No. 13-1559

In the Supreme Court of the United States

JOHN B. CORR; JOHN W. GRIGSBY, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED,
Petitioners,
v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

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

PETITIONERS' OPPOSITION TO THE MOTION TO INTERVENE BY THE COMMONWEALTH OF VIRGINIA AND THE DISTRICT OF COLUMBIA

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INTRODUCTION

Petitioners urge the Court to deny the motion of Virginia and the District of Columbia to intervene in this case for two separate and independent reasons. *First*, Petitioners challenge the constitutionality of a federal statute—the so-called "Transfer Act"—and not any statute of Virginia or the District. Accordingly, neither Virginia nor the District can invoke the intervention rights conferred by 28 U.S.C. § 2403(b). *Second*, even if Section 2403(b) applied, the decision of Virginia and the District to enter this litigation now—after declining to do so in the courts below—renders their motion untimely.

ARGUMENT

I. Virginia and the District Have No Right to Intervene.

Virginia and the District seek to intervene in this case pursuant to 28 U.S.C. § 2403(b), which provides:

> In any action, suit, or proceeding 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 presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b) (emphasis added).

Under Section 2403(b), the right of Virginia and the District to intervene is limited to those cases in which the constitutionality of one of their statutes is "drawn in question." As the Court has explained, statutes are "drawn in question" only when their "existence, or constitutionality, or legality" is questioned:

> The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.

United States v. Lynch, 137 U.S. 280, 285 (1890). *See also* 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4013 (3d ed. 2012) (describing *Lynch*'s interpretation of the phrase "drawn in question" as "[o]ne of the most frequently quoted formulations" of the phrase that "established its meaning and remain[s] good"); *Peruta v. County of San Diego*, ___ F.3d ___, Case No. 10-56971, 2014 WL 5839792, at *4 (9th Cir. Nov. 12, 2014) (published order denying a State's motion to intervene after publication of appellate opinion).

Put simply, Virginia and the District have no right to intervene pursuant to Section 2403(b) because the questions presented in the petition do not "draw[] in question"—that is, deny by "direct inquiry"—the "constitutionality of any statute of" either Virginia or the District. Rather, both of the questions presented in the petition focus only on a separation-of-powers challenge to the constitutionality of a federal statute—the Metropolitan Washington Airports Act of 1986, 49 U.S.C.

§§ 49101 *et seq.* (the "Transfer Act")—which transferred control over federal assets and certain federal powers to respondent Metropolitan Washington Airports Authority ("MWAA"), whose existence predates the Transfer Act. Specifically, those questions are:

> 1. Whether, as the United States implicitly conceded below, 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.
>
> 2. Whether the Transfer Act violates the separation of powers, including the Executive Vesting, Appointments, and Take Care Clauses of Article II, by depriving the President of control over MWAA, an entity exercising—as the United States admits—Executive Branch functions pursuant to federal law.

Based on these questions presented, Virginia and the District contend that "Petitioners, therefore, are challenging the constitutionality of the interstate compact establishing MWAA." Mot. to Int. 2; *see also id.* at 3 ("The petition for writ of certiorari argues that MWAA is constitutionally invalid."). Not true. Petitioners take no issue with Virginia's and the District's creation of (or the constitutionality of) MWAA. For that reason, the petition does not even cite to a single statutory provision from Virginia or the District.

Notably, Virginia and the District identify *no* statute of theirs that the petition purportedly challenges as unconstitutional. That would explain why Virginia and the District's putative brief in opposition fails to set out "verbatim," as

required by Supreme Court Rules 15.3,[1] 24.1(f), and 24.2,[2] the supposedly challenged Virginia and District statutes if Virginia and the District were "dissatisfied" with the petition's failure to do so. *See* Pet. 1-2; Pet. App. 63-84 (setting out verbatim only federal constitutional and statutory provisions).

Virginia and the District fail to identify any challenged Virginia and District statutes in their putative brief in opposition because the petition only challenges the Transfer Act's *transfer* to MWAA of the federal government's control over certain federal facilities and related powers. That act of the *United States Congress*—which provided MWAA with an unprecedented exercise of federal power to manage federal interests uncontrolled hy the Executive branch—is the only statute that the petition "draw[s] in question." Because the MWAA compact itself—effectively an empty shell—did not transfer any federal powers to MWAA, the fact that Virginia and the District passed such legislation establishing MWAA *prior* to Congress's enactment of the Transfer Act is irrelevant to the questions presented in the petition. *See* Br. of Virginia and the District of Columbia 4-7 (admitting that Virginia and the District established MWAA before passage of the Transfer Act).

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[1] "[T]he brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief[.]" Sup. Ct. R. 15.3.

[2] Supreme Court Rule 24.2 requires that a respondent's brief "shall conform" to the requirements of, *inter alia*, Supreme Court Rule 24.1(f), which requires the brief "set out verbatim with appropriate citation" the "statutes . . . involved in the case," except that they need *not* be included *if* the "respondent . . . is []satisfied with their presentation by the opposing party." Sup. Ct. R. 24.2.

Because the petition does not "draw[] in question" the "constitutionality of any statute" of either Virginia or the District, under the plain terms of Section 2403(b), neither jurisdiction has a right to intervene.

II. Virginia and the District's Motion Is Untimely.

Even if the petition did "draw[] in question" the constitutionality of a statute of Virginia or the District, neither jurisdiction provides a compelling reason for their decision to intervene at this late stage of the litigation. Accordingly, their motion should be denied as untimely.

While this Court's rules do not provide procedures for intervention, Federal Rule of Civil Procedure 24(a) provides a helpful analog.[3] Under that rule, intervention by right requires a "timely motion." To determine whether a motion is timely, courts consider "all the circumstances," *NAACP v. New York*, 413 U.S. 345, 366 (1973), weighing factors such as: (1) the stage of the proceeding at which one seeks to intervene; (2) the prejudice to other parties from the failure to apply to intervene sooner; (3) the prejudice to one if the application is denied; (4) the reason for and length of the delay; and (5) any other unusual circumstances. *See, e.g.*, *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004); *Trans Chem.*

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[3] While "[t]he Federal Rules of Civil Procedure, of course, apply only in the federal district courts ... the policies underlying intervention [under Federal Rule of Civil Procedure 24] may be applicable in appellate courts." *United Auto. Workers v. Scofield*, 382 U.S. 205, 216 n.10 (1965).

Ltd. v. China Nat'l. Mach. Imp. & Exp. Corp., 332 F.3d 815, 822 (5th Cir. 2003); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001).

Appellate courts have used Federal Rule of Civil Procedure 24(a) to help them understand intervention under Section 2403(b). *See Peruta*, 2014 WL 5839792, at *1-*2. Courts of appeals have also "developed their own standards of intervention in order to take account of the unique problems caused by intervention at the appellate stage." *Amalgamated Transit Union Int'l v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) (per curiam with panel including Ginsburg, J.). An overriding rule is that a "court of appeals may allow intervention at the appellate stage where none was sought in the district court only in an exceptional case for imperative reasons." *Id.* at 1552 (citations and internal quotation marks omitted). Since intervention on appeal is limited to such "exceptional case[s], then, by the same logic, intervention after the publication of an appellate opinion must be extremely rare." *Peruta*, 2014 WL 5839792, at *1. In other words, the failure to intervene in the court below raises the bar for intervention in the appellate court.

Against this standard, the motion of Virginia and the District is untimely. The petition seeks review by this Court of the Fourth Circuit's judgment, which opens up for this Court's review the earlier interlocutory decision of the Federal Circuit rejecting Petitioners' separation-of-powers challenge to the Transfer Act. *See* S. Shapiro et al., *Supreme Court Practice* 84 (10th ed. 2013). Tellingly, neither

Virginia nor the District offers any explanation of their failure to intervene before the Federal Circuit, where Petitioners explicitly raised—and the Federal Circuit decided—their separation-of-powers challenge to the Transfer Act contained in the questions presented. *See* Pet. App. 25 ("[W]e conclude that MWAA is not a federal instrumentality for the purpose of Petitioners' [separation-of-powers] claims."). Virginia and the District have not provided good—much less an "imperative"—reason for their abrupt decision to take part in this case at this late hour. In that context, their motion should be deemed untimely.[4]

CONCLUSION

Because Virginia and the District have no right to intervene pursuant to 28 U.S.C. § 2403(b), and because their motion is untimely, Petitioners request the Court to deny the motion to intervene.

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[4] Pursuant to Rule 37.4, Virginia and the District could have filed an *amicus curiae* brief in support of Respondent. Their putative brief in opposition, however, cannot serve that purpose, because it exceeds Supreme Court Rule 33(g)(x)'s 6,000 word limit for petition-stage *amicus curiae* briefs by 1,490 words, according to the brief's Supreme Court Rule 33(h) certificate.

Respectfully submitted,

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