



COMMONWEALTH of VIRGINIA

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The Honorable Scott Lingamfelter
PO Box 7175
Woodbridge, VA 22195

Dear Delegate Lingamfelter:

This letter is in response to your request for a review and legal assessment of the proposed bill by Prince William County Board of Supervisors Chairman Corey Stewart. Please find attached an analysis memo from the Public Safety and Enforcement Division within my office.

I hope that you find the attached information helpful in your quest for beneficial public safety legislation for the commonwealth. Should you need additional information or have further questions, please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in blue ink that reads "Ken C II".

Kenneth T. Cuccinelli, II
Attorney General of Virginia

Comments on Delegate Lingamfelter's request for analysis and feedback of draft immigration bill:

Executive Summary:

The draft submitted for our review contains many of the same provisions found in Arizona's law. As you know, some of those provisions have been enjoined by the federal court. While we do not agree with the grant of the temporary injunction, and have joined the amicus brief in support of Arizona, it remains the state of the law at the moment. Nevertheless, we think that many areas this bill purports to address are already covered by Virginia law, as noted in an AG opinion issued over the summer. (AG Op. 10-047).

In addition, this bill would have a significant, though indeterminate, fiscal impact as it classifies several new serious felonies. Some of the definitions in the bill sweep too broadly. Finally, some of the employment provisions run contrary to the AG opinion issued this winter. (AG Op. 09-071).

Analysis:

The draft bill has seven operative sections. Our section by section analysis is:

Section 3 This section raises several significant constitutional concerns.

Paragraph (B), which allows officers to make a "reasonable inquiry" into a detainee's immigration status where there is a reasonable suspicion the person is unlawfully present in the United States, is unnecessary. Virginia law already permits law enforcement officers to inquire about the legal status of any person stopped or arrested based upon probable cause or reasonable suspicion, so long as the inquiry does not prolong the lawful detention. (AG Op. 10-047).

The operative provisions of paragraph (C) are already addressed under our "Secure Communities" partnership with ICE. Under this partnership, an arrestee's fingerprints are transmitted to both the FBI and Department of Homeland Security during the booking process and simultaneously checked against both the FBI criminal history records and the biometrics-based immigration records maintained by the (DHS). If any fingerprints match

those of someone in the DHS biometric system, the new automated process notifies ICE. As of this summer, Secure Communities is active in every county in Virginia. In addition, we have used our partnership with ICE to identify and remove more than 500 criminal alien sex offenders from the Commonwealth over the past several years.

Paragraph (D) is unnecessary because law enforcement already has authority to transport prisoners, and there appears to be no need for this additional provision specifically related to persons illegally present in the United States.

Paragraph (G) has the potential to run afoul of Crawford v. Washington, 541 U.S. 36 (2004) and Melendez-Diaz v. Massachusetts, 557 U.S. __ (2009), depending upon the type of record(s) sought to be introduced into evidence.

Paragraph (H) would violate the Virginia Constitution, which requires that any such fees must go to the state literary fund.

Paragraph (J) raises potential equal protection concerns, because it specifically differentiates between United States citizens and other persons in protecting privileges and immunities.

Section 4 This section creates sweeping new classes of felonies and will have a significant fiscal impact.

In addition, many of the definitions within the section create overbreadth concerns and could be portrayed as criminalizing legitimate behavior not intended by the drafter. For instance, human smuggling as defined in the draft bill could potentially subject many drivers-for-hire (taxi, limo, etc.) to prosecution. These concerns could significantly entangle the legislation during the session and create headlines when more targeted legislation could achieve the intended impact.

Additionally, the provisions of this section may have the unintended consequence of securing visas (or at least visa application delays of deportation) for those unlawfully present. By recasting themselves as trafficking “victims,” the unlawfully present persons could then petition/apply for

a T-visas and receive authorization to remain even though they were willing participants in the crime.

The General Assembly in 2007 created a commission to study the problem of human trafficking in Virginia and in 2009 enacted very narrow legislation in response to the commission's work. HB2016 modified Virginia's abduction statutes and created several RICO (Racketeer Influenced and Corrupt Organizations) provisions to address the problem of human trafficking. The sense of the General Assembly at that time was that all other matters related to human trafficking were satisfactorily addressed by other laws of general application in the Code of Virginia, such as Virginia's statutes governing extortion. It seems unlikely the General Assembly would be eager to revisit this issue and retaining this provision may invite a referral of the entire bill to the Crime Commission for additional study.

Section 5 This provision is contrary to the Attorney General's opinion issued in February regarding federal preemption in the area of employment of unauthorized aliens. (AG Op. 09-071). These provisions trigger preemption concerns as they carry a state-law penalty for violations of federal law.

Section 6 As with Section 4, this provision contains very sweeping language that may encounter overbreadth concerns. It may be advisable to include some intent requirement on the part of the potentially liable individual to reduce the risk of criminally penalizing, for example, a taxi driver or hotel manager.

Paragraph (G)(1) contains a reference to "Superior Court"; there is no such court in Virginia.

Section 7 This provision could create an "entanglement" problem along the lines of the "abusive driver fees" debacle from a couple sessions ago. This provision could have significant commerce clause concerns and needs extensive review by attorneys versed in matters of financial market regulation and taxation litigation.

Section 8 It is unnecessary to create a new crime that may raise federalism concerns. If it is desirable, as a matter of public policy, to prevent some individuals from titling or registering vehicles it would be more effective to amend state law to prohibit DMV from issuing titles or registrations absent proof

of legal presence in the Commonwealth. If someone then presents fraudulent documents to DMV to title or register a vehicle, the existing forgery and uttering statute, § 18.2-168, already imposes felony liability. This approach avoids potential preemption problems because it addresses only issues that plainly and inarguably fall within the Commonwealth's traditional police powers. In addition, by not creating a new felony, it would avoid fiscal impact concerns.

Section 9 The provisions of this section raise significant ex post facto/takings concerns that are not easily addressed through revision or redrafting. In addition, because parts of this section create a felony there will be a fiscal impact that cannot be determined.

As prosecutors we recognize the frustration of law enforcement and the public with the failure of the federal government to enforce existing immigration law, and with the fact that offenses are committed by persons who properly should have been removed from the United States. Nevertheless, we must recognize that the framework created by the Constitution gives the federal government primacy in regulating immigration. In short, we recommend that any legislation on these topics be narrowly tailored to address specific items not covered under existing state or federal law. State efforts to strengthen the rule of law by creating additional disincentives to illegal immigration will be most effective when carefully focused upon areas in which the federal government has not occupied the field, and this focus will minimize the likelihood of successful challenges by the federal government. In addition, the enactment of laws of general application, within areas traditionally encompassed by state police powers, may provide law enforcement with opportunities to improve community safety that have as incidental benefits the discouragement of illegal immigration.