SUPREME COURT OF VIRGINIA
STATE OF VIRGINIA

Record No. 13-0317

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

Appellant/Plaintiff,

vs.

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

Appellees/Defendants

PLAINTIFF/APPELLANT'S INITIAL BRIEF

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

TRACY ANN HOUCK
Va. Bar No. 34944
MEDFORD JENNINGS BROWN, IV
Va. Bar No. 76543
Parrish, Houck & Snead, PLC
701 Kenmore Avenue, Suite 100
Fredericksburg, Virginia 22401
(540) 373-3500
(540) 899-6394
houck@pslfirm.com
brown@pslfirm.com

JOHN C. DAVIS
(pro hac vice pending)
Fla. Bar No. 827770
Law Office of John C. Davis
623 Beard Street
Tallahassee, FL 32303
(850) 222-4770
(850) 222-3119
john@johndavislaw.net

TABLE OF CONTENTS

Table of Authorities……..……..ii

Statement of the Case……..……..……..1

Questions Certified……..……..4

Argument……...……..……5

A. The Standard of Review……..……5

B. Small Has Statutory Authority To Sue To Collect The Transfer Tax……..……5

C. The Authority Of Clerks To Sue To Enforce The Transfer Tax Is Not Inconsistent With The Department's Responsibility For Administration Of Taxes, Particularly Where The Tax Is Local In Character……..12

D. Small Has Standing to Sue as a Class Representative of Similarly Situated Officials……....……18

Conclusion…….20

Certificate of Compliance……20

Certificate of Service……21

TABLE OF AUTHORITIES

Cases

Casey v. Merck & Co., 283 Va. 411, 722 S.E.2d 842, 846 (Va., 2012)…..19

City of Bristol, Virginia v. Earley, 145 F. Supp. 2d 741 (W.D. Va. 2001)…..9

First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983)...…6

Harvey v. Chesapeake & Potomac Tel. Co. of Va., 198 Va. 213
93 S.E.2d 309 (Va., 1956)……11

In Re: Commonwealth of Va., Dept. of Corrections, 222 Va. 454,
281 S.E.2d 857, 863 (Va. 1981)……..11

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)……19

The Mattaponi Indian Tribe v. Commonwealth, 43 Va.App. 690,
601 S.E.2d 667, 675 (Va. App., 2004)……...10

Mendez v. Commonwealth, 220 Va. 90, 255 S.E.2d 533 (Va. 1979)…10,11

Philip Morris USA v. Chesapeake Bay Foundation, 273 Va. 564,
643 S.E.2d 219, 224, (Va. 2007)……..……5

Radin v. Crestar Bank, 249 Va. 440, 457 S.E.2d 65, 66 (Va. 1995)……6,19

Reston Hosp. Ctr., LLC v. Remley, 59 Va.App. 96, 717 S.E.2d 417
(Va. App. 2011)…….……5

United States v. Nat'l Bank of Commerce, 472 U.S. 713, 733 (1985)…..…15

United States v. Wells Fargo, 485 U.S. 351 (1988)……10

W.S. Carnes, Inc. v. Board of Sup'rs of Chesterfield County,
252 Va. 377, 478 S.E.2d 295 (Va. 1996)……...19

Waldrop v. Commonwealth, 23 Va.App. 614, 478 S.E.2d 723, 729
(Va. App. 1996)……..……11

Statutes

12 U.S.C. § 1452(e)……..……3
12 U.S.C. § 1723a(c)(2)……3
12 U.S.C. § 4617(j(1)&(2)……..……3
Va. Code Ann. T. 58.1, Subt. II. *Taxes Administered by Other Agencies*……12
Va. Code § 58.1-202……13
Va. Code § 58.1-202(8) ……..13
Va. Code § 58.1-202(9) ……..13
Va. Code § 58.1-605……16
Va. Code § 58.1-801……2,16
Va. Code § 58.1-802(A) ……2
Va. Code § 58.1-812(B) ……..…passim
Va. Code § 58.1-813……14
Va. Code § 58.1-816……..…7
Va. Code § 58.1-1803……..…15
Va. Code § 58.1-1806……..…14
Va. Code § 58.1-3000……..…17
Va. Code § 58.1-3127……..…14
Va. Code § 58.1-3176……6
Va. Code § 58.1-3800……16
Va. Code § 58.1-3907……6
Va. Code § 58.1-3919……14
Va. Code § 58.1-3930……..…14
Va. Code § 58.1-3934……..…14
Va. Code § 58.1-3953……12,14

Rules

Rule 23, Federal Rules of Civil Procedure……18,19
Rule 12(b)(6), Federal Rules of Civil Procedure……..……5

Executive Opinions

Op.Atty.Gen., Opinion No. 03-059 (Aug. 14, 2003), 2003 WL 220083572……..…..8

11-41 Ruling of Va. Tax Commissioner (March 14, 2011)…….……8

11-191 Ruling of Va. Tax Commissioner (Nov. 30, 2011)……..…..8

Tax. Va. Dep't of Tax., Re: Ruling Request: Recordation Tax,
§ 58.1-811 Exemptions, 20 U.S.C. § 1087-2(b)(2), P.D. 90-142,
1990 WL 323991, (Aug. 29, 1990)……..….10

STATEMENT OF THE CASE

This case comes before the Court on the certified questions of the Honorable Henry E. Hudson of the United States District Court for the Eastern District of Virginia. On July 3, 2012, the Plaintiff/Appellant, Jeffrey S, Small ("Small"), filed his complaint in his official capacity as Clerk of Court of the City of Fredericksburg, Virginia, against the Defendants/Appellants, Federal National Mortgage Association a/k/a Fannie Mae and Federal Home Loan Mortgage Corporation a/k/a Freddie Mac (the "Enterprises"), in the United States District Court for the Eastern District of Virginia in the case captioned *Jeffrey S. Small, as Clerk of Circuit Court of City of Fredericksburg, Virginia, individually and on behalf of all others similarly situated, v. Federal National Mortgage Association a/k/a Fannie Mae and Federal Home Loan Mortgage Corporation a/k/a Freddie Mac*, Case No. 3:12-cv-487. (Appx. 1.) Small is the Clerk of the Circuit Court of the City of Fredericksburg, Virginia. (App. 2.) Small seeks to represent a class of similarly situated clerks and officials of cities and counties in Virginia. (Appx. 3-4.) The action seeks damages and declaratory and injunctive relief against the Enterprises for their failure to pay the statutory state tax on the recordation of deeds or instruments transferring real property in the state of Virginia (hereinafter the "Transfer

Tax”). (Appx. 7-8.)

As stated in the Complaint, pursuant to Va. Code § 58.1-801, there is levied a state deed recordation tax on each “deed admitted to record” at the rate of $0.25 for each $100 or fraction thereof of consideration or actual value. (Appx. 2-3.) Section 58.1-802(A) imposes an additional tax

> on each deed, instrument, or writing by which lands, tenements or other realty sold is granted, assigned, transferred, or otherwise conveyed to, or vested in the purchaser, or any other person, by such purchaser's direction. (Appx. 2-3.) The rate of the tax, when the consideration or value of the interest, whichever is greater, exceeds $100, shall be 50 cents for each $500 or fraction thereof, exclusive of the value of any lien or encumbrance remaining thereon at the time of the sale, whether such lien is assumed or the realty is sold subject to such lien or encumbrance.

Id. Section 58.1-801 is silent regarding who pays the tax; the tax imposed by § 58.1-802 is paid by the grantor. *Id*. The Transfer Tax is determined and collected by the clerk of court. Va. Code §§ 58.1-802(B) & 812(B). It is paid at the time a deed or other instrument is presented for recording. *Id*. The Clerk of Court retains five percent (5%) of the amount collected and remits the balance of fifty percent (50%) to the treasury of the locality in which it is collected and fifty percent (50%) to the Commonwealth. Va. Code § 58.1-802(B).

On January 8, 2013, the Enterprises filed a motion to dismiss Small’s complaint in which they contend that they are exempt from payment of the

Transfer Tax under the federal charters governing their operations, 12 U.S.C. §§ 1452(e) and 1723a(c)(2), as well as the Federal Housing Finance Administration's ("FHFA") statutory immunity from taxation, 12 U.S.C. § 4617(j)(1) & (2).[1] (Appx. 2 and 22-25.) The principal focus of the Enterprises' argument is their alleged statutory immunity. *Id.* In a footnote at the conclusion of their brief, they suggested that Small lacked standing to bring his claims. (Appx. 80.) Small responded in opposition to the Motion to Dismiss on January 21, 2013. (Appx. 81-115.)

On January 29, 2013, the federal district court ordered the parties to brief the issue of Small's statutory standing to maintain the action. (Appx. 143-44.) The parties did so. (Appx. 147-181.) Small requested that he be permitted to amend his complaint to substitute the City of Fredericksburg in his place if it was determined he lacked standing to sue. (Appx. 171.)

On February 20, 2013, the federal district court issued its Order of Certification to this Court certifying two questions relating to the standing of Small to prosecute this action individually and on behalf of a class of similarly situated officials:

1. Under Virginia law does a clerk of court possess statutory standing to initiate a lawsuit, in his official capacity, to enforce the real estate transfer tax on the recording of instruments?

[1] The FHFA was appointed conservator of the Enterprises in 2008 and has sought to intervene in the federal case. (Appx. 22-23.)

2. If a clerk of court does possess authority to bring a suit in his official capacity as described in Certified Question No. 1, does Virginia law authorize him to do so as a class representative on behalf of all clerks of court throughout the commonwealth?

(Appx. 184-91.) On the following day, the federal court stayed the case pending this Court's answer to the certified questions. (Appx. 192.)

On February 28, 2013, this Court accepted the federal court's questions.

QUESTIONS CERTIFIED

Before the Court are the following certified questions:

1. Under Virginia law does a clerk of court possess statutory standing to initiate a lawsuit, in his official capacity, to enforce the real estate transfer tax on the recording of instruments?

2. If a clerk of court does possess authority to bring a suit in his official capacity as described in Certified Question No. 1, does Virginia law authorize him to do so as a class representative on behalf of all clerks of court throughout the commonwealth?

ARGUMENT

A. The Standard Of Review

The questions presented by the federal court in this case were raised at the pleading stage in connection with the Enterprises' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6). Accordingly, as regards the facts stated, the court looks solely to the facts stated in the complaint, which, on a demurrer, are deemed admitted. *Philip Morris USA v. Chesapeake Bay*, 643 S.E.2d 219, 224, 273 Va. 564 (Va. 2007). As regards questions of law, the Court reviews those *de novo*. *Id*.

B. The Clerk Has Statutory Authority To Sue To Collect The Transfer Tax

As stated in *Reston Hosp. Ctr., LLC v. Remley*, 59 Va.App. 96, 105, 717 S.E.2d 417, 422 (Va. App., 2011),

> "Standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action.' " *Biddison v. Marine Res. Comm'n*, 54 Va.App. 521, 527, 680 S.E.2d 343, 346 (2009) (quoting *Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988)). Thus, in evaluating whether a party has standing, we are "not concerned with whether or not a party will ultimately prevail on the legal merits of an issue." *Id*. Rather, the only question is "the ability of a party to seek redress through the courts in the first place by demonstrating sufficient connection to, and actual or potential harm from, the law or action challenged." *Id*.

As a general matter, standing under Virginia law only requires that the party suing "'has sufficient interest in the subject matter to insure that

the [litigants] will be actual adversaries and to insure that the issues will be fully and faithfully developed' [cites omitted]." *Radin v. Crestar Bank*, 249 Va. 440, 457 S.E.2d 65, 66 (Va. 1995). Here, there is the further question of whether Small has standing under Virginia law to sue to collect the Transfer Tax at issue. In making this determination, the Court should look to and consider the entire statutory scheme relating to the subject matter of this suit. *Id*. at 422-23.

Small, as Clerk of Circuit Court, is charged with "collecting" the subject recordation tax, Va. Code Ann. §§ 58.1-802(B) & 58.1-812, and is allowed a fee for doing so. *Id.* § 58.1-802(B)[2]. However, if he "willfully fails to collect or truthfully account for and pay over" the transfer tax, he "shall, in addition to any other penalties provided by law, be guilty of a Class 1 misdemeanor." *Id.* § 58.1-3907. Indeed, to insure the faithful performance of the duties imposed upon the office, a clerk is required to post a bond. *Id.* § 15.1-41. The doctrine of *respondeat superior* applies to a clerk of court in the performance of the duties of the office. *See First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8, 13 (1983) (clerk sued by bank alleging

[2] "Every clerk of court collecting taxes under this section for the county or city which he serves shall be entitled to compensation for such service at five percent of the amount so collected and paid." Va. Code Ann. § 58.1-802. The Clerk is also allowed a fee of 5% for collection of any state tax. Va. Code § 58.1-3176.

misfeasance by clerk's deputy in improperly indexing lien instrument). Thus, the clerk has a personal stake in the proper collection of recordation taxes—both gain and liability—and, thus, in the outcome of this litigation.

Of the recordation taxes he collects, the clerk must pay "one-half into the state treasury and one-half into the treasury of the locality." Va. Code Ann. § 58.1-802. So, despite its listing as a "state tax," the recordation tax is a hybrid state/local tax.

City of Fredericksburg, Virginia ("the City") is a "locality" which is entitled to receive a portion of the tax collected "in proportion to the value of the property located in [it] when recorded therein." *Id.* Additionally, since July 1, 1994, the City has been entitled to share in $40 million of *the state's share* of recordation taxes to use for local transportation purposes. *Id.* § 58.1-816. So, the City has suffered injury in-fact and has a personal stake and standing apart from the Clerk to bring this lawsuit.

Among other reasons discussed herein, the clerk has statutory standing to bring this lawsuit because the "general law or special act[s]" of Virginia, see Va. Const. Art. 7, § 4, require the clerk to collect the tax for the state and the City. The duties of the elected clerks of Virginia's have been discussed in opinions of the Virginia Attorney General, as follows:

> Prior opinions of the Attorney General note that the clerk's office is an integral part of the administrative operations of the circuit court and

> provides numerous services to judicial and other public officials, as well as to the public. Nonetheless, as an elected constitutional officer, considerable deference must be given to the decisions made by a clerk of the circuit court, unless such decisions are contrary to law. In the absence of a legislative mandate specifying a particular method, a clerk may establish a system that satisfies the statutory purpose … of a clerk of court…. Prior opinions of the Attorney General consistently conclude that, in the absence of a constitutional or statutory provision to the contrary, constitutional officers have exclusive control over the operation of their offices…. Accordingly, absent a legislative mandate to the contrary, deference is to be shown to the clerk in establishing a system that satisfies the statutory purpose….

Op.Atty.Gen., Opinion No. 03-059 (Aug. 14, 2003), 2003 WL 22083572 (Circuit court clerks, under their statutory duty to establish a system that satisfies the statutory requirement for maintaining records, have the discretion, but no obligation, to provide a deputy clerk in the courtroom during civil proceedings) (notes omitted). The clerk has the authority to determine the amount of the tax and the discretion to determine what evidence to rely upon in making that determination. 11-41 Ruling of Va. Tax Commissioner (March 14, 2011); 11-191 Ruling of Va. Tax Commissioner (Nov. 30, 2011). Accordingly, deference is due Mr. Small's decision to bring this suit in his official capacity to fulfill his statutory duty to "collect" the recordation tax from the Enterprises. This is particularly so because there is no authority giving Mr. Small the ability to force the Department or any other agency to bring this suit to protect his interests.

Additionally, in Virginia "[e]very locality may sue or be sued in its own name in relation to all matters connected with its duties." Va. Code Ann. § 15.2-1404. Small's suit is clearly connected with his duty to collect the subject tax in furtherance of the City of Fredericksburg's duty "to secure and promote the health, safety and general welfare of its inhabitants."[3] The broad grant of authority to localities to sue in connection with their duties was addressed in *City of Bristol, Virginia v. Earley*, 145 F. Supp. 2d 741 (W.D. Va. 2001). In holding the city had authority to sue in its own name in relation to all matters connected with its duties, the Court stated:

> [Attorney General Earley and the Commonwealth] contend that the City lacks the authority to bring suit under state law. Virginia law grants a locality the power to sue in its own name "in relation to all matters connected with its duties." Va. Code Ann. § 15.2–1404 (Michie 1997). Section 15.2–1102 gives a broad general grant of power to localities to exercise all powers necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof ....Va. Code Ann. § 15.2–1102. Furthermore, the statute specifies that these enumerated powers are not exclusive, but shall be construed to be in addition to a general grant of power. *See id.* Among the general powers granted to localities is the power to establish, maintain, and operate "public utilities," Va.Code Ann. § 15.2–2109 (Michie 1997), which are defined as including "the furnishing of telephone service." Va. Code Ann. § 56–265.1 (Michie 1995). Therefore, I find that providing telecommunications services *falls within the ambit of the City's duties*, and the suit is therefore authorized under state law.

---

[3] *See, e.g.,* Va. Code Ann. §§ 15.2-1102 and 1200.

145 F. Supp. 2d at 744-45 (emphasis added).

The instant case presents a scenario not unlike *Earley*, - in which the Commonwealth and Attorney General opposed the City's authority to sue - inasmuch as an opinion of the Department suggests it would be unwilling to pursue the claims of the Clerk or City of Fredericksburg to recover the Transfer Tax. Va. Dep't of Tax., Re: Ruling Request: Recordation Tax, § 58.1-811 Exemptions, 20 U.S.C. § 1087-2(b)(2), P.D. 90-142, 1990 WL 323991, (Aug. 29, 1990).[4] It is particularly appropriate that the clerk, the official designated to act on behalf of the City to collect its 50% share of the tax, have standing to enforce the law in the courts.

One of the few decisions in which the Court has addressed the clerk's duties, *Mendez v. Commonwealth*, 255 S.E.2d 533 (Va. 1979), is inapposite to the issue at hand. There, the Court addressed, in the context of a criminal prosecution for perjury, the nature of the clerk's power to

---

[4] As explained in Small's opposition to the Enterprises' motion to dismiss, the Department's opinion, which considers the exemption of a federal agency, does not take into consideration the Supreme Court's decision in *United States v. Wells Fargo*, 485 U.S. 351 (1988), which draws the distinction between indirect excise taxes like the Transfer Tax at issue and direct taxes, the latter come with an exemption for "taxation," whereas the former do not. (Appx. 102-03.) Nor is the Department's opinion binding legal authority. *The Mattaponi Indian Tribe v. Commonwealth*, 43 Va.App. 690, 601 S.E.2d 667, 675 (Va. App., 2004) ("Though we defer to an agency's factual determinations, we afford no such deference to its legal interpretations of statutes.").

administer oaths. *Mendez* "stands for the proposition that a person commits perjury only if the oath he or she breached was acknowledged before a person with the legal authority to administer the oath." *Waldrop v. Commonwealth*, 478 S.E.2d 723, 729 (Va. App., 1996). It says nothing about the limits of the clerk's power, in particular his power arising under his duty to collect the Transfer Tax.

Similarly, the Court's decision in *Harvey v. Chesapeake & Potomac Tel. Co. of Va.*, 198 Va. 213, 93 S.E.2d 309 (Va., 1956), does not preclude standing to sue to collect the Transfer Tax. In *Harvey*, the issue was whether the filing of a motion to set aside the verdict with the clerk was timely. There, the actions or inactions of the clerk were not an issue, other than merely accepting the motion for filing. The proposition for which the case stands is simply that "the mere filing of a motion to set aside a judgment is not sufficient to extend certain time limits prescribed for perfecting appeals." *In Re: Commonwealth of Va., Dept. of Corrections*, 222 Va. 454, 281 S.E.2d 857, 863 (Va. 1981).

In the case at bar, the statutory language is that '[t]he tax … shall be determined and collected by the clerk…." Va. Code Ann. § 58.1-812(B). The tax code does not define "collect" or anywhere limit the efforts that the clerk may take to "collect" the tax. Instead, elsewhere the city is authorized

by statute to sue and be sued and to conduct its affairs through its officials, like the clerk. Va. Code Ann. § 15.2-1500(A). In short, Small's standing to sue to collect the tax is not inconsistent with the overall statutory scheme of the Transfer Tax.

C. The Authority Of Clerks To Sue To Enforce The Transfer Tax Is Not Inconsistent With The Department's Responsibility For Administration Of Taxes, Particularly Where The Tax Is Local In Character

Virginia taxation laws provide for the administration of state taxes by various agencies including the Department of Taxation ("Department"). While the Department has extensive duties regarding state and local taxes, it is not omnipotent . Other Virginia agencies administer taxes on fuels and oil companies, license taxes on insurers, taxes on public service corporations, road taxes on motor carriers, sale and use taxes, taxes on corporations, and taxes on electrical and natural gas consumption. See Va. Code T. 58.1, Subt. II. *Taxes Administered by Other Agencies.* And, as noted above, local authorities are authorized to administer and enforce local taxes. Va. Code § 58.1-3953.

The Department's powers include supervision of the administration of the tax laws of the Commonwealth, recommendations to the Governor and the General Assembly of measures to promote uniform assessments, the exercise of general supervision over all commissioners of the revenue, so

far as the duties of such officers pertain to state revenues, and instructions and advisement of all such officers in the performance of their duties. *Id.* § 58.1-202. The Department is further given authority to direct "such proceedings, actions and prosecutions to be instituted as may be needful to enforce the revenue laws of the Commonwealth and call on the Attorney General or other proper officer to prosecute such actions and proceedings." *Id.* § 58.1-202(8). A court in which a Virginia tax law is questioned or must be construed "*may* … make the Tax Commissioner a party thereto whenever deemed necessary." *Id.* § 58.1-202(9) (emphasis added).

While the Department is granted the authority to assess and collect any tax that remains uncollected for thirty days, that authority is permissive, not mandatory:

> The Department ***may*** assess and collect any tax imposed by this chapter which has remained uncollected for thirty days. The Department, prior to collecting such tax, ***shall*** give notice to the clerk of court in whose office the tax was to be collected. The Department ***may*** then proceed to assess and collect the unpaid tax in the same manner and by the same methods used for the collection of any ***state tax*** administered by the Department.
>
> Any local tax collected hereunder in conjunction with the collection of a state tax by the Department ***shall*** be deposited into the state treasury. The Comptroller ***shall***, by warrant drawn on the Treasurer of Virginia, remit to the proper city or county any amounts due to such city or county.

Va. Code Ann. § 58.1-813 (emphasis added). The remedy is not exclusive,

but instead is cumulative. *Id.* § 58.1-1806 ("The payment of any state taxes and the filing of returns *may*, *in addition to the remedies provided in this chapter* be enforced by action at law, suit in equity or by attachment….") (emphasis added).

A similar authority to sue is bestowed upon cities and counties and their officers to collect local taxes, as follows:

> 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, suit in equity or by attachment in the same manner, to the same extent and with the same rights of appeal as now exist or may hereafter be provided by law for the enforcement of demands between individuals.

Va. Code § 58.1-3953. Again, the statute is permissive and cumulative.

In addition to clerks, the Virginia tax code provides for other local officers such as county Treasurers, Va. Code § 58.1-3127, to collect taxes. Treasurers shall collect taxes due to be paid them "by distress or otherwise," *id.* § 58.1-3919, including the use of the services of private collection agents*, id.*§ 58.1-3919.1, the recordation of liens, *id.* § 58.1-3930, and the employment of an attorney, sheriff, or other delinquent tax collector. *Id.* § 58.1-3934.

Thus, the Virginia legislature has created parallel systems of collecting taxes, including recordation taxes like the Transfer Tax. The Legislature provides primary responsibility for the clerks to collect the tax

and divide it among the parties entitled to share in it. To protect the state's interest, the legislature also created a converse right of the state to act through the Department, at its discretion, when the clerk has failed to act. The state must give the clerk notice (apparently to avoid duplication of efforts) and then must pay the local portion of the tax collected to the locality.

Similarly, the Department may appoint a collector in any city or county, including the treasurer thereof, to collect delinquent *state* taxes. Va. Code § 58.1-1803. "Delinquent claims for state taxes may be assigned to collectors or collection agencies so designated for the purpose of litigation in the Department of Taxation's name and at the Department of Taxation's expense." *Id*. subsec. (B) (emphasis supplied).

This multi-track system of tax collection makes sense given that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 733 (1985) (quoting *Bull v. United States,* 295 U.S. 247, 259 (1935)). If a clerk fails to collect a tax because of inattention, lack of funds or staff, or misunderstanding of the law, the state *may* act through its various officers and offices, or the other county official charged with tax duties may act. However, nothing in the statutes relied on by the

Enterprises *requires* the Department to act when the clerk fails to do so. Nothing in these statutes gives the Department the *exclusive* right to act.

The collection and administration of Virginia's sales tax provides an apt illustration of why the statutory scheme contemplates that the clerk has standing to sue to collect the Transfer Tax. Virginia allows localities to impose their own sales taxes over and above those imposed by the state. Va. Code § 58.1-605. However, in this situation, the Department not only administers, but also collects the tax for both the state and the localities, *id.* subsec. (D), and remits the local share. *Id.* subsec. (F).

Like the sales tax, the Transfer Tax at issue in this case may be imposed by both the state and localities. Va. Code § 58.1-801 and § 58.1-3800. However, unlike the sales tax in which the locality has no involvement in its administration, the converse is true of the Transfer Tax. The local governments through their clerks, like Small, are intimately involved in its administration by virtue of their duty to collect the tax for both the state and local governments, Va. Code § 58.1-802 (B), and remit the state's portion to the state treasury. *Id.* They further have a direct financial interest in its collection that does not exist to the same extent in the case of the sales tax. The clerk is paid 5% and the locality 50% of the tax collected.

Moreover, the fact that collection of the Transfer Tax is the responsibility of a local official, the clerk is of great significance in the enforcement scheme. All of the relevant information relating to tax is in the hands of the clerk; that is, he is given discretion to calculate the tax, *receives and evaluates claims of exemption*, and has responsibility for and maintains all documents relating to the tax. In short, the clerk possesses all the relevant information necessary to enforce the tax. This coupled with the financial stake held by the clerk and locality in its collection underscores the inherently local character of the tax. It is essentially a tax on real estate, which is the paradigmatic case of local taxation, because it directly relates to the transfer of real property and is calculated based on the value of the property transferred.[5] These factors demonstrate that the legislative scheme for its administration contemplates that standing to sue to collect the Transfer Tax comes within the ambit of the clerk's duty to "collect" the tax under §§ 58.1-802(B) & 58.1-812.

Finally, The clerk's authority to sue exists to protect his own interests,

[5] The taxation of real property under the Virginia Constitution and general law is exclusively local: "All taxable real estate, all taxable coal and other mineral lands, and all taxable tangible personal property and the tangible personal property of public service corporations, except rolling stock of corporations operating railroads, and also the capital of merchants are hereby segregated and made subject to local taxation only." Va. Code § 58.1-3000 (implementing Va. Const. art. X, § 4).

those of the locality he is served to protect and it allows him to discharge his statutory duty to collect the tax. He should not be at the mercy of the state and its officers to act on his behalf, particularly, as here, when there would appear to be an unwillingness to do so.[6]

D. Small Has Standing To Sue As A Class Representative of Similarly Situated Officials

There is no impediment to Small acting as a class representative for a class of similarly situated clerks and local officials with responsibility to collect the Transfer Tax. A threshold requirement under Rule 23 of the Federal Rules of Civil Procedure for a class representative, before consideration of satisfaction of any of the requirements of subsection (a) of the Rule, is standing.[7] As demonstrated above, Small has standing, both statutory and constitutional,[8] to bring his claims to recover the unpaid

---

[6] Leaving to the clerk as the sole means of enforcement refusal to record the deeds of the Enterprises – a suggestion of the federal district court in its order requesting certification (Appx. 186.) - is neither a practicable nor realistic alternative to enforcement by filing suit under § 58.1-812. It would require a clerk, in the course of accepting any deed for recordation in which a facially legitimate claim of exemption is asserted, to conduct an exhaustive, in depth examination of the exemption claim. This would not be practicable in the ordinary course of business.

[7] The procedural aspects of this case are controlled by Rule 23 of the Federal Rules of Civil Procedure. Virginia law does not have a counterpart to Rule 23 and does not authorize class actions for damages.

[8] As noted above, standing under Virginia law only requires that the party suing "'has sufficient interest in the subject matter to insure that the

Transfer Tax under Virginia law. Under Virginia law, an individual has standing to pursue claims in a representative capacity if that individual has standing in his individual capacity; that is, the individual must have a "justiciable interest" in the controversy, which means that his rights will be affected by the outcome. *W.S. Carnes, Inc. v. Board of Sup'rs of Chesterfield County*, 478 S.E.2d 295, 252 Va. 377 (Va., 1996); *Casey v. Merck & Co.*, 283 Va. 411, 722 S.E.2d 842, 846 (Va., 2012). That is the case here. Small has an individual interest in his official capacity because he is entitled to a 5% fee of all unpaid Transfer Tax amount, and the City of Fredericksburg for which he is clerk and for which he acts has a 50% interest in all unpaid Transfer Tax. He thus can act as a class representative under Federal Rule 23 for similarly situated class members.

[litigants] will be actual adversaries and to insure that the issues will be fully and faithfully developed' [cites omitted]." *Radin v. Crestar Bank*, 249 Va. 440, 457 S.E.2d 65, 66 (Va. 1995). Federal constitutional standing requires that a litigant have suffered an actual or imminent injury attributable to the defendant that is likely to "be redressed by [favorable] judicial decision" so as to present a justiciable "case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

CONCLUSION

Based on the foregoing, the Court should answer both question certified by the federal court in the affirmative.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the requirements of Rule 5:26 of the Rule of the Supreme Court of Virginia.

Respectfully submitted:

s/Tracy Ann Houck
TRACY ANN HOUCK
Va. Bar No. 34944
MEDFORD JENNINGS BROWN, IV
Va. Bar No. 76543
Parrish, Houck & Snead, PLC
701 Kenmore Avenue, Suite 100
Fredericksburg, Virginia 22401
(540) 373-3500
(540) 899-6394
houck@pslfirm.com
brown@pslfirm.com

s/John C. Davis
JOHN C. DAVIS
(pro hac vice pending)
Fla. Bar No. 827770
Law Office of John C. Davis
623 Beard Street
Tallahassee, FL 32303
(850) 222-4770
(850) 222-3119
john@johndavislaw.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been served by first class mail and e-mail to the following:

Alexander J. Kramer
Ann Marie Uetz
Jill L. Nicholson
FOLEY & LARDNER LLP
3000 K Street NW, Suite 600
Washington, DC 20007-5109
E-mail: akramer@foley.com
E-mail: auetz@foley.com
E-mail: jnicholson@foley.com

Jonathan A. Henry
Michael J. Ciatti
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
E-mail: mciatti@kslaw.com

On this 9th day of April, 2013. This brief has been delivered to the clerk for filing by Federal Express delivery.

s/John C. Davis
JOHN C. DAVIS