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 THE BOARD OF SUPERVISORS OF CULPEPER COUNTY'S AMENDED DEMURRER

Original

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

DEPUTY

_____, **CLERK**

INTRODUCTION

The Board of Supervisors of Culpeper County's Amended Demurrer seeks to dismiss one claim: Plaintiffs Michael McClary and Christina Stockton's Count III, which seeks to declare—as unconstitutional, unlawful, *ultra vires*, and void *ab initio*—the Board's appropriation of funds for carrying out the 287(g) Agreement between Sheriff Scott Jenkins and United States Immigration and Customs Enforcement. As a matter of Virginia law, the Board has only those powers granted to it by the General Assembly. And the General Assembly *has not* granted the Board the power to appropriate funds to Sheriff Jenkins to enforce federal civil immigration law.

The Board seeks to dismiss Count III because, they argue, Plaintiffs lack standing to challenge how their taxpayer dollars have been and will be spent on the 287(g) Agreement. The Board alternatively argues that Sheriff Jenkins had authority to enforce federal civil immigration law, meaning that the Board's appropriations to that effect were permissible.

The Board dresses up its arguments in the guise of "several legal defects," Am. Demurrer at 1, but its core, repeated contention is that Plaintiffs cannot pursue their case because they did not identify—when starting this lawsuit—specific expenditures flowing from taxpayer contributions used to carry out the 287(g) Agreement. That argument fails because Plaintiffs do not challenge an isolated policy untethered to expenditures, but an entire program that has no function without funding from the taxpayers of Culpeper County. The Board's alternative argument fails to support dismissal because no Virginia law gives Sheriff Jenkins that authority. To the contrary, the General Assembly has repeatedly rejected attempts to do so.

LEGAL STANDARD

"A demurrer accepts as true all facts properly pled, as well as reasonable inferences from those facts." *Steward v. Holland Family Properties, LLC*, 284 Va. 282, 286 (2012). At the

demurrer stage, it is not the function of the trial court to decide the merits of the allegations in a complaint, but only to determine whether the factual allegations pleaded and the reasonable inferences drawn therefrom state a cause of action. *Riverview Farm Associates v. Board of Supervisors of Charles County*, 259 Va. 419, 427 (2000). To survive a challenge by demurrer, a pleading must have "sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Eagle Harbor, L.L.C. v. Isle of Wight County*, 271 Va. 603, 611 (2006).

FACTS

The Board of Supervisors of Culpeper County collects taxes from Plaintiffs. 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. The Board violates Virginia law by appropriating funds to Sheriff Jenkins without prohibition on the use of those monies to enforce federal civil immigration law.

The Board has "only those powers that are expressly granted [by the General Assembly], those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Johnson v. Arlington County*, 292 Va. 843, 853 (2016); Compl. ¶ 88.

The Board does not dispute that the "General Assembly has not expressly granted the Board of Supervisors the power to appropriate funds, including local tax revenue, to any sheriff to pay for the salaries, costs, or expenses relating to the enforcement of federal civil immigration law." Compl. ¶ 91. Nor could it—because that is *not* the law of Virginia. *See infra* Section III.B (identifying bills introduced by individual legislators, but not passed into law, that would have allowed the enforcement of federal civil immigration law or entry into 287(g) Agreements).

Nor does the Board dispute that the power to appropriate funds, including local tax revenue, to any sheriff to pay for costs and expenses relating to the enforcement of federal civil immigration law "is not necessarily or fairly implied from those powers that the General Assembly has expressly granted" to it, and "is not essential and indispensable." Compl. ¶¶ 92-93.

Plaintiffs pleaded that the Board "may condition its appropriation of funds, including local tax revenue, to Sheriff Jenkins on Sheriff Jenkins' acceptance of certain restrictions on the use of the appropriated funds." Compl. ¶ 90. So the Board could condition its appropriation of Plaintiffs' taxpayer funds to Sheriff Jenkins in that Sheriff Jenkins could not use those funds to facilitate his enforcement of federal civil immigration law. *See* Compl. ¶ 97.

The Board appears to argue against this factual allegation by referencing Code § 15.2-1600, though it does not otherwise discuss this provision. Am. Demurrer at 3. Even so, this statutory provision does not apply to limit Plaintiffs' lawsuit. Code § 15.2-1600(b) simply prohibits the

Board from passing an ordinance or other law that either requires Sheriff Jenkins "to exercise a power or perform a duty" that is discretionary, or limits Sheriff Jenkins' "powers or duties" under Virginia law. Code § 15.2-1600(B) does not address the Board's ability to condition its appropriation of funds. And, even if it did, Code § 15.2-1600(B) does not limit the Board's ability to condition its funds to prevent Sheriff Jenkins from spending money *contrary to* Virginia law.

Considering these pleaded facts under the applicable law, the Board's appropriation of Plaintiffs' taxpayer funds to Sheriff Jenkins, which Sheriff Jenkins has and will continue to use to enforce federal civil immigration law, is unconstitutional. *Whiting v. West Point*, 88 Va. 905, 906 (1892) ("A municipal corporation . . . is a mere local agency of the state, having no other powers than such as are clearly and unmistakably granted by the law-making power."); *see also* Va. Const. art. VII, § 2. Plaintiffs have stated a claim for relief that survives demurrer.

The Board does not confront this constitutional limitation on its appropriation of funds to finance the enforcement of federal civil immigration law. It instead points to Code § 15.2-1605.1 as allowing it to "supplement the compensation of the sheriff, or any of their deputies or employees, above the salary of any such officer, deputy or employee, in such amounts as it may deem expedient." Am. Demurrer at 12. The Board cites no authority for how this statutory provision—which simply allows the Board to appropriate funds to Sheriff Jenkins—overrides the constitutional limitations on *the purposes* for which those funds may be appropriated. *See Miller v. Commonwealth*, 172 Va. 639, 648 (1939) (holding that courts should read statutes "in harmony with the Constitution" when that construction "conforms to the general purpose of the statute").

II. Plaintiffs have standing to bring this suit.

A. Plaintiffs adequately pleaded taxpayer 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). To establish such an interest at the pleading stage, the plaintiff must allege 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.*

Plaintiffs' allegations meet this standard by pleading that the Board collects Plaintiffs' taxes and then funnels that money to Sheriff Jenkins to finance his illegal actions under the 287(g) Agreement:

- The Board collects Plaintiffs' taxes. Compl. ¶¶ 18-21.
- The Board uses that tax money to populate its funds, including the General Fund. Compl. ¶¶ 22-24.
- 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.
- Sheriff Jenkins has used, and will continue to use, those taxpayer funds (received from the Board) to finance his enforcement of federal civil immigration law under the 287(g) Agreement. Compl. ¶¶ 41-65.

Plaintiffs thus pleaded how the Board collects Plaintiffs' taxpayer money; the Board appropriates that taxpayer money to Sheriff Jenkins with no condition prohibiting Sheriff Jenkins from using that money to enforce federal civil immigration law; and then Sheriff Jenkins spends

Plaintiffs' taxpayer money to enforce federal civil immigration law in violation of Virginia law. That is enough to allege taxpayer standing. *See Lafferty*, 293 Va. at 363; *W.S. Carnes*, 252 Va. at 383.

B. The Board's argument that Plaintiffs lack standing for failing to allege specific expenditures and costs is factually and legally incorrect.

The Board argues that Plaintiffs lack standing because they did not allege specific expenditures or costs linked to Sheriff Jenkins' enforcement of federal civil immigration law. Am. Demurrer at 8-10. The Board is incorrect both on the law and on the pleaded facts.

1. The Board overstates the pleading requirements for taxpayer standing.

The Board supports its legal argument about taxpayer pleading requirements with conclusory references to Virginia cases that have considered taxpayer standing, including repeated references to *Lafferty*. Am. Demurrer at 8-12. Contrary to the Board's assertion, neither *Lafferty* nor any other Virginia authority undermines Plaintiffs' standing here. Instead, *Lafferty* synthesized Virginia's history of taxpayer standing as follows: "[T]he common thread in the line of precedent . . . relies on [a] key element: the connection to government expenditures." 293 Va. at 363.

From that summary, the Board seeks to apply a pleading requirement that Plaintiffs specifically identify the expenditures and costs for which their taxpayer dollars have been earmarked. Neither *Lafferty* nor the cases cited therein require this specificity.

In *Lafferty*, the Supreme Court upheld the dismissal of a complaint that challenged 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." *Id.* The Court held that the plaintiff lacked standing because the only allegation of costs and expenditures was that the school board would have to defend actions, like Lafferty's, in court. In other words, the costs and expenditures alleged by Lafferty bore no relation to the school board's

implementation of the anti-discrimination and anti-harassment policy. Rather, the alleged costs and expenditures stemmed from speculative reactive measures the school board would have to take in response to actions taken by others (the filing of lawsuit) that the school board could not control. The policy itself had no economic effect on the taxpayers.

Prior cases confirm the importance of the distinction drawn in *Lafferty*, making clear that the appropriation of taxpayer funds in an illegal manner confers standing on the taxpayers challenging those appropriations. *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, 333 392 (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, 4 S.E.2d 386, 389 (1939) (same)

Unlike the ancillary litigation costs considered in *Lafferty*, Plaintiffs do more than argue that the Board will have costs and expenditures related to its defense against this lawsuit. Plaintiffs alleged that the Board's "costs" and "expenditures" is the appropriation from the Board to Sheriff Jenkins, which includes Plaintiffs' taxpayer money. Compl. ¶¶ 18–31. And Plaintiffs alleged that Sheriff Jenkins then uses Plaintiffs' taxpayer money to enforce federal civil immigration law under the 287(g) Agreement. Compl. ¶¶ 45–65. To be sure, under no circumstances could Sheriff Jenkins enforce federal civil immigration law without expending his Office's funds, which include Plaintiffs' taxpayer money—*as provided by the Board.*

These "costs" and "expenditures" of both the Board and Sheriff Jenkins establish Plaintiffs' taxpayer standing under *Lafferty* and Virginia law. The Board cannot successfully argue, on these

pleaded facts, that Plaintiffs' claims against the Board are not "connect[ed] to government expenditures." *Lafferty*, 293 Va. at 363.

2. Even if *Lafferty* imposed a heightened pleading standard, Plaintiffs met it.

Though Plaintiffs need not plead a specific link between Plaintiffs' collected taxes and the expenditures related to Sheriff Jenkins' illegal activity, Plaintiffs have still met that burden. For example, Plaintiffs pleaded that the Board collects taxes from Plaintiffs and then appropriates that tax money to Sheriff Jenkins and his Sheriff's Office. Compl. ¶¶ 18–31. If nothing else, Sheriff Jenkins uses that taxpayer money to pay the salaries of the employees working under the authority of the 287(g) Agreement. Compl. ¶¶ 48–52. This expenditure is just one of the ways Sheriff Jenkins impermissibly spends Plaintiffs' taxpayer money to enforce federal civil immigration law under the 287(g) Agreement—taxpayer money appropriated by the Board. *See also* Comp. ¶¶ 53–65.

Against these pleaded facts, the Board says that "no challenged expenditures are particularly identified" in the complaint, and that the complaint "lacks any allegations as to any specific costs incurred or expenditures made by the [Board]." Am. Demurrer at 9. These arguments ignore the pleaded facts and are therefore inappropriate on demurrer. *Steward*, 284 Va. at 286.

D. Whether Sheriff Jenkins receives funding from other sources does not preclude standing to challenge to the Board's use of taxpayer funds.

The Board next argues that Plaintiffs lack standing because Sheriff Jenkins receives funding from several different sources, including those that are not Culpeper taxes. Am. Demurrer at 10–11. The Board therefore contends "Plaintiffs are challenging, in substantial part, state funding and state funding decisions, that are not made by the [Board]." Am. Demurrer at 11. This

argument improperly injects a factual dispute at the demurrer stage and, even so, does not compel dismissal.

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

The Board's argument about whether non-taxpayer funds are used to finance Sheriff Jenkins' enforcement of federal civil immigration law introduces a disputed factual issue. 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 reject this line of argument at the demurrer stage. *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. The Board cites no case holding that a taxpayer must show through accounting methods that the *very* taxpayer dollar the Board collected was the *exact* dollar Sheriff Jenkins spent to fund the challenged program. That standard is not Virginia law.

In comparable situations the commingling of 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). Because Sheriff Jenkins commingles Culpeper taxpayer funds with other monies, Sheriff Jenkins and the Board lose whatever benefits they 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 the Board's and Sheriff Jenkins' failure to take adequate accounting measures, the Supreme Court has suggested in related cases that *the Board and Sheriff Jenkins* bear 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, the Board has failed to show that the money Sheriff Jenkins spent to enforce federal civil immigration law came from these non-taxpayer sources. Instead, the pleaded facts establish that Plaintiffs' claims against the Board are "connect[ed] to government expenditures"—their taxpayer dollars. *Lafferty*, 293 Va. at 363.

3. The Board appropriates Culpeper taxpayer money to Sheriff Jenkins that facilitates, both directly and indirectly, his enforcement of federal civil immigration law.

Whether funds from other sources also support Sheriff Jenkins's unconstitutional enforcement of federal civil immigration law has no bearing on Plaintiffs' lawsuit. *All* taxpayer money that the Board appropriates to the Sheriff's Office enables Sheriff Jenkins' enforcement of federal civil immigration law. Sheriff Jenkins uses that taxpayer money as direct expenditures. *See, e.g.*, Compl. ¶¶ 48–65. In addition, *any other* Culpeper taxpayer money spent by the Sheriff's Office also 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 taxpayer money that the Board appropriates to the Sheriff's Office enables Sheriff Jenkins to enforce federal civil immigration law in violation of Virginia law. Whether other sources provide funding to Sheriff Jenkins' office does not change that conclusion.

III. Virginia law does not authorize Sheriff Jenkins to enter into a 287(g) Agreement.

Incorporating arguments from Sheriff Jenkins's Demurrer, the Board contends that none of its appropriations to Sheriff Jenkins's budget can be held unconstitutional because Virginia law affords Sheriff Jenkins the authority to enforce federal civil immigration law. Am. Demurrer at 12–13. The Board's argument is wrong for the same reasons when argued by Sheriff Jenkins.

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.").

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. The Board points to no statute authorizing Sheriff Jenkins' actions.

Had the General Assembly wanted to empower Virginia sheriffs with the ability to enter into 287(g) Agreements, and to 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, the Board misconstrues three Code provisions as justifying Sheriff Jenkins' actions. These statutes do no such thing. This Court should therefore reject the Board's argument that the Code permits Sheriff Jenkins to enforce federal civil immigration law.

1. Code § 15.2-1609.

First, the Board 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.

The Board interprets Code § 15.2-1609 as "expressly" giving him "plenary power to enforce *the law*, without limitation." Am. Demurrer at 13. The Board's 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.

The Board's contrary interpretation of Code § 15.2-1609 would authorize Sheriff Jenkins 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 the Board's 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, the Board cites Code § 19.2-81.6 as "expressly authoriz[ing] [sheriffs] to enforce the immigration laws of the United States." Am. Demurrer at 13. The Board incorrectly reads this statute to give Sheriff Jenkins 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.

The Board 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. The Board misconstrues this statute as permitting Sheriff Jenkins to enter into *any* agreement with *any* governmental entity. Am. Demurrer at 13. The Board 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 The Board 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]").

CONCLUSION

Plaintiffs request that the Court deny the Board's Amended Demurrer and grant such other and further relief as the ends of justice may require. 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