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IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

MICHAEL V. McCLARY, *et al.*,

Petitioners-Appellants,

v.

SCOTT H. JENKINS, *et al.*,

Respondents-Appellees.

PETITION FOR APPEAL

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

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions

Other Authorities

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 Department of Homeland Security. The General Assembly declined to authorize this conduct, and 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 it funds federal civil immigration law. This action upends Virginia's adherence to the Dillon Rule. The Board's actions are unlawful.

Petitioners Michael McClary and Christina Stockton continue to suffer injury as Sheriff Jenkins and the Board use their local taxpayer money to fund this unlawful scheme. And McClary and Stockton are not alone. Sheriffs throughout

Virginia are wrestling with whether to enter into similar 287(g) Agreements or enforce federal civil immigration law. As in Culpeper County, these localities and sheriffs would use local taxpayer money to fund federal priorities.

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 circuit court's ruling challenges the fundamental structure of Virginia locality law. That judgment also raises issues about local cooperation with federal entities in the face of the General Assembly's opposition or silence. And the court's reasoning wrongly construed Virginia law. These issues are significant, and they will arise again. This case is a good vehicle to resolve these purely legal issues because there are no distracting factual disputes.

For these reasons, the Court should grant this petition.

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: R. 946-93 (opposition to demurrer), 1127-29 (final order), 1130-1233 (hearing transcript, including specifically 1212-24).

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: R. 1004-49 (opposition to demurrer), 1127-29 (final order), 1130-1233 (hearing transcript, including specifically 1163-79).

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: R. 966 (opposition to demurrer), 1022 (opposition to demurrer), 1127-29 (final order), 1130-1233 (hearing transcript, including specifically 1225).

FACTS AND MATERIAL PROCEEDINGS

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

McClary and Stockton are Culpeper County residents. R. 2. They pay their taxes, including those levied by the Board of Supervisors. R. 5. The Board receives

those taxes as revenue that forms and funds the Board's fiscal year budget. R. 5. McClary's and Stockton's local taxes are paid into the Board's General Fund. R. 5.

The Board appropriates money from its General Fund to the Culpeper County Sheriff's Office. R. 5, 15. The Board can impose conditions on how Sheriff Jenkins uses the funds it appropriates to the Sheriff's Office. R. 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). R. 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. R. 6.

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

II. Sheriff Jenkins and the Board decide that they would enforce federal civil immigration law.

Sheriff Jenkins attended the Board of Supervisors' December 2017 meeting. R. 6. Sheriff Jenkins spoke at that meeting and informed the Board that he would enter into a 287(g) Agreement with ICE. R. 6. That agreement, Sheriff Jenkins explained, would allow the Sheriff's Office to enforce federal civil immigration law. R. 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. R. 7.

Although the Board knew of Sheriff Jenkins's plans, it has done nothing but hand money over to Sheriff Jenkins. R. 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. R. 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. R. 8; *see also* R. 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. R. 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.

R. 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." R. 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. R. 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 the 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.

R. 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." R. 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. R. 16. And 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. R. 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 enforce federal civil immigration law. R. 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. R. 3, 12. Thus, Sheriff Jenkins's entry into the 287(g) Agreement in unlawful. R. 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. R. 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. R. 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. R. 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. R. 16.

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

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

Sheriff Jenkins and the Board of Supervisors filed various defensive papers, all of which they eventually withdrew except for their demurrers. *See* R. 45-807, 812-878, 923-37, 943, 1230. McClary and Stockton filed oppositions. R. 946-93, 1004-49. The court held a hearing on those demurrers, and ultimately took the parties' arguments under advisement. R. 1130-1233.

The court later issued a letter opinion sustaining the demurrers. R. 1099-1100. 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." R. 1100. Second, because "[f]ederal law expressly authorizes

cooperative efforts with state and local governments through cooperative agreements." R. 1100. 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." R. 1100. The court entered judgment in the Board's favor "on the same basis as it sustained the Sheriff's Demurrer." R. 1100.

After that letter opinion, but before the circuit court entered the final order, McClary and Stockton moved the court to reconsider its opinion. R. 1113-26. The circuit court later entered a final order reflecting its letter opinion and rejecting the arguments made in the motion to reconsider. R. 1127-29.

McClary and Stockton timely appealed. R. 1101-06.

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 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. <u>This case raises central questions about Virginia governance (A/E 1&2).</u>

A. The circuit court's judgment allows Virginia sheriffs to act in defiance of the General Assembly's will.

The circuit court's judgment breaks new ground in Virginia law. Never before could a Virginia sheriff act outside those powers the General Assembly granted his office. *See* Va. Const. art. VI, § 4 ("The duties and compensation of [sheriffs] shall be prescribed by general law or special act."). For over 100 years—since the 1902 Constitution made Virginia sheriffs "a constitutional officer"—a sheriff's "duties [have been] defined by statute." *See Narrows Grocery Co. v. Bailey*, 161 Va. 278, 284 (1933). Thus sheriffs' "duties [have been] subject to legislative control . . . by state statute." *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 infraction matters); 19.2-81 (authorizing sheriffs to conduct arrests in criminal matters).

No longer. No Code provision authorizes Sheriff Jenkins to enter into a 287(g) Agreement or to enforce federal civil immigration law. Argument § III.A.1. Under the circuit court's judgment, then, Virginia sheriffs no longer look to the Code to determine their authority.

In fact, a clear indication of what *is not* Virginia law is to look and see what bills the General Assembly *has rejected. Tabler v. Board of Supervisors of Fairfax County*, 221 Va. 200, 202 (1980) ("In determining legislative intent, we have looked both to legislation adopted and bills rejected by the General Assembly."). The General Assembly expressly contemplated allowing Virginia sheriffs to enter into agreements with the federal government to enforce federal civil immigration law. But the General Assembly declined to give 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. R. 969-70. Also during that session, Delegate Rust introduced House Bill 2926—essentially identical to Senator O'Brien's senate bill. R. 971-72. These bills would have amended various Code sections 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.

Both bills died in committee. *See* SB 1045, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, http://bit.ly/SB1045 (last visited August 30, 2019); HB 2926, VIRGINIA'S LEGISLATIVE INFORMATION SYSTEM, http://bit.ly/HB2926 (last visited August 30, 2019). The General Assembly has since considered—and rejected—similar bills that would help the enforcement of federal civil

immigration law. R. 950, 973-76. These proposed revisions to the Code *are not* Virginia law.

With no other Code provisions authorizing Sheriff Jenkins's conduct, the General Assembly's failure to act speaks volumes about the limits of his power. *Cf. Howell v. McAuliffe*, 292 Va. 320, 338-39 (2016) (failed legislation about changing the Virginia Constitution revealed the limits of the current Constitution).

The circuit court ignored the General Assembly's unmistakable pronouncement: Virginia sheriffs are not in the business of enforcing federal civil immigration law. Under the circuit court's ruling, however, the General Assembly no longer controls what Virginia sheriffs can do.

B. The circuit court's judgment allows Virginia localities to shed the restraints of the Dillon Rule.

Previously, "Virginia follow[ed] the Dillon Rule." *Johnson v. Arlington County*, 292 Va. 843, 853 (2016). Under the Dillon Rule, local governing bodies—like the Board of Supervisors—"have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." *Id.*

Virginia's Dillon Rule now stops at the border of Culpeper County. No Code provision expressly or impliedly permits the Board to fund Sheriff Jenkins's enforcement of federal civil immigration law. *See* R. 1173. Nor has the Board argued that its funding of federal law is essential and indispensable. *See* R. 923-37.

Had the circuit court applied the Dillon Rule, it would have held the Board's actions unlawful.

Yet the circuit court declined to apply the Dillon Rule to the Board's actions. Instead, the court permitted the Board to fund federal civil immigration law enforcement without the General Assembly's approval. Under that ruling, localities no longer need be concerned with the Dillon Rule's constraints.

II. This case raises recurring questions of statewide importance (A/E 1&2).

These questions about who has the authority to define the powers of Virginia sheriffs and localities arise in a novel context for Virginia courts: local enforcement of federal civil immigration law under 287(g) Agreements. But other Virginia actors also have 287(g) Agreements on their minds.

For example, like Sheriff Jenkins, the Prince-William-Manassas Regional Adult Detention Center also has an ongoing 287(g) Agreement with ICE. *Delegation of Immigration Authority*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, https://www.ice.gov/287g (last visited August 30, 2019) (chart at the bottom of the webpage). Meanwhile, Fairfax County Sheriff Kincaid ended her office's 287(g) Agreement earlier this year. *Sheriff Terminates Intergovernmental Service Agreement with ICE*, FAIRFAX COUNTY, http://bit.ly/FairfaxCountyICE (last visited August 30, 2019). Fauquier County Sheriff Mosier recently declined to enter into a 287(g) Agreement. *Sheriff drops controversial 287(g) immigration-*

enforcement application, FAUQUIER TIMES (April 26, 2017), http://bit.ly/FauquierSheriffICE (last visited August 30, 2019). And the federal government continues to increase its efforts to coax localities to enforce federal immigration policy in other ways—regardless of the General Assembly's say-so. *See, e.g.*, *ICE launches program to strengthen immigration enforcement*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (May 6, 2019), http://bit.ly/ICE-WSO-Program (last visited August 30, 2019) (ICE announcing its Warrant Service Officer program to allow "local law-enforcement . . . to honor immigration detainers [despite being] prohibited due to state and local policies").

This case is no one-off problem. Lacking the General Assembly's authorization, other Virginia sheriffs and localities will look to the circuit court's judgment when considering 287(g) Agreements and other cooperative efforts with the federal government to enforce federal policy.

III. The circuit court's judgment was wrong. (A/E 1-3).

Not only are the issues significant and recurring, but this case also needs error correction. The circuit court wrongly construed Virginia law to hold that Sheriff Jenkins and the Board of Supervisors could use local taxpayer funds to enforce federal civil immigration law.

A. The circuit court erred in entering judgment on Counts I and II (A/E 1).

The crux of the circuit court's judgment in favor of Sheriff Jenkins was its misreading of the Code. R. 1100. It also wrongly used federal law and the Virginia Attorney General's recent opinions to support its incorrect holding. R. 1100.

Reasonable people may disagree about whether Virginia sheriffs should be able to spend local taxpayer money to enforce federal civil immigration law. That policy dispute is not before this Court. In deciding whether Sheriff Jenkins has stepped beyond his constitutional limits, Virginia courts do "not evaluat[e]—and indeed cannot speak to—the merits of the various policy decisions underlying this case." *Elizabeth River Crossings OpCo, LLC v. Meeks*, 286 Va. 286, 309 (2013). Virginia courts instead "simply . . . ascertain whether the political entities have acted within the constitutional boundaries that limit the exercise of their governmental power." *Id.* Sheriff Jenkins has acted, and continues to act, outside the scope of the constitutional limits on his position.

The Constitution limits Sheriff Jenkins's duties and responsibilities to those set out in the Code. Va. Const. art. VI, § 4. No Code provision allows Sheriff Jenkins to enter into 287(g) Agreements or otherwise enforce federal civil immigration law. Argument § III.A.1. The General Assembly expressly contemplated legislation to grant that power—and rejected it. Argument § I.A. The circuit court erred in its contrary holding and entering judgment on Counts I and II.

1. The Code does not give sheriffs the power to enforce federal civil immigration law.

The circuit court held that three Code provisions gave "Sheriff Jenkins authority to enforce the law." R. 1100. Because federal law authorized Sheriff Jenkins's conduct, the court reasoned, Virginia law permitted Sheriff Jenkins's actions. R. 1100. The circuit court's error was misreading the Code to allow Sheriff Jenkins to enforce federal civil immigration—even if authorized by federal law.

Code § 15.2-1609. The circuit court first pointed to Code § 15.2-1609 as authorizing Sheriff Jenkins to enforce federal civil immigration law. R. 1100. This provision is a general authorizing statute, stating 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 provision speaks to a sheriff enforcing Virginia's 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*, 71 Va. (30 Gratt.) 24, 35 (1878). The circuit court erred when it held that Code § 16.2-1609 permitted Sheriff Jenkins to enforce the laws of other sovereigns.

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. R. 1100. But this provision allows Sheriff Jenkins to enforce only *criminal* immigration law "pursuant to the provisions of this section." Code § 19.2-81.6 (law enforcement can arrest some aliens on "reasonable suspicion that [the person] has committed or is committing a crime"). Code § 19.2-81.6 does not address the circumstances of this case: *civil* immigration law.

Virginia recognizes a distinction between civil and criminal law. 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 matters, specific Code sections authorize sheriffs to perform only limited civil duties. *See, e.g.*, Code § 55-237.1 (permitting sheriffs to oversee removal of personal property after eviction).

Federal law also recognizes this distinction between civil and criminal immigration enforcement. For example, physical presence in the United States

without proper authorization, such as overstaying a visa, is a civil—but not criminal—offense. *See, e.g.*, 8 U.S.C. § 1227; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (Kagan, J., plurality op.) (holding, in the context of 8 U.S.C. § 1227, that "[t]he removal of an alien is a civil matter"); *id.* at 1231 (Gorsuch, J., concurring) (agreeing about the civil context). In contrast, unlawful re-entry is a criminal offense with criminal penalties. *See, e.g.*, 8 U.S.C. § 1326(a).

Given this distinction in both Virginia and federal law, Code § 19.2-81.6 authorizes Sheriff Jenkins to enforce only *criminal* law: it allows law enforcement to act only when (among other things) they suspect an individual of criminal activity. *Id.* But 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 August 30, 2019); *see also* R. 22 (purpose of the 287(g) Agreement is to assist "ICE's *civil* immigration enforcement priorities" (emphasis added)). The circuit court therefore erred when it held that Code § 19.2-81.6 permitted Sheriff Jenkins to enforce federal *civil* immigration law.

Code § 15.2-1730.1. The circuit court also cited Code § 15.2-1730.1 as allowing Sheriff Jenkins to enforce federal civil immigration law. R. 1100. 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. This statute does not authorize Sheriff Jenkins's conduct for three reasons.

First, Code § 15.2-1730.1 does not allow Sheriff Jenkins to enter into agreements with federal agencies. 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, like Code § 16.2-1728, expressly identify when the Code authorizes "agreement[s] with . . . federal authorities." But Code § 15.2-1730.1, which the circuit court used, 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").

Second, 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"). That makes sense. Code § 15.2-1730.1 encompasses agreements between Virginia entities with their own separate—rather than overlapping—jurisdictional boundaries.

Under the 287(g) Agreement, however, Sheriff Jenkins is *furnishing* his assistance *inside* his jurisdiction. *See, e.g.*, R. 28 (Sheriff Jenkins will provide ICE information and evidence about his regular law-enforcement activities); R. 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—to undertake new actions within his own jurisdiction to help some other sovereign—do not fit Code § 15.2-1730.1.

Third, Code § 15.2-1730.1 does not give Sheriff Jenkins free rein to enter into an agreement in which he gives *himself* new authority. Instead, the subject of an agreement under this provision must be the "law-enforcement responsibilities and duties" that Sheriff Jenkins already has under Virginia law. *See* 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). No other Code provision permits Sheriff Jenkins to enter into 287(g) Agreements or enforce federal civil immigration law, and so Sheriff Jenkins cannot rely on Code § 15.2-1730.1 to grant himself that power.

Each of these reasons establish that the circuit court erred in holding that Code § 15.2-1730.1 authorized Sheriff Jenkins to enter into a 287(g) Agreement to enforce federal civil immigration law.

2. The question is one of Virginia law, not federal law.

The circuit court also held that federal law authorized Sheriff Jenkins's actions. R. 1100. Federal law might allow ICE to delegate authority to localities. But federal authorization is insufficient. Instead, Virginia law *must also* authorize these actions. McClary and Stockton sued Sheriff Jenkins because the General Assembly has not granted Virginia sheriffs authority to enforce federal civil immigration law.

The circuit court recognized that both federal and Virginia law must authorize Sheriff Jenkins actions. *See* R. 1100. It erred by holding that Virginia law authorizes Sheriff Jenkins's actions. Argument § III.A.1. Whether federal law *also* authorizes Sheriff Jenkins's conduct is beside the point.

In fact, Sheriff Jenkins's focus on federal law led him to argue, R. 822-25, that federal law can unconstitutionally erase *state* law limitations on *state* actors spending *state* funds. *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). Focusing on federal law leads to unconstitutional results.

The question here is purely one of state law: does Virginia law allow Sheriff Jenkins to use local taxpayer funds to enforce federal civil immigration law? Federal law cannot answer that question. And Virginia law has answered "no."

3. The Attorney General's 2019 opinions are irrelevant.

The circuit court last supported its holding by relying on Attorney General Herring's April 2019 opinions. R. 1100. These opinions—rendered just months ago, without time for the General Assembly to consider them—are not persuasive authority. *See Appalachian Power Co. v. State Corporation Commission*, 284 Va. 695, 704 (2012) (not giving weight to the Commission's interpretation of a statute that the General Assembly had no opportunity to consider).

Nor do these opinions address the issue here. *See* R. 1071-83 (the 2019 opinions). The circuit court remarked that the 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." R. 1100 (emphasis added). This litigation asks not whether Virginia law *prohibits* Sheriff Jenkins's conduct, but whether Virginia law *affirmatively authorizes* it.

Attorney General Herring was right to avoid addressing the issues in this pending litigation. Had he done so, the Attorney General 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 wield the Commonwealth's judicial power and "rende[r] judgment in matters properly before it." *Starrs v. Commonwealth*, 287 Va. 1, 7 (2014); *see also* Va. Const. art. VI, § 1.

The circuit court thus erred in relying on the 2019 Attorney General opinions to enter judgment on Counts I and II.

B. The circuit court erred in entering judgment on Count III (A/E 2).

No matter what the Code might say about Virginia sheriffs, no party has pointed to any Code provision that allows the Board of Supervisors to spend local taxpayer money to enforce federal civil immigration law. *See* R. 1173. The circuit court thought nothing of that fact because, simply, it "sustained the Sheriff's Demurrer." R. 1100. But whether the Code authorizes *Sheriff Jenkins's* actions does not address whether the Code allows *the Board of Supervisors'* conduct. *See Johnson v. County of Goochland*, 206 Va. 235, 237 (1965) ("The powers of boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication.").

The circuit court erred in refusing to undertake the Dillon Rule analysis for the Board of Supervisors' actions. That analysis would reveal no authority for the Board's funding of federal civil immigration law. R. 1007-08 (laying out the Dillon Rule analysis). The circuit court's entry of judgment on Count III was error.

C. The circuit court erred in denying leave to amend (A/E 3).

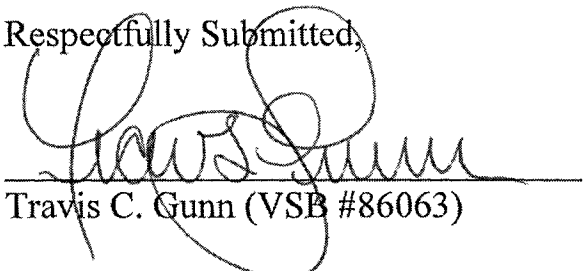
The circuit court denied leave to amend because no facts could cure the dismissal based on the law. R. 1100. McClary and Stockton recognize that this holding is correct *only if* the circuit court's holding correctly required judgment on their claims as a matter of law. McClary and Stockton assert Assignment of Error 3

to preserve their ability to amend the complaint should this Court hold that alternative arguments implicating factual issues require additional consideration.

CONCLUSION

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

Respectfully Submitted,



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Counsel for Petitioners-Appellants

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that:

(1) The foregoing Petition for Appeal fully complies with the Rules of this Court, including Rules 5:17 and 5:26. This Petition for Appeal satisfies the length requirements by being fewer than 35 pages. Rule 5:17(f).

(2) The Petitioners-Appellants are Michael V. McClary and Christina Stockton.

(3) Counsel for Petitioners-Appellants are

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(4) Petitioners-Appellants desire to state orally, in person, to a panel of this Court the reasons why the petition for appeal should be granted.

(5) The Respondents-Appellees are Sheriff Scott H. Jenkins and the Board of Supervisors of Culpeper County.

(6) Respondent-Appellee Sheriff Jenkins's counsel is

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(8) On this 30th day of August, 2019:

(a) An original and seven copies of the foregoing Petition for Appeal was hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing as required by Rule 5:17(b), (e).

(b) A copy of the foregoing Petition for Appeal was sent by U.S. Mail, expenses prepaid, to Sheriff Jenkins and the Board of Supervisors at the counsel addresses listed above as required by Rule 5:17(i)(2).

Travis C. Gunn (VSB #86063)