



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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April 7, 2016

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The Honorable Terence R. McAuliffe  
Governor of Virginia  
Post Office Box 1475  
Richmond, Virginia 23218

## VIA HAND-DELIVERY

Dear Governor McAuliffe:

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

### Issue Presented

You have expressed concern that House Bill 834,<sup>1</sup> legislation that has been passed by both houses of the General Assembly and presented for your consideration, violates the separation-of-powers principles in the Constitution of Virginia. Among other things, House Bill 834 creates a Virginia Growth and Opportunity Board that would make grants of appropriated funds to promote regional economic activities in the Commonwealth. Although you do not question the laudable policy benefits of creating a statewide public body that would promote regional economic and workforce projects, you are concerned about the structure proposed by the General Assembly for the Board's governing body.

A majority of the Board's membership consists of members of the General Assembly and their appointees; moreover, the Board's legislative members would have veto power over grant-making decisions of the Board. You ask whether the "current proposed composition and duties of the Virginia Growth and Opportunity Board and the Board's placement in the executive branch of government as a policy-making board violates the separation of powers doctrine outlined in the Virginia Constitution."

### Background

During the General Assembly's 2016 Regular Session, the Assembly passed legislation proposing the Virginia Growth and Opportunity Act (the "Act").<sup>2</sup> The Act would create a Virginia Growth and Opportunity Board (the "Board") as "a policy board in the executive branch of state government,"<sup>3</sup> with

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<sup>1</sup> H.B. 834, 2016 Reg. Sess. (Va. 2016) [hereinafter House Bill 834], <http://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+HB834ER+pdf>.

<sup>2</sup> See generally *id.* (lines 81-322).

<sup>3</sup> *Id.* (lines 101-02).

the purpose of “promot[ing] collaborative regional economic and workforce development opportunities and activities.”<sup>4</sup> The legislation also would create in the state treasury a special nonreverting fund designated as the Virginia Growth and Opportunity Fund (the “Fund”), monies from which would “be used to incentivize and encourage cooperation among business, education, and government on regional strategic economic development and workforce development efforts.”<sup>5</sup> The General Assembly would appropriate monies for the Fund.<sup>6</sup> The Act would create regional councils across the Commonwealth, consisting of representatives of the government and the business and education communities in each region; these councils could apply to the Board for grants from the Fund based on expected economic impact and other criteria.<sup>7</sup>

The primary power and duty of the Board would be to award grants of money from the Fund to encourage regional economic and workforce development projects.<sup>8</sup> Specifically, the Board would “[r]eceive and assess applications for awards from the Fund submitted by regional councils and determine the distribution, duration, and termination of awards from the Fund for uses identified in such applications.”<sup>9</sup> Among other powers and duties, the Board would also “[d]evelop and implement guidelines and procedures for the application for and use of any moneys in the fund”; “[s]eek independent analytical assistance from outside consultants, including post-grant assessments and reviews to evaluate the results and outcomes of grants”; “[e]nter into contracts to provide services to regional councils to assist with prioritization, analysis, planning, and implementation of regional activities”; and advise the Governor in related areas.<sup>10</sup>

The Board would have twenty-two members, consisting of seven legislative members, twelve nonlegislative citizen members, and three ex officio members.<sup>11</sup> Members would be appointed as follows:

four members of the House of Delegates, consisting of the Chairman of the House Committee on Appropriations and three members appointed by the Speaker of the House of Delegates; three members of the Senate, consisting of the Chairman of the Senate Committee on Finance and two members appointed by the Senate Committee on Rules; four nonlegislative citizen members to be appointed by the Speaker of the House of Delegates, who shall be from different regions of the Commonwealth and have significant private-sector business experience; four nonlegislative citizen members to be appointed by the Senate Committee on Rules, who shall be from different regions of the Commonwealth and have significant private-sector business experience; and four nonlegislative citizen members to be appointed by the Governor, who shall be from different regions of the Commonwealth and have significant private-sector business experience. At least two of the nonlegislative citizen members appointed by the Governor shall represent areas other than those represented by Planning District 8, 15, 16,

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<sup>4</sup> *Id.* (lines 102-03).

<sup>5</sup> *Id.* (lines 175-87).

<sup>6</sup> *Id.* (line 178).

<sup>7</sup> *Id.* (lines 142-43; 204-29; 259-85).

<sup>8</sup> *Id.* (lines 146-48).

<sup>9</sup> *Id.*

<sup>10</sup> *See id.* (lines 139-74).

<sup>11</sup> *Id.* (lines 104-06).

or 23. The Governor shall also appoint three Secretaries from the following, who shall serve ex officio with voting privileges: the Secretary of Agriculture and Forestry, the Secretary of Commerce and Trade, the Secretary of Education, the Secretary of Finance, and the Secretary of Technology. Nonlegislative citizen members shall be citizens of the Commonwealth.<sup>[12]</sup>

The chairman of the Board would be a nonlegislative citizen elected by the Board from among its membership, and a majority of the Board's members would constitute a quorum.<sup>13</sup>

Section 2.2-2101 of the *Code of Virginia* generally prohibits service by legislators on boards, commissions, and councils within the executive branch:

Members of the General Assembly shall be ineligible to serve on boards, commissions, and councils within the executive branch of state government who are responsible for administering programs established by the General Assembly. Such prohibition shall not extend to boards, commissions, and councils engaged solely in policy studies or commemorative activities. If any law directs the appointment of any member of the General Assembly to a board, commission, or council in the executive branch of state government that is responsible for administering programs established by the General Assembly, such portion of such law shall be void, and the Governor shall appoint another person from the Commonwealth at large to fill such a position.<sup>[14]</sup>

The General Assembly has created a number of exceptions to that statutory prohibition, however, and has allowed legislators to serve on nearly twenty executive-branch boards, commissions, and councils.<sup>15</sup> To enable legislators to serve on the Board, House Bill 834 would amend § 2.2-2101 to add the Board to the list of exempted entities.<sup>16</sup>

Any award granted by the Board would have to be approved not only by a majority of the full Board but also by a majority of each of the two groups of legislative members on the Board as well as the ex officio members:

A decision by the Board to award grants from the Fund shall require an affirmative vote of (i) a majority of the members of the Board who are present and voting, (ii) a majority of the legislative members of the Board from the House of Delegates who are present and voting, (iii) a majority of the legislative members of the Board from the Senate who are present and voting, and (iv) a majority of the members of the Board who are gubernatorial Secretaries who are present and voting. Decisions of the Board shall be final and not subject to review or appeal.<sup>[17]</sup>

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<sup>12</sup> *Id.* (lines 106-20). *See also id.* (lines 121-29) (providing for terms of members: “[l]egislative members and ex officio members of the Board shall serve terms coincident with their terms of office”; “nonlegislative citizen members shall be appointed for a term of four years”).

<sup>13</sup> *Id.* (lines 130-31).

<sup>14</sup> VA. CODE ANN. § 2.2-2101 (Supp. 2015).

<sup>15</sup> *Id.*

<sup>16</sup> House Bill 834 (lines 79-80).

<sup>17</sup> *Id.* (lines 313-18).

### Applicable Law and Discussion

You relate that you have concerns that House Bill 834 violates the Constitution of Virginia with respect to the Board's composition and the legislative members' veto power, in light of the duties assigned to it. Part A below discusses the separation-of-powers principles that guide my analysis, while Parts B and C address two ways in which there is significant risk that the Supreme Court of Virginia would find that House Bill 834 violates separation-of-powers principles.

#### **A. The Constitution of Virginia requires separation of powers, so that no branch exercises the "whole power" of another.**

The separation-of-powers principle appears in two places in the Constitution of Virginia. Article I, § 5 provides "[t]hat the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct."<sup>18</sup> Article III, § 1 further provides that "[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time . . . ."<sup>19</sup>

Notwithstanding the seemingly absolute terms in which the separation-of-powers principle is couched, courts have held that the required separation is not absolute. In a 1906 case, *Winchester & Strasburg Railroad Co. v. Commonwealth*,<sup>20</sup> for example, the Supreme Court of Virginia upheld the constitutionality of the powers of the State Corporation Commission despite its exercise of some judicial, executive, and legislative authority. The Court drew on Joseph Story to explain that "'we are to understand this [separation-of-powers] maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct . . . .'"<sup>21</sup> It elaborated:

It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced. The universal construction of this maxim in practice has been that the *whole power* of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another *to a limited extent*.<sup>[22]</sup>

This principle appears in modern cases as well. In a 1991 case, *Taylor v. Worrell Enterprises, Inc.*, the Supreme Court of Virginia observed that "[t]he legislative branch may delegate some of its powers to agencies in the executive branch if the delegation is accompanied by appropriate standards for the exercise of that authority. There will also be instances where the line between the powers of two

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<sup>18</sup> VA. CONST. art. I, § 5.

<sup>19</sup> VA. CONST. art. III, § 1.

<sup>20</sup> 106 Va. 264 (1906).

<sup>21</sup> *Id.* at 270 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 393 (Melville M. Bigelow ed., 5th ed. 1891)).

<sup>22</sup> *Id.* at 268 (emphasis added). See also *In re Phillips*, 265 Va. 81, 87 (2003) (upholding constitutionality of statute that did "not authorize a circuit court to exercise the 'whole power,' or any part of the power, granted to the Governor to remove political disabilities resulting from a felony conviction").

branches may be less than clear and incidental encroachment is necessary and permitted.”<sup>23</sup> And in a 2013 case, *Elizabeth River Crossings OpCo, LLC v. Meeks*,<sup>24</sup> holding that the General Assembly may empower a private entity to assist the Virginia Department of Transportation to impose and set rates of roadway user fees, the Supreme Court of Virginia again recognized that the separation-of-powers principle is not absolute. It wrote there that “[p]ractical considerations of modern governance require some degree of intermixing governmental powers between branches,”<sup>25</sup> and that this “is particularly true in the area of the Executive Branch’s administration and enforcement of law enacted by the General Assembly.”<sup>26</sup>

The touchstone of a separation-of-powers violation, therefore, is when one branch exercises the “whole power” of another. In assessing whether one branch is exercising another branch’s “whole power” rather than only “to a limited extent,” the “common determinative factor is whether the governmental branch constitutionally vested with authority retains the final decision-making power.”<sup>27</sup> Thus, in 1995, in *Tross v. Commonwealth*, the Virginia Court of Appeals found that, although judicial intake officers exercise some judicial power, they do not exercise the “whole power” of the judiciary because “the juvenile and domestic relations district court judges control the actual disposition of juveniles before the court.”<sup>28</sup> By contrast, in 2013, in *Montgomery v. Commonwealth*, the Virginia Court of Appeals found a separation-of-powers violation where the Governor conditioned a pardon on the court’s issuance of a writ of actual innocence, holding that this condition “delegate[d] the chief executive’s ‘whole [clemency] power’ to the judiciary.”<sup>29</sup>

**B. There is significant risk that the Supreme Court of Virginia would find that the composition of the Board is unconstitutional because it gives the legislative branch control over an executive-branch policy board.**

The proposed composition of the Board gives the General Assembly and its appointees a great deal of control over an entity “established as a policy board in the executive branch of state government.”<sup>30</sup> Under the *Code of Virginia*, a policy “board, commission or council” such as the Board “is specifically charged by statute to promulgate public policies or regulations.”<sup>31</sup> Of the twenty-two members on the Board, seven would be members of the General Assembly, and another eight would be appointed by members of the General Assembly; only seven of the twenty-two members of this executive-branch entity would be appointed by the Governor. Thus, members of the General Assembly or their appointees would exercise majority voting control over the grant-making decisions of the Board. Your question amounts to whether that degree of control in an executive-branch policy board is valid.

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<sup>23</sup> 242 Va. 219, 221-22 (1991) (citation omitted).

<sup>24</sup> 286 Va. 286 (2013).

<sup>25</sup> *Id.* at 310 (citing *Baliles v. Mazur*, 224 Va. 462, 472 (1982)).

<sup>26</sup> *Id.* at 311.

<sup>27</sup> *Montgomery v. Commonwealth*, 62 Va. App. 656, 667 (2013).

<sup>28</sup> *Tross v. Commonwealth*, 21 Va. App. 362, 378-79 (1995).

<sup>29</sup> *Montgomery*, 62 Va. App. at 670 (alteration in original).

<sup>30</sup> House Bill 834 (lines 101-02).

<sup>31</sup> VA. CODE ANN. § 2.2-2100(A) (2014).

Although the Supreme Court of Virginia has not addressed the precise issue presented here, there is significant risk that the Court would find that the separation-of-powers principles in the Constitution of Virginia forbid such intrusion into decision-making authority committed to the executive branch. As § 2.2-2101 of the *Code of Virginia* provides, although membership of legislators on boards, commissions, and councils within the executive branch is generally prohibited, there are nearly twenty express exceptions,<sup>32</sup> of which the Board would be another.<sup>33</sup> But in only one of the entities listed in § 2.2-2101—the Council on Virginia’s Future—is a majority of the membership composed of or appointed by legislators. And unlike the grant-making policy board at issue here, the Council on Virginia’s Future is an “advisory” body that exercises no executive policymaking, decision-making, or spending authority.<sup>34</sup>

No Virginia case law defines the relative number of legislators or legislative appointees who may sit on an executive-branch entity without violating separation-of-powers principles.<sup>35</sup> But it is clear that gubernatorial nonlegislative appointees and members of the Governor’s Cabinet would not constitute a majority of the members of this executive-branch policy board and thus have control of, and be responsible for, the Board’s decisions to “determine the distribution, duration, and termination of awards” from monies appropriated by the General Assembly; instead, members of the General Assembly and their appointees—who constitute fifteen of the Board’s twenty-two members—would exercise effective control over those decisions.<sup>36</sup> Continuing legislative control over such spending decisions could well run afoul of the Constitution’s commitment of those decisions to the executive branch.

It is solely the Governor’s role to “take care that the laws be faithfully executed.”<sup>37</sup> “As [James] Madison stated on the floor of the First Congress, ‘if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.’”<sup>38</sup> A group of legislators and legislative appointees with the ability to approve—or to veto—spending decisions would

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<sup>32</sup> VA. CODE ANN. § 2.2-2101 (Supp. 2015).

<sup>33</sup> See House Bill 834 (lines 46-47).

<sup>34</sup> See VA. CODE ANN. §§ 2.2-2684 to -2686 (2014). One entity not listed in § 2.2-2101 is the Jamestown-Yorktown Foundation. See VA. CODE ANN. § 23-287 (Supp. 2015). The executive and legislative branches each appoint 16 members of the Foundation’s Board of Trustees with the remaining 5 members appointed by the Board itself. *Id.* But the Foundation is an “educational institution,” not a “policy board in the executive branch of state government” for which an exception was required in § 2.2-2101. House Bill 834 (lines 101-02).

<sup>35</sup> Federal courts have not recognized a distinction between legislators themselves serving on an executive-branch board and their appointees. See, e.g., *Hechinger v. Metro. Wash. Airports Auth.*, 845 F. Supp. 902, 907-09 (D.D.C.) (stating that the legislative changes to the executive-branch board’s membership so that the membership was “not restricted to congressional officials, but rather to those selected by congressional officials” were “superficial,” and holding that the board “exercises significant executive powers delegated to it by Congress” and thus was unconstitutional), *aff’d*, 36 F.3d 97 (D.C. Cir. 1994); see also *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991) (“If the [Board of Review’s] power is executive, the Constitution does not permit an agent of Congress to exercise it.”).

<sup>36</sup> See House Bill 834 (lines 146-48).

<sup>37</sup> VA. CONST. art. V, § 7. Cf. 1981-82 Op. Va. Att’y Gen. 93, 96 (“It is the function of the General Assembly to confer powers and duties upon administrative agencies with appropriate standards, but the executive branch, under the supervision of the Governor, must execute and implement those powers and duties.”).

<sup>38</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 ANNALS OF CONG. 463 (1789)).

be exercising the “whole power” of the executive branch, and “the governmental branch constitutionally vested with authority” would not “retain[] the final decision-making power.”<sup>39</sup>

Two historical examples illustrate the limits of the General Assembly’s ability to encroach on an executive function like this one. In 1982, the Attorney General opined that the General Assembly lacks the power to defer, modify, or annul a state agency’s regulations.<sup>40</sup> Applying a three-factored separation-of-powers analysis suggested by Professor Howard in his *Commentaries on the Constitution of Virginia*,<sup>41</sup> the Attorney General considered the danger of abuse, the necessity, and the propriety of the General Assembly’s control over the promulgation of regulations.<sup>42</sup> He concluded that legislative review of regulations was vulnerable to abuse and “could well lead to an impermissible intrusion into the arena of authority exercised by the executive branch.”<sup>43</sup> He also concluded that a court would reject the proposed regulatory review process on the “necessity and propriety” factors.<sup>44</sup> As a result, he questioned the constitutionality of this degree of involvement of the General Assembly in the regulatory process because it “projects the legislative branch into the executive branch beyond constitutionally permissible limits” and “violates both Art. III, § 1 and Article IV, § 11 of the Constitution of Virginia.”<sup>45</sup>

Nine years later, the Supreme Court of Virginia held in *Taylor v. Worrell Enterprises, Inc.* that a list of the Governor’s long-distance telephone calls was not subject to disclosure under the Virginia Freedom of Information Act (“FOIA”) because disclosure would unduly interfere with the chief executive’s ability to perform his duties.<sup>46</sup> In its decision, the Court observed that “the legislature may run afoul of the separation of powers doctrine even though it is exercising legitimate regulatory authority,”<sup>47</sup> and adopted the reasoning of the U.S. Supreme Court to determine whether a legislative act “disrupts the proper balance between the coordinate branches.”<sup>48</sup> It noted that “the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.”<sup>49</sup> Because the disclosure of the telephone records sought would “unconstitutionally interfere with the ability of the Governor to execute the duties of his office,” the Court held that the records were not subject to compelled disclosure under FOIA.<sup>50</sup>

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<sup>39</sup> *Montgomery v. Commonwealth*, 62 Va. App. 656, 667 (2013). See also *Free Enter. Fund*, 561 U.S. at 498 (“Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct. He is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”).

<sup>40</sup> 1981-82 Op. Va. Att’y Gen. 93, 96.

<sup>41</sup> See I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 443-46 (1974).

<sup>42</sup> 1981-82 Op. Va. Att’y Gen. 93, 94-95.

<sup>43</sup> *Id.* at 94.

<sup>44</sup> *Id.* at 95.

<sup>45</sup> *Id.* at 96.

<sup>46</sup> 242 Va. 219, 224 (1991).

<sup>47</sup> *Id.* at 222.

<sup>48</sup> *Id.* at 223 (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977)).

<sup>49</sup> *Id.* (quoting *Nixon*, 433 U.S. at 443).

<sup>50</sup> *Id.* at 224.

Federal case law also provides examples where legislative control over an executive function went too far.<sup>51</sup> In *Bowsher v. Synar*,<sup>52</sup> for instance, a case concerning the constitutionality of the Balanced Budget and Emergency Deficit Control Act, the U.S. Supreme Court held that powers granted to the Comptroller General, an agent of Congress, violated the Constitution's command that Congress play no role in the execution of the laws. "To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto."<sup>53</sup> The Court further explained that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."<sup>54</sup>

Although there is no dispositive Supreme Court of Virginia opinion directly on point, the existing Virginia and federal authorities strongly suggest that House Bill 834 would violate separation-of-powers principles by not giving the executive branch control over this executive-branch policy board.

**C. There also is significant risk that the provision allowing legislative members of the Board to veto grant-making decisions is unconstitutional.**

House Bill 834 also creates a legislative veto:

A decision by the Board to award grants from the Fund shall require an affirmative vote of (i) a majority of the members of the Board who are present and voting, (ii) a majority of the legislative members of the Board from the House of Delegates who are present and voting, (iii) a majority of the legislative members of the Board from the Senate who are present and voting, and (iv) a majority of the members of the Board who are gubernatorial Secretaries who are present and voting.<sup>55</sup>

By conferring on the legislative members of the Board (the House of Delegates members and the Senate members, as subsets of their respective houses, separately and independently) the power to block the award of a grant—even if the decision were supported by a majority vote of the full Board—House Bill 834 is very difficult to square with the legal authorities addressing the question presented here. Like the arrangement that this Office concluded in 1982 was constitutionally invalid, a small group of legislators would have the power to “defer, modify, or annul” an executive-branch entity’s decisions.<sup>56</sup> Such a legislative veto power was invalid because it “projects the legislative branch into the executive branch beyond constitutionally permissible limits” and “violates both Art. III, § 1 and Article IV, § 11 of the Constitution of Virginia.”<sup>57</sup> Just as none of the other boards, commissions, and councils listed in § 2.2-2101—with the one exception of the “advisory” Council on Virginia’s Future—has a composition

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<sup>51</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (“[T]he Legislative Branch may not exercise executive authority by retaining the power to appoint those who will execute its laws.”).

<sup>52</sup> 478 U.S. 714 (1986).

<sup>53</sup> *Id.* at 726.

<sup>54</sup> *Id.* at 733-34 (citing *INS v. Chadha*, 462 U.S. 919, 958 (1983)).

<sup>55</sup> House Bill 834 (lines 313-18).

<sup>56</sup> 1981-82 Op. Va. Att’y Gen. 93, 96.

<sup>57</sup> *Id.* See also *Chadha*, 462 U.S. at 954-55 (“Congress made a deliberate choice to delegate to the Executive Branch . . . Congress must abide by its delegation until that delegation is legislatively altered or revoked.”).

that is decisively controlled by legislators and their appointees, none has a similar legislative veto provision by which legislative members can override the decision of the board.<sup>58</sup>

Authorizing a subset of the General Assembly to block the spending of funds appropriated by the General Assembly likely represents an improper delegation of legislative authority. Eight years ago, in *Marshall v. Northern Virginia Transportation Authority*, the Supreme Court of Virginia found improper the General Assembly's delegation of authority to the Northern Virginia Transportation Authority (the "NVT") to decide whether to impose certain specified regional taxes.<sup>59</sup> The Court reasoned that "if the General Assembly were permitted to avoid compliance with these constraints [of Article IV, § 11, which requires that "[n]o law shall be enacted except by [a] bill" that has passed both houses of the General Assembly] by delegating to NVT the decisional authority whether to impose taxes," then those constraints would "be rendered meaningless."<sup>60</sup> And three years ago, a pair of Attorney General opinions relied on *Marshall v. NVT* to conclude that the then-proposed Medicaid Innovation and Reform Commission would exert similarly unconstitutional powers.<sup>61</sup> Those same principles also are found in federal case law.<sup>62</sup>

In sum, although the Supreme Court of Virginia has not addressed the identical situation presented here, I conclude that the provision of House Bill 834 creating a legislative veto power has a significant risk of being found unconstitutional.

### Conclusion

While the General Assembly's goal to promote regional cooperation on important economic and workforce development projects is laudable, that goal may not be accomplished by creating a governance

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<sup>58</sup> *Baliles v. Mazur*, 224 Va. 462 (1982), which upheld a requirement that the Virginia Public Building Authority not undertake projects without authorization by the General Assembly, is not to the contrary. There the approval was required in advance by "bill or resolution . . . by a majority of those elected to each house of the General Assembly, authorizing such project or projects." *Id.* at 465, 471-72.

<sup>59</sup> 275 Va. 419, 426-27, 436 (2008).

<sup>60</sup> *Id.* at 435.

<sup>61</sup> See 2013 Op. Va. Att'y Gen. 73, 74 (finding unconstitutional a proposed arrangement under which "budgetary language related to Medicaid [would] become effective only if, at some point after the General Assembly has passed the law and the Governor has signed it, a subset of members of the General Assembly (not constituting a majority of each house) votes that certain conditions have been met"); 2013 Op. Va. Att'y Gen. 76, 79-80 (concluding that the General Assembly "may not avoid" Article IV, § 11 (which requires that "[n]o law shall be enacted except by [a] bill" that has passed both houses of the General Assembly) and Article V, § 6 (which requires that any such bill that has passed both houses shall be "presented" to the Governor for his consideration) by delegating its authority to the Medicaid Innovation and Reform Commission to "determine that certain subjective conditions are met" before a related legislative provision would go into effect).

<sup>62</sup> See, e.g., *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275-76 (1991) (noting that "Congress may not delegate the power to legislate to its own agents or to its own Members"; "If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7"); *Bowsher v. Synar*, 478 U.S. 714, 755 (1986) (Stevens, J., concurring) ("If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade the carefully crafted restraints spelled out in the Constitution.") (internal quotation marks omitted); *Chadha*, 462 U.S. at 954-55 (invalidating the "one-House veto" in the Immigration and Nationality Act and noting that Congress may implement "determinations of policy . . . in only one way; bicameral passage followed by presentment to the President").

Honorable Terence R. McAuliffe

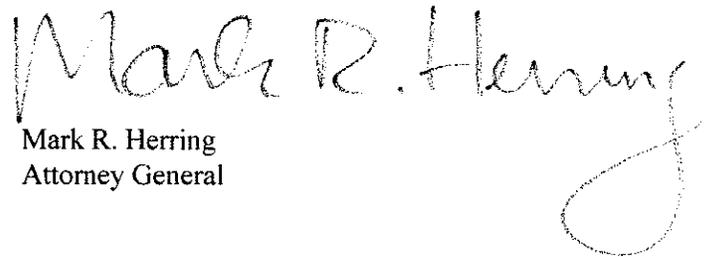
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structure for the Board that violates the Constitution's separation-of-powers requirements. Although there is no definitive Supreme Court of Virginia opinion directly on point, I conclude that there is a significant risk that the Supreme Court of Virginia would find that House Bill 834 violates the separation-of-powers principles in the Constitution of Virginia on two grounds: that it creates an executive-branch policy board that does not have executive-branch officials, employees, or appointees as a majority of its members; and that it grants the legislative members of the Board effective veto power over the Board's grant decisions. My Office will be glad to work with you and the General Assembly to remedy these defects, and amend the bill to alter the structure and composition of the Board in order to establish this initiative.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, sweeping flourish at the end of the word "Herring".

Mark R. Herring  
Attorney General