In the

SUPREME COURT OF VIRGINIA

At Richmond

Record Nos. 091883, 091930

FFW Enterprises,

Petitioner,

-Against-

Fairfax County and the Board of Supervisors of Fairfax County,

Respondents,

After a Decision by the Fairfax Circuit Court
Nineteenth Judicial Circuit of Virginia
Hon. Jane Marum Roush, Judge
Case No. CL-2008-13918

AMICUS CURIAE BRIEF OF THE TAX FOUNDATION IN SUPPORT OF FFW ENTERPRISES, *Petitioner*

Patrick M. McSweeny, Esq.
Virginia Bar No. 5669
McSweeny, Crump, Childress & Temple
11 South Twelfth Street
P.O. Box 1463
Richmond, Virginia 23218
Telephone: 804.783. 6800
Facsimile: 804.782.2130
PMcSweeney@mcsweeneycrump.com
Counsel for Amicus Curiae Tax Foundation

June 01, 2010

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

ASSIGNMENTS OF ERROR

The Tax Foundation adopts the Assignments of Error as set forth by FFW Enterprises, Appellant.

QUESTIONS PRESENTED

The Tax Foundation adopts the Questions Presented as set forth by FFW Enterprises, Appellant.

STATEMENT OF THE CASE

The Tax Foundation adopts the Statement of the Case and Statement of Facts as set forth by FFW Enterprises, Appellant.

INTEREST OF THE AMICUS CURIAE

The Tax Foundation is a non-partisan, non-profit research organization formed in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Tax Foundation seeks to make information about government finance more understandable, accessible, and relevant to the general public, and its economic and policy analysis is guided by principles of sound tax policy: simplicity, neutrality, transparency, and stability. The Tax Foundation's Center for Legal Reform furthers this goal by educating the legal community about economics and principled tax policy.

The Tax Foundation has an institutional interest in this Court's ruling because of our past research on state uniformity clauses and how they advance simple, neutral, transparent, and stable tax systems. This research can be helpful to this Court, particularly since it is likely that this Court's decision will be cited as authority by other state courts confronting similar uniformity clause questions.

Patrick M. McSweeny, attorney for *amicus curiae*, is an attorney practicing civil litigation in Richmond, Virginia.

SUMMARY OF ARGUMENT

Uniformity clauses meaningfully restrain legislative power to classify taxpayers. Virginia's Uniformity Clause, in Article X § 1 of the state Constitution, limits the General Assembly's power to classify property within a special district when the public improvement benefits the entire designated territory.

While the Uniformity Clause pertains to uniformity within a class of properties, the court below erred in holding that the General Assembly could make any classification it chooses and exempt any properties from that class as long as uniformity exists within the class. In Virginia, as in other states, such provisions mandate that the legislature classify real property to confer equal treatment on similarly situated taxpayers. Thus, when a special district tax is imposed for the benefit of the locality, state uniformity provisions require tax levies across all properties within the geographic scope of the taxed district.

This Court's decisions requiring geographic equality are consistent with the U.S. Supreme Court's and state Supreme Court's decisions invoking uniformity clauses to bar differential treatment of property within the benefited territory. If the analysis of the trial court were upheld, the result would be absurd, permitting the General Assembly to make any

discriminatory classification and rendering the Uniformity Clause a dead letter.

The District and Transportation Tax laws are designed under the theory of benefits conferred. The laws designate territories to be burdened with a tax on the presumption that benefits will inure to all properties within. However, the laws also create conflicting property-specific classifications which are based on the theory of special assessments. As the U.S. Supreme Court has observed, district-wide taxes for public benefit are uniform when they include similarly situated properties. Thus, the tax laws here – stating a purpose to benefit localities while taxing only specific types of properties – are neither rational nor uniform. It is further irrational to believe that a Metrorail extension will serve the interests of only commercial and industrial landowners (and sometimes leasehold estates), when entire districts benefit from the improvements.

If the District and Transportation Tax laws survive constitutional scrutiny, legislative classifications could routinely overburden select groups of private property to finance benefits enjoyed by the broader public. Vesting the General Assembly with the power to make such narrow classifications could create a federal takings challenge, as current law

holds that unequal taxation above benefits conferred is a taking of private property for public benefit.

ARGUMENT

I. THE DECISION OF THE TRIAL COURT UNDERMINES THE PURPOSE OF THE UNIFORMITY CLAUSE AS A MEANINGFUL RESTRAINT ON THE STATE'S TAXING POWER.

Uniformity clauses provide strict restraints on legislatures' ability to distinguish among similarly situated taxpayers, even in states where the clauses have been construed to permit legislatures significant flexibility in creating tax classifications. As the U.S. Supreme Court has observed, uniformity clauses are "narrow and sometimes cramping," putting "inflexible restrictions upon the taxing powers of the state." *Nashville, C. & St. L. Ry. V. Browning*, 310 U.S. 362, 368 (1940). The trial court's holding ignores this principle, in accepting the County's argument that the Virginia Constitution merely requires uniformity within any classification the General Assembly creates. Such an interpretation would impose a uniformity rule after the fact, when the General Assembly has already defined the taxable class and arbitrarily exempted some taxpayers. The consequences would be absurd, permitting any legislative classification to be inherently constitutional.

Virginia's Uniformity Clause,[1] VA. CONST. art. X § 1, like nearly identical uniformity provisions in other state constitutions, prevents such results by mandating uniformity in the classification process itself. [2] Simply put, the Uniformity Clause not only relates to uniformity within the taxable class, but also requires equal treatment of similarly situated taxpayers.

A. Uniformity Clauses Restrict Legislatures' Power to Classify Property, Prohibiting Arbitrary Treatment of Similarly Situated Taxpayers.

Uniformity is not subordinate to the legislature's choice of classification; rather, the legislature's choice of classification is restricted by the Uniformity Clause's principle of equality. 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1036 (1974) [hereinafter HOWARD]. Tax classifications are particularly vulnerable to constitutional scrutiny "where an attempt is made to exercise legislative discretion in

[1] That provision states, in pertinent part: "All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government." VA. CONST. art. X, § 1 (1971).

[2] Ten states share the Virginia provision's language requiring uniformity specifically upon the same class of subjects – Arizona, Washington, South Dakota, North Dakota, Pennsylvania, Louisiana, Idaho, Delaware, Georgia, and Colorado.

choosing between individuals and things to be taxed". William L. Matthews, Jr., *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 KY. L.J. 31, 62 (1949 -1950) [hereinafter *Matthews*]. In Virginia and other states, classifications among types of property have been narrowly construed and are generally permitted only with express constitutional language. Additionally, Virginia's uniformity provision requires equal treatment of similarly situated taxpayers when as here, a tax is levied on the theory of benefits conferred. Thus, the trial court erred in accepting the County's argument that the Uniformity Clause permits the General Assembly unfettered discretion in choosing which property it may identify as the object of taxation.

1. Uniformity Clauses Prohibit Arbitrary Treatment of Similarly Situated Taxpayers, Even Where Legislatures Have Discretion to Make Tax Classifications.

The trial court held that the Uniformity Clause permits the General Assembly to make any classification for tax purposes, but the court neglected the underlying rule that uniformity is required among all properties which are the subject matter of the tax. Uniformity provisions were enacted in the nineteenth century to specifically limit legislatures' plenary revenue-raising powers, serving as a "constitutional strait jacket" on classification. David A. Myers, *Open Space Taxation and State*

Constitutions, 33 VAND. L. REV. 837, 868-69 (1980) [hereinafter *Myers*]; *see also* JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION I: CONSTITUTIONAL LIMITATIONS AND CORPORATE INCOME AND FRANCHISE TAXES 8.07 [2-21] (3d ed. 1998). [hereinafter HELLERSTEIN & HELLERSTEIN]. Consequently, when a legislature selects properties and persons for differential taxation, its actions are particularly vulnerable to constitutional scrutiny. *Matthews*, at 62.

In most states, uniformity provisions have traditionally precluded any legislative classification among real property, not merely requiring uniformity "within a class." *See, e.g.*, *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395, 396 (1897) (referencing state uniformity clause's recent amendment to prohibit financial institution from being charged less than its just proportion of property *ad valorem* taxes). Such an approach is still employed in Illinois, Kansas, North Dakota, Ohio, Pennsylvania, and Tennessee. *See Matthews*, at 62. As late as 1959, twenty states had similarly strict approaches to classification of real property, permitting only those exemptions stated in their state constitutions. These included Alabama, Arkansas, California, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin,

and Wyoming. *See* WADE J. NEWHOUSE JR., CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 665 (1959) (hereinafter "NEWHOUSE").

In states (such as Virginia) where uniformity is required "on all property of the same class," the constitutional prohibition on differential treatment of similarly situated taxpayers remains. *See, e.g.*, *Glasco v. State ex rel. Okla. Dep't of Corrs.*, 2008 Ok. 65, 188 P.3d 177, 186 (2008) ("Art. 5, § 46 mandates in absolute terms statewide procedural uniformity for an entire class of similarly situated persons or things."); *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, 291, 93 P.3d 486, 491 (2004) ("Arizona's Uniformity Clause provides greater protection for taxpayers than does the Equal Protection Clause of the Fourteenth Amendment and is designed to ensure that each taxpayer's property bear the just proportion of the property tax burden.") (internal citations omitted); *Devlin v. City of Philadelphia*, 580 Pa. 564, 593, 862 A.2d 1234, 1251 (2004) ("[W]e cannot independently discern a legitimate distinction that would permit us to escape the conclusion that the tax scheme imposes substantially unequal tax burdens upon persons otherwise similarly situated.") (internal quotations omitted); *Bond v. Burrows*, 103 Wash.2d 153, 157, 690 P.2d 1168, 1170 (1984) ("[W]hile the taxing authority is free to impose different tax burdens on different classes, the rule requires that taxation of a class

shall be uniform within the limits of the authority levying the tax. A tax levied for state purposes shall be uniform throughout the state; a tax levied for county purposes shall be uniform throughout the county; and so on."); *Simmons v. Ericson*, 54 S.D. 429, 223 N.W. 342, 344 (1929) (invalidating an exemption of agricultural lands in a special tax district) (reversed by constitutional amendment permitting the exemption, in *Great N. Ry. V. Whitfield*, 65 S.D. 173, 272 N.W. 787, 791-92 (1937)).

This rationale is shared by states with different types of uniformity provisions. *See generally Allen v. Town of West Windsor*, 177 Vt. 1, 2, 852 A.2d 627, 629 (2004) ("The need for uniformity derives from the constitutional command that no taxpayer pays a disproportionate share of the public tax burden."); *Virden v. Schaffner*, 496 S.W.2d 846, 848 (Mo. 1973) (*citing 508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823, 830-31 (Mo. 1965) ("As far as the uniformity requirement is concerned the legislative body may lawfully tax the gross receipts from one phase of the operation of the hotel or motel business and not tax the gross receipts from another phase of the operation of that business, as long as the tax operates alike on all hotels and motels similarly situated and equally on all similar sources of revenue."); *Town of Monticello v. Banks*, 48 Ark. 251, 2 S.W. 852, 853 (1887) ("The ordinance also violates the constitutional

principle of uniformity in the imposition of the burden, vacant lots similarly situated being exempted.").

This Court has pronounced an identical rule in several contexts, linking the concept of uniformity to equality among taxpayers in a geographic area for tax purposes. *See, e.g.*, *Brunswick County v. Peebles & Purdy Co.*, 138 Va. 348, 122 S.E. 424, 426 (1924) ("'[T]he district for the apportionment of a state tax is the state, for a county tax the county, and so on. Subordinate districts may be created * * * but the principle is general, and in all subordinate districts the rule must be the same.'") (internal citation omitted); *Woolfolk v. Driver*, 186 Va. 174, __, 41 S.E.2d 463 (1947) (finding the uniformity clause to prohibit exempting some towns within the county from a tax when it is imposed on the entire county); *Campbell v. Bryant*, 104 Va. 509, __, 52 S.E. 638, 640 (1905) ("[A] part of a county cannot be made to bear all the burden of taxation for county purposes; and the uniformity required by Va. Const. § 168 extends not only to the rate and mode of assessment, but also to the territory to be assessed, and when a tax is levied by a county it must be uniform throughout the county."); *Day v. Roberts*, 101 Va. 248, __, 43 S.E. 362, 363 (1903) ("[U]niformity must be co-extensive with the territory to which it applies. If a tax is imposed by the Commonwealth of Virginia, it must be uniform over the whole State; if by a

county, city, town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable"). As a noted Virginia commentator has said:

> The uniformity language of section 1, together with the exemption provisions of section 6, has proved useful to strike down what one might call special exemptions. One such device is a provision in a town charter…exempting all town residents from county taxes. Other techniques include an agreement whereby taxpayers undertaking to make certain improvements would receive tax exemptions for a period of years...or an agreement to pay a lump sum in lieu of taxes. All these devices have been declared unconstitutional as outright infringements on uniformity, as permitting lack of uniformity to develop as assessments change in the future, or as taxation by agreement rather than by general law.

HOWARD, at 1042 (internal citations omitted).

Even in a state having no principle of uniformity in the state constitution, such as New York, the principle of equality among taxpayers has led to limitations on the legislative power to classify similarly situated taxpayers. New York's Court of Appeals has held that "not only is uniformity required in rates and in assessment among similarly situated taxpayers, but geographic uniformity is also required." *Foss v. City of Rochester*, 65 N.Y.2d 247, 261, 480 N.E.2d 717, 725 (1985) (invalidating a disparity in county taxes on non-homestead properties in a city versus similar types of property located outside the city). *See also In re Howell's Estate*, 255 N.Y. 211, 217, 174 N.E. 457, 459 (1931) (finding equal treatment of similarly

situated persons and equal imposition of tax to be restraints on the Legislature's right of selection and power to tax).

The challenged District and Transportation taxes are unconstitutional under either broad or narrow interpretations of the Uniformity Clause. Residential real property should not receive an arbitrary exemption from a tax which is imposed on a territorial basis for public benefits to that area. Even if Virginia had no uniformity clause, the tax laws violate fundamental principles of equality among similarly situated taxpayers because the "integrity of any system of taxation, and particularly real property taxation, rests upon the premise that similarly situated taxpayers pay the same share of the tax burden". *Foss*, 480 N.E.2d at 720.

2. Uniformity Provisions Require Legislatures to Distinguish Among Similarly Situated Properties Through Constitutional Amendment.

Uniformity clauses preclude legislative enactment for tax classifications to such a degree that they have been dubbed "constitutional amendment breeders." *See, e.g.*, Frank P. Grad*, The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 969-70 (1968) [hereinafter *Grad*]. Consequently, amendments to uniformity clauses have been forthcoming.

In the 1970s alone, 16 of 22 states with "uniformity structures interpreted to require the strictest of uniformity" had to pass constitutional amendments to authorize tax exemptions for open space land, forest land, and agricultural land. NEWHOUSE, 665; *see* MYERS, 848. Yet, even in Virginia and other states which permit legislative discretion to classify real property, constitutional amendments were required to permit blanket exemptions for specific types of real property for environmental purposes.

The necessity of constitutional amendments demonstrates that uniformity provisions apply by default to real property unless specially exempted in the constitution. This interpretation is consistent with the views of the Virginia Commission on Constitution Revision, which recognized the "tension between the principles of universality, uniformity, and equality…in sections 1 and 2 of Article X and the principles of exemption…in section 6." HOWARD, 1071. The Commission discussed this tension in its 1969 report, and noted that "'[t]he basic policy ought to be one of equality in the tax structure, and exemptions, *widely applied, undercut this policy*.'" *Id.* at 1071 (citing H. Doc. No. 1, 1969 Ex. Sess.) (emphasis added).

Others states also narrowly construe the scope of legislative classification power created by constitutional amendment. *See, e.g.*, *Jacobs v. Lexington-Fayette Urban County Gov't*, 560 S.W.2d 10, 14 (Ky.

1978) (declining to extend amendment permitting differential *ad valorem* tax rates to differential personal property rates); *City of E. Orange v. Township of Livingston*, 102 N.J. Super. 512, 535, 246 A.2d 178, 190 (1968) (interpreting an amendment relating to municipally owned farmland to not confer similar status upon municipally owned watersheds). *See also* Grad, 54 VA. L. REV. at 966 ("[E]xpress and detailed prohibitions and limitations form a major source of constitutional inflexibility, rigidity is fostered to the same extend by express and direct grants of power to the legislature.").

The fact that Article X includes permissive and mandatory property class exemptions does not give the General Assembly more discretion to pick and choose among taxpayers for classification purposes. Rather, the presence of specific exemptions to the Uniformity Clause makes it more difficult for the General Assembly to create classifications at its discretion. The presence of exceptions does not mean the rule no longer exists.

When the Uniformity Clause was amended in 1901-02 to require uniformity "within a class," opponents to the amendment argued that such a rule would "give the General Assembly an unchecked power to pass discriminatory taxes under the guise of classification." HOWARD, at 1029. This debate foreshadows the County's argument here, which undermines

the purpose of the Uniformity Clause and permits the General Assembly unchecked power to discriminate among taxpayers.

Article X states that certain property "and no other" shall be exempted for tax purposes, and the detailed property exemptions in Section 2 and Section 6 show that the Uniformity Clause limits the General Assembly's ability to classify real property. VA. CONST. art. X §§ 2, 6

B. Uniformity Has Particular Application to Taxes Levied on the Theory of Benefits Conferred.

This Court's understanding of the Uniformity Clause in *City of Hampton v. Ins. Co. of North America*, 177 Va. 494, 494-96, 14 S.E.2d 396 (1941), is consistent with the Virginia Founders' motivation for enacting the Uniformity Clause, to "prohibit discriminatory geographical classifications and prevent one section of the lands from financing improvements particularly beneficial to it while making the other lands bear the burdens." HOWARD, at 1038.

City of Hampton is also consistent with the U.S. Supreme Court's analysis of the theory of taxes based on benefits conferred. In *Valley Farms Co. v. Westchester County*, 261 U.S. 155, 163 (1923), the Court permitted a state to establish special tax districts, but held that none of the lands within the tax district "may escape liability solely because they will not receive direct benefits." *See also Allegheny Pittsburgh Coal Co. v. County*

Comm'n of Webster County, West Virginia, 488 U.S. 336, 345 (1989) ("[T]he fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings."); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959) (finding the Equal Protection Clause to require the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.); *Cheseboro v. Los Angeles County Flood Control Dist.*, 306 U.S. 459, 463-64 (1939) ("[T]he State…may establish local districts to include real property that it finds will be specially benefited … [and] may impose special tax burdens upon the lands benefited.")

It is generally understood that real property in a city benefits from improvements in the surrounding area, and that that improvement will factor into properties' market value from the time the improvement plans are announced. *See, e.g.*, 70C AM. JUR. 2D Special or Local Assessments § 23 (2010). The Washington Metrorail project in particular has resulted in property value increases for both residential and commercial property proximate to stations. *See, e.g.*, ZACHARY SCHRAG, THE GREAT SOCIETY SUBWAY: A HISTORY OF THE WASHINGTON METRO (2006) 1, 221-42; Robert Cervero, *Rail Transit and Joint Development: Land Market Impacts in*

Washington, D.C. and Atlanta, 60 JOURNAL OF THE AMERICAN PLANNING ASSOCIATION 1, 83-94 (1994).

Special district taxes are properly levied on the whole territory where the improvement appears, and the "benefit is presumed to accrue not to the present uses of the land but to the land itself." 70C AM. JUR. 2D Special or Local Assessment, § 23 (2010). Where the purpose behind a particular tax is that benefits will be realized by the area surrounding the planned improvement, as here, courts have invalidated non-geographical classifications under state uniformity provisions. *See generally* HELLERSTEIN & HELLERSTEIN, [2-21]. *See also Put In Bay Island Taxing Dist. v. Colonial, Inc.*, 65 Ohio St. 3d 449, 450, 605 N.E.2d 21, 22 (1992), *cert denied*, 508 U.S. 930 (1993) (invalidating state law that authorized extra sales taxes on islands in Ohio, noting that "all laws of a general nature shall have a uniform operation throughout the state."); *Martin v. Ellis*, 242 Ga. 340, 344, 249 S.E.2d 23, 26 (1978) (striking differential treatment of property in unincorporated areas outside municipalities, when property within the municipality was subject to a disproportionate tax burden); *Woodlard v. Thomas*, 238 Ark. 162, 164, 381 S.W.2d 453, 454 (1964) (invalidating ad valorem tax levied on tax on property in one of two judicial districts of a county, when public safety improvements being financed were for the

county as a whole); *Drey v. State Tax Comm'n*, 345 S.W.2d 228, 236-37 (Mo. 1961) (reasoning that uniformity still requires like classification of real property and uniform taxes on the same class of subjects even though perfect equality in distribution of the tax burden is not possible); *State Tax Comm'n v. Wakefield*, 222 Md. 543, 563, 161 A.2d 676, 686 (1960) (holding that separate classification of certain land for tax purposes contravened limitations on classification in uniformity provision); *Supervisors of Manheim Tp., Lancaster County v. Workman*, 350 Pa. 168, 175-76, 38 A.2d 273, 276-79 (1944) (invalidating street-light tax because it was not uniform within the territorial limit of the township and was imposed only on a specified district.)

The challenged tax laws in this case are the appropriate platform for the Court to correct the General Assembly's misstep in creating arbitrary classifications of property owners within the territorial jurisdiction which should equally bear the burden of the tax. The challenged tax statutes are exactly the type of arbitrary legislative tax classifications which Art. X § 1 was enacted to prevent.

The Uniformity Clause is a strict restraint on the General Assembly's power to classify property owners who will benefit from the Metrorail extension and other local transportation improvements. Along with other

states' similar provisions, Virginia's Uniformity Clause requires uniform treatment of taxpayers who stand to benefit from a local public improvement. This Court should reverse the lower court because Uniformity Clause renders the challenged tax laws unconstitutional.

II. THE CHALLENGED TAX LAWS ARE BASED ON BENEFITS CONFERRED BUT IRRATIONALLY CREATE CONFLICTING TAXPAYER CLASSIFICATIONS.

The Transportation and District Tax laws are irrational because they create conflicting territorial and property-specific classifications under a single theory of taxation based on benefits conferred. A classification is constitutionally uniform when it includes properties within a geographic area that share like characteristics, "except as to classes of property expressly segregated for either State or local taxation, by the Constitution." *East Coast Freight Lines v. City of Richmond*, 194 Va. 517, 527, 74 S.E.2d 283, 289 (1953). When a territory is designated for the burden of a tax for public benefits, the inherent assumption is that all properties will be commonly benefited. If all are to be benefited in a special district by a special tax, it is irrational to create a conflicting classification that designates only some property types to be specially benefited.

A. <u>When the General Assembly Creates Taxes to Fund Public Improvements, the Proper Standard for a Tax Classification is the Territory to be Specially Benefited.</u>

When a tax is based on the theory of benefits conferred, the appropriate classification to be made by the legislature is to define the territory which will benefit specially or directly from the public improvement. *See, e.g.*, THOMAS M. COOLEY, LAW OF TAXATION 138 (1876) ("Nor do these [uniformity] provisions require the rate of assessment to be equal for all purposes throughout the state, but only to be equal and uniform throughout the district for which the tax is levied."). *See also Dep't of Local Gov't Fin. v. Griffin*, 784 N.E.2d 448, 452-53 (Ind. 2003) ("This means that as a general proposition, [the Uniformity Clause] requires that a tax for a state purpose must be uniform and equal throughout the state, a tax for a county purpose must be uniform and equal throughout the county, and so forth."); *Kendall v. Douglas, Grant, Lincoln, and Okanogan Counties Public Hosp. Dist. No. 6*, 118 Wash. 2d 1, 12, 820 P.2d 497, 503 (1991) ("All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only."); *Jarvill v. City of Eugene*, 289 Or. 157, 191, 613 P.2d 1, 19 (1980) ("Closely related to benefits as a basis for tax classification is the special taxing district in which property in an area is specially taxed to defray the cost of one or more public services specially benefiting that property. * * * The classification can be based on the benefits received from

expenditure of the revenue derived from the charges. Sometimes, indeed, the courts seem to speak interchangeably of classifying property and of including it in a special taxing district."); *Supervisors of Manheim Tp.,* 350 Pa. at 171, 38 A.2d at 275 ("Obviously the tax under consideration was not uniform within the territorial limits of the township for it was imposed only upon the properties within the district specified."); *Vine St. Commercial P'ship v. City of Marysville*, 547 Wash.App. 541, 547, 989 P.2d 1238, 1242 (1999) ("[T]heir properties will be specially benefited by the improvement, for which they will be assessed in direct proportion to the amount of the special benefit that each of them will enjoy").

In contrast, when a tax is premised on the theory of special assessments, specific types or areas of property are assessed for the special benefit they receive individually over and above the benefits to surrounding area. Uniformity clauses mandate that legislatures distribute the tax burden among those upon whom benefits are conferred, a principle expounded upon by the U.S. Supreme Court:

> [S]ince the period when express provisions have been made in many of the state constitutions requiring uniformity and equality of taxation, several courts [have perceived that] the special benefit actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that the cost of a local improvement can be assessed on particular

> property only to the extent that it is specially and peculiarly benefited, and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.

Village of Norwood v. Baker, 172 U.S. 269, 287 (1898) (citing JOHN F. DILLON, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS, Section 761 (1872)).

The Supreme Court has also noted that property-specific and territory-specific classifications are distinct. A state legislature can create a tax district and levy therein a "general tax based on the assessed valuation of all property within a district, to pay for a public improvement, so long as its not an abuse or arbitrary exercise of its power." *See Valley Farms Co. v. Westchester County*, 261 U.S. 155, 157 (1923). Alternatively, the legislature can create a special tax levied on individual properties for special benefits conferred to those properties. *See, e.g.*, *Browning v. Hooper*, 269 U.S. 396, 403 (1926) (Noting that where funds for public improvement may be raised by general taxes or special assessments, and when certain properties are singled out for taxation within a road district, "it is clear that the burdens [on the taxpayers] are special assessments for local improvements"). *See also Village of Norwood*, at 287 ("Special benefits to the property assessed (that is, benefits received by it in addition to

those received by the community at large) are the true and only just foundation upon which local assessments can rest").

A legislature may impose a tax classification on the special properties to be benefited or provide a tax districting plan to specify which territories are to be benefited. As the Supreme Court observed in *Village of Norwood* uniformity clauses have placed particular restrictions on a legislatures' ability to classify and exempt certain properties in a district which stands to benefit from the tax. Further, if specific properties are targeted and others are exempted, the tax is a special assessment. *See id.*

B. Property-Specific Classifications Are Irrational When Tax Laws Define a Territory to Be Specially Benefited.

The laws at issue here state that the taxes are for the benefit of the district or locality of the improvement. As the County notes, the Transportation Tax was enacted by the General Assembly to permit certain localities to impose a special tax. Br. in Opp. to Petition for Appeal, at 2. The statute gives local jurisdictions two options to impose the tax, both based on "specially classified" territories–either all properties within the tax jurisdiction's boundaries or regional districts within its boundaries. The statute also notes that the purpose of the tax is to create special transportation improvements to "benefit the locality imposing the tax". *See* VA. CODE. ANN. § 58.1-3221.3(B)-(D). Yet, upon establishing that an entire

locality is to benefit from the tax, the statute irrationally imposes the tax only on a select group of real property.

The District Tax, codified in a Virginia Code section entitled "Transportation Districts Within Certain Counties," similarly creates special transportation districts based on territorial classification. VA. CODE. ANN. § 33.1-435. The purpose of the tax is to fund transportation improvements for the benefit of the special district, yet the only taxpayers who pay are commercial, industrial, and residential apartment building owners. Even the landowners who submitted a petition for the tax indicated that residential properties would benefit, noting in their petition: "[C]itizens of Fairfax County…and all travelers to and from the Nation's Capital would derive extraordinary benefits" from the improvement. Appendix at 26.

The challenged tax laws create two conflicting schemes of taxpayer classification. The General Assembly defined the tax's purpose as *ad valorem* taxes based on the theory of benefits conferred, but created special assessments on only certain types of properties. The result is an inconsistent statute that defies common sense. "Despite the strong presumption in favor of the constitutionality of statutes and the low hurdle imposed by the rational basis standard, where that standard has not been met both the Supreme Court and this court have struck down taxes as

violative of the Equal Protection and Uniformity Clauses." *Council of Indep. Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300, 317 (Minn. 2006). This Court should do so here.

III. THE CHALLENGED TAX LAWS THREATEN TO PROMOTE TAXPAYER DISCRIMINATION.

It is irrational to conclude that commercial property owners are the only beneficiaries of a public improvement erected in a defined public improvement district. If such a theory survived constitutional scrutiny, legislative classifications could routinely overburden select groups of private property to finance benefits enjoyed by the broader public. Such classifications would then be prone to a federal takings challenge because as the General Assembly's classification becomes increasingly specific to a certain type of property, a tax based on benefits conferred takes the nature of a special assessment. As the U.S. Supreme Court has held in *Village of Norwood v. Baker*:

> [T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

172 U.S. 269, 279 (1898). *See also Thomas v. Gain*, 35 Mich. 155, 162 (1876) ((citing *Tide-Water Co. v. Coster*, 18 N.J. Eq. 527, 528 (1866) ("[I]t is generally agreed that an assessment levied without regard to actual or

probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses."); *McCormack v. Patchin* 53 Mo. 33, 36 (1873) ("A law which would attempt to make one person, or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation").

The decision of the trial court impermissibly gave the General Assembly the power to create special tax classifications under the guise of district-wide taxes while burdening specific types of private property for public benefit of the public. The method created by the General Assembly to raise revenues for the Metrorail improvements may be administratively and politically convenient, but it creates exactly the type of discriminatory tax classification that the Virginia Constitution prevents.

CONCLUSION

For the foregoing reasons, *Amicus* Tax Foundation respectfully requests that the decision of the trial court be reversed.

Date: June 1, 2010

Respectfully submitted,

Patrick M. McSweeny, Esq.
Attorney of Record
Virginia Bar No. 5669
McSweeny, Crump, Childress & Temple
11 South Twelfth Street
P.O. Box 1463
Richmond, Virginia 23218
Telephone: 804.783. 6800
Facsimile: 804.782.2130
PMcSweeney@mcsweeneycrump.com

Counsel for Amicus Curiae Tax Foundation

RULE 5.26(D) CERTIFICATE OF SERVICE

Case: *FFW Enterprises v. Fairfax County et. al*

Record Nos. 091883, 091930

I, Patrick M. McSweeny, am over the age of eighteen years, a resident of Virginia, and not party to the within action. My business address is 11 South Twelfth Street, P.O. Box 1463, Richmond, Virginia 23218. I served the within document:

AMICUS CURIAE BRIEF OF THE TAX FOUNDATION
IN SUPPORT OF FFW ENTERPRISES, *Petitioner*

by depositing three true copies thereof, enclosed in a sealed envelope with postage fully pre-paid, in a mailbox regularly maintained by the Government of the United States at Richmond, Virginia, to each person listed below, addressed as follows:

CHRISTOPHER W. WALKER, VSB #35491
ATTORNEY AT LAW
10740 Parkridge Boulevard
Suite 110
Reston, Virginia 20191
T: (703) 758-3807
F: (703) 391-0909
cwalker@cwalker.com
Counsel for Parkridge 6, LLC

JAMES N. MARKELS, VSB #68399
JACKSON & CAMPBELL, P.C.
1120 Twentieth Street, N.W.
South Tower, Third Floor
Washington, DC 20036
T: (202) 457-1600
F: (202) 457-1678
jmarkels@jackscamp.com
Counsel for FFW Enterprises

THOMAS O. LAWSON, VSB #4975
LAWSON & SILEK, PLC
10805 Main Street
Suite 200
Fairfax, Virginia 22030
T: (703) 352-2615
F: (703) 352-4190
thomaso.lawson@verizon.net

PETER L. CANZANO, VSB #76571
A. FRANCIS ROBINSON, *Pro Hac Vice*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
T: (202) 736-8350
F: (202) 736-8711
pcanzano@sidley.com
frobinson@sidley.com
Counsel for Fairfax County Economic Development Authority

DAVID P. BOBZIEN, VSB #12027
JAMES V. MCGETTRICK, VSB #14436
MICHAEL H. LONG, VSB #23112
FAIRFAX COUNTY ATTORNEY'S OFFICE
12000 Government Parkway
Suite 549
Fairfax, Virginia 22035
T: (703) 324-2421
F: (703) 324-2665
david.bobzien@fairfaxcounty.gov
james.mcgettrick@fairfaxcounty.gov
michael.long@fairfaxcounty.gov

Counsel for Fairfax County, Virginia;
Board of Supervisors, Fairfax County, Virginia

And by submitting an electronic copy to the email address scvbriefs@courts.state.va.us as a Microsoft Word © document and by depositing fifteen copies with the office of the Clerk of the Supreme Court of Virginia at the following address:

C/O Patricia L. Harrington

Clerk of the Court
Supreme Court of Virginia
P.O. Box 1315
100 North Ninth Street, 5th Floor
Richmond, VA 23219-1315
Phone: (804) 786-2251

Dated: June 1, 2010

By: _____

Patrick M. McSweeny, Esq.
Virginia Bar No. 5669
McSweeny, Crump, Childress & Temple
11 South Twelfth Street
P.O. Box 1463
Richmond, Virginia 23218
Telephone: 804.783. 6800
Facsimile: 804.782.2130
PMcSweeney@mcsweeneycrump.com