Nos. 20-56172, 20-56304

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE GEO GROUP, INC.,
Plaintiff-Appellant,

and

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GAVIN NEWSOM et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
Civ. Case Nos. 3:19-cv-02491-JLS-WVG & 3:20-cv-00154-JLS-WVG
(Honorable Janis L. Sammartino)

BRIEF OF AMICI CURIAE CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, CENTER FOR GENDER & REFUGEE STUDIES, IMMIGRANT DEFENSE ADVOCATES, AND IMMIGRANT LEGAL DEFENSE IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each *Amicus Curiae* certifies that it does not have a parent corporation and no publicly held corporation owns 10 percent or more of the stock of the *Amicus*.

Dated: February 12, 2021

/s/ Jamie L. Crook
Jamie L. Crook

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STATEMENT OF INTEREST OF *AMICI CURIAE*

California Collaborative for Immigrant Justice, the Center for Gender and Refugee Studies ("CGRS"), Immigrant Defense Advocates, and Immigrant Legal Defense (collectively "*Amici*") respectfully submit this brief in support of Defendants-Appellees.

California Collaborative for Immigrant Justice, a project of the nonprofit Social Good Fund, provides legal services to detained immigrants throughout California. CGRS engages in advocacy, technical assistance, training, and scholarship relating to refugee and asylum law. CGRS provides representation to detained and non-detained clients in immigration court, before the Board of Immigration Appeals, and before the federal courts of appeals. Immigrant Defense Advocates is also a project of the nonprofit Social Good Fund, with a focus on immigrants' rights policy and advocacy in the California. Immigrant Legal Defense is a nonprofit agency based in Oakland, California, dedicated to providing immigration legal services.

As part of a broader coalition of immigrants' rights organizations involved in providing services to detained immigrants, *Amici* advocate for the interests of non-profit and pro bono attorneys providing legal

services in detention facilities in California, as well as those presently detained in federal institutions while awaiting deportation decisions.

Amici are familiar with the issues presented in this case and have interest in the matter on behalf of the group of immigrants whom they serve in the state of California.

All parties have consented to the filing of this brief.

RULE 29(a)(4)(E) CERTIFICATION

No person or entity other than counsel for *Amici* authored or contributed funds intended for the preparation or submission of the instant brief.

/s/ Jamie L. Crook
Jamie L. Crook

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INTRODUCTION

Through his litigation, Plaintiff-Appellant The GEO Group, Inc. ("GEO") seeks to avoid the application of California Assembly Bill 32, 2019–2020 Reg. Sess. (Cal. 2019) ("AB 32") to five contracts that GEO executed with U.S. Immigration and Customs Enforcement ("ICE") for the provision of civil immigration detention services: (a) the contracts for operation of the Mesa Verde ICE Processing Facility, Central Valley Modified Community Correctional Facility, and Golden State Modified Community Correctional Facility, all in the City of McFarland, California, and (b) the contracts for operation of the Adelanto ICE Processing Center and the Desert View Modified Community Correctional Facility, both in the City of Adelanto, California. The contracts were executed mere days before AB 32, which restricts the use of private immigration detention facilities in California, took effect.

The District Court granted in part Defendants' motion to dismiss and denied in part GEO's motion for a preliminary injunction.[1] Order (Dkt. 53), The GEO Group, Inc. v. Newsom, Case No. 3:19-cv-02491-

[1] The District Court's Order also applied to Plaintiff-Appellant United States in Case No. 20-56304.

JLS-WVG (S.D. Cal. Oct. 8, 2020). The Court concluded that AB 32 directly regulates private contractors, not the United States, and does not discriminate against the United States or its contractors, and therefore does not violate the principle of intergovernmental immunity. Id. at 51–68. It further held that except as applied to facilities operated by the U.S. Marshals Service, AB 32 is not conflict preempted or field preempted, id. at 28–51, and that GEO was unlikely to succeed on the merits of its argument that AB 32's safe harbor provision exempted GEO's December 19, 2019 contracts through December 19, 2034 (when the two option extensions would expire), id. at 70–71.

In this brief, *Amici* present additional context for evaluating GEO's efforts to establish the validity of the December 19, 2019 contracts with ICE, notwithstanding AB 32—context that they also provided to the District Court as *Amici* below. *Amici* respectfully submit three reasons why this Court should affirm the District Court's decision. First, GEO engaged in bad-faith conduct in relation to the contracts. GEO's actions continued a pattern of unduly influencing financially struggling city governments for purposes of being awarded federal contracts, resulting in sizable profit to GEO. Second, the

government contracting solicitation and award process was flawed and executed in violation of longstanding federal procurement regulations that require full and open competition. Third, the District Court lacked jurisdiction over GEO's claim for declaratory relief because jurisdiction over claims seeking to ascertain the validity of contracts with the federal government lies exclusively in the Federal Court of Claims.

The following discussion demonstrates GEO's misconduct in seeking to be awarded the contracts at issue and ICE's procedural departures in awarding the contracts at the eleventh hour while skirting the requirements of federal procurement law. This additional context—showing the contracting parties' willingness to evade the procedural requirements of fair-play and transparency that apply to the awarding and execution of contracts with the federal government—supports the need for, and lawfulness of, AB 32, as well as a ruling that the contracts cannot be deemed valid through 2034. Moreover, the record belies any argument by GEO that the injunction it seeks is in the public interest, where the contracts it seeks to protect appear to have been entered into in violation of the spirit of federal procurement laws. The Court should not countenance this effort to evade the application of

a legally enacted state law expressing the will of Californians to limit the operation of private, for-profit civil immigration detention facilities in their State to procedurally flawed contracts that will cost U.S. taxpayers billions of dollars over the next fifteen years.

I. GEO HAD UNCLEAN HANDS.

The unclean hands doctrine derives from the equitable maxim that *he who comes into equity must come with clean hands*. This maxim "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945). Equity requires that those seeking its protection have acted fairly and without fraud or deceit as to the controversy in issue. See Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933).

In the matter before the Court, GEO's pattern of conduct with respect to the contracts at issue involves documented instances of inequitable conduct and bad faith, as set forth in detail below. This includes exercising undue influence over local cities in California with respect to federal contracts, in pursuit of GEO's financial gain. GEO has

offered extracontractual payments to local cities in order to secure the benefit of intergovernmental agreements and other outcomes. GEO has sought to hide this influence from the public record, cloaking its intentions and goals under the guise of independent decisions made by local cities. GEO's CEO has failed to truthfully testify about these activities. GEO engaged in a sophisticated effort to influence the Cities of Adelanto and McFarland with respect to local permits and the contracts at hand.

GEO's conduct directly relates to its pursuit of the detention contracts at issue. In applying the unclean hands doctrine, "[w]hat is material is not that the plaintiff's hands are dirty, but that he dirtied them in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant." Rep. Molding Corp. v. B.W. Photo Utils., 319 F.2d 347, 349 (9th Cir. 1963). The misconduct described by GEO in the following discussion culminated in the execution of the contracts with ICE for the civil detention of immigrants in California that GEO now seeks to protect through this legal challenge.

A. GEO Usurped Local Government Authority and Circumvented Open Competition Rules to Secure Prior Contracts with ICE.

GEO has acted outside its normal function as a private actor, and has instead sought to control, manipulate, or interfere with governmental functions in order to pursue its financial interests. This pattern of behavior included improperly approaching local cities in California as partners for intergovernmental service agreements ("IGSAs") with the federal government, including the City of Adelanto and the City of McFarland.

Typically, a local government actor contracts directly with the federal government to provide detention services, and subsequently seeks out a private operator in order to execute the contract. With respect to the Cities of Adelanto and McFarland, however, it appears that GEO initiated these agreements, which enabled it to avoid the requirements to compete in a fair and open competition process against other contractors.

A report by the State Auditor of California confirmed that in the case of Adelanto and McFarland, GEO has used IGSAs as a means to circumvent federal procurement rules:

> Federal law allows ICE to enter into these types of agreements with states, counties, or cities for the provision of detention services without competitive bidding. However, if ICE contracted directly with the private operators, ICE would have to comply with federal procurement rules that generally require full and open competition unless a statutory exception to the competitive process applies. . . . City council documents show how the private operators worked with two of the cities to secure or amend the intergovernmental service agreements with ICE. . . . Under the terms of the detention subcontracts, each of the cities passed millions of dollars of federal payments through to the private operators . . . . [E]ach city agreed to pay the private operator the same per-diem rate that the city is paid under the terms of the ICE contract—essentially passing through all of the payments to the private operators.

Add. 36–37 (Cal. State Auditor, REPORT 2018-117, CITY AND COUNTY CONTRACTS WITH U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Feb. 2019) at pp. 15–16).

The ability to circumvent competitive bidding law requires the cooperation of a local city. Usually, the bidding process is initiated by a federal entity looking to contract with a local city. With the City of McFarland, however, GEO took on the role of initiating an IGSA in order to benefit from a contract awarded without competition. The California audit described a January 2015 memo to the city council in which McFarland's city manager explained how GEO sought to enter

into the contract with ICE by approaching city after city to "partner" with them. As quoted by the State Auditor, the memo stated:

> GEO would like to enter into an [IGSA] with the Department of Homeland Security, U.S. Immigration and Customs Enforcement (ICE) for the detention and care of aliens at its Mesa Verde facility in Bakersfield. GEO cannot enter into an [IGSA] with a federal government on its own. An [IGSA] can only be entered into with another government authority. Mesa Verde is located on South Union, in the City of Bakersfield. Since the prison is in the City of Bakersfield, GEO first approached the City of Bakersfield to partner with them on [the IGSA]. The City of Bakersfield declined to be a partner. GEO then asked the City of McFarland to partner with them.

Add. 36 (Cal. State Auditor at p. 15).

GEO also flouted open competition requirements within the procurement process when it initiated an IGSA with the City of Adelanto. In the case of Adelanto, GEO inappropriately negotiated on behalf of the city directly with ICE regarding an IGSA that related to its facilities. As noted by the State Auditor, "A similar situation occurred in Adelanto. In a May 2014 memo to the city council, the Adelanto city manager at the time explained that GEO negotiated with ICE to amend Adelanto's ICE contract to house additional detainees at the Adelanto Detention Facility." Add. 36 (Cal. State Auditor at p.15).

GEO therefore did not come to the current controversy with clean hands. It usurped legitimate governmental authority for its own benefit, and undercut open and fair competition, harming competitors and, most importantly, the public interest. See, e.g., Aguayo v. Amaro, 153 Cap. Rptr. 3d 52, 58 (Cal. Ct. App. 2013) (explaining that the doctrine applies where the plaintiff has engaged in "conduct that violates conscience, or good faith, or other equitable standards of conduct"); Kendall-Jackson Winery, Ltd. v. Super. Ct., 90 Cal. Rptr. 2d 743, 749, 753 (Cal. Ct. App. 1999) (holding that past conduct is relevant when it "relate[s] directly to the transaction concerning which the complaint is made").

GEO sought out cities that would likely provide minimal interference or oversight with respect to their administration of these facilities. As the State Auditor found, "[t]he cities have only been minimally involved in the ICE contracts. For example, the Adelanto city manager stated that the only involvement the city has with ICE or GEO is to sign monthly invoices from GEO and then to transfer to GEO the federal funds the city receives when ICE pays the invoices." Add. 38 (Cal. State Auditor at p. 17).

B. GEO Exerted Undue Influence Over Local Governments to Terminate IGSAs.

Before it entered into the five contracts at issue in this case, GEO exercised undue influence over the city governments of Adelanto and McFarland in order to obtain outcomes that serve its financial interests. This prior bad conduct related to the contracts now at issue and provides additional evidence of GEO's unclean hands in pursuing them.

GEO convinced the city governments in both Adelanto and McFarland to terminate existing IGSAs with ICE by promising to make extra-contractual payments to each city. GEO then used the termination of the IGSAs to secure short bridge contracts with ICE outside of the normal federal procurement process, creating the circumstances for GEO to secure the long-term contracts that are at issue in this case. GEO terminated the IGSAs with Adelanto and McFarland in order to facilitate the expansion of its facilities and increase its profits, in circumvention of California Senate Bill 29, 2017-2018 Reg. Sess. (Cal. 2017) ("SB 29") and Assembly Bill 103, 2017-2018 Reg. Sess. (Cal. 2017) ("AB 103"), two California laws passed to prevent the expansion of immigration detention. SB 29 makes it illegal under California law for any city or county to renew or modify a contract that

would allow for the expansion of an immigrant detention facility. AB 103 prohibits local jurisdictions from entering into contracts with any federal government agency for the purpose of housing or detaining someone in civil immigration custody.

Notwithstanding these laws, GEO wielded undue influence over the City of Adelanto by offering inappropriate financial payments outside of direct contracts in order to exert its influence. As reported by the Desert Sun, City Manager Jessie Flores sought donations from GEO for "donations to local causes, including $7,500 for the city's annual Christmas parade. In one email, Flores called a January 16, 2019 meeting with GEO's CEO George Zoley and his executive team 'very productive and informative' and asked for a $3,500 contribution to the baseball league." Add. 215 (Rebecca Plevin, How a Private Prison Giant Has Continued to Thrive in a State that Wants It Out, Desert Sun (Jan. 25, 2020)).

GEO also exerted undue influence over the City of Adelanto to protect its financial interests and to expand its facilities in 2019 in response to the passage of AB 103. See Cal. Gov. Code §§ 7310, 7311 (2017). This California law regulated IGSAs by limiting the expansion

of any facility that operated pursuant to a federal contract with a local city or county in California. Id. GEO pursued a plan to convince the Adelanto city government to terminate its IGSA in order for GEO to expand its facilities, using financial promises outside of any apparent contractual arrangement.

On April 8th, 2019, the Los Angeles Times ran a story which uncovered the role that GEO played in the sudden termination of the IGSA between ICE and Adelanto. Add. 81–89 (Andrea Castillo, Adelanto Cuts Ties to Troubled ICE Detention Center—and Removes a Layer of Oversight, Los Angeles Times (Apr. 8, 2019)). The article included an interview with then Mayor Pro Tem Stevevonna Evans, in which she recounted her own first-hand knowledge of GEO's attempts to lobby the Adelanto City Manager Jessie Flores to end the IGSA in order to expand the facility:

> Evans said Flores' idea to cancel the contract goes back to late February, when she walked in on a meeting between him and GEO Group Chief Executive George Zoley over the possibility of ending the contract. She said they explained that ending the contract would alleviate the city of potential future litigation. . . .
>
> At that February meeting, Evans said, Zoley also explained that state law prohibited the company from expanding operations — unless the city backed out of the contract.

> In fiscal year 2017, Adelanto transferred more than $71 million in payments from ICE to GEO Group. In return, GEO has paid the city a yearly fee of about $1 million to oversee the distributions. Evans said that Zoley assured city leaders that they would continue receiving payment even after they ended the contract.

Add. 87 (Castillo, Adelanto Cuts Ties).

GEO then promised the continuation of monetary payments *only if* city officials agreed to terminate the existing IGSA. A collection of emails obtained by the Desert Sun through the California Public Records Act documents how GEO systematically lobbied the City of Adelanto to terminate the IGSA and set the stage for the Adelanto facility to expand. These emails describe an offer for extra-contractual payments from GEO to the City of Adelanto:

> On March 13, a GEO employee sent Flores a memo from Zoley. "We are respectfully requesting that the City of Adelanto give its notice of discontinuation to ICE," Zoley said in the memo. In addition to the bed taxes, GEO would continue paying the city $50,000 a year, even though Adelanto would no longer be contractually involved in the detention center and the city would have no oversight role of the facility, he said. Terminating the contract, he said, would "reduce the city's legal and financial exposure to ICE critics advancing claims for detainee records, or other facility documents."
>
> The annual financial compensation to the City of $50,000 for facilitating the IGSA will be continued by GEO," he wrote. GEO would also keep paying the bed tax — nearly $1 million

> — outlined in the 2016 development agreement between the company and the city, he said. Critics see GEO's pledge to continue paying Adelanto $50,000, with no strings attached, as an incentive to get the struggling city to comply with its request.

Add. 221–22 (Plevin, Private Prison Giant).

The City ultimately copied the termination letters Zoley's staff drafted to Flores onto its letterhead, changed the date, and sent these notices of termination as requested to ICE and GEO on March 27, 2019. Add. 223 (Plevin, Private Prison Giant). Despite these facts, CEO Zoley stated under oath in another proceeding that other than one single meeting with officials from the City of Adelanto to discuss the possible termination of the IGSA for the Adelanto Facility, he was aware of no other communications between himself and officials from the City of Adelanto related to the termination of the IGSA. See Add. 191–92 (Pls.' Mem. of Law and P. & A. in Opp'n to GEO's Mot. for a Protective Order (Dkt. 233) at pp. 4–5, Novoa v. The GEO Group, Inc., Case 5:17-cv-02514-JGB-SHKx (C.D. Cal. Dec. 16, 2019)).

GEO undertook a similar effort to influence the City of McFarland. As reported by the Desert Sun:

> On Nov. 30, 2018, John Wooner, the McFarland city manager at the time, notified GEO that the city would be ending its

> agreements with the company and ICE. In a letter, he said the city's agreements with the company and ICE had been a "satisfactory arrangement for the City" until the state started adopting laws targeting detention facilities. When he sent two more letters to GEO and ICE on Dec. 19, 2018, informing them that the city would be ending its agreements in three months, he used nearly identical language as that provided by GEO to Adelanto.

Add. 225 (Plevin, Private Prison Giant).

The terminations of IGSAs with the Cities of Adelanto and McFarland not only appear to have been part of a scheme by GEO to circumvent SB 29, but also suggest that GEO's actions were coordinated with ICE. GEO's actions strongly indicate that they had some level of assurance that if IGSAs terminated, they would receive a direct contract with ICE. When assessed within the broader context of the procurement process for the contracts in dispute, serious questions arise of collusion to circumvent state and federal law.

In fact, following the termination of the IGSA for the Mesa Verde Detention Facility by the City of McFarland, GEO received a one-year, $19.4 million contract from ICE to continue operating the detention facility. Add. 92 (Andrea Castillo, Immigration Detention Center in Bakersfield, Thought to Be Set to Close, Will Stay Open, Los Angeles Times (Mar. 9, 2019)). The contract was awarded outside of the full and

open competition requirements of federal law, discussed below in Part II, with ICE citing "unusual and compelling urgency." Add. 92 (Castillo, Adelanto Cuts Ties). This exception to normal procedural requirements is normally invoked in urgent situations in which the procurement of specific services is needed to avert emergency circumstances or serious injury. See 48 C.F.R. § 6.302-2. For example, the DHS Justification and Approval Guide[2] notes, "This authority is used to provide rapid deployment of supplies and/or services to support time critical missions." Id. at 6-11. However, in this case the specific circumstance and sudden termination of the IGSA was not an emergency at all, but rather the direct result of GEO's conduct.

GEO also received a direct nine-month contract from ICE for the Adelanto detention facility, for nearly $63 million dollars. Add. 225 (Plevin, Private Prison Giant). The legal rationale cited by ICE to secure those bridge contracts—that is the "unusual and compelling urgency" clause—failed to acknowledge the role that GEO played in the termination of prior IGSAs. The emails between GEO's CEO and the

[2] *Available at* https://www.hsdl.org/?view&did=233186.

City, as described in the Desert Palm Spring article, indicate that the IGSA was terminated at GEO's request, in order for it to contract for immigration detention services directly with ICE. ICE's "unusual and compelling" justification for continuing these contracts ignores the fact that the urgency was created by the private contractor's improper role in achieving the termination of those IGSAs.

C. GEO Continued to Exercise Undue Influence Over Both the City of Adelanto and the City of McFarland in Obtaining Permits Related to the Contracts in Dispute.

GEO furthermore exercised undue influence with respect to the Cities of Adelanto and McFarland in obtaining permits for the use of three facilities which had previously been operated by the California Department of Corrections and Rehabilitation. The facilities include the Central Valley Modified Community Correctional Facility and the Golden State Modified Community Correctional Facility in McFarland and the Desert View Modified Community Correctional Facility in Adelanto.

Each of these facilities requires a local permit to operate. Despite not having these permits secured, GEO included these facilities in the December 2019 contracts it signed with ICE. GEO offered these

facilities as "turnkey-ready" when it bid to secure the contracts at issue, even though it did not have permits from local authorities. Such behavior suggests that GEO had reason to presume it would be able to secure these permits from the respective cities, or that it believed that doing so would be a mere formality given its previous ability to exact certain results.

GEO's deep influence and intent was specifically raised during a February 19, 2020 public hearing held by the Adelanto City Planning Commission to discuss, among other things, GEO's request for a permit to convert its property (Desert View) into an annex for the Adelanto detention facility pursuant to the December 2019 contracts with ICE. During the hearing, Commission Vice Chairman Jay Shawn Johnson, who opposed the proposal, went on record stating his concerns that GEO had exercised undue influence on the commission and city officials at large. "How do you enter into a contract for beds that, at that point, you technically didn't have?" he said before the expansion's approval. Add. 115 (Martin Estacio, Adelanto Planning Commissioner Removed a Week After Opposing GEO Expansion, Daily Press (Feb. 27, 2020)). "What made the GEO Group so sure that this modification would be

approved?" Id. He detailed GEO's behind-the-scenes communications with city officials with GEO to terminate the prior IGSA in order for it to expand its facilities, and allegations of GEO receiving preferential treatment in submitting a proposal for the annexation of the Desert View facility. Add. 201–05 (Rebecca Plevin, Adelanto Planner Who Voted Against Detention Center Expansion Ousted from Commission, Desert Sun (Feb. 27, 2020)). Significantly, Vice Chairman Johnson noted that GEO had already issued a press release which announced the expansion of the Adelanto detention facility, even though the city had yet to vote on the proposal. Add. 115 (Estacio). Based on his belief of GEO's misconduct, Johnson voted against the proposal—and was subsequently removed from the planning commission by the Adelanto city council. Add. 201–05 (Plevin, Adelanto Planner).

On January 28, 2020, the ACLU of Southern California ("ACLU") sent a letter to the Chairperson of the McFarland Planning Commission raising concerns about the committee hearings' lack of compliance with state laws in its approval of the permits to GEO. Add. 239 (Jordan Wells Letter to Dave Borcky, Jr. (Jan. 28, 2020) at p.2). Wells stated

that the Commission had not complied with the notice requirements of the Dignity Not Detention Act, SB 29, *codified at* Cal. Civil Code § 1670.9, and reminded them that "that law promises transparency by prohibiting a city from issuing a permit for a corporation to detain immigrants unless the city has met both of two requirements: provided notice to the public of the proposed . . . permitting action at least 180 days before [issuing the permit] and solicited and heard public comments on the proposed . . . permit action in at least two separate meetings." Add. 238 (Jordan Wells Letter at p.1 (internal alterations omitted)). The letter further explained that the McFarland Planning Commission did not adequately provide notice to the public with regard to GEO's permit application. "GEO representatives appear to have been the lone members of the public with access to the applications before last week's hearing and thus were the only attendees in a position to offer fully informed input." Add. 239 (Jordan Wells Letter at p. 2).

Despite GEO's attempts to influence the process, the planning commission failed to pass the resolution approving the expansion, ending in a 2-2 vote on February 19, 2020. The Mayor of McFarland, Manuel Cantu Jr. resigned the next day after the vote. Add. 155–57

(Sam Morgen, McFarland Mayor Manuel Cantu Resigns Following Planning Commission Vote, The Bakersfield Californian (Feb. 20, 2020)). In April 2020, the McFarland City Council voted to approve to conditional use permits for the Mesa Verde ICE Processing Facility.

D. GEO Continues to Profit from the Contracts It Obtains Through Such Means

GEO's undue influence in local politics and circumvention of state and federal laws continues has resulted in significant profit. Indeed, the profits yielded by GEO are notable, and obtained in part through the labor of those they detain. In a wage-and-hour lawsuit filed against GEO, GEO counterclaimed against the ICE detainees it employs at $1 per day at a GEO Group detention facility in Washington state. Add. 122–28 (GEO's Answer and Counterclaim (Dkt. 33), Nwauzor v. The GEO Group, Inc., Case No. 17-cv-5769-RJB (W.D. Wash. Dec. 20, 2017)). In Nwauzor, GEO disclosed that in FY2016 it spent approximately $7.6 million on detention operations at that facility, yet it received almost $57 million from ICE for those services. Add. 134 (GEO's Fed. R. Civ. P. 26(a)(1) Initial Disclosures (Dkt. 45-6) at p. 3, Nwauzor v. Geo Group, Inc., Case No. 17-cv-5769 (W.D. Wash. Mar. 23, 2018)); Add. 110–11 (Decl. of Joan K. Mell (Dkt. 19) at pp. 6–7, Nwauzor

v. Geo Group, Inc. (W.D. Wash. Nov. 17, 2017)). In other words, on that contract alone, GEO pocketed nearly $50 million, a profit margin of more than 80%. Placing this in perspective, according to Forbes magazine, the top profit margins by industry in 2015 were between 22 and 30%. Add. 98–100 (Liyan Chen, The Most Profitable Industries in 2016, Forbes (Dec. 21, 2015).

In sum, the factual circumstances of GEO's efforts to influence the conduct of the Cities of Adelanto and McFarland and to prevent an open bidding and award process provide strong evidence of GEO's unclean hands.

II. GEO's CONTRACTS WITH ICE DID NOT COMPLY WITH OPEN COMPETITION REQUIREMENTS.

Not only did GEO come to the contracting negotiations with unclean hands, but GEO and ICE raced the clock to negotiate and execute these contracts, flouting federal procurement requirements in order to beat the effective date of AB 32.

The Competition in Contracting Act of 1984 ("CICA") and the Federal Acquisition Regulation ("FAR") requires, with certain limited exceptions, that federal contracting officers shall promote and provide for full and open competition in soliciting offers and awarding

government contracts. 10 U.S.C. § 2304; 41 U.S.C. § 3301; 48 C.F.R. § 6.101. In this case, the solicitation which resulted in the ICE contracts secured by GEO did not meet the standards for full and open competition.

The solicitation from ICE which resulted in the contract awards at issue was Solicitation No. 70CDCR20R00000002, issued on October 16, 2019. See Add. 234–37. Although the solicitation indicates that the procurement process would be conducted in a manner consistent with "full and open competition," see id., its terms eliminated meaningful competition in favor of three private corporations which were already operating four existing immigration detention facilities within California, including GEO. The solicitation sought four contractor-owned-and-operated facilities, with the requirement that each be "turnkey ready," and able to provide detainee services. These requirements were posted with a fifteen-day response time for bids. Id.

Far from creating a competitive process in the interest of public savings and economic efficiency, the solicitation also required a base term of five years with two five-year renewal options that could ultimately result in a fifteen-year contract. Add. 236.

The solicitation process and optional fifteen-year term of the contracts contravened the letter and spirit of the requirements in CICA and FAR that contracting officers promote and provide for full and open competition in soliciting offers and awarding government contracts. 10 U.S.C. § 2304; 41 U.S.C. § 3301; 48 C.F.R. § 6.101. Federal procurement law generally requires that contracts with an estimated value exceeding $25,000 be advertised for at least fifteen days before issuance of a solicitation. 41 U.S.C. §§ 1708(a)(2), (e)(1)(A); 48 C.F.R. § 5.203(a).

CICA and FAR also include requirements for solicitations to provide lengthy bidding windows in order to attract competitive offers. For contracts expected to be greater than $250,000, agencies may not issue solicitations earlier than fifteen days after the notice is published, or establish a deadline for submission of bids or offers earlier than thirty days after the solicitation is issued. See 41 U.S.C. § 1708(e)(1)(B); 48 C.F.R. § 5.203(c). Federal contracts are typically set for a period of one year, in order to ensure flexibility and financial prudence by the government.

For these solicitations, however, ICE utilized the combined synopsis and solicitation procedure set forth in FAR § 12.603, which is

designed "to reduce the time required to solicit and award contracts for the acquisition of commercial items." 48 C.F.R. § 12.603(a). However, ICE was not simply obtaining commercial items, but instead securing detention services for terms extending up to fifteen years at four facilities. As a result, bidders were required to propose turnkey ready facilities within an extremely short period of time, underscoring the advantage that existing contractors had in securing these contracts, and contradicting the spirit of full and open competition required by law. ICE exploited this procedure in order to circumvent a true bidding process and extend contracts with preselected bidders. The utilization of this streamlining procedure undermined any real opportunity to assess bids or conduct due diligence for services. It was utilized as a formality to award contracts to preselected bidders.

The fact that the solicitation in question was publicized for only fifteen days, in pursuit of fifteen-year contracts in excess of five billion dollars, shows that the solicitation process was neither competitive nor open. Rather, ICE treated the solicitation as a mere formality with which it was obliged to comply with in order to expedite contract renewals for facilities that were already in operation in California in a

coordinated attempt to circumvent AB 32, which was set to go into effect on January 1, 2020.

The Department of Homeland Security Office of Inspector General ("OIG") has previously identified highly circumspect behavior by ICE regarding its procurement practices. In a 2018 report of an audit of ICE's modification of an IGSA with one city to procure family detention space in another city, the OIG found that ICE engaged in non-competitive negotiations that resulted in an unjustified windfall to the first city. See Add. 158–87 (Office of Inspector Gen., Dep't of Homeland Sec., IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES (FEB. 21, 2018)). The OIG concluded that "ICE has no assurance that it executed detention center contracts in the best interest of the Federal Government, taxpayers, or detainees" and further noted that "[i]t appears that ICE deliberately circumvented [Federal Acquisition Regulation (FAR)] provisions[.]" Add. 159, 165 (OIG at pp. 3, 6). The OIG recommended among other things that ICE develop and implement "administrative requirements for the solicitation and award" of such IGSAs. Add. 165 (OIG at p. 6).

In this case, a bi-cameral delegation of twenty-one Members of Congress expressed concern that the solicitation was designed to prioritize the existing contractors over a truly open competitive environment. The letter included the Chairs of the House Judiciary and Homeland Security Committees, along with the acting Chairwoman of the House Committee on Oversight and Reform. Add. 102–06 (Congresswoman Zoe Lofgren et al. Letter to Chad F. Wolf, Acting Secretary, U.S. Dep't of Homeland Sec. (Nov. 14, 2019)). The legislators expressed "serious concern with the process by which [ICE] has solicited contracts for federal detention facilities." Add. 102 (Lofgren at p. 1). They continued, "Given the timing and terms of this Solicitation—particularly in light of ICE's history of suspect contract activities and insufficient oversight—we are understandably concerned that the Solicitation is intended to favor incumbent contractors. If so, these efforts would be in direct contradiction with the spirit of full and open competition required by federal procurement law." Add. 104 (Lofgren at p. 3).

Legal experts have joined the Congressional delegation in expressing concern regarding this solicitation. See Add. 206–09

(Rebecca Plevin, Homeland Security's Solicitation for Detention Facilities Could Violate Law, Experts Say, Desert Sun (Nov. 5, 2019)). Michael Greenberger, a professor at the University of Maryland Francis King Carey School of Law and founder and director of the University of Maryland Center for Health and Homeland Security, stated that "[i]t's improper to write the solicitation in such a way that is so specific that it would only attract certain favored bidders . . . . [The solicitation is] unnecessarily limited in that regard." Add. 207 (Plevin, Homeland Security's Solicitation). He went on to explain, "[ICE is] in effect trying to grease the skids to get the contracts to the prison industry officials who they want to run the prisons." Id.

To date, ICE has not responded to inquiries from the Congressional delegation with respect to the procurement process. GEO's lawsuit prematurely sought relief from the District Court to validate these contracts, while oversight and accountability measures remain pending in Congress.

The contracts were furthermore executed by an ICE Contracting Officer ("CO"), whereas the Homeland Security Acquisition Regulation ("HSAR") confers authority to enter into fifteen-year contracts for the

rental of detention facilities only on the ICE Head of Contracting Activity, not ICE COs. 48 C.F.R. § 3017.204-90.[3]

The history of the procedurally irregular solicitation and award process leading to the entry of the five contracts at issue in this case, combined with the history of GEO's other efforts to skirt other California laws restricting the operation of private immigration detention facilities, provides compelling support for Defendants-Appellants' enforcement of AB 32.

III. THE DISTRICT COURT LACKED JURISDICTION OVER GEO'S FOURTH CAUSE OF ACTION.

GEO sought declaratory relief for the contracts it entered into with ICE, an agency of the U.S. government. In its Complaint, GEO argued in Count IV: Temporary Safe Harbor that it was entitled to a declaration that AB 32 did not apply to any of the five contracts at issue "through at least December 19, 2034" and requested that the District Court enter a judgment declaring those contracts "valid" through that date. GEO Compl. (Dkt. 1) at pp. 29, 30, The GEO Group, Inc. v.

[3] See Add. 2 (Adelanto and Desert View Current ICE Contract at p. 556); Add. 137 (Mesa Verde, Central Valley, Golden State-Current ICE Contract at p. 1277).

Newsom, No. 19-cv-2491-JLS-WVG (S.D. Cal. Dec. 30, 2019). In effect, GEO seeks a ruling regarding the validity of the contracts.

But this claim is subject to the Contract Disputes Act of 1978, and thus any relief with respect to these contracts must be obtained through that statute, in a proceeding before the U.S. Court of Federal Claims. See Pub. L. No. 95-563, 92 Stat. 2383 (1978), *codified at* 41 U.S.C. §§ 7101-09. The intention of the Act includes "to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies." See id. As such, the District Court lacked subject matter jurisdiction over the fourth cause of action for declaratory relief, as that Court recognized although it ultimately determined it was unnecessary to resolve the jurisdictional obstacle. *See* Order (Dkt. 53) at p. 71 (citing, *inter alia*, N. Side Lumber Co. v. Block, 753 F.2d 1482, 1486 (9th Cir. 1985)).

CONCLUSION

The ICE – GEO contracts did not comply with federal procurement laws, and GEO entered into these contracts with a directly related history of unclean hands. The District Court correctly granted

the motion to dismiss and correctly denied preliminary injunctive relief with respect to the claims over which it had jurisdiction.

Dated: February 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: February 12, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2021, I electronically filed the foregoing **BRIEF OF AMICI CURIAE CALIFORNIA COLLABORATIVE FOR IMMIGRANT JUSTICE, CENTER FOR GENDER & REFUGEE STUDIES, IMMIGRANT DEFENSE ADVOCATES, AND IMMIGRANT LEGAL DEFENSE IN SUPPORT OF DEFENDANTS-APPELLEES** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will automatically send an email notification of such filing to the attorneys of record who are registered CM/ECF users.

Dated: February 12, 2021

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