IN THE

Supreme Court of Virginia

RECORD NOS. 091883 & 091930

FFW ENTERPRISES,

Appellant,

v.

FAIRFAX COUNTY ECONOMIC DEVELOPMENT AUTHORITY, FAIRFAX COUNTY, THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, and THE PHASE I DULLES RAIL TRANSPORTATION IMPROVEMENT DISTRICT,

Appellees.

BRIEF AMICUS CURIAE OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC., THE VIRGINIA ASSOCIATION OF COUNTIES, THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY, AND THE COUNTIES OF PRINCE WILLIAM AND ARLINGTON IN SUPPORT OF THE BRIEF OF APPELLEES

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

This brief is submitted as an *amicus curiae* by the Local Government Attorneys of Virginia, Inc. (LGA), the Virginia Association of Counties (VACo), Northern Virginia Transportation Authority (NVTA), the County Board of Arlington County (Arlington County) and the Board of County Supervisors of Prince William County (Prince William County) in support of the Brief of Appellees filed by Fairfax County, the Board of Supervisors of Fairfax County, the Fairfax County Economic Development Authority, and the Phase I Dulles Rail Transportation Improvement District (the Local Entities).

This Court's consideration of the Questions Presented will address important issues of law that affect the organization of the government of the Commonwealth under the Constitution and the taxing authority of the General Assembly and all localities. If this Court grants the relief sought by Appellant, its ruling may affect the validity of numerous local government legislative actions not now before the Court; it will certainly have a profound impact on state and local budgets and the delivery of public infrastructure. Any ruling along the lines urged by Appellant will immediately damage the creditworthiness of the Commonwealth and several localities, because it will deprive them of a revenue source needed to support the repayment of

hundreds of millions of dollars in outstanding debt incurred in good faith over more than twenty years. It will effectively halt all progress at the local level toward the provision of desperately needed transportation and other public infrastructure.

Citing little to no support in the Constitution, statutes, or rulings of this Court over the last one hundred years, and without factual basis, Appellant has challenged fundamental and well-established aspects of the General Assembly's taxing authority. The power to tax is one of the essential attributes of the sovereignty of the people of Virginia, and through the Constitution, they have confided it to the General Assembly. If Appellant prevails, the government's tax policy, to say nothing of the financial affairs of the Commonwealth and localities, will be thrown into disarray, and the citizens will suffer.

ASSIGNMENTS OF ERROR

We adopt the Assignments of Error set forth in the Brief of Appellees.

QUESTIONS PRESENTED

We adopt the Questions Presented as set forth by the Local Entities.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

We adopt the Statement of the Case and the Statement of Facts submitted by the Local Entities in the Brief of the Appellees.

INTEREST OF THE AMICUS CURIAE

The nature and extent of the interests of LGA, VACo, NVTA, Prince William County and Arlington County in this case are stated in our Motion for Leave to File Brief Amicus Curiae, and are incorporated here.

For Northern Virginia localities, the taxing power set forth in Code § 58.1-3221.3[1] and, for all other Virginia localities, the authority to create service districts with taxing powers similar to those provided by § 33.1-435 are essential instruments by which revenue can be raised to help address current and future transportation problems. For these reasons, we have a material and significant interest in the outcome of these proceedings and we request this Court, in its consideration of the case, to recognize the context in which the issues before it arise and the consequences its decision will have.

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[1] Unless otherwise specified, references to "Code" sections are to the Code of Virginia.

SUMMARY OF ARGUMENT

In this case, FFW Enterprises (FFW or Appellant) contends that the Code §§ 33.1-345 and 58.1-3221.3 are, on their face, unconstitutional. For the reasons stated by the Local Entities in the Brief of the Appellees, FFW has failed to meet the substantial burden it must bear in order to succeed on a facial challenge. FFW fails to overcome either the strong presumption of constitutionality for legislative enactments or the presumption of validity that attaches to the tax classification at issue here. Further, this record is devoid of any evidence to show that the distinction between commercial and industrial real property on the one hand and other types of real property on the other is arbitrary. This is a distinction the General Assembly has been drawing now for many years, through several different enactments, and it was FFW's burden to prove that there is no reasonable basis for this distinction.

FFW's challenge is based on a series of misunderstandings of fundamental principles. It misapprehends the nature of legislative power in Virginia's constitutional scheme. It confuses the creation of a service district with the creation of a tax classification. It incorrectly equates property which is exempt from taxation with property that is simply outside a tax classification.

Worst of all, FFW suggests that, if the Court were to adopt its reasoning and superimpose a rigid rule of universality on Article X of the Virginia Constitution, no serious or long-lasting harm will be done to the Commonwealth and its localities. FFW seems unaware that its suggested approach will disrupt over one hundred years of Constitutional interpretation and tax jurisprudence. It certainly takes no cognizance of the many times, over the last twenty years, the General Assembly has asserted the power it clearly believes it has to classify commercial and industrial property separately for the purposes of special taxation. Finally, FFW has no concept of the actual harm that will accrue to the Commonwealth and its citizens if the statutory scheme at issue here, and the financial obligations that have been incurred in reliance on it, are disturbed.

PRINCIPLES OF LAW AND ARGUMENT

I. THE CIRCUIT COURT WAS CORRECT TO DECIDE THAT §§ 33.1-435 AND 58.1-3221.3 WITHSTAND APPELLANT'S FACIAL CHALLENGE AND ARE CONSTITUTIONAL.

The Local Entities have described the appropriate standard of review for the circuit court's decision and the presumptions that it correctly applied in analyzing FFW's challenge to the constitutionality of Code §§ 33.1-435

and 58.1-3221.3 in Sections I and II(A) and (B) of the Brief of Appellees. We offer the following additional points and authorities.

A. Sections 33.1-435 and 58.1-3221.3 are presumptively constitutional.

Any analysis of the constitutionality of a Virginia statute must begin with an acknowledgment that

> [t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature ... The Legislature represents the sovereign authority of the people, except so far as restrictions are enforced by the Constitution in express terms or by strong implication... When the prohibition is not found in the language of that instrument, or in its framework and general arrangement, there is no solid ground to pronounce the enactment void.

Whitlock v. Hawkins, 105 Va. 242, 248, 53 S.E. 401, 403 (1906).

Legislation cannot be declared unconstitutional unless it "clearly" and plainly violates the Constitution in such a manner as to leave no doubt or hesitation in the mind of the Court. *Reed v. Union Bank of Winchester*, 70 Va. (29 Gratt.) 719, 722 (1878). "[E]very reasonable doubt must be resolved in favor of the act's constitutionality." *Terry v. Mazur,* 234 Va. 442, 449, 362 S.E. 2d 904, 908 (1987) (citing *Almond v. Gilmer,* 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949)). Indeed, "[t]o doubt is to affirm." *Peery v. Virginia Bd. Of Funeral Dirs. & Embalmers,* 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961) (quotations and citations omitted).

B. Appellant misapprehends the effect of the Constitution on the taxing power of the General Assembly.

Appellant's challenge to the circuit court's ruling is predicated upon too narrow an interpretation of the powers of the General Assembly of Virginia. The fundamental flaw in Appellant's contention arises from its faulty premise that the Virginia Constitution delegates powers and specifies authority. This is incorrect. In contrast to the federal Constitution, the Virginia Constitution "is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit." *Harrison v. Day,* 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959). Accordingly, when addressing the power of the General Assembly, the appropriate starting place is the first paragraph of Article IV, § 14, which provides:

> [T]he authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted, and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.

Va. Const. Art. IV, § 14. As described by Professor Howard, the portion of the constitutional provision quoted above states two propositions:

> (1) that the Legislature has the power to legislate on any subject unless the Constitution says otherwise;
>
> (2) that the canon of construction, *expression unius est exclusion alterius*, does not apply in interpreting the legislative powers of the General Assembly ...

A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 538 (University Press of Virginia 1974). *See also* Report of the Commission on Constitutional Revision 152 (Jan. 1, 1969). The Constitution of Virginia does not grant power to the General Assembly; it only restricts powers "otherwise practically unlimited." *Lewis Trucking Corp. v. Commonwealth,* 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966). *See also Terry v. Mazur,* 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987).

Virginia law simply does not support Appellant's suggestion that the Constitution contains an unstated, implied ban on the ability of the Legislature to classify commercial and industrial real estate differently from other real estate for taxation purposes.

C. Appellant has not met its burden to establish that the taxes authorized by § 33.1-435 and § 58.1-3221.3 lack uniformity.

In Sections II(C), III(B) and (C) and IV, the Local Entities demonstrate that Appellant produced insufficient evidence and argument before the

circuit court to successfully challenge the uniformity of the taxes authorized by Code § 33.1-435 and § 58.1-3221.3. We offer the following additional points and authorities:

1. Appellant cannot demonstrate that the tax class created by Code § 58.1-3221.3 lacks uniformity

Section 58.1-3221.3(A) provides, in relevant part: "all real property used for or zoned to permit commercial or industrial uses is hereby declared to be a separate class of real property for local taxation..." Outside of its contention that the Constitution contains an implied "universality requirement" that prohibits the General Assembly from distinguishing among the various types of real property for taxation purposes, Appellant has presented little argument and no evidence to support any conclusion that the taxes levied against commercial and industrial property pursuant to § 58.1-3221.3 are anything other than uniform. While Appellant complains that other property is treated differently than commercial and industrial property for the purposes of this tax, the fact remains that uniformity is determined within the four corners of the tax classification created by the General Assembly. The question is not whether other property should be included in the tax classification created by the statute, it is whether all properties within the same classification are treated the same. *See Lee Gardens Arlington, Ltd. Partnership v. Arlington*

County, 250 Va. 534, 538, 463 S.E.2d 646, 698 (1995); *R. Cross, Inc. v. Newport News,* 217 Va. 202, 206, 228 S.E.2d 113, 116 (1976); *East Coast Freight Lines v. City of Richmond,* 194 Va. 517, 522, 74 S.E.2d 283, 287 (1953).

2. *Appellant has mischaracterized the tax class created by §33.1-435.*

Section 33.1-430, et seq., authorizes the creation of a transportation improvement district in any county with a population in excess of 500,000. § 33.1-431. Appellant has not challenged the constitutionality of § 33.1-431. Section 33.1-435 provides "... the governing body may levy and collect an annual special improvements tax on taxable real estate zoned for commercial or industrial use or used for such purposes and taxable leasehold interests in that portion of the improvement district within its jurisdiction." The tax classification thus created clearly includes *only* taxable real estate zoned for commercial or industrial use ... which is *within* a transportation improvement district created under §33.1-431.

One fundamental flaw in Appellant's challenge to the uniformity of the tax authorized by § 33.1-435 is its characterization of the tax class as all property within the transportation improvement district. The statutes themselves do not support this position; nothing in them requires that

district boundaries include only commercial or industrial property. Further, the language of § 33.1-435 indicates, by its description of which property in the district is taxable, the expectation that not all of the real estate in the district will belong to the tax class.

Appellant argues that because non-commercial and non-industrial property within the district goes untaxed, then the tax class is not uniform. This argument fails because Appellant has simply mischaracterized what the tax class is. Further, Appellant has not produced argument or evidence to support any conclusion that the commercial and industrial property and taxable leasehold interests within the Phase I Dulles Rail Transportation Improvement District are taxed differently from one another.

II. OTHER CONSIDERATIONS SUPPORT THE CIRCUIT COURT'S DETERMINATION THAT § 33.1-435 AND § 58.1-3221.3 ARE CONSTITUTIONAL.

A. The General Assembly has repeatedly enacted the classification of commercial and industrial property for tax purposes.

Where a challenge to a statute rests on no express or necessarily implied prohibition in the Constitution, the Court can take cognizance of the acts of the Legislature in resolving the challenge. In *Forbes & Co. v. Southern Cotton Oil Co.,* 130 Va. 245, 108 S.E.15 (1921), this Court

considered a challenge to the statute which allowed a trial court to set aside a jury verdict as being contrary to the evidence in the case. The plaintiff complained that judgment notwithstanding the verdict was an unconstitutional abridgment of his right to trial by jury. The Constitution provided at the time that "trial by jury is preferable to all others, and ought to be held sacred." In finding the statute constitutional, the Court said:

> The statute is a new and important one and demands careful consideration...The statute was proposed by the revisors of the Code of 1919, and enacted by the legislature. The revisors were carefully selected with reference to the work to be submitted to them, and it is to be presumed that they gave the statute their careful consideration, and, in drafting it and submitting it to the legislature, they gave their deliberate judgment as to its constitutional validity. To this must be added the judgment of the legislature in adopting it. In a peculiar sense, therefore, this court ought not to pronounce the section unconstitutional unless it is plainly so – so plainly as to leave no doubt on the subject.

Forbes, 130 Va. At 257, 108 S.E. at 19 (citations omitted).

Here, in the absence of any express or necessarily implied limitation on the power of the General Assembly to classify commercial and industrial property differently than other property for tax purposes, it is worth noting the number of times the General Assembly has enacted legislation making this classification. In addition to § 33.1-435 and § 58.1-3221.3, the following sections segregating commercial and industrial property for different tax treatment have been adopted:

Section 15.2-2403(6) (Powers of service districts): "To levy and collect an annual tax upon any property in such service district subject to local taxation to pay, either in whole or in part, the expenses and charges for providing the governmental services authorized by subdivisions 2 and 11 for constructing, maintaining, and operating such facilities and equipment as may be necessary and desirable in connection therewith ... Such tax may be levied on taxable real estate zoned for residential, commercial, industrial or other uses, *or any combination of such use classification*, within the geographic boundaries of the service district." (emphasis supplied; second sentence added in 2007).

Section 15.2-4607 (Multicounty Transportation Improvement Districts): ...[E]ach board of supervisors may levy and collect an annual special improvements tax on taxable real estate zoned for commercial or industrial use or used for such purposes and taxable leasehold interests in that portion of the improvement district within its jurisdiction. (Formerly § 15.1-1372.7, 1987).

Section 15.2-4706 (Transportation Improvement Districts in Individual Localities): ... [T]he local governing body may levy and collect an annual special improvements tax on taxable real property zoned for commercial or industrial use or used for such purposes and leasehold interests in that portion of the improvement district within its jurisdiction. (Formerly § 15.1-1372.27, 1987)

Section 15.2-4806 (Virginia Transportation Service Districts Act): ... [T]he board of supervisors may levy and collect an annual special improvements tax on all taxable real property which is (i) zoned for commercial or industrial use or used for such purposes or (ii) was unimproved at the time the district was created, regardless of zoning. (Formerly § 15.1-791.7, 1987).

> **Section 33.1-415** (Local Transportation Improvement Districts): ...[E]ach local governing body may levy and collect an annual special improvements tax on taxable real estate zoned for commercial or industrial use or used for such purposes and taxable leasehold interests in that portion of the improvement district within its jurisdiction. (1993)

> **Section 33.1-453** (Transportation improvement district for the City of Charlottesville and the County of Albemarle): "... [E]ach local governing body may levy and collect an annual special improvement tax on taxable real estate zoned for commercial or industrial use or used for such purposes and taxable leasehold interests in that portion of the improvement district within its jurisdiction." (2004)

In accord with the holding in *Forbes*, it can be presumed that each time one of these provisions was enacted, the General Assembly was satisfied that classifying commercial and industrial real estate for tax purposes was constitutionally permissible. This is a telling point in favor of the constitutionality of § 33.1-435 and § 58.1-3221.3.

B. The Court can consider the potential harm to localities which have reasonably relied on the constitutionality of classifications created by the General Assembly in deciding this case.

In *Smith v. Commonwealth,* 75 Va. 904 (1880), this Court considered whether a statute which allowed a judge of one county court to sit as a judge in another county court as a substitute violated the provision of the

Constitution that established the county courts. This Court decided first that the Constitution did not expressly limit the power of county court judges to the jurisdictions in which they reside. The Court then noted a strong public policy in favor of allowing the substitution of judges in the event of illness, disability, death or resignation. In deciding that the statute involved was constitutional, the Court observed:

> And whilst *public convenience and the administration of public justice* cannot avail against an express provision or necessary implication of the provisions of the constitution, yet such considerations, *where there is no such express provisions or necessary implications, will always prevail in the construction of statutes.*

Smith, 75 Va. At 908 (emphasis supplied).

Since this Court is asked by Appellant to overturn the special improvement taxes that are based on the classification of commercial and industrial real property as a separate tax class, without any express or necessarily implied requirement in the Constitution, it is appropriate for the Court to consider the real-world impact should it accept Appellant's invitation.

Prince William County, in reliance on the constitutional presumption of legislative acts, created two transportation improvement districts under

the former §15.1-1372.23, VA Code Ann.[2] To finance these transportation projects, the County issued bonds and pledged the tax revenues from the transportation districts to pay the annual debt service on the bonds. There is still outstanding debt on both bond issuances. Should this Court rule the enabling legislation for the taxing classification is unconstitutional because the General Assembly did not have the authority to create the commercial and industrial classifications within these districts, Prince William County will face a total loss in tax revenue of approximately $41 million, of which approximately $18 million will be the projected amount needed to pay the remaining debt service on the outstanding bonds, and approximately $23 million will be the amount of refunds the County would be legally obligated under §58.1-3990, VA Code Ann., to pay the affected taxpayers.[3]

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[2] The Prince William County Parkway Transportation Improvement District was created in December of 1990 and the Route 234 Bypass Transportation Improvement District was created in December of 1991.

[3] Section 58.1-3990, VA Code Ann., provides that "if any tax is declared to be unconstitutional by a court of competent jurisdiction, the governing body may grant a refund of such tax hereunder to all taxpayers, for those years to which the court proceeding is applicable." In the case of *Harper v. Virginia Dep't of Taxation*, 250 Va. 184; 462 S.E.2d 892, cert denied, 517 U.S. 1128, 116 S. Ct. 1371, 134 L. Ed. 2d 535 (1996), this Court dealt with whether the word "may" in Section 52.1-1826, Va. Code Ann., a state tax

Such a revenue loss to Prince William County would be catastrophic, not only due to the enormous amount involved, but also in the impact of the loss on its bond rating and its relationship with and credit-worthiness in the financial markets and with bondholders. Furthermore, to comply with its duty to the bond holders to ensure sufficient revenues to pay the principal and interest on the bonds, the Board of County would likely have to increase tax rates for all county residents substantially, and as soon as possible. This raises an issue of fairness because the increase in rates to cover the debt incurred for the transportation districts will cause citizens outside the territorial limits to pay for improvements within the districts.

This result appears never to have been the intent of the General Assembly. More importantly for the Court's purposes in this case, it begs the question of whether *that* outcome is within the scheme of the Virginia Constitution.

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refund statute, is permissive or mandatory. This Court determined that while the word "may" is prima facie permissive, importing discretion, courts construe it to be mandatory when it is necessary to accomplish the manifest purpose of the legislature. This Court has not ruled on whether the word "may" in §58.1-3990, VA Code Ann. is mandatory, but because the "manifest purpose" of §58.1-3990, VA Code Ann., is the refund of local taxes erroneously paid, it seems highly likely this Court will construe the word "may" to require the refund of an unconstitutional tax.

Fairfax County stands to lose much more revenue than Prince William if its general transportation tax on commercial and industrial real properties is overturned, and if the taxes which support the Phase I Dulles Rail Transportation Improvement District (the "Phase I District"), the Phase II Dulles Rail Transportation Improvement District (the Phase II District"), and the State Route 28 Highway Transportation Improvement District (the "Route 28 District") are invalidated. Construction of the massive Dulles Rail Project that will extend Metrorail public transit service from Falls Church to and beyond Dulles Airport in Loudoun County began approximately two years ago and is well underway on a large scale. The Dulles Rail Project, supported by an intricate array of commitments at the federal, state, and local level, is critically dependent on the availability of $720 million in construction funds from special taxes authorized by § 33.1-435 in the Phase I District and Phase II District. In addition, there are approximately $300 million in outstanding Commonwealth and local bonds that were used to pay for extensive improvements to Route 28 in Fairfax and Loudoun Counties. Those bonds depend for repayment on revenues from a tax in the Route 28 District authorized by § 15.2-4607.

Arlington County, with its transportation tax and Loudoun, which shares the Route 28 District with Fairfax, will likewise be seriously affected.

Stafford County has implemented service districts under § 15.2-2400, et seq., and it too is at risk because the tax structure which supports the debt service for improvements in those districts relies on the separate classification of commercial and industrial real property.

These localities and likely others have relied on the validity of the classification of commercial and industrial real property for tax purposes. Their reliance was eminently reasonable, given the specific wording of Article X., Section 1 of the Virginia Constitution providing that "[t]he General Assembly may define and classify taxable subjects."

CONCLUSION

For the reasons advanced by the Local Entities and supported by LGA, VACo, NVTA, Prince William County and Arlington County, this Court is urged to find that facially, §33.1-435 and §58.1-3221.3, VA Code Ann., are constitutional acts of the Virginia General Assembly. The decision of the trial court should be affirmed.

Respectfully Submitted,

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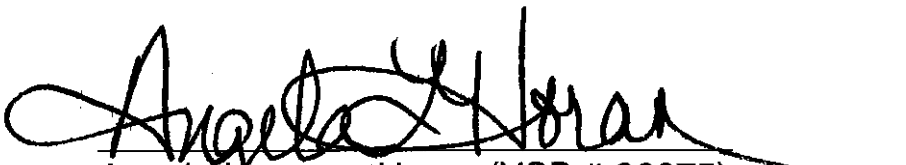

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CERTIFICATE

Pursuant to Rules 5:30(c), 5:28(g) and 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that fifteen copies of this Motion, together with a copy of the Brief *Amicus Curiae* were hand-delivered to:

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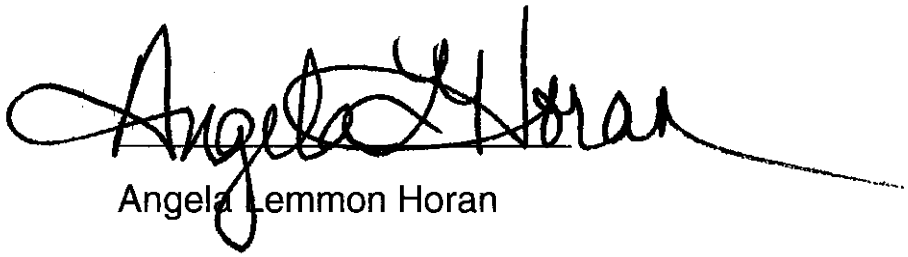

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