sign papers with potentially significant deportation consequences by using physical intimidation and verbal threats, often without explaining the ramifications of signing the documents.¹¹¹ And the grievances detainees file are mostly unanswered, thrown away, ignored, or processed extremely slowly.¹¹² Detainees are also deterred from filing grievances out of fear that doing so will result in officer retaliation.¹¹³

Highlighting the intersection of many of these issues, the Northwest ICE Processing Center's response to COVID-19 concerns has been extremely inadequate. In March, wardens held a town hall packed with dozens of people and urged detainees to wash their hands frequently.¹¹⁴ Detainees reported that facility doctors told detainees they tested negative for the virus only ten minutes after swabbing their noses, which the facility is extremely unlikely to have the capacity to do, and detainees felt they had received false results.¹¹⁵ Despite the crowded nature of the detention center, no accommodations for social distancing were made months into the pandemic.¹¹⁶ Until at least July 2020, some pods remained at full capacity, housing fifty to one hundred people.¹¹⁷ Guards without masks moved

¹¹⁰ NW. IMMIGRANT RTS. PROJECT, *supra* note 78, at 10.

¹¹¹ SEATTLE UNIV. SCH. OF L. INT'L HUM. RTS. CLINIC & ONEAMERICA, *supra* note 51, at 39.

¹¹² *Id.* at 41.

¹¹³ *Id.*

¹¹⁴ Jeremy Raff, 'We are Like Sitting Ducks,' ATLANTIC (Mar. 28, 2020), <https://www.theatlantic.com/politics/archive/2020/03/ice-detainees-coronavirus-covid-19/608920/> [<https://perma.cc/XAT8-MVK2>].

¹¹⁵ Chang, *supra* note 46.

¹¹⁶ See Nola Thury, *Detainees Launch Hunger Strike at the Northwest Detention Center*, TRAIL (May 5, 2020), <http://trail.pugetsound.edu/?p=17039> [<https://perma.cc/KXY9-3S42>].

¹¹⁷ INTER-AM. COMM'N ON HUM. RTS., *supra* note 72.

throughout the facility, even in quarantined pods.¹¹⁸ One guard suddenly began to wear a mask in October, and detainees learned it was because he had tested positive for COVID-19.¹¹⁹ One attorney reported he witnessed guards escort a coughing, ill-looking detainee into the same room as his client.¹²⁰ Additionally, detainees were not given personal protection equipment such as masks, adequate soap, or gloves, and were only allowed three showers per week.¹²¹ Though guards disinfected the facility, they did not clean it, and detainees reported that the disinfectants caused them to experience eye irritation, skin irritation, rashes, coughing, and nosebleeds.¹²²

In protest against these conditions and in fear for their lives, hundreds of detainees have engaged in multiple hunger strikes to draw attention to their plight and demand immediate release.¹²³ One, Victor Fonesca, engaged in a hunger strike for over 100 days.¹²⁴ He faced threats to force-feed him¹²⁵

¹¹⁸ *Id.*

¹¹⁹ Feltz, *supra* note 48.

¹²⁰ Raff, *supra* note 114.

¹²¹ Thury, *supra* note 116.

¹²² *Id.* In March 2021, the Environmental Protection Agency issued a warning to the GEO Group for misusing a chemical pesticide spray at the Adelanto ICE Processing Facility in ways that caused detainees to experience similar symptoms. Letter from Amy Miller-Bowen, Director, Enforcement and Compliance Assurance Division, Environmental Protection Agency, Region IX, to George C. Zoley, CEO, The GEO Group (Mar. 2, 2021), https://earthjustice.org/sites/default/files/files/now_geo_final_1.pdf [<https://perma.cc/67SS-6T8N>]. It is unclear whether that pesticide is the same chemical as the disinfectant referred to by NWIPC detainees.

¹²³ *People Detained at the Northwest Detention Center Spell Out Distress Signal, SOS, as They Begin the Third Hunger Strike at the Facility in Three Weeks to Demand their Immediate Release*, DETENTION WATCH NETWORK (Apr. 15, 2020), <https://www.detentionwatchnetwork.org/pressroom/releases/2020/people-detained-northwest-detention-center-spell-out-distress-signal-sos> [<https://perma.cc/22HJ-2D3S>].

¹²⁴ Victor Fonesca's hunger strike is ongoing at time of publication of this article. La Resistencia, FACEBOOK (Mar. 1, 2021), <https://www.facebook.com/LaResistenciaNW/posts/3887236881337163> [<https://perma.cc/7T62-MBRT>].

¹²⁵ La Resistencia, FACEBOOK (Dec. 24, 2020), <https://www.facebook.com/LaResistenciaNW/posts/3703564456371074> [<https://perma.cc/92FD-X4ZY>].

and was hospitalized at least twice for hypertension and liver failures.¹²⁶ In April 2020, detainees used their bodies to spell “SOS” in the detention center’s yard.¹²⁷ One detainee said, “We know it’s not true that we will receive medical care here in NWDC.”¹²⁸ Northwest ICE Processing Center guards have retaliated against detainees for attempting to announce these hunger strikes to radio stations by revoking their communications privileges.¹²⁹

Overall, conditions at the Northwest ICE Processing Center are abysmal. The GEO Group, a private prison company, has failed to protect the rights and safety of detainees held there, and there is an urgent need to take action to ensure that such unregulated practices are not allowed to continue.

D. Washington’s Progress Toward Protecting Immigrants

On January 15, 2020, twenty Washington representatives introduced House Bill 2576. The bill’s initial purpose was to “eliminate the use of private detention operations in this state” to “ensure the safety and welfare of people in Washington,” and it recognized the harms private detention facilities cause to Washingtonians.¹³⁰ These goals persisted throughout the first three versions of the bill. However, on February 17, 2020, the bill was transformed from a private detention center ban to a study on private detention facilities to “evaluate current state and local authority and practices regarding the enforcement of existing requirements applicable to private detention facilities operating within the state.”¹³¹ The bill as signed into law outlines plans to conduct a study inquiring into issues such as state

¹²⁶ La Resistencia, FACEBOOK (Jan. 1, 2021), <https://www.facebook.com/LaResistenciaNW/posts/3723391604388359> [<https://perma.cc/UA9P-ZW4A>].

¹²⁷ DETENTION WATCH NETWORK, *supra* note 123.

¹²⁸ La Resistencia Press Release, *supra* note 75. “NWDC” is an acronym for “Northwest Detention Center,” the facility’s former name.

¹²⁹ *Id.*

¹³⁰ H.B. 2576, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

¹³¹ Engrossed Substitute H.B. 2576, 1, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

and local facility inspection authority, state and local rule compliance evaluation practices, and possible rule changes to ensure effective inspections and enforcement.¹³² While it represents a step in the right direction, delaying a private detention facility ban in favor of conducting a study fails to adequately combat the existing urgent threats to the health, safety, and welfare of detainees.

Members of that legislative session also shied away from a second opportunity to ban private detention facilities in Washington. On January 16, 2020, thirteen Washington senators introduced Senate Bill 6442, which appears to have initially proposed an end to the operation of both private prisons and private detention facilities.¹³³ However, as of the first substitute bill introduced on February 18, protections for immigrants were abandoned.¹³⁴ The final bill, signed into law by Governor Inslee on April 2, 2020, is limited to prohibiting private prisons, not immigration detention centers.¹³⁵ Still, the final bill does emphasize a rule highlighted in *United States v. California*: states possess “the general authority to ensure the health and welfare of inmates *and detainees* in facilities within its borders.”¹³⁶

The following year, on January 11, 2021, legislators in the Washington House of Representatives introduced House Bill 1090 (HB 1090), yet another attempt to ban privately operated immigration detention facilities in the state.¹³⁷ The bill, if passed, would prohibit private detention in

¹³² *Id.*

¹³³ S.B. 6442, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

¹³⁴ Substitute S.B. 6442, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

¹³⁵ Engrossed Substitute S.B. 6442, 66th Leg., 2020 Reg. Sess. (Wash. 2020).

¹³⁶ *United States v. California*, 921 F.3d 865, 886 (9th Cir. 2019).

¹³⁷ *HB 1090 – 2021-22, WASH. STATE LEGISLATURE*, <https://app.leg.wa.gov/bills/summary?BillNumber=1090&Year=2021&Initiative=false> [perma.cc/59ZW-25F9]; Thomas Antkowiak & Alejandra Gonza, *Stop Cruel Immigration Detention: Close the Northwest Processing Center*, SEATTLE TIMES (Jan. 24, 2021), <https://www.seattletimes.com/opinion/stop-cruel-immigration-detention-close-the-northwest-processing-center/> [https://perma.cc/8FTK-FNXX].

Washington.¹³⁸ It would allow facilities to operate until their existing contracts expire, so the Northwest ICE Processing Center would continue to operate until its contract expires in 2025.¹³⁹ On February 23, the Washington House passed HB 1090, moving it forward into the senate.¹⁴⁰ At the time of publication of this article, it has passed through two senate committees and has been placed on second reading.¹⁴¹ There, it will be debated and may be amended before being placed on third reading for a senate vote, and if it passes the senate, HB 1090 will be signed into law or vetoed by the governor.¹⁴²

Washington State has already taken some steps to protect the rights of immigrants. For example, the Washington State Attorney General's Office produced a lengthy report, *Guidance Concerning Immigration Enforcement*,¹⁴³ that indicated ways to support immigrants by withholding from ICE as much information as is allowable by law. Some examples include encouraging local officials to avoid collecting citizenship, place of birth, or immigration status data whenever possible;¹⁴⁴ clarifying the reciprocity of information-sharing between local law enforcement, ICE, and related federal agencies;¹⁴⁵ encouraging jails to consider diversion practices

¹³⁸ Engrossed H.B. 1090, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

¹³⁹ *Id.*; Lilly Fowler, *Private Prison Ban Could Limit ICE Detention in the Pacific Northwest*, CROSSCUT (Mar. 2, 2021), <https://crosscut.com/news/2021/03/private-prison-ban-could-limit-ice-detention-pacific-northwest> [<https://perma.cc/6CCM-DBJL>].

¹⁴⁰ *HB 1090 – 2021-22*, WASH. STATE LEGISLATURE, <https://app.leg.wa.gov/bills/summary?BillNumber=1090&Year=2021&Initiative=false> [perma.cc/59ZW-25F9].

¹⁴¹ *Id.*

¹⁴² *How a Bill Becomes a Law*, WASH. STATE LEGISLATURE, <https://leg.wa.gov/legislature/Pages/Bill2Law.aspx> [<https://perma.cc/3YJA-PBAG>].

¹⁴³ Bob Ferguson, *Guidance Concerning Immigration Enforcement*, WASH. STATE OFF. OF ATT'Y GEN. (April 2017), <https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/AGO%20Immigration%20Guidance.pdf> [<https://perma.cc/7Z4A-UEN5>].

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.* at 21–22 (referencing that federal investigative agencies may provide to ICE information submitted to them by local law enforcement, and that local law enforcement

that do not require booking, as jails are required to provide federal immigration officials with personal information about every non-U.S. citizen they book;¹⁴⁶ and encouraging courts to announce ICE presence in the courthouse and to allow parties to use pseudonyms and technology allowing for remote appearance.¹⁴⁷

Further, in May 2019, Washington State enacted a law prohibiting state and local Washington law enforcement agencies from asking about immigration status or place of birth unless those details are directly connected to a criminal investigation.¹⁴⁸ In 2017, an executive order by Washington Governor Jay Inslee imposed similar prohibitions on state agencies.¹⁴⁹ The 2019 law also prohibits local jails and state prisons from voluntarily holding people at the request of federal authorities and from alerting federal authorities when an immigrant in the custody of the jail or prison is about to be released.¹⁵⁰ In addition, the City of Seattle has filed a lawsuit challenging the constitutionality of the President’s Interior Executive Order¹⁵¹ that would cut federal funding to localities that designate themselves as “sanctuary cities.”¹⁵² The City’s website,

officers are not obliged to provide ICE with information about an arrestee unless ICE has a warrant).

¹⁴⁶ *Id.* at 27–28.

¹⁴⁷ *Id.* at 30.

¹⁴⁸ WASH. REV. CODE § 10.93.160(4)(a) (2019); Tom James, *New Law Bars Local Police in Washington from Asking Immigration Status – Unless Directly Connected to Criminal Investigation*, SEATTLE TIMES (May 27, 2019), <https://www.seattletimes.com/seattle-news/new-law-bars-local-police-in-washington-from-asking-immigration-status-unless-directly-connected-to-criminal-investigation/> [<https://perma.cc/CX3Z-DNPP>].

¹⁴⁹ Wash. Exec. Order No. 17-01 (Feb. 23, 2017), https://www.governor.wa.gov/sites/default/files/exe_order/eo_17-01.pdf [perma.cc/WZD8-PPE9].

¹⁵⁰ WASH. REV. CODE § 10.93.160(4)(a) (2019); WASH. REV. CODE § 10.93.160(4)(b) (2019).

¹⁵¹ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

¹⁵² Ferguson, *supra* note 143, at 6–7.

Seattle.gov, maintains an updated list of actions that the city has taken to be a “Welcoming City,” dating back to November 2016.¹⁵³

The steps that Washington has already taken to protect the rights of immigrants indicate the state’s willingness to act and to advocate for them. To continue building toward Washington’s goal of achieving justice for immigrants, the state legislature should pass a bill banning privately run detention centers similar to the bill that California enacted in October of 2019. Washington should then supplement that bill with provisions that further protect immigrants while they are in detention centers by implementing the measures suggested below.

III. PROPOSAL TO MODIFY BY STATUTE THE EXISTING IMMIGRATION DETENTION SYSTEM IN WASHINGTON

On October 11, 2019, California Governor Gavin Newsom signed Assembly Bill No. 32 into law and banned private immigration detention centers (but allowed private facilities with existing contracts to operate until they expire).¹⁵⁴ On September 27, 2020, Governor Newsom signed Assembly Bill No. 3228 into law and provided detained immigrants with an avenue toward recovery against private facilities that violate their rights in the interim.¹⁵⁵ The Washington State Legislature should adopt and build upon California’s legislation and (1) pass a law banning future contracts with privately owned for-profit detention centers and allowing detainees to

¹⁵³ *How We Are a Welcoming City*, OFF. OF IMMIGRANT & REFUGEE AFFS., SEATTLE.GOV, <https://www.seattle.gov/iandraftaffairs/issues-and-policies/how-we-are-a-welcoming-city> [<https://perma.cc/6GSR-GETP>].

¹⁵⁴ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code, approved Oct. 11, 2019); Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9501, approved Oct. 11, 2019); Press Release, Rob Bonta, Assemblymember, District 18, California Enacts Strongest-in-the-Nation Law to Ban Both For-Profit, Private Prisons and Detention Centers (Oct. 11, 2019), <https://a18.asmdc.org/press-releases/20191011-california-enacts-strongest-nation-law-ban-both-profit-private-prisons-and> [<https://perma.cc/GHW8-DYMS>].

¹⁵⁵ Assemb. Bill No. 3228 Ch. 190, Statutes of 2020 (to be codified at California Penal Code, approved Sept. 27, 2020).

recover for harm in the interim; and (2) introduce supplementary protections for immigrants by detailing extensive standards and policies to be enforced at any publicly operated facility that detains immigrants in Washington.

A. Proposal for Washington's Private Detention Center Ban

Washington should look to California's new private detention center ban for guidance as it develops its bill. First, similar to California,¹⁵⁶ Washington should establish a deadline after which local governments and local law enforcement agencies may not enter into a new contract or renew a contract with a private, for-profit prison for the purpose of detaining individuals in a private detention facility. Washington should frame this prohibition similarly to the framing in California's Assembly Bill No. 32, which prevents the California Department of Corrections and Rehabilitation from operating private incarceration facilities by prohibiting any person under the jurisdiction of the Department from being incarcerated in a private, for-profit prison facility after existing contracts expire.¹⁵⁷ Second, similar to California, Washington should explicitly ban the operation of a private detention facility within the state.¹⁵⁸ Third, Washington should establish definitions similar to those in California's Assembly Bill No. 32, which provides that a "detention facility" is any facility where people are incarcerated or confined involuntarily "for purposes of execution of a punitive sentence imposed by a court or detention pending a trial, hearing, or other judicial or administrative proceeding,"¹⁵⁹ while a "private detention

¹⁵⁶ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code, approved Oct. 11, 2019); Assembly Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9505(a), approved Oct. 11, 2019).

¹⁵⁷ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §5003.1, approved Oct. 11, 2019).

¹⁵⁸ *Id.*

¹⁵⁹ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9500(a), approved Oct. 11, 2019).

facility” is a facility operated by a private, for-profit, nongovernmental entity that operates “pursuant to a contract or agreement with a governmental entity.”¹⁶⁰ Fourth, similar to California, Washington should clarify that the bill does not ban facilities that detain individuals for the following reasons unrelated to immigration detention: the bill does not apply to facilities that serve to provide individuals with rehabilitative, counseling, treatment, educational, vocational, or medical services; to school facilities used for student disciplinary detention; to facilities for the quarantine of persons for public health reasons; or to facilities used for the temporary detention of people detained or arrested by a merchant or security guard subsequent to theft or another crime.¹⁶¹ HB 1090, the bill currently moving through the Washington Legislature, meets all of these recommendations.¹⁶²

While Washington should look to California for guidance in establishing these basic principles, Washington’s statute should also provide necessary protections for immigrants that are not offered by California Assembly Bill No. 32. First, and most importantly, Washington should not include the provision in California Assembly Bill No. 32 that allows for detention facilities to be privately owned as long as they are leased and operated by a law enforcement agency.¹⁶³ It should further clarify that the statute banning private detention facilities bans both facilities that are privately operated and facilities that are privately owned, but publicly operated. While the current version of Washington HB 1090 does not include the problematic California provision explicitly allowing for privately owned facilities, the

¹⁶⁰ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9500(b), approved Oct. 11, 2019).

¹⁶¹ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9502(a)-(g), approved Oct. 11, 2019).

¹⁶² Engrossed H.B. 1090, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

¹⁶³ The California provision states that a “‘private, for-profit prison facility’ does not include a facility that is privately owned, but is leased and operated by the department.” Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §9503, approved Oct. 11, 2019).

current Washington bill’s lack of clarifying language may be construed to create such an interpretation. The bill provides only that “‘Private detention facility’ means a detention facility that is operated by a private, nongovernmental for-profit entity.”¹⁶⁴ By failing to explicitly prohibit the private ownership of detention facilities, Washington may inadvertently allow private corporations to continue to heavily influence immigration detention.¹⁶⁵

An essential purpose behind a ban of private detention centers is to remove the influence of private, for-profit companies from the immigration detention system. CoreCivic and the GEO Group, the biggest private prison companies in the United States, are classified as real estate investment trusts, which offers them a powerful financial incentive to build and lease detention facilities as virtually tax-free property-related operations.¹⁶⁶ When private parties are involved in immigration contracting, they in turn form a powerful lobby to shape immigration policies to their benefit.¹⁶⁷ Providing private companies with an interest in detention facilities—even if that interest is merely ownership of those facilities—affords them the opportunity to push for policies that favor profit, via increased numbers of incarcerated individuals, at the expense of immigrants and detainees. To best augment immigrants’ rights in this context, therefore, private companies should not be permitted to profit from detention centers in any way and should not be permitted to own detention facilities even when the centers are publicly leased and operated.

¹⁶⁴ Engrossed H.B. 1090, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

¹⁶⁵ Such an interpretation may be contested through another provision in H.B. 1090: that the act “shall be construed liberally for the accomplishment of the purposes thereof.” *Id.*

¹⁶⁶ Rob Urban & Kristy Westgard, *It’s a Great Time to Be a Prison Landlord, Thanks to the IRS*, BLOOMBERG (Aug. 9, 2018), <https://www.bloomberg.com/news/articles/2018-08-09/private-prison-companies-expand-empires-thanks-to-tax-advantages> [<https://perma.cc/YFZ2-WP98>.]

¹⁶⁷ Rubenstein, *supra* note 3.

Second, while California Assembly Bill No. 32 has many beneficial provisions, Washington should not incorporate the provision that allows for private detention facility contracts to be renewed to “comply with the requirements of any court-ordered population cap.”¹⁶⁸ The current version of HB 1090 rightly does not incorporate this problematic exception in the California statute.¹⁶⁹ California’s exception would allow the use of private detention centers if public detention centers were at capacity. However, such an exception is unnecessary because there are viable alternatives to detention that should instead be implemented to resolve an overpopulation issue. For example, as discussed above, implementing ankle monitors, releasing detainees on parole, and reducing ICE arrests are three low-cost, simple solutions that can significantly reduce the population of immigration detainees.¹⁷⁰ Alternatively, though at a greater expense, existing public facilities could be expanded or new public facilities could be built to meet the population needs. Washington should not allow concerns that the number of immigration detainees in public detention centers may exceed the centers’ capacities to obfuscate the purpose of the bill, which is to bar private, for-profit companies from the business of detaining immigrants. Immigrants’ livelihoods should not be compromised due to a lack of public facility capacity.

If Washington does allow private facilities to house detained individuals during instances of overpopulation, the facilities should be subject to the same inspections as public facilities, and the state should guarantee that detainees will be safe from the poor conditions rampant in private detention centers. Washington should therefore increase the obligations of any private detention center assuming custody of Washington detainees and provide specific standards of care regarding nutrition, healthcare, facilities, guards,

¹⁶⁸ Assemb. Bill No. 32 Ch. 739, Statutes of 2019 (to be codified at California Penal Code Part 3, Title 9.5, §5003.1(e), approved Oct. 11, 2019).

¹⁶⁹ Engrossed H.B. 1090, 67th Leg., 2021 Reg. Sess. (Wash. 2021).

¹⁷⁰ *Alternatives to Detention*, *supra* note 38; Shaheen, *supra* note 15.

and more. The Washington legislature should also provide that Washington has standing to bring charges in court against any private facility that fails to meet these standards.

Finally, the Washington statute should mirror California’s Assembly Bill No. 3228 and allow individuals harmed by a private facility’s failure to “comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility’s contract for operations” to bring a civil action for relief against the private facility operator and recover consequent attorney’s fees.¹⁷¹ Such a provision will mitigate the harms that individuals detained in private facilities will endure until existing contracts expire in 2025.¹⁷²

B. Washington Should Develop Additional Standards to Ensure Acceptable Conditions of Public Detention

In addition to adopting and building upon the California statute’s ban, Washington should add more extensive protections to immigrant detainees to protect those held in public facilities. These protections should apply both to facilities that detain immigrants exclusively and to other public facilities where immigrants are held.

First, Washington should provide that all facilities detaining immigrants must take measures to counter potential exacerbation of mental health issues. Many immigrants in detention are survivors of traumatic violence, including torture, rape, and persecution, and the harsh conditions of

¹⁷¹ Assemb. Bill No. 3228 Ch. 190, Statutes of 2020 (to be codified at California Penal Code, approved Sept. 27, 2020).

¹⁷² Andrea Castillo, *Detainees at California’s For-Profit ICE Detention Centers Will Soon Be Able to Sue over Abuse, Harm*, L.A. TIMES (Sept. 28, 2020), <https://www.latimes.com/california/story/2020-09-28/detainees-at-californias-for-profit-ice-detention-centers-will-soon-be-able-to-sue-over-abuse-harm> [https://perma.cc/C2X8-E6QL].

detention centers can compound their trauma.¹⁷³ Detention experiences, including immigration interviews, long stays in detention, stressful legal proceedings, the uncertainty of acquiring asylum, social isolation, and staff abuse, increase the risk of mental illness among asylum seekers.¹⁷⁴ Many of these experiences are likely to be shared by other immigrants held in detention. To counter these issues, facilities detaining immigrants should provide immigration detainees with easy access to mental health practitioners who understand the cultures, values, and norms of the detainees. If these practitioners do not speak the same language as an immigration detainee requiring their service, an interpreter should be provided. There should be enough mental health practitioners to meet the needs of the immigration detainees in a timely manner. Upon arrival at the facility, all immigration detainees should be clearly notified, in a language they understand, of the availability of mental health care. Solitary confinement should not be used as a strategy to handle mental health crises; instead, immigrant detainees should receive treatments and care consistent with medical best practices. All mental health care records and exchanges should remain confidential between the practitioner and the immigration detainee with the exception of instances of severe risk to the health or safety of the detainee or others.

Second, the Washington bill should provide that immigration detainees must be given timely and adequate access to medical care. Immigrants in detention should receive care that exceeds the low standards provided by ICE, provides for an emergency mental health staff at all hours, grants

¹⁷³Riddhi Mukhopadhyay, *Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States*, 7 SEATTLE J. FOR SOC. JUST. 693, 709 (2009).

¹⁷⁴Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRITISH J. PSYCHIATRY 306, 306–07 (Jan. 2, 2009), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/D5BE178EDE1219503F263C15BF5B57CE/S0007125000249362a.pdf/mental_health_implications_of_detaining_asylum_seekers_systematic_review.pdf [<https://perma.cc/NT3B-ZBXP>].

detainees access to a variety of services, and screens detainees upon arrival.¹⁷⁵ In Washington, immigrants seeking healthcare should have access to practitioners who speak their language or to a translator. They should receive comprehensive healthcare and treatment that reasonably meets their needs. They should be able to schedule appointments with providers within a reasonable amount of time. If they desire, immigration detainees should be provided a healthcare practitioner of their same gender. If a person in detention requires outside medical care, they shall not be handcuffed or otherwise restrained unless doing so is absolutely required for their own safety or the safety of others and does not hinder their treatment or the successful administration of their medical care. Furthermore, immigration detainees should have access to extensive and unbiased pregnancy-specific medical care and information, including pregnancy testing, abortion services, prenatal care, and postpartum care in a compassionate, supportive setting.¹⁷⁶ These pregnancy and abortion services should be available to all immigration detainees. All medical treatment should continue regardless of whether an immigration detainee may soon be deported or released from the detention center. All medical records should remain confidential.

Third, the Washington bill should provide that immigration detainees must receive at least three daily servings of fresh, appetizing food that meets their nutritional needs as established by the U.S. Recommended

¹⁷⁵ U.S. IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 § 4.3 (revised 2016), <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf> [<https://perma.cc/34CR-4E8E>] [hereinafter ICE OPERATIONS MANUAL].

¹⁷⁶ Immigration detention centers provide inadequate and dangerous care and resources for pregnant detainees. *See generally* Letter from ACLU et al. to Cameron Quinn, Officer for Civ. Rts. & Civ. Liberties, Dep't of Homeland Sec. & John Roth, Inspector Gen., Dep't of Homeland Sec. (Nov. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf [<https://perma.cc/3UZS-X6PX>].

Dietary Allowances.¹⁷⁷ Hot meals should be served at least twice daily and should vary over time so as not to become repetitive. Food preparation must comply with food safety standards. Allergies, food sensitivities, medical diets, and religious dietary restrictions should all be respected, and immigration detainees with any of these dietary restrictions should receive fresh, appetizing alternative meals that equally satisfy their nutritional needs. Food shall be served in areas that are adequately separated from toilet facilities to prevent food contamination.

Fourth, the Washington bill should provide protections for LGBTQ immigration detainees.¹⁷⁸ Gender non-conforming and transgender immigration detainees should be able to select the housing placement they are most comfortable with given their gender identity. Further, medical care and unbiased advising should be available to immigration detainees covering gender transition-related healthcare. Mental health practitioners who are comfortable with and trained in counseling LGBTQ individuals, especially LGBTQ immigrants, should be readily accessible to immigration detainees.

Fifth, the Washington bill should ensure that immigration detainees are guaranteed freedom from harassment at the hands of detention officials. In particular, the bill should provide increased measures to enforce the prohibition of verbal, physical, or sexual harassment or assault of any immigration detainee by detention officials. In addition, solitary confinement should be avoided as a means of punishment or as a means of

¹⁷⁷ U.S. DEP'T OF HEALTH & HUM. SERVS., NUTRIENT RECOMMENDATIONS: DIETARY REFERENCE INTAKES (DRI) (1997, 1998, 2000, 2001, 2005, 2011, 2019), https://ods.od.nih.gov/Health_Information/Dietary_Reference_Intakes.aspx [<https://perma.cc/LNK2-5VWN>].

¹⁷⁸ Immigration detention facilities including the Northwest ICE Processing Center fail to safeguard the rights and safety of LGBTQ detainees. *See, e.g.*, Washington Immigrant Solidarity Network, *The Northwest Demands the End to Trans Detention #EndTransDetention*, MEDIUM (Jan. 28, 2020), <https://medium.com/@waisn/the-northwest-demands-the-end-to-trans-detention-endtransdetention-7a54a47ca033> [<https://perma.cc/H48V-P7VC>].

quarantining dangerously contagious detainees unless absolutely necessary. In the case of contagious detainees, the confined individual should be provided with meaningful access to outside communication and human interaction. Immigration detainees should have access to an efficient complaint process to safely and easily report any instances of official misconduct. Detainees should be informed of this complaint process in a language they understand upon arrival at the detention center. These complaints should be monitored regularly and investigated thoroughly. If an official is found to have violated the standards of professional and respectful conduct expected of them, the official involved should be dismissed or reprimanded, depending on the severity of their violation.

Sixth, the Washington bill should include protections for the privacy and personal liberty of immigration detainees. While communications between detainees and medical staff should remain confidential, the structure of the detention facilities should also provide adequate privacy to those inside. Beds should be located in a separate room with a door, and overhead lights should be turned off during nighttime hours. Detainees should have access to a common room at all hours that is sufficiently separated from the beds so that the sleeping areas remain quiet at night. Bathrooms should provide adequate facilities to support the number of people using them without a significant wait for use of the shower, toilet, or sink. Showers should all have curtains, and toilets should have stall doors. Furthermore, immigration detainees should be permitted to wear plain clothes. They should have access to laundry facilities at a reasonably low cost. There should be enough washing machines and dryers to serve the needs of the number of detainees in the facility. Broken machines should be repaired promptly. If detainees require new clothes, basic clothing should be available for purchase at the facility. Alternatively, friends or family should be able to mail new clothing to the immigration detainee to wear.

Detainees should also be permitted to be outdoors for at least two hours per day, and outdoor recreation space should be large enough to

comfortably serve the needs of the detainees on even the most popular outdoor days. Moreover, detainees should be permitted to move between outside and inside as often as they like during their outdoor recreation period.

Additionally, detainees should have access to reasonably priced phone calls on a sufficient number of phones to serve their needs. They should be allowed as much time as they need on the telephone each day. Because many immigration detainees likely desire significant telephone communication with their family and friends, detention centers should install a large quantity of telephones. If these telephones are mounted to the wall, nearby seating should be made available so that detainees may talk with their loved ones in comfort. Broken phones should be promptly repaired. Finally, family members in detention should be permitted to remain together in designated family facilities. These facilities should include the same amenities and standards as general facilities.

Seventh, the Washington bill should provide for an increased visitation policy. Most importantly, contact visits should be permitted with friends and family who visit immigration detainees. Visitors should be able to meet with detainees for at least two hours daily. Visitation should occur in spacious, reasonably comfortable rooms that are not overly crowded or loud. Child-friendly visitation rooms should be made available with toys and other amenities to entertain visiting children and to provide them with a measure of comfort in an otherwise cold and unfamiliar setting. If an immigration detainee wishes to take a walk outside with their visitors, they should be temporarily fitted with an ankle monitor and allowed outside on facility grounds.

Eighth, the Washington bill should protect immigration detainees by supporting their access to legal counsel and due process rights. To ensure access to confidential communication with their attorneys, detainees should be provided a sufficient number of telephones that do not record or monitor conversations. Like the telephones provided for personal use, these

telephones should be reasonably priced so that indigent immigration detainees are not effectively prohibited from using them. Further, all mail, especially confidential mail between detainees and their attorneys, should not be tampered with or withheld. In addition, the Washington bill should provide immigration detainees with adequate access to resources in the case of self-representation. Detention facilities should include a library of important legal texts on immigration and habeas corpus cases. Materials should be provided in a variety of languages. These libraries should also provide detainees with access to newspapers and the internet so they may perform legal research and learn about recent legal and political changes that may impact their cases. And immigrant advocacy groups should be invited to regularly provide detainees with legal resources and teach them their rights.

Ninth, the Washington bill should provide that the Attorney General, any district attorney, or any city attorney may bring a civil action against a public facility on behalf of Washington State when a facility operator violates either the provisions of the bill or national detention standards provided by ICE.¹⁷⁹

Funding all of the above provisions will undoubtedly be expensive. However, establishing them is essential if Washington intends to truly protect the rights and wellbeing of its sizeable immigrant population. Simply banning privately run, for-profit detention centers will not guarantee safety or justice for immigrants. It is thus imperative that Washington take further steps to protect the rights and livelihoods of immigrants. Moreover, given the inevitably high operating costs of such a facility, it is possible that the United States government may increasingly turn to alternatives to detention; individuals who would otherwise have been confined to detention facilities might instead be released on parole, fitted with ankle monitors, or never detained at all. These low-cost options would allow

¹⁷⁹ ICE OPERATIONS MANUAL, *supra* note 175.

immigrants enhanced freedoms. Overall, developing and implementing protections for detained immigrants in conjunction with a general ban on private ownership and operation of detention centers is the most effective plan Washington State lawmakers can develop to protect immigrants in their communities.

IV. RESPONSE TO ANTICIPATED CHALLENGES AND CRITICISMS OF PROPOSED DETENTION CENTER LEGISLATION

Because the proposed Washington statute shares fundamental similarities with California Assembly Bill No. 32, it is likely to receive similar legal challenges. However, the California legislature anticipated constitutional challenges to the law and determined that the law will likely survive such legal challenges in court because the law will likely be found neither to violate the Intergovernmental Immunity Doctrine under the Supremacy Clause nor to interfere with existing contractual obligations.¹⁸⁰ Both California and Washington are under the jurisdiction of the Ninth Circuit Federal Court of Appeals.¹⁸¹ If Washington enacts a similar law, it should expect similar challenges—and similar victories over those challenges.

A. The Proposed Law Will Not Be Found to Violate the Supremacy Clause of the United States Constitution

Perhaps unsurprisingly, critics of the California law include the GEO Group itself, which operates the Northwest ICE Processing Center in Tacoma, Washington.¹⁸² The GEO Group and other critics argue that the provision violates the Supremacy Clause of the United States Constitution, which provides that states are prohibited from interfering with the operation of the federal government, by interfering with the federal regulation of

¹⁸⁰ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 10 (Cal. 2019).

¹⁸¹ *Map of the Ninth Circuit*, U.S. CTS. FOR THE NINTH CIR., https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000135 [<https://perma.cc/S6Y7-CJHA>].

¹⁸² NW. IMMIGRANT RTS. PROJECT, *supra* note 43.

immigration.¹⁸³ GEO’s lawsuit argues that the bill is preempted under the Supremacy Clause by federal immigration law.¹⁸⁴ These claims are unlikely to succeed in court.

Neither the proposed Washington bill nor California Assembly Bill No. 32 violates the Supremacy Clause of the United States Constitution. The Supremacy Clause provides that the Constitution, federal laws, and treaties are supreme over any conflicting state and local laws.¹⁸⁵ In *United States v. California*, an April 2019 case from the Ninth Circuit,¹⁸⁶ the court highlighted the United States Supreme Court’s establishment of the rule that all courts should assume historic state police powers are not superseded by the federal government “unless that was the clear and manifest purpose of Congress.”¹⁸⁷ States historically have “great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”¹⁸⁸

The United States Supreme Court has developed three doctrines for interpreting whether state laws violate the Supremacy Clause. First, Congress may expressly preempt state or local regulation by superseding any state regulation of a specified subject matter.¹⁸⁹ *Medtronic, Inc. v. Lohr* provided the framework for these issues: first, “The purpose of Congress is the ultimate touchstone” in preemption cases, and second, Congress’s

¹⁸³ U.S. CONST. art. VI, cl. 2; Notice of Motion and Motion for Preliminary Injunction at 2, *Geo Group, Inc. v. Newsom*, No. 2:20cv00533 (E.D. Cal. Mar. 16, 2020) [<https://perma.cc/K8KM-BPMT>] [hereinafter Notice of Motion and Motion for Preliminary Injunction]; see, e.g., Gorman, *supra* note 2.

¹⁸⁴ Plaintiff’s Combined Brief in Reply in Support of Plaintiff’s Motion for Preliminary Injunction and in Opposition to Defendants’ Motion to Dismiss Complaint at 12–29, *Geo Group, Inc. v. Newsom*, 3:19cv02491 (S.D. Cal. Apr. 9, 2020) [<https://perma.cc/QL4M-SCNY>].

¹⁸⁵ U.S. CONST. art. VI, cl. 2.

¹⁸⁶ *United States v. California*, 921 F.3d 865 (9th Cir. 2019).

¹⁸⁷ *Id.* at 885–86 (quoting *Arizona v. United States*, 567 U.S. 387, 400 (2012)).

¹⁸⁸ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

¹⁸⁹ *Id.* at 485–86.

purpose is determined based on both the preemption statute's language and the surrounding statutory framework.¹⁹⁰ However, Congress has not expressly completely preempted states from regulating immigration, so express preemption will not prohibit states' regulation of detention centers.

Second, a court may find that a state or local law fails under conflict preemption when it is either impossible to comply with both state and federal laws or the state law frustrates the purpose of the federal law by obstructing the essential objectives of the laws.¹⁹¹ California Assembly Bill No. 32 and the proposed Washington bill both provide enhanced requirements to federal immigration laws. They do not directly conflict with federal immigration laws, nor do they obstruct the essential objectives of immigration laws.¹⁹² The new bills allow for the federal government to continue to own and operate immigration detention centers publicly. Furthermore, Congress has not demonstrated an intent that the federal government carry out its immigration detention operations using private contractors.¹⁹³

Third, field preemption provides that states may not regulate any conduct in a regulatory field over which Congress has exclusive control.¹⁹⁴ State bans on private detention facilities do not interfere with the field of immigration because the United States government retains the power it has over who may be lawfully present in the United States and who may be deported or detained.¹⁹⁵ Rather, the bills merely prohibit private, for-profit companies from contracting with the United States government in their respective states; the government is therefore still able to make general

¹⁹⁰ *Id.* at 485.

¹⁹¹ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁹² S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 12 (Cal. 2019).

¹⁹³ 8 U.S.C. § 1103(a)(11); 8 U.S.C. § 1231(g)(1).

¹⁹⁴ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁹⁵ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 12 (Cal. 2019).

immigration decisions.¹⁹⁶ These bills do not regulate who may achieve immigration status. Instead, the bills stipulate that private persons may not operate detention facilities. Therefore, states are not preempted from enacting legislation banning private detention facilities. Instead, states have the authority to ensure the health and welfare of both prison inmates and detainees in facilities within the state.¹⁹⁷

B. The Proposed Law Will Not Be Found to Violate the Intergovernmental Immunity Doctrine

The California legislature correctly anticipated that Assembly Bill No. 32 would be challenged based on the Intergovernmental Immunity Doctrine.¹⁹⁸ The Intergovernmental Immunity Doctrine derives from the Supremacy Clause and establishes that a state may not discriminate against the federal government and those with whom it deals by “treat[ing] someone else better than it treats them.”¹⁹⁹ The United States Supreme Court has clarified that “[a] state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals,”²⁰⁰ and that a regulation does not directly regulate the United States when it is “imposed equally on other similarly situated constituents of the State.”²⁰¹

GEO’s lawsuit argues that the California bill violates the intergovernmental immunity doctrine under the Supremacy Clause by (1) discriminating against the federal government via the private contractors it hires and (2) directly regulating the federal government.²⁰² A similar

¹⁹⁶ *Id.* at 11.

¹⁹⁷ *United States v. California*, 921 F.3d 865, 866 (9th Cir. 2019).

¹⁹⁸ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 9 (Cal. 2019); Notice of Motion and Motion for Preliminary Injunction, *supra* note 183, at 2.

¹⁹⁹ U.S. CONST. art. VI, cl. 2; *United States v. California*, 921 F.3d at 881 (citing *Washington v. United States*, 460 U.S. 536, 544 (1983)).

²⁰⁰ *North Dakota v. United States*, 495 U.S. 423, 435 (1990).

²⁰¹ *Id.* at 438.

²⁰² Notice of Motion and Motion for Preliminary Injunction, *supra* note 183, at 9–10, 13.

Washington bill can expect a similar challenge. In both California and Washington, the challenge will likely fail. Indeed, this argument has already failed in a related case in which GEO challenged California Civil Code § 1670.9, which prohibits cities, counties, and local law enforcement from extending or entering into contracts with the federal government for immigration detention purposes.²⁰³ The United States District Court for the Eastern District of California found that “GEO has not shown that § 1670.9(d) discriminates against the federal government.”²⁰⁴ GEO appealed, and the matter is pending before the Ninth Circuit.²⁰⁵ The court deciding the constitutionality of California Assembly Bill No. 32 acknowledged that the outcome of that appeal will likely influence its own decision because those constitutional arguments “are nearly identical to the arguments GEO raises in the instant case.”²⁰⁶

Neither California Assembly Bill No. 32 nor the proposed Washington law discriminates against or directly regulates the federal government. Both prohibit private, for-profit companies from incarcerating immigrants and operating detention facilities in their respective states.²⁰⁷ The bills explicitly regulate private actors within the states. The bills would not prevent the federal government from publicly maintaining detention facilities in the states. Further, requirements for additional protections in public facilities²⁰⁸ would apply to the federal government, state actors, and local actors alike, impacting both federal detention facilities and state and locally operated public jails holding immigration detainees. In this way, neither California’s

²⁰³ Cal. Civ. Code § 1670.9 (2018); Order at 15–16, *Immigrant Legal Res. Ctr. v. City of McFarland* (Filed Aug. 11, 2020) (No. 1:20-cv-00966-TLN-AC) [hereinafter *Immigrant Legal Res. Ctr. Order*].

²⁰⁴ *Immigrant Legal Res. Ctr. Order*, *supra* note 203, at 15–16.

²⁰⁵ Order at 2, *Geo Group, Inc. v. Newsom* (Filed Aug. 31, 2020) (No. 2:20-cv-00533-TLN-AC).

²⁰⁶ *Id.*

²⁰⁷ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 13 (Cal. 2019).

²⁰⁸ *Infra* part III, section B.

law nor the proposed Washington law would discriminate against the federal government.

Further, neither California Assembly Bill No. 32 nor the proposed Washington bill singles out the federal government as a target of their regulations. Instead, they merely regulate private detention centers, which may be operated by state agencies just as they are operated by federal agencies. For example, the California law explicitly provides that the California Department of Corrections and Rehabilitation, a county sheriff, or other law enforcement, including federal entities, may lease and operate detention centers.²⁰⁹ Because California treats these groups, including federal entities, equally in the bill, the California provision does not violate the Intergovernmental Immunity Doctrine.²¹⁰ The same analysis would apply to the proposed Washington bill to regulate detention centers; therefore, the proposed bill would not violate the Intergovernmental Immunity Doctrine.

C. The Proposed Law Will Not Be Found to Interfere with Existing Contractual Obligations

California Assembly Bill No. 32 and the proposed Washington statute are also likely to withstand claims that the laws are unconstitutional because they interfere with existing contracts. Under Article 1, § 10(1) of the United States Constitution, “No State shall . . . pass any . . . law impairing the obligation of contracts.”²¹¹ Both California’s statute and the proposed Washington bill explicitly provide that contracts that existed prior to the law’s enactment date may continue for the duration of the existing

²⁰⁹ Assemb. Bill No. 32 Ch. 739 (to be codified at Cal. Penal Code Part 3, Title 9.5, §9503, approved Oct. 11, 2019).

²¹⁰ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 13 (Cal. 2019).

²¹¹ U.S. CONST. art. I, § 10; S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 14 (Cal. 2019).

contract.²¹² The provisions simply prohibit parties from entering into new contracts with private for-profit facilities²¹³ or extending or renewing existing contracts with them after the law is enacted.²¹⁴ As such, they do not interfere with existing contractual obligations or otherwise run afoul of this constitutional provision.

Moreover, the United States Supreme Court has noted that state legislation may interfere with contracts under certain circumstances. To determine whether such legislative interference is constitutional, a court must examine whether the state law aims to further a significant, legitimate public purpose in an appropriate and reasonable way.²¹⁵ A court should find the purposes of the relevant California and Washington provisions to be legitimate because protecting individuals from experiencing harm in detention facilities is a legitimate purpose that a state may invoke as an exercise of the state's power to protect those within its borders.²¹⁶ This objective is in turn best served by banning private detention facilities and by implementing stronger protections for individuals held in public detention. Even if a court found that the state legislation did interfere with existing contractual obligations, the court should still find that such legislation was reasonably necessary to further a legitimate public purpose.

²¹² Assemb. Bill No. 32 Ch. 739 (to be codified at California Penal Code Part 3, Title 9.5, §9505(a), approved Oct. 11, 2019); S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 14 (Cal. 2019).

²¹³ Assemb. Bill No. 32 Ch. 739 (to be codified at California Penal Code Part 3, Title 9.5, §9501, approved Oct. 11, 2019); S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 14 (Cal. 2019).

²¹⁴ Assemb. Bill No. 32 Ch. 739 (to be codified at California Penal Code Part 3, Title 9.5, §9505(a)-(b), approved Oct. 11, 2019); S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 14 (Cal. 2019).

²¹⁵ *See, e.g.,* *Sveen v. Melin*, 138 S. Ct. 1815, 1817 (2018) (citing *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411–412 (1983)); S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 14 (Cal. 2019).

²¹⁶ S. Judiciary Rep., June 25, 2019, 2019-2020 Regular Sess., at 10, 14 (Cal. 2019).

V. CONCLUSION

In sum, privately run detention centers such as the Northwest ICE Processing Center present numerous violations to the human rights of immigrants who are detained within them. Washington State has an obligation to protect immigrants within its borders; therefore, Washington must combat such violations by taking legislative action. The Washington Legislature should begin by enacting a statute that bans private immigration detention centers. Further, the rights and safety of Washington immigrants can only be safeguarded by providing increased protections to detained immigrants and enforcing more stringent detention facility regulations and standards. Washington must take these critical steps to demonstrate that it will no longer tolerate the human rights violations that inevitably arise from the profit-motivated exploitation of detained immigrants.