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**Vol. 5 No. 2, Spring 2014; "You Can't Handle the Truth" . . . Well, the States That Is: The Legality of State-Imposed Transfer Taxes on Fannie Mae, Freddie Mac, and the Federal Housing Finance Agency**

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**“You Can’t Handle the Truth” . . . Well, the  
States That Is: The Legality of State-Imposed  
Transfer Taxes on Fannie Mae, Freddie Mac,  
and the Federal Housing Finance Agency**

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### I. INTRODUCTION

I think it's salutary to ask yourself, over and over, if what you believe is true or just expedient, true or just comfortable or worse, *just profitable*? Truth is never finally entirely graspable, but neither is it entirely unknowable; glimpses of it come to the courageous, the curious, the diligent . . . .<sup>1</sup>

Intuitively, can a state tax the federal government? Most people respond to this question with a resounding “NO!” However, there are a few people—primarily state, city, and county officials—who believe the federal government owes them something more in the form of excise taxes on the purchase of property. This Comment proposes clear and rational reasoning to explain why the Federal National Mortgage Association (hereinafter “Fannie Mae” or “Fannie”), the Federal Home Loan Mortgage Corporation (hereinafter “Freddie Mac” or “Freddie”) (together the “Entities”), and the Federal Housing Finance Agency (hereinafter “FHFA”) should be regarded as exempt from paying state transfer taxes on the recording of real property deeds. The core of this Comment rests on the supposition that it is error to conclude that Fannie Mae and Freddie Mac must pay transfer taxes on the purchase of real property. Decisions to the contrary are counterintuitive to a majority of legal decisions and principles concerning the immunity of government instrumentalities from “all taxation” imposed by any local taxing authority.<sup>2</sup>

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1. Tony Kushner, *10 Questions for . . . Tony Kushner*, N.Y. TIMES (June 4, 2004), <http://www.nytimes.com/2004/06/04/readersopinions/kushner-questions.html?pagewanted=all> (emphasis added).

2. 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008).

This Comment proposes that Congress explicitly provided federal instrumentality status to Fannie Mae and Freddie Mac and also provided clear and unambiguous exemptions to Fannie, Freddie, and FHFA from “*all taxation now or hereafter imposed by any State, . . . county, municipality, or local taxing authority,*” with the exception of any real property owned by the Entities or FHFA.<sup>3</sup> What is more, the United States Supreme Court has consistently held that Fannie and Freddie are federal instrumentalities created by Congress to serve vital roles for the welfare of the public.<sup>4</sup>

This Comment provides an in-depth analysis of arguments supporting Fannie, Freddie, and FHFA’s exemption from “all taxation” by states and local taxing authorities. Part II provides a brief history and background of Fannie, Freddie, and FHFA. Part III presents a brief discussion of the federal statutes exempting Fannie, Freddie, and FHFA. Part IV presents a survey of state transfer tax statutes. Part V reviews the most relevant cases concerning the transfer tax issue. Part VI offers evidence of Fannie’s and Freddie’s label as government instrumentalities, including Congress’s intent to establish Fannie and Freddie as instrumentalities and historical and contemporary cases holding the same.

Part VII is the crux of this Comment. Part VII proposes that precedents such as *M’Culloch v. Maryland* and *Osborn v. Bank of the United States* hold that states do not have legal authority to tax an instrumentality of the federal government.<sup>5</sup> Rather, the Supremacy Clause of the United States Constitution expressly provides that the federal statutes exempting the Entities from state taxation are supreme over the state transfer tax provisions; the plain language of the exemption statutes clearly and unambiguously exempt the Entities from state taxation; and the term “all taxation” includes excise taxes (e.g., a sales tax), as well as direct taxes. Part VIII concludes by contending that as conservator of Fannie and Freddie, the FHFA is charged with taking any action “necessary to put the regulated entity in a sound and solvent condition,” and any action “appropriate to carry on the business of the regulated entity and preserve and conserve

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3. See 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008) (Fannie Mae); 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac); 12 U.S.C. § 4617(j)(2) (2006 & Supp. II 2008) (FHFA) (emphasis added).

4. See *infra* Part VI.

5. See *M’Culloch v. Maryland*, 17 U.S. 316, 317 (1819); *Osborn v. Bank of the U. S.*, 22 U.S. (9 Wheat.) 738 (1824).

the assets and property of the regulated entity.”<sup>6</sup> As named federal agencies, and with the fact that Congress explicitly provided a taxation exemption to the FHFA when acting as a conservator, Fannie, Freddie, and FHFA are exempt from state transfer taxes.<sup>7</sup>

## II. THE HISTORY AND BACKGROUND OF FANNIE MAE, FREDDIE MAC, AND FHFA

Fannie Mae and Freddie Mac were originally created by Congress as federal instrumentalities in 1938 and 1970, respectively.<sup>8</sup> However, both became private, publicly traded corporations—Fannie Mae in 1968<sup>9</sup> and Freddie Mac in 1989.<sup>10</sup> FHFA is a federal agency created in 2008 to act as conservator of the Entities and the Federal Home Loan Banks.<sup>11</sup>

Reacting to the Great Depression, the New Deal policies led by President Franklin D. Roosevelt sought to create a government-sponsored entity to combat the widespread foreclosures and disparate interest rates consuming the national mortgage market.<sup>12</sup> President Roosevelt’s National Emergency Council suggested the creation of Fannie Mae and other housing agencies in order to provide “a program for long-term, federally-insured mortgages and the creation of national mortgage associations to purchase these mortgages.”<sup>13</sup>

In 1970, under the Emergency Home Finance Act, Congress created Freddie Mac to purchase conventional mortgages,<sup>14</sup> while at the same time also permitting Fannie Mae to purchase the same mort-

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6. 12 U.S.C. § 4617(b)(2)(D) (2006 & Supp. II 2008).

7. *See id.*; 12 U.S.C. § 4617(j)(1)-(2) (2006 & Supp. II 2008); Nevada *ex rel.* Hager v. Countrywide Home Loans Servicing, LP, 812 F. Supp. 2d 1211, 1218 (D. Nev. 2011).

8. Government Sponsored Enterprises, FED. HOUSING FIN. AGENCY, <http://www.fhfa.gov/Default.aspx?Page=33> (last visited Dec. 28, 2012).

9. 12 U.S.C. § 1717 (2006 & Supp. II 2008).

10. Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §§ 1451-1459 (2006).

11. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. § 4617 *et seq.* (2006 & Supp. II 2008)).

12. Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077, 1081 (2007).

13. *Id.*

14. Pub. L. No. 91-351, § 303, 84 Stat. 450, 452-53 (codified as amended at 12 U.S.C.A. §§ 1421-1428(a) (West, Westlaw current through 2012 session)).

gages.<sup>15</sup> “Freddie Mac was expected to purchase mortgages from savings and loan associations, while Fannie Mae was expected to purchase primarily from commercial banks and mortgage banks.”<sup>16</sup>

Soon after the housing market crash of 2008, FHFA replaced the Office of Federal Housing Enterprise Oversight (OFHEO) as conservator of the Entities.<sup>17</sup> FHFA is an independent agency of the federal government that was created on July 30, 2008, by way of the Housing and Economic Recovery Act of 2008.<sup>18</sup> “The Act gave FHFA the authority necessary to oversee vital components of our country’s secondary mortgage markets—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.”<sup>19</sup>

Following the collapse of the housing market and the looming financial market crisis, Congress placed the Entities under FHFA’s control. “On September 6, 2008, the Director of FHFA placed the Entities into FHFA’s conservatorship ‘for the purpose of reorganizing, rehabilitating or winding up [their] affairs.’”<sup>20</sup> Congress recommended that FHFA be granted conservatorship of the Entities because the ability of Fannie Mae and Freddie Mac to achieve “their public missions is important to providing housing in the United States and the health of the Nation’s economy, [therefore] more effective Federal regulation is needed to reduce the risk of failure of the [Entities].”<sup>21</sup> The director of FHFA, James Lockhart III, United States Treasury Secretary, Henry Paulson, and Federal Reserve Bank Chairman, Ben Bernanke unanimously agreed with Congress that in order to ensure the financial soundness of the Entities and the mortgage market, FHFA should be placed as conservator of the Entities.

With a very turbulent market facing our nation, the strengthening of the regulatory and supervisory over-

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15. Pub. L. No. 91-351, § 201, 84 Stat. 450, 450-51 (codified as amended at 12 U.S.C. § 1717(b) (2006 & Supp. II 2008)).

16. Forrester, *supra* note 12, at 1081 (referencing James E. Murray, *The Developing National Mortgage Market: Some Reflections and Projections*, 7 REAL PROP. PROB. & TR. J. 441, 445-46 (1972)).

17. About FHFA, FED. HOUSING FIN. AGENCY, <http://www.fhfa.gov/Default.aspx?Page=4> (last visited Dec. 28, 2012).

18. 12 U.S.C. § 4511 (2006 & Supp. II 2008).

19. FED. HOUSING FIN. AGENCY, *supra* note 17.

20. 12 U.S.C. § 4617(a)(2) (2006 & Supp. II 2008), quoted in *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 871 F. Supp. 2d 662, 664 (E.D. Mich. 2012).

21. 12 U.S.C. § 4501(2) (2006 & Supp. II 2008).

sight of the 14 housing-related GSEs is imperative. FHFA's mission is to provide effective supervision, regulation and housing mission oversight of Fannie Mae, Freddie Mac and the Federal Home Loan Banks to promote their safety and soundness, support housing finance and affordable housing, and support a stable and liquid mortgage market.<sup>22</sup>

Moreover, Henry Paulson provided that FHFA was appointed conservator of the Entities to “provid[e] stability to financial markets, support[] the availability of mortgage finance, and protect[] taxpayers—both by minimizing the near term costs to the taxpayer and by setting policymakers on a course to resolve the systemic risk created by the inherent conflict in the GSE structure.”<sup>23</sup>

Under conservatorship, Fannie Mae and Freddie Mac operate to “provide liquidity, stability and affordability to the mortgage market.”<sup>24</sup> Fannie and Freddie present mortgage companies, banks, and other financial institutions the opportunity to access funds on reasonable terms, which in turn allow the banks and financial institutions to offer affordable loans to finance housing.<sup>25</sup> “Fannie Mae and Freddie Mac buy mortgages from lenders and either hold these mortgages in their portfolios or package the loans into mortgage-backed securities (MBS) that are sold to the public.”<sup>26</sup>

### III. FEDERAL STATUTES EXEMPTING FANNIE AND FREDDIE FROM STATE TRANSFER TAXES

Pursuant to their missions as creators of “secondary market facilities for residential mortgages” and “provide[rs] [of] stability in the secondary market for residential mortgages,”<sup>27</sup> the Entities purchase a myriad of mortgages throughout the country. The Entities then lo-

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22. FED. HOUSING FIN. AGENCY, *supra* note 17.

23. Press Release, Secretary Henry M. Paulson, Paulson Statement on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>.

24. *Government Sponsored Enterprises*, FED. HOUSING FIN. AGENCY, <http://www.fhfa.gov/Default.aspx?Page=33> (last visited Dec. 28, 2012).

25. *See id.*

26. *Id.*

27. 12 U.S.C. § 1716 *et seq.* quoted in *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 716 F.3d 935, 937 (6th Cir. 2013).

cate a buyer for a foreclosed property, convey the property, and record the deed.<sup>28</sup> However, when the Entities offer the deed for recording, they claim they are exempt from paying the transfer tax under both federal and state law.<sup>29</sup>

Congress exempted the Entities and FHFA from “all taxation” imposed by any state, county, or municipality, providing an exception for taxes on real property.<sup>30</sup> Specifically, Fannie Mae’s federal charter maintains that Fannie Mae, “including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, *shall be exempt from all taxation now or hereafter imposed by any State, . . . county, municipality, or local taxing authority,*” with the exception of any real property owned by Fannie Mae.<sup>31</sup> Similarly, Freddie Mac’s charter provides that Freddie Mac, “including its franchise, activities, capital, reserves, surplus, and income, *shall be exempt from all taxation now or hereafter imposed . . . by any State, county, municipality, or local taxing authority,*” with the exception of any real property owned by Freddie Mac.<sup>32</sup> Likewise, in accordance with its authority over Fannie Mae and Freddie Mac,<sup>33</sup> Congress granted FHFA, as conservator of the Entities, “including its franchise, its capital, reserves, and surplus, and its income, *shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority,*” with the exception of any real property owned by FHFA in its conservator status.<sup>34</sup>

#### IV. STATE TRANSFER TAX STATUTES REQUIRING FANNIE AND FREDDIE TO PAY TAX ON THE RECORDING AND TRANSFER OF PROPERTY

Across the nation, many states have enacted statutes that seek to collect taxes from the transfer and recording of real property purchased within their respective borders. The following statutes from

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28. *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 871 F. Supp. 2d 662, 664 (E.D. Mich. 2012).

29. *Id.*

30. 12 U.S.C. § 1723(a)(c)(2) (2006 & Supp. II 2008) (Fannie Mae) 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac); 12 U.S.C. § 4617(j)(2) (2006 & Supp. II 2008) (FHFA).

31. 12 U.S.C. § 1723(a)(c)(2) (2006 & Supp. II 2008) (emphasis added).

32. 12 U.S.C. § 1452(e) (emphasis added).

33. 12 U.S.C. § 4511(b)(2) (2006 & Supp. II 2008).

34. 12 U.S.C. § 4617(j)(1), (2) (emphasis added).



Illinois, Ohio, and North Carolina establish how states collect taxes on the transfer and recording of real property within the state, county, or municipality.

#### A. ILLINOIS TRANSFER TAX

Illinois requires purchasers of real property to pay tax on the recording and transfer of the property deed.<sup>35</sup> Illinois taxes transfers of property within the State and levies an obligatory privilege tax of \$0.50 per every \$500.00 of assessed real property value, notwithstanding an applicable exemption.<sup>36</sup> Counties then collect the tax and deposit the revenue into the treasury.<sup>37</sup> The county board of each Illinois county levies an excise tax of up to \$0.25 for each \$500.00 of the real property's assessed value on the transfer of real property, notwithstanding an applicable exemption.<sup>38</sup> Similarly, the Illinois Compiled Statutes permit home rule counties and home rule municipalities, correspondingly, to levy a subsequent excise tax on transfers of real property, notwithstanding an applicable exemption.<sup>39</sup> However, deeds of real property acquired and transferred by "any governmental body or from any governmental body" are exempt from the transfer tax statutes.<sup>40</sup>

#### B. OHIO TRANSFER TAX

Ohio has two county taxes, both of which are paid by the grantor of a real property deed before the deed is recorded.<sup>41</sup> The first tax is a mandatory statewide tax that requires the auditor in each county to collect \$0.10 per \$100.00 of the value of the transferred real property.<sup>42</sup> The second tax authorizes each county to levy a transfer tax on

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35. 35 ILL. COMP. STAT. 200/31-1, *et seq.* (2012 State Bar Edition).

36. 35 ILL. COMP. STAT. 200/31-10 (2012 State Bar Edition).

37. *Id.*

38. 55 ILL. COMP. STAT. 5/5-1031 (2012 State Bar Edition).

39. 55 ILL. COMP. STAT. 5/5-1031.1 (2012 State Bar Edition); 65 ILL. COMP. STAT. 5/8-3-19 (2012 State Bar Edition).

40. 35 ILL. COMP. STAT. 200/31-45 (2012 State Bar Edition) (providing that transfers of real property "acquired by any governmental body or from any governmental body" are exempt under Article 31); 55 ILL. COMP. STAT. 5/5-1031(a) ("All deeds . . . exempted in Section 31-45 shall also be exempt from any tax imposed pursuant to this section.").

41. OHIO REV. CODE ANN. §§ 319.54(G)(3), 322.02 (West, Westlaw current through 2012 session).

42. *Id.* § 319.54(G)(3).

real property “[f]or the purpose of paying the costs of enforcing and administering the tax and providing additional general revenue for the county . . . at a rate not to exceed thirty cents per hundred dollars for each one hundred dollars . . . .”<sup>43</sup>

### C. NORTH CAROLINA TRANSFER TAX

North Carolina imposes transfer taxes, which are collected following the conveyance of real property, but prior to presentation of the deed for recordation.<sup>44</sup> North Carolina’s excise tax collects \$1.00 per \$500.00 of value transferred from the grantor.<sup>45</sup> The county is then authorized to retain 2% of the tax proceeds in compensation for the county’s effort in “collecting and remitting the State’s share of the tax.”<sup>46</sup> North Carolina also authorizes at least six counties to levy an additional transfer tax of \$1.00 per \$100.00 of value transferred from the grantor.<sup>47</sup>

## V. CASES THAT HAVE DEALT WITH THE TRANSFER TAX ISSUE

### A. *OAKLAND COUNTY V. FEDERAL HOUSING FINANCE AGENCY* (ROUND I)

States won a preliminary victory after the District Court for the Eastern District of Michigan granted summary judgment in favor of Oakland County.<sup>48</sup> The *Oakland County v. Federal Housing Finance Agency* decision arose from certain Michigan county representatives who demanded that the defendants—Fannie Mae, Freddie Mac, and FHFA—pay the Michigan Real Estate Transfer Tax<sup>49</sup> and the County Real Estate Transfer Tax.<sup>50</sup> “The statutes impose[d] a tax by the State of \$7.50 per \$1,000 in value on the property sold, and by the County

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43. *Id.* § 322.02(A).

44. N.C. GEN. STAT. ANN. § 105-228.30(a) (West, Westlaw current through 2012 session).

45. *Id.*

46. *Id.* § 105-228.30(b).

47. Complaint, *Henderson Cnty. v. Fed. Hous. Fin. Agency*, 2012 WL 3191437, at ¶ 10 (W.D.N.C. 2012) (No. 1:12-cv-216).

48. *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 871 F. Supp. 2d 662, 671 (E.D. Mich. 2012).

49. MICH. COMP. LAWS ANN. § 207.521 *et seq.* (West, Westlaw current through 2012 session).

50. *Id.* § 207.501 *et seq.*

of \$1.10 per \$1,000.”<sup>51</sup> In holding Fannie, Freddie, and FHFA liable for both of the transfer taxes, the court reasoned that the federal statutory exemption from “all taxation” applied only to direct taxes, as opposed to excise taxes.<sup>52</sup>

The court further ruled that Fannie and Freddie were not government instrumentalities and thus were not exempt under the Michigan statute.<sup>53</sup> The court reasoned that, under the Supreme Court’s decision in *United States v. Wells Fargo Bank* and numerous other Supreme Court cases, Michigan’s Transfer Tax is an excise tax “which is levied upon the use or transfer of property,” whereas a direct tax is “levied upon the property itself.”<sup>54</sup> However, assuming there would be subsequent litigation concerning the transfer taxes, the court certified for appeal the legal issue of whether the federal statutes exempting the Entities and FHFA from “all [state and local] taxation” apply to transfer taxes imposed under Michigan statutes,<sup>55</sup> stating that “[t]here is substantial ground for difference of opinion as to that question . . . .”<sup>56</sup>

B. *NEVADA EX REL. HAGER V. COUNTRYWIDE HOME LOANS SERVICING, LP*

The District Court for the District of Nevada ruled in favor of Fannie Mae and FHFA after plaintiffs brought suit under Nevada’s False Claim Act.<sup>57</sup> In *Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, plaintiffs filed suit “on behalf of the State of Nevada and all seventeen counties in the State.”<sup>58</sup> Plaintiffs claimed that Fannie and FHFA, among others, were required to pay transfer taxes<sup>59</sup> under Nevada statute.<sup>60</sup> Plaintiffs’ complaint alleged that the Entities and FHFA purchased “thousands” of properties and transferred the same amount of titles while “completely or partially”

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51. *Oakland Cnty.*, 871 F. Supp. at 663-64.

52. *Id.* at 670.

53. *Id.*

54. *Id.* at 667 (quoting *United States v. Wells Fargo*, 485 U.S. 351, 356 (1988)).

55. MICH. COMP. LAWS ANN. § 207.501 *et seq.*; *Id.* § 207.521 *et seq.*.

56. *Oakland Cnty.*, 871 F. Supp. at 671.

57. *Nevada ex rel. Hager v. Countrywide Home Loans Servicing, LP*, 812 F. Supp. 2d 1211 (D. Nev. 2011).

58. *Id.* at 1213.

59. *Id.*

60. NEV. REV. STAT. § 375.030(2) (2009).

avoiding payment of transfer taxes.<sup>61</sup> In granting Fannie and FHFA's motion to dismiss, the court held that although "Fannie Mae is not a federal instrumentality for taxation purposes,"<sup>62</sup> FHFA "is an independent agency of the federal government who has authority over Fannie Mae."<sup>63</sup> As such, the court found that while under conservatorship with the FHFA, Fannie Mae is statutorily exempt from taxes, penalties, and fines to the same extent as FHFA.<sup>64</sup>

C. *HAGER V. FEDERAL NATIONAL MORTGAGE ASSOCIATION*

The Entities and FHFA won another victory following a decision by the District Court for the District of Columbia, which held that Fannie Mae and Freddie Mac were exempt from District of Columbia's recordation tax.<sup>65</sup> In *Hager*, plaintiffs brought a reverse false claim<sup>66</sup> alleging that the Entities and FHFA "knowingly invoke[d] exemptions to which they were not entitled."<sup>67</sup> The D.C. recordation statute imposes a recordation tax (excise tax) when "[a] deed that conveys title to real property' or 'a security interest instrument is submitted for recordation.'"<sup>68</sup> The court narrowed the issue to a single legal question: whether the Entities are, in fact, exempt from the recordation tax.<sup>69</sup> The court answered in the affirmative, reasoning the language of the federal statutes exempting Fannie Mae and Freddie Mac "is sweeping and unambiguous."<sup>70</sup> The Entities "*shall be exempt from all taxation* imposed by D.C., with a single, narrow exception all agree is inapplicable here. The recordation tax is undoubtedly a form of taxation imposed on the Entities. That should be 'the

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61. *Nevada ex rel Hager*, 812 F. Supp. at 1214.

62. *Id.* at 1215.

63. *Id.* at 1217 (citing 12 U.S.C. § 4511(a)-(b) (2006 & Supp. 2008)).

64. *Id.* at 1218.

65. *Hager v. Fed. Nat'l Mortg. Ass'n*, 882 F. Supp. 2d 107 (D.D.C. 2012).

66. D.C. CODE § 2-381.02(a)(6) (2011). The District of Columbia False Claims Act authorizes damages against a person who "[k]nowingly makes or uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the District." *Id.*

67. *Hager*, 882 F. Supp. 2d at 109.

68. D.C. CODE § 42-1103(a)(1)(A), (a)(3) (2011), quoted in *Hager*, 882 F. Supp. 2d at 108.

69. *Hager*, 882 F. Supp. 2d at 111.

70. *Id.*

end of the matter.”<sup>71</sup> Plaintiffs urged the court to allow them to file an amended complaint. However, the court ruled that “because no new allegations could cure the complaint's core deficiency, amendment would be futile.”<sup>72</sup> Accordingly, the court dismissed the complaint with prejudice.<sup>73</sup>

#### D. OAKLAND COUNTY V. FEDERAL HOUSING FINANCE AGENCY (ROUND II)

What was seen as a preliminary victory in the first *Oakland County* district court case turned into a disaster when the Sixth Circuit Court of Appeals handed down an appeal that took the wind out of the States’ sails. The court held that Fannie, Freddie, and FHFA were, in fact, exempt from Michigan’s transfer tax.<sup>74</sup>

The court began their opinion with this subtle revelation: “In an effort to get around the *plain language* of the exemption statutes, [the Michigan counties] argue that when Congress exempted the defendants from ‘all taxation,’ it did not intend to exempt them from state and county real estate transfer taxes.”<sup>75</sup> The major issue before the court was whether the congressional exemptions from “all taxation” exempted the Entities from Michigan’s state and county transfer taxes.<sup>76</sup> The court first examined the actual language of the exemption statutes and found that the “statutes at issue . . . *plainly* state that defendants are exempt from ‘all taxation.’”<sup>77</sup> Although neither “all” nor “taxation” is defined in the statutes, the “everyday understanding” of the terms should be implied.<sup>78</sup> Basically, the court interpreted “all taxation” to include just that—all taxation from state and county transfer taxes.<sup>79</sup>

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71. *Id.* at 111-12 (emphasis added) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)) (internal quotation marks omitted).

72. *Hager*, 882 F. Supp. 2d at 113 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

73. *Id.*

74. *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 716 F.3d 935, 944 (6th Cir. 2013).

75. *Id.* at 936 (emphasis added).

76. *Id.* at 939.

77. *Id.* at 940 (emphasis added).

78. *Id.* (citing *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)).

79. *Id.* “A straightforward reading of the statute leads to the unremarkable conclusion that when Congress said all taxation, it meant all taxation.” *Oakland Cnty.*, 716 F.3d at 940 (citing *Lopez*, 549 U.S. at 53). *See also Sander v. Alexander Richardson Inv.*, 334 F.3d 712, 716 (8th Cir. 2003) (“In short, ‘all’ means all.”).

However, one of the best rationales was the court's explanation of the missing "carve-out" in the federal exemption statute from the transfer of deeds purchased by the Entities. The court expounded on how Congress carved out from exemption the taxation of real property but failed to add a similar carve-out for real estate transfer taxes.<sup>80</sup> "Accordingly, because the statutes are clear, we are not in a position to second-guess Congress and create a new exception in the statute for state and county real estate transfer taxes."<sup>81</sup>

The court then analyzed two essential entity exemption cases—the Supreme Court case *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*<sup>82</sup> and a Sixth Circuit case *United States v. State of Michigan*<sup>83</sup>—“for the proposition that when Congress broadly exempts an entity from ‘taxation’ or ‘all taxation’ it means *all* taxation.”<sup>84</sup> In *Bismarck*, the Court interpreted a statutory exclusion that exempted “every Federal land bank . . . from . . . State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank . . . .”<sup>85</sup> Similarly, the exclusion in *Michigan* exempted:

Federal credit unions . . . [,] their property, their franchises, capital, reserves, surpluses, and other funds, and their income . . . from all taxation now or hereafter imposed by . . . any State, . . . or local taxing authority; except that any real property . . . shall be subject to . . . State, . . . and local taxation to the same extent as other similar property is taxed.<sup>86</sup>

The court reasoned that in both cases the statutory exemptions “precluded a sales tax on the entities’ purchases, even though sales taxes were not a specifically enumerated exemption in the statute.”<sup>87</sup>

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80. *Oakland Cnty.*, 716 F.3d at 940 (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.” (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000))).

81. *Id.* at 941.

82. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

83. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988).

84. *Oakland Cnty.*, 716 F.3d at 941.

85. *Id.* at 940-41 (quoting *Bismarck*, 314 U.S. at 96 n.1).

86. *Id.* at 941 (internal quotation marks omitted) (citing *Michigan*, 851 F.2d at 805 n.1 (quoting 12 U.S.C. § 1768)).

87. *Id.*

In its holding, the Sixth Circuit explicitly rejected Oakland County's "arcane" argument that when Congress exempted the Entities from "all taxation," they did not actually mean "all taxation;" Congress merely used the "all taxation" phrase "as a term of art" that did not include the transfer taxes in question.<sup>88</sup> The plaintiffs, Oakland County et al., used the *Wells Fargo* line of reasoning which holds that statutory exemptions from "all taxation" applies only to a *direct* tax on the property itself, rather than an *excise* tax on the use or transfer of the property.<sup>89</sup> The court found this argument lacked merit based on four specific reasons: (1) the *Wells Fargo* line of reasoning dealt with an exemption of the *property*—not an exemption of a governmental *entity*; (2) plaintiffs failed to mention why the *Wells Fargo* decision and its progeny should overrule the *Bismarck* line of reasoning which holds that governmental instrumentalities cannot be taxed by any state where the federal government has exempted that instrumentality from taxation; (3) whether the Michigan taxes fall directly on the Entities or on a privilege of transferring the property is moot given that the plain language of the Michigan statute applies directly to the Entities themselves; and (4) following the plaintiff's argument that "all taxation" means only "direct taxation" would lead to an "absurd" result that undermines the previous rulings of the Supreme Court.<sup>90</sup>

## VI. FANNIE AND FREDDIE ARE FEDERAL INSTRUMENTALITIES

When fashioning the Entities' charters, Congress explicitly exempted Fannie and Freddie from having to qualify to do business in any state<sup>91</sup> and exempted Fannie and Freddie from all state taxation (with the exception of real estate taxes).<sup>92</sup> Congress made it clear that Fannie and Freddie perform a significant governmental purpose by stabilizing the secondary mortgage market,<sup>93</sup> and that the federal government has high awareness and concern in mortgage market as-

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88. *Id.* at 941-42.

89. *Oakland Cnty.*, 716 F.3d at 942. See *infra* Part VIII.A for a detailed analysis of the *Wells Fargo* case and its progeny.

90. *Oakland Cnty.*, 716 F.3d at 943. See *infra* Part VII.B for a detailed analysis of the *Bismarck* line of reasoning.

91. *Fed. Nat'l Mortg. Ass'n v. Lefkowitz*, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975) (citing 12 U.S.C. § 1723a(a) (2006)).

92. *Id.* (citing 12 U.S.C. § 1723a(c)(1) (2006)).

93. See 12 U.S.C. §§ 1716(1), 1719(a)(1) (2006 & Supp. II 2008).

sistance,<sup>94</sup> thereby showing that Congress has both explicitly and impliedly afforded federal instrumentality status to Fannie Mae and Freddie Mac.

There is nothing in the legislative history or in the statutes governing the operation of Fannie Mae and Freddie Mac that supports the conclusion that they are not government instrumentalities operating under the federal government. Congress clearly intended that Freddie Mac would operate and be treated as a federal instrumentality. This intent is reflected throughout Fannie Mae and Freddie Mac's Charter Acts. For example, Congress provided that Fannie Mae shall be immune from state and local taxation<sup>95</sup> and shall have continuous existence as an entity until dissolved by a separate act of Congress.<sup>96</sup> Similarly, Congress further provided that Freddie Mac shall be immune from state and local taxes,<sup>97</sup> shall be deemed a federal "agency" for purposes of bringing suit as a plaintiff,<sup>98</sup> report annually and directly to Congress,<sup>99</sup> and have continuous existence as an entity until dissolved by a separate act of Congress.<sup>100</sup> These provisions constitute conclusive signals that Fannie Mae and Freddie Mac are to be treated as instrumentalities of the federal government.

It is no coincidence that Congress, when chartering Fannie Mae and Freddie Mac, failed to explicitly mention that Fannie and Freddie did not have the characteristics of federal instrumentalities. In fact, over the years, Congress has established dozens of government-sponsored corporations that had limiting text in their charters expressly exempting them from federal agency or instrumentality purposes.<sup>101</sup> For example, the Corporation for Public Broadcasting's (CPC) charter states that CPC "will not be an agency or establish-

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94. See *Lefkowitz*, 390 F. Supp. at 1368.

95. 12 U.S.C. § 1723(a) (2006 & Supp. II 2008).

96. *Id.* § 1717.

97. *Id.* § 1452(e).

98. *Id.* § 1452(f).

99. See *id.* § 1456(f).

100. 12 U.S.C. § 1452(c).

101. See, e.g., 49 U.S.C. § 24301(a)(3) (2006) (chartering the National Railroad Passenger Corporation (Amtrak), which "is not a department, agency or instrumentality of the United States Government"); 42 U.S.C. § 3932(a) (2006) (chartering the National Housing Partnership Corporation, which "will not be an agency or establishment of the United States Government"); 36 U.S.C. § 152401 (2006) (chartering the National Recording Preservation Foundation as a federal corporation, which "is not an agency or establishment of the United States Government"); *Id.* § 152601 (2006) (chartering the Help America Vote Foundation, which "is not an agency or establishment of the United States Government").



ment of the United States Government.”<sup>102</sup> Similarly, the Legal Services Corporation (LSC) charter provides that LSC “shall not be considered a department, agency or instrumentality, of the Federal Government.”<sup>103</sup> Nowhere in Fannie Mae or Freddie Mac’s charter does Congress explicitly state that the Entities “shall not be an instrumentality of the federal government.”<sup>104</sup> If Congress intended the Entities not to have the characteristics of, or be considered as, a federal instrumentality, Congress undoubtedly would have stipulated that sentiment in Fannie’s and Freddie’s charters.

Federal agencies have also consistently recognized Fannie’s and Freddie’s designation as a federal instrumentality. The Office of Federal Housing Enterprise Oversight (OFHEO)—an agency created exclusively by Congress to oversee Fannie and Freddie, which subsequently merged with the Federal Housing Finance Board to establish FHFA<sup>105</sup>—noted that “[t]he Enterprises are Federal instrumentalities [and were] established under Federal law to effect various broad public policy purposes.”<sup>106</sup> Additionally, the Securities and Exchange Commission (SEC) has repeatedly acknowledged that Fannie and Freddie are federal instrumentalities of the United States for purposes of federal securities laws.<sup>107</sup> The SEC affirmed its position even after Fannie and Freddie voluntarily registered their common stock under the Exchange Act, which required the Entities, for the first time, to file periodic reports with the SEC.<sup>108</sup> The SEC provided that the Entities’s “voluntary registration” would not affect their status as an “agency, authority or instrumentality of the United States” with regards to federal securities laws, and that all “[s]ecurities issued or

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102. 47 U.S.C. § 396(b) (2004).

103. 42 U.S.C. § 2996b(a) (1986); 42 U.S.C. § 2996d(e)(1) (1974).

104. See 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008) (Fannie Mae); 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac).

105. *Office of Federal Housing Enterprise Oversight*, ALLGOV (2013), <http://www.allgov.com/departments/department-of-housing-and-urban-development-hud/office-of-federal-housing-enterprise-oversight?agencyid=7407>.

106. Rules of Practice and Procedure, 66 C.F.R. § 18040-01 (2001).

107. See Fed. Home Loan Mort. Corp., SEC No-Action Letter, 1971 WL 9616 (Sept. 18, 1971); Fed. Nat’l Mortg. Ass’n, SEC No-Action Letter, 1988 WL 234392 (May 25, 1988).

108. See Fed. Home Loan Mortg. Corp., SEC No-Action Letter, 2002 WL 1493134, at \*2-3 (Jul. 12, 2002); Fed. Nat’l Mortg. Ass’n, SEC No-Action Letter, 2002 WL 32165826, at \*1-2 (Jul. 12, 2002).

guaranteed by [the Entities] are exempt securities under the Securities Act of 1933.”<sup>109</sup>

Other federal entities such as the Congressional Budget Office and Congressional Research Service have provided that Freddie Mac is an instrumentality of the United States. The Congressional Budget Office declared that government-sponsored enterprises, including Fannie Mae and Freddie Mac, are treated as federal instrumentalities, as opposed to private corporations.<sup>110</sup> Likewise, the Congressional Research Service described Fannie Mae and Freddie Mac as an “instrumentality of government” which it defined as a:

[P]rivately-owned institution not subject to any of the general management laws and regulation unless so indicated in its enabling legislation (charter). An instrumentality is assigned in its charter limited prerogatives (e.g., immunity from state taxation) normally associated with the government’s sovereign authority. . . . [An instrumentality] is supervised but not directly managed by the federal government.<sup>111</sup>

Contemporary cases have also treated Fannie and Freddie as federal instrumentalities of the federal government.<sup>112</sup> In *Paslowski v. Standard Mortgage Corporation of Georgia*, plaintiffs filed a class action suit against Freddie Mac alleging breach of contract, violations of the Pennsylvania Unfair Trade Practices and Consumer Protection

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109. See Fed. Home Loan Mortg. Corp., SEC No-Action Letter, 2002 WL 1493134, at \*2-3 (Jul. 12, 2002); Fed. Nat’l Mortg. Ass’n, SEC No-Action Letter, 2002 WL 32165826, at \*1-2 (Jul. 12, 2002).

110. See CONG. BUDGET OFFICE, EFFECTS OF REPEALING FANNIE MAE’S AND FREDDIE MAC’S SEC EXEMPTIONS 1 (2003), available at <http://www.cbo.gov/publication/14415>.

111. KEVIN R. KOSAR, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 13 (2007).

112. See, e.g., *Mendrala v. Crown Mortg. Co.*, 955 F.2d 1132, 1140 (7th Cir. 1992) (finding Freddie Mac is a federal instrumentality that is afforded Merrill doctrine protection); *McCauley v. Thygerson*, 732 F.2d 978, 982 (D.C. Cir. 1984) (“[Freddie Mac] should be considered a federal entity for purposes of deciding the proper scope of promissory estoppel.”); *Rust v. Johnson*, 597 F.2d 174 (9th Cir. 1979) (finding Fannie Mae is federal instrumentality in regards to property interests in foreclosure cases); *Deerman v. Fed. Home Loan Mortg. Corp.*, 955 F. Supp. 1393, 1400 (N.D. Ala. 1997) (finding Freddie Mac is a federal instrumentality that is afforded Merrill doctrine protection), *aff’d*, 140 F.3d 1043 (11th Cir. 1998); *Fed. Nat’l Mortg. Ass’n v. Lefkowitz*, 390 F. Supp. 1364, 1368 (S.D.N.Y. 1975) (noting that there is “little doubt that Congress intended [Fannie Mae] to be recognized as a federal instrumentality”).

Law, and breach of fiduciary duty regarding administration of plaintiffs' mortgage loan agreements.<sup>113</sup> Freddie had purchased plaintiffs' mortgages but allowed third parties, so-called "servicers," to control the operation of the mortgages.<sup>114</sup> The court found that Freddie Mac "is a federal instrumentality that is entitled to protection . . . from liability for the unauthorized acts of its sellers/servicers" under the ostensible *Merrill* doctrine.<sup>115</sup> The court further held that when agents of Freddie Mac are accused of misrepresentations beyond the scope of their authority, Freddie "cannot be estopped or bound by the unauthorized acts or conduct of its agents."<sup>116</sup>

Furthermore, a survey of the cases involving the Federal Land Banks and the Federal Home Loan banks reveals that, just as the banks are treated as federal instrumentalities,<sup>117</sup> Fannie Mae and Freddie Mac are also treated as *federal instrumentalities engaged in the performance of governmental functions* even though their stock may be privately owned.<sup>118</sup> In *Federal Land Bank of St. Louis v. Priddy*, the Supreme Court affirmed its previous rulings that federal land banks "are instrumentalities of the federal government, engaged in the performance of an important governmental function."<sup>119</sup> The Court's reasoning was partially based on the fact that the land banks "partake of the sovereign character of the United States" and the fact that Congress has the authority to "determine the extent to which they may be subjected to suit and judicial process."<sup>120</sup>

In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, the Supreme Court affirmed the holding in *Priddy* that the federal land

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113. *Pasowski v. Standard Mortg. Corp. of Ga.*, 129 F. Supp. 2d 793, 795-98 (W.D. Pa. 2000).

114. *Id.*

115. *Id.* at 801. The *Merrill* doctrine provides that the federal "government cannot be estopped or bound by the unauthorized acts or conduct of its agents or its employees has been widely applied in a variety of contexts." *See id.* at 800.

116. *Id.*

117. *Fed. Land Bank v. Priddy*, 295 U.S. 229, 231 (1935); *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 101-04 (1941); *Fahey v. O'Melveny & Myers*, 200 F.2d 420, 446, 454 (9th Cir. 1952); *Willhoit v. Fahey*, 345 U.S. 952 (1953); 12 U.S.C. §§ 692, 1426 (2006 & Supp. II 2008).

118. *Priddy*, 295 U.S. at 231 (emphasis added); *Rust v. Johnson*, 597 F.2d 174, 178 (1979).

119. *Priddy*, 295 U.S. at 231 (citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)); *Fed. Land Bank v. Gaines*, 290 U.S. 247 (1933).

120. *Priddy*, 295 U.S. at 231.

banks are “instrumentalities of the federal government.”<sup>121</sup> The Court further opined that Congress has the authority to insulate and shield instrumentalities that it has constitutionally established,<sup>122</sup> a “conclusion [that] follows naturally from the express grant of power to Congress ‘to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States.’”<sup>123</sup>

Supreme Court precedent further establishes that in order for Congress to create a constitutionally valid corporation, such as Fannie Mae and Freddie Mac, the corporation must be a federal instrumentality established to carry out governmental functions.<sup>124</sup> In *M’Culloch v. Maryland*, the Supreme Court held that Congress has the authority to create federal corporations.<sup>125</sup> *M’Culloch* also provided that Congress’s power is limited to creating corporations, which will serve as “instruments,” executing the authority of the federal government.<sup>126</sup> The Court in *Federal Land Bank of Wichita v. Board of County Commissioners* ruled that a corporation created by Congress, owned by private shareholders, and which may incur a profit or loss on their shares is still a federal instrumentality constitutionally created to execute governmental functions.<sup>127</sup> Consequently, if Congress wished to remain in accordance with its constitutionally granted powers, it may only establish a corporation that is an instru-

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121. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102 (1941) (quoting *Priddy*, 295 U.S. at 231).

122. *Id.*

123. *Id.* at 102-03 (quoting U.S. CONST. art. I, § 8, cl. 18).

124. *See Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529 (1894) (“Congress . . . may create corporations . . . executing the powers of [the federal] government.”); *Bismarck*, 314 U.S. at 102 (“It . . . follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental.”) (citations omitted); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (finding the operations of a federal corporation is always governmental, “not partly public or partly private . . .”); *Fed. Land Bank of Wichita v. Bd. of Cnty. Comm’rs*, 368 U.S. 146, 150-51 (1961) (“[T]he Federal Government performs no ‘proprietary’ functions. If the enabling Act is constitutional and if the instrumentality’s activity is within the authority granted by the Act, a governmental function is being performed.”).

125. *See M’Culloch v. Maryland*, 17 U.S. 316 (1819).

126. *Id.* at 420. *See also Osborn v. Bank of the U.S.*, 22 U.S. 738, 860 (1824) (“It has never been supposed that congress could create . . . [a private] corporation . . . . [T]he case of *McCulloch v. Maryland*, is founded on . . . the idea that the [corporate] bank is an instrument which ‘is necessary and proper for carrying into effect the powers vested in the government of the United States.’”).

127. *See Fed. Land Bank of Wichita*, 368 U.S. at 150-51.

mentality of the United States. As such, because Fannie and Freddie were created by Congress to serve the public in creating affordable mortgages, a legitimate government function, Fannie and Freddie are both instrumentalities of the federal government.

## VII. LEGAL INTUITIVENESS: STATES CANNOT TAX THE FEDERAL GOVERNMENT

The crux of this Comment rests on the proposition that state governments cannot tax the federal government. I have coined this argument “legal intuitiveness” because people who have knowledge of the Federal Constitution and how it relates to the states, through either the Fourteenth Amendment or case precedent, intuitively know that states cannot tax the federal government. As laid out previously, Congress exempted Fannie, Freddie, and FHFA from “all taxation” levied by states, counties, or municipalities.<sup>128</sup> Moreover, since Fannie and Freddie are federal instrumentalities that act under the authority of the federal government,<sup>129</sup> states that attempt to collect transfer taxes following the purchase of real property are usurping well established precedent that holds states cannot tax the federal government.<sup>130</sup>

### A. *M’CULLOCH AND OSBORN*

The cornerstone assertion in this Comment is that states cannot tax federal instrumentalities. The famous case of *M’Culloch v. Maryland* concerned several states that attempted to tax federal banks.<sup>131</sup> Congress had chartered the Second Bank of the United States, establishing branches in multiple states, including one in Baltimore, Maryland.<sup>132</sup> The Maryland legislature then adopted an Act that imposed a tax on all banks in the state not chartered by the state legislature.<sup>133</sup>

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128. See *supra* Part III.

129. See *supra* Part VI.

130. See *Mich. Nat’l Bank v. Michigan*, 365 U.S. 467 (1961); *Des Moines Bank v. Fairweather*, 263 U.S. 103 (1923); *First Nat’l Bank v. Adams*, 258 U.S. 362 (1922); *Owensboro Nat’l Bank v. Owensboro*, 173 U.S. 664 (1899); *Weston v. City Council of Charleston*, 27 U.S. 449 (1829); *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738 (1824); *M’Culloch v. Maryland*, 17 U.S. 316 (1819).

131. *M’Culloch*, 17 U.S. 316.

132. *Id.* at 317.

133. *Id.* at 317-18.

James McCulloch, a cashier for the Baltimore branch of the Second Bank, was sued by Maryland for violating this Act after he admitted he was not complying with the Maryland law.<sup>134</sup> After losing two state appeals, McCulloch appealed to the United States Supreme Court.<sup>135</sup>

The Supreme Court held that, under the Necessary and Proper Clause of the Constitution, Congress is permitted to create a Bank of the United States, and because the Constitution is supreme over state laws, the states cannot levy taxes against the banks.<sup>136</sup>

Following the *M'ulloch* decision, the Supreme Court once again encountered the question of whether a state could tax a federal bank.<sup>137</sup> In 1819, the Ohio legislature passed a law labeled as “an act to levy and collect a tax from all banks, and individuals, and companies and associations of individuals, that may transact banking business in this state, without being allowed to do so by the laws thereof.”<sup>138</sup> Ralph Osborn, Auditor of the State of Ohio, ordered the collection of \$100,000 from a United States Bank in accordance with the Ohio Tax Act.<sup>139</sup> Osborn argued that it was “contended, that, admitting congress to possess the power [to exempt United States’ Banks from taxation], this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court.”<sup>140</sup> Justice Marshall countered by stating, “[i]t is no unusual thing, for an act of congress to imply . . . this very exemption from state control . . . .”<sup>141</sup>

Osborn also attempted to distinguish between

the bank and the public institutions, such as the mint or the post office. The agents in those offices are . . . officers of government. . . . Not so the directors of the bank. The connection of the government with the bank is likened to that with contractors.<sup>142</sup>

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134. *Id.* at 318-19.

135. *Id.* at 320.

136. *M'ulloch*, 17 U.S. at 324-26.

137. *Osborn v. U.S. Bank*, 22 U.S. (9 Wheat.) 738 (1824).

138. *Id.* at 740 (internal quotation marks omitted).

139. *Id.* at 742.

140. *Id.* at 865.

141. *Id.*

142. *Osborn*, 22 U.S. (9 Wheat.) at 866.

Justice Marshall agreed with the analogy but held that the Bank (United States contractor) was exempt from taxation because it was acting under the guise of the United States government.<sup>143</sup> Justice Marshall further held that “property of the contractor may be taxed, as the property of other citizens . . . [b]ut we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.”<sup>144</sup> The holding in *Osborn* not only reaffirmed *M’Culloch*, but also expanded the argument that instrumentalities of the federal government are exempt from state taxation.

#### B. CASES THAT HAVE EXPANDED *M’CULLOCH* AND *OSBORN*

The first major case to reaffirm and expand *M’Culloch* and *Osborn* concerned a South Carolina ordinance that imposed taxation on “bonds, notes . . . or other obligations” of the United States.<sup>145</sup> In *Weston v. City Council of Charleston*, the Court held that “states have no power, by taxation, or otherwise, to retard, impede, burthen, or in any manner control, the operations of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government.”<sup>146</sup> The Court further held: “[t]he sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; *but not* to those means which are employed by congress [sic] to carry into execution powers conferred on that body by the people of the United States.”<sup>147</sup>

Fiscal institutions chartered by Congress, their shares, and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.<sup>148</sup> Like Fannie and Freddie, national banks are privately run federal instrumentalities, chartered by Congress, with specific goals of “mak[ing] investments directly or indirectly, each of which promotes the public

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143. *Id.* at 867.

144. *Id.*

145. *Weston v. City Council of Charleston*, 27 U.S. 449 (1829).

146. *Id.* at 467 (quoting *M’Culloch v. Maryland*, 17 U.S. 316, 317 (1819)) (internal quotations omitted).

147. *Id.* (emphasis added) (quoting *M’Culloch*, 17 U.S. at 429) (internal quotation marks omitted).

148. *See, e.g., Mich. Nat’l Bank v. Michigan*, 365 U.S. 467 (1961); *Des Moines Bank v. Fairweather*, 263 U.S. 103, 106 (1923); *First Nat’l Bank v. Adams*, 258 U.S. 362 (1922); *Owensboro Nat’l Bank v. Owensboro*, 173 U.S. 664, 669 (1899).

welfare by benefiting primarily low- and moderate-income communities or families (such as by providing housing, services, or jobs).<sup>149</sup> National banks, “[u]pon duly making and filing articles of association . . . shall become, as from the date of the execution of its organization certificate, a body corporate” of the United States.<sup>150</sup> Akin to national banks, federal land banks are chartered by Congress as a body corporate of the United States.

As previously discussed, federal land banks are instrumentalities of the federal government, “engaged in the performance of an important governmental function.”<sup>151</sup> In *Pittman v. Home Owners’ Loan Corp.*, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, refused to record a mortgage purchased by the Home Owners’ Loan Corporation.<sup>152</sup> Similar to the state transfer tax statutes, a Maryland statute “impose[d] a tax upon every mortgage, recorded or offered for record, at the rate of 10 cents for each \$100, or fraction thereof, of the principal amount of the debt secured by the mortgage.”<sup>153</sup> Like the federal statutes exempting Fannie and Freddie, Congress, through the Home Owners’ Loan Act, provided that “the Home Owners’ Loan Corporation, its franchise, capital, reserves and surplus, and its loans and income shall be exempt from all state or municipal taxes.”<sup>154</sup> The Court found the federal statute controlling, reasoning that Congress has both the “power to create a corporation to facilitate the performance of governmental functions” and the power to protect the operations of that corporation.<sup>155</sup> The Court relied on *M’Culloch* for the proposition that, under the Necessary and Proper Clause of the Constitution,<sup>156</sup> “[a] power to create implies a power to preserve.”<sup>157</sup>

The Supreme Court held that a similar excise tax was unconstitutional when applied to Federal Land Banks by states. In *Federal*

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149. 12 U.S.C. § 24 (2006 & Supp. II 2008).

150. *Id.*

151. *Fed. Land Bank v. Priddy*, 295 U.S. 229, 231 (1935).

152. *Pittman v. Home Owners’ Loan Corp. of Washington, D.C.*, 308 U.S. 21, 29 (1939).

153. *Id.* (citing Acts of 1937, Ex. Sess., Chap. 11, Code of Maryland, Art. 81, sec. 213).

154. *Id.* at 31.

155. *Pittman*, 308 U.S. at 32-33.

156. *Id.* at 33 (citing U.S. CONST. art. I, § 8, cl. 18).

157. *Id.* (quoting *M’Culloch v. Maryland*, 17 U.S. 316, 426 (1819)) (internal quotation marks omitted).



*Land Bank v. Bismarck Lumber Co.*, North Dakota tried to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by *foreclosure or mortgages*.<sup>158</sup> North Dakota argued:

Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositaries and fiscal agents for the federal government . . . all other functions of the land banks are private; [the Federal Land Bank] here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore [federal tax exemptions] cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions.<sup>159</sup>

The Court held that the federal statute exempting “every Federal land bank . . . from Federal, State, municipal, and local taxation”<sup>160</sup> applied to the North Dakota sales tax on all gross receipts from sales of material personalty,<sup>161</sup> and, therefore, the Federal Land Bank in question was not liable for the enforced sales tax.<sup>162</sup> The Court's reasoning stemmed from the fact that “[t]he federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.”<sup>163</sup> The Court further held, “when Congress constitutionally creates a

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158. *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 98 (1941) (emphasis added). The Federal Land Bank of St. Paul was created pursuant to the Federal Farm Loan Act of July 17, 1916, ch. 245, 39 Stat. 360, 380, and was subject to the Sales Tax Act of North Dakota, North Dakota Laws of 1937, ch. 249. *Id.*

159. *Bismarck*, 314 U.S. at 101.

160. Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916) (codified as amended at 12 U.S.C. § 931).

161. *Bismarck*, 314 U.S. at 99 (construing 1937 N.D. Laws ch. 249, § 2 (amended at 1937 N.D. Laws §§ 3(a), 6, 7)).

162. *Bismarck*, 314 U.S. at 100.

163. *Id.* at 102 (citing *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477 (1939)).

corporation through which the federal government lawfully acts, the activities of such corporation are governmental.”<sup>164</sup>

C. THE SUPREMACY CLAUSE FORBIDS STATES FROM TAXING FANNIE AND FREDDIE

It is also intuitive that, through the Supremacy Clause of the Constitution, federal law trumps state law when the federal government regulates the area in question. The Supremacy Clause contained in the United States Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>165</sup>

When interpreting the Supremacy Clause, the Supreme Court has held that “[i]t lies within Congressional power to authorize regulation, *including taxation*, by the state of federal instrumentalities,” and “Congress may protect its agencies from the burdens of local taxation.”<sup>166</sup> The Supreme Court has extended its inclusion of federal exemptions over taxation by expressing that a state tax can be found repugnant to the Constitution or federal law even if the tax “does not

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164. *Id.* (citing *Pittman v. Home Owners’ Loan Corp.*, 308 U.S. 21, 32 (1939); *Graves*, 306 U.S. at 477).

165. U.S. CONST. art. VI, § 2.

166. *E.g.*, *Mayo v. United States*, 319 U.S. 441, 446 (1943) (emphasis added). *Mayo* concerned an action by the United States against certain Florida officials for the enforcement of a state inspection fee of fertilizer that was purchased out of state for use by Florida farmers. *Id.* at 442. The Court explicitly provided that the government of the United States is of “delegated powers,” which cannot be trumped by any one state. *Id.* at 445. This is true even where the Constitution or any federal statute is void of language exempting the government or its instrumentalities from regulation or taxation by the states. *See id.* at 445-46. *Contra Graves*, 306 U.S. at 595 (finding that a matter of local concern within the scope of the federal government did not violate the Supremacy Clause because an extension of immunity by a federal instrumentality does not extend to an employee claiming an imposition of income tax was a burden on the federal government).

fall directly on the United States if [the tax] operates so as to discriminate against the Government or those with whom it deals.”<sup>167</sup>

Even Illinois, whose counties filed suit against the Entities and FHFA,<sup>168</sup> has found the Supremacy Clause applicable against state taxation because the Supremacy Clause prohibits state intrusion on areas policed by Congress.<sup>169</sup> In *United States v. Hynes*, the United States sought declaratory judgment that Cook County was prohibited from administering *ad valorem* property taxes on two federal buildings being acquired by a federal entity.<sup>170</sup> The federal statute allowed any state to tax an interest in real property until title was passed to the government of the United States.<sup>171</sup> The recently amended Illinois statute<sup>172</sup> provided that any real property acquired by the federal government or an instrumentality thereof, under an installment contract, to be exempt, except property that the federal government has permitted to be taxed.<sup>173</sup> In granting judgment for the United States, the court, among other things, ruled the tax to be discriminatory and in-

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167. *United States v. City of Detroit*, 355 U.S. 466, 473 (1958) (citing *M’Culloch v. Maryland*, 17 U.S. 316, 317 (1819)). In *City of Detroit*, the United States brought an action against Michigan to recover taxes paid on property owned by the federal government but leased to a private business party. *City of Detroit*, 355 U.S. at 467. The Court affirmed the Michigan Supreme Court decision in favor of the State. *Id.* at 475. The Court reasoned that because the Michigan tax on real property applied to every private business, and because the United States does business with a variety of private businesses, the State should not be deprived of the benefit of property tax. *See id.* at 473-75. However, the Court did state that a tax immunity in situations such as this could be promulgated by Congress. *Id.* at 474. In his dissent, Justice Whittaker indirectly tiptoed on a Supremacy Clause argument by concluding that the state “statute imposes the tax on the Government’s property interest, which is immune from state taxation,” and thus the tax should be found repugnant to the Constitution. *See id.* at 483 (Whittaker, J., dissenting). Justice Whittaker found the federal exemption applicable, because the State was taxing the private business at the full rate of the assessed property, not for the value of the lease, and thus was imposing a tax on a federally immune instrumentality. *City of Detroit*, 355 U.S. at 483 (Whittaker, J., dissenting).

168. Complaint, *Dekalb Cnty. v. Fed. Hous. Fin. Agency*, 2012 WL 2609755 (N.D.Ill. 2012) (No. 3:12CV50227).

169. *United States v. Hynes*, 759 F. Supp. 1303 (1991). *See Katz v. Westlawn Cemetery Ass’n*, 285 Ill. App. 3d 695 (1st Dist. 1996).

170. *Hynes*, 759 F. Supp. at 1304.

171. *Id.* at 1305 (citing 40 U.S.C. § 602a(d)).

172. This case was decided previously in a decision in which the Seventh Circuit Court of Appeals affirmed the lower court’s finding that two buildings owned by the federal government were exempt from local taxation. *United States v. Cook Cnty.*, 725 F.2d 1128 (7th Cir. 1984). In its reasoning, the court saw the tax as discriminatory because Illinois was attempting to tax the federal government while exempting itself from the same taxation. *Id.* at 1131.

173. *Hynes*, 759 F. Supp. at 1305 (quoting Illinois Revised Statutes ch. 120, ¶ 500.9a).

consistent with the Supremacy Clause because “the state has . . . treat[ed] themselves better than it treat[ed] the federal government,”<sup>174</sup> and that this type of taxation has been forbidden since *M’Culloch v. Maryland*.<sup>175</sup>

As such, the federal statutes exempting the Entities and FHFA from “all taxation” are laws of the United States, which are the supreme law of the land. Accordingly, through the Supremacy Clause, the federal statutes prevent any state law claim regarding transfer tax liability.

#### D. THE PLAIN LANGUAGE OF THE STATUTES EXEMPTS THE ENTITIES FROM STATE TAXATION

When interpreting a statute, it is well established that courts must initiate their analysis on the express language of the statute itself.<sup>176</sup> “When the statute’s language is plain, the sole function of the courts . . . is to enforce it according to its terms.”<sup>177</sup> Furthermore, it is

174. *Id.* at 1307. The court reasoned, “[b]y taking advantage of this situation, the Illinois legislature was imposing a tax on property being acquired by the federal government under an installment contract but not on property similarly situated yet being acquired by the state.” *Id.*

175. *Id.* (citing *M’Culloch v. Maryland*, 17 U.S. 316, 436 (1819)).

176. *E.g.*, *Burlington N. R. Co. v. Okla. Tax Comm’n*, 481 U.S. 454, 461 (1987) (quoting *United States v. James*, 478 U.S. 597, 606 (1986)); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987); *Consumer Product Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). *See also* *U.S. Bank Nat’l Ass’n v. Clark*, 216 Ill. 2d 334, 346 (2005) (holding when “construing a statute, the most fundamental rule is to give effect to the legislature’s intent, and the best evidence of that intent is the statutory language” that “must be given its plain and ordinary meaning. . . . If the statutory language is clear, we must give effect to its plain and ordinary meaning. . . .”); *Katz v. Dep’t of Liquor Control of Ohio*, 166 Ohio St. 229, 231 (1957) (holding that “[i]t is too well established to require citation of authority that we look primarily for the intention of the Legislature as it is expressed in the enactment language which it adopted. Where the language itself clearly expresses the legislative intent, the courts need look no further”); *North Carolina ex rel. Pender Cnty. Child Support Enforcement Agency v. Parker*, 319 N.C. 354, 358 (1987) (holding “[t]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive”). State court decisions were included to show that some of the states that are making transfer tax claims have solid common law footing in their own states that give deference to the legislature of the United States when the plain language of the statute clearly expresses Congress’s intent to exempt the Entities and FHFA from tax liability.

177. *Dodd v. United States*, 545 U.S. 353, 359 (2005) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1 (2000)).

a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning.<sup>178</sup>

As of February 2013, the most recent decision concerning this argument was *Hertel v. Bank of America N.A.*, in which a Register of Deeds for a Michigan county brought suit against Fannie, Freddie and other defendants for unpaid transfer taxes.<sup>179</sup> The district court explained the “first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. [The court’s] inquiry must cease if the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent.’”<sup>180</sup> Fannie and Freddie argued that the exemption statutes are unambiguous, as “all taxation” means exactly that, “all taxation.”<sup>181</sup> They further argued that if the court interprets the exemption statutes as not exempting transfer taxes, then “the Court would have to rewrite ‘all taxation’ as ‘some taxation, but not recording taxes.’”<sup>182</sup> The court agreed and saw the exemption statutes as unambiguous. In its reasoning the court explained, “[a]ll is an inclusive adjective that does not leave room for unmentioned exceptions. Indeed, the fact that one exception [the real property tax exception] is explicitly included further supports this conclusion.”<sup>183</sup>

The language in the federal exemption statutes is clear and unambiguous. The statutes are materially identical.<sup>184</sup> Congress clearly and plainly provided the Entities and FHFA “shall be exempt from *all taxation* now and hereafter imposed by any State . . . county, mu-

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178. See *Perrin v. United States*, 444 U.S. 37 (1979).

179. *Hertel v. Bank of Am. N.A.*, 897 F. Supp. 2d 579, 580 (W.D. Mich. 2012).

180. *Id.* at 582 (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)) (quoting *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989)).

181. *Id.*

182. *Id.*

183. *Id.* The District Court for the Western District of Michigan further reasoned, “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Hertel*, 897 F. Supp. 2d at 582 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). “Consequently, the Court finds that the text unambiguously exempts the Enterprise Defendants from all state taxation, with the sole exception of taxes on real property.” *Id.* The court further held that the exemption statutes were coherent and consistent with another federal tax exemption statute (12 U.S.C. § 4617(j)(4)) that applied to “any person,” rather than “the agency” itself, because § 4617(j)(4) and the exemption statutes were not “mutually exclusive,” and thus the exemption statutes were not surplus. *Id.* at 582-83.

184. See *supra* Part III.

nicipality, or local taxing authority.”<sup>185</sup> The transfer tax that states are attempting to recover is unquestionably a tax imposed on the Entities and FHFA by a local taxing authority. “That should be the end of the matter,”<sup>186</sup> because the statutes are clear that “all” states, counties, and municipalities are not able to obtain any tax, albeit property taxes, from the Entities and FHFA because Congress clearly exempted them from taxes such as these.<sup>187</sup> Had Congress intended “all taxation” to exclude transfer taxes, the legislature would have expressly mentioned that exclusion in the plain language of the statutes. As such, courts have no other option than to interpret the statutes at face value and enforce the exemptions from state imposed transfer taxes.

#### VIII. “ALL TAXATION” INCLUDES EXCISE TAXES, AS WELL AS DIRECT TAXES

The Supreme Court has consistently held that statutes prohibiting documentary stamp taxes<sup>188</sup> on federal instrumentalities from state, county, or local taxation—statutes similar to the Corporations’ Exemption Statutes—do in fact exempt federal instrumentalities from state taxation.<sup>189</sup> Moreover, the fact that Congress has expressly exempted Fannie, Freddie, and FHFA from “all [state and local] taxation,” with a narrow exception for taxes on real property,<sup>190</sup> gives more weight to the conclusion that Fannie, Freddie, and FHFA are exempt from state transfer tax.

#### A. “ALL TAXATION” CASES

A common argument put forth by states is that Fannie and Freddie are not exempt from transfer taxes because the federal exemption

185. See 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008) (Fannie Mae); 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac); 12 U.S.C. § 4617(j)(2) (2006 & Supp. II 2008) (FHFA) (emphasis added).

186. *Hager v. Fed. Nat’l Mortg. Ass’n*, 882 F. Supp. 2d 107, 112 (D.D.C. 2012) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993)) (internal quotation marks omitted).

187. See *Hager*, 882 F.Supp. 2d at 112-13.

188. A documentary stamp tax “is a tax on documents, instruments, loan agreements and papers evidencing the acceptance, assignment, sale or transfer of an obligation, right or property incident thereto.” Documentary Stamp Tax, BUREAU OF INTERNAL REVENUE. [http://www.bir.gov.ph/taxinfo/tax\\_docstm.htm](http://www.bir.gov.ph/taxinfo/tax_docstm.htm) (last visited Jan. 6, 2013).

189. *Pittman v. Home Owners’ Loan Corp.*, 308 U.S. 21 (1939).

190. See *supra* Part III.

from “all taxation” includes only direct taxes, not excise taxes.<sup>191</sup> *United States v. Wells Fargo* is a decisive case supporting this argument.<sup>192</sup> In *Wells Fargo*, the Supreme Court held that “Project Notes” held by state and federal housing agencies could be subject to excise taxation, such as an estate tax, by the federal government even though a federal statute exempted the project notes from taxation.<sup>193</sup> In contrast, *Federal Land Bank of St. Paul v. Bismarck Lumber* held that federal instrumentalities are exempt from paying an excise tax under a federal statute immunizing the instrumentality from federal, state, and local taxation.<sup>194</sup> Moreover, *Gurley v. Rhoden* provides that even if prompted by an underlying transaction, an excise tax is imposed on the individual entity itself, not the transaction.<sup>195</sup>

The more recent case of *Hager v. Federal National Mortgage Association* dealt with Fannie, Freddie, and FHFA’s refusal to pay transfer tax on the recordation of deeds.<sup>196</sup> The court in *Hager* took an opposing view to the *Wells Fargo* decision.<sup>197</sup> The court reasoned that unlike the *Wells Fargo* decision, which focused on a statutory exemption for *property*, the *Bismarck* decision focused on an exemp-

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191. See, e.g., *Oakland Cnty. v. Fed. Hous. Fin. Agency*, 871 F. Supp. 2d 662, 667 (E.D. Mich. 2012). Direct taxes are taxes “imposed on property, as distinguished from a tax on a right or privilege,” whereas an excise tax is a “tax imposed on the manufacture, sale, or use of goods.” BLACK’S LAW DICTIONARY 646 (9th ed. 2009).

192. *United States v. Wells Fargo*, 485 U.S. 351 (1988). The *Wells Fargo* case was an appeal by the United States against a ruling from the United States District Court for the Central District of California that exempted federal housing agency obligations from federal estate taxes. *Id.* at 353. Pursuant to the Housing Act of 1937, obligations owed by certain state and federal public agency housing entities, commonly referred to as “Project Notes,” were exempt from “all taxation” imposed by the United States. The Project Notes were used by the agencies to finance housing projects. *Id.* Congress provided that the *Project Notes*, not the actual *entities* themselves, were exempt from the federal estate tax. See *id.*

193. *Id.* at 356 (emphasis added). In its holding, the Court commented that if Congress had intended to exempt the Project Notes from the estate tax, it would have expressly provided an “estate tax” exemption in the statute. *Wells Fargo*, 495 U.S. at 356.

194. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). In *Bismarck*, the Federal Land Bank of St. Paul brought action against Bismarck Lumber Co. and the North Dakota State Tax Commissioner for an enforced sales tax on the sale of lumber required for improvements. *Id.* at 98. The applicable federal statutory exemption provided “[t]hat every Federal land bank shall be exempt from Federal, State, municipal, and local taxation . . . .” *Id.* at 99 (quoting the Federal Farm Loan Act, ch. 245, § 26, 39 Stat. 360, 380) (internal quotation marks omitted).

195. See, e.g., *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975).

196. *Hager v. Fed. Nat’l Mortg. Ass’n.*, 882 F. Supp. 2d 107 (D.D.C. 2012). See *supra* Part V.

197. See *Hager*, 882 F. Supp. 2d at 112-13.

tion that applied to the *entity* itself.<sup>198</sup> The statutes concerning Fannie Mae and Freddie Mac “exempt *an entity* from all taxation. A recordation tax for a deed on one of the Entities’ records is indisputably a tax on that entity. It thus falls within the statutory exemption.”<sup>199</sup>

For example:

[I]f the statute had provided that “Fannie Mae’s real property shall be exempt from all taxation,” Fannie Mae would still be liable for the recordation tax because it is a tax on the real property’s transfer rather than on the real property. But because the statute instead exempts Fannie Mae itself, neither its property nor its activities can be taxed.<sup>200</sup>

The court further distinguished *Wells Fargo* on the fact that the decision failed to “mandate an atextual reading of ‘all taxation.’”<sup>201</sup> Rather, *Wells Fargo* concerned limitations on taxation of the *entities’* property, not the *owner* of the entities’ property.<sup>202</sup> Shortly following *Hager*, another Michigan District Court case, this time from the Western District,<sup>203</sup> agreed with the District Court for the District of Columbia and reaffirmed that *Wells Fargo* was misconstrued.<sup>204</sup> The court in *Hertel v. Bank of America N.A.* held that although the *Wells Fargo* decision provides that, in limited circumstances, a statutory exemption from “all taxation” concerning *property* might not include excise taxation, concluding that the decision applies to a statutory exemption from “all taxation” concerning the *entity* itself is misguided.<sup>205</sup> The court in *Hertel* expressly stated that the *Wells Fargo* deci-

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198. *Id.*

199. *Id.* at 112.

200. *Id.* at 111 (internal quotation marks omitted).

201. *Id.* at 112.

202. *Hager*, 882 F. Supp. 2d at 112.

203. This case was from the Western District of Michigan, as opposed to the District Court for Eastern District of Michigan, which handed down the *Oakland County* decision. *See supra* Part V.A.

204. *Hertel v. Bank of Am. N.A.*, 897 F. Supp. 2d 579 (W.D. Mich. 2012). *See also* Brief of the United States as Amicus Curiae in Support of the Appellants at \*15, *Cnty. of Oakland v. Fed. Hous. Fin. Agency*, 2012 WL 5817171 (6th Cir. 2012) (Nos. 12-2135, 12-2136). This appellate brief was filed by the Department of Justice as *amicus curiae* in support of the appellants—FHFA, Fannie Mae, and Freddie Mac—following notice of appeal of the *Oakland County* decision to the Sixth Circuit Court of Appeals.

205. *Hertel*, 897 F. Supp. 2d at 584-85.



sion and its progeny did not contain any language applying to a tax exemption for an *entity*.<sup>206</sup> One of the clearest articulations of the distinction between a property and entity tax exemption was provided by the *Hertel* court:

In *Wells Fargo*, “all taxation” in the housing statute still meant all taxation even after the court's decision. The promissory notes remained exempt from the estate tax, even though the estate tax was required to be paid. The reason “all taxation” was still able to retain its meaning is because the estate tax never purported to tax the promissory notes. The estate tax . . . was a tax on the *transfer* of property, not the property itself. And because the statute specified an exemption *only* for the property and not its owner or its transfer, the exemption was never triggered even though it was the owner of the promissory notes who was liable for the tax.<sup>207</sup>

The federal statutes exempting the Entities and FHFA offer broad exemptions from state and local taxation.<sup>208</sup> The tax on the transfer and recordation of the deeds can be construed as a tax on the transfer itself.<sup>209</sup> However, the tax of the transfer of property must be paid by the entity and is thus a tax on the property itself.<sup>210</sup> “To say that a transfer tax only taxes an entity’s transfer is equivalent to saying that the income tax only taxes an entity’s income,”<sup>211</sup> as opposed to the entity itself.

Likewise, the statutes exempting Fannie, Freddie, and FHFA exempt the *entities* themselves, not the property or the holdings of the entities.<sup>212</sup> Unlike the *Wells Fargo* and *Oakland County* decisions, the term “all taxation,” when used in a statute exempting an entity

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206. *Id.* at 584.

207. *Id.*

208. *See supra* Part III.

209. *See supra* Part IV.

210. *See Hertel*, 897 F. Supp. 2d at 585-86.

211. *Id.* at 585.

212. *See* 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008) (Fannie Mae); 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac); 12 U.S.C. § 4617(j)(2) (2006 & Supp. II 2008) (FHFA) (emphasis added).

itself, includes both direct and excise taxes.<sup>213</sup> Therefore, the statutes exempting the entities and FHFA from “all taxation” by states, counties, and municipalities apply to both direct and excise taxes such as the transfer tax.<sup>214</sup>

IX. EVEN IF FANNIE AND FREDDIE ARE NOT DEEMED FEDERAL INSTRUMENTALITIES, THEY ARE EXEMPT UNDER THE CONSERVATORSHIP OF FHFA

Even if Fannie and Freddie are not deemed federal instrumentalities, this Comment argues that they are (or should be) exempt under the conservatorship of the FHFA. This argument is saved for last because, depending on how this argument is viewed, it could be a last resort. For instance, the courts could find the exemptions valid if they were to accept that Fannie and Freddie are government entities,<sup>215</sup> under conservatorship of the FHFA, and are exempted under federal statute from paying transfer tax because states cannot tax federal instrumentalities<sup>216</sup> where Congress has provided an unambiguous tax exemption.<sup>217</sup> On the other hand, however, courts could find that Fannie and Freddie are private corporations, not government instrumentalities, and are thus not immune from state transfer tax liability. If the latter occurs, this argument could be pushed to the front of the line, rather than be an afterthought argument. Furthermore, while important, this argument could lend itself short-lived if Fannie and Freddie emerge from conservatorship and regain their status as independent instrumentalities of the federal government. In any instance, as a named federal agency, and because Congress explicitly provided a taxation exemption to the FHFA when acting as a conservator, Fannie, Freddie, and FHFA are exempt from state transfer taxes.<sup>218</sup>

As conservator of Fannie and Freddie, “FHFA is charged with taking any action necessary to put the regulated entity in a sound and solvent condition and any action appropriate to carry on the business

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213. *Contra* Fahey v. O'Melveny & Myers, 200 F.2d 420, 446, 454 (9th Cir. 1952); Willhoit v. Fahey, 345 U.S. 952 (1953); Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 101-04 (1941); Fed. Land Bank v. Priddy, 295 U.S. 229, 231 (1935).

214. *See id.*

215. *See supra* Part VI.

216. *See supra* Part VII.A, B.

217. *See supra* Part VII.D.

218. *See* 12 U.S.C. § 4617(j)(1)-(2) (2006 & Supp. II 2008).

of the regulated entity and preserve and conserve the assets and property of the regulated entity.”<sup>219</sup> In *Nevada ex rel. Hager v. Countrywide Home Loans Servicing*, the court concluded that Fannie Mae was exempt from transfer tax liability due to FHFA’s conservator status.<sup>220</sup> The court looked at FHFA’s broad control over Fannie’s assets and operations and the fact that Congress explicitly provided FHFA tax exemption from any state or local imposed tax.<sup>221</sup> Another federal district court echoed this sentiment, holding that, as conservator of Fannie and Freddie, FHFA is exempt from taxation because Congress expressly provided a taxation exemption to FHFA.<sup>222</sup>

## X. CONCLUSION

As advanced in this Comment, it is well established that Fannie Mae and Freddie Mac are government instrumentalities.<sup>223</sup> The exemption statutes Congress enacted provide broad exemptions from state taxation for Fannie, Freddie, and FHFA.<sup>224</sup> These exemptions

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219. *Nevada ex rel. Hager v. Countrywide Home Loans Servicing*, LP, 812 F. Supp. 2d 1211, 1217 (D. Nev. 2011) (quoting 12 U.S.C. § 4617(b)(2)(D)) (internal quotation marks omitted).

220. *Nevada ex rel. Hager v. Countryside Home Loans Servicing*, LP, 812 F. Supp. 2d at 1218. Although holding that Fannie Mae was exempt under FHFA’s control, the court also held that Fannie Mae is not a federal instrumentality for tax purposes because Fannie Mae is not “interdependent” on the federal government “as to make Fannie Mae’s actions the actions of the federal government.” *Id.* The court reasoned, “Fannie Mae does not act as a virtual arm of the federal government because it operates as a for-profit entity owned by its private shareholders.” *Id.* at 1217.

221. *Id.* (quoting 12 U.S.C. § 4617(b)(2)(A), (B), (J) (FHFA’s conservatorship over Fannie Mae); 12 U.S.C. § 4617(j)(1)-(2) (FHFA’s Tax Exemption statute)). *See also, e.g.,* Leon Cnty. v. Fed. Hous. Fin. Agency, 816 F. Supp. 2d 1205 (N.D. Fla. 2011) (stating that FHFA “is a federal agency that has duties both as a regulator, and . . . as the conservator” of Fannie and Freddie); *Williams v. Geithner*, No. 09–1959 ADM/JJG, 2009 WL 3757380, at \*3 (D. Minn. Nov. 9, 2009) (“FHFA is a federal agency that supervises and regulates housing finance and also serves as the Conservator for Fannie Mae and Freddie Mac.”); *In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F. Supp. 2d 790, 792 (E.D. Va. 2009) (stating that FHFA is “the federal agency acting as conservator of Freddie Mac pursuant to the Housing and Economic Recovery Act of 2008 . . .”).

222. *Fed. Hous. Fin. Agency v. Royal Bank of Scotland Group*, No. 3:11-CV-01383 (AWT), 2012 WL 3580522, at \*2 (D. Conn. Aug. 17, 2012) (quoting *Nevada v. Countrywide Home Loan Servicing*, LP, No. 3:10–cv–419–RCJ–PAL, 2011 WL 4356507, at \*5 (D. Nev. Sept. 16, 2011) (“[N]o court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver.” (quoting 12 U.S.C. § 4617(f))).

223. *See supra* Part VI.

224. *See* 12 U.S.C. §§ 1452(e), 1723a(c)(2), 4617(j)(2) (emphasis added).

explicitly prohibit state imposed transfer taxes on the Entities. The statutes provide that Fannie, Freddie, and FHFA “shall be exempt from *all taxation*” imposed by states, counties, and local taxing authorities, with a narrow exception for real property taxes that are not at issue in this Comment.<sup>225</sup>

Determining that states can impose a transfer tax on the Entities and FHFA contradicts years of Supreme Court decisions and interpretations, undermines the Supremacy Clause of the Constitution, and undercuts the authority of Congress. *M’Culloch v. Maryland* established that states cannot tax the federal government or instrumentalities of the government.<sup>226</sup> This cornerstone of law was reaffirmed in *Osborn v. United States Bank*, where Justice Marshall stated that the Bank of the United States was exempt from state taxation because it was acting under the guise of the federal government.<sup>227</sup> Subsequent cases expanded this notion by holding that “states have no power by taxation, or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by congress, to carry into execution the powers vested in the general government.”<sup>228</sup> Furthermore, pursuant to the Supremacy Clause of the United States Constitution, “[i]t lies within Congressional power to authorize regulation, *including taxation*, by the state of federal instrumentalities,” and “Congress may protect its agencies from the burdens of local taxation.”<sup>229</sup> The federal statutes exempting the Entities and FHFA, while supreme to the state transfer tax statutes, also provide exemptions that are clear and unambiguous, and plainly provide that the Entities and FHFA “shall be exempt from *all taxation* now or hereafter imposed . . . by any State county, municipality, or local taxing authority . . . .”<sup>230</sup>

Moreover, the *Wells Fargo* decision is not controlling in any form or fashion because *Wells Fargo* dealt with an exemption of *specific property* from taxation, not excise taxes imposed on an *entity*.<sup>231</sup> The federal exemptions provided by Congress give broad exemptions

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225. 12 U.S.C. §§ 1452(e), 1723a(c)(2), 4617(j)(2) (emphasis added).

226. *M’Culloch v. Maryland*, 17 U.S. 316, 318-19 (1819).

227. *Osborn v. U.S. Bank*, 22 U.S. 738 (1824).

228. *Weston v. City Council of Charleston*, 27 U.S. 449, 467 (quoting *M’Culloch*, 17 U.S. at 317 (1819) (internal quotation marks omitted).

229. *E.g.*, *Mayo v. United States*, 319 U.S. 441, 446 (1943) (emphasis added).

230. *See supra* Part III.

231. *See Hager v. Fed. Nat’l Mortg. Ass’n*, 882 F. Supp. 2d 107, 112 (D.D.C. 2012).

to the entities themselves.<sup>232</sup> The *Bismarck Lumber* decision, however, is controlling because *Bismarck* concerned an almost identical tax exemption of an entity.<sup>233</sup> The Court in *Bismarck* held that the statutory exemption incorporated a state sales tax that was an excise tax that taxed the *entity* itself, rather than *specific property*.<sup>234</sup>

Finally, even if each of the above arguments should fail, FHFA is a federal agency charged with conservatorship of Fannie and Freddie.<sup>235</sup> As such, under FHFA's control, Fannie and Freddie are not liable for state imposed transfer taxes because FHFA is clearly exempt from "all taxation" by any local taxing authority.<sup>236</sup> As presented, it is legally intuitive that state and local taxing authorities cannot tax Fannie Mae, Freddie Mac, and FHFA. In the words of a savvy, tough Navy Judge Advocate: "You can't handle the truth!"<sup>237</sup>

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232. See 12 U.S.C. § 1723a(c)(2) (2006 & Supp. II 2008) (Fannie Mae); 12 U.S.C. § 1452(e) (2006 & Supp. II 2008) (Freddie Mac); 12 U.S.C. § 4617(j)(2) (2006 & Supp. II 2008) (FHFA) (emphasis added).

233. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941).

234. *Id.*

235. See *Government Sponsored Enterprises*, FED. HOUSING FIN. AGENCY, <http://www.fhfa.gov/Default.aspx?Page=33> (last visited Dec. 28, 2012).

236. See *supra* Part III.

237. *A Few Good Men, Quotes*, IMDB, <http://www.imdb.com/title/tt0104257/quotes> (last visited Jan. 23, 2014).

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