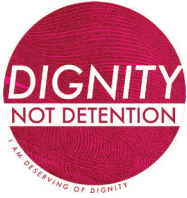


OCTOBER 2021

AB 32 NINTH CIRCUIT COURT OF APPEALS DECISION, AT A GLANCE



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

BACKGROUND

California Assembly Bill 32 (People Not Profit)¹ signed in 2019 and effective January 2020, outlaws criminal and civil private incarceration in California, with some exceptions. Some brief months after AB 32 was signed, private prison company GEO Group Inc. and the Trump administration sued California aiming to strike down this momentous law. Federal District Court Judge Sammartino largely upheld AB 32, after which GEO and the Biden administration appealed to the Ninth Circuit. In defense of the law, the California Dignity Not Detention coalition [held an action during the Ninth Circuit oral argument](#). On October 5, 2021, the Ninth Circuit regrettably ruled to strike down AB 32. This summary provides a review of the [Ninth Circuit Court of Appeals' decision](#).

WHAT DOES THE DECISION SAY?

- Two Ninth Circuit judges — U.S. Circuit Court Judges Bridget Bade and Kenneth Lee — in a three-judge panel blocked AB 32 pending further litigation. The judges said that AB 32 impermissibly conflicts with DHS' (questionable) legal authority to contract with private companies for the purposes of immigration detention, calling this "within the core of exclusive federal powers." The judges additionally cited the "intergovernmental immunity doctrine" as an additional basis to strike down the law. Both judges were appointed by Trump.
- In striking down AB 32 on this basis, the judges wrongly viewed AB 32 as a law that aims to regulate immigration policy. In fact, AB 32 is about the health and safety of Californians, as the dissenting judge described and as California state officials have repeatedly stated.
- The majority misstated key facts, claiming that California relies exclusively on private detention, when in fact one government-run contract remains and many others have existed in recent history. The decision makes apparent that the judges are redefining the issue in order to serve the outcome they want - to strike down AB 32.
- One judge, U.S. Circuit Court Judge Mary H. Murgia, dissented, saying her colleagues were wrong to focus on AB 32's impacts on immigration enforcement since the law applies to various kinds of private detention facilities, not just those overseen by U.S. Immigration and Customs Enforcement. Murgia was appointed to the federal bench by Barack Obama.
- "The majority offers no support for its decision to focus narrowly on the effect of AB 32 on only one type of facility — ICE detention centers," Murgia said. She noted the evidence that California enacted AB 32 to safeguard the health and welfare of detained people given reports of "substandard conditions, inadequate

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



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medical care, sexual assaults and deaths in for-profit facilities.” The regulation of health and safety is traditionally within the realm of states to undertake. She also pointed out that the two judge majority applied the wrong standard at this phase of the litigation.

WHAT DOES THIS MEAN?

- The two judge majority “remanded” (returned) the case to District Court Judge Sammartino. This means that AB 32 will likely be subject to a “preliminary injunction,” which means putting the law on hold — possibly for years — as the other parts of the case continue to be litigated in court. The lower court had also dismissed some of GEO’s claims against AB 32 and under this order, those claims will also likely go forward.
- Regarding whether the law will be blocked permanently, the Ninth Circuit has given the lower court a very lengthy set of marching orders. It now may be very difficult to find a way to convince that court that AB 32 is lawful and may be enforced.

WHAT’S NEXT?

- The CA Department of Justice and Attorney General Bonta will be making decisions about how to advocate at the District Court based on whether they think there is a chance of defending the law under this ruling.
- California’s legal team will also be deciding whether to appeal this decision to a larger portion of the Ninth Circuit Court of Appeals (“en banc”), or whether to appeal to the U.S. Supreme Court.
- Advocates including members of the [California Dignity Not Detention Coalition](#) who fought to pass laws like AB 32, [SB 29](#), and [AB 103](#) will continue to fight for the liberation of our communities. This is a mere setback in our larger battle to abolish all cages, nationwide.
- Follow California’s Dignity Not Detention coalition at @CADignity (Twitter) and @DignityNotDetentionCA (Facebook) for future calls to action. #FreeThemAll

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