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April 23, 2026

The Honorable Wes Moore
Governor of Maryland
State House, 100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1017, "Correctional Services – Private Detention Facilities – Zoning Requirement"

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1017, entitled "Correctional Services – Private Detention Facilities – Zoning Requirement." Although it is our view that this bill is not clearly unconstitutional, we write to discuss constitutional risk under the Supremacy Clause of the United States Constitution, especially with regard to certain applications of Section 1 of the bill.[1]

There are two alternative sections to HB 1017. Section 1 of HB 1017 prohibits the State or a unit of local government from approving the construction or operation of a building, structure, or other real property to be used by a private entity as a detention facility.[2] The bill also subjects a private entity that operates or attempts to operate a detention facility in violation of the bill's prohibition to civil penalties. The Attorney General is authorized to enforce the bill through a civil action.

Section 2 of HB 1017 goes into effect only if the validity of Section 1 is challenged in litigation and a court renders unenforceable any provision enacted by Section 1 of the bill. Section 2 provides that the State or a unit of local government cannot approve the construction or operation of a building, structure, or other real property to be used by a private entity as a detention facility, *unless* the detention facility is located in a zone that expressly authorizes private detention

[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

[2] The bill defines "detention facility" as "any building, facility, or structure used, in whole or in part, to house or detain individuals for civil or criminal violations." The definition includes immigration detention facilities, but does not include certain licensed health care facilities and certain licensed residential child care programs or child placement agencies.

facilities. The bill contains certain factors that the State or a unit of local government must consider before establishing such a zoning classification. Section 2 also prohibits a private entity from operating or occupying a building, structure, or other real property as a detention facility without the required use and occupancy authorization.

Neither Section of HB 1017 is clearly unconstitutional on its face. In general, the State can exercise its police power to regulate and condition land use and detention facilities in the State. However, if the bill's restrictions are enforced against the construction or operation of a federal immigration detention facility to prevent the facility's construction or operation, there is a strong chance that a court would hold that application to violate the Supremacy Clause.

The Supremacy Clause "prohibit[s] States from interfering with or controlling the operations of the Federal Government."[3] *United States v. Washington*, 596 U.S. 832, 838 (2022). States cannot regulate the federal government or its employees directly, unless expressly authorized by Congress. *Id.* at 838-39. Additionally, state laws are preempted if they stand as an obstacle to the accomplishment of the full purposes and objectives of Congress. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotation marks omitted). Courts will usually apply a presumption against preemption when reviewing laws that fall within a state's traditional police powers, but not "when the State regulates in an area where there has been a history of significant federal presence." *GenBioPro, Inc. v. Raynes*, 144 F.4th 258, 272 (4th Cir. 2025) (quoting *United States v. Locke*, 529 U.S. 89, 108 (2000)).

There is a significant risk that a court might view HB 1017's restrictions on private operation of immigration detention facilities as both an unconstitutional direct regulation of the federal government and a preempted conflict with federal law.[4] First, although the State has more latitude to regulate private contractors working with the federal government than federal employees or instrumentalities, it still "cannot regulate private parties in a way that severely undercuts a federal function." *CoreCivic, Inc. v. Governor of New Jersey*, 145 F.4th 315, 322 (3d Cir. 2025). Although the bill does not prohibit immigration detention facilities operated by the federal government, Section 1 would prevent the federal government from using private contractors to operate a federal immigration detention facility, which is a common operation model. As the United States Court of Appeals for the Ninth Circuit explained, a state cannot "require[ ] ICE to entirely transform its approach to detention in the state or else abandon its [state] facilities" or "prevent ICE's contractors from continuing to run detention facilities." *Geo Grp., Inc. v. Inslee*, 151 F.4th 1107, 1118 (9th Cir. 2025).

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[3] The Supremacy Clause states that "the Laws of the United States ... shall be the supreme Law of the Land ..., any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[4] The Supremacy Clause's intergovernmental immunity doctrine forbids states from (1) directly regulating the federal government, and (2) discriminating against the federal government or those with whom it deals. *United States v. Washington*, 596 U.S. at 838-39.

Second, federal law delegates to the Department of Homeland Security ("DHS") Secretary the responsibility to "arrange for appropriate places of detention" and authorizes spending appropriated money to "acquire land and to acquire, build, remodel, repair, and operate facilities … necessary for detention." 8 U.S.C. § 1231(g)(1).[5] A court might view HB 1017's prohibition as an obstacle to Congress' intent that DHS be able to choose where to detain individuals and who would operate such facilities and so find that the regulation is preempted.[6]

Both federal appellate courts that have considered state bans on privately operated immigration detention centers have held that such laws violate the Supremacy Clause. *See Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 757-58, 761 (9th Cir. 2022) (holding that California law prohibiting persons from operating private detention facilities in the state was obstacle preempted and violated intergovernmental immunity); *CoreCivic, Inc. v. Governor of New Jersey*, 145 F.4th 315, 319, 321 (3d Cir. 2025) (holding that law forbidding new contracts for civil immigration detention unconstitutionally interferes with federal government's "core power" to enforce immigration laws).

Furthermore, there are other federal court decisions holding that state and local building codes and zoning laws cannot be applied to prevent construction or use of a facility on behalf of the federal government. For example, in *U.S. Postal Service v. City of Hollywood, Florida*, a federal court concluded that the City could not require a building permit for renovation of an existing building for use as a postal facility, even though the Postal Service only leased the building and the contract for renovation was between the private lessor and a private contractor. 974 F. Supp. 1459, 1460 (S.D. Fla. 1997). The court determined that the generally applicable permit procedures would directly intrude into activities of the federal government conducted under its power to operate the Postal Service.[7] *Id*. at 1463.

However, all of the above court decisions are not binding and had dissenting opinions, and the Fourth Circuit has not addressed this type of law. It is possible a reviewing court could view HB 1017 differently. Thus, while it is our view that there is a significant chance that a court would determine that Section 1 of HB 1017 could not be constitutionally applied to prohibit the federal government from using a private entity to construct or operate an immigration detention facility on the government's behalf, Section 1 is not clearly unconstitutional.

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[5] *See also* 48 C.F.R. § 3017.204-90; 8 C.F.R. § 235.3(e) (both providing for federal contracting for detention facilities and related services).

[6] *See Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 762–63 (9th Cir. 2022) (holding that California's ban on private detention facilities was conflict preempted); *but see CoreCivic, Inc. v. Governor of New Jersey*, 145 F.4th 315, 344 (3d Cir. 2025) (Ambro, C.J., dissenting) ("Section 1231 does not evince a clear congressional intent that ICE be permitted to use private immigration detention. Nor does it contemplate that private facilities must be a part of the detention scheme.").

[7] *See also U.S. Postal Serv. v. Town of Greenwich, Conn.*, 901 F. Supp. 500, 502, 507 (D. Conn. 1995) (holding that Town could not enforce generally applicable state building code requirements or require payment of permit fees relating to the construction of a new post office against the U.S. Postal Service who leased the land, the private lessor, or the independent building contractor because the building code conflicted with the federal laws authorizing the Postal Service to construct and operate post offices).

In addition, because it does not expressly ban all privately operated immigration detention facilities, Section 2 of HB 1017 presents less legal risk than Section 1 and is distinguishable from laws banning privately operated immigration detention facilities. The State or local governments could choose to establish a zoning classification to allow such facilities. In addition, the bill does not apply to construction or operation of a detention facility to be used by the federal government. In light of these details, a court might determine that Section 2 of HB 1017, on its face, does not unconstitutionally interfere or conflict with federal government operations, as a federal district court did in *GEO Group, Inc. v. City of Tacoma*. No. 3:18-CV-05233-RBL, 2019 WL 5963112 (W.D. Wash. Nov. 13, 2019).[8] Still, it is our view that a court would likely find Section 2 of HB 1017 unconstitutional under the Supremacy Clause if it actually prevented the federal government from directing a private entity to construct or operate an immigration detention facility on its behalf, thus interfering with authorized federal detention functions.

Nevertheless, this is new legal terrain, and there is no binding legal authority addressing a law exactly like this one. Moreover, the bill can lawfully apply to other types of private detention facilities. Accordingly, we conclude that HB 1017 is not clearly unconstitutional and can be signed into law.

Sincerely,

Anthony G. Brown

cc: The Honorable Susan C. Lee, Secretary of State
Jeremy Baker, Chief Legislative Officer
Victoria L. Gruber, Exec. Director of DLS

[8] In that case, a privately operated immigration detention facility wanted to expand but would have been prevented from getting necessary permits by a new zoning ordinance. The court held that the private contractor's immunity from zoning laws under the Supremacy Clause was "limited by the scope of its obligations to the U.S. government," and since the city ordinance's restrictions on expansion did not necessarily interfere with how the private contractor carried out its current contractual duties with ICE, and there was no evidence that ICE had anything to do with the expansion plans, then the ordinance was not barred on its face by the Supremacy Clause. *Id*. at *5.