IN THE

SUPREME COURT OF VIRGINIA

Record No. 191132

MICHAEL V. McCLARY, *et al.*,

Appellants,

v.

SCOTT H. JENKINS, *et al.*,

Appellees.

OPENING BRIEF

From the Circuit Court of Culpeper County
Case No. CL 18-1373-00

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NATURE OF THE CASE

This case is ultimately about where power resides. Whether, as this Court has held, the General Assembly decides the scope of authority for Virginia sheriffs and localities. Or whether, as the circuit court held, sheriffs and localities can freely act beyond the General Assembly's grant of authority.

For years, the General Assembly has considered but refused to allow Virginia sheriffs to enforce federal *civil* immigration law. Yet Sheriff Scott H. Jenkins is doing it anyway: he is spending local taxpayer money to enforce federal civil immigration law under a 287(g) Agreement with Immigration and Customs Enforcement ("ICE"), a federal agency under the United States Department of Homeland Security. In doing so, Sheriff Jenkins is acting beyond the constitutional limits of his office.

Nor has the General Assembly authorized localities to fund federal civil immigration law. Yet the Board of Supervisors of Culpeper County is doing exactly that. It is unconditionally appropriating local taxpayer money to Sheriff Jenkins knowing that, by doing so, it funds federal civil immigration law. This action upends Virginia's adherence to the Dillon Rule. The Board's actions are unlawful.

Michael McClary and Christina Stockton, both taxpaying residents of Culpeper County, suffer injury as Sheriff Jenkins and the Board use their local

taxpayer money to fund this unlawful scheme. Virginia has long recognized that local taxpayers like McClary and Stockton can sue over Sheriff Jenkins's and the Board's unlawful use of local taxpayer money.

The circuit court erroneously sustained Sheriff Jenkins's and the Board's demurrers and entered judgment against McClary and Stockton. The circuit court essentially authorized Virginia sheriffs to enforce any law they want, anywhere they want—*even if* the General Assembly already decided *against* giving sheriffs that authority. The circuit court also ignored the Dillon Rule, thus giving local governing bodies unlimited authority to fund any priority they want.

The General Assembly has already decided that Virginia is not in the business of enforcing federal civil immigration law. By authorizing Sheriff Jenkins's and the Board's actions, the circuit court contravened the General Assembly's will.

The Court should reverse the circuit court's judgment sustaining Sheriff Jenkins's and the Board's demurrers, and remand for further proceedings.

ASSIGNMENTS OF ERROR

1. The circuit court erred as a matter of law in sustaining Sheriff Jenkins's demurrer, denying Plaintiffs' motion for reconsideration, and entering final judgment on Plaintiffs' Counts I and II because neither the Constitution of Virginia nor the General Assembly has authorized Virginia sheriffs either (A) to contract with the federal government to enforce federal civil immigration law, or (B) to otherwise enforce federal civil immigration law.

Preserved: JA 302-49 (opposition to demurrer), 473-75 (final order), 477-580 (hearing transcript, including specifically JA 559-571).

2. The circuit court erred as a matter of law in sustaining the Board of Supervisors of Culpeper County's demurrer, denying Plaintiffs' motion for reconsideration, and entering final judgment on Plaintiffs' Count III because neither the Constitution of Virginia nor the General Assembly has authorized localities to appropriate funds to enforce federal civil immigration law.

Preserved: JA 350-95 (opposition to demurrer), 473-75 (final order), 477-580 (hearing transcript, including specifically JA 510-26).

3. The circuit court erred in denying Plaintiffs' request for leave to file an amended complaint because courts should liberally grant leave to amend and additional factual pleading would remedy any issues potentially supporting dismissal.

Preserved: JA 322 (opposition to demurrer), 368 (opposition to demurrer), 473-75 (final order), 477-580 (hearing transcript, including specifically JA 572).

FACTS AND MATERIAL PROCEEDINGS

I. The Board appropriates local taxes to Sheriff Jenkins's office.

McClary and Stockton are Culpeper County residents. JA 2. They pay their local taxes levied by the Board of Supervisors. JA 5. In turn, the Board receives those taxes as revenue that funds its fiscal year budget. JA 5. McClary's and Stockton's local taxes are paid into the Board's General Fund. JA 5.

The Board voluntarily appropriates money from its General Fund to the Culpeper County Sheriff's Office. JA 5, 15. The Board can impose conditions on how Sheriff Jenkins uses the funds it appropriates to the Sheriff's Office. JA 15. For example, the Board conditions its appropriations by specifying the categories for which Sheriff Jenkins can use those funds (such as law enforcement, court security, or adult detention). JA 6. The Board determines how much money it will appropriate to the Sheriff's Office, and for what purposes, by working with Sheriff Jenkins to determine how to fund his policies and priorities. JA 6.

Sheriff Jenkins spends the local taxpayer money the Board allocates and distributes as part of his office's budget. JA 6-7.

II. Sheriff Jenkins and the Board decide to enforce federal civil immigration law.

Sheriff Jenkins attended the Board of Supervisors' December 2017 meeting. JA 6. Sheriff Jenkins spoke at that meeting and informed the Board that he would enter into a 287(g) Agreement with ICE. JA 6. That agreement, Sheriff Jenkins

explained, would allow the Sheriff's Office to enforce federal civil immigration law. JA 6. Sheriff Jenkins told the Board that his office's budget—which includes McClary's and Stockton's taxpayer money—would cover the costs and expenses under the 287(g) Agreement. JA 7.

Although the Board knew of Sheriff Jenkins's plans, it has done nothing but hand money over to Sheriff Jenkins. JA 7-8. The Board has not restricted Sheriff Jenkins's use of the Board's past, current, or future appropriations to his office to prevent him from using local tax money to pay for salaries, costs, and expenses incurred under the 287(g) Agreement. JA 7-8.

III. Sheriff Jenkins entered the 287(g) Agreement to enforce federal civil immigration law.

True to his word, Sheriff Jenkins entered into a 287(g) Agreement with ICE in April 2018. JA 8; *see also* JA 22-40 (the full 287(g) Agreement). The 287(g) Agreement, in purpose and effect, purports to authorize Sheriff Jenkins and his deputies to enforce federal civil immigration law. JA 8.

Under the 287(g) Agreement, Sheriff Jenkins and his deputies have the authority to:

- Interrogate detained persons about their immigration status.
- Process immigration violations for removable aliens.
- Process immigration violations for aliens arrested for violating federal, state, or local law.

- Administer oaths and take evidence to process aliens (like fingerprinting, photographing, and interviewing aliens, or taking sworn statements).
- Prepare charging documents.
- Issue immigration detainers.
- Detain and transport aliens subject to removal.

JA 38-39.

Sheriff Jenkins and his office must also compile and provide, if ICE requests, "statistical or aggregated arrest data" and "specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular arrest." JA 28.

IV. Sheriff Jenkins and the Board spend taxpayer money to enforce federal civil immigration law.

Sheriff Jenkins spends local taxpayer money to enforce federal civil immigration law. JA 8-9. Under the 287(g) Agreement, Sheriff Jenkins spends local taxpayer money to:

- Pay the salaries and benefits of Sheriff Jenkins's employees for every minute they spend enforcing federal civil immigration law.
- Pay for personnel expenses (such as transportation costs) incurred while enforcing federal civil immigration law.
- Pay for travel, housing, and per diem expenses during a four-week training by ICE for Sheriff Jenkins's employees.

- Pay to acquire security equipment, including handcuffs and other restraints, associated with enforcing federal civil immigration law.
- Pay for all technology-related expenses, including monthly phone and internet bills, used while enforcing federal civil immigration law.
- Pay for all administrative supplies.
- Pay for an ICE office if ICE requests it.

JA 9-11.

The 287(g) Agreement requires Sheriff Jenkins to "manage [his] resources dedicated to" immigration enforcement—that is, local taxpayer money—by "follow[ing] ICE's civil immigration enforcement priorities." JA 38.

The Board of Supervisors has appropriated, continues to appropriate, and will appropriate McClary's and Stockton's local taxpayer money to Sheriff Jenkins to pay for salaries, costs, and expenses under the 287(g) Agreement. JA 16. Sheriff Jenkins has used, continues to use, and will use McClary's and Stockton's local taxpayer money to pay for salaries, costs, and expenses under the 287(g) Agreement. JA 14.

V. McClary and Stockton sued to stop the unlawful use of their tax money.

McClary and Stockton sued to stop Sheriff Jenkins and the Board of Supervisors from unlawfully using local taxpayer money (including their own) to fund and enforce federal civil immigration law. JA 3-4.

Count I against Sheriff Jenkins alleges that neither the Constitution of Virginia nor the Virginia Code allows Virginia sheriffs to enter into agreements with the federal government to enforce federal civil immigration law. JA 3, 12. Thus, Sheriff Jenkins's entry into the 287(g) Agreement in unlawful. JA 12.

Count II against Sheriff Jenkins alleges that Virginia law does not permit Virginia sheriffs to use local taxpayer money to enforce federal civil immigration law. JA 3-4, 13. Sheriff Jenkins's use of McClary's and Stockton's local taxes to pay to enforce federal civil immigration law is therefore unlawful. JA 14.

Count III against the Board of Supervisors alleges that neither the Constitution of Virginia nor the General Assembly permits localities like the Board to appropriate funds to enforce federal civil immigration law. JA 3-4, 15-16. The Board's unconditional appropriation of funds—including McClary's and Stockton's local taxes—to Sheriff Jenkins to pay for costs and expenses under the 287(g) Agreement is thus unlawful. JA 16.

McClary and Stockton sought declaratory and injunctive relief, as well as reasonable costs and expenses. JA 17-19.

VI. The circuit court approved Sheriff Jenkins's and the Board's actions.

Sheriff Jenkins and the Board of Supervisors filed various defensive papers, all of which they eventually withdrew from consideration except for their demurrers. *See* JA 299, 577. McClary and Stockton filed oppositions. JA 302-49,

350-95. The court held a hearing on those demurrers, and ultimately took the parties' arguments under advisement. JA 477-580.

The court later issued a letter opinion sustaining the demurrers. JA 445-46. The court entered judgment in Sheriff Jenkins's favor on three bases. First, because "Virginia law gives Sheriff Jenkins authority to enforce the law under certain statutes." JA 446. Second, because "[f]ederal law expressly authorizes cooperative efforts with state and local governments through cooperative agreements." JA 446. Finally, because "recent opinions of the Attorney General of Virginia . . . . opine that there is no Virginia law which precludes a sheriff from entering into cooperative agreements with federal authorities to enforce immigration laws." JA 446. The court entered judgment in the Board's favor "on the same basis as it sustained the Sheriff's Demurrer." JA 446.

After that letter opinion, but before the circuit court entered the final order, McClary and Stockton moved the court to reconsider its opinion. JA 459-72. The circuit court later entered a final order reflecting its letter opinion and rejecting the arguments made in the motion to reconsider. JA 473-75.

McClary and Stockton timely appealed. JA 447-52. A panel of this Court granted their petition for appeal.

STANDARD OF REVIEW

"Because this appeal arises from the grant of a demurrer, [the Court] accept[s] as true all factual allegations expressly pleaded in the complaint and interpret[s] those allegations in the light most favorable to the plaintiff[s]." *Coward v. Wellmont Health System*, 295 Va. 351, 358 (2018).

The Court addresses constitutional and statutory interpretation issues de novo. *Palmer v. Atlantic Coast Pipeline, LLC*, 293 Va. 573, 577 (2017); *Fitzgerald v. Loudoun County Sheriff's Office*, 289 Va. 499, 504 (2015).

The Court reviews the denial for leave to amend for an abuse of discretion. *Lucas v. Woody*, 287 Va. 354, 363 (2014).

ARGUMENT

I. A/E 1: The circuit court erred in holding that Sheriff Jenkins may enforce federal civil immigration law under Virginia law.

A. Virginia law determines whether Sheriff Jenkins can spend local taxpayer money and enforce federal civil immigration law.

Sheriff Jenkins enforces federal civil immigration law through the 287(g) Agreement. JA 8. Without that Agreement, federal law would prohibit his actions. *Arizona v. United States*, 567 U.S. 387, 407-10 (2012) (federal law prevents state officials from unilaterally enforcing federal immigration law); *Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 465 (4th Cir. 2013) ("[A]bsent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.").

Federal law allows 287(g) Agreements like the one here. JA 22 (citing 8 USC § 1357(g) as the source of authority). But it permits Sheriff Jenkins's enforcement of federal civil immigration law under the 287(g) Agreement only "to the extent consistent with State and local law." 8 USC § 1357(g)(1). Virginia law must therefore authorize Sheriff Jenkins's actions and expenditures of Virginia taxpayer money under the 287(g) Agreement.

Federal law is not enough. Virginia law must also authorize Sheriff Jenkins's enforcement of federal civil immigration law. It does not.

B. No Code provision empowers Virginia sheriffs to enforce federal civil immigration law.

The circuit court held that three Code provisions gave "Sheriff Jenkins authority to enforce the law," including federal civil immigration law, under the 287(g) Agreement. JA 446. That holding was error. No Code provision authorizes Sheriff Jenkins's enforcement of federal civil immigration law.

1. Code § 15.2-1609.

The circuit court first pointed to Code § 15.2-1609. JA 446. But Code § 15.2-1609 is simply a general authorizing statute. It does not permit Virginia sheriffs to enforce federal civil immigration law.

Code § 15.2-1609 states in full:

> The voters in every county and city shall elect a sheriff unless otherwise provided by general law or special act. 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; assist in the judicial process as provided by general law; and be charged with the custody, feeding and care of all prisoners confined in the county or city jail. He may perform such other duties, not inconsistent with his office, as may be requested of him by the governing body. The sheriff shall be elected as provided by general law for a term of four years.

Ignoring everything else, Sheriff Jenkins seizes on the Code allowing him to "enforce the law" to say he can enforce any law he wants. JA 210, 542-43. The circuit court appeared to adopt this reading. *See* JA 446.

This argument misreads the plain statutory language by "isolat[ing] single phrases" rather than "consider[ing] them in the context in which they are found."

Capelle v. Orange County, 269 Va. 60, 67 (2005). Reading the entire Code section together, Sheriff Jenkins may "enforce the law," which the prior sentence explains to be the "general law." Code § 15.2-1609. And the general law is merely those laws that "embrac[e] all persons and places within the state." *Martin's Executers v. Commonwealth*, 126 Va. 603, 609 (1920). Reading Code § 15.2-1609 to authorize Virginia sheriffs to enforce *any* law beyond Virginia general law—be it tribal law, another state's law, or even federal law—is an impermissibly "strained construction" that ignores the "plain, obvious, and rational meaning" of the statute. *Hall v. Commonwealth*, 296 Va. 577, 582 (2018).

Being authorized to "enforce the law" means Sheriff Jenkins must enforce Virginia's general laws, once passed by the General Assembly, as an officer exercising the authority of the Commonwealth. *See Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24, 35 (1878). Code § 15.2-1609 is simply an authorizing statute for Virginia sheriffs to enforce Virginia general law.

If the circuit court's reading were correct, then a Virginia sheriff would need no other statutory authority to enforce any law. Yet the Code is full of authorizing language allowing sheriffs to enforce specific laws beyond Virginia general law. The circuit court's reading improperly voids this other statutory language. *See Idoux v. Estate of Helou*, 279 Va. 548, 554 (2010) ("[T]his Court is not free to ignore statutory language or render such language meaningless.").

Take Code § 15.2-1609 itself. If Virginia sheriffs can already enforce any law they want, then the General Assembly pointlessly added that a sheriff can also "perform such other duties . . . as may be requested of him by the governing body." Code § 15.2-1609. The redundancy would not stop with Code § 15.2-1609. Plenty other statutes authorizing Virginia sheriffs to enforce specific laws would also be rendered superfluous. *E.g.*, Code §§ 15.2-1727 (under a reciprocal agreement, sheriffs can enforce the laws of a "jurisdiction outside the Commonwealth" when "serving" in that other jurisdiction), 19.2-81.6 (under ICE's direction, sheriffs can arrest illegal aliens who are committing crimes), 19.2-83.2 (sheriffs can determine an inmate's U.S. citizenship).

The General Assembly does not pointlessly legislate. *See Cook v. Commonwealth*, 268 Va. 111, 114 (2004) ("Words in a statute should be interpreted, if possible, to avoid rendering words superfluous."). The Court should thus reject the circuit court's reading of Code § 15.2-1609 that would render this other statutory language superfluous.

Code § 15.2-1609 authorizes Virginia sheriffs to enforce Virginia general law. It does not permit Sheriff Jenkins to enter into a 287(g) Agreement and enforce federal civil immigration law. The circuit court erred in holding otherwise.

2. Code § 19.2-81.6.

The circuit court next identified Code § 19.2-81.6 as permitting Sheriff Jenkins to enforce federal civil immigration law. JA 446. But Code § 19.2-81.6 relates to *criminal* law. It says nothing about this case: whether Sheriff Jenkins can enforce federal *civil* immigration law.

Code § 19.2-81.6 allows Virginia sheriffs "to enforce immigration laws of the United States" only "pursuant to the provisions of this section." The rest of the section allows Virginia sheriffs to limitedly enforce criminal law. That is, law enforcement officers can arrest certain aliens, after ICE confirms their immigration status, only if that alien "has committed or is committing a crime." *Id*. The sheriff must then comply with the criminal process for a warrantless arrest. *Id.*; *see also* Code § 19.2-82 (detailing the warrantless arrest procedure).

This provision has nothing to do with Sheriff Jenkins's 287(g) Agreement and enforcement of federal civil immigration law. For starters, Sheriff Jenkins's enforcement activities fall well beyond the scope of limited activities permitted under Code § 19.2-81.6. *See* JA 38-39 (listing Sheriff Jenkins's civil immigration powers under the 287(g) Agreement).

Additionally, Code § 19.2-81.6, which authorizes some criminal law enforcement, cannot apply to justify Sheriff Jenkins's enforcement of civil law. Virginia distinguishes law enforcement officers' authority in civil and criminal

matters. *Compare, e.g.*, Code § 15.2-1704(B) ("A police officer has no authority in civil matters" with narrowly enumerated exceptions), *with, e.g.*, Code § 15.2-1704(A) (authorizing police to engage in criminal enforcement, including "prevention and detection of crime [and] the apprehension of criminals"). While a law enforcement officer is more broadly empowered to act in criminal matters, specific Code sections authorize sheriffs to perform only limited civil duties. *E.g.*, Code § 55-237.1 (sheriffs can oversee removal of personal property after eviction).

Federal law also recognizes a distinction between civil and criminal immigration enforcement. For example, being in the United States without proper authorization, such as overstaying a visa, is a civil—not criminal—offense. 8 USC § 1227; *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (Kagan, J., plurality op.) (holding, in the context of 8 USC § 1227, that "[t]he removal of an alien is a civil matter"); *id.* at 1231 (Gorsuch, J., concurring) (agreeing about the civil context); *see also Santos*, 725 F.3d at 467 ("[T]he Supreme Court has long characterized deportation as a civil proceeding."). In contrast, unlawful re-entry is a criminal offense with criminal penalties. 8 USC § 1326(a).

Given this distinction in both Virginia and federal law, Code § 19.2-81.6 authorizes Sheriff Jenkins to enforce only certain *criminal* law. It allows law enforcement to act only when (among other things) they suspect an individual of criminal activity. *Id*. By contrast, Sheriff Jenkins's actions under the 287(g)

Agreement are *civil*. They are "[a]ction[s] . . . to apprehend, arrest, interview, or search an alien in connection with enforcement of *administrative* immigration violations." *Directive 11072.1*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (Jan. 20, 2018) (emphasis added), http://bit.ly/ICEDirective2018 (last visited Jan. 24, 2020); *see also* JA 22 (purpose of the 287(g) Agreement is to assist "ICE's *civil* immigration enforcement priorities" (emphasis added)). Code § 19.2-81.6 does not authorize civil immigration law enforcement under the 287(g) Agreement.

Rather than justifying Sheriff Jenkins's actions, Code § 19.2-81.6 shows why Sheriff Jenkins cannot enforce federal civil immigration law under a 287(g) Agreement. In opposing the petition for appeal, Sheriff Jenkins described Code § 19.2-81.6 as authorizing "law enforcement to make warrantless arrests of certain removable individuals who have committed or are committing felonies and assists the United States in expediting its civil removal process of removable aliens who have committed certain felonies." Jenkins's Opp. Br. at 15. *Precisely*.

The General Assembly "chose, with care, the words it used when it enacted the relevant statute[s]." *Simon v. Forer*, 265 Va. 483, 490 (2003). The General Assembly allows Virginia sheriffs to entangle themselves with federal immigration law in only delineated circumstances, like with Code § 19.2-81.6. But the General Assembly does not authorize Virginia sheriffs to meddle in federal immigration

law beyond those expressly authorized situations—such as to enforce federal civil immigration law under a 287(g) Agreement.

Ultimately, Code § 19.2-81.6 allows Virginia sheriffs to enforce some criminal law in specific, limited situations. It does not permit Sheriff Jenkins to enter into a 287(g) Agreement and enforce federal civil immigration law. The circuit court erred in holding otherwise.

3. Code § 15.2-1730.1.

Finally, the circuit court cited Code § 15.2-1730.1 as allowing Sheriff Jenkins to enforce federal civil immigration law. JA 446. To the contrary, Code § 15.2-1730.1 simply allows Virginia sheriffs to enter into agreements with other Virginia governmental entities. It does not give sheriffs the ability to exercise new powers through those agreements.

Code § 15.2-1730.1 reads:

> In counties where no police department has been established and the sheriff is the chief law-enforcement officer, the sheriff may enter into agreements with any other governmental entity providing law-enforcement services in the Commonwealth, and may furnish and receive interjurisdictional law-enforcement assistance for all law-enforcement purposes, including those described in this chapter, and for purposes of Chapter 3.2 (§ 44-146.13 et seq.) of Title 44. Sheriffs and their deputies, providing or receiving such assistance, shall have all the authority, benefits, immunity from liability and exemptions from laws, ordinances and regulations as officers acting within their own jurisdictions.

Code § 15.2-1730.1 does not allow Sheriff Jenkins to enter into agreements in which he gives himself new powers. Instead, the agreement's "law-enforcement purposes" must be those that Sheriff Jenkins already has under Virginia law, such as in Chapter 17 of Title 15.2 or Chapter 3.2 of Title 44. *Id*.

In fact, the Act clarifying this authority for Virginia sheriffs was "declarative of existing law." 1999 Acts ch. 352; *see also PKO Ventures, LLC v. Norfolk Redevelopment & Housing Authority*, 286 Va. 174, 183 (2013) (this Court "look[s] to the whole body of a statute," including "the entirety of a single legislative enactment as it appears in the Acts of Assembly"); *Eberhardt v. Fairfax County Employees' Retirement System*, 283 Va. 190, 194 (2012) ("[T]he authoritative text of any statute is the text enacted by the General Assembly . . . . Simply put, the language of the Acts of Assembly *is* the plain language of the statute."). Because Chapter 352 of the Acts of Assembly of 1999 explains that Code § 15.2-1730.1 is declarative of existing law, Code § 15.2-1730.1 did not give Virginia sheriffs a newfound ability to create their own authority out of whole cloth through contract when the Code does not already grant them such powers. *See Virginia International Gateway, Inc. v. City of Portsmouth*, __ Va. __, 834 S.E.2d 234, 240 n.1 (2019) (the General Assembly uses the phrase "declarative of existing law . . . when it wishes to clarify a statute or correct an interpretation of a statute with which it disagrees").

Code § 15.2-1730.1, then, does not allow Sheriff Jenkins to enlarge his authority by private agreement beyond what power the Code already grants him. *See, e.g.*, Virginia A.G. Opinion No. 03-056, 2003 WL 22680739, at *2 & nn. 6-8 (Oct. 8, 2003) (because the General Assembly had not enacted legislation allowing sheriffs "to supervise prisoner-workers beyond their territorial limits," sheriffs could not "obtain this authority by agreement with another jurisdiction" under Code § 15.2-1730.1). It simply authorizes Sheriff Jenkins to engage in a particular procedure: entering into inter-jurisdictional agreements. Because the Code does not otherwise allow Virginia sheriffs to enforce federal civil immigration law, Sheriff Jenkins cannot try to claim that power by entering into a 287(g) Agreement under the auspices of Code § 15.2-1730.1.

Moreover, the 287(g) Agreement here could not qualify as a Code § 15.2-1730.1 inter-jurisdictional agreement for two reasons.

First, Code § 15.2-1730.1 does not allow a sheriff to furnish his own assistance within his own jurisdiction—but that's all the 287(g) Agreement allows. Code § 15.2-1730.1 allows Sheriff Jenkins to "*receive*" another governmental entity's "assistance" *within* his jurisdiction, and to "*furnish*" his own "assistance" *outside* his jurisdiction. (Emphasis added); *see also* Virginia A.G. Opinion No. 03-056, 2003 WL 22680739, at *2 (Oct. 8, 2003) (Code § 15.2-1730.1 allows "local law-enforcement officers [to] exercise their law-enforcement responsibilities and

duties outside their territorial jurisdiction"). After all, a sheriff already can enforce Virginia general law within his jurisdiction. *See* Code § 15.2-1609. So Code § 15.2-1730.1 fills the gap by allowing sheriffs to act outside of their jurisdiction or to receive assistance within it.

Under the 287(g) Agreement, however, Sheriff Jenkins is *furnishing* his assistance *inside* his own jurisdiction. *See, e.g.*, JA 28 (Sheriff Jenkins will provide ICE information and evidence about his regular law enforcement activities), 38 (officers will enforce federal civil immigration law while "assigned to [Sheriff Jenkins's] jail/correctional facilities"). Sheriff Jenkins's conduct under the 287(g) Agreement—undertaking new actions within his own jurisdiction to help another sovereign—does not fit Code § 15.2-1730.1.

Second, Code § 15.2-1730.1 does not allow a sheriff to enter into agreements with a federal agency. Statutory neighbors define the reach of Code § 15.2-1730.1. *See Lucy v. City of Albemarle*, 258 Va. 118, 129-30 (1999) (courts read related statutes together to "make the body of the laws harmonious and just in their operation"). 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. And other related statutes identify when the Code authorizes "agreement[s] with . . . federal authorities." *E.g.*, Code § 15.2-1728 (allowing Virginia law enforcement agencies to enter into mutual aid agreements

with federal authorities related to any property or territory over which the Commonwealth has granted exclusive jurisdiction to the federal government). But Code § 15.2-1730.1, which the circuit court cited, says nothing about agreements with federal authorities.

In this statutory context, Code § 15.2-1730.1 concerns a sheriff's ability to enter into agreements with other Virginia entities to provide law enforcement assistance "in the Commonwealth." *See* Virginia A.G. Opinion No. 03-056, 2003 WL 22680739, at *2 & nn.6-8 (Oct. 8, 2003) (Code § 15.2-1730.1 relates to "interjurisdictional law enforcement authority of counties, cities, and towns"). Yet Sheriff Jenkins entered into the 287(g) Agreement with a federal agency. Code § 15.2-1730.1 therefore does not authorize that agreement.

Code § 15.2-1730.1 allows Virginia sheriffs to enter into inter-jurisdictional agreements (1) to exercise authority they already have under Virginia law, (2) to furnish assistance in other jurisdictions, (3) in agreement with other Virginia entities. The 287(g) Agreement flunks each of those requirements. Code § 15.2-1730.1 authorizes neither the 287(g) Agreement nor Sheriff Jenkins's enforcement of federal civil immigration law.

C. The General Assembly expressly contemplated, and *rejected*, giving sheriffs the ability to enter into 287(g) Agreements.

The General Assembly decides whether Sheriff Jenkins has the power to enter into 287(g) Agreements and enforce federal civil immigration law. *See* Va.

Const. art. VII, § 4 ("The duties and compensation of [sheriffs] shall be prescribed by general law or special act."). For over 100 years—at least since the 1902 Constitution made Virginia sheriffs "a constitutional officer"—a sheriff's "duties [have been] defined by statute." *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284 (1933). Thus, sheriffs' "duties are subject to legislative control." *Roop v. Whitt*, 289 Va. 274, 280 (2015); *see also, e.g.*, Code §§ 19.2-73.2 (authorizing sheriffs to issue subpoenas in misdemeanor and traffic matters); 19.2-81 (authorizing sheriffs to conduct arrests in criminal matters).

This Court thus looks to the General Assembly to determine whether Virginia law permits Sheriff Jenkins's actions. In doing so, this Court "look[s] both to legislation adopted and bills rejected by the General Assembly." *Tabler v. Board of Supervisors of Fairfax County*, 221 Va. 200, 202 (1980).

Considering what bills the General Assembly has rejected is imperative here. The General Assembly has deliberated about whether Virginia sheriffs should be able to enforce federal civil immigration law. It *rejected* giving sheriffs that power.

In the 2007 legislative session, Senator O'Brien introduced Senate Bill 1045, which would have afforded Sheriff Jenkins the authority to enforce federal civil immigration law. JA 325-26. Also during that session, Delegate Rust introduced House Bill 2926—essentially identical to Senator O'Brien's bill. JA 327-28. These bills would have amended the Code to allow a Virginia sheriff to exercise "any

immigration powers conferred upon the sheriff by agreement with the U.S. Department of Homeland Security." R. 969-72. That's *precisely* what Sheriff Jenkins has done by entering into the 287(g) Agreement. JA 23, 38-40.

Both bills died in committee. *See* SB 1045, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, http://bit.ly/SB1045 (last visited Jan. 24, 2010); HB 2926, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, http://bit.ly/HB2926 (last visited Jan. 24, 2010). The General Assembly has since considered and rejected other bills that would entangle Virginia sheriffs or localities with federal civil immigration law. *E.g.*, JA 329-32. These proposed Code revisions are not Virginia law.

"These actions by the General Assembly indicate clearly and unambiguously that the legislature did not intend to grant" Virginia sheriffs the authority to enforce federal civil immigration law. *Tabler*, 221 Va. at 204 (when General Assembly rejected various bills about disposable containers, it "clearly and unambiguously" declined to grant localities power over disposable containers); *see also Howell v. McAuliffe*, 292 Va. 320, 338-39 (2016) (failed legislation about changing the Virginia Constitution revealed the limits of the current Constitution).

The General Assembly has repeatedly rejected bills that would have allowed Sheriff Jenkins to enter into the 287(g) Agreement and enforce federal civil immigration law. Virginia law therefore prohibits Sheriff Jenkins's actions.

D. Attorney General Herring avoided answering whether Virginia law allows Virginia sheriffs to enter into 287(g) Agreements.

The circuit court also cited recent Attorney General opinions "[a]s further legal authority" for holding that Sheriff Jenkins could enforce federal civil immigration law under a 287(g) Agreement. JA 446. But those opinions do not address the question here: whether the Code affirmatively authorizes Virginia sheriffs to enter into 287(g) Agreements to enforce federal civil immigration law. They simply recognize, at most, that no Code provision would conflict with that authorization—were the General Assembly ever to give it.

The circuit court accurately captured what Attorney General Herring stated: "[T]here is no Virginia law *which precludes* a sheriff from entering into cooperative agreements with federal authorities to enforce immigration laws." JA 446 (emphasis added); *see also* Virginia A.G. Opinion No. 16-045, 2019 WL 1758322, at *3 (April 12, 2019) ("You next ask whether any conflicting state or local laws exist that would preclude the implementation of a § 287(g) agreement. I am unaware of any such conflicts of laws.").[1]

Attorney General Herring's 2019 opinion simply restates what Attorney General Cuccinelli observed a decade ago:

[1] Attorney General Herring simultaneously issued another opinion about ICE warrants and detainers, which does not address 287(g) Agreements. *See* Virginia A.G. Opinion No. 18-050, 2019 WL 1758323, at *1 (April 12, 2019).

> As a matter of state law, the authority of police officers to arrest for civil violations is restricted by statute. Sheriffs are not so limited, *but neither does the Code expressly authorize sheriffs to make arrests for civil violations of federal immigration laws*.

Virginia A.G. Opinion No. 10-047, 2010 WL 3064578, at *2 (July 30, 2010) (emphasis added).

The Code is silent about Virginia sheriffs enforcing federal civil immigration law. It neither affirmatively precludes that action (as Attorney General Herring opined), nor affirmatively authorizes it (as Attorney General Cuccinelli opined). Because a Virginia sheriff's duties "are regulated *and defined* by . . . statute," *Hilton v. Amburgey*, 198 Va. 727, 729 (1957) (emphasis added), the lack of statutory authority means there is no authority to act. Otherwise, scores of Code provisions empowering Virginia sheriffs to take certain actions or procedures would be rendered superfluous.[2] *See REVI, LLC v. Chicago Title Insurance Co.*, 290 Va. 203, 221 (2015) (this Court "assume[s] that the General Assembly's amendments to the law are purposeful and not unnecessary or vain").

[2] In a statement of interest, the United States argued that Virginia law allows 287(g) Agreements by citing cases in which the Home Rule applied; were applying federal Fourth Amendment principles; or were discussing state law that differs from Virginia. JA 406-07. In Virginia, however, the Dillon Rule governs. *Johnson v. Arlington County*, 292 Va. 843, 853 (2016). And the Constitution of Virginia imposes a Dillon Rule equivalent on sheriffs. *See* Va. Const. art. VII, § 4 ("The duties and compensation of [sheriffs] shall be prescribed by general law or special act."); *Brown v. Mitchell*, 308 F. Supp. 2d 682, 698 (E.D. Va. 2004) (even though the Dillon Rule did not apply to sheriffs, the Code must authorize sheriffs' actions because "the duties, powers, and obligations of Virginia's constitutional officers are regulated and defined *solely by statute*" (emphasis added)).

And Attorney General Herring's 2019 opinion does not answer the question here: whether the Code *authorizes* Sheriff Jenkins's actions. He rightly avoided answering that question. Had the Attorney General done so, he would have violated his Office's longstanding "policy" to avoid "express[ing] an opinion upon matters which are currently being litigated" unless a court asks him to do so. 1977-78 Virginia A.G. Opinion 34, 1977 WL 27405, at *1 (Oct. 6, 1977). "This well-established practice" protects Virginia's constitutional structure by "ensur[ing] that [the Attorney General's] Office will not render opinions upon questions whose answers may bring it into conflict with judicial tribunals." *Id*. Otherwise, the Attorney General's Office would be intruding upon the Virginia judiciary's constitutional role to "rende[r] judgment in matters properly before it." *Starrs v. Commonwealth*, 287 Va. 1, 7 (2014); *see also* Va. Const. art. VI, § 1.

Attorney General Herring's 2019 opinions do not answer whether Virginia law authorizes Sheriff Jenkins to enter into a 287(g) Agreement to enforce federal civil immigration law. Those opinions cannot justify the circuit court's actions.

E. The circuit court erred in sustaining Sheriff Jenkins's demurrer.

The circuit court ignored the General Assembly's decision that Virginia sheriffs are not in the business of enforcing federal civil immigration law. It also misconstrued three Code provisions as allowing Sheriff Jenkins to enter into the 287(g) Agreement and enforce federal civil immigration law. "Because the circuit

court erred in sustaining [Sheriff Jenkins's] demurrer, [this Court should] reverse the judgment of the circuit court and remand the case for further proceedings." *Hale v. Town of Warrenton*, 293 Va. 366, 366 (2017).

II. A/E 2: The circuit court erred in holding that the Board may fund the enforcement of federal civil immigration law under Virginia law.

A. The Board can attach conditions to its voluntary appropriations to Sheriff Jenkins.

The Board is Culpeper County's governing body. JA 2; *see* Code § 15.2-1400. As a legislative body, the Board may voluntarily appropriate the County's funds to Sheriff Jenkins. *See* Code §§ 15.2-1401, 15.2-1425. The Board "may condition such appropriations on the sheriff's acceptance of certain restrictions on the use of the appropriated funds." *Roop*, 289 Va. at 279 n.1 (2015).

This unexceptional holding follows from the principle that the "power to give such [appropriations] necessarily . . . implies the right to refuse it, and this in turn implies a power to attach appropriate conditions thereto." *City of Portsmouth v. Virginia Railway & Power Co.*, 141 Va. 54, 57 (1925) (discussing a locality's ability to condition its consent to a railroad company's use of public streets); *see also South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("[i]ncident" to Congress's spending power is the ability to "attach conditions on the receipt of federal funds").

As a result, local governing bodies throughout the Commonwealth properly condition their voluntary appropriations to sheriffs. *E.g.*, *Bailey v. Loudoun County*

Sheriff's Office, 288 Va. 159, 167-68 (2014) (noting Loudoun County's conditions on its appropriations to the Loudoun County Sheriff's Office).

Culpeper County is no different. The Board works with Sheriff Jenkins to "determine the use and amount of funds" that the Board will appropriate to Sheriff Jenkins. JA 6. The Board then conditions its appropriations to Sheriff Jenkins so that Sheriff Jenkins uses only specified amounts of appropriated money for specific purposes: either law enforcement, court security and transportation, or adult detention. JA 6.

Despite its ability to do so, the Board does not condition its voluntary appropriations to Sheriff Jenkins on the Sheriff's Office not using that local taxpayer money to enforce federal civil immigration law. The Board's voluntary appropriations lacking this condition violate Virginia law.

B. Code § 15.2-1600 does not upend conditional funding in Virginia.

Both the Board and Sheriff Jenkins have pointed to Code § 15.2-1600(B) as supposedly establishing that "under no circumstances will a locality be able to control a constitutional officer or otherwise direct a constitutional officer in the performance of his duties or operation of his office." JA 208, 286. This position reads Code § 15.2-1600(B) too broadly, impermissibly pushing it beyond the scope of its ordinary meaning. *See Turner v. Commonwealth*, 295 Va. 104, 109 (2018)

("[T]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.").

Code § 15.2-1600(B) does two things—neither of which are relevant to conditional funding. First, it prohibits a locality from passing an ordinance or resolution (which the Code calls "to designate") that would *force* a constitutional officer to take a discretionary action. *Id*. Second, it prohibits a locality from passing an ordinance or resolution limiting a constitutional officer's "powers or duties as provided by applicable state law." *Id*. Code § 15.2-1600(B)'s restrictions, then, simply establish that localities may not unilaterally impose their will on a constitutional officer.

Neither restriction relates to conditional funding. Conditional funding first requires a locality to voluntarily offer funds to a sheriff. The sheriff then has the freedom to accept or reject those funds, knowing of any conditions. A sheriff's voluntary decision to comply with conditions so that his office will receive a locality's voluntary appropriations has nothing to do with Code § 15.2-1600(B).

C. Code § 15.2-1200 prevents the Board from funding Sheriff Jenkins's illegal enforcement of federal civil immigration law.

"Any county may adopt such measures as it deems expedient to secure and promote the health, safety[,] and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth." Code § 15.2-1200. Sheriff Jenkins's enforcement of federal civil immigration law itself violates

Virginia law. *See* Argument § I. The Board's appropriation of funds for Sheriff Jenkins's illegal enforcement is therefore a "measur[e] . . . inconsistent with the general laws of the Commonwealth." Code § 15.2-1200. The Board's unconditional appropriations to Sheriff Jenkins violates Code § 15.2-1200.

D. The Dillon Rule separately prohibits the Board from funding Sheriff Jenkins's enforcement of federal civil immigration law.

"Virginia follows the Dillon Rule." *Johnson v. Arlington County*, 292 Va. 843, 853 (2016). Under the Dillon Rule, the Board has "only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Id*. "If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body." *Id*.

The Dillon Rule prevents the Board from funding Sheriff Jenkins's enforcement of federal civil immigration law—even if Virginia law were to allow Sheriff Jenkins's actions. The General Assembly has not expressly or impliedly given the Board that power, nor is it essential and indispensable to the Board.

First, the General Assembly has not expressly granted the Board the power to fund federal civil immigration law. No Code provision allows for that funding.

Second, funding the enforcement of federal civil immigration law is not necessarily or fairly implied from the powers the Board has. "To imply a particular power from a power expressly granted, it must be found that the legislature

intended that the grant of the express also would confer the implied." *Marble Technologies, Inc. v. City of Hampton*, 279 Va. 409, 418 (2010).

In this Nation, it is "undoubted" that the "power to determine immigration policy" rests with the federal sovereign. *Arizona*, 567 U.S. at 394-95. States largely cannot legislate in the immigration arena—even when it comes to criminal (not just civil) offenses. *E.g.*, *id.* at 400-07 (holding preempted two state criminal laws, one mirroring and the other going beyond federal immigration law). Nor can state officers participate in civil immigration enforcement without *at least* federal approval. *See id.* at 407-08; *Santos*, 725 F.3d at 465.

Against that backdrop, localities are twice removed from the locus of civil immigration policy: the federal government. And the General Assembly knows it. *See Turner*, 295 Va. at 109 ("We also presume that, in choosing the words of the statute, the General Assembly acted with full knowledge of the law in the area in which it dealt.").

In this context, the General Assembly has empowered the Board to help fund *state* offices and *state* priorities. *E.g.*, Code §§ 15.2-1605.1 (localities may supplement salaries of various state officials, including sheriffs), 15.2-1613 (localities may help fund operations of a sheriff's office). Nothing about that given ability necessarily or fairly implies that the Board can fund federal civil immigration law. *See, e.g.*, *Commonwealth v. Board of Arlington County*, 217 Va.

558, 577-79 (1977) (power for local boards to contract with and hire employees did not imply power to collectively bargain with labor organizations, particularly given legal landscape about collective bargaining).

Third, funding federal civil immigration law is not an essential and indispensable power to the Board as the local governing body. Rather, immigration policy is a matter for the federal government. *See Arizona*, 567 U.S. at 394-95.

The Board is funding Sheriff Jenkins's enforcement of federal civil immigration law with its voluntary appropriations. But the General Assembly has neither expressly nor impliedly given the Board that power, and that power is not essential and indispensable to the Board. The Dillon Rule thus prohibits the Board's unconditional appropriations to Sheriff Jenkins.

E. The circuit court erred in sustaining the Board's demurrer.

The Board's unconditional appropriations allows Sheriff Jenkins to use local taxpayer money to fund his enforcement of federal civil immigration law. That unconditional funding not only violates Code § 15.2-1200, but also it exceeds the Board's power under the Dillon Rule. The circuit court thus erred in sustaining the Board's demurrer by reasoning that its actions aligned with Virginia law. The Court should reverse the circuit court's sustaining of the Board's demurrer, and remand for further proceedings. *E.g.*, *Hale*, 293 Va. at 366 (providing this relief when a circuit court errs on demurrer).

III. The Court should not affirm on alternative grounds.

A. Political questions are beyond the scope of this appeal.

Sheriff Jenkins and the Board have invoked politics to sidestep legal arguments. *E.g.*, JA 540, 558. This case is not about policy. Nor does it raise political questions. It is a cut-and-dry case about what the Code allows. The Court should not affirm on the alternative grounds of political questions.

Without doubt, the normative question of whether sheriffs and localities *should* entangle themselves with federal civil immigration law is a political one. And reasonable people may disagree about whether Virginia sheriffs should be able to spend local taxpayer money to enforce immigration law. Because that question "involves many competing economic, societal, and policy considerations," the legislative process is "particularly appropriate" to decide it. *Williamson v. Old Brogue, Inc.*, 232 Va. 350, 354 (1986).

And the political process has decided the issue. The General Assembly debated the policy of allowing Virginia sheriffs to enter into 287(g) Agreements—and rejected it. Argument § I.C. It has not otherwise authorized sheriffs or localities to fund and enforce federal civil immigration law. Argument §§ I.B, II.D. Virginia's policymakers have already decided Virginia's policy in this area.

Given that the General Assembly already answered the "should" political questions, the issue here is a limited "can" question. *See Elizabeth River Crossings*

OpCo, LLC v. Meeks, 286 Va. 286, 309 (2013) (in cases questioning the constitutionality of government action, this Court's "role is simply to ascertain whether the political entities have acted within the constitutional boundaries that limit the exercise of their governmental power"). That is, *can* Sheriff Jenkins and the Board fund and enforce federal civil immigration law consistent with the Code and Constitution of Virginia? The answer is no.

The General Assembly already answered the policy questions. This appeal asks the Court simply to apply the law as it exists. There are no political questions here. *See id.* ("In addressing this issue, we are not evaluating—and indeed cannot speak to—the merits of the various policy decisions underlying this case.").

B. Preemption is irrelevant.

Sheriff Jenkins also argued that federal law preemption in immigration matters required dismissing the case. *E.g.*, JA 203-06. Without specifying any particular preemption doctrine—there are at least four, *see Anthony v. Verizon Virginia, Inc.*, 288 Va. 20, 30 (2014)—Sheriff Jenkins argued that Virginia courts lack jurisdiction to adjudicate this matter. To the contrary, preemption does not provide alternative grounds for affirming dismissal either.

Federal law authorizing the 287(g) Agreement requires that Agreement to be "consistent with State and local law." 8 USC § 1357(g)(1). And state courts are the "final arbiter[s] of what is state law." *Montana v. Wyoming*, 563 U.S. 368, 377 n.5

(2011); *see also, e.g.*, *Elizabeth River*, 286 Va. at 309 n.4 (resolving state law issue under state law principles that was "not compelled by, or necessarily coextensive with, federal jurisprudence"). As a result, the federal government specifically invited *Virginia* courts to opine about whether *Virginia* law permits *Virginia* government actors to enter into and act under 287(g) Agreements and spend *Virginia* local taxpayer money. State courts can resolve that question. *See, e.g.*, *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 42-47 (N.Y. App. Div. 2018) (holding New York statutory and common law does not allow state officers to conduct civil immigration arrests); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1154-56 (Mass. 2017) (holding state law does not allow state officials to arrest based on civil immigration detainers); *State v. Rodriguez*, 854 P.2d 399, 401-02 (Or. 1993) (deciding whether state officials violated state law that prohibited state officials from using state money, equipment, and personnel to help enforce federal immigration law).

Congress included that state court safety valve for good reason. Without it, 287(g) Agreements would be unconstitutional. As Sheriff Jenkins views it, "preemption" means that federal law can force Virginia to spend Virginia money contrary to Virginia law to fund and enforce federal policy. But the United States Constitution prohibits that type of commandeering. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 933-35 (1997) (holding unconstitutional federal law requiring

state law enforcement officers to take actions supporting federal handgun legislation because the federal government "cannot compel the States to enact or enforce a federal regulatory program"); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding unconstitutional federal law directing States to dispose of radioactive waste). That Tenth Amendment limit on the federal government's commandeering power extends to immigration law. *City of El Cenizo v. Texas*, 890 F.3d 164, 178 (5th Cir. 2018) ("The plaintiffs acknowledge that the Tenth Amendment prevents Congress from compelling Texas municipalities to cooperate in immigration enforcement."). Congress avoided Sheriff Jenkins's unconstitutional erasure of this Nation's dual sovereignty by requiring a 287(g) Agreement to comply with state law. Again, Virginia courts are the best forum to resolve these state law issues. *See Montana*, 563 U.S. at 377 n.5.

Nor does this concern over preemption deprive Virginia courts of subject matter jurisdiction. Ordinary preemption doctrines (like express preemption, implied conflict preemption, and implied field preemption) "d[o] not create federal jurisdiction." *Anthony*, 288 Va. at 30. Virginia courts can adjudicate claims subject to those preemption defenses all the way through trial. *Id.* at 30-31. And complete preemption simply categorizes claims as "arising under" federal law for purposes of federal courts' removal jurisdiction. *Id.* at 29-30. But Virginia courts have jurisdiction to adjudicate *those* type of preempted claims, too. *Id.* at 32-33; *see*

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962) (holding, generally, state courts "can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States").

Preemption is irrelevant here. As a matter of federal law, 287(g) Agreements must comply with state law. Virginia courts are best suited to opine about whether Virginia law allows 287(g) Agreements in this Commonwealth. And, in any event, preemption does not deprive Virginia courts of jurisdiction. The Court should not affirm on the alternative grounds of federal preemption.

C. The complaint pleaded sufficient facts to establish standing.

Finally, Sheriff Jenkins and the Board argued that McClary and Stockton lack taxpayer standing to sue. JA 206-10, 270-75. To the contrary, the complaint pleaded more than enough facts to survive a demurrer challenging standing. The Court should not affirm on these alternative grounds, either.

1. Virginia has long embraced local taxpayer lawsuits.

McClary and Stockton, as local taxpayers, "possess the common law right to challenge the legality of expenditures by local governments, distinct from federal or state standing requirements." *Lafferty v. School Board of Fairfax County*, 293 Va. 354, 363 (2017). "The direct and immediate interest of the citizen" that "permits these citizen or taxpayer challenges" is the citizen's interest "in the operation of local government." *Goldman v. Landsidle*, 262 Va. 364, 373 (2001).

This is no new development in Virginia common law. It is "well-established . . . that courts of equity have jurisdiction to restrain the illegal diversion of public funds at the suit of a citizen and taxpayer." *Johnson v. Black*, 103 Va. 477, 484 (1905). This is true throughout the Nation, as "taxpayers' suits to test the legality of expenditures by local governments are permitted in virtually every state." *Gordon v. Board of Supervisors of Fairfax County*, 207 Va. 827, 831 (1967). And it has long been true here in the Commonwealth. *E.g.*, *Bull v. Read*, 54 Va. (13 Gratt.) 78, 87 (1855) ("[A court of chancery's] jurisdiction in such cases would seem to be well defined and fully sustained by authority."). Even over 200 years ago, permitting local taxpayer suits was "the prevailing doctrine on the subject." *Roper v. McWhorter*, 77 Va. (2 Hans.) 214, 217 (1883).

2. The complaint pleaded facts satisfying taxpayer standing.

There are no special pleading requirements for a local taxpayer suit. Like any lawsuit, a taxpayer's complaint "must be made with sufficient definiteness to enable to court to find the existence of a legal basis for its judgment." *Squire v. Virginia Housing Development Authority*, 287 Va. 507, 514 (2014).

For taxpayer standing, that requirement means that a complaint must contain "allegations of costs or expenditures connected to" the challenged government action—that is, "a government expenditure authorized by the policy itself." *Lafferty*, 293 Va. at 363 (no standing when the only potential expenditures were

litigation costs). Otherwise, the lawsuit would be "nothing more than a difference of opinion between a taxpayer and his government," rather than a claim about improper use of local taxpayer funds. *Id.* at 364.

McClary and Stockton's complaint more than satisfies this minimal requirement. It explains how the Board collects their taxes and voluntarily appropriates that local tax money to Sheriff Jenkins with knowledge that he will use it to enforce federal civil immigration law. JA 5-7. In turn, Sheriff Jenkins spends that local taxpayer money on salary and personnel incidentals, training, security equipment, technology incidentals, and administrative supplies under the 287(g) Agreement. JA 9-11. In sum, Sheriff Jenkins's "local enforcement of federal civil immigration law under the 287(g) Agreement is paid for and made possible by local tax revenue collected from Culpeper County residents . . . to fund personnel, training, equipment, and other expenses." JA 8-9.

These are not "nominal costs of implementation," like the costs associated with a change in a non-discrimination policy. *Lafferty*, 293 Va. at 363. Even shading the facts during a Board of Supervisors meeting, Sheriff Jenkins could only proclaim that he did not foresee "an enormous cost"—*not* cost-free enforcement—under the 287(g) Agreement. JA 7. And, since then, Sheriff Jenkins has compared the price tag for his enforcement of federal civil immigration law to Prince William County's $310,000-a-year expense under its own 287(g)

Agreement. *STRAIGHT TALK and FACTS from the Sheriff on the cost of 287g*, Culpeper County Sheriff's Office, FACEBOOK.COM (Sept. 18, 2019), http://bit.ly/SheriffFBVideo (last visited Jan. 24, 2020) (at runtime 2:07 to 2:56).[3] The Board and Sheriff Jenkins are spending real dollars—McClary and Stockton's local taxpayer dollars—to fund and enforce federal civil immigration law under the 287(g) Agreement.

The Board's entire chunk of unconditional, voluntarily appropriated local taxes to Sheriff Jenkins is unlawful. JA 14-17. So too is Sheriff Jenkins's expenditure of those taxpayer dollars, all of which helps his enforcement of federal civil immigration law. JA 12-14. These allegations survive a demurrer challenging taxpayer standing.

3. Virginia has never required a complaint to detail the exact dollars being spent on unlawful conduct.

Sheriff Jenkins and the Board argued that a local taxpayer must plead "the specific costs or expenditures of local taxpayer funds," and "describ[e] any actual costs paid by local taxpayer dollars." JA 207-08, 272-73. But this hyper-specific standard of proof contradicts "Virginia's notice pleading regime." *Allison v. Brown*, 293 Va. 617, 624 (2017); *see also* Rule 1:4(d) ("Every pleading . . . shall

[3] McClary and Stockton would proffer this and similar facts to the circuit court on remand, for amendment, if this Court holds that Sheriff Jenkins's and the Board's standing arguments have merit. *See* Argument § III.D.

be sufficient if it clearly informs the opposite party of the true nature of the claim.").

Never before has a taxpayer been required to specify the precise dollars that were being unlawfully spent. *See, e.g.*, *Burk v. Porter*, 222 Va. 795, 796-97, 799 (1981) (reversing order sustaining demurrer to taxpayer's suit that simply alleged the defendants unlawfully "withdrew County funds for the purpose of paying their [travel] expenses"). Instead, McClary and Stockton's allegations were adequate by not only describing the flow of taxpayer money from their wallets to the Board and then to Sheriff Jenkins, but also detailing how that money was being unlawfully appropriated and spent to enforce federal civil immigration law. JA 5-11.

In fact, this Court held that local taxpayers had standing to challenge an agreement that contemplated the unlawful use of taxpayer funds. *See, e.g.*, *Armstrong v. Henrico County*, 212 Va. 66, 67, 71-72, 75-76 (1971) (reversing dismissal of complaint because taxpayers could "challenge an agreement made between the County and its Sanitary Districts as beyond the authority of each" when the contract contained payment and credit agreements contrary to Virginia law). And so McClary and Stockton's allegations were sufficient simply by challenging the legality of the 287(g) Agreement, which makes Sheriff Jenkins "responsible" for many "costs and expenditures" that he pays with local taxpayer dollars. JA 26-27; *see also* 8 USC § 1357(g)(1) (state or local officials "may carry

out such function [under a 287(g) Agreement] *at the expense of the State or political subdivision*" (emphasis added)).

McClary and Stockton's allegations went beyond the needed facts to make out a taxpayer standing case against Sheriff Jenkins's and the Board's unlawful uses of local taxpayer dollars.

4. Other funding is irrelevant to a demurrer and, in any event, could not compel dismissal.

Looking outside the pleadings, Sheriff Jenkins and the Board have argued that Sheriff Jenkins's budget consists of money provided by sources other than local taxpayer dollars. JA 208-10, 273-74. Because McClary and Stockton lack standing to challenge Sheriff Jenkins's use of those *other* funds, the argument goes, McClary and Stockton lack standing because they did not plead that local taxpayer dollars *solely* fund Sheriff Jenkins's actions under the 287(g) Agreement. The Court should reject this argument.

To begin with, this argument is beyond the scope of a demurrer. That other moneys fill Sheriff Jenkins's budget were allegations raised in Sheriff Jenkins's and the Board's pleas in bar. *E.g.*, JA 200-01 (reciting these allegations as "Additional Facts in Support of Special Plea in Bar"). Sheriff Jenkins and the Board withdrew from the circuit court's consideration their pleas in bar to avoid having to engage in discovery motions on this issue. JA 299. Sheriff Jenkins and the Board cannot scoop up the assertions that they wanted to prove at a plea in bar

hearing, and dump them in a court's lap to decide a demurrer. *See Our Lady of Peace, Inc. v. Morgan*, 297 Va. 832, 847 n.4 (2019) (describing the differences between demurrers and pleas in bar).

It's not just that Sheriff Jenkins and the Board ask courts to accept that other, non-local taxpayer moneys exist in Sheriff Jenkins's budget. They also suggest that those moneys are a "significant" and "substantial" proportion of Sheriff Jenkins's budget. JA 208, 293. And they imply that Sheriff Jenkins uses that other, non-local taxpayer money to fund actions under the 287(g) Agreement. JA 209, 294.

But these are just contested assertions, not facts based on evidence. *See* JA 316-17, 359 (noting the factual dispute). Mere assertions about what the facts might show do not carry the day on a plea in bar. *See Our Lady of Peace*, 297 Va. at 846 (when no party submitted evidence at a plea in bar hearing, "[t]he trial court could not have made a factual finding on [contested] issues without such facts"). And these factual assertions—found nowhere in the complaint—have no place in an appeal from a demurrer. *See Pendleton v. Newsome*, 290 Va. 162, 171 (2015) ("In deciding whether to sustain a demurrer, the sole question before the trial court is whether the facts pleaded, implied, and fairly and justly inferred are legally sufficient to state a cause of action against a defendant.").

Even if suited for demurrer, this argument does not compel affirming dismissal for three reasons: (1) the factual premise does not lead to the stated legal

conclusion; (2) comingling actionable and nonactionable funds makes them all actionable; and (3) Sheriff Jenkins and the Board have not satisfied their burden of proving this defense even if it were available.

First, that multiple sources fund Sheriff Jenkins's budget does not mean McClary and Stockton lack taxpayer standing. Sheriff Jenkins is spending their local tax dollars directly under the 287(g) Agreement. JA 9-11. Sheriff Jenkins cannot claim immunity from taxpayer suit just because he might spend some local tax dollars on something else (say, to pay overtime for a deputy on patrol). Even *those* local tax dollars indirectly help Sheriff Jenkins's enforcement of federal civil immigration law by freeing other money in his budget to pay for his enforcement of federal civil immigration law. Sheriff Jenkins cannot use accounting techniques that simply shuffle money around to avoid accountability for his unlawful conduct. *See, e.g.*, *Bailey*, 288 Va. at 173-75 (holding a sheriff's use of "creative accounting practices" could not obscure his violations of Virginia law).

Second, Sheriff Jenkins's commingling of local taxpayer funds with other monies, as he suggests occurs, *see* JA 209, does not cloak his entire budget in immunity from a local taxpayer suit. Even if this commingling happens, this Court has rejected placing the "impossible burden" of sifting through commingled funds on parties like McClary and Stockton. *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 local taxpayer funds with other monies, Sheriff Jenkins loses whatever benefits he might be able to claim—like a defense against suit—from the other monies. *See, e.g.*, *id.* at 522 (depositing exempt money "in a general account and commingling them with other nonexempt money . . . lost whatever exemptions [that money] may have had"); *Smoot v. Smoot*, 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). Sheriff Jenkins cannot immunize himself from otherwise proper local taxpayer suits by losing track of local taxpayer funds in commingled accounts.

Third, even if a viable defense, it is one that the Board and Sheriff Jenkins must prove—and they have not. Rather than placing the burden on local taxpayers to untangle Sheriff Jenkins's failure to take adequate accounting measures, this Court has suggested that *Sheriff Jenkins and the Board* bear the burden of disproving standing.

For example, when a trustee commingles their property with trust property, and later wants to separate their own property from the trust, the trustee has "the burden of proving how much of the commingled funds they owned personally." *Tauber v. Commonwealth*, 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.

This Court has applied that evidentiary burden to the party who has control over accounts in other contexts. *See, e.g.*, *Carlson v. Wells*, 281 Va. 173, 185-86 (2011) (collecting cases when 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).

That burden also applies here. If the Court were to hold this is a viable defense to standing, it is Sheriff Jenkins's and the Board's burden to prove it. They have not.

For all of these reasons, the Court should not affirm the circuit court's sustaining of the demurrer on the alternative grounds of standing.

D. A/E 3: Any alternative grounds that implicate factual deficiencies cannot be grounds for affirmance without leave to amend.

The circuit court denied leave to amend because no facts could cure dismissal. JA 446. That holding was correct *only if* the court should have sustained the demurrers as a matter of law. *See, e.g.*, *Brown v. Jacobs*, 289 Va. 209, 218-19 (2015) (not abuse of discretion to deny amendment when allegations would be "insufficient as a matter of law" to state a claim). That is, McClary and Stockton accept the circuit court's ruling that no facts can change a court's decision about

whether the Constitution of Virginia and Code permits the Board and Sheriff Jenkins to fund and enforce federal civil immigration law.

That said, Sheriff Jenkins and the Board will likely raise alternative grounds for affirmance that implicate factual disputes, or arguments about inadequate factual allegations. Assignment of Error 3 preserves McClary and Stockton's right to seek amendment of the complaint to address those alternative grounds—not the grounds stated by the circuit court—should this Court favor any of those alternative grounds. *See* Rule 1:8 ("Leave to amend shall be liberally granted in furtherance of the ends of justice.").

Sheriff Jenkins and the Board cannot fight amendment on the premise that it would be improper here because "there is no proffer or description of the new allegations." *AGCS Marine Insurance Co. v. Arlington County*, 293 Va. 469, 487 (2017) (describing circumstances when a circuit court does not abuse its discretion in denying leave to amend). McClary and Stockton did not proffer additional facts in response to the circuit court's holding because any additional facts would be futile *for that holding*. But McClary and Stockton are not on notice about what (if any) alternative grounds a court might eventually accept until at least this Court issues its ruling. *See Whitehead v. Commonwealth*, 278 Va. 105, 115-16 (2009) (holding "right result for the wrong reason" could not apply to alternative grounds that could implicate additional facts when the appellant "was not on notice to

present evidence to rebut" those alternative grounds), *affirmed in relevant part by Perry v. Commonwealth*, 280 Va. 572, 579 (2010).

Only once a court accepts those alternative grounds would McClary and Stockton be on notice about what type of facts it would need to proffer. And they will proffer appropriate facts at that time.

CONCLUSION

McClary and Stockton ask the Court to reverse the circuit court, remand for further proceedings, and grant all other appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies on this 27th day of January, 2020, that the foregoing brief complies with Rule 5:26 and has been filed electronically through VACES and three paper copies have been delivered to the Clerk's Office of the Supreme Court of Virginia. This same day a copy of the foregoing brief has been delivered via email to the following counsel for appellees:

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