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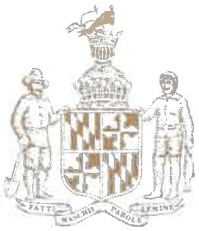

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January 21, 2020

The Honorable Vaughn Stewart
Maryland General Assembly
220 House Office Bldg.
Annapolis, MD 21401

Dear Delegate Stewart:

You asked for advice about proposed legislation to prohibit any State or local entity, or State or local officer or employee, from entering into an immigration detention agreement with any "facility owned, managed, or operated, in whole or part, by a private entity." In addition, the bill also seeks to end all immigration detention agreements by prohibiting State or local entities, as well as State or local officers or employees from entering into such agreements. You asked whether the bill is constitutional and legally sufficient. It is my view that it is, as explained below.

The federal government "has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). Federal law directs the Attorney General of the United States to arrange for appropriate places of detention for aliens detained pending removal or a decision on removal, which might include the "purchase or lease of [an] existing prison, jail, detention center, or other comparable facility suitable for such use." 8 U.S.C. § 1231(g). In addition, federal law permits agreements with state and local governments "for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention." 8 U.S.C. § 1103(a)(11)(B). Moreover, the Supremacy Clause makes clear that federal law is the "supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. IV, cl. 2.[1]

[1] Federal law may preempt state law in one of three ways: where the federal law contains an express preemption provision, where there is a conflict such that "compliance with both federal and state regulations is a physical impossibility," or in those instances where the challenged state law "stands as an obstacle to the accomplishment and execution

At the same time, the Supreme Court has emphasized that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). Thus, "Congress cannot circumvent that prohibition by conscripting the State's officers directly." *Printz v. United States*, 521 U.S. 898, 935 (1997).

> The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1476 (2018).

Your proposal is directed to State and local government entities, officials, and employees. It does not seek to regulate federal activity. The federal government is not prohibited from entering into agreements with private entities. While federal law authorizes the federal government to enter into intergovernmental service agreements with state and local entities, it does not require state and local entities to do so. "Federal law provides states and localities the *option*, not the *requirement*, of assisting federal immigration authorities. [The state law] simply makes that choice for California law enforcement agencies." *United States v. California*, 921 F.3d 865, 889 (9th Cir. 2019) (emphasis in original) (determining that the Department of Justice was unlikely to succeed in its claim that a state law that prohibited state and local law enforcement agencies from assisting the federal government in certain immigration matters was unconstitutional). Likewise, in my view, your proposal is not preempted by federal law but is a lawful exercise of the State's own legislative authority.

Sincerely,

Sandra Benson Brantley
Counsel to the General Assembly

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of the full purposes and objectives of Congress." *See Arizona*, 567 U.S. at 399 (citations omitted).