Amend § 53.1-1 Definition, "Local correctional facility" to include facilities that contract with the federal government so that certain subsections may apply to enforce Virginia's health and sanitary standards within these facilities.

The amendment will apply *only* to subsections which:

- Set and enforce minimum standards for health services;
- Allow the local governing body to limit the number of people allowed to be detained at the facility or request transfer of detainees, when the minimum standards are not met;
- Call for the governing body of the facility to review the reasons a detainee died in the facility.
- Grant the jurisdiction to the Circuit Court where the facility is located to enforce orders of the local governing body;
- Grant jurisdiction to the Circuit Court where the facility is located, to enforce orders to repair unsafe facilities;
- Allow access to the facility by the local governing body, Department of Corrections, the local health department, and attorneys of detainees.

Possible Questions

Does the doctrine of intergovernmental immunity prohibit the Commonwealth from inspecting detention facilities?

The doctrine of 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. 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." 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.'" 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 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.

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.

Is the Commonwealth nonetheless preempted by federal law?

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.

Relevant federal health code provisions recognize concurrent authority on this issue. Title 44 of the United States Code governs Public Health and Welfare. Chapter 6A of that title controls Public Health. Within Chapter 6A, the section discussing quarantine and inspection explicitly disclaims all but conflict preemption in this area.[1] Therefore, so long as the laws of the Commonwealth do not directly conflict with federal laws, they do not appear to be otherwise preempted. In other words, 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.

Moreover, at least one federal Court of Appeals has found that state health regulations do obstruct government regulation. Although the federal government has exclusive control over immigration laws, the Ninth Circuit found that "given the [California] Attorney General's power to conduct investigations related to state law enforcement—a power which [the United States] concedes—the Court does not find this directive in any way constitutes an obstacle to the federal government's enforcement of its immigration laws or detention scheme."[2]

Q: Can the Commonwealth regulate a facility contracting with the federal government?

A: Yes, the Commonwealth has the authority to regulate public health via the state's police powers under the Tenth Amendment of the U.S. constitution.

The Commonwealth of Virginia has the inherent power to legislate and regulate for the benefit of the public. Under the Tenth Amendment, states retain all rights not expressly

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[1] *See* 42 U.S.C.A. § 264(e) ("Nothing in this section [regulations to control communicable diseases] or section 266 [federal special quarantine powers during war] of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.").

[2] *See also* United States v. California, 921 F.3d 865, 886 (9th Cir. 2019)

delegated to the federal government. Historically, this includes the "police power" to protect the general welfare of people in its jurisdiction.

This "police power" extends to regulating the health and well-being of states' citizens. Generally, "a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power."[3] This power is expansive; indeed, states are given great "latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."[4] Several courts have held that, "when the state faces a major public health threat . . . its Tenth Amendment police and public health powers are at a maximum."[5] Therefore, the Commonwealth not only has the inherent power to regulate and promote the public health, but in times of crisis- such as global pandemic- this power is even more expansive.

Q: What about the law that says the Commonwealth cannot impose stricter regulations on federal contractors who work within the state because it would "frustrate the objectives of the federal procurement laws"?[6]

A: That case is not analogous to proposed amendment here. In that case, the court found that individuals who worked within the Commonwealth exclusively for the FBI could not be required, by Virginia law to be registered separately with the state and obtain a state issued license for their work.

Here, for instance, Farmville Detention Center is governed by the Town of Farmville which has a contract to house detainees for the federal government for a fixed day rate. The operations and maintenance of the facility are carried out by private corporations, Immigration Centers of America (ICA) and Armor Correctional Health Services in accordance with a contract between them and the Town of Farmville.[7] As such, these companies are contractors of the Town of Farmville and not contractors of the federal government. Although the contract between the Town of Farmville and ICE requires that the facility maintain federal minimum standards of the health and safety, it does not (nor could it) preclude the Town of Farmville from maintaining standards consistent with all "local correctional facilities" in the Commonwealth.

Q: Won't the Commonwealth's inspection infringe upon federal powers?

A: No. The Commonwealth's ability to regulate and inspect all facilities is neither preempted by federal law nor does it violate the doctrine of intergovernmental immunity.

The Supremacy Clause of the United States Constitution declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties

[3] *Falls Church Med. Ctr., LLC v. Oliver*, 412 F. Supp. 3d 668 (E.D. Va. 2019)
[4] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).
[5] *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 JB\SCY, 2020 WL 1905586 (D.N.M. Apr. 17, 2020).
[6] *States v. Com. of Va.,* 139 F.3d 984 (4th Cir. 1998)
[7] https://ica-farmville.com/?page_id=43

made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."[8] States can run afoul of the Supremacy Clause by either improperly regulating the federal government or by conflicting with the federal legislation.[9]

States improperly regulate when they attempt to regulate the federal government directly or when they impose discriminatory regulations on the federal government that are different, and presumably more burdensome, than those they impose on their own state. *Id.* This form of regulation is barred by the doctrine of intergovernmental immunity. In contrast, when state law otherwise conflicts with federal law, it is deemed "preempted" by that federal law.

Will this bill cost money to the Commonwealth?

LIS initially determined that this bill has no fiscal impact, but at the request of the agency revised the fiscal impact statement to $66,500 per year.

We disagree that the bill would have a 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 only two deaths in the past decade. Accordingly, it is not correct that the agency would need to hire more staff in order to carry out the requirements of this bill; at most, existing staff would incur travel expenses to two facilities both located within an hour of Richmond.

Nonetheless, even $66,500 per year would be a small price to pay. Inadequate health and sanitary conditions at the Farmville and Caroline County facilities affect the detainees in the facilities—most of whom are from Virginia, and many of whom will ultimately be released back into their families and communities in Virginia—but also the guards in the facilities, and through them, the surrounding communities. After ICE created the worst COVID-19 outbreak in any detention facility in the nation in Farmville by bringing in 74 detainees from Arizona and Florida without testing them, several guards were infected, and had to obtain commercial testing in the community after the operators of the Farmville facility refused the Governor's offer to voluntarily test every detainee and staff member; several others reported working while having COVID-19 symptoms but not getting tested.

Examples of state laws that regulate detention centers:

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[8] ART. VI. U.S. CONST.
[9] *North Dakota v. United States*, 495 U.S. 423, 434 (1990).

California: AB 103

A recent decision from a federal appeals court, *United States v. California*, 921 F.3d 865 (9th Cir. 2019), shows that the GA can promulgate protections to ensure the health and safety of detainees in the Commonwealth. In that case, the federal government challenged AB 103, a 2017 California law requiring the state Attorney General to inspect county, local, and private immigration detention facilities in California and to report on the conditions of confinement and the standard of care that the detainees receive. The law also requires the detention facilities to give the California AG "all necessary access" to perform those inspections.

The Ninth Circuit also found that California's health-inspection law was not preempted by federal immigration law because it did not constitute an obstacle to the federal government's enforcement of its immigration laws or detention scheme. *See United States v. California*, 921 F.3d 865, 885–86.

The same is true of Virginia's health-inspection laws. Like California, the proposed amendment in Virginia law "does not regulate whether or where an immigration detainee may be confined, require that federal detention decisions or removal proceedings conform to state law, or mandate that ICE contractors obtain a state license." *Id.* at 885. Even if a state health inspection might require some federal or quasi-federal action to permit inspections and produce data, that would not implicate preemption concerns. *See id.* at 885.

In the California case, the Trump Administration conceded that states possess "the general authority to ensure the health and welfare of inmates and detainees in facilities within [their] borders." *Id.* at 886. And as the Supreme Court has said, in preemption analysis, courts should assume that federal law does not supersede the historic police powers of the states unless that was the clear and manifest purpose of Congress. *Id.* at 885–86, citing *Arizona v. United States (Arizona II)*, 567 U.S. 387, 400 (2012). The Ninth Circuit found nothing in federal immigration law or in ICE's contracts that showed *any* intent by Congress to supersede the states' authority to protect detainees in their territory. *Id.* at 886. Thus, the court found, state health inspections of ICE detention facilities were not preempted by federal law. *Id.* Therefore, a state health inspection of Virginia's ICE detention centers would likely survive a preemption challenge as well.

Michigan, blocks the sale of local jail to ICA because "it was determined that ICA was unable to agree to terms that guaranteed that this facility would not be used to detain adults who had been separated from their children." [10]

Illinois passed a law banning private immigration detention centers: HB 2040.

[10] https://www.detroitnews.com/story/news/local/michigan/2019/02/17/whitmer-michigan-values-led-blocked-sale-shuttered-prison/2899133002/

“Detention requires the exercise of coercive police powers over individuals that should not be delegated to the private sector…issues of liability, accountability, and cost warrant the prohibition of the ownership, operation, or management of detention facilities by private contractors within the State…” Illinois GA, HB 2040.