

SUPPORT SB5017 (Boysko)

Ensure health and safety standards for all detention facilities operated in the Commonwealth, including those contracting with the federal government.

Issue: Where a Virginia town or county operates a local correctional facility to hold federal detainees pursuant to a contract, the Code of Virginia does not clearly specify that the Commonwealth has authority to carry out health and sanitary inspections. This creates a clear risk to the health of detainees, staff, and—with respect to infectious diseases—the surrounding communities.

The Farmville and Caroline County Detention Centers are owned by the Town of Farmville and Caroline County respectively. The localities contract with U.S. Immigration Customs and Enforcement to house adult detainees in civil immigration proceedings at a per-day rate. Because of these contracts, the Commonwealth has treated these facilities as outside their jurisdiction with respect to health and sanitation standards required of other local correctional facilities.

Facilities that contract with the federal government to detain immigrants in Virginia, particularly ICA-Farmville, have had serious COVID-19 outbreaks with little oversight and less transparency on whether they are providing adequate care and humane treatment of people detained. The Farmville detention center has by far the worst COVID-19 outbreak of any ICE detention center in the nation, and one detainee has already died. As described by in numerous news articles (emphasis added):

- “It took until July 2 to test all 366 detainees. *Only 19 people tested negative*. In addition, 22 employees of the detention center have tested positive. The detained population inside Farmville, as of Jul. 13, now totals 360 people.”¹
- “*One detainee at the privately run facility who had covid-19 died [on August 6th, 2020]*. Nearly all of the 298 detainees are being monitored for infection, according to U.S. Immigration and Customs Enforcement.”²
- “The Virginia Department of Health reached out to the detention center to offer help with testing, and even scheduled an event for July 21 in consultation with the state’s National Guard, according to a Northam administration official briefed on the planned

¹ <https://www.thedailybeast.com/ice-prison-sees-outbreak-of-coronavirus-and-guard-violence-they-put-us-in-here-to-let-us-die?source=us-news&via=rss>

² https://www.washingtonpost.com/local/virginia-politics/federal-scientists-begin-addressing-massive-covid-19-outbreak-at-immigration-detention-center-in-virginia/2020/08/10/fa0079be-db37-11ea-b205-ff838e15a9a6_story.html

event. *The Farmville Detention Center canceled the event just a few days before it was supposed to take place, the official said.*³

The Solution: Give the Commonwealth appropriate authority to enforce health and sanitary standards in all facilities within the Commonwealth, including those that contract with the federal government.

- The federal government has failed to ensure that the Farmville and Caroline County Detention Centers comply even with its own detention standards, let alone CDC or Virginia Department of Health Standards. Due to inadequate safety precautions, nearly all the detainees and numerous staff at Farmville Detention Center have tested positive for COVID-19.⁴
- By allowing these locally owned facilities to operate without oversight, all Virginians are at risk. Without proper safeguards, infected staff may spread the virus to others in their community. If local facilities are going to contract with the federal government, they must be required ensure safety by adhering to the same health and safety standards of any other facility in the Commonwealth.

Federal courts agree that states may enforce their health and sanitary standards in ICE-contracted local detention facilities, as long as they are no more burdensome than the standards or inspections carried out in other local detention facilities.

The Farmville Detention Center is not a federal facility—it’s operated by the Town of Farmville, which contracts it out to ICE. Farmville, in turn, contracts with a private company, Immigration Centers of America, to operate the facility. The federal government neither owns nor operates the facility. It exists as a local jail under Virginia law.

This type of state health inspection over ICE detention facilities has been upheld in United States v. California, 921 F.3d 865 (9th Cir. 2019), cert. denied, No. 19-532, 2020 WL 3146844 (U.S., June 15, 2020). In the California case, the U.S. Court of Appeals for the Ninth Circuit held that where a state statute allowing the state to inspect ICE detention facilities was no more burdensome on the federally contracted facilities than are state inspections of state facilities, the statute was neither preempted nor violated intergovernmental immunity. Just two months ago the U.S. Supreme Court denied the federal government’s petition seeking review of the Ninth Circuit decision, thus implicitly agreeing with the Ninth Circuit’s ruling.

³ <https://www.wric.com/news/virginia-news/northam-virginias-senators-urge-trump-to-send-cdc-team-to-immigrant-detention-center-in-farmville/>

⁴ <https://www.wric.com/news/taking-action/covid-19-cases-spike-at-farmville-ice-detention-center-after-transfers-from-florida-arizona/>

Our proposed legislation easily passes that test by not creating any new requirements for the ICE-contracted facilities, it merely includes the ICE-contracted facilities within the ambit of the state’s ability to carry out health and sanitation inspections in all local correctional facilities. Under this bill, the Commonwealth of Virginia wouldn’t be telling ICE what to do, it would only be telling local correctional facilities what to do. (To the extent that in the future, ICE might directly contract with a private corporation to open a detention center in Virginia, that would *not* be covered by this bill, precisely because the federal preemption issues are much more complicated.)

The Commonwealth’s inspection activities are not preempted. Preemption occurs when state law conflicts with federal law. State laws are preempted if they contradict the express mandates of federal law, if there is conflict between the mandates of federal and state law, if the federal government “occupies the field” of regulation, or if state law presents a sufficient obstacle to federal interests or regulation.

- Here, both Farmville and Caroline County Detention Center are owned by the locality. The locality in turn, contracts with the federal government. The localities are responsible, pursuant to their agreements with ICE, to maintain health and safety standards at or above the minimum required by the ICE detention standards. Virginia would be preempted from setting a lower health and safety floor than the ICE detention standards, but is not preempted from setting a higher floor.

Intergovernmental Immunity prevents states from implementing incommensurate burdens on the federal government. The key to whether a state law runs afoul of the intergovernmental immunity doctrine is whether it is a neutral law, or if it imposes additional burdens on the federal government.⁵ According to the U.S. Supreme Court, “a state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.”⁶ The question of discrimination “cannot be viewed in isolation . . . [rather] the entire regulatory system should be analyzed to determine whether it is discriminatory ‘with regard to the economic burdens that result.’”⁷ Regulations can also be found to discriminate where they apply to an entity exclusively because of its relationship with the federal government.

Neither the current nor proposed provisions of the Virginia Code regulate the federal government or federal contractors in a discriminatory manner. Indeed, the current Virginia health code gives the Commonwealth the authority to inspect *any* facility within the Commonwealth and require *any person* to comply with its regulations. The Code does not

⁵ *North Dakota v. United States*, 495 U.S. 423, 434 (1990).

⁶ *Id.* at 435.

⁷ *Id.* at 436.



LEGAL AID
JUSTICE CENTER

single out government facilities but instead requires compliance by all similarly situated entities throughout the state. This includes other health care facilities and even prisons.⁸ Similarly, the proposed change to the provision makes explicit that local facilities contracting with the federal government must also comply with the standards imposed on all “local correctional facilities.” As the Ninth Circuit has found, when states regulate in this neutral, generally applicable fashion, they do not run afoul of the doctrine of intergovernmental immunity.⁹

LIS has determined that this bill has little to no fiscal impact. The bill would not require the creation of new standards or a new inspection regime, but rather would merely add two facilities into an already-existing inspection regime that currently inspects several dozen facilities per year. Under normal circumstances, aside from any extraordinary inspections that might take place due to specific reasons like infectious disease outbreaks, each facility would be inspected once per year. As to wrongful death investigations, including the most recent COVID-19 death, there have been two deaths in the past decade.

Questions?

- Sophia Gregg – Attorney – sophia@justice4all.org
- Luis Oyola – Organizer – luis@justice4all.org
- Simon Sandoval-Moshenberg – Legal Director – simon@justice4all.org

⁸ <https://www.vdh.virginia.gov/southside/environmental-health-services/jail-inspections/>

⁹ *United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019); *see also North Dakota v. United States*, 495 U.S. 423, 438 (1990) (“[t]he State does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them.”)