No. 13-1559

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN B. CORR, *et al.*,

Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Respondent.

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

REPLY OF THE COMMONWEALTH OF VIRGINIA AND THE DISTRICT OF COLUMBIA IN SUPPORT OF THEIR MOTION TO INTERVENE

The petitioners want the Court to invalidate the composition of MWAA's Board of Directors without hearing from the two interstate-compact jurisdictions that established MWAA and specified the Board's composition: Virginia and the District of Columbia. The rule of law and the plain language of 28 U.S.C. § 2403(b) call for declining the petitioners' effort to muzzle the governments that, exercising sovereign authority, created MWAA.

I. Virginia and the District have a right to intervene because the composition of MWAA's Board of Directors is specified by their interstate compact.

The petitioners cannot credibly maintain that they "take no issue with Virginia's and the District's creation of (or the constitutionality of) MWAA"[1] and that their sole challenge is to the

[1] Pet'rs Opp'n to the Mot. to Intervene by the Commonwealth of Virginia and the District of Columbia at 3 [hereinafter Pet'rs Opp'n].

"act of the United States Congress"[2] in the Transfer Act. In other words, the petitioners claim to be challenging only Congress's approval of the compact, not the compact itself.[3] That is a distinction without a difference, for the composition of MWAA's Board of Directors was determined by Virginia and the District.[4]

The petition for writ of certiorari itself belies the petitioners' claim that they are not challenging the compact that established MWAA. Their Article II challenge attacks the composition of MWAA's Board of Directors because "MWAA is not accountable to the President."[5] They deride "MWAA's unprecedented exercise of federal power—uncontrolled by the President."[6] And they argue that "the President cannot remove *even a majority or a plurality* of MWAA's members for cause."[7]

The composition of MWAA's Board of Directors is based on the compact between Virginia and the District, which the Transfer Act simply approved. Without the compact, there would be no MWAA, and the underlying action in the district court would never have been filed. Put another way, if the petitioners' argument prevailed, it would be unlawful for Virginia and the District to enter into a compact to operate the Washington airports without giving the President control of the board of directors.

Accordingly, the constitutionality of the compact and the composition of the MWAA Board of Directors is necessarily "drawn into question" within the meaning of 28 U.S.C.

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[2] *Id.* at 4 (emphasis omitted).

[3] The petitioners have still not complied with Rule 29.4(b) for actions challenging the constitutionality of an act of Congress.

[4] *See* Br. of Virginia and the District of Columbia as Intervenors at 3-7.

[5] Pet. Cert. 23.

[6] *Id.* (emphasis omitted).

[7] *Id.* at 24.

§ 2403(b). The phrase "drawn into question" has been used "in many jurisdictional statutes,"[8] and under any reasonable reading, the petitioners' challenge qualifies. The MWAA Compact's specification of the Board's composition is "drawn in question directly, and not incidentally," because the "constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of [the petitioners'] direct inquiry."[9]

The petitioners dubiously argue that Virginia and the District cannot intervene because the petition for writ of certiorari did not actually cite the Virginia and D.C. code provisions[10] establishing MWAA.[11] But the petition for writ of certiorari acknowledges that MWAA was established "in 1985 when Virginia and the District of Columbia passed the necessary legislation."[12] The petitioners cannot use their own failure to cite the enabling legislation as the basis for preventing Virginia and D.C. from defending it. If that stratagem were viable, a plaintiff could challenge a statute as unconstitutional and routinely block the sovereign's intervention to defend it simply by refusing to cite the statute.

Finally, the petitioners' assertion that they are not challenging the "creation of (or the constitutionality of) MWAA"[13] would appear to be a case-dispositive concession. Either petitioners have just conceded that the Board's composition *is* constitutional—in which case they have waived their Article II objections—or the petitioners, in fact, do challenge the Board's

[8] Charles Alan Wright and Arthur R. Miller, et al., 16B *Federal Practice & Procedure* § 4013 (3d ed. 2012).

[9] *United States v. Lynch*, 137 U.S. 280, 285 (1890).

[10] 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)).

[11] *See* Pet'rs Opp'n 3.

[12] Pet. Cert. 3.

[13] Pet'rs Opp'n 3.

composition, in which case Virginia and the District have the right to intervene to defend their laws that specify the Board's composition.

II. The motion to intervene is timely, particularly in light of the petitioners' unexplained and repeated failures to give the required notice to Virginia, the District, and the United States.

Section 2403(b) permits a State to intervene of right in "*any instance* where a State is not a party in a case challenging the constitutionality of any statute of that State affecting the public interest . . . ."[14] Congress added § 2403(b) to give States "the same option" to intervene that the United States enjoys under § 2403(a).[15] Intervention is thus permitted in the Supreme Court itself. As the leading treatise explains: "[a]s applied to Supreme Court proceedings, § 2403(b) means that the state is no longer relegated to the position of an amicus in such a situation."[16]

We found no case in which this Court denied intervention of right under § 2403(b) on the ground that that the State had not become a party in the lower courts. To the contrary, in *Estate of Thornton v. Caldor, Inc.*, the Court granted intervention of right to Connecticut to defend its statute (allowing employees not to work on a Sabbath of their choosing), notwithstanding that Connecticut appeared for the first time in this Court.[17] The trial court had upheld the statute, but the Connecticut Supreme Court declared it unconstitutional.[18] Connecticut was granted intervention of right under § 2403(b) to join in the private party's petition for writ of certiorari.[19]

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[14] S. Rep. No. 94-204, at 9 (1975) (emphasis added).

[15] *Id.* at 14.

[16] Stephen M. Shapiro, et al., *Supreme Court Practice* 429 (3d ed. 2013).

[17] 465 U.S. 1098, 472 U.S. 703, 708 n.7 (1985).

[18] 472 U.S. at 707.

[19] *Id.* at 708 n.7.

The petitioners rely[20] on the Ninth Circuit's recent order in *Peruta v. County of San Diego*,[21] but *Peruta* is inapposite. Seeking to defend San Diego's policy allowing the local sheriff to deny concealed-weapons permits, the State of California moved to intervene after judgment in order to request en banc review of the panel's decision. The court of appeals refused the State's intervention at that stage because § 2403(b) did not apply to the county policy at issue: "Simply put, no California statute has been challenged, overturned, or had its constitutionality 'drawn into question.'"[22] In this case, by contrast, the petitioners seek to invalidate the composition of MWAA's Board of Directors as specified in the Virginia and D.C. laws creating MWAA. And unlike California, Virginia and the District have not waited until after an adverse ruling; they have timely moved to intervene at the certiorari stage, permitting the matter to be resolved without disrupting the Court's normal schedule or burdening other parties.

The petitioners are also on thin ice to complain about the timeliness of our intervention in light of their persistent failure to follow the rules requiring notice to our respective Attorneys General. The petitioners did not plead their Article II claim in the district court, let alone give notice to the Attorneys General of Virginia, the District, or the United States, as required by the Federal Rule of Civil Procedure 5.1(a).[23]

Nor did the petitioners give the required notice, under Federal Rule of Appellate Procedure 44, when they appealed the case to the Federal Circuit. The petitioners claim that Virginia and the District should have intervened there, but the petitioners offer no excuse for failing to notify us about their constitutional challenge.

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[20] Pet'rs Opp'n 2, 6.

[21] No. 10-56971, 2014 WL 5839792 (9th Cir. Nov. 12, 2014).

[22] *Id.* at *3.

[23] *See* Br. of Virginia and the District of Columbia as Intervenors 14-15.

Tellingly, the petitioners do *not* claim that Virginia and the District should have intervened in the Fourth Circuit. And for good reason: the Article II question was not at issue there and the petitioners themselves dissuaded Virginia and the District from intervening. Upon transfer to the Fourth Circuit, petitioners initially claimed that the "issues in this case may implicate the constitutionality of a Virginia statute."[24] They even claimed to have given notice to the Virginia Attorney General, who had supposedly "declined to intervene."[25] But when MWAA pointed out the absence of any record of such notice and that notice was required under § 2403(b), the petitioners abruptly altered course. They claimed that no such notice was required because they did "not contend that MWAA is constitutionally invalid."[26] The petitioners then filed an opening brief declining to raise their Article II and federal-instrumentality arguments on the ground that the Federal Circuit's decision was the "law of the case."[27] At that point, although the clerk had issued § 2403 notices,[28] Virginia specifically declined intervention because "the Opening Brief of the Appellants fails to challenge the constitutionality" of the MWAA Compact.[29] In light of their position in the Fourth Circuit, the petitioners, understandably, do not fault Virginia and the District for not intervening in that court.

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

[25] *Id.*

[26] 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.

[27] 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.

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

[29] 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.

The petitioners now seek to resuscitate their Article II challenge in this court, but they have failed (yet again) to give notice to Virginia and the District, as required by Rule 29.4(c), let alone notice to the United States, as required by Rule 29.4(b). Fortunately, Virginia and the District learned of the petition in time to move to intervene on our own initiative. We have acted diligently in doing so, in spite of the petitioners' failure to notify us, and well in time to intervene without prejudicing any party or delaying the case.

CONCLUSION

The motion to intervene should be granted. In the alternative, the Court should treat the previously filed Brief of Virginia and the District of Columbia as Intervenors as an amicus curiae brief in opposition to the petition for writ of certiorari.

Respectfully submitted,

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November 21, 2014