IN THE

Supreme Court of Virginia

RECORD NO. 130317

JEFFREY S. SMALL, as Clerk of Circuit Court
of City of Fredericksburg, Virginia, individually
and on behalf of all others similarly situated,
Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
a/k/a FANNIE MAE and FEDERAL HOME LOAN
MORTGAGE CORPORATION a/k/a FREDDIE MAC,
Appellees.

**On Appeal by Certified Question
from the United States District Court
Eastern District of Virginia**

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

I. THE ENTERPRISE DEFENDANTS.....5

II. THIS ACTION AND RELATED LITIGATION.....6

STANDARD OF REVIEW 8

ARGUMENTS AND AUTHORITIES 8

I. SMALL'S SUIT TO ENFORCE THE VRTA IS *ULTRA VIRES* AND IMPROPER 9

A. Small Is Presumptively Powerless to Act Absent an Express Legislative Grant of Authority 9

B. No Law Authorizes Small to File a VRTA Tax Enforcement Action 14

C. Small's Duty to "Collect" Transfer Taxes Does Not Create an Implied Power to File a VRTA Tax Enforcement Action 17

II. THE VRTA CANNOT BE CONSTRUED TO INCLUDE THE IMPLIED TAX ENFORCEMENT POWERS THAT SMALL ASSERTS HERE 22

III. SMALL'S ACTION IS *ULTRA VIRES* IN LIGHT OF THE COMMONWEALTH'S EXPRESS ROLE IN ENFORCING TRANSFER TAXES 25

A. Because the VRTA Expressly Grants Enforcement Authority to the Department of

Taxation, No Separate, Implied Right of Action Is Presumed to Exist 25

B. An Implied Right of Action Undermines the Commonwealth's Tax Policy, Its Sovereign Interests, and Its Enforcement Priorities..... 26

IV. SMALL'S REMAINING ARGUMENTS FAIL..... 28

A. Small's Theory of a "Parallel" Tax Enforcement Scheme is Wrong and Irrelevant ... 28

B. The City of Fredericksburg Does Not Have Statutory Standing to Sue, Nor Can it Vicariously Confer Such Statutory Standing on Small 32

V. SMALL LACKS STATUTORY STANDING TO SUE AS A CLASS REPRESENTATIVE OF SIMILARLY SITUATED OFFICIALS 35

CONCLUSION..... 37

TABLE OF AUTHORITIES

Page(s)

CASES

Appalachian Power Co. v. State Corp. Comm'n,
284 Va. 695 (2012) 27

Bd. of Supervisors v. Tallant,
96 Va. 723, 32 S.E. 479 (1899) 23

Bd. of Zoning Appeals of Fairfax Cnty. v. Bd. of Sup'rs of Fairfax Cnty.,
276 Va. 550 (2008) 33, 34

Buonocore v. Chesapeake & Potomac Tel. Co. of Virginia,
254 Va. 469 (1997) 19

Cape May Cnty. v. Fed. Nat'l Mortg. Ass'n,
12-cv- 04712, ECF No. 37 (D.N.J Apr. 30, 2013) 7

City of Bristol v. Earley,
145 F. Supp. 2d 741 (W.D. Va. 2001) 33

City of Lynchburg v. English Const. Co., Inc.,
277 Va. 574 (2009) 23

City of Richmond v. SunTrust Bank,
283 Va. 439, 722 S.E.2d 268 (2012) 23

City of Virginia Beach v. Int'l Family Entm't, Inc.,
263 Va. 501 (2002) 23, 34

City of Winchester v. Am. Woodmark Corp.,
250 Va. 451 (1995) 34

Clinchfield Coal Co. v. Robbins,
261 Va. 12 (2001) 13

Com. Ex. Rel. Moore v. P. Lorillard Co., Inc.,
129 Va. 74, 105 S.E. 683 (1921) 22

Com. v. Gen. Elec. Co.,
236 Va. 54 (1988) 22, 24, 27

Com. v. Arlington Cnty. Bd.,
217 Va. 558 (1977) 25, 33

DeKalb Cnty. v. FHFA,
No. 3:12-cv-50227 (N.D. Ill. Feb. 14, 2013) 6, 7

Delaware Cnty., Pa. v. FHFA,
No. 2:12-cv-4554, 2013 WL 1234221 (E.D. Pa. Mar. 26, 2013) 7

Dist. of Columbia ex rel. Hager v. Fed. Nat'l Mortg. Ass'n,
882 F. Supp. 2d 107 (D.D.C. 2012) 6

Drewry v. Baugh and Sons,
150 Va. 394 (1928) 22

Fed. Nat'l Mortg. Ass'n v. Hamer,
No. 3:12-cv-50230, 2013 WL 591979 (N.D. Ill. Feb. 13, 2013) 6

First Am. Title Ins. Co. v. W. Sur. Co.,
283 Va. 389 (2012) 26

First Virginia Bank-Colonial v. Baker,
225 Va. 72 (1983) 9

Hampton Nissan Ltd. P'ship v. City of Hampton,
251 Va. 100 (1996) 23

Harvey v. Chesapeake & Potomac Tel. Co. of Va.,
198 Va. 213 (1956) 12

Hennepin Cnty. v. Fannie Mae,
No. 12-cv-2075, 2013 WL 1235589 (D. Minn. Mar. 27, 2013) 7

Hertel v. Bank of Am.,
897 F. Supp. 2d 579 (W.D. Mich. 2012) 6

Lucy v. Cnty. of Albemarle,
258 Va. 118 (1999) 19

Marye v. Diggs,
98 Va. 749 (1900) 22

Mendez v. Commonwealth,
220 Va. 97 (1979) 11, 12, 14

Montgomery Cnty. v. Fed. Nat'l Mortg. Ass'n,
No. 13-cv-66, 2013 WL 1832370 (D. Md. Apr. 30, 2013).....7

Nicolai v. FHFA,
No. 8:12-cv-1335, 2013 WL 899967 (M.D. Fla. Feb. 12, 2013).....6

Oakland Cnty. v. Fed. Hous. Fin. Agency,
871 F. Supp. 2d 662 (E.D. Mich. 2012) 7

Page v. Taylor,
16 Va. 492 (1811) 11

Patrick v. Com.,
115 Va. 933, 78 S.E. 628 (1913) 10

Piedmont Envtl. Council v. Virginia Elec. & Power Co.,
278 Va. 553 (2009) 27

PMA Capital Ins. Co. v. US Airways, Inc.,
271 Va. 352 (2006) 8

Radin v. Crestar Bank,
249 Va. 440 (1995) 31

Reston Hosp. Ctr., LLC v. Remley,
59 Va. App. 96 (2011) 31

Ross v. Craw,
231 Va. 206 (1986) 15, 16, 30

School Bd. v. Giannoutsos,
238 Va. 144 (1989) 25

Standard Peanut Co. v. Wilson,
110 Va. 650, 66 S.E. 772 (1909) 11

The Mattaponi Indian Tribe v. Commonwealth,
43 Va. App. 690 (2004) 13

Town of Falls Church v. Myers,
187 Va. 110 (1948) 10

Vadnais v. Fannie Mae,
No. 12-cv-1598, 2013 WL 1249224 (D. Minn. Mar. 27, 2013) 5, 7

Vansant & Gusler, Inc. v. Washington,
245 Va. 356 (1993) 26

FEDERAL STATUTES

12 U.S.C. § 1452 ..... 3, 6

12 U.S.C. § 1723a(c)(2) 3, 6

12 U.S.C. § 4617(j)(1) 3, 6

12 U.S.C. § 1716 5

20 U.S.C. § 1087-2(b)(2) 7

Housing and Economic Recovery Act of 2008,
Pub L. No. 110-289, 122 Stat. 2654,
codified at 12 U.S.C. § 4617 *et seq.* 5

VIRGINIA CONSTITUTION AND STATUTES

Va. Const. Art. VII, § 4 9

Va. Code § 17.1-123 10

Va. Code § 17.1-208 10

Va. Code § 17.1-249(I) 10

Va. Code § 58.1-801, *et seq*. ..... passim

Va. Code § 58.1-802 15

Va. Code § 58.1-803 15

Va. Code § 58.1-806 16

Va. Code § 58.1-812 3

Va. Code § 58.1-812(a) 17

Va. Code § 58.1-812(b) 3, 17

Va. Code § 58.1-813 ..... 16, 18

Va. Code § 58.1-817 17

Va. Code § 58.1-3907 32

Va. Code § 58.1-3953 29

VIRGINIA ATTORNEY GENERAL OPINIONS

1986 Va. Op. Att'y. Gen. 284,
1986 WL 221283 (Mar. 31, 1986) 24

1987 Va. Op. Att'y. Gen. 159,
1987 WL 271636 (May 30, 1987) 13, 15

1990 Va. Op. Att'y. Gen. 259,
1990 WL 511444 (Feb. 20, 1990) 7

1996 Va. Op. Att'y. Gen. 84,
1996 WL 425012 (June 26, 1996) 13

2001 Va. Op. Att'y. Gen. 057,
2001 WL 1699784 (Nov. 29, 2001) 13

2003 Va. Op. Att'y. Gen. 059,
2003 WL 22083572 (Aug. 14, 2003)..... 21

2009 Va. Op. Att'y. Gen. 105,
2009 WL 570959 (Feb. 25, 2009) 12

2012 Va. Op. Att'y. Gen. 008,
2012 WL 979305 (Mar. 16, 2012) 14

OTHER AUTHORITIES

2B Sutherland Statutory Construction (7th ed.) 19

Va. Dep't of Tax., P.D. 90-142,
1990 WL 323991 (Aug. 29, 1990) 7

Va. Sup. Ct. R. 5:28(b) 4

Va. Sup. Ct. R. 5:28(c) 5

INTRODUCTION

Appellant ("Small") is the Clerk of the Circuit Court for the City of Fredericksburg. He filed a putative class action against Appellees Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac") in the U.S. District Court for the Eastern District of Virginia. Appellee Federal Housing Finance Agency ("FHFA," and together with Fannie Mae and Freddie Mac, the "Enterprise Defendants"), subsequently intervened in the action in its role as conservator for Fannie Mae and Freddie Mac. Small seeks to recover recordation taxes imposed on the transfer of real property in Virginia ("transfer taxes"), *see* Virginia Recordation Tax Act ("VRTA"), Va. Code § 58.1-801, *et seq*., that Fannie Mae and Freddie Mac allegedly have not paid.

The question before this Court is whether Virginia law permits Small to bring this lawsuit to enforce the VRTA when no law expressly authorizes him to do so. Basic principles of Virginia constitutional law and statutory construction control the Court's analysis. *First*, a clerk of court is a ministerial officer with no

inherent authority to act. A clerk's powers are limited strictly to those expressly enumerated in the Virginia Code or Constitution. The Court has adhered to this principle for over a century, repeatedly finding the clerk's actions to be *ultra vires* when he exceeds the scope of his statutory duties. *Second*, tax statutes in the Commonwealth are construed narrowly and in favor of the taxpayer. Consistent with this principle, this Court has declined to imply hidden powers to impose, enforce, or assess taxes where a tax statute is silent or ambiguous as to those powers. *Finally*, if a statute expressly provides a right of action or an enforcement mechanism, no others are presumed to exist.

These principles—conspicuously unaddressed in the Opening Brief—defeat Small's statutory standing to bring this case. No statute confers on the clerk express authority to enforce Virginia tax statutes generally or the VRTA specifically. The legislature instead vests that authority in the Department of Taxation, which has not authorized or joined Small's action. To the contrary, the Department of Taxation and the Commonwealth's Attorney General have issued opinions that contradict Small's theory of

recovery, effectively concluding that the Enterprise Defendants are exempt from the VRTA due to their federal statutory exemptions from materially "all [state and local] taxation." 12 U.S.C. §§ 1452, 1723a(c)(2), 4617(j)(1).

Ignoring these dispositive principles, Small principally argues that his *mandatory statutory duty* to "collect" transfer taxes prior to the recordation of a deed confers *discretionary powers* to file this enforcement lawsuit. It does not. Small's textually unmoored interpretation finds no support in the statute, *see* Va. Code § 58.1-812(b), which does not remotely relate to tax enforcement actions. In addition, longstanding principles—a clerk has no implied authority to act, and tax statutes do not contain hidden enforcement powers—decisively resolve any ambiguities in favor of the Enterprise Defendants.

Small's remaining arguments are baseless. He claims a personal interest in the collection of transfer taxes. That argument fails because it confuses *constitutional standing*, which considers a plaintiff's stake in the matter, with *statutory standing*, which does not. Next, Small argues for the existence of a

"parallel" tax enforcement scheme, invoking other tax statutes that are misread or irrelevant. Small's convoluted argument about the structure of Virginia tax law, even if true, would not remedy his lack of statutory standing. Finally, Small asserts that the City of Fredericksburg has tax enforcement powers. Small conflates his authority as clerk with that of the City, which is not a party to this action. Even if the City's standing were properly before the Court, it could not save Small's suit—the City lacks statutory standing for the same reasons Small does.

At bottom, Small must identify some law permitting him to enforce the VRTA, whether he sues individually or as the representative of a putative class. He has failed to do so; the Court should answer both certified questions in the negative.

STATEMENT OF THE CASE

Pursuant to Rule 5:28(b) of the Rules of the Supreme Court of Virginia, the Enterprise Defendants do not disagree with any statements contained in Small's statement of the case to the extent they describe the procedural history of the litigation.

STATEMENT OF FACTS

Pursuant to Rule 5:28(c) of the Rules of the Supreme Court of Virginia, the Enterprise Defendants state the following facts necessary to correct or amplify the facts set forth in Small's Opening Brief.

I. THE ENTERPRISE DEFENDANTS

Fannie Mae and Freddie Mac are government-sponsored enterprises chartered by Congress to establish secondary market facilities for residential mortgages, to provide stability and liquidity to the secondary market for residential mortgages, and to promote access to mortgage credit throughout the Nation. [*See* JA at 22-23 (citing 12 U.S.C. §§ 1716; 1451 note)].

FHFA is an independent federal agency, created pursuant to the Housing and Economic Recovery Act of 2008 ("HERA"), Pub L. No. 110-289, 122 Stat. 2654, *codified at* 12 U.S.C. § 4617 *et seq.*, with comprehensive regulatory and oversight authority over the Enterprises and the Federal Home Loan Banks. [*See* JA at 23]. On September 6, 2008, the Director of FHFA placed the

Enterprises into FHFA's conservatorship; FHFA appears in this matter in its capacity as Conservator to the Enterprises.

II. THIS ACTION AND RELATED LITIGATION

This lawsuit, like many others across the nation, implicates the Enterprise Defendants' statutory immunity from materially "all [state and local] taxation." 12 U.S.C. §§ 1452, 1723a(c)(2), 4617(j)(1). Most of these suits are brought by municipalities or their officials seeking to impose real estate transfer taxes on the Enterprise Defendants, without first obtaining the joinder or consent of the state agencies responsible for administering these taxes. Small's lawsuit is one such example. [*See* JA at 184, n.2]. To date, ten out of eleven federal district courts have sided with the Enterprise Defendants on the merits, confirming that their statutory exemptions shield them from liability in circumstances substantially identical to those here.[1]

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[1] *See Dist. of Columbia ex rel. Hager v. Fed. Nat'l Mortg. Ass'n*, 882 F. Supp. 2d 107 (D.D.C. 2012); *Hertel v. Bank of Am.*, 897 F. Supp. 2d 579 (W.D. Mich. 2012); *Nicolai v. FHFA*, No. 8:12-cv-1335, 2013 WL 899967 (M.D. Fla. Feb. 12, 2013); *Fed. Nat'l Mortg. Ass'n v. Hamer*, No. 3:12-cv-50230, 2013 WL 591979 (N.D. Ill. Feb. 13, 2013); *DeKalb Cnty. v. FHFA*, No. 3:12-cv-

The Commonwealth's agencies agree with the consensus of federal courts. [*See* JA at 184, n.2]. The Department of Taxation concluded that the Student Loan Marketing Association was exempt from transfer taxes due to its federal statutory exemption from materially "all [state and local] taxation." *See* Va. Dep't of Tax., P.D. 90-142, 1990 WL 323991, at *1 (Aug. 29, 1990) (citing 20 U.S.C. § 1087-2(b)(2)). Similarly, the Attorney General found that the National Consumer Cooperative Bank, also statutorily exempt from materially "all [state and local] taxation," was immune from a similar state recordation tax on deeds of trust. *See* 1990 Va. Op. Att'y. Gen. 259, 1990 WL 511444 (Feb. 20, 1990).

50227 (N.D. Ill. Feb. 14, 2013); *Delaware Cnty., Pa. v. FHFA*, No. 2:12-cv-4554, 2013 WL 1234221 (E.D. Pa. Mar. 26, 2013); *Hennepin Cnty. v. Fannie Mae*, No. 12-cv-2075, 2013 WL 1235589 (D. Minn. Mar. 27, 2013); *Vadnais v. Fannie Mae*, No. 12-cv-1598, 2013 WL 1249224 (D. Minn. Mar. 27, 2013); *Cape May Cnty. v. Fed. Nat'l Mortg. Ass'n*, 12-cv- 04712, ECF No. 37 (D.N.J Apr. 30, 2013); *Montgomery Cnty. v. Fed. Nat'l Mortg. Ass'n*, No. 13-cv-66, 2013 WL 1832370 (D. Md. Apr. 30, 2013). *But see Oakland Cnty. v. Fed. Hous. Fin. Agency*, 871 F. Supp. 2d 662 (E.D. Mich. 2012) (holding that the Enterprise Defendants are not exempt).

STANDARD OF REVIEW

The questions certified to this Court present pure questions of law, which this Court reviews *de novo*. *PMA Capital Ins. Co. v. US Airways*, Inc., 271 Va. 352, 358 (2006).

ARGUMENTS AND AUTHORITIES

No law authorizes Small to sue to recover transfer taxes imposed by the VRTA. To the contrary, the VRTA vests such authority solely in the Virginia Department of Taxation. Small nevertheless argues that his *ministerial duty* to "collect" transfer taxes prior to recordation empowers him with *discretionary authority* to file this enforcement action. That argument misconstrues the VRTA, which merely requires the clerk to "collect" taxes as a prerequisite to the recordation of an instrument. No colorable reading of the VRTA authorizes the clerk to file civil lawsuits or tax enforcement actions.

Small's counter-textual reading of the VRTA is also incompatible with longstanding principles of Virginia law. *First*, a clerk's actions are *ultra vires* unless expressly authorized by statute. This Court narrowly reads statutes that enable a clerk's

actions, adopting a presumption against implied powers. *Second*, because tax statutes are construed in favor of the taxpayer, they cannot be read to confer hidden or unmentioned enforcement authority. *Third*, if a statute provides a method of enforcement, there is a presumption against a separate, implied right of action. These principles resolve both certified questions, defeating Small's purported authority to sue individually or as a class representative on behalf of similarly situated individuals.

ARGUMENT

I. SMALL'S SUIT TO ENFORCE THE VRTA IS *ULTRA VIRES* AND IMPROPER

A. Small Is Presumptively Powerless to Act Absent an Express Legislative Grant of Authority

The powers of a clerk of court are strictly limited. The clerk is a constitutional officer whose duties "shall be prescribed by general law or special act." Va. Const. Art. VII, § 4. "The duties of a clerk are prescribed by statute." *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 80 (1983). To that end, the legislature has enumerated the clerk's powers in dozens of provisions throughout the state code. These duties leave little room for discretion. *See,*

e.g., Va. Code § 17.1-123 (the clerk "shall" record "all orders that make up each day's proceedings of every circuit court"); *id.* § 17.1-208 ("the clerk shall, when requested, furnish copies [of records or papers of the court], except in cases in which it is otherwise specially provided"). Where the clerk is granted discretionary powers, they are also narrowly tailored. *See, e.g.*, Va. Code § 17.1-249(I) ("The clerk may maintain his indexes on computer" and "may maintain his grantor and grantee indexes on paper"). The level of specificity with which the legislature has authorized the clerk's ministerial actions creates a strong inference that the clerk otherwise lacks implied, discretionary powers to act.

This Court has recognized the "ministerial" nature of a clerk's duties for over a century, holding that a clerk's actions are *ultra vires* when the controlling enabling statute does not expressly authorize the action. *Town of Falls Church v. Myers*, 187 Va. 110, 119 (1948) (noting the clerk's "ministerial" role); *see also Patrick v. Com.*, 115 Va. 933, 78 S.E. 628, 630 (1913) ("The clerk not only had no authority to draw and place upon the

list more than 20 names [from a pool of prospective jurors], but he was prohibited from doing so"); *Standard Peanut Co. v. Wilson*, 110 Va. 650, 66 S.E. 772, 773 (1909) ("The clerk, of course, had no authority to make [bills of exception] part of the record"); *Page v. Taylor*, 16 Va. 492, 496 (1811) (clerk's ministerial duties did not extend to assessing the sufficiency of a bond).

Mendez v. Commonwealth, 220 Va. 97, 102 (1979), is instructive. This Court overturned a perjury conviction because the clerk lacked statutory authority to perform the oath upon which the conviction rested. The conviction was infirm because the Commonwealth did not prove "that an oath was lawfully administered," a necessary element of the perjury offense. *Id.* at 102. And the oath was unlawful because the clerk exceeded his authority—his statutory mandate to administer oaths "required by law" did not permit him to issue oaths at his discretion. *Id.*

Recognizing the impropriety of the clerk's actions, the Court noted that "[t]he authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute." *Id.*

Small argues that *Mendez* is irrelevant, characterizing it as a narrow criminal law decision. [Br. at 11]. That is wrong—essential to the Court's holding was the clerk's *ultra vires* behavior. *Mendez* is but another illustration that a clerk's actions are sharply limited.

Similarly, in *Harvey v. Chesapeake & Potomac Telephone Company of Virginia*, 198 Va. 213, 218 (1956), this Court refused to interpret a silent enabling statute in a matter that would expand the clerk's authority to act. At issue was whether the clerk had authority to modify a final judgment entered by the court. The Court held that "[t]he clerk has no such authority. His duties are ministerial. He receives and notes on the papers the dates they are lodged with him. He is not concerned with the legal effect of such papers." *Id.*

The Court's decisions in *Harvey* and *Mendez* are consistent with a long line of Attorney General opinions that have repeatedly declined to find implied powers for clerks; rather, the enabling statute must expressly authorize any authority for the clerk to act. *See, e.g.*, 2008 Va. Op. Att'y. Gen. 105, 2009 WL 570959,

at *3 (Feb. 25, 2009) (clerk lacked authority to "refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials"); 2001 Va. Op. Att'y. Gen. 057, 2001 WL 1699784, at *1 (Nov. 29, 2001) (clerk's duty to "make an order authorizing [a] minister to celebrate the rites of matrimony," did not generate a duty to "to investigate proof of a facially valid ordination or certificate to determine the authenticity of a given religious society or denomination"); 1996 Va. Op. Att'y. Gen. 84, 1996 WL 425012, at *1 (June 26, 1996) (clerk's authority to "provide remote access to all nonconfidential court records maintained by his office," did not imply "the statutory authority to . . . mak[e] such information available on the Internet"); 1987 Va. Op. Att'y. Gen. 159, 1987 WL 271636, at *1 (May 30, 1987) (noting that "the clerk has no authority to add requirements for the recording of documents beyond those already required by statute").[2]

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[2] Small does not substantively respond to the Attorney General's opinions except to say that they carry little weight. [Br. at 10 n.4]. That is wrong—these opinions are of "persuasive character." *Clinchfield Coal Co. v. Robbins*, 261 Va. 12, 18

Taken together, the opinions of the Court and Attorney General establish "a general rule"—"circuit court clerks have no inherent powers, and the applicable statutes determine the scope of the clerk's powers. If a particular action does not fall within the express statutory authority, the clerk has no authority to perform that action." 2012 Va. Op. Att'y. Gen. 008, 2012 WL 979305, at *2 (Mar. 16, 2012) (citing *Mendez*, 220 Va. at 102).

B. **No Law Authorizes Small to File a VRTA Tax Enforcement Action**

No statute expressly permits the clerk to file and prosecute lawsuits to recover unpaid state taxes. Indeed, in his Opening Brief, Small identifies no such authority. In fact, no law grants a clerk of court *any* discretionary tax enforcement authority in

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(2001) (finding persuasive the Attorney General's analysis of "whether there is statutory authority for [the] commissioner of revenue" to act). In support of his assertion that "executive agency's interpretation of law is entitled to no deference," Small misleadingly cites *The Mattaponi Indian Tribe v. Commonwealth*, 43 Va. App. 690, 601 (2004), *rev'd*, 270 Va. 423. [Br. at 10]. But that non-binding case only concerned the deference due to an administrative agency that was party to a suit and whose statutory interpretation was subject of the appeal.

connection with real estate transactions that are no longer before the clerk.

The VRTA expressly grants clerks only the narrow ministerial duty to calculate and collect transfer taxes. *See* Va. Code § 58.1-802 ("the clerk shall return taxes collected hereunder one-half into the state treasury and one-half into the treasury of the locality"); *id.* § 58.1-812 (the tax "shall be determined and collected by the clerk"). The operative verb—"shall"—reflects the fact that the clerk's duties are mandatory, not permissive, in nature. *Ross v. Craw*, 231 Va. 206, 212 (1986) ("the word 'shall' is primarily mandatory in its effect and the word 'may' is primarily permissive."); *see also* 1987 Va. Op. Att'y. Gen. 159, 1987 WL 271636, at *1 (May 30, 1987) (noting that "a clerk must record a document which meets these basic statutory requirements without inquiry as to the legal sufficiency of the writing" and that "the clerk has no authority to add requirements for the recording of documents beyond those already required by statute").

In contrast, the Virginia Department of Taxation "*may* assess and collect any [transfer tax] which has remained

uncollected for thirty days" in the "same manner and by the same methods used for the collection of any state tax administered by the Department." Va. Code § 58.1-813 (emphasis added). To administer such taxes, the Department "may" institute and conduct civil suits "in the name of the Commonwealth of Virginia." *Id.* § 58.1-1806. Filing a lawsuit is not a ministerial act; it inherently requires judgment and prudence. Consistent with this role, the operative statutory verb—"may"—reflects the fact that the Department's enforcement powers are discretionary in nature. *See Ross*, 231 Va. at 212.

The VRTA confers no similar authority to Small. Indeed, these statutes provide no role whatsoever for the clerk in the transfer tax enforcement scheme, save for the ministerial requirement that the Department of Taxation "*shall* give notice to the clerk of court in whose office the tax was to be collected." *Id.* § 58.1-1803 (emphasis added).[3]

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[3] Small offers no support whatsoever for his suggestion that this notification requirement exists "apparently to avoid duplication of efforts." [Br. at 15]. Given that the clerk has no express

C. **Small's Duty to "Collect" Transfer Taxes Does Not Create an Implied Power to File a VRTA Tax Enforcement Action**

In an effort to find some statutory hook, Small implausibly contends that his *ministerial obligation* to "collect" transfer taxes under the VRTA gives him the *discretionary power* to file this suit. [Br. at 7-8]. His argument misconstrues the statute, which provides:

> The tax on every deed, deed of trust, contract or other instrument shall be determined and collected by the clerk in whose office the instrument is first offered for recordation. The clerk may ascertain the consideration of the deed or of the instrument, the actual value of the property conveyed, and the qualification of the deed or instrument for any exemption claimed by inquiry, affidavit, declaration or other extrinsic evidence acceptable to the clerk. The fee shall be $1 on every recorded deed pursuant to § 58.1-817 and shall be collected by the clerk in whose office the deed is offered for recordation.

Va. Code § 58.1-812(b). The VRTA sets forth the clerk's duty to "collect" transfer taxes in the context of "admitt[ing] to record" a "deed, deed of trust, contract or other instrument" after "payment of the tax imposed thereon by law." *Id.* § 58.1-812(a).

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authorization to pursue collection efforts, Small's inference is unfounded conjecture.

The statute does not specify how the clerk may "collect" transfer taxes except, perhaps, by refusing to record the deed. *Id.* § 58.1-812(b) (noting that the clerk "may ascertain . . . the exemption claimed by inquiry"); [*see also* JA at 186 n.3]. Nor does it refer to an alternative method of enforcing the tax. One cannot reasonably read the clerk's obligation to "collect" transfer taxes as anything other than a precondition to recording a deed.

The VRTA, by contrast, empowers the Department of Taxation to "assess and collect" transfer taxes that remain "unpaid." Va. Code § 58.1-813. The VRTA specifies the manner in which the Department may "assess" and "collect" unpaid taxes—by using "the same methods used for the collection of any state tax administered by the Department." *Id.* By incorporating the entire panoply of the Department's statutory tax powers, the VRTA unambiguously grants the Department authority to enforce transfer taxes. The statutory structure also reflects the legislature's intent: the VRTA is located within the subtitle, "Taxes Administered by the Department of Taxation," not the subtitle, "Local Taxes."

Small's interpretation of the VRTA is incompatible with multiple canons of statutory construction. There is a presumption of "a different intent when a legislature omits words used in a prior statute on a similar subject," and "where a legislature inserts a provision in only one of two statutes that deal with a closely related subject, courts construe the omission as deliberate rather than inadvertent." 2B Sutherland Statutory Construction § 51:2 (7th ed.). Had the legislature intended to permit the clerk to enforce the VRTA, it would have stated so unequivocally, just as it did with regard to the Department of Taxation.

Moreover, Small's isolated emphasis on the term "collect" improperly disregards the rest of the statute. *Buonocore v. Chesapeake & Potomac Tel. Co. of Va.*, 254 Va. 469, 472 (1997) ("We will not construe a statute by singling out a particular term or phrase, but will construe the words and terms at issue in the context of the other language used in the statute."). Rather, statutory provisions relating to the same subject are construed *in pari materia*. *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129 (1999). Properly read together, the two provisions of the VRTA

are fully consistent: the clerk has the mandatory, ministerial duty to collect transfer taxes at the point of recordation, whereas the Department of Taxation retains the option to sue to recover uncollected taxes after recordation. As discussed below, Small's construction of the statute, under which the Department and clerks have concurrent authority to file suit, would make little sense as a matter of tax policy or state sovereignty. *See infra* Part III.B.

Not only does Small's argument clash with the plain text of the VRTA, it violates the narrow construction of a clerk's statutory powers. As noted above, the Attorney General has concluded repeatedly that a clerk lacks the power to act in the face of silent or ambiguous statutes that do not expressly confer the exercised power. *See supra* at 12-13. Many of the statutes referenced in those opinions, if anything, gave clerks a stronger textual basis for their purported authority than the VRTA does here. Yet in each of these instances, the Attorney General decisively rejected the clerks' attempts to discover implied powers in the statutory texts.

These opinions defeat Small's bald contention that his decision to bring this suit in his official capacity deserves "deference" in light of his statutory duty to "collect" transfer taxes. [Br. at 8]. The only authority Small cites in support of his purported "deference" is an Attorney General opinion, which concluded that a clerk was not "obligated to assign a deputy circuit court clerk to the courtroom during civil proceedings before the court." 2003 Va. Op. Att'y. Gen. 059, 2003 WL 22083572 (Aug. 14, 2003).

But that opinion is off-point—it addresses whether the clerk *must* act when the statute is silent as to the mode for carrying out a clerk's ministerial duties. The issue here is whether the clerk *may* sue absent a clear grant of discretionary authority. Put differently, the opinion cited by Small only addresses when a clerk's *ministerial inaction* is due deference; the opinion in no way upends the longstanding principle that the clerk's *affirmative actions* are sharply limited and entitled to no deference.

II. THE VRTA CANNOT BE CONSTRUED TO INCLUDE THE IMPLIED TAX ENFORCEMENT POWERS THAT SMALL ASSERTS HERE

Taxation is an "exercise of sovereign power" that is "exerted through the Legislature." *Com. Ex. Rel. Moore v. P. Lorillard Co., Inc.*, 129 Va. 74, 105 S.E. 683, 685 (1921). Because the legislature has the prerogative to determine the scope of tax statutes, "taxes can only be levied, assessed and collected in the mode pointed out by express statute." *Marye v. Diggs,* 98 Va. 749, 752 (1900); *accord Drewry v. Baugh and Sons,* 150 Va. 394, 398-99 (1928).

Accordingly, "[s]tatutes imposing taxes are construed most strongly in favor of the taxpayer, and will not be extended by implication to the prejudice of the taxpayer beyond the clear import of the language used." *P. Lorillard*, 105 S.E. at 685. This rule of construction applies equally to tax enforcement powers: "[A]n executive officer who seeks to enforce a tax must always be able to put his finger upon the statute which confers such authority." *Com. v. Gen. Elec. Co.*, 236 Va. 54, 64 (1988)

(quoting *P. Lorillard*, 105 S.E. at 685); *Bd. of Supervisors v. Tallant*, 96 Va. 723, 32 S.E. 479, 480-81 (1899).

This Court has consistently avoided construing tax statutes so as to generate unmentioned or hidden tax enforcement powers. *See, e.g.*, *City of Richmond v. SunTrust Bank*, 283 Va. 439, 442-43 (2012) (rejecting argument that operating agreements authorize City to tax certain entities absent statutory authorization); *City of Lynchburg v. English Const. Co., Inc.*, 277 Va. 574, 583-84 (2009) (rejecting City's "authority by implication" to "levy a tax on gross receipts from services performed by a contractor in other localities in which he has a definite place of business" when no statute grants such authority); *City of Virginia Beach v. Int'l Family Entm't, Inc.*, 263 Va. 501, 507 (2002) (rejecting as unauthorized City's attempt to tax satellites under its power to tax "personal property"); *Hampton Nissan Ltd. P'ship v. City of Hampton*, 251 Va. 100, 104-105 (1996) (rejecting city's argument that it had "implied powers" to collect overpayments as taxes).

The Attorney General has also interpreted tax statutes to avoid the discovery of implied powers. In a particularly apt opinion, the Attorney General opined that a statute permitting the taxing body to "levy and provide for the assessment and collection of . . . license taxes" did not permit a locality to "discontinue municipal utility services to a taxpayer who is delinquent in the payment of the business license tax." 1986 Va. Op. Att'y. Gen. 284, 1986 WL 221283, at *1 (Mar. 31, 1986). In other words, the taxing body could not rely on a specific grant of collection authority to employ a different, unmentioned means for collecting that tax. That is precisely what Small seeks to do here.

In sum, Small's has not "put his finger upon the statute which confers such authority" to enforce transfer taxes. *Gen. Elec. Co*., 236 Va. at 64. Because tax statutes are narrowly construed, Small's argument for implied power fails.

III. SMALL'S ACTION IS *ULTRA VIRES* IN LIGHT OF THE COMMONWEALTH'S EXPRESS ROLE IN ENFORCING TRANSFER TAXES

A. Because the VRTA Expressly Grants Enforcement Authority to the Department of Taxation, No Separate, Implied Right of Action Is Presumed to Exist

The VRTA provides no right of action to Small or any other person or entity other than the Department of Taxation. "One of the basic principles of statutory construction is that where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *School Bd. v. Giannoutsos*, 238 Va. 144, 147 (1989); *Com. v. Arlington Cnty*. Bd., 217 Va. 558, 577 (1977) ("[T]he rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable."). Were it otherwise, the law would permit unauthorized third-parties to interfere with the decisions of those—such as state policymakers or prosecutors—that do have the statutory standing to enforce the law.

Because the VRTA expressly vests enforcement authority in the Department of Taxation only, this Court may presume that no other entity or person may properly file suit. Small gets it backward in arguing that no statute expressly gives the Department exclusive enforcement authority. [Br. at 13-14]. No such exclusive grant is necessary. Where a statutory scheme vests enforcement authority in a state agency, there is no separate, implied right of action. *See, e.g.*, *First Am. Title Ins. Co. v. W. Sur. Co.*, 283 Va. 389, 397 (2012) (no right of action where statute authorized licensing authorities to enforce statute); *see also Vansant & Gusler, Inc. v. Washington*, 245 Va. 356, 360 (1993) (no private right of action to enforce criminal larceny statute). That rule is particularly apt where, as here, Small's authority to act is inherently limited under the law.

B. An Implied Right of Action Undermines the Commonwealth's Tax Policy, Its Sovereign Interests, and Its Enforcement Priorities

The presumption that the Commonwealth's agencies have exclusive authority to enforce their statutes makes good sense, and it provides strong reasons to reject Small's claim of implied

power. It would be quite odd for Virginia law implicitly to permit a clerk with only ministerial authority to countermand the formal position of the policy-making body charged with enforcement of a tax statute; yet that is exactly what Small seeks to do here. The Department of Taxation and the Commonwealth's Attorney General have issued formal rulings squarely at odds with Small's claim, concluding that virtually identical statutory exemptions bar the imposition of transfer taxes. *See supra* at 7.

These opinions—the "construction of a statute by a State official charged with its administration"—are "entitled to great weight." *Gen. Elec. Co.*, 236 Va. at 64; *see also Appalachian Power Co. v. State Corp. Comm'n*, 284 Va. 695, 703 (2012) ("[T]he practical construction given by [an agency] to a statute it is charged with enforcing is entitled to great weight by the courts and in doubtful cases will be regarded as decisive") (quoting *Piedmont Envtl. Council v. Virginia Elec. & Power Co.*, 278 Va. 553, 563 (2009)).

The policies underlying substantive judicial deference to the opinions of state agencies apply with equal force here. Allowing

Small's *ultra vires* enforcement action to proceed would constitute an end-run around the Commonwealth's longstanding tax policy, undermine its sovereign interests, and thwart the consistent enforcement of Virginia tax law. That the Department of Taxation's policy conflicts with Small's position here confirms *a fortiori* that Small is not the proper party to bring a claim under the VRTA for unpaid transfer taxes. Only the Department of Taxation may pursue such relief.

IV. SMALL'S REMAINING ARGUMENTS FAIL

A. Small's Theory of a "Parallel" Tax Enforcement Scheme is Wrong and Irrelevant

Citing no precedent, Small asserts that Virginia tax law establishes a "parallel" or "multi-track" scheme under which the Commonwealth or political subdivisions may sue to enforce state taxes. [Br. at 14-15]. In support, Small misconstrues an array of different statutes that have no bearing on the questions presented to the Court.

Small cites, for instance, a statute authorizing the Department of Taxation to appoint county treasurers and private collection agencies to collect certain delinquent state taxes. [*Id.*

at 15]. This provision undermines Small's argument, as he does not claim that he has been appointed by the Department to collect delinquent recordation taxes pursuant to this power here. Small also quotes a section of the laws under which "the payment of any county, city or town taxes, may, in addition to the other remedies provided in this chapter, be enforced by action at law." [*Id.* at 14 (citing Va. Code § 58.1-3953)]. That provision, too, is irrelevant because it falls within the subtitle, "Local Taxes," and not the subtitle that governs the VRTA, "Taxes Administered by the Department of Taxation."

Small also misreads unrelated tax statutes. He argues that the Department of Taxation lacks exclusive enforcement authority because a statute says that the Department "may" assess and collect delinquent taxes. [*Id*. at 13-14]. That argument, however, is unsound because it conflates two different propositions—whether the Department is *required* to act, and whether the Department has *exclusive authority* to act. By using the word "may," the statute merely confers upon the Department

the discretion to enforce taxes. *See Ross*, 231 Va. at 212. It does not imply that others may act in its place.

To the contrary, the Department's statutory discretion is necessary to create tax policy and set enforcement priorities. No sound purpose would be served by giving the Department discretionary enforcement powers if third-parties—such as Small here—could undermine the agency's enforcement priorities. For this reason, Small has it backwards when he claims that he "cannot be at the mercy of the state and its officers . . . to act on his behalf." [Br. at 18]. That concern is misplaced and, in any event, irrelevant.[4] The opposite is true—the Department of Taxation's enforcement priorities cannot be subject to the whims of hundreds of ministerial officials, each acting as he or she deems appropriate.

Next, Small argues that his "personal stake in the proper collection of recordation taxes" supports his theory of a "parallel" enforcement scheme. [Br. at 7]. Small cites his statutory duty

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[4] That concern, as the District Court noted below, is also arguably wrong as a substantive matter. [*See* JA at 186 n.3].

to collect transfer taxes, his right to 5 percent of the tax as a collection fee, and the City's right to retain 50 percent of the tax collected. [*See id.* at 16]. Moreover, Small purportedly fears that he might face criminal sanctions for his failure to carry out his responsibilities. [*See id.* at 5-6].

Even if Small's fears of a hypothetical future injury were genuine and well-founded, they would not cure his lack of statutory authority. Small's purported gains or harms may affect his Article III standing to be a plaintiff in federal court, but they are irrelevant to his statutory standing to sue under Virginia law.[5] His argument proves too much; it would permit any ministerial officer facing a speculative harm, such as lost tax revenues or other third-party benefits, to sue to enforce the Virginia tax laws without express authorization. It would also upend this Court's

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[5] The standing cases cited by Small, [*see* Br. at 5-6], are inapposite because they involved statutes—unlike the VRTA—that clearly conferred private rights of action. *Radin v. Crestar Bank*, 249 Va. 440, 442 (1995) (action lies in "customer"); *Reston Hosp. Ctr., LLC v. Remley*, 59 Va. App. 96, 107-108 (2011) (action lies in "party aggrieved").

jurisprudence on the propriety of implied private rights of action. Small's position cannot be correct.

In any event, Small has not credibly claimed a fear of sanctions for his failure to collect transfer taxes. Small asserts no real risk of liability; courts and the Commonwealth's agencies have consistently indicated that the Enterprise Defendants and similar entities are exempt from laws like the VRTA. Moreover, the statute Small invokes in support of his purported liability for collecting taxes, Va. Code § 58.1-3907, does not govern here. [*See* Br. at 6]. It applies only where there has been a *willful* failure to collect "local admission, transient occupancy, food and beverage, daily rental property or cigarette taxes administered by the commissioner of the revenue or other authorized officer." *Id.*

B. **The City of Fredericksburg Does Not Have Statutory Standing to Sue, Nor Can it Vicariously Confer Such Statutory Standing on Small**

Throughout his Opening Brief, Small repeatedly conflates his powers with those of the City of Fredericksburg, which is not a party to this action. [*See, e.g.*, Br. at 14]. The Court may disregard Small's arguments regarding the City's statutory

authority to sue, as that issue is not properly before the Court. But even if this Court were to consider the City's powers, they would not remedy Small's lack of statutory standing. The City lacks authority to file this tax enforcement action in the first instance; therefore, it cannot vicariously confer upon Small statutory standing here.

This Court has repeatedly recognized that "localities" like the City of Fredericksburg may properly exercise their limited powers only pursuant to express grant. Virginia follows the Dillon Rule of strict construction, which limits the power of localities to "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 of Fairfax Cnty. v. Bd. of Sup'rs of Fairfax Cnty.*, 276 Va. 550, 554 (2008); *Arlington Cnty. Bd.,* 217 Va. at 573-74. Small cites a non-binding decision from a wholly different context, *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 744 (W.D. Va. 2001); [*see* Br. at 9].; but it too merely confirms that a City's authority to sue must be tied to an express grant of power. That the Virginia Code enumerates

general powers of localities, [*see id.* at 9, n.3], does not change the well-settled proposition that the Dillon Rule limits the authority of localities to act.

Similarly, the City's general power to "sue and be sued" does not confer authority to enforce every tax in the Virginia code. [Br. at 11-12]. The Court's presumption against hidden tax enforcement powers applies equally to localities. *Bd. Of Zoning Appeals of Fairfax Cnty.*, 217 Va. at 554 (county zoning board lacked statutory authority to bring a declaratory judgment action); *Int'l Family Entm't, Inc.*, 263 Va. at 506 ("it is well established in Virginia that a municipal corporation, such as [a city], can only derive its taxing power through positive grants of authority from the General Assembly") (quoting *City of Winchester v. Am. Woodmark Corp*., 250 Va. 451, 456 (1995)).

Here, the VRTA does not authorize localities, the City of Fredericksburg, or any other entity to sue on behalf of, or in addition to, the Virginia Department of Taxation. Accordingly, the VRTA does not provide the City a statutory right of action for the same reason it cannot be construed to authorize Small to

bring this suit. Thus, it is immaterial whether Small is assumed to be a "proper officer" of the City.

V. SMALL LACKS STATUTORY STANDING TO SUE AS A CLASS REPRESENTATIVE OF SIMILARLY SITUATED OFFICIALS

This Court need not decide the second certified question—whether Small may properly sue on behalf of all Virginia county clerks—because Small lacks authority to sue individually in the first instance. In any event, all of the reasons why Small lacks authority to sue individually apply with greater force in the class action context.

First, the clerk's ministerial powers are circumscribed by law. Even if Small has statutory standing based on his ministerial duty to "collect" transfer taxes that would redound to his office and the City of Fredericksburg, that hardly empowers him to represent others in a class action lawsuit. That is a wholly separate power. Small provides no reason why *his* narrowly defined statutory interests should imply authority to assert the interests of *other* localities and clerks. Indeed, there is no statutory provision plausibly permitting Small to sue on behalf of other clerks or as a

class representative. [*See* Br. at 18-19 (citing no such authority)].

Second, the policies underlying the narrow construction of tax statutes and the presumption against implied enforcement actions are even more salient in the class action context. Permitting class actions like Small's would severely prejudice Virginia taxpayers by disturbing their settled expectations and exposing them to the unpredictable specter of tax enforcement actions by ministerial officials.

Finally, principles of comity counsel against a class action. A successful statewide class action could impose new tax obligations on Virginia taxpayers, effectively rewriting state tax policy without the Commonwealth's consent—and, indeed here, in direct contravention of the Attorney General and the Department of Taxation's position. The Court need not, and should not, jeopardize the Commonwealth's sovereign interests by permitting this *ultra vires* class action to continue.

CONCLUSION

For the foregoing reasons, the Enterprise Defendants respectfully request that this Court answer both questions certified by the District Court in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 5:26(h), I hereby certify the following:

On this 6th day of May, 2013, fifteen printed copies of the Brief of Appellee have been hand-filed with the Clerk of the Virginia Supreme Court and one electronic version of the same has been emailed to scvbriefs@courts.state.va.us. Additionally, three printed copies of the Brief of Appellee have been served via First Class Mail upon Counsel for Appellants and one electronic version of the same has been emailed to Counsel for Appellant's email addresses, as set forth below:

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I hereby certify that this Brief of Appellee is within the page limit set out by the Rules of the Supreme Court of Virginia, Rule 5:26.

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