May 15, 2011

Via First Class Mail

The Honorable Robert G. Marshall
Member, Virginia House of Delegates
P.O. Box 421
Manassas, Virginia 20108

Re: July 30, 2010 Opinion by Virginia Attorney General

Dear Delegate Marshall:

On behalf of the undersigned organizations, we write to express our concerns about the Advisory Opinion addressed to you by the Virginia Attorney General, dated July 30, 2010 ("Advisory Opinion"). This Opinion, and any legislative action undertaken in reliance upon it, is very likely susceptible to constitutional challenges on the grounds that its conclusions are an impermissible interference with comprehensive federal alien registration law. We are also concerned that the Advisory Opinion fails to address controlling legal authority that contravenes the Attorney General's conclusion. Neighboring jurisdictions are also concerned about the Advisory Opinion because immigrants and other minorities, who often travel between jurisdictions, may be impacted. Therefore, we recommend that the Virginia legislature not rely on the Opinion and that it furthermore refrain from immigration regulation, which is the province of the federal government.

The Advisory Opinion was issued on July 30, 2010, two days after the United States District Court for Arizona enjoined portions of the state law SB 1070[1] that, like the Advisory Opinion, required law enforcement officers to inquire about the immigration status of persons stopped or arrested whom they reasonably suspect may be undocumented.[2] The Advisory Opinion holds, *inter alia*, that "Virginia law enforcement officers, including conservation officers, may, like Arizona police officers, inquire into the immigration status of persons stopped or arrested" of a federal crime.[3] In so holding, the Advisory Opinion makes legal conclusions that interfere with comprehensive federal alien registration law and federal resources and priorities, which we explain in more detail below. We then highlight why the legal authorities cited in the Opinion are not persuasive and do not withstand rigorous scrutiny.

First, the Advisory Opinion's support of state law enforcement officers' inquiry into immigration status interferes with comprehensive federal alien registration law, raising the question of preemption by federal law.[4] Congress has "manifested a purpose to [regulate

[1] Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 211.

[2] *See United States v. Brewer, No*. CV 10-1413-PHX-SRB (D.Ariz. July 28, 2010).

[3] Cuccinelli, II, Kenneth T. Advisory Opinion, July 30, 2010.

[4] *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941) ("Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict

immigration] in such a way to protect the personal liberties of law-abiding aliens through one uniform national . . . system[] and to leave them free from the possibility of inquisitorial practices and police surveillance."[5] Lawfully-present aliens will likely be burdened when their immigration status is checked, subjecting them to extended detention times. Numerous categories of lawfully-present aliens – such as asylum applicants, people with temporary protected status, and U and T non-immigrant visa applicants – may not have "readily accessible documentation" to prove lawful status. The Supreme Court has cautioned against imposing such burdens on lawfully-present aliens,[6] and Virginia, as a state, cannot create state penalties and prosecutions that are "inconsistent[] with the purposes of Congress."[7]

Second, though the Advisory Opinion allows for state law enforcement officers to inquire about immigration status, this state exercise improperly burdens federal resources and priorities. Federal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in immigration status determinations directed at federal officials and bodies.[8]

Additionally, the Advisory Opinion states, in the fashion of a simple assertion, that "Virginia law enforcement officers have the authority to make the same inquiries as those contemplated by the new Arizona law." [9] It analogizes from SB1070 without explanation. It does not explain, for example, how Virginia law enforcement officers have, without any legislative enactment, the power to make immigration inquiries that required legislation in Arizona.

Finally, the Opinion does not address how Virginia may permissibly trump the federal government's regulation of immigration laws. It relies instead on *Muehler v. Mena*, which found that so long as police questioning does not prolong a lawful detention, police may ask questions about immigration status.[10] *Muehler* lends no support here because the case merely held that questioning as to immigration status is not a Fourth Amendment violation; the case did not address the Supremacy Clause, which is at issue here. In fact, relevant portions of SB1070 were enjoined by a federal court, and upheld on appeal, on federal preemption grounds.[11]

---

or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations"). State enforcement of federal immigration law is subject to conflict preemption. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (stating that conflict preemption occurs when "compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

[5] *Hines*, 312 U.S. at 74.

[6] *See Hines*, 312 U.S. at 73-74.

[7] *See Hines*, 312 U.S. at 66-67.

[8] *Buckman Co. v. Plainitffs' Legal Comm*., 531 US. 341, 351 (2001) (finding a state law preempted in part because it would create an incentive for individuals to "submit a deluge of information that the [federal agency] neither wants nor needs, resulting in additional burdens"). This problem is compounded in light of other states following suit.

[9] Advisory Opinion at 3.

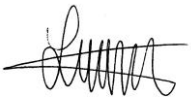
[10] Advisory Opinion at 3 (quoting *Muehler v. Mena*, 544 U.S. 125 (2005)).

[11] *See United States v. Brewer, No*. CV 10-1413-PHX-SRB (D.Ariz. July 28, 2010); *United States v. Brewer*, No. 10-16645 (9th Cir., April 11, 2011).

The undersigned organizations submit these comments for the consideration of the Virginia Legislature because we believe that the problems of our immigration system require a federal solution. We furthermore believe that the weight of controlling legal authority supports federal primacy in the area of immigration and thus the legal support offered by the Attorney General in the Advisory Opinion is not persuasive. We encourage the Virginia Legislature to support federal efforts to enact comprehensive immigration reform that contains but does not solely focus on enforcement. Thank you for your consideration.

Sincerely,

Juan Milanes, President
Hispanic Bar Association of the
Commonwealth of Virginia, Inc.



Lyzka P. DeLaCruz, President-Elect
Hispanic Bar Association of the District of Columbia

Habib Ilahi, President
South Asian Bar Association of the District of Columbia

cc: Kenneth T. Cuccinelli, II, Attorney General of Virginia