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PREEMPTING PRIVATE PRISONS

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Abstract: In 2019 and 2021, respectively, California and Washington enacted laws banning the operation of private prisons within each state, including those operated by private companies in contracts with the federal government. Nevertheless, the federal government continues to contract with private prisons through Immigrations and Customs Enforcement for the detention of non-United States citizens. In 2022, the Ninth Circuit Court of Appeals held in *GEO Group, Inc. v. Newsom* that federal immigration law preempted California's private prison ban.

Preemption—when federal law supersedes state law—is a doctrinal thicket. Federal courts analyze preemption issues in multiple different ways in a particular case, often leaving unclear rules as to which mode of analysis is applicable. However, recent United States Supreme Court precedent clarified how lower courts should apply preemption doctrines.

This Note asserts that the Ninth Circuit erred in *GEO Group v. Newsom*. In doing so, it analyzes preemption doctrines, including intergovernmental immunity and an interpretive tool called the "presumption against preemption." It also analyzes *GEO Group*'s impact on Washington's private prison statute and how the dissent's position in *GEO Group* not only applied the law correctly but resulted in a more manageable allocation of state and federal power. This Note concludes by offering solutions for Washington State to avoid preemption problems in the future.

INTRODUCTION

Preemption—when federal law supersedes state law[1]—is a doctrinal thicket. Many of its principles overlap, and the Supreme Court frequently uses multiple forms of preemption analysis when analyzing a particular preemption issue.[2] In 2022, the Ninth Circuit Court of Appeals added to this confusion in *GEO Group, Inc. v. Newsom*[3] when it held that federal law preempted a California ban on private prison operations, which would have closed multiple Immigrations and Customs Enforcement (ICE)

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1. *See* U.S. CONST. art. VI, cl. 2.

2. *E.g.*, Arizona v. United States, 567 U.S. 387 (2012). There, the United States Supreme Court used multiple forms of preemption analysis to address whether federal law preempted Arizona's statutory scheme regarding immigration. *See id.* at 402 (utilizing field preemption); *id.* at 406 (analyzing obstacle preemption); *id.* at 415 (discussing conflict preemption).

3. 50 F.4th 745 (9th Cir. 2022) (en banc).

facilities that detained noncitizens[4] within the State.[5] This Note analyzes current preemption principles and doctrines, concludes that the Ninth Circuit erred in *GEO Group*, and predicts Washington's ban on private prisons will suffer the same fate as California's. It ends by offering solutions to the preemption problem with respect to private prison operations in Washington.

Congress empowers the United States Department of Homeland Security (DHS) to carry out border protection, enforcement, detention, and removal through ICE.[6] The Secretary of Homeland Security can enter contracts that are necessary to the agency's responsibilities.[7] That authority is further delegated to the directors of subagencies, granting them the discretion to enter into contracts on their own.[8] Through agency regulation, ICE is authorized to enter contracts as it sees fit, with minimal oversight.[9] As of the 2024 fiscal year—fall 2023—ICE facilities

4. In this Note, the term "noncitizen" refers to noncitizens of the United States.

5. *GEO Grp.*, 50 F.4th at 762–63. This Note uses the term "noncitizen" rather than "alien" when discussing the group of people incarcerated in immigration detention in the United States. The Immigration and Nationality Act defines an "alien" as "any person not a citizen or national of the United States." Pub. L. No. 82-414, § 101(a)(3), 66 Stat. 163, 166 (1952) (codified at 8 U.S.C. § 1101(a)(3)). However, classifications of "citizen," "immigrant," and "alien" can create status-based distinctions both in the legal and social sphere; "alien" carries strong associations of criminality, and "citizen" carries associations of abstract ideals of civic-mindedness and participation. D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1518–19 (2014). Furthermore, President Biden recently directed immigration agencies to replace the term "illegal alien" with "undocumented noncitizen." *E.g.*, Joel Rose, *Immigration Agencies Ordered Not to Use Term 'Illegal Alien' Under New Biden Policy*, NPR (Apr. 19, 2021), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-policy [https://perma.cc/MAN4-R5HU].

6. Federal law empowers the United States Attorney General and the United States Department of Justice to enforce immigration law. 8 U.S.C. § 1103(g). The Attorney General's powers include arrest and detention of noncitizens. 8 U.S.C. § 1226. In 2002, Congress established the Department of Homeland Security and charged the agency with "[c]arrying out the immigration enforcement functions vested by statute" through the Commissioner of Immigration and Naturalization. Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(3), 116 Stat. 2135, 2177–78 (2002) (codified at 6 U.S.C. § 202(3)); *see also id.* § 101(a), 116 Stat. at 2142 (codified at 6 U.S.C. § 111(a)) (establishing the Department of Homeland Security). In 2016, Congress formally transferred border enforcement—including oversight of the detention and removal program through ICE—to the Secretary and Department of Homeland Security. 6 U.S.C. § 253 (charging the Secretary of Homeland Security with inspecting ICE's operations); *see also* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 802(g)(1)(b)(v)(II)(bb), 130 Stat. 122, 212 (2016) (codified at 6 U.S.C. § 253) (replacing references to the United States Bureau of Border Security in the Homeland Security Act with references to ICE).

7. 6 U.S.C. § 112(b)(2).

8. 48 C.F.R. § 1.601(a) (2022) (allowing agency heads to "delegate broad authority to manage the agency's contracting functions to heads of such contracting activities").

9. *Cf. id.* (allowing agency heads to delegate contracting authority to subagencies); 48 C.F.R. § 3017.204–90 (2021) (authorizing ICE to enter into fifteen-year contracts for detention facilities). At

maintained on average 38,481 individuals per month in detention centers both domestically and internationally.[10]

In recent years, some state governments have sought to undermine ICE's ability to contract with private prisons. In 2019, California enacted Assembly Bill 32 (AB 32)[11] into law, which banned the operation of private prisons within the State.[12] Shortly after that, The GEO Group, a private prison business that contracts with the federal government to operate ICE detention centers,[13] sued in federal court and claimed that the law violates the Supremacy Clause.[14] In 2021, the Washington State Legislature passed a bill similar to that of California, banning the operation of private prisons in Washington, including those operating under contracts with the federal government.[15] On September 26, 2022, in *GEO Group v. Newsom*, an en banc panel of the Ninth Circuit Court of

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the beginning of his term, President Biden directed the Attorney General to "not renew Department of Justice contracts with privately operated criminal detention facilities." Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14006, 86 Fed. Reg. 7483, 7483 (Jan. 29, 2021). The executive order stated that ending contracts with private prison companies would reduce incentives around profits and ensure "safe and humane treatment of those in the Federal criminal justice system." *Id.* This executive order, however, does not apply to noncitizens in immigration detention, who are incarcerated through the Department of Homeland Security. *See* Aamer Madhani, *Biden Orders Justice Dept. to End Use of Private Prisons*, AP (Jan. 26, 2021), https://apnews.com/article/joe-biden-race-and-ethnicity-prisons-coronavirus-pandemic-c8c246f00695f37ef2afb1dd3a5f115e [https://perma.cc/4YE3-WYJ7].

10. *ICE Detention Statistics*, *FY2024*, U.S. IMMIGR. & CUSTOMS ENF'T, https://ice.gov/detain/detention-management (last visited Dec. 26, 2023) (scroll to bottom of page, click "FY 2024 ICE Statistics"; then click "Detention FY 2024 YTD, Alternatives to Detention FY 2024 YTD and Facilities FY 2024 YTD, Footnotes (219KB)" to download the spreadsheet; and then click on the "Detention FY24" tab within the spreadsheet).

11. Assemb. B. 32 § 2 (Cal. Assemb. 2019) (codified at CAL. PENAL CODE § 9501 (2020)).

12. *Id.*

13. *See ICE Processing Centers Operated by The GEO Group on Behalf of Immigrations and Customs Enforcement (ICE)*, THE GEO GRP., INC., https://www.geogroup.com/ice [https://perma.cc/2GEF-W4ET].

14. *See* GEO Grp., Inc. v. Newsom, 50 F.4th 745, 752 (9th Cir. 2022).

15. WASH. REV. CODE § 70.395.030(1) (2021); *see also* H.B. 1090, 67th Leg., Reg. Session § 2(2) (Wash. 2021) (defining a private detention facility to include private prison businesses "operating pursuant to a contract or agreement with a federal, state, or local governmental entity"); Gene Johnson, *Bill in Washington State Would Ban Private Immigration Jail*, AP (Mar. 30, 2021, 2:49 PM PST), https://apnews.com/general-news-704d68ea73727cac126f28885da14a27 [https://perma.cc/W7PB-CBX7] (noting how Washington's statute only applies to one private prison in the state, an ICE detention facility).

Appeals held that AB 32[16] violates the Supremacy Clause with respect to private prison operators that contract with the federal government.[17]

The doctrine of preemption is rooted in the Supremacy Clause of the United States Constitution.[18] Under this clause, federal law supersedes state law through either express or implied preemption. Express preemption occurs when Congress plainly states that a federal statute is meant to invalidate contrary state statutes.[19] Implied preemption occurs when Congress has not explicitly preempted state law, but such state law is nevertheless displaced by federal law.[20] For example, when Congress comprehensively regulates in an area or it is impossible to comply with both federal and state law, federal law supersedes state law.[21] Relatedly, when a state statute directly regulates or discriminates against the federal government, the federal government is entitled to intergovernmental immunity, and the state law is void as applied to the federal government.[22]

Closely related to preemption and intergovernmental immunity is the presumption against preemption. The presumption against preemption is a judicial doctrine that assumes that federal law does not preempt a state statute or regulation unless it was the "clear and manifest" intention of Congress.[23] This interpretive method attempts to preserve the states' traditional areas of police power and their ability to regulate those areas, such as health and safety.[24] The presumption against preemption has

16. This Note refers to the California statute as AB 32 because that is how the court in *GEO Group v. Newsom* referenced the law when it was being challenged in the federal courts. *GEO Grp.*, 50 F.4th at 752–53; *id.* at 763, 766–67 (Murguia, C.J., dissenting). AB 32 was codified at Section 9501 of the California Penal Code. CAL. PENAL CODE § 9501 (2020).

17. *GEO Grp.*, 50 F.4th at 751.

18. U.S. CONST. art. VI, cl. 2; *see also GEO Grp.*, 50 F.4th at 758 ("Modern Supremacy Clause cases discuss two separate doctrines: intergovernmental immunity and preemption.").

19. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 399 (2012) ("There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision.").

20. *See, e.g.*, Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) ("Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred . . . ."); *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 (1983) (holding that the "pre-emptive reach" of Section 514(a) of the Employee Retirement Income Security Act of 1974 "is apparent from that section's language"); *id.* at 86–88 (making this holding even though there was no express preemption provision).

21. *See infra* section II.A.2.

22. *See infra* section II.A.3.

23. Wyeth v. Levine, 555 U.S. 555, 565 (2009); *see infra* section II.A.4.

24. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also, e.g.*, Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001) (contrasting a state statute regulating federal agencies with "the historic primacy of state regulation of matters of health and safety" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

evolved over time,[25] and the ways in which it is applied have been scattered and unclear in United States Supreme Court case law.[26] Although the principles of preemption, intergovernmental immunity, and the presumption against preemption often overlap and resemble one another, it is important to understand that they are in fact distinct doctrines.

This Note proceeds in three parts. Part I provides an analysis of Washington and California's private prison ban statutes. Part II analyzes the principles of preemption, the doctrine of intergovernmental immunity, and the presumption against preemption. It also details the litigation surrounding California's private prison ban and analyzes the Ninth Circuit's majority and dissenting opinions in *GEO Group v. Newsom*. Part III argues that the dissent was correct in *GEO Group* and that Washington's ban on private prisons is likely also unconstitutional. This Part concludes by analyzing the impact of the *GEO Group* decision on Washington State and provides solutions for how Washington can avoid the preemption problem in the future.

I. BANNING PRIVATE PRISON OPERATIONS: WASHINGTON AND CALIFORNIA'S ALMOST IDENTICAL APPROACHES

Twenty-three states do not use private prisons.[27] Many of these states enacted or proposed legislation to ban state and local entities from contracting with private prison entities or phased out their contracts with private prisons.[28] Two of these states, however—California and Washington—have gone further and enacted statutes that, in effect, prohibit even the federal government from using private prisons within

25. *See infra* section II.A.4.

26. *Compare, e.g.*, *Wyeth*, 555 U.S. at 565–66 n.3 (discussing a presumption against preemption without clear Congressional intent), *and id.* at 566 n.3 (relying on the "historic presence of state law"), *with, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 872–73 (2000) (discussing how a "special burden" to show conflict preemption does not apply under traditional preemption analysis). Dissenting in *Geier*, Justice Stevens argued that "the Court simply ignores the presumption, preferring instead to put the burden on petitioners to show that their tort claim would not frustrate the Secretary's purposes." *Id.* at 906–07 (Stevens, J., dissenting).

27. Kirsten M. Budd & Niki Monazzam, *Private Prisons in the United States*, THE SENT'G PROJECT (June 15, 2023), https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/ [https://perma.cc/6RP2-3GDR].

28. *See, e.g.*, NEV. REV. STAT. § 208.280(1) (2019) (requiring prisons to be under the "direct operational control of the State"); Tim Walker, *Private Prison Prohibition Heads to House Floor*, MINN. HOUSE OF REPRESENTATIVES (Mar. 5, 2021), https://www.house.mn.gov/SessionDaily/Story/15734 [https://perma.cc/7JAJ-JB8V] (noting that Minnesota's only private prison has been closed since 2010).

the state, either directly or through contracting with private entities.[29] Both California and Washington's private prison bans focused on concerns around the health and welfare of detainees, companies cutting costs to the detriment of detainee safety, and shareholders of private prison companies maximizing profits without regard for the welfare of those they detained.[30]

A. California's Legislation: Assembly Bill 32

California's private prison ban statute is simple. The language outlawing the business of private detention in the State reads: "Except as otherwise provided in this title, a person shall not operate a private detention facility within the state."[31] The statute defines a private detention facility as "a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a government entity."[32] It also allows existing private facilities to continue running for a limited period.[33] Private prisons are permitted to complete existing government contracts, but cannot not exercise any contractually authorized extensions beyond the initial contract duration.[34]

Other provisions in the California statute allow narrow circumstances in which private detention facilities are not subject to the ban.[35] Private facilities operating juvenile detention centers providing rehabilitative, mental health, or educational services are not subject to the ban.[36] Additionally, private facilities operating as school detention centers,[37]

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29. CAL. PENAL CODE § 9501 (2020); WASH. REV. CODE § 70.395.030 (2021). Both state statutes have limited exceptions to the ban on private prison operations, including privately operated juvenile detention, rehabilitative sources, and involuntary mental health commitment. *See* CAL. PENAL CODE § 9502(a)–(g) (2020) (listing exceptions); WASH. REV. CODE § 70.395.030(3) (same).

30. *See* 2021 Wash. Sess. Laws 202 (finding that "private prison operators have cut costs by reducing essential security and health care staffing"); Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs AB 32 to Halt Private, For-Profit Prisons and Immigration Detention Facilities in California (Oct. 11, 2019), https://www.gov.ca.gov/2019/10/11/governor-newsom-signs-ab-32-to-halt-private-for-profit-prisons-and-immigration-detention-facilities-in-california [https://perma.cc/HNU4-87GM] ("[W]e will stand up for the health, safety and welfare of our people, and . . . we are committed to humane treatment for all.").

31. CAL. PENAL CODE § 9501 (2020).

32. *Id.* § 9500(b).

33. *See id.* § 9505(a) (allowing private prison contracts in place prior to January 1, 2020, to operate through the remainder of the contract term, but prohibiting renewals).

34. *Id.*

35. *E.g.*, *id.* § 9502.

36. *Id.* § 9502(a).

37. *Id.* § 9502(e).

ancillary services for inmates,[38] or mental health centers for those who have been involuntarily committed are not prohibited.[39]

Lastly, in addition to banning the operation of private prisons within the State, the statute prohibits the California Department of Corrections from entering into contracts with private prison operators, except when leasing property from which the department operates.[40]

B. Washington's Legislative Effort: Engrossed House Bill 1090

Washington's private prison ban is similar to California's:

> Except as [otherwise] provided . . . , no person, business, or state or local governmental entity shall operate a private detention facility within the state or utilize a contract with a private detention facility within the state. No state or local government entity shall utilize a contract with a private detention facility outside of Washington State . . . .[41]

This portion of the statute bans both the operation of private detention companies and the use of contracts with private detention companies by any state or local government entity.[42] It also allows existing contracts with private detention facilities to stay in effect for the duration of the contract.[43] However, it does not allow extension of the contracts, even if extensions are authorized by the contract itself.[44]

Washington's statute also has exceptions to the private prison ban. These include private detention facilities for juvenile services,[45] individuals who are civilly committed to a medical facility,[46] public health quarantine facilities,[47] and facilities owned and operated by federally recognized tribal nations.[48]

II. PREEMPTION DOCTRINES AND *GEO GROUP V. NEWSOM*

The conflict between state statutes and federal law is long standing, producing an unclear jurisprudence. A recent United Supreme Court

38. *Id.* § 9502(c).
39. *Id.* § 9502(b).
40. *Id.* § 5003.1.
41. WASH. REV. CODE § 70.395.030(1) (2021).
42. *Id.*
43. *Id.* § 70.395.030(2).
44. *Id.*
45. *Id.* § 70.395.030(3)(a).
46. *Id.* § 70.395.030(3)(b).
47. *Id.* § 70.395.030(3)(c).
48. *Id.* § 70.395.030(3)(h).

decision recently clarified one portion of preemption doctrine.[49] This section analyzes the preemption doctrines, including the unique relationship between intergovernmental immunity and preemption. It then scrutinizes the presumption against preemption as an interpretive method that acts independently of preemption doctrines. Lastly, it summarizes the litigation that led to *GEO Group v. Newsom*.

A. The State of Modern Supremacy Clause Principles

Preemption and its associated doctrines are constitutional principles. The United States Constitution states that "[t]his Constitution, and the Laws of the United States . . . , shall be the supreme Law of the Land."[50] This means that the federal government enjoys immunity "from state laws that directly regulate or discriminate against it."[51]

Questions of preemption occur when state laws either explicitly or implicitly conflict with a federal statute or regulation.[52] When courts attempt to determine whether a federal law should supersede state law, Congress's purpose is the "ultimate touchstone."[53] Congress can explicitly preempt state law in the language of a statute, but Congress may also preempt state law in a more indirect manner.[54] The Supremacy Clause also in a limited manner protects federal contractors who do work on behalf of the federal government,[55] but states have more flexibility to regulate federal contractors.[56] The following sections discuss the background principles of preemption and the Supremacy Clause as interpreted by the Supreme Court. The first section outlines broad principles of preemption, including express and implied preemption. The second section covers the doctrine of intergovernmental immunity. The section concludes by analyzing the presumption against preemption, an interpretive doctrine courts use when confronting preemption issues.

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49. United States v. Washington, 596 U.S. __, 142 S. Ct. 1976, 1984 (2022) (clarifying intergovernmental immunity analysis).

50. U.S. CONST. art. VI, cl. 2.

51. *Washington*, 142 S. Ct. at 1982.

52. *See, e.g.*, Arizona v. United States, 567 U.S. 387, 399–400 (2012) (identifying express, field, and conflict preemption).

53. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978)).

54. *See, e.g.*, *Arizona*, 567 U.S. at 399–400 (discussing field and conflict preemption).

55. *E.g.*, Leslie Miller, Inc. v. Arkansas, 352 U.S. 187, 190 (1956).

56. *See, e.g.*, David S. Rubenstein, *State Regulation of Federal Contractors: Three Puzzles of Procurement Preemption*, 11 U.C. IRVINE L. REV. 207, 245–47 (2020) (discussing how federal contracts with private entities may prevent state laws from being preempted with respect to federal procurement regulation).

1. Express Preemption

Express preemption occurs when Congress explicitly identifies the extent to which its enactments preempt state law.[57] Justice Marshall noted in *Gibbons v. Ogden*[58] that "[i]f Congress were to pass an act expressly revoking or annulling" a state law, the state law "would be wholly useless and inoperative."[59] Thus, Congress has the power to overrule contrary state laws with express statutory language.[60] When a statute expressly preempts state law, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent."[61]

However, even when Congress expressly preempts a state law provision, a federal preemption provision is only as broad as the statute allows. For example, in *Chamber of Commerce of the United States v. Whiting*,[62] the Supreme Court analyzed express preemption within the immigration context.[63] Under the Immigration Reform and Control Act (IRCA), employers are required to review employment eligibility documents and swear under penalty of perjury that they reviewed them.[64] The IRCA also "expressly preempts 'any State or local law imposing civil or criminal sanctions (*other than* through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized [noncitizens].'"[65] Despite the provision, the State of Arizona enacted the Legal Arizona Workers Act of 2007.[66] The statute authorized punishment for businesses that employed an unauthorized noncitizen by revoking and suspending business licenses.[67]

The Chamber of Commerce of the United States sued, arguing that the Legal Arizona Workers Act's language allowing courts to suspend or revoke business licenses was expressly preempted by the IRCA.[68] Chief Justice Roberts wrote for the majority, and the Court held that the

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57. *See Arizona*, 567 U.S. at 399; *cf.* 21 C.F.R. § 808 (2023) (describing procedures to preempt state law with respect to medical devices and providing exemptions from preemption).

58. 22 U.S. (9 Wheat.) 1 (1824).

59. *Id.* at 30.

60. *See Arizona*, 567 U.S. at 399; Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95–98 (1983).

61. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993).

62. 563 U.S. 582 (2011).

63. *Id.* at 611.

64. *Id.* at 589.

65. *Id.* at 590 (emphasis added) (quoting 8 U.S.C. § 1324a(h)(2)).

66. *Id.* at 591.

67. *Id.*

68. *Id.* at 593–94.

legislative text of the IRCA preempting state law was limited in scope: "Congress's 'authoritative statement is the statutory text, not the legislative history.'"[69] Thus, because the IRCA preempted state law except under licensing or similar laws, Arizona's law was not expressly preempted.[70] This case exemplifies the potential scope of express preemption. Congress *could* have created a broad preemption provision, which would have vastly limited Arizona's ability to regulate immigration at the state level. However, by creating an apparent carve out for licensing laws, the Court expressed unwillingness to invalidate the Arizona law under IRCA's express preemption clause.[71] Even though the IRCA contains express language preempting state law, the Court gave only the express preemption clause as much effect as the text clearly provided.[72] In sum, express preemption permits Congress to explicitly state when it seeks to preempt state law, either in whole or in part.

2. *Implied Preemption: Field, Conflict, Obstacle, and Impossibility Preemption*

Implied preemption occurs when Congress does not use language expressly preempting state law.[73] Courts look to whether Congress clearly intended to override state law and attempt to discern Congress's intent without making "a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'"[74] Instead, courts discern congressional intent by "consider[ing] whether the federal statute's

69. *Id.* at 599 (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005)).

70. *Id.* at 600 ("IRCA expressly preempts some state powers dealing with the employment of unauthorized [noncitizens] and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."). Justice Breyer dissented and would have held that Arizona's law was not actually a licensing statute and Congress did not intend to create such a broad exemption under IRCA such that the federal law applied to Arizona's statute. *Id.* at 612–13 (Breyer, J., dissenting). Justice Sotomayor dissented separately, stating that Arizona could only impose penalties after a "final federal determination" of the employer's violation of IRCA. *Id.* at 641 (Sotomayor, J., dissenting). Thus, Justice Sotomayor would have held that the Arizona statute as it existed was expressly preempted. *See id.* at 631–32.

71. *See id.* at 611 (majority opinion).

72. *See id.* at 596–97 (discussing whether Arizona's statute was a licensing law).

73. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 376–77 (2015).

74. *Chamber of Com. of the U.S.*, 563 U.S. at 607 (plurality opinion) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)); *see also id.* at 609–10 (discussing whether Congress intended to preempt state law through expansion of the E-Verify program).

'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent."[75]

Implied preemption can occur through two mechanisms: field and conflict preemption.[76] Field preemption occurs when Congress intends to prohibit state regulation in a particular area of law, even though there is not an express preemption clause.[77] Conflict preemption has two subcategories: impossibility and obstacle preemption, where either (1) it is impossible to comply with both federal and state law; or (2) state law acts as an obstacle to a federal statute's implementation, respectively.[78] Obstacle preemption is distinguishable from field preemption in scope rather than kind; field preemption can occur over a broad area of law, whereas obstacle preemption is narrower in that a state law must frustrate a specific congressional purpose.[79]

Rice v. Santa Fe Elevator Corp.[80] succinctly defines field preemption. The Supreme Court determined that courts may infer that federal law displaces state law entirely when a framework or regulation is "so pervasive . . . that Congress left no room for the States to supplement it,"[81] or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[82]

Arizona v. United States[83] provides an example of both field and conflict preemption with respect to immigration law.[84] In 2010, Arizona enacted an immigration statute to "deter the unlawful entry and presence of [unauthorized noncitizens] and economic activity by persons unlawfully present in the United States."[85] Part of the statute made failure

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75. Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 31 (1996) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)). Another example of this kind of implied preemption is in the National Labor Relations Act (NLRA), which preempts state law whenever a lawsuit is based on conduct that is "arguably" protected or prohibited by the NLRA. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959). *But cf.* Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. No. 174, 598 U.S. __, 143 S. Ct. 1404, 1415–16 (2023) (allowing a private tort suit to proceed in state court despite acknowledging that the conduct may be protected by the NLRA).

76. *Oneok*, 575 U.S. at 377.

77. *Id.*

78. *Id.*

79. *Compare, e.g.*, *id.* at 377–82 (analyzing field preemption in the context of the regulation of natural gas from the twentieth century through 2015), *with* Geier v. Am. Honda Motor Co., 529 U.S. 861, 875–86, 881–82 (2000) (assessing whether the District of Columbia's common law tort regime was an obstacle to federal regulation of seatbelts and thus preempted).

80. 331 U.S. 218 (1947).

81. *Id.* at 230 (citing Penn. R.R. Co. v. Pub. Serv. Comm'n of Penn., 250 U.S. 566, 569 (1919)).

82. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 63 (1941)).

83. 567 U.S. 387 (2012).

84. *Id.* at 399.

85. *Id.* at 393 (quoting ARIZ. REV. STAT. ANN. § 11-1051 note (West 2012)).

to comply with federal registration requirements for noncitizens a state-level misdemeanor.[86] Another part made it a misdemeanor for an unauthorized noncitizen to seek or engage in work in the state.[87] The statute authorized local police to arrest individuals without a warrant if they believed that an individual committed a removable offense, and it required officers who conducted stops to make efforts to verify the person's immigration status.[88] The United States sued, arguing that federal law preempted the state statute.[89]

Justice Kennedy discussed the field preemption issue by explaining that Congress has "broad, undoubted power over the subject of immigration and the status of [noncitizens]."[90] First, the Court noted that Congress had "occupied the field of [noncitizen] registration."[91] As applied to the criminal statutes in Arizona, the Court held that state law intruded on the structure of immigration law Congress specifically created.[92] The criminal statutes, in turn, were in conflict with Congress's intention "to preclude States from 'complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.'"[93] Thus, the criminal statutes invaded the field of federal immigration law, which Congress exclusively intended to regulate, and the state statutes were preempted.[94]

Arizona also applied conflict preemption where state law conflicted with federal law. With respect to the State law's empowerment of police officers to make warrantless arrests, the majority found that federal law limited how local police can enforce immigration law.[95] For example, federal law already has extensive requirements that the United States Department of Justice enforces when local police want to act as immigration officers.[96] Due to the myriad ways the federal government limits state police officers' involvement in immigration enforcement, the Arizona statute's requirements of police officers "violate[d] the principle that the removal process is entrusted to the discretion of the Federal Government."[97] Furthermore, "Congress has put in place a system in

86. *Id.*
87. *Id.* at 393–94.
88. *Id.* at 394.
89. *Id.* at 393.
90. *Id.* at 394.
91. *Id.* at 401.
92. *See id.* at 402–03.
93. *Id.* at 403 (alterations in original) (quoting Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941)).
94. *Id.*
95. *See id.* at 408–09.
96. *See id.* at 409–10.
97. *Id.* at 409.

which state officers may not make warrantless arrests of [undocumented noncitizens] based on possible removability except in specific, limited circumstances."[98] Thus, because there was already robust regulation in the field of immigration enforcement, Arizona could not impose additional requirements.[99]

The Supreme Court has articulated two narrower forms of conflict preemption: impossibility and obstacle preemption. Impossibility preemption occurs when it is impossible to comply with both a federal and state law at the same time, rendering the state statute void.[100] For example, in *Mutual Pharmaceutical Co. v. Bartlett*,[101] a New Hampshire law required drug manufacturers to have stronger warnings on their labels for certain drugs or be subject to product liability for defective warnings.[102] However, federal law prohibited generic drug manufacturers from both changing their labels and the chemical composition of their drugs.[103] The Court found that a New Hampshire defective design claim was preempted because the company could not comply with the State statute's stronger-label requirement and federal law's requirement to not change drug labels.[104]

Obstacle preemption occurs when a state statute acts as an obstacle to a federal purpose or objective, rendering the state law invalid.[105] In *Leslie Miller, Inc. v. Arkansas*,[106] the federal government contracted with a construction company to help build facilities at an Air Force base in Arkansas.[107] This contract was pursuant to federal laws prescribing the minimum requirements for accepting bids from federal contractors.[108] The State of Arkansas accused the construction company of violating the state's licensing requirements, and the eventual trial resulted in a fine.[109] In a per curiam opinion, the United States Supreme Court held that if the federal contractors were subjected to Arkansas's state licensing requirements, it would give Arkansas review over federal contracting decisions, frustrating Congress's decision to require the military to

98. *Id.* at 410.

99. *See id.*

100. Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015).

101. 570 U.S. 472 (2013).

102. *Id.* at 475.

103. *Id.*

104. *Id.* at 480.

105. GEO Grp., Inc. v. Newsom, 50 F.4th 745, 758 (9th Cir. 2022).

106. 352 U.S. 187 (1956).

107. *Id.* at 187–88.

108. *See id.* at 188.

109. *Id.*

contract with the "lowest responsible bidder."[110] The State law was preempted because it imposed difficulties in carrying out the purpose of federal law.[111]

The distinction between impossibility and obstacle preemption is subtle. Impossibility preemption occurs where a state law—in text or function—conflicts with federal law and it is *impossible* to comply with both laws at the same time.[112] Obstacle preemption occurs when a state law frustrates the purpose of a federal law, making it harder for federal law to operate.[113]

3. Intergovernmental Immunity: Related to but Distinct from Preemption

Preemption cases frequently implicate a distinct but related doctrine known as intergovernmental immunity. An easy way to think about intergovernmental immunity is as a corollary to preemption. Preemption is about how federal law supersedes state law whereas intergovernmental immunity prevents states from regulating the federal government.[114] Intergovernmental immunity shields the federal government from state statutes that directly regulate or discriminate against it.[115]

The doctrine of intergovernmental immunity starts with *McCulloch v. Maryland*.[116] In 1816, Congress authorized the incorporation of the Second Bank of the United States.[117] Two years later, the State of Maryland passed a statute that imposed a $15,000 tax on all banks operating within the State, with additional penalties for failure to pay.[118] James McCulloch, a cashier of the Second Bank of the United States, issued promissory notes in Maryland.[119] In turn, Maryland attempted to

110. *Id.* at 190.

111. *See id.*

112. Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 480 (2013).

113. *See, e.g.*, *Leslie Miller*, 352 U.S. at 190 (noting that imposing state law requirements on federal contractors would conflict with federal policies on military contracting).

114. *See, e.g.*, GEO Grp., Inc. v. Newsom, 50 F.4th 745, 758 (9th Cir. 2022) (noting the difference between intergovernmental immunity and obstacle preemption); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 376–77 (2015) (providing an overview of preemption doctrine).

115. *See, e.g.*, *GEO Grp.*, 50 F.4th at 754–57 (surveying the scope of intergovernmental immunity doctrine).

116. 17 U.S. (4 Wheat.) 316 (1819).

117. *Id.* at 317.

118. *See id.* at 317, 320–22.

119. *Id.* at 318–19.

collect the $15,000 it was entitled to under state law.[120] The State of Maryland then sued the federal government when it was not paid.[121]

After concluding that Congress had the authority to create the Second Bank of the United States,[122] Justice Marshall noted that the states cannot directly tax the federal government like Maryland did,[123] for "the power of taxing [the bank] by the States may be exercised so as to destroy it."[124] Because the states entered the Union together, Justice Marshall reasoned that "when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control."[125] However, Justice Marshall conceded that while a direct tax on the Second Bank of the United States was unconstitutional, it would be constitutional for the states to tax the real property that the Second Bank of the United States owns, because a state tax on property owned by the federal government would not deprive it of new revenue, only revenue it had already accumulated.[126] Ultimately, *McCulloch* stands for the proposition that a direct tax by the states on the federal government is unconstitutional, but it leaves open the possibility of other state regulation of federal functions.[127] This notion that the federal government is immune from direct regulation by the states led to the development of intergovernmental immunity.[128]

From *McCulloch* to the twentieth century, the intergovernmental immunity doctrine frequently changed. For example, it was used to hold both that federal taxes on a state judge's salary were unconstitutional,[129] and that a state tax on a federal judge's salary was unconstitutional.[130]

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120. *Id.* at 319.

121. *Id.* at 317.

122. *Id.* at 424.

123. *Id.* at 436.

124. *Id.* at 427.

125. *Id.* at 435.

126. *See id.* at 436–37.

127. *E.g.*, *id.* (expressly allowing for the possibility that states could tax real property owned by the federal government even though the states cannot tax the federal government).

128. *See* Rubinstein, *supra* note 56, at 219–20.

129. Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1871). The Court reasoned that because the state and federal governments have similar taxing power, the principles prohibiting a state tax on the federal bank in *McCulloch* also prohibited the federal government from taxing the salaries of some state employees. *See id.* (prohibiting federal taxation of "judicial officer[s] of . . . State[s]").

130. Dobbins v. Comm'rs of Erie Cnty., 41 U.S. (16 Pet.) 435, 449–50 (1842). The Court in *Dobbins* closely analogized a state tax on a federal judge's salary to that of the tax in *McCulloch*, reasoning that any state attempt to regulate the federal government's "constitutional powers" was unconstitutional. *Id.* at 448–49.

With the growth of the administrative state, issues around intergovernmental immunity began to appear in both state and federal regulations, particularly concerning federal contractors.[131] This led to *North Dakota v. United States*,[132] in which the Supreme Court attempted to resolve the intersection of preemption and intergovernmental immunity to mixed results.[133]

In *North Dakota*, the United States military issued procurement regulations allowing military bases to purchase liquor from federally authorized distributors, who offered liquor at cheap prices to the government.[134] North Dakota, however, tightly regulated the import, distribution, and sale of liquor.[135] Along with regulations for state-level purchases and sales of alcohol, North Dakota also enacted regulations requiring alcohol sold to federal entities within the State to have labels and conform to state reporting requirements.[136] Not wanting to deal with the hassle of labeling and complying with the regulation, most alcohol distributors indicated that they would not ship liquor to military bases within North Dakota.[137] The case resulted in three opinions and a four-one-four split[138] that left the intergovernmental immunity doctrine blurry.

Justice Stevens, writing for a plurality of the Court, found that North Dakota's labeling and reporting requirements did not violate intergovernmental immunity.[139] First, North Dakota's regulation did not directly regulate the federal government; it was a regulation against suppliers of alcohol.[140] In this way, Justice Stevens reasoned, the regulation was akin to a tax on federal contractors, which the Court previously upheld as constitutional.[141] Second, the regulation did not "discriminate against the [f]ederal [g]overnment or those with whom it deals."[142] North Dakota extensively regulated its liquor sales, requiring retailers to purchase from State-approved distributors.[143] The federal

131. *See* Rubenstein, *supra* note 56, at 220–21 (discussing intergovernmental immunity's doctrinal development through the New Deal era).

132. 495 U.S. 423 (1990).

133. *Id.* at 434, 444, 448.

134. *Id.* at 427.

135. *See id.* at 428–29.

136. *Id.*

137. *Id.* at 429.

138. *See id.* at 426 (plurality opinion); *id.* at 444 (Scalia, J., concurring); *id.* at 448 (Brennan, J., concurring in part and dissenting in part).

139. *Id.* at 436–39 (plurality opinion).

140. *Id.* at 436–37.

141. *Id.* at 437.

142. *Id.*

143. *See id.* at 428, 439.

government, however, had looser requirements under the state statute, giving it the option to ignore the state regulation entirely and purchase liquor from wherever it wanted.[144] Because the state regulation favored the federal government, it could not be considered discriminatory and trigger intergovernmental immunity.[145] The military was free to purchase alcohol without the labeling and reporting requirements by purchasing alcohol within North Dakota, like all other North Dakotans.[146]

Justice Scalia issued a lone concurrence, stating that under the Twenty-First Amendment,[147] North Dakota was free to regulate the sale of alcohol as it saw fit, even against the federal government.[148] Because the federal government was also subject to the parameters of the Twenty-First Amendment, it could be subject to State regulation.[149] Thus, North Dakota's labeling requirement did not violate any federal immunity.[150]

Justice Brennan, writing for a four-justice concurrence, argued that the reporting requirement was lawful, but the labeling requirement was not.[151] This concurrence stated that the labeling requirement both substantially obstructed federal operations and discriminated against the federal government and the companies with which it did business.[152] Because the North Dakota labeling requirement compelled liquor distributors to engage in two different kinds of activity depending on whether the liquor was going to retailers or military bases in the State, the requirement discriminated against the federal government.[153] Rather than looking at the State regulatory scheme in its entirety, Justice Brennan did not inquire into whether the federal government was "better or worse off on the whole."[154] Because no opinion in *North Dakota* had a majority of justices on the Court, no rationale in the Court governed the doctrine of intergovernmental immunity after the case was decided.

In 2022, the Supreme Court released a unanimous opinion in *United States v. Washington*[155] and clarified that Justice Stevens's interpretation

144. *See id.* at 439.

145. *Id.*

146. *See id.* at 439; *id.* at 444 (Scalia, J., concurring).

147. *See* U.S. CONST. amend. XXI, § 2 (allowing state regulation of liquor transportation and importation).

148. *See North Dakota*, 495 U.S. at 447–48 (Scalia, J., concurring).

149. *See id.*

150. *Id.* at 448.

151. *Id.* at 448 (Brennan, J., concurring in part and dissenting in part).

152. *Id.* at 452.

153. *See id.* at 460–61.

154. *Id.* at 462.

155. 596 U.S. __, 142 S. Ct. 1976 (2022).

of *North Dakota* controls intergovernmental immunity cases.[156] Washington State passed a statute that explicitly allowed workers' compensation claims for workers at the Hanford nuclear site.[157] The law made it easier for Hanford workers, who were federal contractors, to receive workers' compensation, which was paid by the federal government.[158] This statute provided greater protection for former Hanford workers.[159] The United States sued Washington State, asserting the statute unconstitutionally discriminated against the federal government.[160]

Writing for the Court, Justice Breyer held that Washington's statute violated principles of intergovernmental immunity.[161] Justice Breyer specifically adopted Justice Stevens's view of *North Dakota*, stating "[w]e later came to understand the doctrine [of intergovernmental immunity], however, as prohibiting state laws that *either* 'regulat[e] the United States directly *or* discriminat[e] against the Federal Government or those with whom it deals' (*e.g.*, contractors)."[162] The Court in *Washington* determined that the state statute explicitly singled out the federal government for "unfavorable treatment" by specifically referencing those who have worked for the United States.[163] The state statute necessarily increased the cost of workers' compensation claims for the federal government.[164] Barring a waiver of immunity, Justice Breyer reasoned, the law "consequently violate[d] the Supremacy Clause."[165]

The state of intergovernmental immunity has changed over time, but *Washington* has since clarified its scope: intergovernmental immunity doctrine analysis begins when a state statute directly regulates or discriminates against the federal government or those with whom it does business.[166]

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156. *See id.* at 1984.

157. *Id.* at 1982.

158. *Id.* at 1982–83.

159. *See id.* ("In particular, the statute creates a causal presumption that certain diseases and illnesses are caused by the cleanup work at Hanford." (citing WASH. REV. CODE §§ 51.32.187(2)–(4))).

160. *Id.* at 1983.

161. *See id.* at 1984.

162. *Id.* (second alteration added) (emphasis in original) (quoting North Dakota v. United States, 495 U.S. 423, 435 (1990) (plurality opinion)).

163. *Id.*

164. *See id.* at 1983–84.

165. *Id.* at 1984. The Court held that the United States did not waive intergovernmental immunity. *See id.* at 1985–86.

166. *Id.* at 1984.

4. The Independent Role of the Presumption Against Preemption in These Doctrines

Whereas preemption and intergovernmental immunity are doctrines barring states from enacting certain laws, the presumption against preemption is an interpretive tool that courts use in analyzing implied preemption.[167] When a state law indirectly regulates or interferes with federal law, courts will presume that federal law does not preempt state law unless doing so is the "clear and manifest purpose of Congress."[168]

In *Rice v. Santa Fe Elevator Corp.*, the first case to articulate the presumption against preemption, a group of public warehouses in Illinois were regulated by both state and federal licensing requirements.[169] Rice, a grain distributor, alleged that Santa Fe Elevator Corporation, a warehouse facility, had violated Illinois law, filing a complaint before a state agency.[170] Santa Fe Elevator Corporation moved to enjoin the complaint before the commission in federal court.[171] When the case advanced to the United States Supreme Court, the majority held that federal law made clear that it was to be the sole regulation in this area, and the Court overturned the state statutes.[172] However, the Court also noted that the analysis "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[173]

Further, in *North Dakota*, Justice Stevens's opinion makes clear that when a state statute does not directly regulate the federal government, there is a presumption of validity.[174] Articulated differently, this presumption of the validity of a state statute is a presumption *against* its preemption. With respect to North Dakota's regulation of alcohol going to federal facilities, Justice Stevens explained that a specific state statute should not be looked at in isolation.[175] Instead, "the entire regulatory system should be analyzed to determine whether it is discriminatory."[176]

Given the unclear overlap between preemption doctrine, intergovernmental immunity, and the presumption against preemption,

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167. *See* Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009).

168. *See id.* at 565 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

169. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 220 (1947).

170. *See id.* at 220–22.

171. *Id.* at 222.

172. *See id.* at 232–36.

173. *Id.* at 230.

174. *See* North Dakota v. United States, 495 U.S. 423, 434–35 (1990) (plurality opinion).

175. *See id.* at 435.

176. *Id.*

scholars have debated whether a presumption against preemption even exists.[177] Caleb Nelson argues that the presumption against preemption permits judicial expansion of categories of implied preemption, and narrows the scope of express preemption.[178] In turn, according to Nelson, this results in an unequal reading of federal law depending on what type of preemption applies.[179] Others argue that the presumption against preemption violates federalism principles, allowing Congress to silently displace state law in cases of implied preemption.[180] Because the presumption against preemption has not been expressly overruled, its doctrinal soundness is outside the scope of this Note.

That said, at least in implied preemption cases, the presumption against preemption makes logical sense. In the absence of an express preemption provision, one could infer that Congress did not intend to preempt state law.[181] The presumption serves an important interpretive purpose. Preemption doctrines, as described above, have a blurry overlap.[182] As seen in *Arizona*, different parts of a state statute may implicate different principles of express and implied preemption.[183] Given this blur, the presumption against preemption provides the federal courts with flexible opportunities to survey multiple sources of legislative intent to determine whether a state statute is preempted by federal law.[184] While not a distinct doctrine of preemption itself, the presumption against preemption serves as a tool that federal courts use while analyzing preemption; the courts will lean in favor of a state statute's constitutionality, rather than it being unconstitutional.

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177. *See, e.g.*, Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1219 (2010) ("The Supreme Court has mentioned this presumption on many occasions. But just as frequently, the Court has decided cases involving preemption and never mentioned the presumption." (footnotes omitted)); Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption,* 66 ALB. L. REV. 759, 763 (2003) ("To answer the riddle of why the presumption [against preemption] has *left and gone away* is to engage in speculation.").

178. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 290–92 (2000).

179. *Id.* at 298 (arguing that a presumption against preemption applies differently in express preemption and conflict preemption cases, resulting in different interpretations of a statute).

180. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2111–12 (2000) ("A general presumption against federal preemption of state law is obviously untenable because state law can be displaced in cases of congressional ambiguity and silence . . . .").

181. *See, e.g.*, Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 274 (noting how *Rice* can lend itself to the interpretation that a conflict may be "so minor that a court is unsure whether Congress would prefer for state and federal law to operate side by side").

182. *See* Arizona v. United States, 567 U.S. 387, 403, 410 (2012).

183. *Id.*

184. *See, e.g.*, Young, *supra* note 181, at 271 ("A presumption . . . might permit a court to canvass a broad range of sources of statutory meaning yet still impose a hefty burden of proof . . . .").

B. The Application of Supremacy Clause Principles in GEO Group v. Newsom

The GEO Group, a major operator of private prisons in contracts with ICE, sued almost immediately upon the passage of private prison bans in California in 2019 and in Washington in 2021.[185] The company sued the governors of both states in their official capacity,[186] alleging that the two states' private prison bans were unconstitutional under the Supremacy Clause.[187] It claimed that under theories of preemption and intergovernmental immunity, the states' private prison bans were unconstitutional as applied to private prison operators in contracts with the federal government.[188] Separately, the United States also sued California over the statute, which the district court consolidated with The GEO Group's litigation later.[189]

In the California proceedings, the State moved to dismiss the case for failure to state a claim upon which relief can be granted.[190] The GEO Group also moved for a preliminary injunction to prevent the law from applying to it.[191] The district court granted the State of California's request in part, upholding the private prison ban with respect to ICE.[192] The GEO Group appealed to the Ninth Circuit, where a three-judge panel reversed the district court with one judge in dissent, and California then petitioned for an en banc rehearing, which the Ninth Circuit granted.[193] The en banc panel similarly reversed the district court with two judges concurring in part and three dissenting.[194] The Ninth Circuit's en banc opinion,

185. Complaint at 1, GEO Grp., Inc. v. Inslee, No. 3:21-cv-05313, 2023 WL 7919947 (W.D. Wash. Nov. 16, 2023), ECF No. 1 [hereinafter Washington Complaint]; Complaint at 1, GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905 (S.D. Cal. 2020) (No. 19-CV-2491), ECF No. 1 [hereinafter California Complaint].

186. Washington Complaint, *supra* note 185, at 1; California Complaint, *supra* note 185, at 1.

187. *See* Washington Complaint, *supra* note 185, at 13–15; California Complaint, *supra* note 185, at 25–26.

188. *See* Washington Complaint, *supra* note 185, at 13–15; California Complaint, *supra* note 185, at 25–26.

189. Order Consolidating Cases, United States v. Newsom, No. 3:20-cv-00154 (S.D. Cal. July 20, 2020), ECF No. 34.

190. Memorandum of Points and Authorities in Support of Motion to Dismiss Complaint at 1, GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905 (S.D. Cal. 2020) (No. 3:19-cv-02491), ECF No. 22.

191. Plaintiff The GEO Group, Inc.'s Combined Brief in Reply in Support of Plaintiff's Motion for Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss Complaint, GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905 (S.D. Cal. 2020) (No. 3:19-cv-02491), ECF No. 30.

192. GEO Grp., Inc. v. Newsom, 493 F. Supp. 3d 905, 959–60 (S.D. Cal. 2020), *rev'd en banc*, 50 F.4th 745 (9th Cir. 2022).

193. *See* GEO Grp., Inc. v. Newsom, 50 F.4th 745, 753 (9th Cir. 2022) (en banc).

194. *See id.* at 750; *id.* at 763 (Murguia, J., dissenting).

including the majority, concurring, and dissenting opinions, are discussed further in this Note.[195]

In the Washington litigation, The GEO Group moved for a preliminary injunction on similar theories to those in the California case.[196] While the proceedings were pending, the Ninth Circuit took up the California case, and the district court in Washington stayed the proceedings pending the outcome.[197] Upon the decision of the Ninth Circuit in *GEO Group v. Newsom*, however, the parties moved for summary judgment, and the case was dismissed as moot.[198]

1. The Majority Opinion at the Ninth Circuit

An en banc panel held that The GEO Group and United States government were likely to prevail on the merits and vacated the preliminary injunction entered by the district court. Five judges joined the majority in full and two joined in part.[199] These two, Judges Smith and Watford, joined all but the part of the opinion analyzing the presumption against preemption, but they did not issue a concurring opinion.[200] Three judges dissented.[201]

Judge Nguyen, writing for the majority, held that California's AB 32 violated the Supremacy Clause.[202] Therefore, the plaintiffs would likely prevail on the merits, an element of a preliminary injunction.[203] Using general principles of the Supremacy Clause, the court reasoned that AB 32 would not only prevent ICE from hiring employees, but would also create "an outright ban on hiring any private contractor."[204] Given that Congress expressly preferred housing detained noncitizens in existing facilities under federal law, ICE determined that private entities were appropriate for its California detainees.[205]

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195. *See infra* section II.B.1.

196. *See* The GEO Group, Inc.'s Motion for Preliminary Judgment and Memorandum of Law in Support, GEO Grp., Inc. v. Inslee, No. 3:21-cv-05313, 2023 WL 7919947 (W.D. Wash. Nov. 16, 2023), ECF No. 8.

197. Order Granting Parties' Stipulation to Stay Case Until After Issuance of Mandate in *Newsom*, GEO Grp., Inc. v. Inslee, No. 3:21-cv-05313 (W.D. Wash. Nov. 16, 2023), ECF No. 58.

198. *See* GEO Grp., Inc. v. Inslee, No. 3:21-cv-05313, 2023 WL 7919947, at *6 (W.D. Wash. Nov. 16, 2023).

199. *See GEO Grp.*, 50 F.4th at 750.

200. *See id.*

201. *Id.* at 763 (Murguia, C.J., dissenting); *see infra* section II.B.2.

202. *GEO Grp.*, 50 F.4th at 751 (majority opinion).

203. *Id.*; *see also id.* at 755–56.

204. *Id.* at 757.

205. *See id.* at 751.

The majority then analogized AB 32 to the circumstances of *Leslie Miller v. Arkansas*, where the United States Supreme Court held that a state could not enforce its licensing requirements against federal contractors.[206] Rather than engaging in a fact-to-fact comparison, the Court found that if a state licensing requirement against a federal contractor violated the Supremacy Clause, an outright ban on that contractor doing the business it is contracted to perform did too.[207] Because the imposition of a licensing requirement on private entities contract with ICE would be struck down under *Leslie Miller*, a more restrictive ban on that contractor's business with the government could not stand either.[208] In the Court's view,

> the Supremacy Clause protects against state laws that would 'in any manner control . . . the operations of the constitutional laws enacted by congress to carry into execution the power vested in the general government.' This foundational limit on state power cannot be squared with the dramatic changes that AB 32 would require ICE to make.[209]

With respect to the doctrine of intergovernmental immunity, the majority acknowledged the varying theories about the direct regulation of government contractors.[210] First, it noted the split opinions in *North Dakota*, where no rationale commanded a majority of the Court.[211] Thus, the result in *North Dakota* was binding, but not the reasoning behind it.[212] The Court ultimately followed Justice Brennan's opinion and held that intergovernmental immunity applies whenever a state regulation against a federal contractor creates the same effect as direct regulation of the federal government.[213] In rejecting California's claim that intergovernmental immunity did not apply to the case, the Court found that AB 32's regulation of the private prison industry was not a neutral regulation of a private entity.[214] Rather, the Court held that the California law "controll[ed] federal operations by interfering in the same way [as in

206. *See id.* at 756–58.

207. *Id.* at 757–58.

208. *Id.*

209. *Id.* at 758 (first alteration in original) (citation omitted) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819)).

210. *See id.* at 759–60 (discussing *Leslie Miller* and *North Dakota*).

211. *Id.* at 759 (noting Justices Stevens's, Scalia's, and Brennan's separate opinions in *North Dakota*). See *supra* notes 138–154 and accompanying text for further discussion on the multiple opinions of *North Dakota*.

212. *See GEO Grp.*, 50 F.4th at 759.

213. *See id.* at 760.

214. *See id.*

Leslie Miller] with ICE's contracting decisions" and "prohibit[ed] ICE from exercising its discretion to arrange for immigration detention in the privately run facilities it has deemed appropriate."[215]

The Court next addressed the presumption against preemption, holding that it did not apply.[216] In declining to use the presumption against preemption, the Court found that "the presumption does not apply when a state law would interfere with inherently federal relationships."[217] The presumption applies to fields the states have traditionally occupied (such as their police powers or the general health and safety of their citizens), but the relationship between a federal agency and its contractor is not traditionally regulated by the states, and is "'inherently federal in character.'"[218]

The majority then asserted that intergovernmental immunity regarding contractors supports the opposite of the presumption against preemption—a presumption in favor of preemption.[219] Under the intergovernmental immunity doctrine, because Congress did not expressly waive intergovernmental immunity when it delegated authority to ICE to contract with private prisons, AB 32's "obstruct[ion]" of "federal functions" led to a presumption that Congress did not want state law to apply.[220] The Court—using disparate Supreme Court cases applying the presumption against preemption[221]—found that the presumption does *not* apply where states interfere in "inherently federal relationships."[222] In the Court's view, intergovernmental immunity (and the federal government's ability to regulate) overcame the presumption against preemption because California's statute too closely regulated the federal government.

2. The Dissenting Opinion's Application of the Presumption Against Preemption

In dissent, Chief Judge Murguia argued that under theories of either intergovernmental immunity or traditional preemption analysis, California would prevail on the merits.

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215. *Id.* at 761.

216. *Id.*

217. *Id.*

218. *Id.* at 762 (quoting Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)).

219. *Id.*

220. *Id.*

221. *See id.* at 761.

222. *Id.*

First, the dissent asserted that under *North Dakota*, regardless of which plurality opinion governs, the intergovernmental immunity doctrine is triggered only when a state statute discriminates or directly regulates the federal government.[223] Under *United States v. Washington*, Justice Stevens's view of *North Dakota* prevails, and only direct regulation of the federal government triggers an analysis of intergovernmental immunity.[224] The dissent then pointed out that the majority's analysis erred by equating a state law that directly regulates the federal government with a state law that had the same effect.[225] The dissent called this "problematic" because it was "contrary to *Washington*" and "ma[de] a muddle of the intergovernmental immunity doctrine."[226] *Washington* established that intergovernmental immunity only applies where a state statute directly regulates the federal government in the language of the statute.[227] By contrast, California's statute did not directly regulate the federal government on its face; rather, it banned private prison operations within the state without respect to what entity operates them.[228] The dissent reasoned that *Washington* demands a strict adherence to this form of text-based distinction: intergovernmental immunity only applies in cases of direct regulation.[229] Thus, the dissent argued that the majority rejected the holding of *Washington* and did not follow the appropriate steps for intergovernmental immunity analysis when it inferred that California's law directly regulates the federal government.[230]

Additionally, attacking the majority's reliance on *Leslie Miller*, the dissent argued that *Leslie Miller* cannot be squared with *United States v. Washington*.[231] Because *Leslie Miller* was about a conflict between state and federal law, it was a preemption case, not an intergovernmental immunity case, and the majority's use of it in the context of intergovernmental immunity was erroneous.[232]

Next, the dissent turned to the presumption against preemption. Traditionally, states have police power to regulate health and safety. When states regulate in this area, courts presume that state law has not been preempted unless it was the "clear and manifest purpose of

223. *Id.* at 763 (Murguia, C.J., dissenting).
224. *Id.* at 764.
225. *Id.* at 765.
226. *Id.*
227. *Id.* at 766.
228. *Id.*
229. *See id.*
230. *See id.*
231. *Id.* at 765.
232. *Id.* at 766.

Congress."[233] This also includes when a state regulates detention facilities run by the federal government within the state.[234] The dissent noted that under circuit precedent, the presumption against preemption still prevails even where state law "'touche[s] on an area of significant federal presence,' such as immigration."[235] The Ninth Circuit has even utilized the presumption to uphold California's regulation of health and safety standards within federal detention facilities.[236]

Looking to the district court record, the dissent found that the legislature that enacted AB 32 expressed concern about the welfare of incarcerated people in California.[237] The Department of Justice had issued a report that showed private prisons have higher rates of violence, and the dissent found that this issue was within the state's police power to regulate.[238] As such, even though AB 32 went further than regulating health and safety standards and could impact federal immigration activities, the dissent would have held that it was a valid exercise of the state's historic police power entitled to the presumption against preemption.[239]

Applying the presumption against preemption, the dissent could not find a clear congressional purpose indicating Congress's intent to preempt the state law at issue, so the statute was not preempted.[240] The statutes governing the Department of Homeland Security's ability to arrange detention facilities and enter into contracts make no mention of private detention facilities and do not forbid the use of them.[241] Thus, in the dissent's view, Congress did not clearly intend to employ private detention facilities for noncitizens.[242] In contrast, Congress explicitly authorized other entities such as the United States Marshal Service to contract with private entities in other statutes.[243]

Lastly, the dissent noted that "[f]ederal discretion . . . is insufficient to achieve preemption."[244] Because Congress did not explicitly mention

233. *Id.* (quoting Wyeth v. Levine, 555 U.S. 555, 565 (2009)).

234. *Id.* at 766–67.

235. *Id.* at 766 (quoting Knox v. Brnovich, 907 F.3d 1167, 1174 (9th Cir. 2018) (alteration in original)).

236. *Id.* at 766–67.

237. *Id.* at 767.

238. *See id.*

239. *Id.*

240. *Id.*

241. *Id.* at 767–68.

242. *Id.* at 768.

243. *Id.*

244. *Id.*

private prisons in its authorizing statutes, California's law did not interfere with a "separate and comprehensive scheme."[245] As such, the dissent would have held that there is no "bright-line rule that interfering with the federal government's discretion is impermissible" and that preliminary injunctive relief was not warranted.[246]

In short, *GEO Group* is a case about what steps courts should take in analyzing preemption issues. The majority took a shortcut: it held that courts can look to the text of a statute and infer its regulation of the federal government from what it purports to do. It then applied principles of preemption and intergovernmental immunity with that assumption in mind. The dissent took the opposite methodological approach: it looked to the text of the statute and asked if it directly regulated the government. Because the statute did not do so in its text, the dissent read the statute with the *presumption* that it was facially valid (i.e., *against preemption*), and then went on to use traditional preemption analyses. As seen by the outcome, these two different methodological approaches produced opposite results. The case also established binding circuit precedent as to how to approach preemption problems. As explained further, *GEO Group* likely created more questions about preemption analysis than it answered.

III. *GEO GROUP V. NEWSOM* SHOULD BE OVERRULED

In *United States v. Washington*, the Supreme Court articulated a clear distinction between traditional preemption doctrines, intergovernmental immunity, and the presumption against preemption. However, in *GEO Group*, the Ninth Circuit blurred the line between intergovernmental immunity, the presumption against preemption, and state statutes that directly or indirectly regulate the federal government. The decision also impacts Washington's private prison ban.

This section analyzes why Washington's private prison ban statute is likely unconstitutional in light of *GEO Group v. Newsom*, and how the parties in the Washington lawsuit ended the litigation because of it. Second, this section argues that the dissent in *GEO Group* was correct in advocating for a stronger role of the presumption against preemption within preemption jurisprudence at large. Through the presumption against preemption, states have more opportunities to try novel solutions to existing problems. However, because of *GEO Group*, the most effective—and maybe only—next steps are likely new legislation or federal executive action prohibiting ICE from using private facilities for immigration detention.

245. *Id.*

246. *Id.* at 768–69.

A. GEO Group v. Newsom *Invades on Washington and California's Ability to Regulate Their Public Health and Justice Systems*

After the opinion was issued in *GEO Group v. Newsom* by the Ninth Circuit, the United States District Court for the Western District of Washington dismissed the case as moot and Washington State agreed that the State's private prison ban was unenforceable.[247] Because the district court is within the Ninth Circuit, it is bound by the Ninth Circuit's precedents.

Washington's private prison ban is largely similar to that enacted by California. Where California's statute bans any "person" from operating a private prison, Washington's statute is more specific in that it bans any "person, business, or state" from operating a private prison entity.[248] Both statutes eliminate the private prison business within the state.[249] The facts of *GEO Group, Inc. v. Inslee*[250] are also substantially similar to those of *GEO Group v. Newsom*. In the Washington litigation, The GEO Group alleged the exact same claims of preemption as it did in the California litigation.[251] Because California's private prison ban was preempted by federal law, the federal court in Washington's litigation is bound by Ninth Circuit precedent. The majority in *GEO Group v. Newsom* also suggested that any state-level legislation to ban private prisons that includes federal contractors may be suspect under the Supremacy Clause.[252]

The negative impact of this decision on California and Washington is clear. States have broad powers to regulate within the realms of health, justice, and welfare. Private prisons sit at the intersection of these areas, where the state has an obligation to administer prison sentences, maintain public health within prisons, and provide adequate care for those in the state. By outlawing private prisons, Washington and California took a decisive step to regulate in this area, and the Ninth Circuit's preemption holding necessarily invaded the states' ability to regulate these issues.

Unfortunately, this wholesale rejection of states' novel solutions to problems is not new, and it is unlikely to get better anytime soon.[253] This

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247. GEO Grp., Inc. v. Inslee, No. 21-cv-05313, 2023 WL 7919947, at *6 (W.D. Wash. Nov. 16, 2023).

248. CAL. PENAL CODE § 9501 (2020); WASH. REV. CODE § 70.395.030 (2021).

249. CAL. PENAL CODE § 9501; WASH. REV. CODE § 70.395.030.

250. No. 21-cv-05313, 2023 WL 7919947 (W.D. Wash. Nov. 16, 2023).

251. *Compare* Washington Complaint, *supra* note 185, at 13–15 (asserting intergovernmental immunity and preemption arguments), *with* California Complaint, *supra* note 185, at 25–26 (same).

252. GEO Grp., Inc. v. Newsom, 50 F.4th 745, 757 (9th Cir. 2022).

253. *Cf.* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1411–12 (2017) (surveying how the Supreme Court frequently uses the novelty of federal statutes as grounds for interpreting them as unconstitutional).

judicial approach to novelty upends and distorts the landscape of federalism, making it murkier and harder to understand. On one hand, states are free to regulate in certain areas as they see fit.[254] However, when it comes to standards for incarceration—specifically in the field of immigration—the federal government wields all the power. This interplay between state and federal power is crucial in a federalist system, and state governments need clear rules about the boundaries of regulation. Further, as noted, states have a broad power to regulate public health and safety within their borders. If this only applies in some cases and not others or is too "novel" to be lawful, then any and all new ideas are dead on arrival. What are states to do?

B. The Dissent in GEO Group *Has the Better Argument and Applied the Law Correctly*

This section asserts the dissenting opinion in *GEO Group v. Newsom* was both correct as a normative matter and in its descriptive analysis of the current preemption doctrine. The dissent was more faithful to precedent and provided clarity on the current state of preemption doctrine in a digestible way. Lastly, it properly analyzed the purpose behind the presumption against preemption. The presumption makes more logical sense than it previously did when applied to a clear understanding of preemption doctrine.

As the dissent in *Newsom* explains, under *United States v. Washington*, Justice Stevens's plurality opinion in *North Dakota* now controls the federal courts with respect to preemption and intergovernmental immunity.[255] Under this clarified standard, intergovernmental immunity analysis applies only when a state statute *directly* regulates or discriminates against the federal government.[256] State statutes are entitled to a presumption against preemption unless it is the "clear and manifest [intent] of Congress" to preempt state law.[257]

The majority in *Newsom* erred in its understanding of precedent in both its textual analysis of California's statute and its application of

254. *See, e.g.*, Rucho v. Common Cause, 588 U.S. __, 139 S. Ct. 2484, 2506–07 (2019) (holding that partisan gerrymandering claims are nonjusticiable in the federal courts, and states can create congressional districts skewed heavily towards one party despite the electorate being evenly divided). *But cf.* Litman, *supra* note 253, at 1413 (noting that individual rights arguments with respect to applications of "antinovelty" principles are inherently different than structurally-based constitutional arguments).

255. *GEO Grp.*, 50 F.4th at 763–64 (Murguia, C.J., dissenting).

256. *Id.* at 764.

257. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

intergovernmental immunity. First, the majority held California's statute controlled the operations of the federal government, and thus the federal government was entitled to intergovernmental immunity.[258] However—and as the dissent states[259]—the standard under *North Dakota* and *Washington* is that a state's regulation must directly regulate or discriminate against the federal government to implicate intergovernmental immunity.

California's statute, although sweeping in its effect of banning private prison operations within the state, makes no explicit textual reference to the federal government. It only states that no person shall operate a private prison within the state.[260] Because of the lack of direct reference to the federal government in the text of the statute, California's law necessarily does not implicate intergovernmental immunity and is entitled to a rebuttable presumption against preemption.

The dissent in *Newsom* also serves another purpose besides being more faithful to current case law; it succinctly clarified existing preemption precedents in a clear way. It started by noting that Justice Stevens's opinion in *North Dakota* only addressed intergovernmental immunity when a state statute directly regulates the government.[261] It then specifically noted that *United States v. Washington* adopted Justice Stevens's understanding of intergovernmental immunity.[262] It also stated that the majority erred by not understanding *Washington* correctly.[263] Thus, California's statute was entitled to a presumption against preemption.[264] This clarity is beneficial. As noted previously, preemption doctrines are traditionally unclear and often overlap or intersect. By providing a step-by-step roadmap for preemption analyses, the dissent in *Newsom* made preemption analysis a clear application of distinct legal rules.

After establishing existing precedent, the dissent explored whether it was Congress's intent for DHS and ICE to use private prison facilities.[265] Again, the dissent was correct. The operative statute empowering DHS to engage in contracts did not show that Congress intended to have DHS employ private prisons, but rather that it does not forbid them from doing

258. *GEO Grp.*, 50 F.4th at 760–61.

259. *See id.* at 764–65 (Murguia, C.J., dissenting).

260. CAL. PENAL CODE § 9501 (2020).

261. *GEO Grp.*, 50 F.4th at 763 (Murguia, C.J., dissenting).

262. *Id.* at 764.

263. *Id.* at 765.

264. *See id.* at 766–69.

265. *Id.* at 766–68.

so.[266] Because of this, as the dissent noted, it was not abundantly clear that Congress wanted to make DHS use private prison facilities.[267]

The dissent's application of existing law helped clarify existing precedent and provided a step-by-step guide for preemption analysis. If a law directly regulates or discriminates against the federal government, it is entitled to intergovernmental immunity. If it does not, then the state statute is entitled to a presumption against preemption, which can only be rebutted by showing that it was the clear and manifest intent of Congress for the federal statute to preempt the state statute.

The majority's analysis in *Newsom* further contributed to the blurry boundaries of existing preemption doctrine. By ignoring *North Dakota* and *Washington*'s mandate to look for direct regulation of the federal government in the text of the state statute, the majority's preemption analysis explored the effects of a statute rather than the analysis that Supreme Court precedent prescribed.[268]

The presumption against preemption should also play a stronger role in existing jurisprudence. It makes logical sense and allows state legislatures to experiment with novel policy choices. The presumption against preemption stems logically from preemption doctrine and intergovernmental immunity. With respect to implied preemption, absent a clear intent to override a state law, or serving as an impossible obstacle to a federal law's objectives, a state law carries a presumption of validity.[269] Because the state law is not expressly preempted, it makes sense that it can be put into force constitutionally. This same reasoning applies in the intergovernmental immunity context. Because a state statute does not directly regulate or discriminate against the federal government, courts assume that the state statute is valid. This presumption reinforces a central tenet of preemption and intergovernmental immunity cases: states should be able to regulate in the traditional areas within their police power.

A presumption against preemption allows states to create novel solutions to problems without fear that federal law will preempt it. California and Washington are examples of this. In response to immigration advocates, prison abolitionists, and carceral reformers, both states found a unique and bold solution to the problem of ICE detention within their borders: an outright, blanket ban on private prison operations. These bills were novel solutions to a problem within the states' general police powers. While they may eventually be found unconstitutional, a

266. *Id.* at 767–68.

267. *Id.* at 768.

268. *Id.* at 766.

269. *E.g.*, Arizona v. United States, 567 U.S. 387, 406 (2012) (finding that express preemption of a federal statute only applied to certain aspects of state law that the federal statute sought to regulate).

presumption against preemption would allow states to move forward through litigation and specifically show why their state laws are valid.

C. Solutions to the Problem: Federal Legislation or Executive Orders

GEO Group v. Newsom prevents California from enforcing its ban on private prisons, and Washington's statute is likely also unconstitutional and unlikely to be enforced.[270] Because states cannot prohibit the operation of private federal immigration detention centers within their borders, federal solutions are likely the only effective solution.

As noted, President Biden ordered the Department of Justice to not renew federal contracts with private prison businesses, but only for private prisons that hold federally incarcerated individuals.[271] This provides no relief for individuals in immigration detention, who are detained by DHS.

An executive order could fix the issue of private immigration detention, but it is fleeting and subject to the turbulence of the political system. The President has broad power to dictate the scope of their delegated power and could issue an executive order demanding the same nonrenewal of contracts for DHS and ICE. An executive order preventing DHS and ICE from contracting with private entities could likely help ameliorate the problem by phasing out private immigration detention. However, such an executive order is subject to a change in administration and the carrying out of existing ICE contracts. To really solve this problem, federal legislation is likely needed.

This is unlikely to happen. It would be fleeting, and could pose real harm to detained noncitizens. First, executive orders live and die by the presidents who enact them. Even if the current President ordered an end to private immigration detention, a subsequent president could rescind the order and reinstate private prison contracting. Second, as a practical matter, it is unclear where the thousands of detained undocumented noncitizens would be moved to if private prison contracts were to end.

Federal legislation could solve the problem on a permanent basis but is likely unattainable. First, federal legislation is difficult to pass. However, it would provide concrete relief. Congress could simply pass a law stating that DHS must directly detain undocumented noncitizens and cannot contract with private prisons. Congress could also provide the remedial steps for how to move or release undocumented noncitizens presently in

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270. There was no determination that Washington's statute was actually constitutional or not, the parties agreed that the Ninth Circuit's opinion controlled, and the district court dismissed the case. *See* GEO Grp., Inc. v. Inslee, No. 21-CV-05313, 2023 WL 7919947, at *6 (W.D. Wash. Nov. 16, 2023).

271. *See* Madhani, *supra* note 9.

private detention. Although unlikely, federal legislative action may be the only lasting solution.

All this is to say that the solutions to private immigration detention are unclear or not lasting. This is exactly why state governments like Washington and California stepped in with legislative solutions. Faced with a real problem, they acted.

CONCLUSION

Political pressure and advocacy pushed Washington and California to address privately run detention facilities, which generally fall under their duties to maintain public health and welfare, particularly with respect to those in their custody. However, an unclear and overlapping set of preemption doctrines prevented their solutions from fully going into effect.

Preemption doctrines frequently overlap, and in *GEO Group v. Newsom*, the Ninth Circuit majority contributed to an already blurred understanding of the preemption landscape. By not clearly delineating the boundaries of preemption doctrine, the majority allowed laws that should be presumptively valid under current Supreme Court precedent to be invalidated. The dissent in *Newsom*, however, correctly applied existing precedent and made existing preemption doctrine understandable.

Washington State now has an unenforceable private prison ban and is left to the whims of federal legislation, executive action, and advocacy to handle private prison operations within the state. However, had the presumption against preemption prevailed in *Newsom*, Washington may have had the opportunity to defend its statute as a traditional exercise of its police powers.

Preemption is about the allocation of power between states and the federal government. When states attempt novel solutions to novel problems, such as banning private prison operations, the public does not know whether the solution will solve the problem. Yet they elected their representatives to try. When the federal government can claim power over the ability of states to regulate within their borders, states are left without options—and cannot solve these local problems.