



# COMMONWEALTH of VIRGINIA

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The Honorable Jerrauld C. Jones  
Member, Virginia House of Delegates  
Post Office Box 2892  
Norfolk, Virginia 23501

Dear Delegate Jones:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

## Issues Presented

You have “request[ed] a formal opinion” on the “recent actions taken by more than twenty localities across the Commonwealth” to declare themselves exempt from any new gun safety laws that the General Assembly may enact in the future,<sup>1</sup> specifically, (1) Do the resolutions adopted by these localities have any legal effect? (2) May localities or local officials (including local constitutional officers) nullify or opt out of state laws duly enacted by the General Assembly?

## Background

As your letter notes, “recurring incidents of gun violence” continue to plague the Commonwealth of Virginia.<sup>2</sup> The scale of the gun violence epidemic is staggering: over 10,000 Virginians have been killed by a gun since 2007.<sup>3</sup> Virginians also have been the victims of several mass shootings, including the 2019 tragedy in Virginia Beach.<sup>4</sup>

Gun violence prevention has been the subject of a vigorous public debate for many years. This debate included a special session of the General Assembly that the Governor convened in July 2019 but

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<sup>1</sup> Letter from Delegate Jay Jones to Mark R. Herring, Attorney General of Virginia (Dec. 2, 2019).

<sup>2</sup> *Id.*

<sup>3</sup> VIRGINIA DEP'T OF HEALTH, OFFICE OF THE CHIEF MEDICAL EXAMINER, ANNUAL REPORT 2017, (Apr. 2019) at 231, available at <http://www.vdh.virginia.gov/content/uploads/sites/18/2019/04/Annual-Report-2017.pdf>; VIRGINIA DEP'T OF HEALTH, OFFICE OF THE CHIEF MEDICAL EXAMINER, *Table 25: One Hundred Thirteen Selected Causes of Resident Deaths by ICD Tenth Revision Codes by Age, Race, and Sex: Virginia 2018*, available at [http://www.vdh.virginia.gov/HealthStats/documents/pdf/death\\_2-25\\_2018.pdf](http://www.vdh.virginia.gov/HealthStats/documents/pdf/death_2-25_2018.pdf).

<sup>4</sup> Steve Almasy & Rebekah Riess, *At Least 12 Dead After Disgruntled Employee Opens Fire at Virginia Beach Municipal Center*, CNN, <https://www.cnn.com/2019/05/31/us/virginia-beach-shooting/index.html> (last updated June 1, 2019).

was adjourned without action.<sup>5</sup> Issues related to gun safety were also a central issue in Virginia's recent legislative elections. Following those elections, the Governor has promised to work with legislative leaders to enact certain gun safety measures—such as universal background checks—once the General Assembly convenes in January 2020.<sup>6</sup> In response to the upcoming General Assembly session, some localities have adopted resolutions declaring that they intend to opt out of any gun violence prevention measure that may be adopted.<sup>7</sup>

### Applicable Law

The Virginia Constitution, the Code of Virginia, and established common law doctrines all bear on these questions.

*First*, the Constitution of Virginia provides that all local authority is subject to the control of the General Assembly. For example, Article VII, Section 2 of the Constitution provides that “[t]he General Assembly shall provide by general law for the . . . powers . . . of counties, cities, towns, and regional governments.”<sup>8</sup>

*Second*, the Code of Virginia establishes the supremacy of state law over local ordinances and policies. Section 1-248 provides:

The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.<sup>9</sup>

As the Virginia Supreme Court has explained, because local authority is subordinate to state law, “local ordinances must conform to and not be in conflict with the public policy of the State as embodied in its statutes.”<sup>10</sup>

*Third*, established common law doctrines specifically limit the authority of local governments. Virginia follows the Dillon Rule, which provides that local governments may exercise “only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”<sup>11</sup> The Dillon Rule is one of strict construction: “[I]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.”<sup>12</sup> Thus, when a Virginia locality seeks to take any action, the Dillon Rule applies “to determine in the first

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<sup>5</sup> Cameron Thompson & Gabrielle Harmon & CNN Wire, *Virginia Republicans End Governor Northam's Special Session on Gun Violence One Hour After It Starts*, WTVR (July 9, 2019), <https://wtvr.com/2019/07/09/gun-violence-special-session-ends/>.

<sup>6</sup> Gregory S. Schneider, *In Virginia, and Elsewhere, Gun Supporters Prepare to Defy New Laws*, WASH. POST (Nov. 23, 2019), [https://www.washingtonpost.com/local/virginia-politics/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/2019/11/23/4a95fcc2-0c86-11ea-bd9d-c628fd48b3a0\\_story.html](https://www.washingtonpost.com/local/virginia-politics/in-virginia-and-elsewhere-gun-supporters-prepare-to-defy-new-laws/2019/11/23/4a95fcc2-0c86-11ea-bd9d-c628fd48b3a0_story.html).

<sup>7</sup> Examples of these resolutions are attached hereto as Exhibit 1.

<sup>8</sup> VA. CONST. art. VII, § 2; *see also* 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 803–05 (1974) (“Central to [Article VII, Section 2] is the idea of the General Assembly’s power to control local government.”); *id.* at 829 (noting that the Constitution of Virginia “makes no attempt to spell out [the] duties or compensation” of local constitutional officers and that “[t]he General Assembly is authorized to fix these either by general law or by special act”).

<sup>9</sup> VA. CODE ANN. § 1-248 (2017).

<sup>10</sup> *King v. Arlington Cty.*, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954).

<sup>11</sup> *Richmond v. Confrere Club of Richmond, Virginia, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

<sup>12</sup> *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010).

instance, from express words or by implication, whether a power exists at all.”<sup>13</sup> If a locality cannot identify a reasonably specific source of delegated authority, “the inquiry is at an end” and the act in question is unauthorized.<sup>14</sup>

### Discussion

These constitutional, statutory, and common law doctrines establish that these resolutions neither have the force of law nor authorize localities or local constitutional officials to refuse to follow or decline to enforce gun violence prevention measures enacted by the General Assembly.

1. By their own terms, these resolutions have no legal effect. Although the resolutions typically contain several “Whereas” clauses, the “be it resolved” clauses generally do not purport to take any concrete action.<sup>15</sup> Instead, the operative clauses: (a) “express[]” the “intent” of the locality’s Board of Supervisors “to uphold the Second Amendment rights of [the county’s] citizens,” (b) “express[]” the Board’s “intent that public funds of the [c]ounty not be used to restrict the Second Amendment rights of the [county’s] citizens,” and (c) “declare[]” the Board’s “intent to oppose” any “infringement” or “restrictions” of their residents’ Second Amendment rights using “such legal means [as] may be expedient, including without limitation, court action.”<sup>16</sup> These general statements do not direct or require any specific result, and any suggestion of potential future action is entirely speculative.

2. In any event, all localities, local constitutional officers, and other local officials are obligated to follow duly enacted state laws. As described above, both the Virginia Constitution and the Code of Virginia specifically establish the supremacy of laws passed by the General Assembly over local ordinances and policies,<sup>17</sup> and “[i]t is well settled that when a statute and an ordinance conflict, the statute must prevail.”<sup>18</sup> Nor have localities been delegated any authority—either express or implied—to exempt themselves (or anyone else) from gun violence prevention statutes.<sup>19</sup> Absent such delegation, under the Dillon Rule, “the inquiry is at an end.”<sup>20</sup>

It also bears emphasis that neither local governments nor local constitutional officers have the authority to declare state statutes unconstitutional or decline to follow them on that basis. “All actions of the General Assembly are presumed to be constitutional.”<sup>21</sup> Furthermore, it has long “been the indisputable and clear function *of the courts*, federal and state, to pass upon the constitutionality of

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<sup>13</sup> Commonwealth v. Cty. Bd. of Arlington Cty., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

<sup>14</sup> See *id.*; see also Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) (“In considering whether a local governing body had authority to enact an ordinance, there is no presumption that it is valid; if no delegation from the legislature can be found to authorize its enactment, it is void.”).

<sup>15</sup> See Exhibit 1.

<sup>16</sup> *Id.* at 2, 4, 5, 6.

<sup>17</sup> VA. CODE ANN. § 1-248.

<sup>18</sup> Covell v. Town of Vienna, 280 Va. 151, 162, 694 S.E.2d 609, 616 (2010).

<sup>19</sup> In fact, Virginia law currently provides that localities are prohibited from “adopt[ing] or enforc[ing] any ordinance, resolution or motion . . . governing the purchase, possession, transfer, ownership, carrying, storage or transporting of firearms, ammunition, or components or combination thereof other than those expressly authorized by statute.” VA. CODE ANN. § 15.2-915(A) (2018).

<sup>20</sup> Commonwealth v. Cty. Bd. of Arlington, 217 Va. at 575, 232 S.E.2d at 41.

<sup>21</sup> Hess v. Snyder Hunt Corp., 240 Va. 49, 52, 392 S.E.2d 817, 820 (1990); see also Montgomery Cty. v. Virginia Dep’t of Rail & Pub. Transp., 282 Va. 422, 435, 719 S.E.2d 294, 300 (2011) (emphasizing that “[t]here is, indeed, no stronger presumption known to the law”).

legislative acts.”<sup>22</sup> It follows from these well-established principles that all localities and local constitutional officers are required to comply with all laws enacted by the General Assembly unless and until those laws are repealed by the legislature or invalidated by the judiciary.<sup>23</sup>

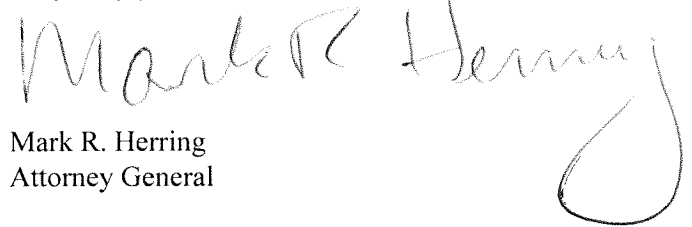
Nor may localities or local constitutional officers decline to enforce laws enacted by the General Assembly on the theory that requiring them to do so would “commandeer” local resources. Although the United States Supreme Court has held that “the Federal Government may not compel *the States* to implement . . . *federal* regulatory programs,”<sup>24</sup> that doctrine derives from the specific limitations on Congress’s legislative powers and the “residuary and inviolable sovereignty” retained by the states in our federal system.<sup>25</sup> In contrast, “the Constitution of Virginia is not a grant of legislative power to the General Assembly,”<sup>26</sup> and, unlike Congress, “[t]he authority of the General Assembly shall extend to all subjects of legislation” not specifically “forbidden or restricted” by the State Constitution.<sup>27</sup> And neither the Federal Constitution nor Virginia law recognizes any “anti-commandeering” principle that allows localities or local constitutional officers to refuse to participate in the enforcement of state law.<sup>28</sup>

### Conclusion

It is my opinion that these resolutions have no legal effect. It is my further opinion that localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact.

With kindest regards, I am,

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>22</sup> *Wise v. Bigger*, 79 Va. 269, 273 (1884) (emphasis added); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>23</sup> *See* *Freeman v. Commonwealth*, 65 Va. App. 407, 421–22, 778 S.E.2d 519, 526 (2015) (stating that “[p]olice [officers] are charged to enforce laws until and unless they are declared unconstitutional” and that “[s]ociety would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement” (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979))); 2014 Op. Va. Att’y Gen. 73, 75, 76 (concluding “that a Clerk has no authority by which to make independent determinations respecting the constitutionality of statutes” because “the interpretation of the federal and state constitutions is a discretionary duty for the judicial branch and thus outside [a Clerk’s] authority”); *see also* 2007 Op. Va. Att’y Gen. 30, 31 n.8 (citing cases for the proposition that administrative agencies have no power to determine the constitutional validity of statutes).

<sup>24</sup> *Printz v. United States*, 521 U.S. 898, 925 (1997) (emphasis added).

<sup>25</sup> *Id.* at 919 (quoting THE FEDERALIST No. 39, at 245 (J. Madison)); *see* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1475 (2018) (noting that, under the Federal Constitution, Congress may not “issue orders directly to the States”)

<sup>26</sup> *FFW Enterprises v. Fairfax Cty.*, 280 Va. 583, 593, 701 S.E.2d 795, 801 (2010) (internal quotation marks and citations omitted).

<sup>27</sup> VA. CONST. art. IV, § 14.

<sup>28</sup> *See, e.g., Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the [F]ederal [C]onstitution which it may invoke in opposition to the will of its creator.” (collecting cases)).