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**

original
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PLAINTIFFS' MOTION FOR RECONSIDERATION

Plaintiffs Michael V. McClary and Christina Stockton move the Court to reconsider its May 28, 2019, letter opinion and, if entered after the filing of this submission,[1] the Court's final order entering final judgment for Defendants.

Plaintiffs respect the Court's time and thoughtful consideration of the arguments to reach its decision, and do not seek to re-litigate the entire breadth of issues here. Instead, Plaintiffs respond only to the reasons given for the Court's May 28 decision to point out specifically why that reasoning is in error.

[1] The parties submitted to the Court a proposed final order reflecting the Court's May 28, 2019, letter opinion. Plaintiffs previously moved to suspend entry of this final order pending the Court's resolution of this motion for reconsideration. As of the date of filing this motion, the Clerk's Office has not received a signed final order from the Court.

Plaintiffs ask the Court to reconsider its opinion given the following arguments and authorities. On reconsideration, Plaintiffs ask the Court to deny Sheriff Scott Jenkins' and the Board of Supervisors of Culpeper County's demurrers.

THE COURT'S MAY 28, 2019, LETTER OPINION

This Court sustained Sheriff Jenkins' demurrer on his third ground: because "Plaintiffs cannot demonstrate Sheriff Jenkins acted outside his duty and authority when he participated in a 287(g) Agreement." Opinion at 2. The Court identified three reasons for that decision:

(1) "Virginia law gives Sheriff Jenkins authority to enforce the law under certain statutes;"

(2) "[f]ederal law expressly authorizes cooperative efforts with state and local governments through cooperative agreements," including 287(g) Agreements; and

(3) the Virginia Attorney General issued "recent opinions" that "opine that there is no Virginia law which precludes a sheriff from entering into cooperative agreements with federal authorities to enforce immigration laws."

Id. Accordingly, the Court held "the existing law to allow the actions of the Sheriff." *Id.*

The Court also granted the Board of Supervisors' amended demurrer "on the same basis" on which it sustained Sheriff Jenkins' demurrer. *Id.* This Court thus held that "any appropriation of local taxes paid by Plaintiffs to [Sheriff Jenkins] was lawful to be spent by the Sheriff under the above ruling." *Id.*

ARGUMENT

Respectfully, none of the stated reasons support the Court's holding that Virginia law authorizes Defendants' actions.

I. <u>This case asks whether Virginia law—not federal law—permits Defendants' actions.</u>

This case asks whether the General Assembly granted the Board of Supervisors and Sheriff Jenkins to expend Plaintiffs' local taxpayer money to enforce federal civil immigration law. Federal law cannot determine the answer.

As this Court noted, Sheriff Jenkins needs federal authorization to enter into agreements and enforce federal civil immigration. Opinion at 2. That authorization under federal law, however, is irrelevant to Plaintiffs' claims about whether Virginia law permits Sheriff Jenkins' actions. (Had Plaintiffs taken issue with the federal bases for Sheriff Jenkins' actions, they may have filed a federal complaint in federal court to argue federal law. *See* 28 U.S.C. § 1331.) Federal authorization is necessary, but not sufficient, to permit local authorities to enter into 287(g) Agreements. It is therefore error for this Court to decide whether Virginia law authorized Defendants' actions by pointing to federal law.

Instead, this case is about what Virginia law authorizes Defendants to do. Everyone agrees that Virginia law defines the breadth of Sheriff Jenkins' permissible conduct. Va. Const. art. VII, § 4 ("The duties and compensation of [sheriffs] shall be prescribed by general law or special act."); Jenkins 01-20-19 Memo. at 12 ("The General Assembly sets forth the duties and responsibilities of a sheriff."). Nor is there legitimate dispute that the Board of Supervisors have only those powers the General Assembly expressly or impliedly gave it, or those powers that are essential to it as the local governing body. *Johnson v. Arlington County*, 292 Va. 843, 853 (2016).

Virginia law permits neither Sheriff Jenkins to enter into 287(g) Agreements and enforce federal civil immigration law by expending Plaintiffs' taxpayer money, nor the Board of Supervisors to appropriate Plaintiffs' taxpayer money to Sheriff Jenkins for that purpose. *See infra* Argument §§ III, IV. It does not matter whether any other sovereign authorizes that conduct. Defendants cannot demonstrate their compliance with Virginia law by pointing to some other government approving their actions. This Court would rightly reject the notion that Virginia law authorized Defendants' conduct just because North Carolina authorized it, or because China said it was a good idea. The same is true for the Federal Government.

Determining whether *Virginia* law authorizes Defendants' conduct requires looking to the *Virginia* Code. While Sheriff Jenkins may need to obtain another sovereign's permission before he acts is irrelevant to whether Virginia has authorized his conduct. Any rationale that the Federal Government can override the General Assembly in matters of Virginia law—like whether Sheriff Jenkins can spend Virginia local taxpayer money to fund a federal program—is unconstitutional commandeering. *Printz v. United States*, 521 U.S. 898, 935 (1997) (the Federal Government "cannot compel the States to enact or enforce a federal regulatory program" because "such commands are fundamentally incompatible with our constitutional system").

That same principle holds true for the Board of Supervisors. The Board has never suggested federal law authorizes *its* actions. Instead, under the Dillon Rule, the Board can only act to the extent its conduct is expressly or implied authorized by Virginia law. *See Johnson*, 292 Va. at 853.

This Court should reconsider its opinion because federal law cannot answer whether Virginia law permitted Defendants' funding and enforcement of federal civil immigration law.

II. <u>This case asks what Virginia law authorizes—not what it has prohibited.</u>

This Court held that Defendants' actions were lawful under Virginia law because, in April 12, 2019, opinions, the Virginia Attorney General "opine[d] that there is no Virginia law which precludes a sheriff from entering into cooperative agreements with federal authorities to enforce immigration laws." Opinion at 2. It was error for this Court to rely on the Virginia Attorney General's April 2019 advisory opinions because they do not address the issue in this case and, moreover, it is premature to give them any consideration or weight.

A. The April 2019 opinions do not address the issues here.

Had the April 2019 opinions addressed the issues currently in litigation, not only would Attorney General Herring have violated his Office's 40-year policy, but he would have challenged Virginia's constitutional structure.

The Virginia Attorney General reflected that it "is not necessary or desirable for the Attorney General to express an opinion upon matters which are currently being litigated." 1977-78 Virginia Attorney General Opinion 34, 1977 WL 27405, at *1 (Oct. 6, 1977). Thus, it has been "the policy of [the Attorney General's] Office" for more than 40 years not to weigh in on litigated issues "unless so requested by the court before which the matter is pending." *Id.* "This well-established practice" has a simple purpose: to "ensur[e] that [the Attorney General's] Office will not render opinions upon questions whose answers may bring it into conflict with judicial tribunals." *Id.*; *accord, e.g.*, 1996 Virginia Attorney General Opinion 152, 1996 WL 658581, at *1 (July 30, 1996) (giving the same rationale and noting that "[t]his well-established practice is analogous to the declination of the United States Attorney General to render an opinion on a question contemporaneously pending before the courts for determination").

That policy protects Virginia's constitutional structure. The Virginia Constitution "vest[s]" the "judicial power of the Commonwealth . . . in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish." Va. Const. art. VI, § 1. "The essential function of the judiciary is the act of rendering judgment in matters properly before it." *Starrs v. Commonwealth*, 287 Va. 1, 7 (2014). And "a judgment conclusively resolves the case because a judicial [p]ower is one to render dispositive judgments." *Moreau v. Fuller*, 276 Va. 127, 137 (2008). Thus, if the Attorney General rendered opinions about issues subject to pending litigation, he would impermissibly encroach upon "exercis[ing] the powers properly belonging to" the Judicial Branch. Va. Const. art III, § 1.

Against this legal backdrop, the Attorney General's April 2019 opinions do not address the issues in this litigation. Instead, as this Court noted, the April 2019 opinions simply "opine that there is no Virginia law *which precludes* a sheriff from entering into cooperative agreements with

federal authorities to enforce immigration laws." Opinion at 2 (emphasis added). This litigation presents the issue not whether Virginia law *prohibits* the Defendants' actions, but whether Virginia law *affirmatively authorizes* their actions.

The Board of Supervisors does not have freewheeling authority to do whatever it would like. Instead, "Virginia follows the Dillon Rule." *Johnson*, 292 Va. at 853. "The Dillon Rule provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Marble Technologies, Inc. v. City of Hampton*, 279 Va. 409, 417 (2010). It is a rule "of strict construction." *City Council of Alexandra v. Lindsey Trusts*, 258 Va. 424, 427 (1999).

So too for Sheriff Jenkins. Although Sheriff Jenkins is not a local governing body, the Dillon Rule's principles still apply: He has only those "duties" that are "prescribed by general law or special act." Va. Const. art. VII § 4. The Supreme Court interpreted this to mean that "a sheriff is a constitutional officer and his duties are regulated and defined by . . . statute." *Hilton v. Amburgey*, 198 Va. 727, 729 (1957); *see also Brown v. Mitchell*, 308 F. Supp. 2d 682, 698 (E.D. Va. 2004) (citing *Hilton* to hold that "the duties, powers, and obligations of Virginia's constitutional officers are regulated and defined solely by statute"); 2002 Virginia Attorney General Opinion 01-114, 2002 WL 31194511, at *3 (Aug. 20, 2002) ("The Dillon Rule of strict construction, under which local public bodies may exercise only those powers conferred expressly or by necessary implication . . . is . . . applicable to constitutional officers," including sheriffs.)

The General Assembly must therefore affirmatively authorize their actions. Without such legislative authorization, Defendants have no lawful power to act. The Attorney General's April 2019 opinions do not address that issue. It was error for this Court to consider those opinions in holding that Virginia law permits Defendants' actions.

B. The April 2019 opinions deserve no weight.

"While it is not binding on this Court, an Opinion of the Attorney General is entitled to due consideration." *Beck v. Shelton*, 267 Va. 482, 492 (2004). Due consideration is proper "when the General Assembly has known of the Attorney General's opinion . . . and has done nothing to change it." *Id.* But when such an opinion "is not a long-standing one and is not a construction which the General Assembly has had the opportunity to consider," then "the presumption of legislative acquiescence does not apply." *Appalachian Power Co. v. State Corporation Commission*, 284 Va. 695, 704 (2012) (rejecting giving considerable weight to the Commission's interpretation of a statute that the General Assembly had not had the opportunity to consider).

That is the case here. The General Assembly ended its 2019 Regular Session on February 24, 2019. The Attorney General issued his April 2019 opinions months later. The General Assembly has not had the opportunity to consider those April 2019 opinions. As such, had the Attorney General been involved in this case, his April 2019 opinions would be entitled to "no weight beyond that of a typical litigant." *Nielsen Co. (US), LLC v. County Board of Arlington County*, 289 Va. 79, 88 (2015) (holding that, while a court may give weight to an administrative agency's position about an ambiguous statute, when the statute is unambiguous "the agency's interpretation is afforded no weight beyond that of a typical litigant"); *see also, e.g.*, *Appalachian Power*, 284 Va. at 704-05 (rejecting the Commission's interpretation as "decisive," and then proceeding to undertake a typical statutory interpretation analysis). But because the Attorney General is *not* even a litigant, the April 2019 opinions should be given no weight or consideration.

III. The Code does not authorize Sheriff Jenkins' conduct.

The Court held that three Code provisions permit Sheriff Jenkins "to enforce the law." Opinion at 2. When paired with the federal law authorizing 287(g) Agreements, the Court held that the Code's grant of authority to enforce the law thus permitted Sheriff Jenkins to act in

accordance with any other sovereign's law. Opinion at 2. This expansive reading of the Code is erroneous because, first, there is no explicit or implicit authority to authorize Sheriff Jenkins' conduct elsewhere in the Code and, second, the Code provisions cited by the Court, read correctly, do not authorize Sheriff Jenkins' conduct.

A. There is no express or implied authorization to conduct civil immigration enforcement under the Virginia Code.

Under Virginia's strict construction of the Dillon Rule, "local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Tabler v. Bd. of Supervisors of Fairfax Cty.*, 221 Va. 200, 202 (1980); *see also* Va. Const. art. VII, § 4.

Express authority are those powers "clearly granted by the law-making power." *Marble Technologies*, 279 Va. at 417. In *Marble Technologies*, the Supreme Court struck down the City of Hampton's criteria for designating Chesapeake Bay Preservation Areas in its jurisdiction because the criteria were not authorized by statute. 279 Va. at 412. Similarly, in *Commonwealth v. County Board of Arlington County*, the Court struck down collective bargaining agreements the Arlington County Board entered into because no statute specifically authorized it to do so. 217 Va. 558, 581 (1977). And in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, the Court held that a fee imposed by a local governing power was invalid because, even though the General Assembly "delegated a portion of its police power to local governing bodies," the locality's authority to impose a fee was not authorized by the General Assembly. 258 Va. 497, 504 (1999).

Applying those principles here, the legislature's failure to explicitly authorize civil immigration enforcement by statute demonstrates Sheriff Jenkins lacks the express authority to engage in this conduct under Virginia law.

The application of the Dillon Rule is designed to ascertain and give effect to the General Assembly's intent in enacting the provisions. *Marble Technologies*, 279 Va. 409 at 418. When analyzing whether an entity has implied authority, the court must examine the purpose and objective of the statute in question. *City of Chesapeake v. Gardner Enterprises, Inc.*, 253 Va. 243, 247 (1997). This is typically resolved through a plain meaning analysis of the statute or governing law. *See Jones v. Commonwealth*, 296 Va. 412, 415 (2018) ("We must presume that the General Assembly chose, with care, the words that appear in a statute, and must apply the statute in a manner faithful to that choice. . . . When the language of a statute is plain and unambiguous, we are bound by the plain meaning of that statutory language."). In keeping with that analytical framework, the Court has refused to imply powers contrary to the General Assembly's intention. *Tabler*, 221 Va. 200 at 202.

In the context of 287(g) Agreements, the General Assembly has enacted no statute that would indicate an intent to confer the implied authority for civil immigration enforcement. *Id.*; *see City of Chesapeake*, 253 Va. at 247 (stating that the statute must be given a rational interpretation that is consistent with its purposes, not one that will substantially defeat its objectives). For example, authorization to engage in *criminal* immigration enforcement would not imply authority to enforce *civil* immigration law.

In assessing legislative intent, courts have analyzed both passed and failed legislation that went before the General Assembly. *Tabler*, 221 Va. at 202. This Court should consider both adopted and rejected legislation to determine whether Virginia law authorizes civil immigration enforcement. *Id.* Given that the General Assembly has introduced bills that *would* authorize localities to enter into 287(g) Agreements, their failure to pass these measures supports the inference that no explicit or implicit authority exists for this conduct. *See* Plaintiffs' Opposition to

the Board's Amended Demurrer, at 12-14, Ex. A. Otherwise, legislators would have had no reason to introduce such bills.

Nor is the power to enforce civil immigration necessary to exercising another power or duty of local government. To analyze the necessary and implied authority, courts have looked at governing codes and examined powers that may vest with municipalities. *See Payne v. Fairfax County School Bd.*, 288 Va. 432, 438 (2014) (ruling that school boards have authority to supervise schools in their divisions because this power to discipline employees is essential and indispensable and the code presupposed school boards to have said power). Here, the authorization to enforce *civil* immigration law is not a power that is necessary to accomplish another duty, such as the *criminal* immigration enforcement that the General Assembly has permitted.

B. The cited Code provisions do not permit civil immigration enforcement.

Code § 15.2-1609. The Court first cited Code § 15.2-1609 in support of the sheriff's authority to enforce civil immigration law. Code § 15.2-1609 is a general authorizing statute, holding that a "sheriff shall exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law," including "to enforce the law or see that it is enforced in the locality from which he is elected." *Id.* This Code speaks to a sheriff enforcing Virginia general law: that is, laws that "embrac[e] all persons and places *within the state*." *Martin's Executers v. Commonwealth*, 126 Va. 603, 609 (1920) (emphasis added). Code § 15.2-1609 simply allows Sheriff Jenkins to enforce any general law of Virginia, as an officer exercising the authority of the Commonwealth. *See Burch v. Hardwicke*, 93 Va. (30 Gratt.) 24, 35 (1878). Holding otherwise—that it permits Sheriff Jenkins to enforce any law any other sovereign purports to impose within Virginia—is error.

Code § 19.2-81.6. The Court then cited Code § 19.2-81.6 as supporting its holding. This provision allows Sheriff Jenkins to enforce *criminal* immigration law. Code § 19.2-81.6 (allowing law enforcement officers to arrest illegally-present aliens who were previously convicted of a felony and then was deported or left). Code § 19.2-81.6 does not address the circumstances of this case: *civil* immigration law.

The distinction between criminal and civil authorization is prescribed by statute—even outside of the immigration context—in the powers and duties granted to the police force by the General Assembly. For example, Virginia law restricts the authority of law enforcement to arrest for civil violations. *Compare, e.g.*, Code § 15.2-1704(B) ("A police officer has no authority in civil matters" with narrowly enumerated exceptions for emergency custody orders, orders of protection, quarantine orders, and similar orders), *with, e.g.*, Code § 15.2-1704(A) (authorizing a local police force to engage in criminal enforcement, including "prevention and detection of crime [and] the apprehension of criminals"). Although a law enforcement officer is more broadly empowered to act in criminal enforcement, specific Code sections authorize sheriffs to perform civil duties. *See, e.g.*, Code § 55-237.1 (permitting sheriffs to oversee removal of personal property pursuant to an eviction).

Federal law also distinguishes between criminal and civil immigration. Civil immigration enforcement encompasses "[a]ction[s] taken … to apprehend, arrest, interview, or search an alien in connection with enforcement of administrative immigration violations," including offenses for which an individual may be fined or deported. U.S. Immigration and Customs Enforcement, Directive Number 11072.1 (Jan. 20, 2018), http://bit.ly/ICEDirective2018. This authority is distinct from the power to engage in criminal immigration enforcement, which permits officers to act when a person commits an offense for which they can be charged criminally under federal law.

See generally, American Immigration Council, *Prosecuting Migrants for Coming to the United States* (May 1, 2018), http://bit.ly/AmericanImmigration2018. For example, physical presence in the U.S. without proper authorization, such as overstaying a visa, is a civil—but not criminal—offense. In contrast, unlawful re-entry to the U.S. "after having been deported, ordered removed, or denied admission," is a crime "punishable as a felony with a maximum sentence of two years." *Id.*; *compare* 8 U.S.C. § 1227, *with* 8 U.S.C. § 1326. Even though the outcome may be the same, as an individual may be subject to deportation under either provision, the authority to enforce the civil and criminal immigration violations require distinct authority. *See* Brian L. Owsley, *Distinguishing Immigration Violations from Civil Violations: A Discussion Raised by Justice Sonia Sotomayor*, 163 U. PA. L. REV. ONLINE 1, 5-8 (2014).

Thus, holding Sheriff Jenkins' conduct authorized under Code § 19.2-81.6 is in error. That holding blurs the distinction between civil and criminal immigration enforcement. And that interpretation upends the General Assembly's broad grant of authority for criminal enforcement and narrow grant of authority for civil enforcement in the Code.

Code § 15.2-1730.1. The Court finally cited Code § 15.2-1730.1 to support its holding. This provision permits Virginia sheriffs to enter into agreements with "other governmental entit[ies] providing law-enforcement services *in the Commonwealth.*" Code § 15.2-1730.1 (emphasis added). This provision authorizes Sheriff Jenkins to enter into agreements only with other Virginia law enforcement authorities, as those provide law enforcement services in the Commonwealth.

Even if Code § 15.2-1730.1 permitted sheriffs to enter into agreements with the Federal Government, it does not permit them to exercise powers they do not already have under Virginia law. Code § 15.2-1370.1 allows "local law-enforcement officers [to] exercise their law

enforcement responsibilities and duties outside their territorial jurisdiction." 03-056 Virginia Attorney General Opinion 03-056, 2003 WL 22680739, at *2 (Oct. 8, 2003). Although sheriffs "have all the authority, benefits, immunity from liability and exemptions from laws, ordinances and regulations as officers acting within their own jurisdictions," this does not imbue localities with authority that has not otherwise been prescribed by the state legislature. Code § 15.2-1730.1. If the General Assembly has not separately given sheriffs the authority to engage in specific conduct, a sheriff cannot use a Code § 15.2-1730.1 agreement to grant himself that power. *See, e.g.*, 03-056 Virginia Attorney General Opinion 03-056, 2003 WL 22680739, at *2 (opining that, because the General Assembly does not permit sheriffs to supervise prisoner-workers beyond their territorial limits, and a sheriff could not under a Code § 15.2-1730.1 agreement give himself that authority). The Court errs when holding that Code § 15.2-1730.1 allows Sheriff Jenkins to enlarge his legal authority under Virginia law simply by having another party agree he should have such authority.

*

Code §§ 15.2-1609 and 15.2-1370.1 lay the groundwork for the General Assembly to authorize Sheriff Jenkins to enforce federal immigration law. And, in fact, the General Assembly did so for federal *criminal* immigration law in Code § 19.2-81.6. But the General Assembly has not authorized Sheriff Jenkins to enforce federal *civil* immigration law—nor has the General Assembly authorized Sheriff Jenkins to spend local taxpayer money to do so. Respectfully, this Court erred when holding otherwise.

To the extent the Court holds these provisions ambiguous or unclear about what conduct they authorize, Sheriff Jenkins is not entitled to deference. Under the Dillon Rule, "[i]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local

governing body." *Marble Technologies*, 279 Va. at 417. This presumption against expanding authority for localities absent a clear delegation of authority should guide the Court's interpretation of these provisions.

IV. The Code does not authorize the Board of Supervisors' conduct.

The Court sustained the Board of Supervisors' demurrer "on the same basis as it sustained the Sheriff's Demurrer." Opinion at 2. This analysis is error twice over, as the powers of boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication. *See Johnson v. Couty of Goochland*, 206 Va. 235, 237 (1965). First, the General Assembly has not authorized Sheriff Jenkins' financing and enforcement of federal civil immigration law with Plaintiffs' local taxpayer money. Second, *even if it had*, the General Assembly has not authorized the Board of Supervisors to appropriate Plaintiffs' local taxpayer funds to pay for the enforcement of federal civil immigration law.

No party has pointed this Court to any Code provision that expressly or impliedly authorizes the Board of Supervisor's expenditure of Plaintiffs' taxpayer funds to finance and enforce federal civil immigration law. No such law exists. The Board of Supervisors' actions are unlawful under the Dillon Rule. Even if Sheriff Jenkins can enforce federal civil immigration law, the General Assembly does not permit the Board of Supervisors to fund that activity with Plaintiffs' local taxpayer money.

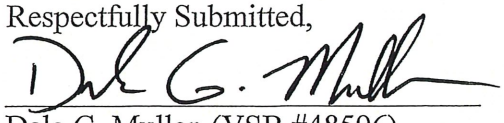
The Court therefore erred when holding that the Board of Supervisors' actions were lawful.

CONCLUSION

Plaintiffs ask the Court to reconsider its May 28, 2019, order and, upon reconsideration, deny Defendants' demurrers.

Dated: June 26, 2019

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was transmitted First-Class Mail, postage prepaid, and by electronic mail this day, June 26, 2019, to all counsel of record, to wit:

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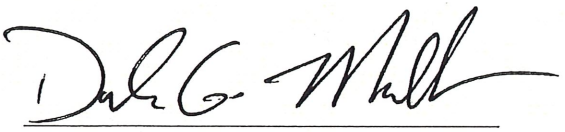

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