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March 25, 2013

BY HAND DELIVERY

Hon. Cynthia P. Morrison, Clerk
Portsmouth Circuit Court
1345 Court Street
Portsmouth, VA 23704

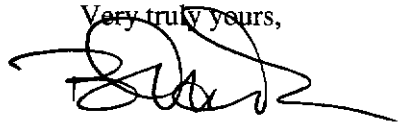
DANNY MEEKS, ET AL. V. VIRGINIA DEPARTMENT OF TRANSPORTATION, ET AL.
CASE NO. 740-CL-12001705-00

Dear Ms. Morrison:

Enclosed please find "Reply Brief in Support of Defendants' Motion for Summary Judgment" which we would appreciate you filing. Please time stamp the additional copy of this pleading and return them to our messenger.

Thank you.

Very truly yours,



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Enclosures

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DANNY MEEKS, ET AL. V. VIRGINIA DEPARTMENT OF TRANSPORTATION, ET AL.
CASE NO. 740-CL-12001705-00

Dear Judge Cales:

Enclosed is a courtesy copy of the "Reply Brief in Support of Defendants' Motion for Summary Judgment."

Respectfully submitted,

Robert M. Tata

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Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

DANNY MEEKS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 740-CL-12001705-00
	)	
VIRGINIA DEPARTMENT OF TRANSPORTATION, et al.,	)	
	)	
	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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March 25, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Other Authorities

PRELIMINARY STATEMENT

Plaintiffs have not cited a single case holding that tolls are taxes. Recognizing the weakness of their original claims, they invoke a new theory that the State Corporation Commission (SCC) alone can set the toll rates and determine the concessionaire's compensation. But the SCC clearly lacks that authority under the Virginia Constitution and the Public-Private Transportation Act of 1995 (PPTA), and the PPTA plainly authorizes the actions taken here by the Virginia Department of Transportation (VDOT). Plaintiffs' theory that the tolls are taxes also fails because the General Assembly properly concluded that the three Project segments here comprise an integrated transportation network, and the General Assembly's single-project determination is neither plainly wrong nor an abuse of discretion. Plaintiffs' challenges to the change-in-tax-law and alternative-facilities provisions of the Comprehensive Agreement are not ripe because they depend on contingent future events and address no present injury. And Plaintiffs' special-law, unlawful-delegation, surrender-of-sovereignty, and due process arguments all ignore the dispositive points and authorities in Defendants' opening brief, which stand un-rebutted.

ARGUMENT

I. The State Corporation Commission does not set toll rates for PPTA projects or establish the concessionaire's compensation.

Plaintiffs' lead argument is plainly wrong. The SCC neither sets the toll rates for PPTA projects nor determines the compensation paid to concessionaires. Plaintiffs misunderstand the significance of the SCC's constitutional status. The SCC "has no inherent power simply because it was created by the Virginia Constitution; and therefore its jurisdiction must be found either in constitutional grants or in statutes which do not contravene that document." *VYVX, Inc. v.*

Cassell, 258 Va. 276, 290, 519 S.E.2d 124, 131 (1999) (quotation and citation omitted) (collecting cases). The SCC has neither a constitutional nor statutory role here.

The Virginia Constitution gives no jurisdiction whatever to the SCC over highways or highway tolls; its constitutional authority is limited to "railroad, telephone, gas, and electric companies," Va. Const. art. IX, § 2, and such other entities as the General Assembly may choose to define, *id.* Thus, unlike the 1902 Constitution, the current Constitution "does not specifically charge [the SCC] with the duty of regulating and controlling transportation companies . . . ." 1977-1978 Op. Atty Gen. Va. 456, 1978 Va. AG LEXIS 275 (1978).[1]

While the General Assembly gave the SCC rate-making authority over operators of specific roads, like the Dulles Greenway, under the Virginia Highway Corporation Act of 1988, Code §§ 56-542(B), (D), the General Assembly specifically provided that the 1988 Act does *not apply* to PPTA projects. Code § 56-574. Plaintiffs' suggestion that ERCO might be a "public service company" — regulated by the SCC under Code § 12.1-12 — is also wrong. ERCO does not meet that statutory definition because it is not a "gas, pipeline, electric light, heat, power [or] water supply" company nor a "common carrier." Code § 56-1.

In short, the SCC has no relevance to this case.

II. The tolls are not taxes (Counts I, II, VI).

We previously gave two independent reasons why the tolls are not taxes: (1) the Project tolls do not raise general revenues for unrelated purposes (Defs.' Br. at 8-16); and (2) motorists drive on the tolled segments for convenience, so the toll is a voluntary payment for a

[1] *See also* 2 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 982 (1974) (while the 1902 Constitution "referred to 'transportation' . . . companies," the revised provision "speaks only of 'railroad' companies"); *Appalachian Power Co. v. John Stewart Walker, Inc.*, 214 Va. 524, 529 n.2, 201 S.E.2d 758, 763 n.2 (1974) (noting language "substantially changed").

governmental service, not "an enforced contribution" that taxes some other transaction (*id.* at 16-18).

Reneging on their Court-approved stipulation,[2] Plaintiffs now claim for the first time that our *second* ground is no longer proper for summary judgment because they dispute it is reasonable for motorists to use the Gilmerton Bridge or the High Rise Bridge as free alternative crossings. The Court could take judicial notice of those free alternative routes. (*E.g.*, Defs.' Ex. 30 at 39, 53.) Plaintiffs essentially concede that point by complaining only that those routes take longer and are more congested and circuitous. (Plfs.' Br. at 22-23.) Plaintiffs cannot claim that they are forced to use the Midtown or Downtown tunnel "against [their] will." *Westbrook, Inc. v. Town of Falls Church*, 185 Va. 577, 582, 39 S.E.2d 277, 280 (1946). Paying a toll to use the more convenient passage represents a contractual exchange for a service, just like, in *Westbrook*, contracting with a locality to extend sewer service (to avoid installing a septic tank) was not a "tax," but an agreement "voluntarily assumed." *Id.*

But even if the Court did not reach that point, our first argument is dispositive: the toll revenues are not used for unrelated purposes but to improve an integrated transportation network.

A. The General Assembly did not abuse its discretion in determining that the Midtown Tunnel, Downtown Tunnel, and MLK Extension are functionally interrelated and should be part of the same transportation project.

Plaintiffs say the three segments are not related because VDOT once considered developing them independently and federal reviewing agencies considered them separately for environmental impacts. Plaintiffs argue that that shows that the idea to combine the segments came about only for financing purposes. (Plfs.' Br. at 6-8, 15.) But Plaintiffs forget that when the Federal Highway Administration evaluated the Project at issue here, in 2007, and again in 2011,

[2] Plaintiffs stipulated that "the issues in this case are susceptible to resolution by the Court on cross-motions for summary judgment." Order (Dec. 19, 2012) at 2, ¶ 11.

it found the three combined segments together would increase capacity at the Midtown Tunnel, provide a direct connection via the MLK Extension, and alleviate traffic on the other river crossings, "particularly the Downtown Tunnel."[3] The fact that, at some earlier time, the Project segments were considered separately for environmental impacts or financing has no bearing on whether they form part of an integrated transportation network. And on that question, as shown below, the General Assembly's legislative determination is dispositive.

1. The General Assembly made legislative findings of interconnectedness.

The Midtown Tunnel was originally built to relieve congestion at the Downtown Tunnel. Sen. Doc. No. 9 at 16 (Va. 1973) ("The Midtown Tunnel was built and opened to traffic in 1962 as a response to the steadily increasing traffic experienced at the Downtown Tunnel"). (Defs.' Ex. 3 at 3.) That is why the 1956 legislation authorizing the Midtown Tunnel treated it as part of a single transportation "project," allowing project toll revenues collected from Downtown Tunnel motorists to be used to fund Midtown Tunnel construction, or vice versa. 1956 Va. Acts ch. 285, § 20 (Defs.' Ex. 1). This critical fact is conspicuously absent from Plaintiffs' brief.

The General Assembly further defined that singular transportation "project" to include "approaches and approach roads (including elevated or depressed highways) thereto," a phrase comfortably embracing the MLK Extension. Indeed, the MLK Extension will allow motorists approaching from the West to determine which of the two tunnels to take, and to permit those crossing from Norfolk through the Downtown Tunnel to access north Portsmouth and the Western Freeway (Highway 164). (*See* note 5 *infra; see also* Defs.' Br. 9 & n.10.) It "will

[3] FHWA, Revised Record of Decision, 2007 (Pls.' Ex. 15 at 29 of 33); *see also* 2011 Environmental Impact Statement (Pls. Ex. 19 at A-5 ("These facilities would experience less congestion and therefore would provide a more reliable travel time. These results benefit all drivers regardless of income level because they provide better access and mobility.")).

enhance connectivity between [the] Midtown and Downtown Tunnels, thereby enabling the crossings to function as a network." (VDOT Presentation to CTB at 2, 10 (Defs.' Ex. 31).)

The General Assembly's legislative finding of interconnectedness did not end in 1956. Although Plaintiffs do not mention it, the General Assembly, in 2007, directed the Hampton Roads Transportation Authority (HRTA) to treat the Midtown and Downtown tunnels again as "a *single transportation facility*." 2007 Va. Acts ch. 896 (adding Code § 33.1-391.8) (Defs.' Ex. 7). Moreover, the legislature specifically directed the HRTA to proceed with certain "First Phase Projects," which specifically included the "Downtown Tunnel/Midtown Tunnel/MLK Extension" — the very "Project" at issue here. *Id.* (§ 33.1-391.10).

2. The General Assembly's findings were not an abuse of discretion.

The General Assembly's treatment of these facilities as integrated segments of a single transportation system — in 1956 and again in 2007 — reflects "[l]egislative determinations of fact" that cannot be set aside unless "clearly erroneous, arbitrary, or wholly unwarranted." *Jamerson v. Womack*, 244 Va. 506, 509, 423 S.E.2d 180, 182 (1992); *City of Charlottesville v. DeHaan*, 228 Va. 578, 590, 323 S.E.2d 131, 137 (1984) (same). Such legislative findings will be overturned only if "'plainly repugnant' to a constitutional provision." *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182 (quoting *DeHaan*, 228 Va. at 583-84, 323 S.E.2d at 133); *Montgomery Cnty. v. Va. Dep't of Rail & Pub. Transp.*, 282 Va. 422, 439, 719 S.E.2d 294, 302 (2011) (same). Where legislative power "is exercised in good faith and without *clear abuse of discretion* . . . it is not a matter of judicial cognizance." *Harrison v. Day*, 202 Va. 967, 977, 121 S.E.2d 615, 622 (1961) (emphasis added). "An abuse of that discretion is shown only by a 'grave, palpable and unreasonable deviation from the principles fixed by the Constitution.'" *Jamerson*, 244 Va. at

510, 423 S.E.2d at 182. And any doubt is resolved in favor of the Commonwealth. *Montgomery Cnty.*, 282 Va. at 435, 719 S.E.2d at 300.[4]

Plaintiffs do not (and cannot) meet that demanding legal test here. The General Assembly's determination — that the Midtown Tunnel, Downtown Tunnel, and MLK Extension are part and parcel of the same transportation project — is entitled to substantial deference and cannot be said to be clearly erroneous or an abuse of discretion. Our opening brief set forth at length the numerous findings by the General Assembly, the Executive Branch, and the Federal Highway Administration showing how the three project segments operate as a single transportation network. (Defs.' Br.at 8-12.) Plaintiffs' own exhibits here confirm the same thing.[5] Indeed, Plaintiffs do not dispute that improvements to each segment will improve traffic congestion on each of the other segments. (Defs.' Br. at 9.) And motorists approaching the toll gantries will see real-time traffic conditions on the other segments to determine the best route. (Comp.

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[4] Plaintiffs misplace their reliance on *Town of Galax v. Appalachian Elec. Power Co.*, 177 Va. 299, 12 S.E.2d 778 (1941), which was distinguished in *Almond v. Gilmer*, 188 Va. 822, 846, 51 S.E.2d 272, 282 (1949) ("doubt as to the constitutionality of this Act [of the General Assembly] must be resolved in favor of its validity. Yet, any similar doubt entertained relative to the power of the municipalities . . . in . . . *Galax* . . . had to be resolved against such right").

[5] *See* Pls.' Ex. 5 at 2 (describing MLK Extension as "vital connection" that will "really help when there is a problem in either the Midtown or the Downtown Tunnel"); Pls.' Ex. 9 (MLK Extension will "provide a direct route between the Midtown Tunnel and the Downtown tunnel. This linkage is vital to the highway transportation system between Norfolk and Portsmouth."); Pls.' Ex. 12a ("A fully functional scope should include the extension of Martin Luther King Highway to I-264 (MLK)"); Pls.' Ex. 20 ("Once this project is completed, motorists will save about a half-hour round trip everyday plus benefit from a much improved transportation network that will better connect the region, stimulate the local economy and create jobs.").

The only contrary hint cited by Plaintiffs is a calendar listing by the federal Office of Small and Disadvantaged Business Utilization that described the Project as "essentially three separate projects." (Pls.' Ex. 21.) That statement by a third-party promoting minority-business opportunities did not address the transportation network the segments connect and cannot be imputed to the Commonwealth. It is certainly not enough to show that the *General Assembly's* contrary finding was an abuse of legislative discretion.

Agr., Defs.' Ex. 25 at 37.7, 37.10-37.11.) Plaintiffs apparently want these benefits; they just don't want to pay for them. But Plaintiffs have not come close to proving that the General Assembly abused its discretion in treating these segments as interconnected parts of one project.

3. The Supreme Court has honored similar findings of project-relatedness by the General Assembly.

The deference owed to the General Assembly's determination of interrelatedness here is further supported by analogy to cases that reject challenges to transportation projects under the Internal Improvements Clause, Va. Const. art. X, § 10. That clause prohibits the Commonwealth from becoming "interested in any work of internal improvement, except public roads and public parks . . . ." *Id.* The Court has repeatedly permitted non-road projects to proceed, however, deferring to the legislature's judgment that the project was sufficiently related to a "road" to qualify under the "public roads" exception. Thus:

- *Montgomery County* recently upheld the Commonwealth's grant of nearly $27 million to Norfolk-Southern Railway to build an intermodal facility to "provide[] for 'the seamless transfer of rail-to-truck and the reverse.'" 282 Va. at 437, 719 S.E.2d at 301 (quoting H.J. Res. 789 (Va. Reg. Sess. 2005)). The intermodal facility "was effectively a purchase by the Commonwealth of additional traffic capacity for Interstate 81." *Id.* at 441, 719 S.E.2d at 303;

- *Almond v. Gilmer,* 188 Va. 822, 51 S.E.2d 272 (1949), held that public ferries qualified as a public "road" or "highway" where, like bridges, they served as "connecting parts or stretches of public road." *Id.* at 838, 51 S.E.2d at 278; and

- *Almond v. Day*, 199 Va. 1, 97 S.E.2d 824 (1957), held that the State's operation of a bus system through the Hampton Roads Bridge Tunnel was reasonably related to the purposes of the facility. *Id.* at 9, 97 S.E.2d at 830-81.

Given that precedent, one cannot seriously question the General Assembly's finding that the Midtown Tunnel, Downtown Tunnel, and MLK Extension are interconnected.

4. Upholding the Project's legality does not allow the General Assembly to define the entire State as a "project."

Plaintiffs claim that, if the Project were allowed, the General Assembly might define *all*

transportation facilities "statewide" as a single "project" funded by user fees on "hundreds of physically separate facilities." (Plfs' Br. at 15.) But the Project threatens no such slippery slope. Defining the entire State as a single "project" is different, in both kind and degree, from saying that two historically-linked tunnels under the same river (and a freeway extension connecting them) is the same Project. The Court's existing standard for reviewing legislative determinations, while deferential, is able to weed out unreasonable actions by the legislature.[6]

5. The percentage spent on the Downtown Tunnel is irrelevant because the new Midtown Tunnel tube directly benefits users of both tunnels.

Plaintiffs argue that only $40 million will be spent on the Downtown Tunnel in a $2.04 billion project principally involving the addition of the new Midtown Tunnel tube. (Plfs.' Br. at 14.) The $40 million figure is misleading because it represents only major *maintenance* funds listed in Exhibit U to the Comprehensive Agreement; that exhibit does *not* include the scope of rehabilitation work on the Downtown Tunnel (such as retrofitting the ventilation system and correcting structural defects), in Exhibit R, or the operating expenses going forward. (Defs.' Ex. 30 at 22.)

But even if *nothing* more were spent on the Downtown Tunnel, tolling it to pay for the Project would still be proper because adding a new Midtown Tunnel will double capacity there, thereby reducing traffic congestion at the Downtown Tunnel. (*See* Defs.' Br. at 10-11.) The Project simply repeats what happened when the original Midtown Tunnel was conceived to relieve congestion at the Downtown Tunnel, and tolls from both facilities were used to finance the new construction.

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[6] A good example is *Terry v. Mazur*, 234 Va. 442, 362 S.E.2d 904 (1987). *Mazur* invalidated the 1986 transportation plan on the ground that it imposed long-term debt without submitting the question to election (as required by Article X, § 9), despite the General Assembly's disclaimer that it was not doing that. *Mazur* proves that courts are able to detect legislative excesses under the existing legal standard.

B. Plaintiffs have no legal support for their tolls-as-taxes argument and misconstrue or ignore Defendants' authorities.

Plaintiffs failed to respond to our challenge to find any case holding that tolls imposed for using a transportation project constituted an illegal tax. (Defs.' Br. at 17.) They cannot persuasively distinguish our cases, and the radical theory they propose would wreak havoc on well-established methods supporting the public financing of large capital projects.

1. Plaintiffs ignore *Corr* and *Gray*.

Given that Plaintiffs' counsel here also represented the plaintiffs in those cases, it is inexplicable why they have ignored *Gray v. Virginia Secretary of Transportation,* No. CL07-203 (Richmond Cir. Ct. Oct. 20, 2008) , and *Corr v. Metropolitan Washington Airports Authority*, 800 F. Supp. 2d 743 (E.D. Va. 2011), *appeal pending*, No. 13-1076 (4th Cir. 2013). Judge Spencer and Judge Trenga, respectively, rejected the same taxation-without-representation arguments there as are raised here. (Defs.' Br. at 18-20.) In their previous federal court briefing, however, Plaintiffs claimed that Judge Spencer offered "no explanation or reasoning to justify [her] cryptic conclusion," and that Judge Trenga's decision was "also lacking in analysis of the issue of whether a toll constitutes a tax . . . ." (Case No. 2:12-cv-00446, Dkt. 32 at 22.) Not so.

Judge Spencer stated that she relied on the reasons given by the Virginia Attorney General in the defendants' "Motion and Reply" (Defs.' Ex. 12 at 1), which involved the same arguments raised here (Defs.' Ex. 10 at 26-28; Defs.' Ex. 10-15.) Judge Trenga found *Gray* to be persuasive authority. *Corr,* 800 F. Supp. 2d at 755. He also concluded that the toll was not a tax because, among other reasons, "the toll collected is not used for unrelated general purposes, but rather for transportation improvements within the same Right-of-way . . . ." *Id.*

Gray and *Corr* call for the same conclusion here: the tolls are user fees, not taxes.

2. Plaintiffs' legal theory would destroy the special fund doctrine and eviscerate long-established revenue-bond financing mechanisms throughout the Commonwealth.

Plaintiffs say the special fund cases are inapposite because they involve different constitutional provisions, Va. Const. art. VII, § 10 and art. X, § 9(b), which prevent the State and its political subdivisions from incurring long-term indebtedness without submitting the question to voter approval. (Plfs.' Br. at 18-19.) Plaintiffs are wrong for three reasons.

First, Plaintiffs ignore that the debt provisions serve the same purpose as the no-taxation-without-representation provision in Art. I, § 6: protecting Virginia citizens who will have to pay taxes to fund the government's financial undertaking.[7] Just as Article I, § 6, ensures that taxes are imposed by the people's elected representatives, the debt provisions in Articles VII and X ensure that voter approval is obtained before the government undertakes indebtedness secured by the "taxing power" of the State. *Baliles v. Mazur*, 224 Va. 462, 469-70, 297 S.E.2d 695, 699 (1982) (quoting *Miller v. Watts*, 215 Va. 836, 841, 214 S.E.2d 165, 169 (1975)).[8]

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[7] That overlapping consideration appeared in *Farquhar v. Board of Supervisors*, 196 Va. 54, 82 S.E.2d 577 (1954), where the special fund doctrine and "taxation without representation" were both involved. Although the opinion is not a model of clarity, the Supreme Court relied on the special fund doctrine to uphold the revenue bonds that were issued to finance a municipal waste treatment plant serving two jurisdictions; as in this case, the bonds were to be repaid solely from a special fund derived from the users of the system. *Id.* at 59-62, 82 S.E.2d at 581-82. The Court next rejected plaintiffs' taxation-without-representation argument, made under Art. I, § 6, which was premised on the complaint that payments made by one municipality to use the treatment plant exceeded the benefit to its own residents. *Id.* at 62-63, 82 S.E.2d at 583. Plaintiffs complain that the appellate briefs in *Farquhar* did not develop the argument, but that is beside the point, given that the Court actually decided it. Prof. Howard agrees that *Farquhar* involved the "issue of taxation without representation" and that it rejected a challenge on that ground to fees charged for using a joint municipal waste system. 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 89 (1974).

[8] Plaintiffs take out of context the statement in *Baliles* that "[t]he overriding consideration, therefore, is whether the legislative body is obligated to appropriate the funds, not the source or composition of the special fund." (Plfs.' Br. at 19 (quoting *Baliles*, 224 Va. at 471, 297 S.E.2d at 700).) The Court simply made that point in rejecting the argument that the special

Second, if Plaintiffs' argument were correct, it would destroy the utility of the special fund doctrine and eviscerate long-established methods for revenue-bond financing. For example, the Court in *Button II* relied on the special fund doctrine to uphold the use of revenue bonds to finance the construction of *new* college facilities that were repaid by imposing new fees on the users of *existing* facilities. *Button v. Day*, 205 Va. 739, 743, 139 S.E.2d 838, 840 (1965). Under Plaintiffs' theory, however, that same practice actually violated Article I, § 6, because the users of the old college facilities could not be required to subsidize the new facilities.

Such a ruling would be a disaster, a financial tsunami sweeping away numerous revenue-bond projects. For instance, the State Revenue Bond Act, Code §§ 33.1-267 to 33.1-295, enables the Commonwealth Transportation Board (an unelected body) to use revenue bonds to finance transportation projects that, although comprised of multiple segments or modalities, are nonetheless defined to constitute a single "project" for the purpose of imposing tolls to repay the bonds. Code §§ 33.1-268(2) (defining projects), 33.1-269(5) (authorizing tolls "for the use of such projects or to refinance the cost of such projects"). Such individual projects include:

- the "York River Bridges" (subsection a);
- the "James River, Chuckatuck and Nansemond River Bridges, together with necessary connecting roads, in the Cities of Newport News and Suffolk and the County of Isle of Wight" (subsection h);
- the "Hampton Roads Bridge, Tunnel, or Bridge and Tunnel System" (subsection j); and
- "Transportation improvements in the Dulles Corridor . . . including without limitation the Dulles Toll Road, the Dulles Access Road, outer roadways adjacent or parallel thereto, mass transit, including rail, bus rapid transit, and capacity enhancing treatments such as High-Occupancy Vehicle lanes, High-Occupancy Toll (HOT) lanes, interchange improvements, commuter parking lots, and other transportation management strategies" (subsection n).

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fund doctrine is inapplicable "where the fund consists entirely of money appropriated by the legislature." *Id.* at 471, 297 S.E.2d at 699-700.

Revenue-bond mechanisms like this are not limited to transportation projects. They are common throughout the Code to enable unelected public bodies, at both the State and local level, to construct new facilities by imposing fees for the use of existing facilities.[9] If Plaintiffs' theory were adopted, it would invalidate revenue-bond projects throughout Virginia.

Third, where the General Assembly has allowed revenue-bond financing that would have been illegal if Plaintiffs' interpretation of Art. I, § 6, were correct — as in the State Revenue Bond Act and in the 1956 and 2007 Acts governing the Midtown and Downtown Tunnels — the legislature's "construction is entitled to great weight" in determining the meaning of the constitutional provision in question. *Almond v. Gilmer*, 188 Va. at 844-45, 51 S.E.2d at 281. The special fund doctrine has been entrenched since the Supreme Court of Virginia embraced it sixty-four years ago in *Almond v. Gilmer*, and it has been re-confirmed and extended in numerous cases since then. *See Baliles,* 224 Va. at 468-71, 297 S.E.2d at 698-700 (tracing development). It is inconceivable that Article I, § 6, silently countermands that history and invalidates the very projects found permissible under our Constitution.

3. The utility-fee cases do apply and show that the tolls are not taxes because the revenues raised are less than the total project costs.

Plaintiffs argue that the utility fee cases "do not apply" but then contradict themselves by claiming that those same cases show that a utility fee becomes a tax when the amount of the fee is not reasonably related to "the benefit received by those paying the fee." (Plfs.' Br. at 19-20.) Plaintiffs are wrong on both points. The utility fee cases do apply, but the reasonableness test

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[9] *See, e.g.,* Code §§ 5.1-2.7, -2.9 (authorizing Virginia Aviation Board to issue revenue bonds and requiring that rates, fees, and charges for all services be sufficient to repay the bonds); Code §§ 10.1-301(2), -307 (same requirements for State Park Development Revenue bonds issued by Director of the Department of Conservation and Recreation); Code §§ 15.2-5125, 15.2-5136 (same requirements for revenue bonds issued by local water and waste authorities).

depends on the *total* costs of operating the system compared to the *total* revenues raised, not by comparing the individual fee paid to the individual benefit for each user.

For example, in *Eagle Harbor, LLC v. Isle of Wight County*, 271 Va. 603, 628 S.E.2d 298 (2006), the plaintiff-developers were required to pay a $4,000-per-tap sewer-connection fee to help defray the cost of a county-wide capital-improvement plan for water and sewer service, but there were no sewer improvements in the "Northern Development Service District" at issue, and the developers there installed their own sewer lines. 271 Va. at 607, 628 S.E.2d at 300. The developers therefore complained that "they received no benefit in return for the sewer connection fee charged by the County." *Id.* at 610, 628 S.E.2d at 301. Nonetheless, the Court held that the fees were reasonable because they applied "to all new customers countywide, were less than the actual system costs and were solely dedicated to retiring the utility bond issue." *Id.* at 619, 628 S.E.2d at 306. Two earlier cases likewise applied the same methodology, comparing total revenues from the utility fee to total project costs, without regard to whether the plaintiff received any specific benefit.[10]

The Project easily passes muster under this test. The tolls do not generate revenue for unrelated purposes and it is undisputed that the tolls alone are not enough to pay for the Project.

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[10] Thus, in *McMahon v. City of Virginia Beach*, 221 Va. 102, 267 S.E.2d 130 (1980), the Supreme Court upheld the City's requirement that landowners served by a private well pay an average fee of $2,200 to extend public water lines to their properties, even if the landowner chose not to connect to the system or receive any public water. *Id.* at 105, 107-08, 267 S.E.2d at 133-34. The fee was not an improper revenue-generating device "because the charges imposed by the ordinance would not exceed the actual cost to the City of installing the waterlines in the streets in front of the landowners' residences." *Id.* at 107, 267 S.E.2d at 134. The revenues collected from the fee totaled no more than $4.7 million, while the total cost of the capital program was $20 million. *Id.* at 105, 26 S.E.2d at 132-33. Similarly, the water connection fee was upheld in *Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach,* because "[t]he anticipated *total* revenue which will be generated by this fee represents only approximately one-third of the *total* costs of the project" [building a pipeline to Lake Gaston]. 241 Va. at 114, 400 S.E.2d 523, 527 (1991) (emphasis added).

Additional financing is required in the form of significant federal loans and more than $420 million in grants from VDOT. (Defs.' Br. at 5, 16.) "Obviously, fee revenues will not exceed the . . . cost in providing the service." *Tidewater*, 241 Va. at 121, 400 S.E.2d at 527.

Only one Virginia case has ever invalidated a utility fee as a tax — *Fairfax County Water Authority v. City of Falls Church,* 80 Va. Cir. 1 (Fairfax County Cir. Ct. 2010) — and it is easily distinguished. The City of Falls Church was improperly charging its out-of-town water customers in Fairfax County by padding their water rates and transferring the surplus to the City's general fund to provide tax relief to in-city residents (who comprised only 8% of the water customers). *Id.* at 5, 9. The City's water revenues greatly exceeded the costs of operating the water system, and the surplus was diverted for entirely unrelated, general governmental purposes. *Id.* at 2.[11] *That* was a tax. But in this case, as in *McMahon, Tidewater,* and *Eagle Harbor,* there is no such diversion and the revenues raised are far less than what is needed to build, operate and maintain the Project assets. (Defs.' Br. at 5, 16.) So *City of Falls Church* does not help Plaintiffs' argument.

4. *Marshall* did not involve tolls and is inapposite.

Plaintiffs repeatedly rely on *Marshall v Northern Virginia Transportation Authority*, 275 Va 419, 657 S.E.2d 71 (2008), ignoring the points in our opening brief. (Defs.' Br. at 19.) *Marshall* did not involve tolls for the use of any government-provided facility, and not even the government disputed that the fees in *Marshall* were "taxes."[12] By contrast, in this case (as in

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[11] A locality may lawfully charge utility rates sufficient to fund "contingencies" or "future expenditures" of its utility system. *Mountain View LP v. City of Clifton Forge*, 256 Va. 304, 311-12, 504 S.E.2d 371, 375-76 (1998); *City of Falls Church,* 87 Va. Cir. at 10 (allowing water rates to provide for "future expense of the water system").

[12] *See, e.g.,* Brief of Appellee Northern Virginia Transportation Authority at *9, *Marshall v. N. Va. Transp. Auth.,* 2008 Va. S. Ct. Briefs 71959 (Dec. 18, 2007) (not disputing that the challenged fees were taxes but arguing that they were proper "because the General Assembly

Gray and *Corr*), the revenues come from tolls on interrelated transportation facilities and will fund the improvements to those facilities, benefitting the users of all segments. *Marshall* is not on point.

5. No out-of-state case supports Plaintiffs' theory.

No out-of-state case supports Plaintiffs' tax theory, and they have failed to persuasively distinguish *Murphy v. Massachusetts Turnpike Authority*, 971 N.E.2d 231 (Mass. 2012). Plaintiffs say that *Murphy* held that "even if the tolls were taxes, they could be imposed by the [MTA] because the legislature had authorized the [MTA] to do so." (Plfs.' Br. at 24 (citing *Murphy*, 971 N.E.2d at 239).) But that ignores the other half of the ruling: the tolls were not taxes but "actually user fees." 971 N.E.2d at 239. *Murphy*'s discussion about the "integrated system" operated by the MTA applies equally to this Project. (Defs.' Br. at 18.)

III. Plaintiffs' challenge to the change-in-tax-law and the alternative-facilities provisions must be dismissed as unripe (Counts I-VI).

It is premature for Plaintiffs to challenge the Comprehensive Agreement's provisions allowing a future "compensation event" if (1) the General Assembly someday eliminates current tax-exemptions for PPTA projects (and localities then tax them); or (2) the Commonwealth someday approves an alternative river-crossing that reduces ERCO's revenues from the Project. Those claims "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation and quotation omitted). They involve precisely the type of "future or speculative facts" that the Supreme Court

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itself specified the subject of the Regional Taxes and Fees, dictated the tax rates, and specified how NVTA may spend the revenue"). The seven taxes were: "an additional annual vehicle license fee; an additional initial vehicle registration fee; an additional vehicle inspection fee; a local sales and use tax on vehicle repairs; a regional congestion relief fee; a local rental car transportation fee; and an additional transient occupancy tax." *Marshall*, 275 Va. at 426, 657 S.E.2d at 74 (citations omitted) .

of Virginia has warned would require an "advisory opinion" or an "answer to a speculative inquiry." *City of Fairfax v. Shanklin*, 205 Va. 227, 231, 135 S.E.2d 773, 776 (1964).

Plaintiffs cannot conjure up ripeness by claiming that the Comprehensive Agreement is somehow chilling the General Assembly or VDOT, right now, from taking action. There are at least three reasons why. First, Plaintiffs cannot allege any present facts (particularly since the General Assembly completed its 2013 regular session). Second, forecasting government decisionmaking is inherently speculative and cannot be used to show present injury. *E.g., Shenandoah Valley Network v. Capka*, 669 F.3d 194, 201-02 (4th Cir. 2012) (holding claim unripe when it depended on how a governmental agency would decide a future regulatory matter). And third, Plaintiffs are asserting an injury to the Commonwealth and VDOT, not one to themselves. That violates the "fundamental principle of constitutional law that one challenging the constitutionality of a statute . . . has the burden of showing that he himself has been injured or threatened with injury by its enforcement." *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 63, 168 S.E.2d 117, 120 (1969). The Commonwealth is represented here by the Office of the Attorney General and does not need Plaintiffs' help. Indeed, if Plaintiffs are right that these contractual provisions are somehow unenforceable, the Commonwealth is more than capable of making that argument if and when the need arises. Deciding it now is both unnecessary and improper.

IV. The special-law claims are also meritless under *Concerned Residents* (Counts III, IV, V).

Assuming that the special-law challenges to the change-in-tax-law provision are ripe (Counts III-V), Plaintiffs have ignored that the Virginia Supreme Court upheld the same provision in *Concerned Residents of Gloucester County v. Board of Supervisors*, 248 Va. 488, 493, 449 S.E.2d 787, 790 (1994). The government can properly find that such provisions provide

"fair consideration for the services received." *Id.* So that controlling precedent stands unrebutted and requires dismissal of Counts III-V. (*See* Defs.' Br. at 25-26.)[13]

V. Neither the PPTA nor the Comprehensive Agreement unlawfully delegates legislative powers nor surrenders sovereign powers (Counts I, II, VI).

Plaintiffs have not mounted a serious delegation challenge to the PPTA or to VDOT's powers under it, let alone one persuasive enough to invalidate a major statutory program on the books for 17 years, under which a dozen enormous transportation projects have been completed or are underway.[14] Plaintiffs ignore that the General Assembly carefully set out in the PPTA the findings that a "responsible public entity" like VDOT must make before entering into a comprehensive agreement, and the guidelines that apply to such agreements. (Defs.' Br. at 27-34.) Because those guidelines are more detailed than the general standards upheld as adequate by the Supreme Court (*id.* at 29-30), Plaintiffs cannot credibly say that legislative guidance is lacking.

Plaintiffs also have no answer to our previous points showing there was no unlawful delegation with regard to congestion pricing (*id.* at 32), different toll rates for E-Z Pass and non-E-Z Pass users (*id.* at 32), or ERCO's compensation (*id.* at 31-32). Indeed, Plaintiffs continue to misstate that ERCO is guaranteed some sort of profit or return on equity under the Comprehensive Agreement. Even though VDOT *could have* contracted to specify "a reasonable maximum rate of return on investment," Code § 56-566(A)(8), it did not. (Defs.' Br. at 25-26.) Plaintiffs' own exhibits belie their claims to the contrary. *E.g.*, Pls.' Ex. 20 at 1-2 ("ERC, also assumes risk of delivering the project on a performance-based, fixed-price, fixed-date contract, protecting users and taxpayers from cost overruns and delays. . . . The comprehensive agreement

[13] Plaintiffs improperly attempt to expand their special-laws challenge in Counts III-V to include the alternative-facilities provision. (Plfs.' Br. at 31.) They did not plead that. Even if they had, *Concerned Residents* would likewise bar the claim.

[14] *See* http://www.vappta.org/projects.asp (PPTA project listing).

does not guarantee a profit to ERC.").

As for the change-in-tax-law and alternative-facility provisions — even assuming Plaintiffs' challenge were ripe — those provisions are well within the authority granted by the General Assembly in Code §§ 56-566(A)(8) and (B) for VDOT to determine the compensation terms for the concessionaire, another argument that Plaintiffs ignore. (Defs.' Br. at 33.)

These contractual provisions, moreover, do not "abridge" or "surrender" the Commonwealth's sovereign power. (Plfs.' Br. at 26.) Plaintiffs decline to address the leading federal case on point, *United States v. Winstar Corp.*, 518 U.S. 839 (1996). (*See* Defs.' Br. at 26.) What Justice Souter said in *Winstar* applies equally here: "[t]he answer to the . . . contention that the State cannot barter away certain elements of its sovereign power is that a contract to adjust the risk of subsequent legislative change does not strip the Government of its legislative sovereignty." *Id.* at 889.[15] That logic squares with the language of the Comprehensive Agreement, which makes clear that none of the State parties is giving up the power to determine whether to construct alternative or competing facilities. (*See* Defs.' Br. at 26 n.26.)

Although *Winstar* was decided by the Supreme Court of the United States, nothing in Virginia's jurisprudence suggests that our Supreme Court would decide the question any differently. In fact, if Plaintiffs were right, *Concerned Residents* would have come out the other way: the change-in-tax-law provision there would have been void as an abridgement of sovereign authority. *None* of Plaintiffs' authorities show that the government is barred from signing a contract that would require the payment of compensation if a change in law occurred that fundamentally altered the economic basis of the parties' bargain.

[15] Justice Souter wrote the plurality opinion but not a single Justice shared Plaintiffs' view that the government cannot sign a contract calling for damages in the event a change in the law upsets the basis for the parties' bargain. *See id.* at 910 (Breyer, J., concurring); *id.* at 919 (Scalia, J, concurring); *id.* at 924 (Rehnquist, C.J., dissenting).

Plaintiffs' principal case, *Mumpower v. Bristol City Housing Authority*, 176 Va. 426, 11 S.E.2d 732 (1940), upheld the power of the General Assembly to create local housing authorities and rejected the argument that doing so abridged any police powers under § 159 of the 1902 Constitution. *Id.* at 444, 452-55, 11 S.E.2d at 739, 742-43. How *Mumpower* helps Plaintiffs is not apparent, but they appear to like the language from old § 159: "that the exercise of the police power of the State shall never be abridged . . . ." Va. Const. § 159 (1902); *Mumpower,* 176 Va. at 444, 11 S.E.2d at 739 (quoting § 159). That text was trimmed back and nearly cut from the 1971 Constitution. It now reads: "The police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged." Va. Const. art. IX, § 6; *see* Report of the Commission on Constitutional Revision, at 291, 423 (1969). The framers of the new Constitution explained that the retained language was likely unnecessary, "since a state cannot in any event bargain away its police power." *Id.* at 291. For that proposition, they cited *Stone v. Mississippi*, 101 U.S. 814 (1879), *the same case* that Justice Souter discussed in *Winstar* before concluding that a contract providing for damages in the event of a change in the law "does not strip the Government of its legislative sovereignty." 518 U.S. at 888-89.

In other words, *Winstar* is perfectly consistent with Virginia's Constitution. Plaintiffs, by contrast, would freeze Virginia constitutional law in an antiquated mindset without any authority for doing that. Our Constitution does not enshrine such an ossified theory of government.

VI. Plaintiffs' Virginia Due Process Claim fails with their other claims (Count VI).

Plaintiffs do not dispute that their Virginia Due Process claim in Count VI is purely derivative of their tax, unlawful delegation, and change-in-tax-law claims. Paragraph 73 of the Amended Complaint (Order (12/19/2012) at Ex. 1 at 21) makes that clear. Because those predicate claims fail as a matter of law, the Due Process claim necessarily fails too.

CONCLUSION

Plaintiffs' tax, special-law, unlawful-delegation, surrender-of-sovereignty, and due process claims find no support in any case — in *or* outside of Virginia. Indeed, Plaintiffs chose to open their brief instead with an entirely new claim about the SCC's supposedly exclusive authority over this Project, a theory that cannot withstand cursory scrutiny.

Plaintiffs have not shown that the actions of the General Assembly and VDOT are clearly repugnant to the Virginia Constitution. What is more, Plaintiffs' theories have no limiting principle. They would destroy established methods of revenue-bond financing approved more than 60 years ago and employed to construct countless projects throughout the Commonwealth. They would disrupt the workings of all single-purpose government utilities by requiring them to use micro-accounting procedures to ensure that each customer is charged no more than the cost of providing individualized service. And they would threaten every PPTA project in the Commonwealth.

Virginia law offers no basis to do that, and the Amended Complaint should be dismissed with prejudice.

Respectfully submitted,

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