

VIRGINIA: IN THE SIXTEENTH JUDICIAL CIRCUIT OF THE COMMONWEALTH  
IN THE CIRCUIT COURT OF CULPEPER COUNTY

MICHAEL V. MCCLARY, )  
 )  
and )  
 )  
CHRISTINA STOCKTON )  
Plaintiffs, )  
 )  
v. ) CASE NUMBER: CL 18-1373  
 )  
SCOTT H. JENKINS, in his official capacity )  
as Sheriff of Culpeper County )  
 )  
and )  
 )  
 )  
BOARD OF SUPERVISORS OF )  
CULPEPER COUNTY, )  
Defendants. )

PLEAS IN BAR

Comes now before this Honorable Court, the Board of Supervisors of Culpeper County, by its counsel, County Attorney Bobbi Jo Alexis, who files the below pleas in bar in response to the Complaint, and requests this Honorable Court to sustain its pleas in bar and dismiss the matter against it. The Board of Supervisors of Culpeper County (hereinafter referred to as the “County”) provides the following to the Court in support of its pleas in bar.

The whole of the Complaint is comprised of three (3) counts. Counts I and II of the Complaint allege causes of action against only Sheriff Scott H. Jenkins (hereinafter referred to as the “Sheriff”). Count III of Complaint is the only count directed towards the County. As such, the County’s pleadings and papers filed herein this lawsuit are directed solely towards those several legal defects with regard to Count III of the Complaint, unless otherwise specifically articulated herein.

### A. Pertinent Foundational Law

1. Sheriffs and their deputies are *not* county employees/actors, as a matter of law, namely the Constitution of Virginia, Art. 7, Sec. 4. A county is not responsible for the actions of the local elected sheriff, who holds his office by virtue of the Constitution of Virginia, Art. 7, Sec. 4, which specifically provides that a sheriff is a constitutional officer and that his duties are regulated and defined by state statute, independent of the state and county governments. See Hilton v. Amburgey, 198 Va. 727, (1957); Carraway v. Hill, 265 Va. 20 (2003); Rashad v. Jenkins, United States District Court for the Eastern District of Virginia, Richmond Div., decided March 3, 2016, Case No. 3:15-cv-655 (2016 U.S. Dist. LEXIS 27879); Sherman v. Richmond, 543 F. Supp. 447 (E.D. Va. 2012); Chien v. Virginia, United States District Court for the Eastern District of Virginia, Richmond Division, decided March 5, 2018, Case No. 1:17-cv-677 (2018 U.S. Dist. LEXIS 36242); and Verry v. Barry, 71 Va. Cir. 318 (Fairfax Cnty. 2006). See Cited Caselaw Authorities, attached as Exhibit A.

2. Virginia sheriffs are independent constitutional officers, who are beholden neither to local governing bodies, nor to the Commonwealth, but rather only to the voters who elected them. See United States v. Gregory, United States Court of Appeals for the Fourth Circuit, decided June 8, 1994, Docket No. 93-1391 (1994 U.S. App. LEXIS 14443, 12). A county board of supervisors does not prescribe the duties of a sheriff; it has no control over his conduct; and, it has no power to remove him from office, nor any control over the duration of his term thereof. See Roop v. Whitt, 289 Va. 274 (2015); United States v. Gregory, United States Court of Appeals for the Fourth Circuit, decided June 8, 1994, Docket No. 93-1391 (1994 U.S. App. LEXIS 14443); Weiner v. Albemarle Cty., United States District Court for the Western District of Virginia, Charlottesville Division, decided January 24, 2018, Case No. 3:17-cv-00046 (2018

U.S. Dist. LEXIS 11123); and Dunn v. Millirons, United States District Court for the Western District of Virginia, Roanoke Division, decided March 31, 2016, Case No. 7:14-cv-000429 See Exhibit A.

3. Pursuant to Va. Code Ann., Sec. 15.2-1600, the voters of each county shall elect a sheriff, as well as other officers as stated therein. The duties and compensation of such elected officers shall be prescribed by general law or special act. *Id.* Moreover, the Virginia General Assembly (*with emphasis*) directs that nothing in Title 15.2 shall be construed to authorize the governing body or the chief administrative officer of a locality (i) to designate an elected constitutional officer to exercise a power or perform a duty which the officer is not required to perform under applicable state law without the consent of such officer, nor by designation (ii) to diminish any such officer's powers or duties as provided by applicable state law including the power to organize their offices and to appoint such deputies, assistants and other individuals as are authorized by law upon the terms and conditions specified by such officers. *Id.*

4. The financial support of elected sheriffs is specifically addressed by general law and special acts, including but not limited to statutes within Title 15.2, Subtitle II, Chapter 16, Article 1 (Local Constitutional Officers, Courthouses, and Supplies), Article 3 (Sheriffs), and Article 6.1 (Compensation Board Generally) of the Code of Virginia (1950), as amended, and the actual annual appropriations acts of the Virginia General Assembly. Within the aforementioned Articles 1, 3, and 6.1, there is a specific (procedural and substantive) process put in place by the Virginia General Assembly regarding the appropriation of financial support to the elected sheriffs that generally involve (i) the annual state appropriations acts<sup>1</sup>; (ii) policy, management, and oversight decisions regarding state funding allocations by the Compensation Board (state

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<sup>1</sup> For example, in fiscal year 2019, approximately three (3) million dollars in state monies were allocated by the Compensation Board and appropriated by the Virginia General Assembly to Culpeper County for the Sheriff's budget.

entity)<sup>2</sup>; (iii) adherence by the respective localities to the policy, management, and oversight decisions of the Compensation Board, and (iv) adherence by the respective localities to any additional related provisions in the Code of Virginia in Title 15.2, Subtitle II, Chapter 16, including but not limited to Va. Code Ann., Sec. 15.2-1605.1. See Financial Support Cited Authorities, attached as Exhibit B.

5. Pursuant to Va. Code Ann., Sec. 15.2-1401, all powers granted to localities are vested in their governing bodies. Governing bodies of localities perform their necessary duties, obligations, and functions, by the adoption of ordinances, resolutions, and motions. See Va. Code Ann., Sec. 15.2-1425 and the Virginia Freedom of Information Act (VFOIA). In adopting ordinances, resolutions and motions, votes are legally required to be recorded in writing and published under VFOIA.

6. Pursuant to the Constitution of Virginia, Art. 7, Sec. 7 and Va. Code Ann., Sec. 15.2-1428, no ordinance or resolution appropriating money exceeding the sum of five hundred dollars shall be passed except by recorded affirmative vote of a majority of all members elected to the governing body, which vote shall be recorded in writing and published under VFOIA.

7. Pursuant to Va. Code Ann., Secs. 15.2-2503 and -2506, the governing bodies of political subdivisions of the Commonwealth of Virginia shall prepare and approve their budgets for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings for the locality for the ensuing fiscal year. The governing bodies shall approve the budget only after a public hearing duly published at least once in a newspaper having general circulation in the locality affected. The governing bodies shall annually publish the approved budget on the locality's

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<sup>2</sup> The Compensation Board (state entity) determines the specific allocation of state funding to each of the localities in the Commonwealth for the support of the elected sheriffs.

website, if any, or shall otherwise make the approved budgets available in hard copies, as needed to citizens for inspection.

8. Pursuant to Rule 2:202 of the Rules of the Supreme Court of Virginia and Va. Code Ann, Sec. 8.01-386, the Court shall take judicial notice of the laws of the Commonwealth of Virginia.

### **B. Judicial Notice**

Pursuant to the Rule 2:203 of the Rules of the Supreme Court of Virginia and Va. Code Ann., Sec. 8.01-388, the court shall take judicial notice of the contents of all official publications of the political subdivisions of the Commonwealth that are required to be published pursuant to the laws of the Commonwealth. Please find attached Exhibit C, which exhibit includes several official publications of Culpeper County, Virginia that are required to be published pursuant to laws of the Commonwealth, which laws are referenced in herein Section A. Pertinent Foundational Law of this filing. This Court shall take judicial notice of the contents of the publications in Exhibit C. The records consist of all appropriations made by the County to the Sheriff and also the County's budget.

### **C. Evidentiary Considerations**

1. A plea in bar is a defensive pleading that asserts, and reduces the litigation to, a single issue which if proved, creates a complete bar to plaintiff's recovery. See Kroger Co. v. Appalachian Power Co., 244 Va. 560 (1992) found in Exhibit A.

2. Unlike a demurrer, the Court may take evidence in considering a plea in bar. A plea in bar permits factual submissions to the court regarding the issue raised in the plea, including the submission of affidavits, depositions, testimony, and other admissible evidence. See Cooper Indus., Inc. v. Melendez, 260 Va. 578 (2000) found in Exhibit A.

3. Upon agreement of the parties, the issue may be submitted, with an identified body of facts, for the trial court's determination. The whole matter of law and fact pertaining to the plea in bar may be decided by the court. See found Kroger Co. v. Appalachian Power Co., 244 Va. 560 (1992) in Exhibit A.

#### **D. Additional Evidence**

1. The Code of Virginia (1950), as amended, Secs. 8.01-389 and -390 provides that courts shall receive as prima facie evidence certain (i) judicial records properly authenticated by the clerks of the circuit courts and (ii) business records of political subdivisions of the Commonwealth properly authenticated. Please find attached Exhibit D, which exhibit includes several business records of Culpeper County, Virginia properly certified under the statute.<sup>3</sup> This Court shall receive these records as prima facie evidence.

2. The records of Exhibit D consist of information from the Compensation Board to the County regarding the allocation and appropriation of state funds to the County regarding the constitutional officers, including the Sheriff. The records of Exhibit D also include an affidavit that comports with Va. Code Ann., Section 8.01-390(C), which declaration under penalty of law provides that after a diligent search of the records of the Finance Office, no record or entry regarding any appropriation, or any expense, accounting, and/or audit submission attributable to:

(i) the Memorandum of Agreement by and between the Honorable Scott H. Jenkins, Sheriff (Sheriff) and various federal offices/officers executed on or about April 24, 2018 concerning the federal 287(g) program; and/or

(ii) the Sheriff's alleged participation in the federal 287(g) program

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<sup>3</sup> I also respectfully direct the Court's attention that most of the records included in Exhibit C (of which the Court shall take judicial notice), also meet the criteria of Va. Code Ann., Secs. 8.01-389 and -390, as well, because they are judicial records properly authenticated or business records of Culpeper County properly authenticated.

for the current and previous fiscal years dating back to July 1, 2017 is found to exist among the records of the Finance Office of Culpeper County, Virginia.

3. Rule 2:201 of the Rules of the Supreme Court of Virginia provides that courts may take judicial notice of factual matters not subject to reasonable dispute in that they are either (1) common knowledge, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Under the rule, judicial notice may be taken at any stage of the proceeding. Please find attached Exhibit E. Exhibit E consists of records subject to VFOIA, and that are published and made publicly available by the the Commonwealth of Virginia through its State Compensation Board. This Court may take judicial notice of these records.

#### **E. Summary of Count III, as alleged**

Count III (improperly) seeks declaratory judgment against the County, and specifically requests the Court enter an order declaring County appropriation of funds to the Sheriff (with emphasis) **absent a condition prohibiting the use of funds to pay for salaries, costs, and expenses relating to the enforcement of federal civil immigration law** to be unconstitutional, unlawful, ultra vires, and void ab initio. See paras. 97 and 98(c) of the Complaint.

#### **F. Lack of Standing**

##### **No Individual Standing**

1. A party claiming standing must demonstrate a personal stake in the outcome of the controversy. A plaintiff has standing to institute a declaratory judgment proceeding if it has a justiciable interest in the subject matter of the proceeding. The plaintiff must demonstrate an actual controversy between the plaintiff and defendant. When the ‘actual objective’ in the declaratory judgment proceeding is a determination of a disputed issue rather than an

adjudication of the parties' rights, the case is not one for declaratory judgment. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

2. The Complaint does not set forth a justiciable controversy where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment.

#### **No Taxpayer Standing**

4. Lawsuits based on status as a federal or state taxpayer, when no individual injury is alleged separate from the public at large, generally are inadequate to establish standing to challenge laws of general application. See Goldman v. Landslide, 262 Va. 364 (2001) found in Exhibit A. The basis for the rule is that because taxpayers' interests in the federal and state treasuries are shared with so many, their pecuniary interests are comparatively minute and indeterminate. See id.

5. However, standing in some taxpayer challenges regarding the legality of certain local government expenditures, when no individual injury is alleged separate from the public at large, has been recognized because the alleged harm to the pecuniary interest of the taxpayers in certain instances has been established to be direct and immediate, rather than remote and minute. See Goldman v. Landslide, 262 Va. 364 (2001) found in Exhibit A.

6. Some of the instances mentioned above include challenges to: actual expenditures of the members of a local governing body for travel reimbursement; contracts executed by the local governing body involving actual expenditures; specific loans of money made by the governing body; etc. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.



7. Most important, in the line of precedent cited above, the common thread is one key element: the connection to the local government's expenditures. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A. This lawsuit is distinguishable, and the proper legal requisites to establish standing are simply not met by the proposition<sup>4</sup> of the Plaintiffs that serves as the basis of Count III of the Complaint or the allegations stated therein. I offer the below in support the County's position:

***No Taxpayer Standing - Basis #1:***

a. In the instant case, the Complaint includes no allegations of costs or expenditures made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise) attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his entry into a 287(g) Agreement.

b. The Plaintiffs in the case at bar seek the Court to declare and to order that when the County appropriates funds to the Sheriff it must impose a condition within the appropriations motion, resolution, and/or ordinance affirmatively prohibiting the Sheriff to use appropriated funds to pay for salaries, costs, and expenses relating to the enforcement of federal civil immigration law. See numbered paras. 97 and 98(c) of the Complaint.

c. There is no challenge here to **any** expenditure made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise). In fact, no challenged expenditures are particularly identified or recited within the whole Complaint, not once in all twenty (20) pages.

d. The Complaint is instead an effort to have the Court supersede, or impose conditions upon the County different from, the Constitution of Virginia and the relevant

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<sup>4</sup> Respectfully, I direct the Court's attention to the Complaint at paras. 97 and 98(C).

statutes of the Commonwealth regarding appropriations generally and/or appropriations to a specific constitutional officer, merely cloaked as a purported taxpayer challenge.

e. The Plaintiffs cannot identify any constitutional provision or statute that gives them the legally enforceable right, i.e. standing, to have the Court compel the County to draft or enact an appropriations motion, resolution, or ordinance in the manner they request with the language they supply. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) and Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors, 285 Va. 87 (2013) found in Exhibit A.

*No Taxpayer Standing - Basis #2*

a. In the instant case, the Complaint includes no allegations of costs incurred or expenditures made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise) attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his entry into a 287(g) Agreement.

b. The Complaint, in all one hundred and three (103) numbered paragraphs, lacks any allegations as to any **specific** costs incurred or expenditures made by the County, much less to any specific costs incurred or expenditures made by the County attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his decision to sign an MOU that authorizes him to participate in the 287(g) program. None have been pled.

c. Any guess as to expenditures of the County in the future, if any, attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program is wholly speculative.

d. Simply put, the Plaintiffs have identified no actual County expenditure in controversy or that is being challenged. Instead, Plaintiffs seek for the County, and the Court, to infer or guess at potential amounts that someday could or may be experienced in the future by the County, if any, attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program. This we simply cannot do. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

***No Taxpayer Standing - Basis #3***

a. It is important to take notice that the financial support of the Sheriff involves (i) substantial state appropriations, funding, and monies; (ii) allocation of state funding and monies to the County, as determined by the Compensation Board (not the County) pursuant to statute; (iii) mandated adherence by the County to the determination of funding by, and the policy, management, and oversight decisions of, the Compensation Board. See Exhibits B, D, and E.

b. In challenging the budget of/appropriations to the Sheriff, the Plaintiffs are challenging, in substantial part, state funding and state funding decisions, that are not made by the County. See Exhibits B, D, and E.

c. Lawsuits based on status as a federal or state taxpayer, when no individual injury is alleged separate from the public at large, generally are inadequate to establish standing to challenge laws of general application. The basis for the rule is that because taxpayers' interests in the federal and state treasuries are shared with so many, their interests are comparatively minute and indeterminate. See Goldman v. Landslide, 262 Va. 364 (2001) and Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

***Summary – No Taxpayer Standing***

a. Earnestly yet candidly, the situation here is nothing more than a difference of opinion between two taxpayers and the Sheriff (not even the County) - and a situation which clearly is not an actual controversy with the County.

b. The Plaintiffs' taxpayer lawsuit is no more than a hollow attack upon the County, absent any single real complaint of injury or threatened injury, improperly based upon a decision of the Sheriff (to sign an MOU that authorizes him to participate in the 287(g) program), a constitutional officer over whom the County enjoys no control or authority. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

c. In sum, as poignantly stated by the Virginia Supreme in an analogous case, zealous interest in this topic alone is not sufficient to create standing. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) found in Exhibit A.

**G. Matter Not Ripe**

a. The Complaint includes no allegations of costs incurred or expenditures made by Culpeper County, any Culpeper County employee, the Board of Supervisors, or its members (or otherwise) attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his entry into a 287(g) Agreement.

b. The Complaint, in all one hundred and three (103) numbered paragraphs, lacks any allegations as to any specific costs incurred or expenditures made by the County, much less to any specific costs incurred or expenditures made by the County attributable to the Sheriff's alleged enforcement of federal civil immigration laws or his decision to

sign an MOU that authorizes him to participate in the 287(g) program. None have been pled.

c. Any guess as to expenditures of the County in the future, if any, attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program is wholly speculative.

d. Simply put, the Plaintiffs have identified no actual County expenditure in controversy or that is being challenged. Instead, Plaintiffs seek for the County, and the Court, to infer or guess at potential amounts that someday could or may be experienced in the future, if any, by the County attributable to the Sheriff's decision to sign an MOU that authorizes him to participate in the 287(g) program.

f. This matter is not ripe given the absence of any challenge or controversy. See Lafferty v. Sch. Bd. Of Fairfax Cnty., 293 Va. 354 (2017) and Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors, 285 Va. 87 (2013) found in Exhibit A.

#### **H. Motion Craving Over**

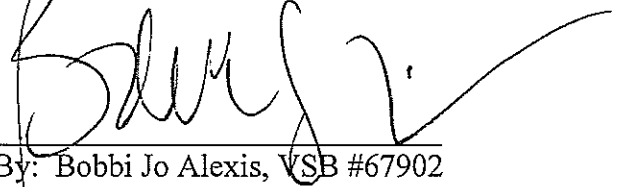
At this time, the County contemporaneously files a Motion Craving Over. The County incorporates herein the matters raised and arguments presented within its Motion Craving Over, and respectfully requests the Court's consideration of the Motion Craving Over to the extent permitted by law when making a determination on the Pleas in Bar.

#### **Prayer for Relief**

WHEREFORE the County prays the Court will sustain the County's Pleas in Bar and dismiss this lawsuit against it, and award the County costs expended, attorneys' fees, and any and all other relief the Court deems just and proper.

Respectfully submitted,

Board of Supervisors of Culpeper County



By: Bobbi Jo Alexis, VSB #67902

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Culpeper, Virginia 22701

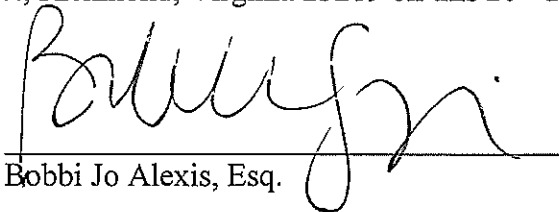
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**CERTIFICATE OF SERVICE**

This Pleas in Bar is served upon Plaintiffs through their counsel of record via US first class postage prepaid directed to: Vishal Agraharkar, Esq. with the American Civil Liberties Union Foundation of Virginia at 701 E. Franklin Street, Suite 1412, Richmond, Virginia 23210 and Dale G. Mullen, Esq., Casey Lucier, Esq., Travis Gunn, Esq., Ashley Peterson, Esq. with McGuire Woods LLP at 800 East Canal Street, Richmond, Virginia 23219 on this 20<sup>th</sup> day of December 2018.



Bobbi Jo Alexis, Esq.