VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ARLINGTON

CASE No. 07-923

NORTHERN VIRGINIA TRANSPORTATION AUTHORITY,

Plaintiff,

COMMONWEALTH OF VIRGINIA
***EX REL*. ROBERT F. MCDONNELL,**
in his official capacity as Attorney General of the Commonwealth;

TIMOTHY M. KAINE,
in his official capacity as Governor of the Commonwealth;

and

WILLIAM H. HOWELL,
in his official capacity as Speaker of the House of Delegates;

Movants to Intervene as Plaintiffs,

v.

STATUTORY DEFENDANTS PURSUANT TO *VIRGINIA CODE* §§ 15.2-2650, ET SEQ.,

Defendants.

BRIEF OF THE COMMONWEALTH

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TABLE OF CONTENTS

BRIEF OF THE COMMONWEALTH 1

INTRODUCTION 1

LEGAL STANDARD TO BE APPLIED 4

ARGUMENT 9

I. THE GENERAL ASSEMBLY MAY CREATE THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY AND MAY AUTHORIZE IT TO IMPOSE TAXES. 9

A. The Virginia Constitution Limits, Rather Than Empowers, the General Assembly. 9

B. The General Assembly May Authorize the Northern Virginia Transportation Authority to Impose Fees and Taxes Within Certain Parameters. 10

II. THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A REGIONAL GOVERNMENT. 12

III. ALTHOUGH THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A UNIT OF GENERAL GOVERNMENT, THE GENERAL ASSEMBLY MAY CREATE THE AUTHORITY AND PROVIDE ADEQUATE FUNDING MECHANISMS. 14

IV. SINCE THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A LOCAL OR REGIONAL GOVERNMENT, THE PROCEDURAL REQUIREMENTS FOR IMPOSING TAXES OR INCURRING DEBT ARE INAPPLICABLE. 16

V. ANY DEBT INCURRED BY THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT CONSTITUTIONAL DEBT OF THE COMMONWEALTH. 18

CONCLUSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page

CASES

Alderson v. County of Alleghany,
266 Va. 333, 585 S.E.2d 795 (2003) 17

Baliles v. Mazur,
224 Va. 462, 297 S.E.2d 695 (1982) 19

Barrows v. Jackson,
346 U.S. 249 (1953) 8

Blue Cross of Virginia v. Commonwealth,
221 Va. 349, 269 S.E.2d 827 (1980) 6

Board of Educ. v. Nyquist,
439 N.E.2d 359 (N.Y. 1982) 10

Bosang v. Iron Belt Bldg. & Loan Ass'n,
96 Va. 119, 30 S.E. 440 (1898) 4

Button v. Day,
204 Va. 270, 130 S.E.2d 459 (1963) 18

Case of County Levy,
9 Va. 139 (5 Call.) 139 (1804) 11

City Council v. Newsome,
226 Va. 518, 311 S.E.2d 761 (1984) 4

City of Newport News v. Elizabeth City County,
189 Va. 825, 55 S.E.2d 56 (1949) 5, 10

City of Roanoke v. Elliott,
123 Va. 393, 96 S.E.2d 819 (1918) 6, 9

City of Roanoke v. James W. Michael's Bakery Corp.,
180 Va. 132, 21 S.E.2d 788 (1942) 5

Commonwealth v. Hartley,
256 Va. 216, 504 S.E.2d 852 (1998) 7

Cooper v. Aaron,
358 U.S. 1 (1958) 8

Page

County Court v. Allen,
442 U.S. 140 (1979) 7

Dean v. Paolicelli,
194 Va. 219, 72 S.E.2d 506 (1952) 5, 14

DePriest v. Commonwealth,
33 Va. App. 754, 537 S.E.2d 1 (2000) 7

Dykes v. Northern Virginia Transp. Dist. Comm'n,
242 Va. 357, 411 S.E.2d 1 (1991) 18

Eaton v. Davis,
176 Va. 330, 10 S.E.2d 893 (1940) 6

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 5

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 8

Farquhar v. Board of Supervisors,
196 Va. 54, 82 S.E.2d 577 (1954) 18

Goddin v Crump,
35 Va. (8 Leigh) 120 (1837) 11

Griswold v. Connecticut,
381 U.S. 479 (1965) 8

Hamer v. School Bd. of Chesapeake,
240 Va. 66, 393 S.E.2d 623 (1990) 15

Harrison v. Day,
201 Va. 386, 111 S.E.2d 504 (1959) 9

Hess v. Snyder Hunt Corp.,
240 Va. 49, 392 S.E.2d 817 (1990) 6

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 6, 14

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Commonwealth,
40 Va. App. 605, 580 S.E.2d 486 (2003) 6

Keller v. Denny,
232 Va. 512, 352 S.E.2d 327 (1987) 5

Kirkpatrick v. Board of Supervisors,
146 Va. 113, 136 S.E. 186 (1926) 10

Langhorne & Scott v. Robinson,
61 Va. (20 Gratt.) 661 (1871) 11

Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration,
113 U.S. 33 (1885) 8

Miller v. Watts,
215 Va. 836, 214 S.E.2d 165 (1975) 18

Mumpower v. Housing Auth. of Bristol,
176 Va. 426, 11 S.E.2d 732 (1940) 18

Peery v. Virginia Bd. of Funeral Dirs.,
203 Va. 161, 123 S.E.2d 94 (1961) 6

In re Phillips,
265 Va. 81, 574 S.E.2d 270 (2003) 4, 6

Rostker v. Goldberg,
453 U.S. 57 (1981) 7

Santillo v. Commonwealth,
30 Va. App. 470, 517 S.E.2d 733 (1999) 7

Short Pump Town Center Community Development Corp. v. Hahn,
262 Va. 733, 554 S.E.2d 441 (2001) 10

Singson v. Commonwealth,
46 Va. App. 724, 621 S.E.2d 682 (2005) 7

Sons of Confederate Veterans, Inc. v. Comm'r,
288 F.3d 610 (4th Cir. 2002) 8, 9

Page

Stanley v. City of Norfolk,
218 Va. 504, 237 S.E.2d 799 (1977) 7

Stephens v. Commonwealth,
___ Va. ____, 645 S.E. 2d 276 (2007) 6

United States v. Morrison,
529 U.S. 598 (2000) 9

United States v. Raines,
362 U.S. 17 (1960) 8

United States v. Salerno,
481 U.S. 739 (1987) 7, 8

Vance v. Bradley,
440 U.S. 93 (1979) 4

Vermont Agency of Natural Res. v. United States ex rel. Stevens,
529 U.S. 765 (2000) 5

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982) 7

Virginia Soc'y of Human Life, Inc. v. Caldwell,
256 Va. 151, 500 S.E.2d 814 (1998) 6

Virginia v. Black,
538 U.S. 343 (2003) 7

Virginia v. Hicks,
539 U.S. 113 (2003) 7, 20

Wise County Bd. of Supvrs. v. Wilson,
250 Va. 482, 463 S.E.2d 650 (1995) 17

Wright v. Norfolk Electoral Bd.,
223 Va. 149, 286 S.E.2d 227 (1982) 11, 12

Yamaha Motor Corp. v. Quillian,
264 Va. 656, 571 S.E.2d 122 (2002) 6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Virginia Const. art. VII 17

Virginia Const. art. VII, § 2 12

Virginia Const. art. VII, § 3 10

Virginia Const. art. VII, § 7 .... 4, 11, 12, 16, 17

Virginia Const. art. VIII, § 1 .... 13, 14

Virginia Const. art. VIII, § 10(b) 4, 16

Virginia Const. art. X, § 9 18

Virginia Const. art. X, § 9(a) 4

Virginia Const. art. X, § 9(b) 4

Virginia Const. art. X, § 9(c) 4

STATUTES

Virginia Code § 1-17.1 8

Virginia Code § 1-213 11

Virginia Code § 5.1-2.1 15

Virginia Code § 5.1-2.2:1 15

Virginia Code § 10.1-625 15

Virginia Code § 15.2-4500 through 15.2-4534 3

Virginia Code § 15.2-4816 through 15.2-4828 1

Virginia Code § 15.2-4829 through 15.2-4840 1

Page

Virginia Code § 15.2-4830 10

Virginia Code § 15.2-4839 2

Virginia Code § 15.2-6402 3

Virginia Code § 15.2-6405 3

Virginia Code § 15.2-6406 3

Virginia Code § 21-113 15

Virginia Code § 21-118 15

Virginia Code § 21-118.4 15

Virginia Code § 22.1-95 11

Virginia Code § 23-287 15

Virginia Code § 23-288 15

Virginia Code § 32.1-189 15

Virginia Code § 32.1-193 15

Virginia Code § 33.1-1 15

Virginia Code § 33.1-49 15

Virginia Code § 36-1 15

Virginia Code § 36-19 15

Virginia Code § 36-27 15

Virginia Code § 36-4 15

Virginia Code § 46.2-755.1 1

Virginia Code § 46.2-755.2 1

Virginia Code § 46.2-1167.1 1

Page

Virginia Code § 58.1-605 1

Virginia Code § 58.1-606 1

Virginia Code § 58.1-802.1 1

Virginia Code § 58.1-1720 11

Virginia Code § 58.1-2402.1 1

Virginia Code § 58.1-3825.1 1

LEGISLATIVE MATERIALS

1930 *Virginia Acts* ch. 460.. 15

1956 *Virginia Acts* ch. 668.. 15

1964 *Virginia Acts* ch. 631.. 13

THE CONSTITUTION OF VIRGINIA:
REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION (1969)..................................... 15

OTHER AUTHORITIES

John Hart Ely,
DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1982) 8

Learned Hand,
THE BILL OF RIGHTS 73 (1958).. 8

2 A.E. Dick Howard,
COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1036 (1974)................................... 10, 13

Page

A.E. Dick Howard,
"*Introduction: A Frequent Recurrence To Fundamental Principles" in*
RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xxiii
(Bradley McGraw ed., 1984) 10

Alexis de Tocqueville,
DEMOCRACY IN AMERICA, 310
(Arthur Goldhammer, trans., The Library of America ed. 2004) (1835) 8

BRIEF OF THE COMMONWEALTH

The Commonwealth of Virginia, upon relation of Robert F. McDonnell in his official capacity as Attorney General of the Commonwealth; Timothy M. Kaine, in his official capacity as Governor of the Commonwealth; and William H. Howell, in his official capacity as Speaker of the House of Delegates; (collectively "Commonwealth") submit this Brief.

INTRODUCTION

The legislation establishing Northern Virginia Transportation Authority ("NVTA") was originally enacted to plan and develop a transportation system for certain cities and counties in Northern Virginia. *See Virginia Code* §§ 15.2-4829 through 15.2-4840 (superceding *Virginia Code* §§ 15.2-4816 through 15.2-4828). In 2007, the General Assembly passed and Governor Kaine signed House Bill 3202 that, among other things, empowered the NVTA to impose certain taxes and fees. *See Virginia Code* §§ 46.2-755.1, 46.2-755.2, 46.2-1167.1, 58.1-605, 58.1-606, 58.1-802.1, 58.1-2402.1, 58.1-3825.1.[1] After imposing the taxes and fees authorized by the

[1] These Regional Taxes and Fees include (i) the additional annual regional vehicle registration fee under *Virginia Code* § 46.2-755.1, (ii) the initial vehicle registration fee under *Virginia Code* § 46.2-755.2, (iii) the additional safety inspection fee under *Virginia Code* § 46.2-1167.1, (iv) the retail sales and use tax on auto repairs under *Virginia Code* §§ 58.1-605 and 58.1-606, (v) the regional congestion relief fee under *Virginia Code* § 58.1-802.1, (vi) the local rental car transportation fee under *Virginia Code* § 58.1-2402.1 and (vii) the additional transient occupancy tax under *Virginia Code* § 58.1-3825.1.

statute, NVTA, exercising its power under *Virginia Code* § 15.2-4839,[2] intends to issue bonds, payable only from revenue set aside for NVTA, as a means of financing long-term projects.

This proceeding concerns the validity of those bonds. In determining the validity of those bonds, this Court will have to pass on the constitutionality of the statutes authorizing the NVTA to impose taxes and fees as well as the constitutionality of the NVTA itself. Because the constitutionality of a statute is at issue and because neither the Commonwealth nor its agency nor its official is a party to this action, the Commonwealth has moved to intervene as a Plaintiff.[3]

For the reasons set forth below, the statutes at issue are constitutional. The Commonwealth does not comment on the non-constitutional issues.

SUMMARY OF ARGUMENT

The Commonwealth's argument in favor of constitutionality is straightforward. First, the General Assembly may create the Northern Virginia Transportation Authority and it may delegate to the NVTA the power to impose fees and taxes within certain parameters. Unlike the federal Constitution, which defines the powers of the National Government, the Virginia Constitution merely limits the powers of the General Assembly. In other words, it is not necessary for the General Assembly to rely upon a specific provision of the Constitution.

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[2] That provision provides:

> The Authority may issue bonds and other evidences of debt as may be authorized by this section or other law. The provisions of Article 5 (§ 15.2-4519 et seq.) of Chapter 45 of this title shall apply, mutatis mutandis, to the issuance of such bonds or other debt. The Authority may issue bonds or other debt in such amounts as it deems appropriate. The bonds may be supported by any funds available except that funds from tolls collected pursuant to subdivision 7 of § 15.2-4840 shall be used only as provided in that subdivision.

[3] The Commonwealth's Motion to Intervene is pending.

Moreover, having created a special purpose political subdivision, the General Assembly may then authorize such a special purpose political subdivision to impose fees and taxes within certain parameters to provide a funding mechanism for the political subdivision to accomplish its limited purpose.

Second, the Northern Virginia Transportation Authority is not a regional government. Rather, NVTA is a special purpose political subdivision. The NVTA is a creation of the state legislature to perform a specific function and is not a unit of general government. The authority is analogous to other political subdivisions such as regional industrial facilities authorities[4] or to a special tax district.[5] Because the NVTA is not a regional government, it is not necessary to conduct a referendum to validate its creation.

Third, although the Northern Virginia Transportation Authority is not a unit of general government, the general assembly may empower the NVTA to impose a tax or to issue bonds. Indeed, the General Assembly routinely authorizes special districts to impose taxes and permits political subdivisions to issue bonds.

Fourth, since the Northern Virginia Transportation authority is neither a county, city, town, nor regional government, the provisions of Article VII of the Constitution, which deal exclusively with those enumerated and defined units of general government, are inapplicable. Thus, it is not necessary that the members of the NVTA's board be elected, that taxes be enacted

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[4] *Virginia Code* § 15.2-6402 permits three or more localities in a region to form a political subdivision known as a regional industrial facilities authority permitting joint action by the locality for economic development. *Virginia Code* § 15.2-6405 permits these authorities to borrow money and issue bonds. *Virginia Code* § 15.2-6406 provides a funding mechanism by allowing localities to revenue share.

[5] *See* for example, *Virginia Code* §§ 15.2-4500 through 15.2-4534 establishing transportation districts.

in the manner set out in *Virginia Const*. art. VII, § 7, or that the issuance of its bonds be put to a local referendum, *Virginia Const*. art. VIII, § 10(b).

Fifth, any debt issued by the NVTA is not constitutional debt of the Commonwealth. Debt that is issued by special purpose political subdivisions is not considered debt of the Commonwealth. Additionally, unless the full faith and credit of the Commonwealth is pledged in support of the debt, it is not debt of the Commonwealth. There is no obligation on the part of the General Assembly to continue to permit the Authority to impose fees and taxes for any specific period. Therefore, any bonds issued by the Authority could not be considered pledge bonds. Thus, *Virginia Const*. art. X, § 9(a), (b) or (c) are inapplicable.

LEGAL STANDARD TO BE APPLIED

In evaluating the constitutionality of these statutes, this Court must adhere to certain principles. First, "[e]very law enacted by the General Assembly carries a strong presumption of validity. Unless a statute clearly violates a provision of the United States or Virginia Constitutions, we will not invalidate it." *City Council v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984).[6] Moreover, the construction of a constitutional provision by the General Assembly "is entitled to consideration, and if the construction be contemporaneous with adoption of the constitutional provision, it is entitled to great weight." *Dean v. Paolicelli*,

[6] *See also In re Phillips,* 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *Bosang v. Iron Belt Bldg. & Loan Ass'n*, 96 Va. 119, 123, 30 S.E. 440, 441 (1898). *Cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted).

194 Va. 219, 227, 72 S.E.2d 506, 511 (1952).[7] "The wisdom and propriety of the statute come within the province of the legislature." *City of Newport News v. Elizabeth City County,* 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949). "Undoubtedly, there are two sides to the question as to the wisdom or expediency of the legislative Act." *Id.* at 836, 55 S.E.2d at 62. "In a determination of the constitutional validity of a general statute, political, economic and geographical situations have no place. Such situations bring up questions of public welfare and conveniences which invoke the wisdom and policy of the legislature in their determination, within reasonable limits." *Id.* at 839, 55 S.E.2d at 64. Rather, "courts are concerned only as to whether the determination of the legislature has been reached according to, and within, constitutional requirements." *Id.*, 55 S.E. 2d at 64.

Second, under the doctrine of constitutional avoidance, "constitutional questions should not be decided if the record permits final disposition of a cause on non-constitutional grounds. One of the most firmly established doctrines in the field of constitutional law is that a court will pass upon the constitutionality of a statute only when it is necessary to the determination of the merits of the case." *Keller v. Denny*, 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987) (internal quotation omitted).[8] "[T]he Constitution is to be given a liberal construction so as to sustain the enactment in question, if practicable." *Johnson v. Commonwealth,* 40 Va. App. 605, 612, 580

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[7] *See also City of Roanoke v. James W. Michael's Bakery Corp.*, 180 Va. 132, 142-43, 21 S.E.2d 788, 792-93 (1942) (noting that contemporaneous construction of constitutional provision by General Assembly is entitled to great weight).

[8] *See also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

S.E.2d 486, 490 (2003) (citation omitted).[9] Statutes must be interpreted "in such a manner as to avoid a constitutional question wherever this is possible." *Yamaha Motor Corp. v. Quillian*, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002) (citations and quotation omitted).[10]

Third, under the doctrine of constitutional doubt, "if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court is "obligated to construe the statute to avoid such problems." *I.N.S. v. St. Cyr,* 533 U.S. 289, 300 (2001). Indeed, any "reasonable doubt as to the constitutionality of a legislative enactment must be resolved in favor of its validity. The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution." *Blue Cross of Virginia v. Commonwealth*, 221 Va. 349, 358, 269 S.E.2d 827, 832 (1980).[11] "To doubt is to affirm." *Peery v. Virginia Bd. of Funeral Dirs.*, 203 Va. 161, 165, 123 S.E.2d 94, 97 (1961).[12]

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[9] *See also Virginia Soc'y of Human Life, Inc. v. Caldwell*, 256 Va. 151, 156-57, 500 S.E.2d 814, 816 (1998); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990); *Eaton v. Davis*, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940).

[10] *See also Stephens v. Commonwealth,* ___ Va. ____, ____, 645 S.E. 2d 276, 276-77 (2007).

[11] *See also Phillips*, 265 Va. at 85-86, 574 S.E.2d at 272.

[12] *See also City of Roanoke v. Elliott*, 123 Va. 393, 406, 96 S.E.2d 819, 824 (1918).

Fourth, while Virginia courts will always entertain an as-applied challenge alleging that the statute is unconstitutional in the specific circumstances before the court, *see Stanley v. City of Norfolk,* 218 Va. 504, 508, 237 S.E.2d 799, 802 (1977),[13] Virginia courts generally should refrain from entertaining a facial challenge.[14] Since the determination of the constitutionality of a legislative act is "the gravest and most delicate duty that [the judiciary] is called upon to perform," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), there is "no jurisdiction to pronounce any statute…void, because irreconcilable with the Constitution, except as it is called upon to

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[13] "That the statute may apply unconstitutionally to another is irrelevant; one cannot raise third party rights." *DePriest v. Commonwealth,* 33 Va. App. 754, 761, 537 S.E.2d 1, 4 (2000). (citation omitted); *Santillo v. Commonwealth,* 30 Va. App. 470, 477, 517 S.E.2d 733, 737 (1999) (citation omitted). *Cf. County Court v. Allen,* 442 U.S. 140, 154-55 (1979) (A litigant in federal court "has standing to challenge the [federal] constitutionality of a statute only insofar as it has an adverse impact on his own rights."). Thus, in criminal cases, the issue is whether the statute may be applied to the criminal defendants' conduct, not whether the statute may be constitutionally applied in other hypothetical circumstances. *See Singson v. Commonwealth*, 46 Va. App. 724, 735, 621 S.E.2d 682, 687 (2005) ("This Court is constrained to deciding whether [the challenged statute] is constitutional as applied to the circumstances of this case."). *Cf. Allen,* 442 U.S. at 155 ("As a general rule, if there is no constitutional defect in the application of the statute to a [federal court] litigant, he does not have standing [in federal court] to argue that it would be unconstitutional if applied to third parties in hypothetical situations.").

[14] There are two types of facial challenges. First, a litigant may bring a facial challenge alleging "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). If the facial challenge is successful, the law is declared "invalid *in toto*" because it is "incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494 n.5 (1982). Second, in *some* First Amendment contexts, litigants in *federal* court may bring a facial challenge alleging overbreadth. In a successful facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is invalid in *many* applications. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) ("The showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'") (citations omitted). *See also Virginia v. Black*, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting) (similar explanation of overbreadth). Essentially, a facial challenge alleging overbreadth is a way to obtain an advisory opinion regarding *all* applications of a statute. *Cf. Commonwealth v. Hartley,* 256 Va. 216, 220-21, 504 S.E.2d 852, 852 (1998) ("the courts are not constituted to render advisory opinions, to decide moot questions, to answer inquiries when they are merely speculative.").

adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). Indeed, if, as Tocqueville suggested, every political issue becomes a constitutional question, *see* Alexis de Tocqueville, DEMOCRACY IN AMERICA, 310 (Arthur Goldhammer, trans., The Library of America ed. 2004) (1835), then there is a danger that the judiciary will be transformed into a "bevy of platonic guardians" who constantly substitute their judgment for the policy choices of elected officials. *See Griswold v. Connecticut*, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (quoting Learned Hand, THE BILL OF RIGHTS 73 (1958)). Thus, while the judiciary has carefully guarded its role as the ultimate arbiter of the Constitution, *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958), it has refused to "frustrate the expressed will of Congress or that of the state legislatures," *Barrows v. Jackson*, 346 U.S. 249, 256-57 (1953), by passing on the constitutionality of "hypothetical cases thus imagined." *United States v. Raines*, 362 U.S. 17, 22 (1960).[15] Consistent with these principles, except where there is no set of circumstances where the statute is constitutional, *Salerno*, 481 U.S. at 745, Virginia courts should entertain only as-applied challenges.

Fifth, in the event that this Court concludes that one or more statutory provisions are unconstitutional, then it must consider the issue of severability. *See Virginia Code* § 1-17.1. The General Assembly "has stated clearly that courts are now to apply a presumption of severability unless two provisions of a statutory section *must* operate together." *Sons of Confederate Veterans, Inc. v. Comm'r*, 288 F.3d 610, 627 (4th Cir. 2002) (emphasis in original). Thus, all

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[15] *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). ("[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."). *Cf.* John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 4-5 (1982) (noting that the existence of judicial review reflects a fundamental distrust of the democratic process).

unconstitutional provisions are "severable unless . . . it is apparent that . . . [the] provisions must operate in accord with one another." *Id*. at 628.

ARGUMENT

I. THE GENERAL ASSEMBLY MAY CREATE THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY AND MAY AUTHORIZE IT TO IMPOSE TAXES.

Nothing in the Virginia Constitution explicitly empowers the General Assembly to create the NVTA. Consequently, some Defendants may assert that the NVTA is unconstitutional. *Cf. United States v. Morrison,* 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). Such an assertion misunderstands the nature of the Virginia Constitution.

A. The Virginia Constitution Limits, Rather Than Empowers, the General Assembly.

"'The Constitution of the State 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).[16] In other words, the Virginia Constitution limits, rather than empowers, the General Assembly. As New York's highest court explained:

> The Federal Constitution is one of delegated powers and specified authority; all powers not delegated to the United States or prohibited to the States are reserved to the States or to the people. Great significance accordingly is properly attached to rights guaranteed and interests protected by express provision of the Federal Constitution. By contrast, because it is not required that our State Constitution contain a complete declaration of all powers and authority of the State, the

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[16] *See also Elliott*, 123 Va. at 406, 96 S.E. at 824.

> references which do appear touch on subjects and concerns with less attention to any hierarchy of values...

Board of Educ. v. Nyquist, 439 N.E.2d 359, 366 n. 5 (N.Y. 1982).[17] Thus, the General Assembly may enact any law or take any action "not prohibited by express terms, *or by necessary implication, by the State Constitution." Kirkpatrick v. Board of Supervisors*, 146 Va. 113, 115, 136 S.E. 186, 190 (1926) (emphasis added).

"The power to tax is a legislative power which the General Assembly inherently enjoys." 2 A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1036 (1974). Creating the NVTA and empowering the NVTA to levy taxes and fees may be innovative, but it is not unconstitutional. "The legislature has full power to determine, within reasonable limits, what public convenience and public welfare require, and to effect that end it has full power to enact legislation, except so far as restrained by the Constitutions of this State and of the United States." *City of Newport News*, 189 Va. 825 at 836, 55 S.E.2d at 62.

B. The General Assembly May Authorize the Northern Virginia Transportation Authority to Impose Fees and Taxes Within Certain Parameters.

Moreover, the General Assembly has the power to create and delegate powers to local government, *see Virginia Const*. art. VII, §§ 2-3, and political subdivisions subject only to the National and Virginia Constitutions.[18] *See* 2 Howard, *supra*, at 804-05. "A municipal corporation, unlike a state, is not a sovereign at common law. Municipalities are created by the

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[17] *See also* A.E. Dick Howard, "*Introduction: A Frequent Recurrence To Fundamental Principles" in* RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xxiii (Bradley McGraw ed. 1984).

[18] The NVTA is expressly designated as a political subdivision, *Virginia Code* § 15.2-4830. The issue of whether an entity is a political subdivision is controlled by "the language of the relevant enabling legislation." *Short Pump Town Center Community Development Corp. v. Hahn,* 262 Va. 733, 745-46, 554 S.E.2d 441, 447 (2001)

state and may be abolished by it. The state may delegate certain of its powers to the municipality and change this delegation at will." *Wright v. Norfolk Electoral Bd.*, 223 Va. 149, 152, 286 S.E.2d 227, 228 (1982).[19] Thus, while *Virginia Const*. art. VII, § 7 provides that "[n]o ordinance or resolution … imposing [local] taxes … shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body," nothing in the Constitution prohibits the General Assembly from *authorizing* NVTA to utilize fees and taxes with the parameters established by the General Assembly. The General Assembly can mandate the use of special revenues for special purposes. *See Virginia Code* § 58.1-1720 (An additional excise tax is imposed by "every county or city which is a member of any transportation district in which a heavy rail commuter mass transportation system operating on an exclusive right-of-way and a bus commuter transportation system are owned"). The General Assembly could command that a local government adopt a local tax. *See Virginia Code* § 1-213 ("The governing body of a political subdivision shall be responsible for any duty or responsibility imposed upon its political subdivision."). Indeed, the General Assembly requires, albeit indirectly, that local governments impose real property taxes for education. *See Virginia Code* § 22.1-95.[20]

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[19] Although the People have adopted multiple Constitutions for Virginia, the power of the General Assembly to authorize local governments to impose a tax has been consistently recognized. *See Langhorne & Scott v. Robinson*, 61 Va. (20 Gratt.) 661, 664 (1871) (1869 Constitution allowed a City to tax non-residents for projects that would benefit them); *Goddin v Crump*, 35 Va. (8 Leigh) 120, 120 (1837) (1830 Constitution allowed the General Assembly to authorize a local government to impose a tax); *Case of County Levy*, 9 Va. 139 (5 Call.) 139, 140-42 (1804) (1776 Constitution allowed the General Assembly to authorize a local government to impose a tax).

[20]That provision provides, "[e]ach county, city and town is authorized, directed and required to raise money by a tax on all property subject to local taxation at such rate as will insure a sum which, together with other available funds, will provide that portion of the cost apportioned to such county, city or town by law for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law."

Rather than limiting the power of the General Assembly, *Virginia Const*. art. VII, § 7 simply defines the procedures that must be followed by a locality or regional government when imposing a tax. *Wright*, 223 Va. at 152-53, 286 S.E.2d at, 228-29. The procedural requirements in § 7 ensure that the People "through their right to elect local and *state officials* and to amend the Constitution [with the right to], retain ultimate control." *Id.* at 153, 286 S.E.2d at 229 (emphasis added). The statutes at issue ensure that the People retain ultimate control. If the People do not approve of the General Assembly adopting a general law permitting that a taxing mechanism may be used by a special district to solve the region's transportation problems, then the People can express their displeasure at the next election and, ultimately, can amend the Constitution. Moreover, the People, through the process of electing members of local governments that ultimately send representatives to the NVTA, can influence, albeit indirectly, the decisions of the NVTA. Because the People retain ultimate control and because the General Assembly is permitting the use of its taxing power within prescribed limits rather than enacting a local tax, there is no constitutional violation.

II. THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A REGIONAL GOVERNMENT.

Some of the Defendants may claim that the NVTA is a regional government. Because a regional government may only be created by referendum, *Virginia Const*. art. VII, § 2, and because there has been no referendum, some Defendants may assert that the NVTA is unconstitutional.

Such an assertion is mistaken. The NVTA is not a regional government. By definition, a regional government must be "a unit of general government," *id.*, which has "'a sufficient range

or number of powers and basic functions so as to be considered organized for "general purposes."' 2 Howard, *supra*, at 799. The NVTA is not organized to provide general governmental services such as police protection, education, parks and recreation, or environmental protection. Rather, the NVTA is limited to one special purpose—transportation. Entities that are organized for "special purposes" are not considered a "general government within the meaning of [the Constitution]." *Id*. at 799-800. Therefore, NVTA cannot be considered a regional government.

Moreover, our constitutional history confirms that special districts, such as the NVTA, are not considered "general governments" and, thus, are not regional governments. To explain, under the 1902 Constitution, there was no restriction on the ability of the General Assembly to establish a regional government. *Id.* at 799. Although the General Assembly never created an entity known as a regional government, it did pass the 1964 Transportation District Act, 1964 *Virginia Acts* ch. 631, at 934, 934-45. The Act allowed that two or more counties or cities or combinations thereof to follow the prescribed procedure and create a transportation district. *Id.* at 936. Once created, the transportation district had certain powers, including extensive authority over planning for transportation needs, entering into contracts, making rules and regulations, and accepting loans and grants. *Id.* at 938-41.

When the present Constitution was adopted in 1971, it imposed restrictions on the creation of a regional government. *See Virginia Const*. art. VIII, § 1. If special districts, such as the transportation districts, were considered regional governments, then one would expect a constitutional challenge to the existing transportation districts. However, in the thirty-six years since the adoption of the present Constitution, no one has asserted that special districts are unconstitutional because they are regional governments established outside the procedures

outlined in *Virginia Const*. art. VIII, § 1. Instead, everyone has acquiesced in the notion that special districts are separate and distinct from regional governments. "Long acquiescence in such an announced construction so strengthens it that it should not be changed unless plainly wrong." *Dean*, 194 Va. at 227, 72 S.E.2d at 511. Additionally, to the extent that there is any doubt as to whether the NVTA is a regional government, the doctrine of constitutional doubt requires this Court to conclude that it is a special purpose political subdivision. *St. Cyr,* 533 U.S. at 300.

Because the NVTA is a special purpose political subdivision rather than a unit of general government, all constitutional provisions dealing with local and regional governments, including those containing in *Virginia Const*. art. VII, are wholly inopposite. Thus, to the extent that the Defendants may choose to rely on those constitutional provisions, their arguments must be rejected.

III. ALTHOUGH THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A UNIT OF GENERAL GOVERNMENT, THE GENERAL ASSEMBLY MAY CREATE THE AUTHORITY AND PROVIDE ADEQUATE FUNDING MECHANISMS.

Although the NVTA is not a local government, regional government, or the Commonwealth, it still has the power to impose taxes within the parameters established by the General Assembly and to incur debt provided that the payment for such debt is limited to revenues available to NVTA. Some Defendants may contend that the General Assembly cannot authorize an entity other than a local government or the Commonwealth itself to impose taxes or debts. Therefore, in their view, any taxes imposed or debt incurred is unconstitutional.

Such a contention must be rejected for two reasons. First, the General Assembly routinely authorizes political subdivisions that are not local government to exercise governmental powers. For example, the power of eminent domain has been expressly delegated

to a number of entities that are not local or regional governments. [21] *See Hamer v. School Bd. of Chesapeake*, 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990) (upholding the delegation of eminent domain power to entities that are not local or regional governments). If it is constitutional to allow an entity other than a local government to force people out of their homes, then it is certainly constitutional to delegate to a political subdivision mechanisms to fund the purpose for which it was created.

Virginia Code § 21-113 authorizes a circuit court to create a sanitary district if certain conditions are met. Once established, the sanitary district may levy taxes, *Virginia Code* § 21-118.6 and to issue debt, *Virginia Code* §§ 21-118, 21-118.4. Similarly, watershed improvement districts "have the authority to levy and collect a tax or service charge to be used for the purposes for which the watershed improvement district was created." *Virginia Code* § 10.1-625. Moreover, both sanitary districts and watershed improvements districts existed before the adoption of the present Constitution in 1971. *See* 1956 *Virginia Acts* ch. 668, at 1021, 1021-26 (adding Article 9 to Chapter 1 of Title 21 authorizing establishment of watershed improvements districts); 1930 *Virginia Acts* ch. 460, at 1001, 1002-04 (enacting legislation authorizing establishment of sanitary districts). As explained above, in adopting the present Constitution, there was "no intention to disturb the existing practice by which counties create special taxing districts, such as sanitary districts." THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 296 (1969). Thus, if water and sanitary districts

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[21] *See Virginia Code* §§ 5.1-2.1, 5.1-2.2:1 (Virginia Aviation Commission); *Virginia Code* §§ 21-113, 21-118, 21-291.1 (Sanitary Districts); *Virginia Code* §§ 23-287, 23-288 (Jamestown-Yorktown Foundation); *Virginia Code* §§ 32.1-189, 32.1-193 (District Mosquito Control Commissions); *Virginia Code* §§ 33.1-1, 33.1-49 (Commonwealth Transportation Board); *Virginia Code* §§ 36-4, 36-19 (Local Redevelopment and Housing Authorities); *Virginia Code* §§ 36-1, 36-27) (Local Housing Authorities).

were constitutional under the 1902 Constitution, then they remain constitutional under the present charter. Because it is constitutional to create sanitary districts and watershed districts and empower those districts to levy taxes and/or issue debt instruments, it is equally constitutional to establish a transportation authority and allow it to levy taxes or issue debt.

IV. SINCE THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT A LOCAL OR REGIONAL GOVERNMENT, THE PROCEDURAL REQUIREMENTS FOR IMPOSING TAXES OR INCURRING DEBT ARE INAPPLICABLE.

Since local governments must follow certain procedures in imposing local taxes, *Virginia Const*., art. VII, § 7,[22] or issuing debt, *Virginia Const.* art. VIII, § 10(b),[23] and since these procedures will not be followed for taxes imposed by the NVTA, some Defendants may

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[22] That provision provides:

> No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body. In case of the veto of such an ordinance or resolution, where the power of veto exists, it shall require for passage thereafter a recorded affirmative vote of two thirds of all members elected to the governing body.

[23] That provision provides:

> No debt shall be contracted by or on behalf of any *county* or *district thereof* or by or on behalf of any *regional government* or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt . . . unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

(emphasis added)

argue that the taxes imposed and the debts incurred by the NVTA are unconstitutional.[24] *Cf. Alderson v. County of Alleghany,* 266 Va. 333, 343-344, 585 S.E.2d 795, 800 (2003) (Statute "does not enact any ordinance, impose any tax, or set any tax rate. Rather, [statute] validates the assessment and levy of taxes under existing ordinances and establishes two short tax years to accommodate the change in government structure. It does so by special act adjusting general situs and tax day provisions."). In other words, they may argue that no entity other than an elected local governing body may levy local taxes and that the voters must approve any local debt. *Cf. Wise County Bd. of Supvrs. v. Wilson*, 250 Va. 482, 484-86, 463 S.E.2d 650, 651-52 (1995) (holding that board of supervisors and not commissioner of revenue had authority to set assessment ratio for merchants capital tax because ratio was integral part of tax and only board had authority to levy taxes).

Such an argument is incorrect. The provisions of *Virginia Const*. art. VII, including the requirements of § 7, apply only to taxes imposed by local or regional governments and are inapplicable to taxes imposed or permitted by the General Assembly whether directly or through a special tax district of limited purpose political subdivision. As explained above, the NVTA is not a county or a city or a regional government. Rather, it is a special purposed political subdivision created for a specific purpose, the need for which was determined by the General Assembly. Therefore, the procedures mandated by *Virginia Const.* art. VII do not apply and have no place in the Court's consideration of this matter.

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[24] To be sure, the procedures outlined in *Virginia Const*. art. VII, § 7 will be followed when the local governments within the Northern Virginia Transportation Authority impose additional real estate taxes.

V. ANY DEBT INCURRED BY THE NORTHERN VIRGINIA TRANSPORTATION AUTHORITY IS NOT CONSTITUTIONAL DEBT OF THE COMMONWEALTH.

The Virginia Constitution prohibits the Commonwealth from incurring debt unless certain procedures are followed. *See Virginia Const*. art. X, § 9. Some Defendants may contend that the debt incurred by the NVTA is actually debt of the Commonwealth and, since these procedures have not been followed, the debt is invalid.

Such a contention misunderstands the Constitution and the case law. First, "the debt incurred by legislatively created, independent political subdivisions, whatever their title, is not the debt of the Commonwealth or of any other governmental unit." *Dykes v. Northern Virginia Transp. Dist. Comm'n*, 242 Va. 357, 372-73, 411 S.E.2d 1, 9 (1991).[25] No debt is created for constitutional purposes if the state or county "incurred no legal liability to underwrite the project." *Miller v. Watts,* 215 Va. 836, 845, 214 S.E.2d 165, 171 (1975). The debt created must involve a "binding and direct commitment," *id.* at 845, 214 S.E.2d at 172, a commitment which can be enforced against the maker. "There must be a *legal* obligation" on the part of the governmental unit. *Dykes*, 242 Va. at 375, 411 S.E.2d at 10. As explained above, the NVTA is a legislatively created independent special purpose political subdivision, it is not a local or regional government. Because the NVTA is not a local or regional government and there is no long-term binding commitment by any state, local, or regional government to support debt service, the bonds issued cannot be considered the debt of the Commonwealth. *See Dykes,* 242 Va. at 372-73, 411 S.E.2d at 9.

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[25] *See also Button v. Day,* 204 Va. 270, 272-74, 130 S.E.2d 459, 461-62 (1963); *Farquhar v. Board of Supervisors,* 196 Va. 54, 61, 82 S.E.2d 577, 582 (1954); *Mumpower v. Housing Auth. of Bristol*, 176 Va. 426, 451-52, 11 S.E.2d 732, 742 (1940) (bonds issued by authorities are not those of the municipalities establishing them).

Second, the constitutional restrictions on the ability of the Commonwealth to incur debt are inapplicable when "the full faith and credit of the Commonwealth is not pledged or committed." *Baliles v. Mazur*, 224 Va. 462, 471, 297 S.E.2d 695, 699 (1982). Any bonds issued by the NVTA will depend upon revenues raised by the NVTA rather than the full faith and credit of the Commonwealth. There is no obligation on the part of the General Assembly to continue to permit the Authority to impose fees and taxes for any specific period. There is no legal obligation by the Commonwealth or any political subdivision thereof to repay the bonds other than NVTA and no obligation of the Commonwealth to maintain NVTA's current funding mechanism in place. Therefore, the debt is not legal debt of the Commonwealth and any bonds issued are not pledge bonds.

CONCLUSION

For the reasons stated above and in the Brief of the Northern Virginia Transportation Authority, the statutes at issue should be declared constitutional.

COMMONWEALTH OF VIRGINIA ex rel.

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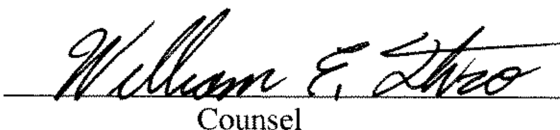

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August 3, 2007

CERTIFICATE OF SERVICE

I certify that on this 3rd day of August 2007, the original of the BRIEF OF THE COMMONWEALTH has been sent via overnight delivery to Office of the Clerk of the Circuit Court of Arlington County and that a copy has been mailed by first class, postage prepaid, U. S. Mail to counsel listed below:

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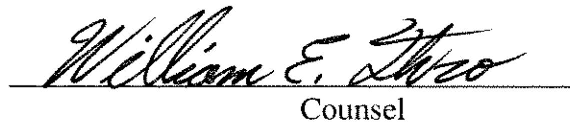

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