

IN THE
SUPREME COURT OF VIRGINIA

Record No. 191132

MICHAEL V. McCLARY, *et al.*,

Appellants,

v.

SCOTT H. JENKINS, *et al.*,

Appellees.

**BRIEF OF AMICUS CURIAE
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF APPELLEES**

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

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STATEMENT OF THE CASE

Amicus curiae adopts appellees' Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae adopts appellees' Statement of the Facts.

STANDARD OF REVIEW

The standard of review in this appeal, for those Assignments of Error involving pure questions of law, is *de novo*. *Lamar Co. v. City of Richmond*, 287 Va. 322, 325 (2014) (“We review pure questions of law *de novo*.”).

ARGUMENT

Appellants McClary and Stockton (“McClary”) complain that Virginia law prohibits appellee Sheriff Jenkins from contracting “with the federal government to enforce federal civil immigration law,” prohibits appellee the Board of Supervisors of Culpeper County from appropriating “funds to help enforce federal civil immigration law,” and even prohibits Jenkins from “otherwise enforc[ing] federal civil immigration law.” Opening Brief at 3.

In short, McClary insists the Commonwealth of Virginia is a “sanctuary” jurisdiction. Sanctuary jurisdictions are “jurisdictions that may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.” OFFICE OF THE

INSPECTOR GEN., U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 n.44 (2007).

McClary's reading of Virginia law, however, is drastically incorrect. The Code of Virginia unmistakably permits Jenkins and Culpeper County to participate in the enforcement of federal immigration law, both generally and through 287(g) agreements.

As McClary urges, Jenkins and Culpeper County possess “only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.” *Bd. of Zoning Appeals v. Bd. of Supervisors*, 276 Va. 550, 553–54 (2008). Even so, multiple Code provisions affirm Jenkins' and Culpeper County's prerogative to enter into inter-governmental cooperative law enforcement agreements—including with the federal government—and further affirm Virginia's proactive participation in the state-and-federal cooperative system of civil and criminal immigration law enforcement.

I. Virginia law permits Jenkins and Culpeper County to enter into 287(g) agreements.

Under the Dillon Rule, local governments “have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.” *Bd. of Zoning Appeals v. Bd. of Supervisors*, 276 Va. 550, 553–54 (2008). Powers can be “necessarily or fairly implied in or incident to the powers expressly granted.” *Winchester v. Redmond*, 93

Va. 711, 714 (1896) (quoting 1 DILLON ON MUN. CORP. (3rd ed.), sec. 89). “We look to the purpose and objective of [the Code] in considering whether this authority necessarily is implied from the powers expressly granted by the statute.” *City of Chesapeake v. Gardner Enters.*, 253 Va. 243, 247 (1997). Here, the power to enter into 287(g) agreements is expressly granted to Jenkins, Culpeper County, and other local governments through the Code of Virginia, and is also fairly implied from the Code.

For example, “[a] municipal corporation shall have and may exercise all powers” conferred or delegated under Virginia law “and all other powers pertinent to the conduct of the affairs and functions of the municipal government” which are “*not expressly prohibited* by the Constitution and the general laws of the Commonwealth, and which are *necessary or desirable* to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof.” Code § 15.2-1102 (emphasis added). Further, “the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power.” *Id.*

Likewise, “[a]ny 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. Participating in the enforcement of federal civil immigration law does indeed promote the health, safety, and general welfare. “DOJ’s understanding that illegal immigration presents a public safety issue has been acknowledged by the Supreme Court.” *City of L.A. v. Barr*, 929 F.3d 1163, 1178 (9th Cir. 2019) (citing *Arizona v. United States*, 567 U.S. 387, 397–98 (2012)). And it is consistent with the general laws of the Commonwealth, which contemplate a large number of scenarios under which Virginia joins in the enforcement of federal civil and criminal immigration law. *Infra* Part II.

Under the Code, Jenkins is obligated to “enforce the law” and “perform such other duties, not inconsistent with his office, as may be requested of him by the governing body.” Code § 15.2-1609. Jenkins enforces the general law. “It is, of course, apparent that statute applicable to the whole State, and to all persons, bodies corporate and property within the State, is general” *Martin’s Ex’rs v. Commonwealth*, 126 Va. 603, 609 (1920). Law enforcement officers, such as police, enjoy powers implied from their express mandates, for example, to “prevent crime, to protect life and property, and to preserve the peace.” *Holland v. Commonwealth*, 28 Va. App. 67, 70–71, 75 (1998) (holding that “a police officer may act as an agent for a property owner, lessee, custodian or other person lawfully in charge of property for the purpose of issuing barment notices to people” even though “the General

Assembly has not addressed this question, and no Virginia statute expressly authorizes or prohibits this practice.”). In furtherance of these law-enforcement goals, the Code permits Jenkins to “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.” Code § 15.2-1730.1.

Even more specifically, “[a]ny locality may, in its discretion, enter into a reciprocal agreement with any other locality, any agency of the federal government exercising police powers,” and possesses “authority to enforce federal laws [if] specifically empowered to do so by statute.” Code § 15.2-1726. Here, the statute specifically empowering Jenkins and Culpeper County’s cooperative enforcement of federal civil immigration law is the Immigration and Nationality Act (“INA”), including its 287(g) agreements program. 8 U.S.C. § 1357(g). Under this program, federal authorities “may enter into a written agreement with a State, or any political subdivision of a State . . . to perform a function of an immigration officer.” 8 U.S.C. § 1357(g)(1). State officials “may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.” *Id.* As the above Code provisions clearly show, Virginia law allows Jenkins and Culpeper County to enter into 287(g) agreements, and their power to carry these agreements out by enforcing federal law is conferred in multiple provisions of Virginia law.

II. The Code of Virginia explicitly permits the enforcement of federal civil and criminal immigration law.

As McClary concedes, the Code explicitly authorizes Jenkins to participate in enforcing federal criminal immigration law. Opening Brief at 15–18. For example, “[a]ll law-enforcement officers enumerated in § 19.2-81 shall have the authority to enforce immigration laws of the United States, pursuant to the provisions of this section.” Code § 19.2-81.6 (“Authority of law-enforcement officers to arrest illegal aliens.”).

But McClary argues that this and other Code provisions do not adequately confer authority upon Jenkins to participate in the enforcement of federal *civil* immigration law. McClary argues that “states largely cannot legislate in the immigration arena” and “the General Assembly has neither expressly nor impliedly given the Board” power to enforce “federal civil immigration law.” Opening Brief at 32–33. Yet the General Assembly *does* legislate in the immigration arena, in multiple ways. By doing so, the General Assembly both expressly and impliedly authorizes local officials to participate in the enforcement of federal civil and criminal immigration law.

For example, the Code creates a “presumption of no bail for illegal aliens” in certain circumstances where “the person has been identified as being illegally present in the United States by United States Immigration and Customs Enforcement.” Code § 19.2-120.1(A)(ii). If a person is “illegally present in the

United States,” in violation of federal *civil* immigration law, then he is presumptively ineligible for bail when charged with certain offenses under state law. This presumption is waived “unless United States Immigration and Customs Enforcement [‘ICE’] has guaranteed that, in all such cases in the Commonwealth, it will issue a detainer for the initiation of removal proceedings and agree to reimburse for the cost of incarceration from the time of the issuance of the detainer.” Code § 19.2-120.1(B).

The General Assembly explicitly aids in federal civil immigration law enforcement in other ways, too. Virginia ties myriad privileges and penalties to individuals’ immigration status under federal civil immigration law. Aliens with temporary visas may not obtain in-state tuition benefits as other Virginia residents do. Code § 23.1-503. It is a crime to employ illegal aliens. Code § 40.1-11.1. Businesses can be barred from the Commonwealth (Code § 13.1-931, § 13.1-1056.2; § 13.1-769), stripped of their limited-liability status (Code § 13.1-1050.3) or corporation status (§ 13.1-915; § 13.1-753) or business trust status (Code § 13.1-1238.2; § 13.1-1246.2) or retail license (Code § 4.1-203.1) for employing illegal aliens. Virginia denies driver’s licenses to illegal aliens. Code § 46.2-328.1. Virginia also excludes illegal aliens from the definition of “minority individual” for nondiscrimination purposes in public contracts. Code § 2.2-4310(F.); § 2.2-1604. Further, Virginia vendors must certify that they do not employ illegal aliens. Code §

2.2-4311.1. Virginia denies certain firearms ownership on the basis of immigration status. Code § 18.2-308.09(10). Virginia denies public welfare benefits to illegal aliens in: medical services (Code § 32.1-325.03); indigent hospitalization programs (Code § 32.1-343); unemployment benefits (Code § 60.2-617); and cash assistance (*see* TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF), <https://www.dss.virginia.gov/benefit/tanf/index.cgi> (last visited Feb. 21, 2020)). Each of these provisions operates on the basis of aliens' legal status under federal civil immigration law and reinforces the federal government's attachment of various privileges and restrictions to individuals' immigration status. These provisions evince the Code's explicit "purpose and objective of" cooperating in the state-and-federal system of federal immigration law enforcement. *City of Chesapeake*, 253 Va. at 247.

The Code of Virginia integrates federal civil and criminal immigration law enforcement into the Commonwealth's own rules of civil and criminal law enforcement. When involuntarily placing an alien in civil detention at a state facility, "the Commissioner shall notify immediately the United States immigration officer in charge of the district in which the state facility is located." Code § 37.2-827. Likewise, Virginia inquires about convicts' (Code § 19.2-294.2), jailed persons' (Code § 19.2-83.2), and incarcerated persons' immigration status, often a question of federal civil immigration law. Code § 53.1-218. Virginia tells ICE about such

incarcerated aliens, and records whether “the person is illegally present in the United States.” *Id.* Then Virginia officials “may, upon receipt of a detainer from U.S. Immigration and Customs Enforcement, transfer custody of the alien to U.S. Immigration and Customs Enforcement,” Code § 53.1-220.2, and even enter into agreements with the federal government regarding such arrangements, similar to the 287(g) program. Code § 53.1-220.1.

In sum, the Virginia Code is saturated with provisions calling for assistance in the enforcement of federal civil immigration law, and both expressly and impliedly affirming local officials’ duty, and power, to help enforce that law. McClary’s claim to the contrary is flatly incorrect.

CONCLUSION

For the foregoing reasons, the circuit court’s judgment should be affirmed.

Dated: February 21, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on this 21st day of February, 2020, that the foregoing brief complies with Rule 5:26 and Rule 5:30, that it has been filed electronically through VACES, that it has been delivered via email to the following counsel for appellants and appellees, and that three paper copies have been delivered to the Clerk's Office of the Supreme Court of Virginia.

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