VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CULPEPER

MICHAEL V. McCLARY, and CHRISTINA STOCKTON, Plaintiffs, v. SCOTT H. JENKINS, in his official capacity as Sheriff of Culpeper County, and BOARD OF SUPERVISORS OF CULPEPER COUNTY, Defendants.	**Case Number CL 18-1373**

PLAINTIFFS' OPPOSITION TO DEFENDANT SHERIFF JENKINS' DEMURRER

Original
Filed in Culpeper County
Circuit Court Clerk's
Office May 10th, 20 19 @ 2:52pm
DEPUTY
_____, CLERK

INTRODUCTION

Plaintiffs Michael McClary and Christina Stockton sued Sheriff Scott Jenkins for using their Virginia taxpayer money to fund his office's enforcement of federal civil immigration law. Sheriff Jenkins filed a demurrer, but his arguments do not satisfy his burden for dismissal.

First, Sheriff Jenkins asserts that his actions are perfectly acceptable under Virginia law. To the contrary, Virginia law does not authorize him entering into 287(g) Agreements or using Virginia taxpayer funds to enforce federal civil immigration law. In fact, the General Assembly has contemplated bills that *would* authorize those actions, but no such bill has ever become law.

Second, Sheriff Jenkins wrongly argues that Plaintiffs lack standing. Plaintiffs have pleaded that the Board of Supervisors collects their taxes, sends that tax money to the Sheriff's Office, and then Sheriff Jenkins uses his funds to enforce federal civil immigration law under the 287(g) Agreement. That is enough to establish standing to bring this lawsuit.

Third, Sheriff Jenkins contends that federal law preempts this suit in its entirety. Not so. Federal law has nothing to say about whether a state actor can, *as a matter of Virginia law*, use local taxpayer funds to enforce federal civil immigration law. Sheriff Jenkins essentially argues that he can freely spend Virginia taxpayer money to fund enforcement of federal civil law, without the General Assembly's authorization, because federal law says so. This argument violates anti-commandeering principles and is itself unconstitutional.

LEGAL STANDARD

Sheriff Jenkins filed a demurrer and plea in bar, and submitted a single memorandum to support both papers. Sheriff Jenkins later withdrew his plea in bar. As a result, this Court should address his arguments under only the demurrer legal standard.

A demurrer tests the legal sufficiency of the complaint. *Dray v. New Market Poultry Products, Inc.*, 258 Va. 187, 189 (1999). The demurrer "admits the truth of all material facts that are properly pleaded, facts which are implied alleged, and facts which may be fairly and justly inferred." *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991). "Thus, the sole question to be decided by the trial court is whether the facts thus pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against the defendant." *Thompson v. Skate America, Inc.*, 261 Va. 121, 128 (2001).

FACTS

The Board of Supervisors of Culpeper County collects taxes from Plaintiffs McClary and Stockton. Compl. ¶¶ 18-21. The Board uses that revenue as part of its budget. Compl. ¶¶ 22-24. As part of that budget, and after consulting with Sheriff Jenkins, the Board appropriates its funds (including Plaintiffs' tax money) to the Culpeper County Sheriff's Office. Compl. ¶¶ 25-30. Sheriff Jenkins then uses that money. Compl. ¶ 31.

In late 2017, Sheriff Jenkins told the Board that he would begin using that money to fund his enforcement of federal civil immigration law. Compl. ¶¶ 32-33, 35-38. And, in fact, in April 2018, Sheriff Jenkins entered into a 287(g) Agreement with United States Immigration and Customs Enforcement. Compl. ¶¶ 41-43. That 287(g) Agreement intends to authorize Sheriff Jenkins and his deputies to enforce federal civil immigration law. Compl. ¶¶ 44-45. Sheriff Jenkins intends to do just that—enforce federal civil immigration law—with several Sheriff Deputies. Compl. ¶¶ 46. Sheriff Jenkins has, and will continue, to finance his Office's enforcement of federal civil immigration law with Plaintiffs' taxes. Compl. ¶¶ 47-65.

ARGUMENT

I. Sheriff Jenkins violates Virginia law by entering into, and acting under, the 287(g) Agreement.

A. Virginia law prohibits Sheriff Jenkins from enforcing federal civil immigration law.

The duties of Virginia sheriffs "are regulated and defined by . . . statute." *Hilton v. Amburgey*, 198 Va. 727, 729 (1957); *see also* Va. Const. art. VII, § 4 ("The duties and compensation of [sheriffs] shall be prescribed by general law or special act."). No sheriff can act outside the General Assembly's expressly granted authority. *See Brown v. Mitchell*, 308 F. Supp. 2d 682, 698 (E.D. Va. 2004) ("[T]he duties, powers, and obligations of Virginia's constitutional officers are regulated and defined solely by statute."). Sheriff Jenkins agrees. Memo. at 12 ("[A] sheriff's duties are defined by the state constitution and applicable statutes.").

Yet the General Assembly has not authorized Sheriff Jenkins to enforce federal civil immigration law. His entry into the 287(g) agreement, and enforcement of federal civil immigration law, contravenes the Virginia Constitution and the General Assembly's will.

B. The General Assembly has contemplated, but never embraced, Sheriff Jenkins' actions—thus underscoring the lack of Virginia authority for his conduct.

Individual legislators have introduced bills that would authorize Virginia sheriffs to enter into agreements with federal authorities to enforce federal civil immigration law. Not one has become law. Legislators' repeated failed attempts to authorize agreements with federal immigration officials or to enforce federal civil immigration law show that doing so is not within Sheriff Jenkins' current lawful authority.

Courts construe statutes to reflect the General Assembly's intent. *See Tobacco Growers' Co-Operative Association v. Danville Warehouse Co.*, 144 Va. 456, 467 (1926). To that end, courts look "both to legislation adopted *and bills rejected* by the General Assembly." *Tabler v. Bd. of Supervisors*, 221 Va. 200, 202 (1980) (emphasis added). This Court should therefore

consider both adopted *and* rejected legislation to determine whether Virginia law authorizes Sheriff Jenkins to enforce federal civil immigration law.

Members of the General Assembly have introduced bills that would authorize localities (including law enforcement officers) to enter into 287(g) Agreements. Legislators have also introduced bills aimed at punishing localities (including law enforcement) who either did not enforce, or who frustrated the enforcement of, federal immigration law. These bills, attached as **Exhibit A**, include:

- On January 9, 2007, Senator Jay O'Brien introduced a bill seeking to expand the power of state and local law enforcement officials to allow them to enter into agreements with the U.S. Department of Homeland Security to enforce their immigration powers. *See* "SB 1045 Immigration; powers of law-enforcement officers by agreement with Department of Homeland Security," https://lis.virginia.gov/cgi-bin/legp604.exe?071+sum+sb1045.

- On January 10, 2007, Delegate Thomas Davis Rust introduced HB 2926, which was essentially identical to Senator O'Brien's SB 1045. *See* "HB 2926 Immigration; powers of law enforcement officers by agreement with Department of Homeland Security," https://lis.virginia.gov/cgi-bin/legp604.exe?071+sum+HB2926.

- During the 2017 Legislative Session, Delegate Robert G. Marshall introduced HB 1468, which purported to prohibit law enforcement from releasing "an incarcerated alien for whom a lawful detainer order has been received from [ICE], except to transfer custody of such alien to another facility or to an appropriate federal authority." "HB 1468 Incarcerated persons, certain; compliance with detainers, U.S. Immigration and Customs Enforcement," https://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB1468.

- On January 10, 2017, Delegate Charles D. Poindexter introduced HB 2000, which aimed to restrict localities from adopting any ordinance, procedure, or policy restricting the enforcement of federal immigration laws. *See* "HB 2000 Sanctuary policies; prohibited," http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB2000.

- On January 11, 2017, Delegate Benjamin L. Cline introduced HB 2236, which went one step further than HB 2000, to reduce state funding to any locality who did not enforce federal immigration law. *See* "HB 2236 Sanctuary policies; enforcement of federal immigration laws," http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB2236.

- Delegate Poindexter also introduced HB 2001 to require public higher education institutions to cooperate in federal enforcement of immigration laws. *See* "HB 2001 Higher educational institutions; immigration enforcement," http://lis.virginia.gov/cgi-bin/legp604.exe?171+sum+HB2001.

Taken together, these bills aimed to allow localities and local law enforcement officials to enforce federal immigration law to the fullest extent possible—or to punish the failure to do so. They all failed to become law.

Current Virginia law, then, does not authorize local law enforcement officials to enter into agreements with federal government agencies to enforce federal civil immigration law. Nor does it allow local law enforcement to enforce federal civil immigration law more generally. *See Tabler*, 221 Va. at 204 ("[A]ctions by the General Assembly [rejecting proposed amendments explicitly granting Alexandria the power to regulate or prohibit the sale or use of disposable containers] indicate clearly and unambiguously that the legislature did not intend to grant local governing bodies the power to regulate or prohibit the sale or use of disposable containers"). Otherwise, these senators and delegates would have no reason to introduce such bills. *See Tharpe v. Commonwealth*, 18 Va. App. 37, 43 (1994) ("It is elemental that the legislature is presumed to know the law in effect when it enacts subsequent laws.").

Legislators' continued efforts to submit bills that would authorize Sheriff Jenkins' conduct show that no existing Virginia law authorizes him to enter into the 287(g) Agreement or to enforce federal civil immigration law.

C. Sheriff Jenkins points to no statute authorizing his actions.

Had the General Assembly wanted to empower Virginia sheriffs with the ability to enter into 287(g) Agreements or enforce federal civil immigration law, it "would have said so." *See, e.g.*, *Phelps v. Commonwealth*, 275 Va. 139, 142 (2008) ("If the legislature had intended to exclude the defendant from the class of persons whose endangerment is prohibited by Code § 46.2-817(B), the legislature would have said so."). It has not. Virginia law thus prohibits Sheriff Jenkins' execution of the 287(g) Agreement and enforcement of federal civil immigration law. *See Hilton*, 198 Va. at 729.

In the face of this legislative silence, Sheriff Jenkins misconstrues three Code provisions as justifying his actions. These statutes do no such thing. This Court should therefore reject Sheriff Jenkins' argument that the Code permits him to enforce federal civil immigration law.

1. Code § 15.2-1609.

First, Sheriff Jenkins cites Code § 15.2-1609, which states:

> The sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law. He shall enforce the law or see that it is enforced in the locality from which he is elected.

Sheriff Jenkins interprets Code § 15.2-1609 as "expressly" giving him "plenary power to enforce *the law*, without limitation." Memo. at 12. Sheriff Jenkins' interpretation of "*the* law" to be "*all* law[s]" impermissibly strains this phrase beyond its rational understanding. *See Blake v. Commonwealth*, 288 Va. 375, 385 (2014) ("In construing a statute, the plain, obvious, and rational meaning . . . is to be preferred over any curious, narrow, or strained construction."). Being a constitutional officer of the Commonwealth of Virginia, "the law" that the Code authorizes Sheriff Jenkins to enforce is Virginia law.

Sheriff Jenkins' contrary interpretation of Code § 15.2-1609 would authorize him to enforce Wisconsin law; or the law of the People's Republic of China; or even Canon Law or Sharia Law. This Court should avoid that absurd result. *See Sheppard v. Junes*, 287 Va. 397, 403 (2014) (courts "construe the statute's plain language in a manner that avoids absurdity").

Reading this provision to authorize Sheriff Jenkins to enforce all law, including federal law, would also render superfluous *other* statutes. The General Assembly has authorized Sheriff Jenkins to enforce some limited types of federal criminal law in other Code sections. *See, e.g.*, Code § 19.2-81.6. Adopting Sheriff Jenkins' reading of Code § 15.2-1609 impermissibly renders those provisions superfluous. *See Cook v. Commonwealth*, 268 Va. 111, 114 (2004) ("Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.").

Instead, Code § 15.2-1609 permits Sheriff Jenkins to enforce *Virginia* law—and nothing more. It "provid[es] general authority" for a Virginia sheriff to do his or her work. Virginia Attorney General Opinion No. 10-047, 2010 WL 3064578, at *2 n.10 (July 30, 2010), attached as **Exhibit B**. But, as the Attorney General agreed, it does not "expressly authorize sheriffs to make arrests for civil violations of federal immigration laws." *Id.* at *2.

2. Code § 19.2-81.6.

Next, Sheriff Jenkins cites Code § 19.2-81.6 as "*expressly* authoriz[ing] [sheriffs] to enforce the immigration laws of the United States." Memo. at 12. Sheriff Jenkins incorrectly reads this statute to give him freewheeling authority to enforce federal immigration law.

Sheriff Jenkins' mistaken reading of Code § 19.2-81.6 ignores the statute's limiting language. Code § 19.2-81.6 allows Sheriff Jenkins to enforce federal immigration law only "*pursuant to the provisions of this section.*" (Emphasis added). The remainder of that section allows law enforcement officers, "in the course of their regular duties, *to detain an individual* illegally present in the United States who previously has been convicted of a felony and has been deported or left the county upon such conviction." Virginia Attorney General Opinion No. 07-086, 2007 WL 3120673, at *5 (Oct. 15, 2007) (emphasis added), attached as **Exhibit C**. While Code § 19.2-81.6 may deal with detentions and arrest, then, it has nothing to do with Sheriff Jenkins' entry into a 287(g) Agreement.

Nor does Code § 19.2-81.6 have anything to do with enforcement of federal *civil* immigration law through detentions and arrests. The statute's concern is about individuals with felony convictions who left the country. Code § 19.2-81.6 (subsection (ii)). This focus is on federal *criminal* immigration law and "does not apply to the vast majority of aliens." Virginia Attorney General Opinion No. 07-086, 2007 WL 3120673, at *3. This statute "limits the ability of Virginia law-enforcement officers to arrest and detain individuals for violations of federal

immigration" *because* it does not speak to civil violations of federal immigration law. *Id.* at *6. Simply, Code § 19.2-81.6 does not authorize entering into a 287(g) Agreement or enforcing federal *civil* immigration law. Virginia Attorney General Opinion No. 10-047, 2010 WL 3064578, at *2 ("[T]he Code [does not] expressly authorize sheriffs to make arrests for civil violations of federal immigration laws."); Virginia Attorney General Opinion No. 07-086, 2007 WL 3120673, at *6 (concluding that Virginia law provides "authority" to detain and arrest individuals for "violations of federal *criminal* immigration law" (emphasis added)).

3. Code § 15.2-1730.1.

Sheriff Jenkins lastly references Code § 15.2-1730.1, which permits sheriffs in some situations to enter into agreements with other governmental entities to provide law enforcement services. Sheriff Jenkins misconstrues this statute as permitting him to enter into *any* agreement with *any* governmental entity. Memo. at 12. He again reads the Code too broadly, contrary to principles of statutory interpretation.

Code § 15.2-1730.1 supplements Code § 15.2-1730. In turn, Code § 15.2-1730 authorizes law enforcement to call upon officers of adjoining localities to help in emergencies. The Court should read Code § 15.2-1730.1 in this context and harmonize these Code provisions. *Lucy v. City of Albemarle*, 258 Va. 118, 129-30 (1999) (related statutes should be read together to "make the body of the laws harmonious and just in their operation"). And in this context, Code § 15.2-1730.1 concerns a sheriff's ability to enter into agreements with *localities* to provide law enforcement assistance. Code § 15.2-1730 (authorizing chief law enforcement officer "in case of an emergency [to] call upon . . . an adjoining county or city, or towns in adjoining counties for assistance"); *see also* Virginia Attorney General Opinion No. 03-056, 2003 WL 22680739, at *2 & nn.6-8 (Oct. 8, 2003) (noting that local law enforcement may act beyond their territorial limits

in some situations, as prescribed by Code §§ 15.2-1724 to 15.2-1730.1, which permits inter-jurisdictional law enforcement authority of counties, cities, and towns), attached as **Exhibit D**.

Other statutory neighbors confirm that Sheriff Jenkins overextends Code § 15.2-1730.1. The General Assembly authorized some local actors to "enter into a mutual aid agreement *with the appropriate federal authorities*" when the Commonwealth has granted exclusive jurisdiction over property or territory to the Federal Government. Code § 15.2-1728 (emphasis added). That the General Assembly has expressly authorized agreements with federal authorities in other statutes confirms that the General Assembly did not intend Code § 15.2-1730.1 to allow Sheriff Jenkins to enter into agreements with the Federal Government. *See Brown v. Commonwealth*, 284 Va. 538, 545 (2012) ("When the General Assembly includes specific language in one statute, but omits that language from another statute, courts must presume that the exclusion of the language was intentional." (alterations omitted)); *see also Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337 (2011) (explaining that courts should "presume that the legislature chose, with care, the words it use[s]").

II. Plaintiffs have standing to sue Sheriff Jenkins.

Sheriff Jenkins claims that Plaintiffs are not the proper parties to challenge his conduct because they lack standing. His position is three-fold. First, he argues that Plaintiffs do not show a "sufficient nexus" between the 287(g) Agreement and their injury. Second, he contends that Plaintiffs fail to "allege specific local taxpayer funded costs." Finally, he argues that Plaintiffs do not track every taxpayer dollar to every dollar spent under the 287(g) Agreement. Memo. at 8. None of these arguments show that Plaintiffs lack standing.

A. Plaintiffs alleged a specific nexus between Sheriff Jenkins' entry into and actions under the 287(g) Agreement and their injury.

Sheriff Jenkins first asserts that Plaintiffs failed to establish "a sufficient nexus" between his actions and their injury. Memo. at 8. That argument falls flat. Sheriff Jenkins is using Plaintiffs' local taxpayer money to fund his unconstitutional enforcement of federal civil immigration law. That is a sufficient nexus to establish standing.

"A plaintiff has standing to institute a declaratory judgment proceeding if it has a justiciable interest in the subject matter of the proceeding, either in its own right or in a representative capacity." *W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 383 (1996). Plaintiffs adequately pleaded a justiciable interest so long as they alleged facts "demonstrat[ing] an actual controversy between the plaintiff and the defendant, such that [plaintiff's] rights will be affected by the outcome of the case." *Id.*

In the taxpayer context, standing is "premised on the peculiar relationship of the taxpayer to the local government that makes the taxpayer's interest in the application of municipal revenues direct and immediate, giving local taxpayers a personal stake in the outcome of the controversy." *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 363 (2017). "As a result, local taxpayers possess the common law right to challenge the legality of expenditures by local governments, distinct from federal or state standing requirements." *Id.*

That's precisely what Plaintiffs alleged. The Board of Supervisors collects Plaintiffs' taxes and then funnels that money to Sheriff Jenkins to finance his actions under the 287(g) Agreement. The Culpeper County Board of Supervisors collects Plaintiffs' taxes. Compl. ¶¶ 18-21. The Board uses that tax money to populate its funds, including the General Fund. Compl. ¶¶ 22-24. And then the Board appropriates monies from that General Fund to the Culpeper County Sheriff's Office. Compl. ¶¶ 25-29. The Board and Sheriff Jenkins work together to

decide how to fund Sheriff Jenkins' policies and priorities, and then Sheriff Jenkins authorizes use of those taxpayer funds. Compl. ¶¶ 30-31. And Sheriff Jenkins has used, and will continue to use, those funds to finance his enforcement of federal civil immigration law under the 287(g) Agreement. Compl. ¶¶ 41-65.

Plaintiffs thus pleaded how Sheriff Jenkins spends their taxpayer money to enforce federal civil immigration law in violation of Virginia law. That is a sufficient nexus to allege standing. *See Lafferty*, 293 Va. at 363.

B. Plaintiffs have satisfied the *Lafferty* standard to show taxpayer standing.

Sheriff Jenkins next asserts that Plaintiffs have not shown standing because they do not "allege any specific local taxpayer funded costs associated with the [287(g)] Agreement." Memo. at 8. This is wrong both on the law and the facts. Virginia law does not impose such an exacting standard and, even if it did, Plaintiffs satisfied it.

1. Sheriff Jenkins overstates taxpayer standing requirements, and Plaintiffs have identified more than litigation defense costs.

Citing *Lafferty*, Sheriff Jenkins contends that Plaintiffs "must specifically plead . . . *the specific costs or expenditures of local taxpayer funds*." Memo. at 9. Neither *Lafferty* nor the cases it cited impose a pleading standard demanding that specificity.

The *Lafferty* Court affirmed the dismissal of a lawsuit challenging a school board's expansion of an anti-discrimination and anti-harassment policy because it "lack[ed] allegations of costs or expenditures connected to the policies implemented by the [b]oard." 293 Va. at 363. The Supreme Court held that the plaintiff lacked standing because the only allegation of costs and expenditures was that the school board would have to defend lawsuits. *Id.* (holding that the "cost of potential litigation to vindicate a policy . . . is not a government expenditure authorized by the policy itself"). In other words, the alleged costs and expenditures bore no relation to the

school board's challenged implementation of the anti-discrimination and anti-harassment policy. Instead, those costs were speculative, reactive measures the school board *might* have to take, secondary to the challenged policy.

Lafferty simply applied longstanding Virginia law that appropriating and spending taxpayer funds to finance a program will confer standing on local taxpayers. *See, e.g.*, *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827, 830 (1967) (noting that "taxpayers have the right to resort to equity to restrain local government officials from exceeding their powers in any way which will injuriously affect the taxpayers, such as making an unauthorized appropriation of corporate funds"); *Appalachian Electric Power Co. v. Town of Galax*, 173 Va. 329, 333 (1939) (holding that taxpayers could seek equitable relief to prevent issuance of bonds which they alleged would result in an illegal tax burden); *Vaughan v. Town of Galax*, 173 Va. 335, 341 (1939) (same).

Lafferty did not create a heightened pleading standard for taxpayer standing to specify specific costs or expenditures. *See Hale v. Town of Warrenton*, 293 Va. 366, 368 (2017) (holding that "a complaint need not descend into statements giving details of proof in order to withstand demurrer").

Unlike *Lafferty*, Plaintiffs do not contend that the costs and expenses establishing their standing are simply those incurred in defending this very lawsuit. Plaintiffs sufficiently alleged that Sheriff Jenkins' entry into and actions under the 287(g) Agreement—to enforce federal civil immigration law—implicates expending local taxpayer money. The 287(g) Agreement itself contemplates and requires these costs and expenses.

In no circumstance could Sheriff Jenkins enforce federal civil immigration law without spending some type of local funding. Nor does Sheriff Jenkins suggest that to be the case.

Instead, Sheriff Jenkins acknowledged the cost of implementing the 287(g) Agreement when representing that the current budget would cover the costs needed to do so. Compl. ¶¶ 36-37. Sheriff Jenkins represented to the Board that "he did not foresee an enormous cost related to the 287(g) Agreement"—meaning that he foresaw, at a minimum, some costs. Compl. ¶ 35. In contrast to the ancillary litigation costs considered in *Lafferty*, here the expenses that give rise to standing result directly from the 287(g) Agreement itself and the enforcement of federal civil immigration law.

Unlike *Lafferty*, Plaintiffs do more than identify the fact that Sheriff Jenkins might spend money to defend a policy. Instead, Sheriff Jenkins will spend the Sheriff Office's funds—appropriated from coffers that include Plaintiffs' Culpeper County taxes—to enforce federal civil immigration law. That is enough to satisfy the *Lafferty* standard.

2. Plaintiffs have identified specific costs and expenditures funded by local taxpayer money.

Never before has Virginia law required a taxpayer to plead "*the specific costs or expenditures of local taxpayer funds*" to establish taxpayer standing. Memo. at 9. *Lafferty* did not fundamentally upend "Virginia's notice pleading regime." *Allison v. Brown*, 293 Va. 617, 624 (2017); *see also* Rule 1:4(d) ("Every pleading . . . shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.").

But even if Plaintiffs had to identify a specific link between taxes collected from Plaintiffs and funds spent by Sheriff Jenkins, they have met that standard. Plaintiffs pleaded that the Board of Supervisors collects taxes from Plaintiffs, and then appropriates that tax money to Sheriff Jenkins and his Sheriff's Office. Compl. ¶¶ 18-31. Plaintiffs have also identified several ways in which Sheriff Jenkins will spend the Sheriff's Office's funds to enforce federal civil immigration law under the 287(g) Agreement. Compl. ¶¶ 48-65. If nothing else, there are

personnel costs incurred under the 287(g) Agreement, as Sheriff Jenkins and his deputies are not working for free. Every minute that these law enforcement officers act under the 287(g) Agreement, the Sheriff's Office is paying them using its budget funded with Plaintiffs' local taxpayer money. Compl. ¶¶ 48-52.

C. That Sheriff Jenkins' office receives funds from multiple sources is of no concern.

Sheriff Jenkins' final argument on standing is that Plaintiffs did not "delineate whether the unidentified and speculative expenses were paid from state or local funds." Memo. at 8. Sheriff Jenkins identifies various sources from where he receives funds, but acknowledges that those funds include "local taxpayer revenues." Memo. at 10-11. The implication of Sheriff Jenkins's argument is that because he has not set up an accounting system that tracks how he spends every dollar that comes into the office, he can defeat any taxpayer suit. Memo. at 11-12. Not so.

1. This argument relies on disputed facts and thus is not suited for demurrer.

Sheriff Jenkins originally filed a demurrer and plea in bar. Thus, his single memorandum supporting both his demurrer and plea in bar alleged a series of disputed facts intended only for his plea in bar. Memo. at 2-3. His standing arguments rely on these disputed facts when he claims that the complaint "mischaracterizes" the Sheriff Office's budget. Memo. at 10-12. Plaintiffs dispute Sheriff Jenkins' argument that only non-taxpayer money funds his enforcement of federal civil immigration law under the 287(g) Agreement.

Later, Sheriff Jenkins withdrew his plea in bar but submitted no memorandum addressing only his demurrer arguments. His operative memorandum thus leaves standing arguments that rely on disputed facts. Yet a "ruling upon a demurrer . . . is confined to the legal sufficiency of a pleading, and does not involve a consideration of disputed facts." *Hop-In Food Stores, Inc. v. Serv-N-Save, Inc.*, 237 Va. 206, 209 (1989).

This Court should thus deny the remainder of Sheriff Jenkins' standing arguments at this stage in the litigation. *See CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (1993) ("[E]ven though a . . . complaint may be imperfect, when it is drafted so that [the] defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer.").

2. Virginia law does not place the impossible burden on Plaintiffs to create accounting methods for the Sheriff's Office.

Even if the Court considers this argument on its merits, the Court should reject it. Sheriff Jenkins cites no case holding that a taxpayer must show through accounting methods that the *very* taxpayer dollar the Board of Supervisors collected was the *exact* dollar Sheriff Jenkins spent to fund the challenged program. That standard is not Virginia law.

In comparable situations with commingled funds, the Supreme Court has rejected placing similar "impossible burden[s]" on a party. *Bernardini v. Central National Bank of Richmond*, 223 Va. 519, 521-22 (1982) (rejecting the argument that a bank must inquire into the source of every deposit to determine whether they were exempt from a general depositor-creditor's claim). By commingling Culpeper taxpayer funds with other monies, Sheriff Jenkins loses whatever benefits he might be able to claim—such as defenses against suit—from the other monies. *See, e.g.*, *Bernardini*, 223 Va. at 522 (holding that depositing exempt money "in a general account and commingling them with other nonexempt money . . . lost whatever exemptions [that money] may have had"); *Smoot v. Smooth*, 233 Va. 435, 441 (1987) (when a spouse commingles separate property, rather than keeping it separate, that commingled property is no longer separate and is subject to equitable distribution).

In fact, rather than placing the burden on *Plaintiffs* to untangle Sheriff Jenkins' failure to take adequate accounting measures, the Supreme Court has suggested in related cases that *Sheriff Jenkins* bears the burden of disproving standing. In *Tauber v. Commonwealth*, the Court held

that when a trustee commingles their property with trust property, and later wants to separate their own property from the trust, they bear "the burden of proving how much of the commingled funds they owned personally." 263 Va. 520, 540-41 (2002). Trustees bear "this evidentiary burden because when trustees conduct their affairs in a manner that prevents a precise accounting of trust assets, the trustees, rather than the trust, must suffer the consequences." *Id.* at 541.

The Supreme Court has applied that evidentiary burden to the party who has control over the accounts in other contexts. *See, e.g.*, *Carlson v. Wells*, 281 Va. 173, 185-86 (2011) (collecting cases where this burden was applied to "the executor of an estate and an agent for property entrusted to him by a principal," and then applying it to the custodian of a Virginia Uniform Transfers of Minors Act account). It applies with equal force here. Even if this evidentiary dispute were proper for a demurrer, Sheriff Jenkins has failed to show that the money he spent to enforce federal civil immigration law came from these non-taxpayer sources. Instead, the pleaded facts still establish that Plaintiffs' claims against Sheriff Jenkins are "connect[ed] to government expenditures"—their taxpayer dollars. *Lafferty*, 293 Va. at 363.

3. Culpeper taxpayer money facilitates Sheriff Jenkins' enforcement of federal civil immigration law, both directly and indirectly.

In any event, *all* taxpayer money flowing from the Board to the Sheriff's Office enables Sheriff Jenkins' enforcement of federal civil immigration law. There are direct expenditures. *See, e.g.*, Compl. ¶¶ 48-65. But *any* taxpayer money spent by the Sheriff's Office enables enforcement of federal civil immigration law. The 287(g) Agreement itself recognizes this indirect support. *See* Compl. Ex. 1 at 5 (ensuring that the Sheriff's Office is responsible to pay the salaries of "those personnel *performing the regular functions* of the participating [Sheriff's Office] personnel while they are receiving training" under the 287(g) Agreement (emphasis added)). As a result, all tax money funding the Sheriff's Office enables Sheriff Jenkins to enforce

federal civil immigration law in violation of Virginia law. Whether other sources provide other funding to Sheriff Jenkins' office does not change that conclusion.

III. Federal law does not preempt this lawsuit.

A. Sheriff Jenkins wrongly applies the concept of preemption to this case.

Sheriff Jenkins argues a handful of preemption doctrines without explaining how they work. He starts with field and conflict preemption. *See* Memo. at 5. Ordinary preemption is "a substantive defense to state law claims" and includes doctrines such as "express preemption, implied conflict preemption[,] and implied field preemption." *Anthony v. Verizon Virginia, Inc.*, 288 Va. 20, 30 (2014). Under these doctrines, Sheriff Jenkins argues that this Court lacks "jurisdiction to rule on immigration matters" and so must dismiss the case. Memo. at 7-8.

Sheriff Jenkins' preemption arguments boil down to (1) federal law preempts state law, and (2) Sheriff Jenkins is enforcing federal civil immigration law, so (3) this Court cannot adjudicate his enforcement of federal civil immigration law. That framing is incorrect. Without doubt, federal law "shall be the supreme Law of the Land." U.S. Const. art. VI. But this lawsuit does not implicate *the Federal Government's* ability to enforce *federal* immigration law.

Instead, Plaintiffs challenge whether Sheriff Jenkins can, under Virginia law, unilaterally appropriate and spend state taxpayer money to enforce federal civil immigration law in Culpeper County. *See supra* Argument Sections I-II. This lawsuit, about whether *Virginia* law permits *Virginia* actors to spend *Virginia* money to enforce *federal* law, does not question whether *federal* actors may spend *federal* money to enforce *federal* law. Sheriff Jenkins' reference to a handful of state habeas cases addressing state courts' inability to adjudicate the legality of *federal* detention under *federal* law are thus inapposite. Memo. at 7.

B. These preemption doctrines are not jurisdictional.

Sheriff Jenkins also incorrectly argues that field and conflict preemption doctrines deprive this Court of jurisdiction to compel dismissal. Memo. at 7-8. "Clearly," a "circuit court possesses jurisdiction over state law claims"—including the ability to evaluate *field preemption* and *conflict preemption* defenses. *Anthony*, 288 Va. at 32. Field and conflict preemption defenses are "a matter for trial" once jurisdiction is established. *Id.* Sheriff Jenkins cannot make these doctrines jurisdictional to deprive Plaintiffs of their day in court. *See Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139 (2013) (warning trial courts against "incorrectly . . . short-circuit[ing] litigation pretrial and . . . decid[ing] the dispute without permitting the parties to reach a trial on the merits").

Instead, by linking preemption to jurisdictional concerns, Sheriff Jenkins implicates *complete preemption.* Complete preemption is a "jurisdictional issue" about whether "it was the intent of Congress to make the cause of action a federal cause of action . . . despite the fact that the complaint identifies only state claims." *Anthony*, 288 Va. at 30. But complete preemption does not apply here, either.

"Complete preemption is a doctrine which transmutes state law claims into federal claims and permits federal courts to exercise their removal jurisdiction, even if federal issues are not pleaded on the face of the complaint." *Id.* at 29-30. Plaintiffs' lawsuit about whether *Virginia* law permits *Virginia* actors to spend *Virginia* tax money is not one of those "state claims [that] implicate uniquely federal policy concerns" to which complete preemption applies. *Id.* at 30.

C. Sheriff Jenkins' "preemption" theory is an unconstitutional commandeering theory.

Sheriff Jenkins' concept of preemption violates the United States Constitution. Sheriff Jenkins argues that this Court cannot determine whether Virginia law forbids state funds from financing federal law, even if the General Assembly has refused to authorize that conduct. And

the reason this Court has its hands tied, Sheriff Jenkins says, is because Congress has the final say in immigration matters.

This argument wrongly minimizes Virginia's role in the Nation's constitutional structure. Contrary to Sheriff Jenkins' argument, "*of course*" Virginia courts have the final say about whether Virginia funds are being appropriated and spent in accordance with Virginia law. *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) (emphasis added) ("The highest court of each State, of course, remains the final arbiter of what is state law."). The Federal Government's authority over immigration does not nullify Virginia's ability to dictate how Sheriff Jenkins can spend Virginia funds. By using the Supremacy Clause to justify his illegal use of local Virginia taxpayer money to fund federal programs, Sheriff Jenkins argues that the Federal Government can force State action. But that commandeering argument itself violates the Constitution.

"[T]he [United States] Constitution established a system of dual sovereignty." *Printz v. United States*, 521 U.S. 898, 918 (1997). "Although the States surrendered many of their powers to the new Federal Government, they retained a residuary and inviolable sovereignty." *Id.* at 918-19. "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people." *Id.* at 919-20.

As a result, the Federal Government "cannot compel the States to enact or enforce a federal regulatory program." *Id.* at 935. "[S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id.*; *see also, e.g.*, *id.* at 933-34 (holding unconstitutional federal law requiring state law enforcement officers to take actions supporting federal handgun legislation); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding unconstitutional federal law directing States to dispose of radioactive waste). And under that

same principle, Sheriff Jenkins is wrong to argue that, when he is "cloak[ed] in federal authority to enforce federal civil immigration law," he can freely spend Virginia taxpayer money without Virginia's ability to say otherwise. Memo. at 7.

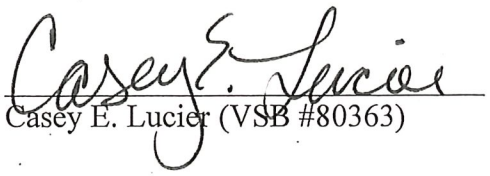
The Court should reject Sheriff Jenkins' "preemption" argument for what it is: unconstitutional commandeering.

CONCLUSION

The Court should deny Sheriff Jenkins' demurrer. If the Court grants the demurrer, Plaintiffs ask for leave to file an amended complaint or for any other additional relief to address any infirmities the Court identifies. Rule 1:8 ("Leave to amend shall be liberally granted in furtherance of the ends of justice."); *AGCS Marine Insurance Co. v. Arlington County*, 293 Va. 469, 487 (2017) (holding that, "[a]fter sustaining a demurrer, a court should grant a motion for leave to amend except" in specifically delineated circumstances not present here).

Dated: May 10, 2019

Respectfully Submitted,



Casey E. Lucier (VSB #80363)

Vishal Agraharkar (VSB #93265)
Eden B. Heilman (VSB #93554)
Jennifer Safstrom (VSB #93746)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
Telephone: (804) 523-2151
Facsimile (804) 649-2733
vagraharkar@acluva.org
eheilman@acluva.org
jsafstrom@acluva.org

Counsel for Plaintiffs

Dale G. Mullen (VSB #48596)
Casey E. Lucier (VSB #80363)
Travis C. Gunn (VSB #86063)
Ashley P. Peterson (VSB #87904)
MCGUIREWOODS LLP
800 East Canal Street
Richmond, Virginia 23219
Phone: (804) 775-7695
Fax: (804) 698-2153
dmullen@mcguirewoods.com
clucier@mcguirewoods.com
tgunn@mcguirewoods.com
apeterson@mcguirewoods.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that the foregoing document was transmitted First Class Mail, postage prepaid, and by email this May 10, 2019, to:

Bobbi Jo Alexis, Esquire
County Attorney
Culpeper County Attorney's Office
306 N. Min Street
Culpeper, VA 22701
Counsel for Board of Supervisors of Culpeper County

Rosalie Pemberton Fessier, Esquire
TimberlakeSmith
25 North Central Avenue
P. O. Box 108
Staunton, VA 24402-0108
Counsel for Sheriff Scott H. Jenkins

Casey E. Lucier (VSB #80363)
Counsel for Plaintiffs