**No. 13-1559**

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**IN THE**
# SUPREME COURT OF THE UNITED STATES

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JOHN B. CORR, *et al.*,

*Petitioners*,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

*Respondent*.

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On Petition for a Writ of Certiorari
to the Court of Appeals for the Fourth Circuit

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## MOTION TO INTERVENE BY THE COMMONWEALTH OF VIRGINIA AND THE DISTRICT OF COLUMBIA

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Pursuant to this Court's Rule 21 and 28 U.S.C. § 2403(b), the Commonwealth of Virginia and the District of Columbia respectfully move to intervene as of right to respond to the petition for writ of certiorari, and to participate in any subsequent proceedings in this case, for the purpose of defending the constitutionality of their interstate compact establishing the Metropolitan Washington Airports Authority. In conjunction with this motion, Virginia and the District are separately filing a certiorari-stage brief as intervenors. Counsel for the petitioners has advised that petitioners oppose this motion; counsel for the respondent has advised that respondent consents to this motion.

1. A petition for certiorari was filed on June 20, 2014 and docketed on June 27, 2014. On August 19, 2014, the Court called for a response from respondent Metropolitan Washington

Airports Authority ("MWAA"). On August 27, 2014, the Court extended the time to respond until November 17, 2014.

2. The first question the petitioners present is whether MWAA exercises sufficient federal power to mandate separation-of-powers scrutiny for purposes of a suit seeking injunctive relief and invoking the Little Tucker Act to seek monetary relief. (Pet. ii.) Their second question is whether the Transfer Act, 49 U.S.C. §§ 49101-49112, violates Article II of the Constitution by depriving the President of control over MWAA. (*Id.*) Petitioners, therefore, are challenging the constitutionality of the interstate compact establishing MWAA, Va. Code Ann. §§ 5.1-152 to 5.1-178 (2010 & Supp. 2014); D.C. Code §§ 9-901 to 9-926 (LexisNexis 2014) (the "MWAA Compact"). They are also challenging the constitutionality of the Transfer Act, by which Congress approved the transfer to MWAA of control over Reagan Washington National Airport and Washington Dulles International Airport, pursuant to a long-term lease.

3. Petitioners did not serve their petition for writ of certiorari on either the Attorney General of Virginia or the Attorney General of the District, as required by this Court's Rule 29.4(c). Upon information and belief, the petition also has not been served on the United States, as required by this Court's Rule 29.4(b).

4. When this case was in the United States Court of Appeals for the Fourth Circuit, the clerk of that court served notices upon the Attorney General of Virginia and the Attorney General of the District that the case "may call into question the constitutionality of state law establishing the Metropolitan Washington Airports Authority."[1] Petitioners, however, represented in a filing with the Fourth Circuit that they did "not contend that MWAA is constitutionally invalid."[2] They

[1] *See* Notices by the Clerk, *Corr v. MWAA*, No. 13-1076 (4th Cir. Jan. 28, 2013), ECF Nos. 17, 19.

[2] Appellants' Reply to Appellee's Resp. to Docketing Statement at 2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794579, at *2 (4th Cir. Jan. 28, 2013), ECF No. 16.

then filed an opening brief on the merits that did not raise the Article II or federal-instrumentality issues presented here.[3] Accordingly, Virginia filed a response to the § 2403 notice declining to intervene on the ground that "the Opening Brief of the Appellants fails to challenge the constitutionality" of the MWAA Compact.[4] The District of Columbia also did not seek to intervene (although it did not file a formal response).

5. Now that the petitioners have raised an argument that they purported not to raise in the Fourth Circuit—that the intervenors' compact is unconstitutional—Virginia and the District have a statutory right to intervene pursuant to 28 U.S.C. § 2403(b). Section 2403(b) provides, in relevant part:

> In any action . . . in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene . . . for argument on the question of constitutionality. The State shall . . . have all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

This case falls squarely within the terms of § 2403(b). The case is pending "in a court of the United States." Neither Virginia nor the District is "a party" to this case. Respondent MWAA does not serve as an "agency" of intervenors because the MWAA Compact provides that MWAA is "independent of the Commonwealth and . . . the District of Columbia." Va. Code Ann. § 5.1-156(B) (2010); D.C. Code § 9-905(b). The petition for writ of certiorari argues that MWAA is constitutionally invalid. And the MWAA Compact directly affects the public interest of Virginia

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[3] Opening Br. of Appellants at 2 n.2, *Corr v. MWAA*, No. 13-1076, 2013 WL 705514, at *2 n.2 (4th Cir. Feb. 27, 2013), ECF No. 21.

[4] Notice of the Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, II, Attorney General Of Virginia, Declining Intervention at 1-2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794580, at *1-2 (4th Cir. Mar. 25, 2013), ECF No. 27.

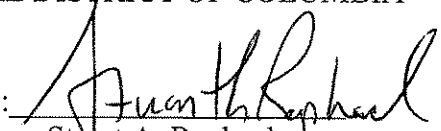
and the District: the enabling legislation recites that MWAA's powers are to be exercised "for the benefit of the inhabitants of" Virginia and the District, "for the increase of their commerce, and for the promotion of their safety, health, welfare, convenience and prosperity," and states further that "the operation and maintenance of the airports by the Authority will constitute the performance of essential governmental functions." Va. Code Ann. § 5.1-172 (2010); D.C. Code § 9-921 (LexisNexis 2014). Accordingly, Virginia and the District have a significant and obvious interest in defending the constitutionality of their interstate compact.

6. Moreover, the Commonwealth and the District were directly involved in the creation of MWAA. *See* Brief of the Commonwealth of Virginia and the District of Columbia as Intervenors at 2-7. Accordingly, their participation as intervening parties at the certiorari stage and in any subsequent proceedings that implicate the constitutional question presented will be of benefit to the Court and is consistent with Congress's mandate granting intervention of right under 28 U.S.C. § 2403(b).

For the foregoing reasons, the Court should grant the motion and permit the Commonwealth of Virginia and the District of Columbia to intervene as of right under 28 U.S.C. § 2403(b). In the alternative, if the Court should find any reason to deny the motion, the Commonwealth and the District request that their brief be treated as an amicus curiae brief in opposition to the petition for writ of certiorari.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA
THE DISTRICT OF COLUMBIA

By: 
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November 17, 2014

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## BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE DISTRICT OF COLUMBIA AS INTERVENORS


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## QUESTION PRESENTED

Article II of the Constitution requires that the President have the power to appoint and remove principal executive officers who determine the policy and enforce the laws of the United States. The Metropolitan Washington Airports Authority was created by a congressionally approved interstate compact between the Commonwealth of Virginia and the District of Columbia. MWAA's Board of Directors consists of 17 members: 7 appointed by the Governor of Virginia, 4 by the Mayor of the District of Columbia, 3 by the Governor of Maryland, and 3 by the President. The question presented is:

> Whether the composition of the Board of Directors of the Metropolitan Washington Airports Authority violates Article II because the President does not have the power to appoint or remove a majority of its members.

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## STATEMENT OF THE CASE

1. As this Court described in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.* [hereinafter *CAAN*],[1] Reagan Washington National Airport ("Reagan" or "National") and Washington Dulles International Airport ("Dulles") "are the only two major commercial airports owned by the Federal Government."[2] Congress

[1] 501 U.S. 252 (1991).

[2] *Id.* at 256.

authorized land acquisition for what became Reagan in 1940.[3] When Congress later authorized "a second major airport to serve the Washington area . . . it again provided for federal ownership and operation," and Dulles "was opened in 1962 under the direct control of the [Federal Aviation Administration]."[4]

In 1984, amid concerns about the unreliability of federal funding for airport improvements, the Secretary of Transportation appointed a commission to develop a plan to create a regional authority to operate the airports.[5] The 15-member commission was chaired by former Virginia Governor Linwood Holton.[6] The Holton Commission recommended "a congressionally approved compact between Virginia and the District."[7] In fact, Congress had given its advance consent for such interstate airport compacts in 1959.[8]

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[3] *Id.* at 255.

[4] *Id.* at 256; *see also Gray v. Va. Sec'y of Transp.*, 662 S.E.2d 66, 68 (Va. 2008).

[5] *CAAN*, 501 U.S. at 257.

[6] Advisory Commission on the Reorganization of the Metropolitan Washington Airports (Dec. 18, 1984), *reprinted in Proposed Transfer of Washington National and Dulles International Airports to a Regional Airports Authority: Hearing Before the Subcomm. on Governmental Efficiency and the District of Columbia of the S. Comm. on Governmental Affairs*, 99th Cong. 371, 374, 376 (1985) [hereinafter 1985 Senate Govt'l Affairs Hearings].

[7] *CAAN*, 501 U.S. at 257.

[8] *See* Act of Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333 (1959); *Cuyler v. Adams*, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state

(Continued on following page)

"Emphasizing the importance of a non-political, independent authority, the Commission recommended that members of the board should not hold elective or appointive political office."[9] The "independence of the MWAA from political influence [was] of critical importance" and "one of the most important objectives of the compact."[10]

Virginia and the District of Columbia strongly supported the Commission's recommendations. In 1985, each enacted parallel legislation to adopt the compact.[11] The Compact established MWAA as "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia."[12] Virginia and

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action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

[9] *CAAN*, 501 U.S. at 257 (quotation and citation omitted).

[10] *Alcorn v. Wolfe*, 827 F. Supp. 47, 53 (D.D.C. 1993). *See* 1985 Senate Govt'l Affairs Hearings, *supra* note 6, at 40 (statement of Gov. Holton that "I do not consider the independence of the Board of Directors a weakness—I repeat, I consider that a strength").

[11] Metropolitan Washington Airports Authority, 1985 Va. Acts ch. 598 (codified at Va. Code Ann. §§ 5.1-152 to 5.1-178 (2010 & Supp. 2014)); District of Columbia Regional Airports Authority Act of 1985, 1985 D.C. Law 6-67 (codified at D.C. Code §§ 9-901 to 9-926 (LexisNexis 2014)).

[12] Va. Code Ann. § 5.1-153 (2010); D.C. Code § 9-902 (LexisNexis 2014).

the District each authorized MWAA to acquire control of Reagan and Dulles from the Federal Government, "by lease or otherwise."[13] They also gave consent, subject to approval by the Governor of Virginia and the Mayor of the District, to conditions imposed by Congress "that are not inconsistent" with the Compact.[14] Virginia and the District also agreed that "[t]he courts of the Commonwealth of Virginia shall have original jurisdiction of all actions brought by or against the Authority, which courts shall in all cases apply the law of the Commonwealth of Virginia."[15]

At congressional hearings in 1985 (after Virginia adopted the compact and while its consideration by the District was pending), Virginia's federal and State leaders uniformly supported transferring control of the Washington airports to MWAA. Virginia Governor Chuck Robb expressed Virginia's "very strong support"[16] and noted that the Virginia General Assembly had adopted the MWAA Compact by "an overwhelming vote."[17] Former Governor Holton testified that he

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[13] Va. Code Ann. § 5.1-154 (2010); D.C. Code § 9-903 (LexisNexis 2014).

[14] *Id.*

[15] Va. Code Ann. § 5.1-173(A) (2010); D.C. Code § 9-922(a) (LexisNexis 2014).

[16] *Transfer of National and Dulles Airports: Hearings Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. and Transp.*, 99th Cong. 80 (1985) [hereinafter 1985 Senate Commerce Hearings].

[17] *Id.* at 83.

"strongly support[ed] the transfer."[18] So did Senator John Warner[19] and Representative Frank Wolf,[20] both of whom served on the Holton Commission.[21]

D.C. Mayor Marion Barry also urged support for the transfer. He testified that the MWAA Compact reflected significant regional strides and cooperation among Virginia, Maryland, and the District.[22] Congress did not act in 1985, however.

In 1986, Virginia and the District, which by then had adopted the compact, again urged Congress to approve transferring control of the airports to MWAA. Representative Wolf pointed out that "[a]ll other U.S. air carrier airports are run by State or local public agencies or authorities. Federal control is neither necessary nor, I believe, appropriate."[23] He noted that the "Federal Government succeeded in transferring the Alaska Railroad to State control for similar

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[18] *Id.* at 49.

[19] *Id.* at 32.

[20] *Id.* at 87.

[21] 1985 Senate Govt'l Affairs Hearings, *supra* note 6, at 376.

[22] 1985 Senate Commerce Hearings, *supra* note 16, at 114; *see also* 1985 Senate Govt'l Affairs Hearings, *supra* note 6, at 153.

[23] *Proposed Transfer of Metro. Wash. Airports: Hearings Before the Subcomm. on Aviation of the H. Comm. on Pub. Works and Transp.*, 99th Cong. 4 (1986) [hereinafter 1986 House Hearings].

reasons."[24] Virginia's new Governor, Gerald Baliles, testified that the "destiny of National and Dulles Airports" was a "subject critical to Virginia's future."[25] He said that the two airports comprised "Virginia's most heavily-used gateway."[26] He also argued that a regional airport authority was appropriate for Dulles and National no less so than for the major airports in Chicago and New York City:

> It would be inconceivable to turn La Guardia and Kennedy, or O'Hare and Midway, over to a Federal corporation that is half agency, half business enterprise. Those airports, like every other major airport in the country, are operated by regional authorities that represent the areas they serve.[27]

Governor Baliles added that, "[f]rom the beginning, Virginia has supported the approach . . . reflected in the bill that you now have before you."[28]

D.C. Mayor Barry agreed.[29] He said that a regional airport authority would "enhance . . . Federalism by providing local regional control over essentially local airports."[30] He argued that "the Federal

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[24] *Id.* at 4-5.

[25] *Id.* at 9.

[26] *Id.* at 10.

[27] *Id.* at 10-11.

[28] *Id.* at 15.

[29] *Id.* at 181 (statement of Mayor Barry) ("[W]e are on record in support of the transfer.").

[30] *Id.*

Government ought not be involved in a business enterprise that is appropriately a local function."[31] He added that the MWAA Compact benefited the District by giving it voting membership on the regional authority.[32]

2. In October 1986, Congress approved the MWAA Compact and authorized a long-term lease of Reagan and Dulles to MWAA in what is commonly called the "Transfer Act."[33] Congress initially created a Board of Review, comprised of Members of Congress, that could exercise a veto over the MWAA Board's actions. As discussed below, the Board of Review was subsequently invalidated as an unconstitutional congressional veto.[34] *See infra* at 25.

The Transfer Act recites that its purpose is to transfer control over the airports "to a properly constituted independent airport authority created by Virginia and the District of Columbia, in order to achieve local control, management, operation,

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[31] *Id.*

[32] *Id. See also id.* at 171 (statement of Julius Hobson, Jr., Executive Office of the Mayor of the District of Columbia) ("We see it as something that is very important to the District.").

[33] Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, Tit. VI, 100 Stat. 3341-376 (1986) (codified as amended at 49 U.S.C. §§ 49101 to 49112).

[34] *CAAN*, 501 U.S. at 269, 277.

and development of these important transportation assets."[35]

Congress set forth specific findings in the Transfer Act. It recited that "the United States Government has a continuing but limited interest in the operation" of the airports.[36] That limited federal interest can be satisfied "through a lease mechanism which provides for local control and operation."[37] Having "an operating authority with representation from local jurisdictions" would make the operating entity "similar to authorities at all major airports in the United States."[38] The findings relied on the recommendation from the Secretary of Transportation:

> [I]n recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary of Transportation . . . recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the United States.[39]

The findings also noted that the Holton Commission, "a commission of congressional, State, and local officials and aviation representatives[,] has recommended

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[35] 49 U.S.C. § 49102(a).

[36] *Id.* § 49101(3).

[37] *Id.* § 49101(10).

[38] *Id.* § 49101(8).

[39] *Id.* § 49101(7).

to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by Virginia and the District of Columbia."[40]

As part of the "long-term lease,"[41] Congress required MWAA to make annual lease payments to the United States in the amount of $3 million (in 1987 dollars).[42] The Transfer Act authorized federal district courts to exercise subject matter jurisdiction over actions by the Attorney General or any aggrieved party to require MWAA to comply with the lease.[43]

The Transfer Act requires that MWAA's powers, while "conferred upon it jointly" by Virginia and the District,[44] must also "at least meet the specifications" set forth in the statute.[45] Among other things, MWAA must be "independent of Virginia and its local governments, the District of Columbia, and the United States Government."[46] It must also be "a political subdivision constituted only to operate and improve the Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area."[47] MWAA may operate the airports only for defined

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[40] *Id.* § 49101(9).

[41] *Id.* § 49102(a).

[42] *Id.* § 49104(b).

[43] *Id.* § 49104(c).

[44] *Id.* § 49106(a)(1)(A).

[45] *Id.* § 49106(a)(1)(B).

[46] *Id.* § 49106(a)(2).

[47] *Id.* § 49106(a)(3).

"airport purposes."[48] And MWAA must meet federal aviation-law requirements that the airports "be as [financially] self-sustaining as possible. . . ."[49]

The Transfer Act tracks the Compact in setting forth the number of members who serve on MWAA's Board of Directors.[50] That number has increased over time from 11, in 1986,[51] to 17 now: 7 members appointed by the Governor of Virginia; 4 members appointed by the Mayor of the District of Columbia; 3 members appointed by the Governor of Maryland; and 3 members appointed by the President with the advice and consent of the Senate.[52] The 3 federal appointees "may be removed by the President for cause."[53] The remaining 14 members are removable for cause in accordance with the laws of their appointing jurisdiction.[54]

3. The original airport master plan called for the extension of rail service to Dulles through the federally owned right-of-way, where the Dulles Airport Access Highway and the Dulles Toll Road are

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[48] *Id.* § 49104(a)(2).

[49] *Id.* § 49104(a)(3) (incorporating requirements of, *inter alia*, 49 U.S.C. § 47107(a)(13)(A)).

[50] *Id.* § 49106(c).

[51] Pub. L. No. 99-591, 100 Stat. 3341-383 (1986).

[52] Va. Code Ann. § 5.1-155(A) (Supp. 2014); D.C. Code § 9-904(a) (LexisNexis 2014); 49 U.S.C. § 49106(c)(1).

[53] 49 U.S.C. § 49106(c)(6)(C).

[54] *Id.*; Va. Code Ann. § 5.1-155(E); D.C. Code § 9-904(e).

located.[55] The Access Highway opened in 1962.[56] No tolls are charged to motorists accessing or leaving the airport along the Access Highway.[57]

In 1980, the Virginia Department of Transportation ("VDOT") requested and received a 99-year easement to operate a toll road within the federal right-of-way, parallel to the Access Road, in order to accommodate local traffic. The Dulles Toll Road—officially the "Omer L. Hirst-Adelard L. Brault Expressway"—opened in 1984, connecting Interstate 495 with Virginia Route 28.[58] Consistent with the original master plan, the easement to Virginia for the Toll Road continued to reserve the median strip for future rail service to Dulles.[59]

The Transfer Act defines Dulles to include the entire federal right-of-way.[60] Thus, the long-term lease to MWAA includes the Access Road and the Dulles Toll Road, "subject only to Virginia's existing easement for the Toll Road."[61]

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[55] Pet. App. 6, 33.

[56] Pet. App. 19.

[57] Pet. App. 3.

[58] Pet. App. 4, 31.

[59] Pet. App. 33. *See* Deed of Easement by the United States to the State of Virginia ¶ 13 (Jan. 10, 1983), *in* Joint Appendix 66, *Corr v. MWAA*, No. 13-1076 (4th Cir. Feb. 27, 2013), ECF No. 22.

[60] 49 U.S.C. § 49103(4).

[61] Pet. App. 34.

Beginning in 1989, the Virginia General Assembly enacted a series of laws designed to finance transportation improvements in the "Dulles Corridor."[62] The legislature repeatedly authorized the Commonwealth Transportation Board to issue bonds secured by revenues from the Dulles Toll Road to pay for improvements in the Dulles Corridor, including "mass transit."[63] In 2004, the General Assembly codified that guidance, defining "[t]ransportation improvements in the Dulles Corridor," including "mass transit," as a bond-eligible project under the State Revenue Bond Act.[64]

In 2006, VDOT and MWAA entered into a memorandum of understanding under which MWAA agreed to undertake the extension of Metrorail to Dulles Airport in exchange for a permit from Virginia to operate the Toll Road and to use toll revenues for the "operation, maintenance and debt service of the Dulles Toll Road, and the design, construction and financing of the Dulles Corridor Metrorail Project."[65] On December 29, 2006, VDOT and MWAA entered into a Master Transfer Agreement.[66]

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[62] Pet. App. 34-35.

[63] *Id*.

[64] *Id.* at 35. *See* 2004 Va. Acts ch. 807, § 1 (amending Va. Code Ann. § 33.1-268(2)(n) (2011)).

[65] Pet. App. 36-37.

[66] Pet. App. 37.

4. Before VDOT transferred control of the Toll Road to MWAA, the first of three rounds of litigation commenced.

In January 2007, in *Gray v. Virginia Secretary of Transportation*, two Dulles Toll Road users filed suit in Richmond Circuit Court, arguing that it was an illegal tax under the Virginia Constitution to use toll revenues to fund Metrorail construction.[67] The circuit court rejected that claim in October 2008,[68] allowing the project to proceed. VDOT promptly issued the permit granting MWAA control over the Dulles Toll Road[69] and the U.S. Secretary of Transportation certified that MWAA's operation of the Toll Road, and its use of toll revenues to pay for the Metrorail project, were valid "airport purposes" under the Transfer Act and the federal lease.[70]

Construction on Phase I commenced in March 2009.[71] The $5.7 billion project depends on approximately $2.78 billion in financing from bonds issued by MWAA, secured by Dulles Toll Road revenues.[72] Those revenues account for approximately 49% of the

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[67] CL-07-203 (Richmond Cir. Ct. Oct. 20, 2008). *See* Pet. App. 6, 38, 50.

[68] Pet. App. 38.

[69] Pet. App. 39.

[70] Pet. App. 38.

[71] Pet. App. 39.

[72] Metro. Wash. Airports Auth., *Report to the Finance Committee* 3 (July 2014), *available at* http://www.mwaa.com/file/Tab_13.3_140716.pdf.

financing.[73] The Federal Government has contributed $900 million in funding (15.8%), and Virginia has committed $575 million (10.1%). The remaining funding comes from Fairfax County (16.1%); Loudoun County (4.8%); and MWAA (4.1% in aviation revenues).[74]

In August 2009, a second lawsuit was filed to stop the project, this time in federal district court.[75] The plaintiffs in *Parkridge 6, LLC v. U.S. Department of Transportation*[76] raised a number of claims, including the same argument from *Gray* "that MWAA's collection of tolls violates the Virginia Constitution because such collection constitutes taxation by unelected officials."[77] The United States District Court for the Eastern District of Virginia dismissed the claims for lack of standing and on the merits, and the Fourth Circuit affirmed the dismissal for lack of standing.[78]

The third lawsuit—this one—was filed in 2011 as a putative class action on behalf of all Dulles Toll Road motorists.[79] The complaint did not mention the Article II claim. Rather, the "crux" of petitioners'

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[73] *Id.*

[74] *Id.*

[75] Pet. App. 39.

[76] No. 1:09cv1312, 2010 U.S. Dist. LEXIS 34182 (E.D. Va. Apr. 6, 2010), *aff'd*, 420 F. App'x 265 (4th Cir. 2011).

[77] Pet. App. 39.

[78] *Parkridge 6*, 2010 U.S. Dist. LEXIS 34182, at *12, *17-18, *aff'd*, 420 F. App'x at 267-68.

[79] Compl., *Corr v. Metro. Wash. Airports Auth.*, No. 1:11-cv-389 (E.D. Va. Apr. 14, 2011), ECF No. 1.

complaint was the same as in *Gray* and *Parkridge 6*: that Dulles Toll Road users were forced to a pay "a tax imposed by an unauthorized, unelected body" in violation of the principle of "no taxation without representation."[80] Petitioners claimed that "'[n]o taxation without representation' is not simply some slogan redolent of a past age of patriots and heroes," but rather "an ever-vital principle" that "profoundly shaped the United States and the Virginia Constitutions."[81]

The United States District Court for the Eastern District of Virginia granted MWAA's motion to dismiss.[82] In briefing that motion, petitioners raised their Article II claim for the first time,[83] together with numerous other arguments not raised in their complaint. The district court rejected all of them.[84] As for the Article II argument, the district court found

> no merit to Plaintiffs' claim that MWAA's governance structure somehow interferes

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[80] Pet. App. 50.

[81] Pet. App. 50 n.9 (quoting Compl. ¶ 1).

[82] Pet. App. 60-62.

[83] Pls.' Br. in Opp. to Def.'s Mot. to Dismiss at 19-21, *Corr v. MWAA*, No. 1:11-cv-389 (E.D. Va. May 16, 2011), ECF No. 17.

[84] The district court also found that, while petitioners had Article III standing, prudential standing was lacking under the Fourth Circuit's decision in *Parkridge 6*. Pet. App. 46-48. But the district court went on to address the merits, "in the alternative," in light of "the ongoing nature of the project challenged and the long history of litigation concerning these issues in this and other courts . . . ." Pet. App. 48.

> with the President's authority under Article II or violates the Appointments Clause . . . . It is settled, as established by this country's long history of interstate compacts, that the President of the United States is not required to have authority to appoint or remove all of the members of an interstate compact commission in order to satisfy the Appointments Clause.[85]

Claiming that MWAA is an instrumentality of the United States, petitioners noted an appeal to the United States Court of Appeals for the Federal Circuit. They argued that the Federal Circuit had jurisdiction under 28 U.S.C. § 1295(a)(2) because theirs was an appeal under the Little Tucker Act of claims "against the United States, not exceeding $10,000 . . . ."[86] Petitioners had not named the United States as a defendant, however, and service was never made upon the Attorney General.[87]

The Federal Circuit did not reach petitioners' Article II argument. The court found that it lacked Little Tucker Act jurisdiction because MWAA is an

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[85] Pet. App. 55 (citing cases).

[86] 28 U.S.C. § 1346(a)(2). *See* Opening Br. of Pls.-Appellants 1, *Corr v. MWAA*, No. 2011-1501, 2012 WL 992892, at *1 (Fed. Cir. Mar. 5, 2012).

[87] *Cf. Finley v. United States*, 490 U.S. 545, 552 (1989) (holding that a suit "against the United States" under the Federal Torts Claims Act, 28 U.S.C. § 1346(a)(1), "means against the United States and no one else").

interstate-compact entity, not a federal instrumentality. The court gave three reasons for that conclusion. First, the Transfer Act "represents Congressional approval of Virginia's and the District of Columbia's compact-legislation authorizing the establishment of MWAA rather than the creation of the Authority in the first instance."[88] Second, the Transfer Act showed that the Federal Government had a "continuing but *limited* interest" in the operation of the airports, an interest satisfied through the lease of airport property to MWAA.[89] Finally, MWAA is controlled by a Board of Directors comprised principally of State appointees. "The fact that a small minority of the board members are federal appointees is insufficient to establish MWAA as a federal instrumentality."[90] Accordingly, the court transferred the case to the Fourth Circuit.[91]

Upon their arrival in the Fourth Circuit, petitioners filed a docketing statement asserting that the "issues in this case may implicate the constitutionality of a Virginia statute."[92] They claimed to have given notice to the Virginia Attorney General and said that

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[88] Pet. App. 23.

[89] Pet. App. 24 (quoting 49 U.S.C. § 49101(3)) (emphasis added).

[90] Pet. App. 25.

[91] Pet. App. 25-26.

[92] Docketing Statement, *Corr v. MWAA*, No. 13-1076 (4th Cir. Jan. 18, 2013), ECF No. 12.

he had "declined to intervene."[93] But when MWAA pointed out the absence of any record of such notice under 28 U.S.C. § 2403(b) and Fed. R. App. P. 44(a),[94] petitioners represented that *no* such notice was required because they "do not contend that MWAA is constitutionally invalid."[95] The Clerk sent § 2403 notices anyway to the Attorneys General of the United States, Virginia, and the District of Columbia.[96]

Four weeks later, petitioners filed their opening brief, representing that the Federal Circuit's ruling that MWAA is not a federal instrumentality was "the law of the case."[97] Based on that assumption, petitioners elected not to reargue the federal instrumentality issue or their Article II claim.[98] Their opening brief confined the merits argument to their original claim that the tolls were taxes, not user fees.[99]

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[93] *Id.*

[94] Resp. to Appellants' Docketing Statement, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794578, at *3 (4th Cir. Jan. 28, 2013), ECF No. 14.

[95] Appellants' Reply to Appellee's Response to Docketing Statement 2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794579, at *2 (4th Cir. Jan. 28, 2013), ECF No. 16.

[96] *See* Notices by the Clerk, *Corr v. MWAA*, No. 13-1076 (4th Cir. Jan. 28, 2013), ECF Nos. 17-19.

[97] Opening Br. of Appellants at 2 n.2, *Corr v. MWAA*, No. 13-1076, 2013 WL 705514, at *2 n.2 (4th Cir. Feb. 27, 2013), ECF No. 21.

[98] *Id.*

[99] *Id.* at 27-48, 2013 WL 705514, at *27-48.

On March 25, 2013, the Commonwealth of Virginia responded to the Clerk's § 2403 notice, declining to intervene because "the Opening Brief of the Appellants fails to challenge the constitutionality" of the MWAA Compact.[100] The District of Columbia also did not intervene. But after the United States later filed an amicus brief in support of affirmance,[101] petitioners filed a supplemental reply attempting to raise the Article II argument they originally said they were not raising.[102] Fourth Circuit precedent, however, treats arguments as waived when not raised in the appellant's opening brief.[103]

In January 2014, the Fourth Circuit affirmed the district court's decision. The court of appeals found that petitioners had standing to raise their taxation-without-representation claim[104] but concluded that

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[100] Notice of the Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, II, Attorney General of Virginia, Declining Intervention at 1-2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794580, at *1-2 (4th Cir. Mar. 25, 2013), ECF No. 27.

[101] Br. for United States as Amicus Curiae, *Corr v. MWAA*, No. 13-1076, 2013 WL 3833647 (4th Cir. July 19, 2013), ECF No. 44-2.

[102] Supplemental Reply Br. of Appellants in Resp. to Amicus Br. of United States 4-9, *Corr v. MWAA*, No. 13-1076, 2013 WL 3947989, at *4-9 (4th Cir. Aug. 1, 2013), ECF No. 51.

[103] *See, e.g.*, *IGEN Int'l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) ("Failure to present or argue assignments of error in opening appellate briefs constitutes a waiver of those issues."); Fed. R. App. P. 28(a)(8)(A) (appellant's opening brief "must contain . . . appellant's contentions").

[104] Pet. App. 8-10.

the tolls were valid user fees, not taxes.[105] The Fourth Circuit did not address petitioners' Article II argument.

In their petition for certiorari, petitioners have abandoned the taxation-without-representation claim that the district court found was the "crux"[106] of their complaint.[107] Their petition for certiorari here is limited to the Article II question addressed by the district court, but not reached by the Federal Circuit, and neither briefed in nor addressed by the Fourth Circuit.

5. Petitioners' litigation efforts (including this petition for certiorari) have attempted to derail a train that left the station in 2008, when the Richmond Circuit Court dismissed the lawsuit in *Gray*. Phase 1 of the Metrorail extension, adding five new stations and extending service to Wiehle Avenue, was completed this year; service on the "Silver Line" began on July 26, 2014.[108] Phase 2, which will add six more stations and provide direct access to Dulles, recently commenced and is expected to be completed

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[105] Pet. App. 10-15.

[106] Pet. App. 50.

[107] Pet. 9 n.1.

[108] Dulles Corridor Metrorail Project, *Silver Line Opens to Great Fanfare; Ridership Numbers Strong* (August 2014), *available at* http://www.dullesmetro.com/documents/_August2014/14AUG_DullesMetroNewsletter.pdf.

in 2018.[109] In August 2014, MWAA obtained a federal low-interest "TIFIA" loan in the amount of $1.28 billion, also secured by Dulles Toll Road revenues.[110] That low-interest loan will allow MWAA "to hold tolls at current levels through 2018 and limit future toll increases."[111] It was strongly supported by MWAA and by federal and State leaders.[112]

## REASONS FOR DENYING THE PETITION

### I. Article II does not require that the President control a majority of MWAA's Board of Directors because MWAA is an interstate-compact entity, not a federal instrumentality.

No one quarrels with the proposition—established in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[113]—that the Appointments Clause[114] and the Take Care Clause[115] require that the President be able to appoint and remove

[109] Washington Metropolitan Area Transit Authority, *About Silver Line* (2014), http://silverlinemetro.com/sv-about/.

[110] Metro. Wash. Airports Auth., *Airports Authority Statement Regarding TIFIA Loan Closing* (Aug. 20, 2014), http://www.metwashairports.com/7286.htm.

[111] *Id.*

[112] *Id.*

[113] 561 U.S. 477 (2010).

[114] U.S. Const. art. II, § 2, cl. 2.

[115] U.S. Const. art. II, § 3, cl. 5.

principal executive officers who are tasked with determining the policy and enforcing the laws of the United States.[116] But it was undisputed in *Free Enterprise Fund* that the Oversight Board, though established as a private, non-profit corporation, was nonetheless "a Government-created, Government-appointed entity, with expansive powers to govern an entire industry."[117] Indeed:

> Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is "part of the Government" for constitutional purposes, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 397, 114 S. Ct. 961, 130 L. Ed. 2d 902 (1995), and that its members are "'Officers of the United States'" who "exercis[e] significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 125-126, 96 S. Ct. 612, 6 L. Ed. 2d 659 (1976) (per curiam) (quoting Art. II, § 2, cl. 2).[118]

Because the law creating the Oversight Board imposed two barriers to the removal of members by the President, the Court held that it violated the Take Care Clause.[119] "The buck stops with the President, in Harry Truman's famous phrase," so "the President

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[116] 561 U.S. at 484.

[117] *Id.* at 484-85.

[118] *Id.* at 485-86.

[119] *Id.* at 492, 495, 513-14.

therefore must have some 'power of removing those for whom he can not continue to be responsible.' "[120]

But unlike the Oversight Board, which all parties agreed was part of the Federal Government for constitutional purposes, MWAA is not a federal instrumentality and is not part of the Federal Government, either for statutory or constitutional purposes.

### A. MWAA is not a federal instrumentality for statutory purposes.

Congress's disclaimer that MWAA is "independent of . . . the United States Government," 49 U.S.C. § 49106(a)(2), conclusively establishes that it is *not* part of the Government for statutory purposes. As cases like *Free Enterprise Board* and *Lebron* teach, such a clear statement is "assuredly dispositive" of MWAA's "status as a Government entity for purposes of matters that are within Congress' control . . . ." *Lebron*, 513 U.S. at 392. Accordingly, MWAA is manifestly not an agency of the United States for purposes of claims "against the United States" under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). Although the Federal Circuit held that Little Tucker Act jurisdiction was absent because MWAA was not a federal

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[120] *Id.* at 493 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). The Court held, however, that the Board's appointments were consistent with the Appointments Clause. *Id.* at 510-13.

instrumentality,[121] its analysis could have begun and ended with that clear disclaimer in § 49106(a)(2).

### B. MWAA is not a federal instrumentality for constitutional purposes.

#### 1. Virginia and the District created MWAA, not Congress.

Virginia and the District of Columbia brought MWAA into existence in 1985,[122] not Congress. Petitioners admitted so in their complaint.[123] Accordingly, the Federal Circuit correctly found that the Transfer Act merely "represents Congressional approval of Virginia's and the District of Columbia's compact-legislation authorizing the establishment of MWAA rather than the creation of [MWAA] in the first instance."[124]

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[121] Pet. App. 22-25.

[122] 1985 Va. Acts ch. 598; 1985 D.C. Law 6-67.

[123] Compl. ¶ 15 ("Defendant MWAA is [a] 'public body corporate and politic' established by the Commonwealth of Virginia and the District of Columbia in an interstate compact, to which the United States Congress gave its consent in 1986."), No. 1:11-cv-389, *Corr v. Metro. Wash. Airports Auth.* (E.D. Va. Apr. 14, 2011), ECF No. 1.

[124] Pet. App. 23.

### 2. MWAA is not a federal instrumentality under *CAAN*.

MWAA is also not a federal instrumentality because, unlike the Oversight Board in *Free Enterprise Fund*, MWAA is not functionally controlled by the Federal Government. The MWAA Compact gives primary voting power to Virginia (7 directors) and the District of Columbia (4 directors), with Maryland and the United States having their own say (3 directors each), but less than the combined vote of the two compact signatories.[125] As the presidential appointees have only 3 of 17 votes, MWAA cannot be called an agent or instrumentality of the Federal Government.

Petitioners misapply this Court's decision in *CAAN* in trying to attribute federal-instrumentality qualities to MWAA that belonged instead to the unconstitutional Board of Review, created by Congress in 1986.[126] The "unique" Board of Review was "composed of nine Members of Congress and vested with veto power over decisions made by MWAA's

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[125] *See also Transfer of National and Dulles Airports: Hearings Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. and Transp.*, 99th Cong. 52-53 (1985) (statement of former Gov. Linwood Holton) (describing delicate negotiations allocating representation among the participants); S. Rep. No. 99-193, at 13 (1985) ("Increased Federal membership would not be necessary to the protection of Federal interests, which are adequately guaranteed by the provisions of the bill, and would be contrary to the intent of the bill to shift control to a regional authority.").

[126] *See* 501 U.S. at 252.

Board of Directors."[127] The Board of Review raised separation-of-powers concerns because it gave an agent of Congress a veto over MWAA's actions:

> We thus confront an entity created at the initiative of Congress, the powers of which Congress has delineated, the purpose of which is to protect an acknowledged federal interest, *and membership in which is restricted to congressional officials*. Such an entity necessarily exercises sufficient federal power *as an agent of Congress* to mandate separation-of-powers scrutiny.[128]

The Court was plainly addressing the Board of Review as the "agent of Congress," not MWAA's Board of Directors.

Contrary to the view of petitioners' amici, Congress did not "ma[ke] the separation-of-powers problem *worse*"[129] by ultimately eliminating the Board of Review after another iteration of it was struck down by the D.C. Circuit.[130] As the D.C. Circuit said, the Board of Review was unconstitutional (even as modified by Congress) because Congress continued "to interfere impermissibly with the [MWAA] Directors'

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[127] *Id.* at 255.

[128] *Id.* at 269 (emphasis added).

[129] Br. of Amici Curiae Am. Highway Users Alliance, et al. 6 (filed Sept. 18, 2014).

[130] *Hechinger v. Citizens Against Abatement of Airport Noise, Inc.*, 36 F.3d 97, 105 (D.C. Cir. 1999).

performance of their *independent* responsibilities."[131] The constitutional problem wasn't with MWAA's independence; it was with Congress's efforts to limit that independence.

Petitioners argue that when Congress finally eliminated the unconstitutional Board of Review in 1996, "the Board of Review's authority to exercise federal power devolved entirely onto MWAA's . . . Board of Directors."[132] But petitioners cite no authority for their *ipse dixit*. The reality is that MWAA's Board of Directors simply was no longer subject to the veto power that Congress previously tried to exercise. MWAA was now the independent regional authority that Congress's original findings[133] said it was supposed to be.

### 3. MWAA's management of important, federally owned airports does not transform MWAA into a federal instrumentality, and petitioners' contrary theory would render the Compact Clause a dead letter.

Petitioners cannot convert MWAA into a federal instrumentality by claiming that its mission is to maintain and promote important, federally owned airports. For starters, Congress found in the Transfer

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[131] *Id.* at 104 (emphasis added).

[132] Pet. 7.

[133] 49 U.S.C. § 49101.

Act that the Federal Government had a "limited" interest in the airports and that that limited interest could be accommodated through a lease mechanism.[134]

More fundamentally, petitioners' argument is fatally flawed in assuming that if the Government has a strong federal interest in the work of an interstate-compact entity, then the President must be given the power to appoint and remove a majority of its members. That theory, if true, would gut the Compact Clause.[135]

As *Cuyler v. Adams* teaches, the Compact Clause requires Congress's consent precisely because the interstate "combination" might lead to an "*increase* of political power in the States, which may *encroach upon or interfere* with the just supremacy of the United States. . . ."[136] The federal interest is necessarily a strong and important one whenever Congress is constitutionally required to approve an interstate compact.

If the Constitution required the President to appoint and remove a majority of the members of an interstate-compact body, no State would likely sign such a compact. An interstate-compact entity controlled by the President would be little different from any other federal agency. It does not matter that

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[134] *Id.*; *see supra* at 8.

[135] U.S. Const. art. I, § 10, cl. 3.

[136] 449 U.S. 433, 440 (1981) (quoting *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468 (1978)) (emphasis added).

Congress's approval "transforms an interstate compact within [the Compact] Clause into a law of the United States."[137] Congressional approval "does not convert the state—or interstate—body into a federal one."[138] "To hold otherwise would have the effect of treating every congressionally authorized interstate compact entity . . . into a federal 'agency' . . . ."[139]

Petitioners' Article II theory would obviously frustrate the use of interstate-compact entities to solve regional problems. As this Court said in *Hess v. Port Authority Trans-Hudson Corp.*, interstate compacts can address needs that "'may be badly served or not served at all by the ordinary channels of National or State political action.'"[140] Such compacts help "safeguard[ ] the national interest."[141] In their seminal article on interstate compacts, then-Professor Frankfurter and Professor Landis criticized the notion of "exclusive duality," which divided persons "into two hostile camps, those seeking relief through

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[137] *E.g.*, *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Cuyler*, 449 U.S. at 438).

[138] *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 533 (2d Cir. 2010) (holding that the Atlantic States Marine Fisheries Commission, created by interstate compact among 15 States and the District of Columbia, is not subject to the Administrative Procedure Act).

[139] *Id.*

[140] 513 U.S. 30, 40 (1994) (quoting V. Thursby, Interstate Cooperation: A Study of the Interstate Compact 5 (1953)).

[141] *Id.* (quoting *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951)).

State action and those appealing for national intervention."[142] The Compact Clause, by contrast, facilitates cooperative solutions. The "*combined* legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action."[143] Interstate-compact entities like MWAA are properly thought of, in Professor Tribe's words, as a "hybrid—a compact agency belonging to neither level of our federal-state hierarchy."[144]

This Court embraced that cooperative model in *Hess*,[145] yet petitioners overlook it entirely. Petitioners mistakenly treat MWAA as some sort of aberration on the ground that it is independent of the jurisdictions that created it (although its Board members are removable for cause by the jurisdictions that appointed them). That independence is no aberration. For as *Hess* explained, interstate-compact "entities owe their existence to state and federal sovereigns acting *cooperatively*, and not to *any one* of the United States"

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[142] Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 688 (1925).

[143] *Id.* (emphasis added).

[144] Laurence H. Tribe, American Constitutional Law 1241-42 (3d ed. 2000). *See also United States ex rel. Blumenthal-Kahn Elec. L.P. v. Am. Home Assur. Co.*, 219 F. Supp. 2d 710, 712 (E.D. Va. 2002) (describing MWAA as "hybrid regional agency").

[145] 513 U.S. at 40-41 (quoting article by Frankfurter and Landis).

acting alone.[146] The very point of such cooperation is to ensure that the compact entity is "*not* subject to the unilateral control" by any one member.[147]

## II. There is no split of authorities on the Article II or federal-instrumentality issues.

This case is also not certworthy because there is no split between *any* two courts on the questions raised here, let alone a split between any federal circuits or between any federal circuit and a State's highest court.[148] Besides the district court below, only two other courts have addressed petitioners' Article II argument. Both courts held that interstate-compact entities like MWAA are not federal instrumentalities whose members must be appointed or subject to removal by the President.

In *Seattle Master Builders Association v. Pacific Northwest Electric Power & Conservation Planning Council*, the Ninth Circuit in 1986 upheld the validity of the Planning Council, an interstate-compact agency comprised of members appointed by the governors of Washington, Oregon, Montana, and Idaho.[149] The Council had the power to review and control certain

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[146] *Id.* at 42 (emphasis added) (quotation and citation omitted).

[147] *Id.* (emphasis added).

[148] Sup. Ct. R. 10.

[149] 786 F.2d 1359, 1362 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

actions of the Bonneville Power Administration, an agency of the United States Department of Energy.[150] The court of appeals rejected the argument that the Council was constitutionally suspect because its activities "directly affect a federal agency."[151] Citing Professors Frankfurter and Landis, the court said that an "unusual feature of a compact does not make it invalid."[152] The court observed that it is "also not unusual for the federal government to be involved in or to be directly affected by compact-created agencies," and listed a number of such compacts as examples.[153]

Because the Planning Council was an interstate-compact agency, the Ninth Circuit held that Article II did not require the President to have the power to appoint or remove its members. The court found that "[n]o court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states."[154] Requiring presidential control "would outlaw virtually all compacts because all or most of them impact federal activities and all or most of them have members appointed by the participating states."[155]

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[150] *Id.*

[151] *Id.* at 1364.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 1365.

[155] *Id.*

In the only other case to have addressed petitioners' argument, a federal district court in Oregon held in 1990 that Article II did not require the President to appoint the members of the Columbia River Gorge Commission, created by the Columbia River Gorge Compact between Washington and Oregon.[156] The court followed the Ninth Circuit's decision in *Seattle Master Builders*.[157] The plaintiffs apparently did not contest the Article II ruling, and the Ninth Circuit affirmed on other grounds.[158]

There is also no split of authorities on whether MWAA is a federal instrumentality. Courts have consistently held that MWAA is an interstate-compact entity created by Virginia and the District of Columbia, not an agency of the United States and not a federal instrumentality.[159]

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[156] *Columbia River Gorge United-Protecting People & Prop. v. Yeutter*, No. 88-1319, 1990 U.S. Dist. LEXIS 15447, at *32-33 (D. Or. May 23, 1990), *aff'd on other grounds*, 960 F.2d 110 (9th Cir.), *cert. denied*, 506 U.S. 863 (1992).

[157] *Id.* at *32-33.

[158] *See* 960 F.2d at 112.

[159] *See* Pet. App. 25 (Federal Circuit holding that MWAA is "not a federal instrumentality"); *San Jose Constr. Grp., Inc. v. Metro. Wash. Airports Auth.*, 415 F. Supp. 2d 643, 645-46 (E.D. Va. 2006) (holding that MWAA is "not a federal entity" for purposes of federal question jurisdiction; "the chartering legislation specifically notes that MWAA is independent of the federal government. MWAA is a creation of state law, established by a joint compact between Virginia and the District of Columbia"); *United States ex rel. Blumenthal-Kahn Elec. L.P.*, 219 F. Supp. 2d at 714 ("Given that the MWAA is not a creature or part of the

(Continued on following page)

The uniformity of case law on both the Article II and the federal-instrumentality issues shows there is no warrant for review of this case.

## III. This case is a poor vehicle to address petitioners' novel Article II claim.

Finally, because the question presented here was insufficiently developed below, this case presents a poor vehicle to address petitioners' argument that interstate-compact entities like MWAA must have a majority of their members appointed (or subject to removal) by the President. Petitioners did not include that argument in their complaint. It was addressed by the district court[160] only after petitioners raised it for the first time in their opposition to MWAA's motion to dismiss.[161]

The Federal Circuit did not reach the issue, having determined that MWAA is not a federal instrumentality.[162] And the Fourth Circuit did not address

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federal government, but is instead a political subdivision created by state statutes, that is independent of the federal government, then it follows that the MWAA's Project in this case is not a 'public work of the United States' and therefore not subject to the Miller Act."); *Virginia v. Achu*, 54 Va. Cir. 109, 110 (2000) (upholding constitutionality of MWAA's regulations, finding it to be "a properly constituted compact agency").

[160] Pet. App. 55-56.

[161] Pls.' Br. in Opp. to Def.'s Mot. to Dismiss at 19-21, *Corr v. MWAA*, No. 1:11-cv-389 (E.D. Va. May 16, 2011), ECF No. 17.

[162] Pet. App. 19-25.

the issue either, after petitioners represented that they did "not contend that MWAA is constitutionally invalid"[163] and filed an opening brief representing that they were not raising the federal-instrumentality issue because the Federal Circuit's ruling was the "law of the case."[164] That representation, in fact, induced Virginia *not* to intervene in the Fourth Circuit, given that petitioners were not challenging the constitutionality of the MWAA Compact.[165]

As a result of petitioners' erratic litigating strategy, this Court would have to address the Article II question without the benefit of any ruling by a court of appeals. It would also receive briefing for the first time on the question by the compact's two signatories—the Commonwealth of Virginia and the District of Columbia. The United States could reasonably be expected to intervene or file an amicus brief in defense of the Transfer Act, once the Government is notified as required by 28 U.S.C. § 2403(a). The Court is properly "mindful that [it is] a court of review, not

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[163] Appellants' Reply to Appellee's Resp. to Docketing Statement at 2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794579, at *2 (4th Cir. Jan. 28, 2013), ECF No. 16.

[164] Opening Br. of Appellants at 2 n.2, *Corr v. MWAA*, No. 13-1076, 2013 WL 705514, at *2 n.2 (4th Cir. Feb. 27, 2013), ECF No. 21.

[165] Notice of the Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, II, Attorney General of Virginia, Declining Intervention at 1-2, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794580, at *1-2 (4th Cir. Mar. 25, 2013), ECF No. 27.

of first view,"[166] and it should decline to consider petitioners' novel argument here.

## CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[166] *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).