LEGAL AID JUSTICE CENTER

Simon Y. Sandoval-Moshenberg, Esq.
Director, Immigrant Advocacy Program

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By e-mail
Jessica Killeen, Deputy Counsel to Gov. Ralph Northam
Mona Siddiqui, Assistant Attorney General

Re: COVID-19 inspections at Farmville and Caroline County detention centers

Dear Jessica and Mona,

I write to follow up on our letter of March 20 and the various telephone conversations we have had since then, regarding the need for the Commonwealth of Virginia to inspect the Farmville and Caroline County ICE detention centers to determine whether they have adequate infection controls, medical facilities, and staffing sufficient to respond to an outbreak of COVID-19. Thank you for your responsiveness on this issue in the midst of so many other pressing concerns.

Since March 20th, the detainees' situation has become even more dire. Before sharing those details, however, I understand that there are still concerns regarding the Commonwealth of Virginia's authority to inspect the local, regional, and private facilities that are used to house federal ICE detainees.

I. Virginia has the legal authority to inspect state, local, and private facilities that are used to house federal immigration detainees in order to protect the detainees from exposure to COVID-19.

A recent decision from a federal appeals court, *United States v. California*, 921 F.3d 865 (9th Cir. 2019), shows that Virginia has the authority to protect the detainees in Farmville and Caroline County from COVID-19. 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 federal government argued that California's detention-inspection law violated the doctrine of governmental immunity, and that California's law was preempted by federal immigration law. On both arguments, the State of California prevailed.[1]

[1] The federal government has appealed the case to the Supreme Court, but it has not asked the Court to review the Ninth Circuit's holding that affirmed the state's authority to inspect state, local, and private immigration-detention centers within its territory. See Sup. Ct. Case No. 19-532, Petition for a Writ of Certiorari at (I) "Question Presented," *available at* https://www.supremecourt.gov/DocketPDF/19/19-532/119897/20191022192538521_California.Pet.10.22.19.pdf. Accordingly, this holding is final.

6066 Leesburg Pike, Suite 520, Falls Church, VA 22041 | **www.justice4all.org**
Phone: 703-720-5605 | Fax: 703-778-3454 | Toll-free 800-763-7323 | email: simon@justice4all.org

A. A Virginia health inspection of the Farmville and Caroline County detention centers would not violate the doctrine of intergovernmental immunity because Virginia law grants the State Health Commissioner the power to perform health inspections on "any property" in general, and local correctional facilities in particular. It does not single out immigration-detention facilities for disparate treatment.

Under the doctrine of intergovernmental immunity, states generally cannot place additional economic benefits exclusively on the federal government. In the California case, the Ninth Circuit found that California's detention-inspection law did not violate intergovernmental immunity because even though AB 103 singled out state and local detention facilities that housed federal immigration detainees, the California Penal Code already gave the state the right to do health and safety inspections at all state and local detention facilities, regardless of who happens to be housed there. *See United States v. California*, 921 F.3d 865, 882–85 (9th Cir. 2019).

Here, Virginia's health inspection authority is on even more solid footing. Unlike California, Virginia does not have a law like AB 103 that purports to single out immigration-detention centers for state inspection. Rather, Virginia law gives the State Health Commissioner (in concert with the Attorney General) broad powers to do health inspections at "any property" in general. Va. Code § 32.1-25.

Virginia law also requires the State Health Commissioner to establish procedures for state health authorities to do at least one unannounced health inspection per year at every local correctional facility in Virginia. Va. Code § 53.1-68(B). The State Health Commissioner may authorize additional announced or unannounced inspections of local detention facilities as the Commissioner deems appropriate. *Id.*

So, like California, Virginia already has the right to do health inspections at all state, local, and private detention facilities, regardless of who happens to be housed there. Therefore, as the California case illustrates, Virginia can likely perform health inspections of state, local, and private detention facilities without running afoul of intergovernmental immunity.

B. A Virginia health inspection of the Farmville and Caroline County detention centers would not be preempted by federal immigration law.

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, 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.

In sum, the holding of *United States v. California* reinforces the point we made in our March 20 letter: that the Virginia Department of Health has legal authority to inspect the health and sanitation conditions at Farmville and Caroline County (which, again, are neither owned nor operated by the federal government, but by the Town of Farmville and the Peumansend Creek Regional Jail Authority).

II. Conditions in Virginia's ICE detention centers require immediate intervention by the state in order to protect the health and safety of detainees, staff, contractors, and the community.

The situation of Virginia's immigration detainees has become even more dire since LAJC's letter of March 20. Though information from within the detention centers is not easy to come by, LAJC and other attorneys have been able to get a glimpse of what is happening to their clients. The facts we do know make it clear that Virginia health authorities must use their state-law inspection powers immediately to protect the detainees' and the community's health.

Farmville Detention Center

- Only today, ICE confirmed that it tested just two men for COVID-19 before they were brought to Farmville, and that it has conducted no other COVID-19 testing at Farmville since the coronavirus crisis began.[2]

- An ICE spokesperson confirmed today that 77 men detained at Farmville were quarantined in Dorm 7 after a detainee showed flu-like symptoms. That quarantine was lifted today.

[2] *Mallory Noe-Payne*, WVTF.org, *Immigration advocates concerned about COVID-19 in Virginia detention facilities,* April 7, 2020, https://www.wvtf.org/post/immigration-advocates-concerned-about-covid-19-virginia-detention-facilities#stream/0

- LAJC and other attorneys report that they have had difficulty reaching clients at Farmville by telephone. Advocates are alarmed, as all in-person non-attorney visits have been banned, and even attorney visits are restricted and require an in-person trip to Farmville. As a result, advocates are extremely concerned about what may or may not be happening to their clients without their knowledge, or what protective measures the detention center may or may not be implementing.

- The *Washington City Paper* reports that one of the dormitories at Farmville has been placed under quarantine, and that detainees staged a hunger strike to protest Farmville's lack of action to keep them safe.

- Various detainees report that there has been a noticeable decline in the amount of food given to the detainees.

- Farmville can house up to 736 detainees, but its medical unit has just 14 beds, 3 cells for detainees with communicable diseases, and a single full-time doctor.

- Detainees are housed together in large groups, typically 40 to 85 people in each dorm. Because the dorms house many individuals in close quarters with people sharing bunk beds, maintaining the CDC recommended distance of six feet apart from others is impossible. (See photos below.)

Caroline County Detention Center

- An LAJC client detained in Caroline County reports that he and his three cellmates have to share a single bar of soap between them for handwashing and showering—and they have to ask a guard when they want to use it. Cleaning products are kept under lock and key.

- Other immigration attorneys report the following from clients detained in Caroline County:

    - Around March 23, an entire unit was placed in quarantine after two detainees from that unit were treated for an unspecified illness.

    - There is no soap in the common areas and no hand sanitizer is provided. When the client asked about hand sanitizer, he was told it was considered contraband because it is flammable.

    - Detainees were told that toilet paper use is restricted and provided only twice a week on Tuesdays and Thursdays, and that if detainees ran out of toilet paper before then,

they would be given none.

- Detention center staff do not seem to be taking the COVID-19 issue seriously and do not appear to understand the gravity of the situation. There are not really significant precautions being taken.

- Detainees are housed together in large groups. Because the dorms house many individuals in close quarters with people sharing bunk beds, maintaining the CDC recommended distance of six feet apart from others is impossible.

III. The need for action by the Commonwealth is urgent.

There is an urgent need for the Commonwealth to take action because, as the World Health Organization recognizes, when it comes to infectious diseases, prisons are like petri dishes.

COVID-19 has already been confirmed in Virginia's prison system: at least three inmates at the Virginia Correctional Center for Women have tested positive, as have four Virginia Department of Corrections staff members. Two employees at the Bon Air Juvenile Correctional Center and a youth in a "contracted facility" have also tested positive.

Outside of Virginia, at least seven ICE detention centers have seen detainees or staff test positive for COVID-19. And given the rapid spread of COVID-19 throughout the state of Virginia, the daily entry of staff and contractors from the community, and the continued influx and transfer of new people into detention facilities, it is only a matter of time before the virus reaches Virginia's detained population as well.

If no immediate action is taken, it is virtually inevitable that COVID-19 will reach and spread among the detainees at the Farmville and Caroline County detention centers. Indeed, it has already reached ICE's Office of Chief Counsel in Arlington, which closed for almost 2 weeks on March 24 because someone in the office was exposed to COVID-19. If ICE cannot keep COVID-19 out of its own prosecutor's office, it does not bode well for the health and safety of the people whom the agency confines in crowded Virginia detention centers.

Indeed, ICE already has a poor track record with communicable diseases in Virginia detention centers: just last year, at least 5 Farmville staff and 17 detainees were infected during an outbreak of mumps—despite the fact that mumps, unlike COVID-19, is almost completely preventable through a commonly available vaccine. If Farmville or Caroline County were to suffer a similar outbreak of the far more virulent COVID-19, the results would be dire.

The time to protect these detainees is now. That is why we call on your offices to immediately send a delegation to inspect health and sanitation conditions in both of Virginia's immigration detention centers, determine whether the facilities are adequately protecting these vulnerable people from COVID-19 and, if necessary, take all actions needed to ensure the detainees' health and safety.

For the foregoing reasons, we request a teleconference or videoconference with the relevant decisionmakers in the Office of the Governor and the Office of the Attorney General, on or before **Friday, April 10**. Please let us know your availability, and if we can provide you with any further information regarding this matter in advance of our meeting

Thank you.

Sincerely,

//s//

Simon Y. Sandoval-Moshenberg