V I R G I N I A:

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.	)	

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO STAY JUDGMENT PENDING APPEAL

On May 1, 2013, this Court ruled that the imposition of tolls on the Midtown Tunnel/Downtown Tunnel/MLK Extension Project (the "Project") under a contract authorized by the Public Private Transportation Act of 1995 ("PPTA") was unlawful because the General Assembly granted unfettered discretion over tolling to the Virginia Department of Transportation ("VDOT"). The ruling is unprecedented, both in substance and impact. No court has ever questioned the constitutional validity of the PPTA. No court has ever found any of Virginia's many statutes authorizing tolling to be illegal. Indeed, no court—state or federal—has ever found a highway toll to be a tax, rather than a user fee. As a result of this unique ruling, various tolled projects completed during the 18-year regime of the PPTA now operate under a cloud, the Project stands in financial limbo, contemplated VDOT projects may be jeopardized, and the financial markets that support these projects are, at best, confused.

In light of these considerations, and given that the Supreme Court's review will be *de novo*, a stay of the judgment pending appeal is clearly warranted. Indeed, the traditional four-factor test is easily satisfied here. As discussed below, a stay will simply maintain the status quo

pending appellate review of this court's ruling. Defendants plan to expedite their appeal to obtain a decision before tolling commences on February 1, 2014. And in the event the Supreme Court should affirm this court's ruling *after* tolling commences, the Plaintiffs' only harm would be the payment of a small amount in user fees should they choose to travel the tolled areas. Under these circumstances, the four factors favor a stay of the judgment pending appeal.

STANDARD FOR GRANTING A STAY PENDING APPEAL

Although the Virginia Supreme Court has not ruled on the appropriate standard to decide motions for stay pending appeal, the published Virginia Circuit Court opinions to consider the issue have utilized federal law, specifically *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). *See Navy League Bldg., LLC v. James G. Davis Constr. Corp.*, 68 Va. Cir. 289, 289-90 (Arlington Cnty. 2005); *Berger v. Pulte Home Corp.*, 55 Va. Cir. 36, 39 (Fairfax Cnty. 2001).[1]

Under that approach, four "traditional stay factors" govern the grant of a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 422, 426 (2009). They are "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken*, 556 U.S. at 426 (quoting *Hilton,* 481 U.S. at 776); *accord Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013) (applying the standard articulated in *Hilton*); *cf. Long v. Robinson*,

[1] More generally, when considering motions for pendente lite relief, the practice is to follow Fourth Circuit law: "Lacking further guidance from the Supreme Court [of Virginia], most Virginia circuit courts have adopted the law of the Fourth Circuit." *Dean v. Va. High Sch. League, Inc.*, 83 Va. Cir. 333, 334 (City of Norfolk 2011); *see, e.g.*, *Festig v. Touchstone Dev.*, 54 Va. Cir. 357, 358 (Loudoun Cnty. 2001) (applying Fourth Circuit standard governing injunctions to other pendente lite relief); *Re: HotJobs.Com Ltd. v. Digital City, Inc.*, 53 Va. Cir. 36, 39 (Fairfax Cnty. 2000) (noting that "[a]lthough the Virginia Supreme Court has not set forth standards for granting or denying a preliminary injunction, this Court has adopted the standard set forth by the United States Court of Appeals for the Fourth Circuit.").

432 F.2d 977, 979 (4th Cir. 1970). "The first two factors of the traditional standard are the most critical," *Nken*, 556 U.S. at 434, as the effect of a stay is to "hold an order in abeyance pending review, . . . allow[ing] an appellate court to act responsibly." *Id.* at 427. Although "[a] stay does not make time stand still, [it] does hold a ruling in abeyance to allow an appellate court the time necessary to review it," thus "ensuring that appellate courts can responsibly fulfill their role in the judicial process." *Id.* at 421, 427.

ARGUMENT

Defendants, VDOT and Elizabeth River Crossings OpCo, LLC (ERCO), submit that these four factors support staying this Court's judgment upon entry of a final order, and that an order holding this Court's judgment in abeyance would better enable the Supreme Court of Virginia to fully review *de novo* this Court's decision and the constitutionality of the relevant provisions of the PPTA. As this case calls into question the Commonwealth's constitutional authority to respond to the modern transportation challenges confronting her, implicates other construction projects involving literally billions of dollars, and, with regard to the Midtown-Tunnel/Downtown-Tunnel/Martin-Luther-King-Extension Project, exposes the Commonwealth to additional financial obligations should the tolls in question not be timely imposed, "[a] stay [that] 'simply suspend[s] judicial alteration of the status quo'" is appropriate to protect the interests of the Defendants and the public while the Supreme Court considers this issue. *Nken*, 556 U.S. at 429 (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). And, as the Supreme Court of the United States has recognized, because "statutes are presumptively constitutional . . . , absent compelling equities on the other side, . . . [they] should remain in effect pending a final decision on the merits" by the court of last resort. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U. S. 1345, 1352

(1977) (Rehnquist, J., in chambers). Accordingly, this Court should stay its judgment pending final resolution of the forthcoming appeal.

A. Likelihood of Success

In considering the Defendants' likelihood of success, it is plain that the Court need not express a lack of confidence in its earlier ruling in order to stay its judgment. *See United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (reasoning that, to grant a stay of its earlier judgment, a district need not "'change its mind or conclude that its determination on the merits was erroneous.' Rather the court must determine whether there is a strong likelihood that the issues presented on appeal could be rationally resolved in favor of the party seeking the stay.") (quoting *St. Agnes Hosp. v. Riddick*, 751 F. Supp. 75, 76 (D. Md. 1990)). This standard is met when an appeal raises a "substantial case on the merits," *Hilton,* 481 U.S. at 778, or a "substantial legal question," *Washington Speakers Bureau, Inc. v. Leading Auths., Inc.*, 49 F. Supp. 2d 496, 499 (E.D. Va. 1999). "The standard does not require the petitioners to show that it is more likely than not that they will win on the merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quotation marks and citation omitted). As the Supreme Court put it in *Hilton,* "[w]here the State establishes . . . *a substantial case on the merits*," granting a stay is appropriate when "the second and fourth factors in the traditional stay analysis" favor the stay. 481 U.S. at 778 (emphases added).

A substantial legal question is necessarily presented when a case raises an issue of first impression. *Fourteen Various Firearms*, 897 F. Supp. at 273 (reasoning that as "[t]he issue on appeal in this case is one of first impression in this circuit," which "weighs in favor of granting a stay," as "reasonable minds could differ respecting whether [the court's decision] was the correct reading of the applicable law"); *see Miller v. Brown*, 465 F. Supp. 2d 584, 596 (E.D. Va. 2006) (granting a motion for stay pending appeal on the ground that, being a case of first impression,

"the Fourth Circuit may resolve the issue differently," and so "Defendants have at least demonstrated a 'substantial case on the merits.'") (quoting *Hilton*, 481 U.S. at 778); *Berger*, 55 Va. Cir. at 41 (granting a motion to stay where the Court concluded that the legal position of the movant "is in fact substantial and the Court is unwilling to conclude that the Supreme Court of Virginia may not consider it favorably.").

Here Plaintiffs have themselves characterized this case as one that involves an issue of first impression. *See* Pls.' Mot. to Remand at 1 (E.D. Va. No. 2:12-cv-00446, Aug. 31, 2012) (Doc. 7) ("The case involves novel questions of Virginia law"); Pls.' Memo. in Support of Mot. to Remand at 4 (E.D. Va. No. 2:12-cv-00446, Aug. 31, 2012) (Doc. 8) ("The claims asserted in this case involve important and unresolved issues of Virginia constitutional law. . . . Each of the first six counts of the Complaint raises novel and important issues of Virginia law."); Pls.' Reply in Supp. of Mot. to Remand at 7 (E.D. Va. No. 2:12-cv-00446, Sept. 19, 2012) (Doc. 27) ("[T]he remaining state law claims do raise novel and complex issues of state law."). The novelty of Plaintiffs' claim is confirmed by Plaintiffs' failure to present even a single case squarely holding that a putative toll constituted a tax. On the other hand, Defendants have shown courts considering such claims have rejected them. *See, e.g.*, *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 754-57 (E.D. Va. 2011). Lacking any authoritative pronouncement from the Supreme Court of Virginia on Plaintiffs' arguments in the context of tolls, it is plain that the Supreme Court of Virginia "could take a different view of the matter." *In re: Abede*, 466 B.R. 63, 66 (Bankr. E.D. Va. 2012) (finding, as a result, "that the Trustee has set forth a sufficiently strong likelihood of success on the merits" to justify granting his Motion to Stay).

This is especially true given that the Supreme Court of Virginia will consider the questions decided by this Court *de novo*. *Gallagher v. Commonwealth*, 284 Va. 444, 449, 732

S.E.2d 22, 24 (2012) (An appeal that raises "a pure question of law involving constitutional and statutory interpretation" is subject to "a de novo standard of review."); *see Renkey v. County Bd.*, 272 Va. 369, 373, 634 S.E.2d 352, 355 (2006) ("The cross-motions for summary judgment presented the circuit court with a question of law"—contractual and statutory interpretation—that is "subject to de novo review by [the Supreme] Court."). And a judgment holding an act of the General Assembly unconstitutional can expect to receive the most searching review from the Supreme Court, as "[t]here is a strong presumption in favor of the constitutionality of statutes." *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010). "Indeed, '[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.' Any reasonable doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and '[o]nly where it is plainly in violation of the Constitution may the court so decide.'" *Id.* at 590, 701 S.E.2d at 799-800 (internal citation omitted) (quoting *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E.2d 401, 403 (1906) and *Almond v. Gilmer*, 188 Va. 822, 834, 51 S.E.2d 272, 276 (1949)); *accord Gallagher*, 284 Va. at 452, 732 S.E.2d at 25.

Finally, consideration by this Court of the General Assembly's motivations in classifying the Midtown and Downtown Tunnels and MLK Freeway Extension as one project makes the appeal even more substantial. *Compare* (May 1, 2013 Tr. at 151-52) ("The Court recognized the power of the General Assembly to join, bundle, and put cases in the same project. In this particular case, without reaching an opinion on the validity of it, the Court is of the opinion that the bundling of the Downtown Tunnel with the Midtown Tunnel and the Martin Luther King Freeway Extension was a bundling solely to produce revenue."), *with Bd. of Supvrs. of Fluvanna Cnty. v. Davenport & Co., LLC*, No. 121191, Slip Op. at *1 (Va. Apr. 18, 2013) (holding that

questions of legislative motivation for taking a particular vote are beyond the judicial ken and, thus, an action that requires a Virginia court to evaluate "the motivations of" legislators "surrounding their vote" relating to government financing must be dismissed absent waiver). In sum, Defendants submit that they will present a substantial case on the merits on appeal, and, therefore, have carried their burden on the first prong.

B. Irreparable Harm and the Public Interest

The second and fourth factors—the Defendants' irreparable injury absent a stay and the public interest—strongly favor granting a stay in these circumstances. First, VDOT suffers irreparable injury insofar as the Court's order frustrates the sovereign interests of the Commonwealth in the full execution of its laws, specifically in the carrying out of "legislative judgments, made by elected representatives, over complex issues of public policy concerning regional transportation needs." *Corr*, 800 F. Supp. 2d at 753. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Board*, 434 U.S. at 1351); *see also Moore v. Tangipahoa Parish Sch. Bd.*, No. 12-31218, 2013 U.S. App. LEXIS 877, at *28, 2013 WL 141791, at *8 (5th Cir. Jan. 14, 2013) (unpublished) (finding "direct irreparable harm against the State [on the ground that the judgment] deprives the State of the opportunity to implement its own legislature's decisions . . .").

If not stayed, this Court's ruling that "[t]he General Assembly has exceeded its power by ceding the setting of toll rates and taxes in violation of . . . the Constitution of Virginia," (May 1, 2013 Tr. at 152), casts a shadow not only over this Project, but over numerous others formed under the authority of the PPTA, thereby affecting public perceptions of the soundness of the Commonwealth's finances. *See* Dave Forster, "Virginia could be on hook for $1B Midtown

Tunnel debt," The Virginian-Pilot, May 3, 2013, http://hamptonroads.com/2013/05/virginia-could-be-hook-1b-midtown-tunnel-debt. This would be difficult to deny given reporting that "Patrick McSweeney, an attorney for the plaintiffs, predicted the case would hurt the state's credit rating and said it calls into question future use of the Public-Private Transportation Act." Dave Forster, "Judge: Midtown Tunnel toll deal is unconstitutional," The Virginian-Pilot, May 2, 2013, http://hamptonroads.com/2013/05/judge-midtown-tunnel-toll-deal-unconstitutional; *see* Sara Forden, Bloomberg, "Virginia Judge Throws Out Toll Plan for Norfolk Project" (May 3, 2013), http://www.bloomberg.com/news/2013-05-02/virgina-judge-throws-out-toll-plan-for-norfolk-project.html (noting that credit rating agencies have taken note of the ruling and are evaluating its impact on the creditworthiness of the Commonwealth). Although it is not clear what the amount of damage to VDOT or the Commonwealth will be due to delays, contracting premiums, or renegotiated financing arrangements, that uncertainty favors granting a motion to stay because "[g]enerally, 'irreparable injury is suffered when monetary damages are difficult to ascertain or are inadequate.'" *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) (quoting *Danielson v. Local 275*, 479 F.2d 1033, 1037 (2d Cir. 1973)).

Already, in order to "postpone the commencement of the imposition, collection and enforcement of tolls on the Existing Project Assets until January 31, 2014," VDOT has paid $112,500,000, (June 12, 2012 Ltr. of Gregory A. Whirley, VDOT Comm'r of Transp. to Mr. Woodsmall, Interim Chief Executive Officer, ERCO) (Attached as Ex. 1), as permitted by an amendment to the Comprehensive Agreement. *See* Amendment No. 1 to the Comprehensive Agreement Relating to the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project § 3 (Mar. 21, 2012) (hereinafter, "Amendment No. 1") (adding Section

5.01(h)). Were tolls not to commence as scheduled and VDOT obligated to fund the difference, it would have no mechanism to recover those moneys; that loss would be irreparable.

What is more, should further delay of tolling prove necessary, notice would have to be given to ERCO by mid-December and, before that can happen, "funds for the payment of Concessionaire Damages payable as a result of such postponement [must first] have been authorized or appropriated by the General Assembly and allocated by the CTB," thus requiring extraordinary legislative action. Amendment No. 1, § 3; *see* Va. Const. art. IV, § 6 ("The General Assembly shall meet once each year on the second Wednesday in January."); *id*. ("The Governor may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require and shall convene a special session upon the application of two-thirds of the members elected to each house."). In addition, legislative activity may prove necessary to address other projects over which the Court's ruling now casts a cloud.[2]

Plainly, the public interest favors averting even the possibility of such a crisis. *See Mowbray v. Kozlowski*, 725 F. Supp. 888, 891 (W.D. Va. 1989) ("The public undoubtedly has an interest in reducing the drain on the Commonwealth's treasury . . . "); *see also Signature Flight Support Corp. v. Landow Aviation Ltd. P'ship*, 442 F. App'x 776, 785 (4th Cir. 2011) ("Recognizing the contractually bargained-for rights of the parties and upholding the authority of [a public transportation authority] cannot be said to disservice the public.").

[2] *See* Virginia.gov, Virginia Dep't of Transp.: Virginia Toll Facilities, http://www.virginiadot.org/travel/faq-toll.asp (last modified April 1, 2013) (listing all of Virginia's transportation facilities that are tolled). Other than this Project, there are two transportation facilities that are presently collecting tolls pursuant to authority delegated by the PPTA, and two others are expected to begin tolling over the next several years.

C. To the Extent Plaintiffs Would Suffer Any Harm, It Would Pale in Comparison to that Suffered by the Defendants and the Public.

Finally, there is no reason to believe that the Plaintiffs will be substantially injured, much less irreparably so, should the Court proceed with caution, preserving the status quo and granting this stay. *See Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers). The only harm to Plaintiffs is that, should the Virginia Supreme Court not resolve the appeal until after January 31, 2014, the tolls will go into effect as scheduled and Plaintiffs, should they choose to use those routes of transportation, will have to pay a small user fee for the benefit—*e.g.,* $1.59 to $1.84 for light vehicles.[3] Of course, if the judgment is reversed, the Plaintiffs, by paying the tolls, will have lost nothing to which they were legally entitled.

CONCLUSION

The Court should grant Defendants' motion to stay the effect of the judgment pending appeal until the forthcoming appeals have been resolved by the Supreme Court of Virginia.

[3] *See* Defs.' Ex. 30 at 11 (Jan. 31, 2013). These amounts are significantly less than tolls for various other transportation facilities in Virginia and elsewhere in the United States. *See* Defs.' Ex. 31 at 10 (Jan. 31, 2013).

VIRGINIA DEPARTMENT OF
TRANSPORTATION, ET AL.

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CERTIFICATE OF SERVICE

I certify that, on May 14, 2013, a true and accurate copy of the foregoing was sent by email and first class postage prepaid mail to the following counsel for Plaintiffs, Danny Meeks, et al.

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EXHIBIT 1

COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
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Gregory A. Whirley
Commissioner

June 12, 2012

Mr. Greg Woodsmall
Interim Chief Executive Officer
Elizabeth River Crossings Opco LLC
99 Canal Street Plaza, Suite 125
Alexandria, Virginia 22314

RE: Commencement of Tolling on the Existing Project Assets of the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project

Dear Mr. Woodsmall:

I am writing regarding the proposed commencement of tolling of the Existing Project Assets, pursuant to the Comprehensive Agreement for the Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project ("Midtown Tunnel Project"), as amended. All capitalized terms used in this letter shall have the respective meanings set forth in the Comprehensive Agreement.

Please accept this letter as formal notice in accordance with the Comprehensive Agreement that Elizabeth River Crossings Opco LLC ("ERC') is to postpone the commencement of the imposition, collection and enforcement of tolls on the Existing Project Assets until January 31, 2014, subject to the following terms and conditions.

- The Virginia Department of Transportation ("VDOT") and ERC have agreed that the Concessionaire Damages payable as a result of the postponement described herein shall be $112,500,000. This payment constitutes a full and complete settlement of all claims arising from VDOT's election to postpone the commencement of tolls until January 31, 2014.

- VDOT and ERC intend for the $112,500,000 Concessionaire Damages payment to be an increase to the Public Funds Amount and to be used to support the design and construction of the Midtown Tunnel Project.

- The VDOT Funding Account currently is overfunded by $53,395,000 due to adjustments made to the Public Funds Amount on the Financial Close Date pursuant to the

Comprehensive Agreement. On or before August 1, 2012, VDOT will deposit an additional $59,105,000 into the VDOT Funding Account in order to make the additional amount of $112,500,000 available to ERC.

- ERC will be entitled to disbursements from the increase to the Public Funds Amount pursuant to the disbursement request procedure set forth in Exhibit M to the Comprehensive Agreement.

- ERC still is required to satisfy the conditions precedent to tolling the Existing Project Assets described in Section 9.02 of the Comprehensive Agreement prior to the imposition, collection and enforcement of tolls on or after January 31, 2014.

- Nothing in this letter shall be construed as altering any other rights or obligations of ERC pursuant to the Comprehensive Agreement.

I have directed my staff to work with ERC to develop any additional documentation required under the Comprehensive Agreement to memorialize the Concessionaire Damages payable as a result of VDOT's direction to postpone the commencement of tolling until January 31, 2014. Please coordinate that work with Ryan Pedraza with the Office of Transportation Public-Private Partnerships.

If you have any questions or concerns, please contact Mr. Pedraza at 804-371-9870.

Regards,

Gregory A. Whirley, Sr.
Commissioner of Highways

cc: Daniel A. Matthews, Orrick Herrington & Sutcliffe LLP