No. _____

In the Supreme Court of the United States

JOHN B. CORR; JOHN W. GRIGSBY, ON BEHALF OF THEMSELVES AND ALL OTHERS 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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Metropolitan Washington Airports Authority ("MWAA") is an ostensible interstate compact entity. Congress dictated the terms of that compact in the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 49101 *et seq*. ("Transfer Act"), which transferred to MWAA all of the federal government's "rights, liabilities, and obligations" concerning, *inter alia*, Dulles Airport and its "access highways and other related facilities," *id.* at § 49102, while retaining the federal government's title to such facilities.

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("*CAAN*"), this Court held that the Transfer Act violated the separation of powers by vesting federal powers in a supervisory Board of Review composed of members of Congress. Congress's response was not to establish a constitutionally permissible mechanism for exercising federal control over MWAA, but instead to eliminate such control altogether through abolition of the Board of Review, whose federal powers devolved on MWAA's Board of Directors—only three of whose seventeen members are appointed by the President.

Petitioners, users of the Dulles Toll Road administered by MWAA, sued MWAA alleging that high tolls imposed by MWAA are illegal exactions because, *inter alia*, the Transfer Act violates the separation of powers. Petitioners seek both restitution of those exactions and an injunction halting them. The Federal Circuit below ruled that MWAA is not a federal instrumentality subject to

separation-of-powers scrutiny—relying primarily on the *absence* of federal control over MWAA—and transferred the appeal to the Fourth Circuit, where the United States, participating for the first time as *amicus curiae*, contended that petitioners' appeal "directly implicates the interests of the United States," that the Transfer Act authorizes MWAA's exactions that petitioners challenge, and that the Secretary of Transportation exercises both "oversight" and "ultimate control" over MWAA for Article II purposes. Ignoring both the Federal Circuit's disposition of petitioners' separation-of-powers claim and the United States' arguments contradicting that disposition, the Fourth Circuit affirmed the district court's dismissal of petitioners' other claims. The questions presented 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.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 740 F.3d 295 and is reproduced at Pet. App. 1-15. The earlier Order of the United States Court of Appeals for the Federal Circuit, concluding that MWAA is not a federal instrumentality implicating separation-of-powers requirements and transferring the case to the Fourth Circuit, is reported at 702 F.3d 1334 and is reproduced at Pet. App. 18-26. The opinion of the district court, granting MWAA's motion to dismiss, is reported at 800 F. Supp. 2d 743 and is reproduced at Pet. App. 27-60.

JURISDICTION

The Fourth Circuit issued its opinion on January 21, 2014. On April 1, 2014, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including June 20, 2014. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Executive Vesting Clause, Art. II, § 1, cl. 1 of the United States Constitution provides:

> The executive Power shall be vested in a President of the United States of America.

The Appointments Clause, Art. II, § 2, cl. 2, of the United States Constitution provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public

> Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

The Take Care Clause, Art. II, § 3, of the United States Constitution provides:

> [The President] shall take Care that the Laws be faithfully executed . . . .

The Little Tucker Act, 28 U.S.C. § 1346(a)(2), provides in pertinent part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . . [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress, . . . or for liquidated or unliquidated damages in cases not sounding in tort . . . .

The relevant portions of the Metropolitan Washington Airports Act of 1986 ("Transfer Act"), 49 U.S.C. §§ 49101 *et seq.*, are reproduced at Pet. App. 63-84.

STATEMENT

A. Statutory and Factual Background

1. MWAA was created in response to a dilemma confronting the federal government. By the early 1980s, National (since renamed Reagan National) and Dulles airports—both owned and operated by the federal government—needed expansion to improve their operations. As this Court explained, the federal government has a "strong and continuing interest" in

those operations because they are "vital to the smooth conduct of Government business, especially to the work of Congress, whose Members must maintain offices in both Washington and the districts that they represent and must shuttle back and forth according to the dictates of busy and often unpredictable schedules." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 266 (1991) ("*CAAN*"). However, the required capital investment was beyond the strained federal budget. A Senate report confessed, "[g]iven the continuing need to limit federal expenditures to reduce Federal deficits, it is unlikely that any significant capital improvements could be undertaken at the airports in the foreseeable future." *Id.* at 257 n.3 (quoting S. Rep. No. 99-193, p.2 (1985)).

The Secretary of Transportation solved the dilemma by appointing an advisory committee to fashion a plan to create "a regional authority with power to raise money by selling tax-exempt bonds" that would take control of the airports and finance the desired expansion. *Id.* at 257. The committee recommendation—that Virginia and the District of Columbia agree to a compact approved by Congress—was put into effect in 1985 when Virginia and the District of Columbia passed the necessary legislation.

The following year, Congress passed the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 49101 *et seq*. ("Transfer Act"), which, while nominally approving the Virginia and D.C. legislation, expressly commanded that MWAA was to be "a public body corporate and politic" created by

legislation passed by Virginia and the District of Columbia, but that legislation must "at least meet the specifications of [the Transfer Act]." 49 U.S.C. § 49106(a)(1). Among the Transfer Act's original specifications was a Board of Review, composed of members of Congress, which could exercise veto power over certain decisions made by MWAA's Board of Directors. Virginia and the District of Columbia amended their legislation to conform, authorizing MWAA to establish the Board of Review. *CAAN*, 501 U.S. at 261.

2. MWAA's sole purpose was (and remains) "to operate and improve both Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area." 49 U.S.C. § 49106(a)(3). The Transfer Act authorized the transfer to MWAA "of operating responsibility under long-term lease of the 2 Metropolitan Washington Airport properties as a unit, including access highways and other related facilities." 49 U.S.C. § 49102(a). The Secretary of Transportation and MWAA executed that lease on March 2, 1987. *CAAN*, 501 U.S. at 261. To fund airport operations and to secure the bonds to finance airport expansion, MWAA was authorized "to levy fees and other charges." 49 U.S.C. § 49106(b)(1)(B), (E), (2)(B).

The Transfer Act shielded MWAA's exercise of its delegated federal powers from any governmental oversight or accountability to the public, requiring that—except for the Board of Review composed of members of Congress—MWAA be "independent of Virginia and its local governments, the District of

Columbia, and the United States Government." 49 U.S.C. § 49106(a)(2).

B. The *CAAN* Litigation

1. The *CAAN* litigation began when a group of residents near the flight path of Reagan Airport filed suit challenging the Board of Review as violating the separation of powers. The district court dismissed the suit, agreeing with MWAA that the transfer of federal powers to a state-created interstate compact entity did not implicate separation-of-powers requirements. *See Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 718 F. Supp. 974, 986 (D.D.C. 1989).

On appeal, the D.C. Circuit reversed the district court: "If the authority exercised by the Board over the operation of National and Dulles is derived from a federal source or exercised on behalf of the federal government, then separation-of-powers principles apply irrespective of the fact that the powers at issue are similar to those enjoyed by states or localities." *Citizens for the Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 54 (D.C. Cir. 1990) (Buckley, J.). Because the Board of Review's power derived from the Transfer Act, "separation-of-powers principles dictate[d] that such oversight, like any exercise of federal power, be carried out in a manner consistent with the Federal Constitution." *Id.* at 55.

Having determined that MWAA's Board of Review was subject to separation-of-powers scrutiny because it exercised federal power, the D.C. Circuit then reviewed the powers exercised by the Board of Review, which was composed entirely of members of

Congress. As the Transfer Act conferred "authority over key operational decisions" to the Board, such authority "is quintessentially executive." *Id.* at 56.

Finally, the D.C. Circuit concluded that the members of Congress serving on the Board of Review were not serving in their individual capacities or as representatives of the public at large, but instead as agents of Congress. *Id*. at 56-57. As such, the Board of Review violated the "constitutional prohibition, articulated in *Bowsher* [*v. Synar*, 478 U.S. 714 (1986)] against legislative agents performing executive functions." *Id.* at 57.

2. In *CAAN*, this Court affirmed the D.C. Circuit. MWAA argued that both it and the Board of Review were "nonfederal entities," and so were beyond separation-of-powers scrutiny. *See* Brief for Petitioners, *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252 (1991), 1991 WL 521281 at **17-19 (U.S. 1991). This Court rejected MWAA's argument, stating "the fact that the Board of Review was created by state enactments *is not enough to immunize it from separation-of-powers review*." *CAAN*, 501 U.S. at 266 (emphasis added). Instead, the Board of Review's exercise of "sufficient federal power" necessarily "mandate[d] separation-of-powers scrutiny" as: (a) the Board of Review was created "at the initiative of Congress," *id.* at 269; (b) Congress "delineated" the powers of the Board of Review, *id.*, which included the unquestionably-federal power to operate Reagan National and Dulles airports (both federal properties), *id.* at 271-72; (c) those powers were designed "to protect an acknowledged federal

interest," *id.* at 269; and (d) the members of the Board of Review were all members of Congress, *id.*

Having affirmed the D.C. Circuit's conclusion that the Board of Review's exercise of federal power necessarily implicated the Constitution's separation-of-powers requirements, this Court concluded that the Board of Review violated those requirements, whether the power exercised by the Board of Review was characterized as executive or legislative. "If the power is executive, the Constitution does not permit an agent of Congress to exercise it." *Id*. at 276. And "[i]f the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, §7." *Id.*

3. After this Court's decision, Congress abolished the Board of Review, *see* Pub. L. No. 104-264, §904(a), 110 Stat. 3276 (1996), and the Board of Review's authority to exercise federal power devolved entirely onto MWAA's seventeen-member Board of Directors, seven of whom are appointed by the Governor of Virginia, four by the Mayor of the District of Columbia, three by the Governor of Maryland, and three by the President with the advice and consent of the Senate. 49 U.S.C. § 49106(c). A Board Member may only be removed for cause by his or her appointing official. 49 U.S.C.§ 49106(c)(6)(C).

C. The Dulles Toll Road

When the federal government acquired the land upon which to build Dulles Airport, it also acquired a strip of land connecting the airport to the Capitol Beltway and built an access highway (the "Dulles Access Highway") on that corridor limited to traffic to and from the airport. Complaint, *Corr v. Wash.*

Metrop. Airports Auth., No. 1:11-cv-389 (¶¶ 47-50) (April 14, 2011) (Dkt. No. 1) ("Complaint").

In 1983, the federal government granted Virginia an easement on a portion of the Dulles Access Highway right-of-way to build and operate a parallel toll road (the "Dulles Toll Road") to accommodate the escalating volume of local traffic from the burgeoning suburban communities between the Beltway and Dulles. The Dulles Toll Road in effect is the Access Highway's twin, built to serve the distinct needs of motorists *not* traveling to the airport in order to preserve the Access Highway's exclusive role as the artery to the airport. *Id.* ¶¶ 47-52. The critical difference between the two is that drivers on the Access Highway pay no toll.

In 2005, MWAA proposed to take over operation of the Dulles Toll Road and oversee the construction of an extension of the Washington Metrorail system to Dulles Airport. *Id.* ¶¶ 87-93. In 2006, Virginia and MWAA entered into an agreement in which MWAA was given a "Permit" to "operate the Toll Road and collect Toll Revenues in consideration for [MWAA's] obligation to fund and cause to be constructed the Dulles Corridor Metrorail Project and other transportation improvements in the Dulles Corridor." *Id.* ¶ 99.

Since its assumption of management and operation of the Dulles Toll Road, MWAA has more than tripled its exactions from Toll Road drivers in order to pay for the Metrorail, which those drivers are obviously not using, and may never use. To what level those exactions may rise is wholly within MWAA's discretion. At this time, the Toll Road users

such as petitioners are committed to fund approximately $2.8 billion of the currently-estimated $5.7 billion cost of the Metrorail project. *See* Dulles Corridor Metrorail Project, *Frequently Asked Questions,* available at http://www.dullesmetro.com/info /faqs.cfm.html#3 (last visited June 19, 2014).

D. The Proceedings Below

1. Petitioners Corr and Grigsby are users of the Dulles Toll Road from whom MWAA has exacted ever-increasing tolls to pay for a facility they are not using, the unfinished Metrorail extension project. Invoking the district court's jurisdiction under 28 U.S.C. § 1331 and the Little Tucker Act, 28 U.S.C. § 1346(a)(2), they brought this suit in the Eastern District of Virginia on behalf of themselves and a class of similarly situated drivers contending MWAA's exaction of this money was illegal on federal separation-of-powers and other grounds. *See* Complaint ¶¶ 135-79. This lawsuit seeks to enjoin MWAA's continued exaction of this money and restitution of amounts already exacted. *Id.* Prayer for Relief ¶¶ 2-3.

The district court granted MWAA's motion to dismiss on the grounds that petitioners lacked standing under prudential standing principles. Pet. App. 46-48. Reaching the merits nonetheless, the district court, *inter alia*, rejected petitioners' separation-of-powers claim on the basis that as an interstate-compact entity, MWAA does not implicate separation-of-powers requirements.[1] Pet. App. 55-56.

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[1] The district court also dismissed petitioners' other claims on the merits, and as discussed *infra*, the Fourth Circuit affirmed

2. Petitioners appealed to the Federal Circuit pursuant to 28 U.S.C. §1295(a)(2), which confers appellate jurisdiction in the Federal Circuit over appeals in cases in which the district court's jurisdiction was based in whole or in part on, *inter alia*, the Little Tucker Act.

Petitioners focused their appeal in the Federal Circuit on two claims. First, petitioners contended that MWAA's tolls were illegal exactions under federal law because MWAA's structure was constitutionally infirm as a violation of the separation of powers. Second, and in the alternative, petitioners argued that MWAA's tolls were illegal under Virginia law.

MWAA moved to dismiss or transfer the appeal for lack of appellate jurisdiction on the ground that MWAA is not a federal instrumentality. After briefing and oral argument on the merits, the Federal Circuit agreed and transferred the case to the Fourth Circuit. Pet. App. 22-26.

Stating that there is no "simple test" to determine whether an entity is a federal instrumentality, the Federal Circuit went on to apply what it described as the four-part test from *Lebron v. National Railroad Passenger Corporation,* 513 U.S. 374 (1995). Pet. App. 22-25. The Federal Circuit first concluded that MWAA was not created by the federal government because, according to the court, the Transfer Act merely approved the creation of MWAA by Virginia and the District of Columbia. Pet. App. 23. The

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the dismissal of those other claims. Petitioners do not seek review of those claims by this Court.

court did not mention, much less address in its analysis that the Virginia and District of Columbia enactments had to meet the "specifications" of the Transfer Act.

Second, the Federal Circuit concluded that the federal government had only a "limited interest" in the operations of Reagan and Dulles, a conclusion directly contradicting this Court's conclusion in *CAAN* (without acknowledging the contradiction). *Compare* Pet. App. 24 *with CAAN,* 501 U.S. at 266 ("[T]he Federal Government has a strong and continuing interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business, especially to the work of Congress.").

Applying the third and fourth parts of the *Lebron* test, the Federal Circuit concluded that MWAA could not be a federal instrumentality because its operations were not controlled by federal officials and only three members of its Board were appointed by the President. Pet. App. 24-25. In a puzzling twist of logic, the Federal Circuit not only recognized that "the gravamen of Petitioners' constitutional claims is that MWAA is an unelected entity independent of elected authorities exercising governmental power," but used those separation-of-powers claims as a justification for its conclusion that MWAA was *not* a federal instrumentality. Pet. App. 24.

The Federal Circuit thus reached a sweeping conclusion intertwining the jurisdictional and merits issues: "As MWAA possesses few, if any, of the hallmarks of a federal instrumentality identified in *Lebron*, we conclude that MWAA is not a federal

instrumentality *for the purpose of Petitioners' claims*." Pet. App. 25 (emphasis added). In other words, according to the Federal Circuit, because MWAA is not a federal instrumentality, it is not susceptible to either a Little Tucker Act claim seeking recovery of an illegal exaction or a claim for injunctive relief grounded on a separation-of-powers violation.

The Federal Circuit then transferred the appeal to the Fourth Circuit. Pet. App. 25-26.

3. In the Fourth Circuit, petitioners did not rebrief their separation-of-powers claim, as the Federal Circuit's decision rejecting that claim was the law of the case and could not have been revisited by the Fourth Circuit, *see Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988). Nevertheless, petitioners expressly preserved their separation-of-powers claim for future review by this Court. *See* Opening Brief of Appellants, *Corr v. Metropolitan Washington Airports Authority,* 2013 WL 705514 at *2 n.2 (4th Cir. 2013). Initially, then, petitioners briefed only their argument that MWAA's tolls were illegal under Virginia law.

The United States, however, unexpectedly appeared for the first time in the litigation as *amicus curiae* in support of MWAA, and in so doing reinserted the separation-of-powers issue. In moving for leave to file its brief out of time, which the court of appeals allowed, the United States stated that petitioners' "appeal directly implicates the interests of the United States." Motion of the United States for Leave to File *Amicus Curiae* Brief Out of Time, at 2 (July 18, 2013). In its statement of interest, the

United States further acknowledged that "the Office of the Secretary of Transportation, with appropriate Federal Aviation Administration ('FAA') coordination, *provides oversight of the MWAA* under its lease to the Authority of the Metropolitan Washington Airports, which include the Dulles Airport Highway and Right-of-way." Brief for the United States as *Amicus Curiae*, *Corr v. Metropolitan Washington Airports Authority*, 2013 WL 3833647 at *1 (4th Cir. 2013) (emphasis added).

The United States confirmed that MWAA exercises federal power for purposes of petitioners' separation-of-powers claim, by noting the Secretary of Transportation had certified (a) that MWAA's operation of the Toll Road was a legitimate "airport purpose" under the Transfer Act, and (b) that MWAA's use of the tolls to pay for the Metrorail project was "consistent" with both the Transfer Act and the federal lease of the airports to MWAA. *Id.* at *11. The United States argued that the Transfer Act and the federal lease—even without the Virginia and District of Columbia legislation—gave MWAA "unambiguous authority" to operate the Toll Road and use the tolls "for capital improvements such as the extension of Metrorail service to Dulles Airport." *Id.* Consequently, according to the United States, any state constitutional constraint on Virginia delegating a taxing power to MWAA was preempted by the Transfer Act, which unambiguously authorized the conduct that petitioners challenge. *Id.* at *12.

In response, petitioners argued that under the reasoning of the United States, MWAA exactions

were an exercise of federal power in violation of the separation of powers, relying on, among other precedents, *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 130 S.Ct. 3138 (2010). *See* Supplemental Reply Brief of Appellants in Response to *Amicus Curiae* Brief of United States, *Corr v. Metropolitan Washington Airports Authority,* 2013 WL 3947989 at *4-9 (4th Cir. 2013).

At oral argument in the Fourth Circuit, counsel for the United States argued that petitioners' separation-of-powers challenge was not properly presented, but that if the court of appeals entertained it, under the Transfer Act and the lease the Secretary of Transportation retained "ample control, ultimate control for purposes of the Article II argument," Pet. App. 86, thereby implicitly conceding—directly contrary to the holding of the Federal Circuit—that MWAA exercised sufficient federal power to mandate separation-of-powers scrutiny.

The Fourth Circuit held that petitioners had standing, Pet. App. 9-10, but affirmed the district court's dismissal of petitioners' illegal exaction and injunctive relief claims on grounds that are not before this Court. Pet. App. 10-15. The court of appeals did not address petitioners' separation-of-powers basis for their illegal exaction and injunctive relief claims, the Federal Circuit's rejection of which was law of the case.

REASONS FOR GRANTING THE WRIT

I. MWAA Exercises Sufficient Federal Power to Mandate Separation-of-Powers Scrutiny

In ruling that MWAA is not subject to separation-of-powers scrutiny, the Federal Circuit erred, because it applied the wrong test for such scrutiny. Contrary to the decision of the Federal Circuit, the *absence* of Executive Branch control does not immunize an entity from separation-of-powers scrutiny. Because MWAA exercises sufficient federal power—indeed the very same power exercised by the Board of Review that this Court invalidated in *CAAN*—such power must be exercised in conformity with Article II's separation-of-powers requirements.

A. The Federal Circuit's "Federal Instrumentality" Test for Petitioners' Separation-of-Powers Claim Conflicts with This Court's Decision in *CAAN*

The Federal Circuit concluded that MWAA was not a "federal instrumentality for the purpose of Petitioners' claims," Pet. App. 25, based on a four-part test it ascribed to this Court's decision in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995). As to the first two elements of that "test"—whether Congress created the entity and whether the entity pursues federal objectives—the Federal Circuit admitted that "MWAA was created by Congress through passage of the [Transfer] Act," and that MWAA "does serve limited federal interests." Pet. App. 23-24. Nevertheless, the Federal Circuit found that there were counterbalancing considerations: "MWAA was in large part created by, and exercises the authority of,

Virginia and the District of Columbia," and "serves regional and state interests as well." *Id.* at 23-24.

What tipped the balance, in the Federal Circuit's view, were the last two *Lebron* factors—whether the federal government controls MWAA and appoints its officers: "Turning to the final two factors, *it becomes clear* that MWAA cannot be considered a federal instrumentality for the purpose of Petitioners' claims." *Id.* at 24 (emphasis added). But petitioners did not allege any such federal control; "[t]o the contrary, the gravamen of Petitioners' constitutional claims is that MWAA is an unelected entity *independent* of [federal Executive Branch control]." *Id*. (emphasis added). In other words, the Federal Circuit concluded that the very *absence* of Executive Branch control over MWAA thereby immunized MWAA from separation-of-powers scrutiny.

In so holding, the Federal Circuit's decision squarely conflicts with this Court's decision in *CAAN* in multiple respects. First, in concluding that the federal government only has a "limited interest" in MWAA, the Federal Circuit ignored this Court's determination in *CAAN* that "the Federal Government has a strong and continuing interest in the efficient operations of the airports, which are vital to the smooth conduct of government business . . . ." 501 U.S. at 266. Similarly, in attaching separation-of-powers significance to the fact that "MWAA was in large part created by, and exercises the authority of, Virginia and the District of Columbia," Pet. App. 23, the Federal Circuit ignored this Court's determination in *CAAN* that "the fact that [MWAA] was created by state enactments *is not*

enough to immunize it from separation-of-powers review." 501 U.S. at 266 (emphasis added).

And most important, the Federal Circuit's decision ignored *CAAN*'s teaching that the applicability of separation-of-powers scrutiny turns on whether the entity "exercises sufficient *federal* power." 501 U.S. at 269 (emphasis added). As the D.C. Circuit explained in the decision this Court affirmed in *CAAN*, "[i]f the authority exercised by the Board over the operation of National and Dulles is derived from a federal source or exercised on behalf of the federal government, then separation-of-powers principles apply irrespective of the fact that the powers at issue are similar to those enjoyed by states or localities." 917 F.2d at 54.

B. MWAA Exercises Sufficient Federal Power to Require Separation-of-Powers Scrutiny Under This Court's Decision in *CAAN*

In *CAAN*, this Court concluded that MWAA's Board of Review exercised sufficient federal power to require separation-of-powers scrutiny because (a) the Board of Review was created "at the initiative of Congress," 501 U.S. at 269; (b) Congress "delineated" the powers of the Board of Review, *id.*, which included the unquestionably-federal power to operate Reagan National and Dulles International Airports (both federal properties), *id.* at 270-72; (c) those powers were designed "to protect an acknowledged federal interest," *id.* at 269; and (d) the members of the Board of Review were all members of Congress, *id.*

Except for the congressional members of the Board of Review, all of the factors that led this Court to conclude that the Board of Review exercised federal power apply with equal force to MWAA here: (a) MWAA was "created at the initiative of Congress"; (b) Congress "delineated" MWAA's powers to manage federal property; and (c) those powers protect a "strong and continuing interest in the efficient operations of the airports, which are vital to the smooth conduct of government business." *See id.* at 266, 269-72. Because MWAA—as much as the Board of Review stricken in *CAAN*—"'exercis[es] significant authority pursuant to the laws of the United States,'" 917 F.2d at 53 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)), it therefore triggers federal separation-of-powers scrutiny.[2] And this conclusion is confirmed by arguments advanced below by the United States.

C. The United States' Arguments Below Confirm that MWAA Exercises Federal Power and Is Subject to Separation-of-Powers Scrutiny

In the Fourth Circuit, the United States appeared as *amicus curiae* to support MWAA and specifically to contend that the Transfer Act preempts state law that might otherwise preclude the exactions petitioners challenge. In so doing, the United

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[2] Unlike the Board of Review stricken in *CAAN*, MWAA's current Board of Directors is not composed of any members of Congress. That, however, is of no moment for Article II purposes. For Article II purposes, what matters is that the President has no control over MWAA's Board of Directors, which exercises sufficient federal power to trigger separation-of-powers scrutiny.

States confirmed that MWAA exercises *federal* power for purposes of petitioners' separation-of-powers claim by acknowledging that the Secretary of Transportation certified that (a) MWAA's operation of the Toll Road is a legitimate "airport purpose" under the Transfer Act, and (b) MWAA's use of the tolls to pay for the Metrorail project is "consistent" with both the Transfer Act and the federal lease of the airports to MWAA. Brief for the United States as *Amicus Curiae*, *Corr v. Metro. Wash. Airports Auth.,* 2013 WL 3833647 at *11 (4th Cir. 2013). The United States argued that the Transfer Act and the federal lease—even without the Virginia and District of Columbia legislation—gave MWAA "unambiguous authority" to operate the Dulles Toll Road and use the tolls "for capital improvements such as the extension of Metrorail service to Dulles Airport." *Id.* Consequently, even according to the United States, any state constitutional constraint on Virginia delegating a taxing power to MWAA was preempted by the Transfer Act, which unambiguously authorized the conduct that petitioners challenge. *Id.* at *12.

Of equal significance for present purposes is that when petitioners reasserted their separation-of-powers challenge to the Transfer Act in response to the *amicus curiae* brief filed by the United States, the United States did not defend the Federal Circuit's holding that MWAA does not implicate constitutional separation-of-powers requirements. To the contrary, counsel for United States contended at oral argument that the Transfer Act gives the United States "ample control, ultimate control for purposes of Article II,"

Pet. App. 86—thereby implicitly conceding that MWAA exercises sufficient federal power to trigger separation-of-powers scrutiny. But what the United States views as "ample control" fails woefully to pass constitutional muster under this Court's decisions.

II. MWAA Violates the Separation of Powers of Article II

If MWAA exercises federal power, as the United States admitted below, MWAA runs afoul of the President's constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3. Specifically: the President cannot "'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enterprise Fund v. Public Company Accounting Oversight Board,* 130 S.Ct. 3138, 3147 (2010). To undertake that oversight, "[a] key 'constitutional means' vested in the President—perhaps *the* key means—was 'the power of appointing, overseeing, and controlling those who execute the laws.'" *Id.* at 3157 (emphasis in original) (quoting 1 Annals of Cong. 463 (1789)).

In *Free Enterprise Fund*, this Court confronted what it acknowledged to be an "unusual situation, never before addressed by the Court . . . ." *Id*. The Sarbanes-Oxley Act of 2002 created a Public Company Accounting Oversight Board ("PCAOB"), an entity comprised of five members, appointed to staggered five-year terms by the Securities and Exchange Commission. *Id.* at 3147. Under the Act, the PCAOB members could be removed by the SEC only for good cause; the SEC commissioners themselves, in turn, could only be removed by the

President for good cause. *Id.* This Court held these two layers of "good cause" removal violated the Take Care Clause, and thus were "incompatible with the Constitution's separation of powers." *Id.* at 3155. This Court stated:

> This novel structure does not merely add to the Board's independence, but transforms it. Neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board. The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired. That arrangement is contrary to Article II's vesting of the executive power in the President.

Id. at 3154.

The composition of MWAA presents another "unusual situation" no less constitutionally infirm than was the PCAOB. MWAA purports, by the Transfer Act, to be "a public body corporate and politic . . . *independent* of Virginia and its local governments, the District of Columbia, and the United States Government." 49 U.S.C. § 49106(a)(1)-(2) (emphasis added).

The Transfer Act's assertion of MWAA's absolute "independen[ce]" is not mere semantics. It is underscored by the splintered nature of the appointments to comprise MWAA's Board of Directors—seven members appointed by the Governor of Virginia, three by the President of the United States, four by the Mayor of the District of

Columbia, and three by the Governor of Maryland, ensuring that *no* elected governmental body, much less the President, can control so much as a significant plurality of MWAA's decision makers. And MWAA exercises *federal* authority, as the United States admits, which is hardly narrow or circumscribed; it is more reminiscent of a grant of a medieval fiefdom.

Yet the President of the United States is permitted to appoint only three of MWAA's seventeen members, and may remove those three only for "good cause." This "diffusion of power carries with it a diffusion of responsibility." *Free Enterprise Fund*, 130 S.Ct. at 3155.

This Court in *Free Enterprise Fund* warned against these sorts of attenuations of the President's power: "By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers." *Id.*

An entity that exercises federal power over a federal interest—but does so "independent" of any other governmental limitations or authority, and is barely restrained at all by the President's appointment, oversight, and removal powers—is not a permissible entity under our Constitutional order. It is something altogether different. *See generally* T. Hobbes, LEVIATHAN, ch. 26, § 2, p. 130 (1651) ("[N]or is it possible for any person to be bound to himself, because he that can bind can release; and therefore

he that is bound to himself only is not bound."), *quoted in Alden v. Maine*, 527 U.S. 706, 727 (1999) (Souter, J., dissenting).

Just as in *Free Enterprise Fund*, where this Court noted that the result of PCAOB's dual-layer insulation of "for cause" removal "result[ed] [in] a Board that is not accountable to the President, and a President who is not responsible for the Board," 130 S.Ct. at 3153, the same result must obtain here. MWAA is not accountable to the President—indeed it explicitly announces that it is "independent" of the President and the entire federal government—and the President is not responsible for MWAA, as he has absolutely no control over 82% (fourteen of seventeen) of its members, and only limited control over the remaining 18% (three of seventeen members).

To be sure, the President's retention of "for cause" removal power is *ordinarily* sufficient to enable him to "take Care that the Laws be faithfully executed." *Morrison v. Olson*, 487 U.S. 654, 696 (1988); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Nor do we dispute the district court's point that the President is not required to have the power to control a run-of-the mill interstate compact entity *not* exercising federal power. *See* Pet. App. 55-56.

It is MWAA's unprecedented exercise of *federal* power—uncontrolled by the President—that makes the difference here for separation-of-powers purposes. While congressionally-approved compacts are federal law for jurisdictional purposes, we know of no entity created by compact that purports, like MWAA, to *exercise federal power to manage federal*

interests. The whole point of an interstate compact is to address a matter of concern to the states that are parties to the compact. Congress normally acts directly to create federal entities to address matters of federal concern. Thus separation-of-powers issues do not arise in the context of normal interstate compact entities. MWAA is truly an unprecedented outlier. *Cf. Free Enterprise Fund*, 130 S.Ct. at 3159 ("'Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. Neither the majority opinion nor the PCAOB nor the United States as intervenor has located any historical analogues for this novel structure.'") (quoting 537 F.3d 667, 669 (Kavanaugh, J., dissenting)).

But here, the President cannot remove *even a majority or a plurality* of MWAA's members for cause. If a dual-layer of "for cause" removal power is too attenuated to pass constitutional muster, we respectfully submit that so, too, is the President's "for cause" removal power over only a tiny fraction of the controlling board of an entity that, according to the United States, is exercising federal power over a federal interest, especially when that entity explicitly claims to be "independent" of the President's authority. As this Court concluded:

> The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully

> accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.' The Federalist No. 70, at 478.

Free Enterprise Fund, 130 S.Ct. at 3164.

III. The Questions Presented Involving Constitutional Structure Are Exceptionally Important and Warrant This Court's Review

Just as this Court observed in *Free Enterprise Fund* that the dilution by Congress of the President's responsibility for holding executive officers accountable could be multiplied if allowed to stand, 130 S.Ct. at 3144, this Court should prevent the likely erosion of the separation of powers and the President's ability to supervise the activities of entities exercising federal power by granting this petition and vacating the decision of the Fourth Circuit with instructions to transfer this appeal to the Federal Circuit for vacatur and remand.

In *Free Enterprise Fund,* this Court reaffirmed the importance of two constitutional principles: the separation of powers and the accountability of executive officers. "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Id.* at 3146. "The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 3147.

Similar reasoning prompted this Court in *CAAN* to invalidate the MWAA's Board of Review as a violation of the Constitution's separation of powers, notwithstanding the absence of any circuit split. This Court observed that "[t]he structure of the Constitution does not permit Congress to execute the laws," 501 U.S. at 275, and that the Transfer Act "provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role." *Id.* at 277. As demonstrated above, abolition of the Board of Review did not solve the separation-of-powers violation identified in *CAAN* because Congress—rather than establishing a constitutionally-permissible mechanism of maintaining Executive Branch control over MWAA—eliminated such control altogether. This "*delegat[ed] primary responsibility for the execution of national policy to the States*," *CAAN*, 501 U.S. at 269-70 (emphasis added), except that Congress made this delegation now no longer subject "to the [unconstitutional] veto power of Members of Congress acting in their individual capacities." *Id*. at 270 (citation and internal quotation marks omitted). Under Article II, however, the President—not the states—must execute national policy.

The Federal Circuit's reasoning—that MWAA is not a federal instrumentality, and so is immune from separation-of-powers scrutiny, in large measure *because of* the absence of presidential control that petitioners contend violates the separation of powers, *see* Pet. App. 24-25—is a prescription for Congress to circumvent the protections of the Constitution's separation-of-powers requirements in virtually every

case by simply failing to honor the Executive Vesting, Take Care, and Appointments Clauses. Moreover, such reasoning promises to be a source of deep confusion among the lower courts if not firmly checked by this Court now.

This case is important and warrants review not simply because the decision of the Federal Circuit below is so directly at odds with this Court's decision in *CAAN*, or even the sheer confusion it invites into judicial policing of the separation of powers, with a corresponding dilution of the President's constitutional prerogatives. Rather, the fundamental importance of this case arises from the threat to individual liberty if this violation of the Constitution's allocation of powers within government is allowed to stand. As this Court observed in *Bond v. United States,* 131 S.Ct. 2355, 2365 (2011), the "structural principles secured by the separation of powers protect the individual as well."

MWAA exercises federal power over federal facilities in service to federal interests, to be sure, but the retail application of this power is the exaction of billions of dollars from individuals to be spent on projects of MWAA's choosing. And MWAA does this "independent" of any other governmental limitations or oversight. In an age when many public officials wish to spend the public's money on various projects, but are loathe to be held accountable for the exactions needed to amass that money, can there be any doubt that variations of the MWAA model will metastasize in our body politic unless held in check by the structural protections of the Constitution

faithfully applied by this Court? There lies the urgent need for the review of this Court now.

CONCLUSION

For the reasons provided above, this Court should grant the petition for a writ of certiorari.

JUNE 20, 2014

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1076

[Filed January 21, 2014]

JOHN B. CORR, on behalf of themselves and all others similarly situated; JOHN W. GRIGSBY, on behalf of themselves and all others similarly situated,

Plaintiffs – Appellants,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant – Appellee.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA; UNITED STATES OF AMERICA,

Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:11-cv-00389-AJT-TRJ)

Argued: December 11, 2013
Decided: January 21, 2014

Before TRAXLER, Chief Judge, and NIEMEYER and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Chief Judge Traxler and Judge Niemeyer joined.

ARGUED: Robert John Cynkar, CUNEO, GILBERT & LADUCA, LLP, Alexandria, Virginia, for Appellants. Stuart Alan Raphael, HUNTON & WILLIAMS, LLP, McLean, Virginia, for Appellee. Jeffrey A. Clair, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus United States of America. **ON BRIEF:** Patrick M. McSweeney, Powhatan, Virginia; Christopher I. Kachouroff, DOMINION LAW GROUP, Woodbridge, Virginia; Richard B. Rosenthal, LAW OFFICES OF RICHARD B. ROSENTHAL, Miami, Florida, for Appellants. Philip G. Sunderland, Office of General Counsel, METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, Washington, D.C., for Appellee. David P. Bobzien, Gail P. Langham, Ann G. Killalea, James V. McGettrick, OFFICE OF THE COUNTY ATTORNEY, Fairfax, Virginia, for Amicus Board of Supervisors of Fairfax County, Virginia. Kathryn B. Thomson, Acting General Counsel, SIDLEY AUSTIN, LLP, Washington, D.C.; Paul M. Geier, Assistant General Counsel for Litigation, Peter J. Plocki, Deputy Assistant General Counsel for Litigation, Joy K. Park, Office of the General Counsel, UNITED STATES DEPARTMENT OF TRANSPORTATION, Washington, D.C.; Stuart F. Delery, Acting Assistant Attorney General, Mark B.

Stern, Michael E. Robinson, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Neil H. MacBride, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Amicus United States of America.

DUNCAN, Circuit Judge:

Appellants John Corr and John Grigsby brought this putative class action attacking the legality of the toll charged by the Metropolitan Washington Airports Authority ("MWAA") for use of the Dulles Toll Road. They contend that this toll is, in reality, an illegal tax. The district court dismissed their complaint on numerous grounds. For the following reasons, we affirm.

I.

A.

In 1950, Congress authorized the construction of the airport now known as Washington Dulles International Airport. The federal government also acquired a right-of-way running from Interstate 495, the Capital Beltway, to Dulles Airport, on which it constructed the Dulles Airport Access Highway. The access highway runs the length of the right-of-way, with no exits and no tolls, exclusively to service traffic to and from the airport. The government reserved a strip of land in the median of the access highway for a possible future public transportation project.

In 1980, the Virginia Department of Transportation requested and received an easement on which to construct a toll road within the right-of-way to serve

non-airport traffic traveling between Washington, D.C. and Fairfax County, Virginia. That road, known as the Dulles Toll Road--or, officially, as the Omer L. Hirst-Adelard L. Brault Expressway--opened in 1984 and connects Interstate 495 with Virginia Route 28.

Also in 1984, the United States Secretary of Transportation proposed the formation of a regional airport authority which would take over control of Ronald Reagan Washington and Dulles International Airports from the United States. Virginia and the District of Columbia both adopted legislation to enter into an interstate compact to form this airport authority.[*] Congress passed legislation approving the compact in 1986 and leased the two airports to the newly formed MWAA. See Metropolitan Washington Airports Act of 1986 ("Transfer Act"), Pub. L. No. 99-591, Title. VI, 100 Stat. 3341-376 (1986) (codified as amended at 49 U.S.C. § 49101 et seq.).

The MWAA was, on one hand, formed as an entity independent from Virginia, the District of Columbia, and the United States government. Id. § 49106(a)(2). On the other, it was to possess the powers delegated to it by the District of Columbia and Virginia. Id. § 49106(a)(1)(A). Congress also explicitly granted

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[*] The constitution provides a process by which states may, with Congress's consent, enter into agreements to coordinate the states' responses to issues of mutual concern, such as the delineation of state borders, see e.g., Virginia v. Tennessee, 148 U.S. 503 (1893); management of a shared resource, see e.g., Lake Country Estates Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979); or creation of a common transportation infrastructure, see e.g., Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994). See U.S. Const. art. 1, § 10, cl. 3.

MWAA the power to "to levy fees or other charges." Id. § 49106(b)(1)(E). Nonetheless, though the MWAA assumed control over the two Washington airports, the Dulles Toll Road continued to be operated not by MWAA but by the Virginia Commonwealth Transportation Board ("CTB").

In the ensuing decades, the Virginia General Assembly repeatedly authorized CTB to use toll revenue to fund mass transit projects within the Dulles Corridor. In 1990, the Virginia General Assembly authorized CTB to use surplus revenue from the Dulles Toll Road to fund improvements, including mass transit projects. 1990 Va. Acts ch. 251 § 13, J.A. 218. In 1995, the Virginia General Assembly again authorized CTB to use surplus toll road revenue to fund mass transit improvements and to raise another $45 million by issuing new bonds. 1995 Va. Acts ch. 560 §§ 2, 14, J.A. 410-13. In 2002, the General Assembly approved a CTB resolution providing that CTB would spend 85% of its surplus revenue from the Dulles Toll Road to fund "mass transportation initiatives in the Dulles Corridor." H.J. Res. 200 (Va. 2002). Finally, in 2004, the Virginia General Assembly granted CTB open-ended authority to issue revenue bonds to fund, among other things, a mass-transit rail project in the Dulles Corridor, to be paid with revenues from the Dulles Toll Road. 2004 Va. Acts ch. 807 § 1, J.A. 224-30. CTB then raised the Dulles Toll Road rates, earmarking the additional money raised for extending the Washington Metrorail system through the Dulles Corridor. The Metrorail expansion is planned to extend through the corridor with stops both before and after the Dulles Airport.

B.

MWAA, meanwhile, shared Virginia's goal of extending the Metrorail system to Dulles Airport. Moreover, under the Transfer Act, MWAA was to "assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports." 49 U.S.C. § 49104(a)(6). The FAA master plans called for an expansion of the Metrorail system to Dulles Airport. See FAA Record of Decision, Dulles Corridor Metrorail Project, 4, J.A. 238.

Therefore, to fulfill this mandate, MWAA proposed to take control of the Metrorail expansion project, as well as the Dulles Toll Road which was providing much of the revenue for the expansion. Virginia agreed and control transferred from Virginia to MWAA in December of 2006. The agreement gave MWAA the power to set tolls on the Dulles Toll Road, but required it to use toll-road revenues exclusively for transportation improvements within the Dulles Corridor.

C.

This arrangement has now been subject to repeated legal challenges. Almost immediately after the agreement was executed, two toll-road drivers sued in Virginia state court seeking a declaration that MWAA's use of toll-road revenue for the Metrorail project was taxation without representation in violation of the Virginia Constitution. See Va. Const. art. I, § 6. The Virginia court there determined that the tolls were not taxes. Gray v. Va. Sec'y of Transp., No. CL-07-203, Am. Order (Va. Cir. Ct. Oct. 20, 2008), J.A. 258-59.

A second action was brought in 2009, this time in federal court. Among many other counts, the plaintiffs in that suit also contended that MWAA's use of toll revenue to fund the Metrorail project was an illegal tax under the Virginia Constitution. That case, however, was ultimately dismissed for lack of standing. Parkridge 6, LLC v. U.S. Dep't of Transp., 420 F. App'x 265, 267 (4th Cir. 2011).

D.

In April of 2011, appellants initiated this action seeking to enjoin MWAA from using toll-road revenue to repay bonds issued to fund the Metrorail project and seeking refunds of all excess tolls collected. Concluding that plaintiffs' grievance was too generalized to support standing, the district court dismissed the complaint on prudential grounds. Plaintiffs' proper recourse, the court concluded, lay in the political process.

The court also deemed it necessary to reach the merits of plaintiffs' complaint should a reviewing court, on appeal, disagree with its standing analysis. The court concluded, among other things, that plaintiffs had withdrawn their 42 U.S.C. § 1983 claim during oral argument, that the toll charged on the Dulles Toll Road was not a tax under Virginia law, and that Congress's approval of the interstate compact preempted any restrictions that Virginia law might have placed on MWAA's powers.

Appellants initially appealed this decision to the Federal Circuit on the theory that MWAA is a federal instrumentality and that the Federal Circuit therefore had jurisdiction under the Little Tucker Act. See 28 U.S.C. §§ 1295(a)(2) & 1346(a)(2). The Federal Circuit

concluded, to the contrary, that MWAA is not a federal instrumentality. Accordingly, it determined that it lacked jurisdiction to hear the appeal and transferred the case to us.

II.

Appellants' argument proceeds from the premise that, under the Virginia Constitution, the state legislature is unable to delegate its taxing authority to an independent body. Under Article I, § 6, of the Virginia Constitution, "taxes must be imposed only by a majority of the elected representatives of a legislative body, with the votes cast by the elected representatives being duly recorded." Marshall v. N. Virginia Transp. Auth., 657 S.E.2d 71, 79 (Va. 2008). Thus, appellants argue, Virginia could not legally have delegated its taxing power to MWAA when Virginia agreed to the interstate compact.

Appellants argue that the toll paid by users of the Dulles Toll Road is in fact a tax. This is so, they contend, because instead of merely defraying the cost of a driver's use of the road, a portion of the toll is used for other purposes, namely the Metrorail expansion project. Therefore, the argument goes, because MWAA lacks the power to tax, the tolls are illegal, and MWAA's exaction and retention of those funds is a violation of due process.

We note at the outset that plaintiffs identify no law that would create a cause of action for this sort of constitutional violation. While it is clear that they allege a violation of the Due Process Clause of the Fourteenth Amendment, their argument is far less illuminating on the question of what law authorizes a

suit in federal court to redress it. See Cale v. City of Covington, 586 F.2d 311, 314 (4th Cir. 1978). Rather, "[appellants'] due process argument sounds like a state law claim dressed up in due process clothing. . . . Such suits are rarely favored, for the Fourteenth Amendment is not meant to be 'a font of tort law.'" Mora v. City Of Gaithersburg, 519 F.3d 216, 231 (4th Cir. 2008) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)). We need not grapple with this complicated constitutional issue, however, because we conclude that appellants' argument suffers from a more fundamental flaw.

A.

Before reaching the substance of appellants' argument, we must also address the question of standing. The district court held that the plaintiffs present a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens" and, accordingly, dismissed the complaint for lack of standing, as a prudential matter. See Bishop v. Bartlett, 575 F.3d 419, 423 (4th Cir. 2009) (internal quotations and citations omitted). We review this determination de novo. S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 181 (4th Cir. 2013). We are compelled to disagree.

The Supreme Court has defined a generally available grievance as one that "claim[s] only harm to [plaintiffs'] and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large." Lance v. Coffman, 549

U.S. 437, 439 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)).

But appellants' claim here is more concrete. While they may bring with them the baggage of various policy-based objections to the Metrorail expansion project, they also bear the concrete harm of having paid what are, in their view, inflated tolls. They seek tangible and particularized relief: they want their money back. Moreover, they are not so numerous, and their grievance is not so attenuated, that their claim amounts to a generalized, and impermissible, taxpayers' claim. See Bishop, 575 F.3d at 424. We therefore conclude that appellants' claims are barred neither by the standing requirement of Article III of the United States Constitution nor the prudential restrictions we have recognized on our own judicial power. See Frank Krasner Enterprises, Ltd. v. Montgomery Cnty., 401 F.3d 230, 234 (4th Cir. 2005)

B.

We turn, then, to the substance of appellants' argument. Though appellants present their claim as arising under the United States Constitution, their theory is parasitic on state-law arguments. The question before us, ultimately, relates to what fund-raising powers the General Assembly could have delegated to the MWAA under Virginia law. As the numerous Virginia cases cited infra demonstrate, Virginia courts look to a substantial body of Virginia Constitutional law in answering such a question. We will do the same.

Under Virginia law "[a] tax is an enforced contribution imposed by the government for

governmental purposes or public needs. It is not founded upon contract or agreement." Westbrook, Inc., v. Town of Falls Church, 39 S.E.2d 277, 280 (Va. 1946). Virginia courts ask whether a given exaction is "a bona fide fee-for-service or an invalid revenue-generating device." Eagle Harbor, L.L.C. v. Isle of Wight Cnty., 628 S.E.2d 298, 304 (Va. 2006) (internal quotation marks omitted). "[T]olls are user fees [and not taxes] when they are 'nothing more than an authorized charge for the use of a special facility.'" Elizabeth River Crossings OpCo, LLC v. Meeks, 749 S.E.2d 176, 183 (Va. 2013) (quoting Hampton Roads Sanitation Dist. Comm. v. Smith, 68 S.E.2d 497, 501 (Va. 1952)).

The "fee-for-service" inquiry does not focus narrowly on whether the fee is calculated to defray just the costs actually incurred by the user. Rather, Virginia law requires only that there be a "reasonable correlation between the benefits of the service provided and burdens of the fee paid." Tidewater Ass'n of Homebuilders, Inc. v. City of Virginia Beach, 400 S.E.2d 523, 527 (Va. 1991). The fee may exceed the immediate cost of providing the service, and the entity that levies the fee may maintain a surplus in anticipation of future expenditures--that is, a fee may permissibly be used to fund future benefits for users of the service as a group. See Mountain View Ltd. P'ship v. City of Clifton Forge, 504 S.E.2d 371, 375-76 (Va. 1998).

Here, the tolls paid by drivers on the Dulles Toll Road are not taxes for precisely the reasons articulated by the Virginia Supreme Court in Elizabeth River Crossings:

(1) the toll road users pay the tolls in exchange

> for a particularized benefit not shared by the general public, (2) drivers are not compelled by government to pay the tolls or accept the benefits of the Project facilities, and (3) the tolls are collected solely to fund the Project, not to raise general revenues.

749 S.E.2d at 183. We discuss each of these conclusions in turn.

1.

First, it is clear that "toll road users pay the tolls in exchange for a particularized benefit not shared by the general public." Id. Users of the Dulles Toll Road will benefit from the Metrorail expansion project whether or not they ultimately choose to ride it. The record makes clear that the goal of the project is not just to provide access to the Airport, but to relieve traffic congestion throughout the corridor, including on the Dulles Toll Road. This is evident not only in the findings of the Virginia General Assembly and the Federal Transit Administration, but also as a matter of common sense: the planned expansion adds multiple stops both before and after the airport, on a route that closely follows the Dulles Toll Road for the perfectly evident purpose of serving the commuters who normally travel that route.

Thus, those who pay the toll receive, in exchange, both the immediate benefit of the use of the road as well as the future benefit of being able to choose between travelling by Metrorail or driving on a road with reduced congestion. While there is no guarantee that each driver who pays the toll will be the exclusive beneficiary of those funds, Virginia law does not

require such a direct correspondence. It requires only a "reasonable correlation." See Tidewater Ass'n of Homebuilders, 400 S.E.2d. at 527.

2.

Similarly, as in Elizabeth River Crossings, "drivers are not compelled by government to pay the tolls or accept the benefits of the Project facilities." 749 S.E.2d at 183. There are two aspects of this conclusion: the fee is both voluntarily paid and the resulting benefits are voluntarily received. While the latter inquiry is counterintuitive, it serves a useful purpose. Some exactions, such as a sales tax, remain taxes despite being levied upon voluntary behavior. Under the reasoning of Elizabeth River Crossings, what distinguishes these taxes from user fees is that the government services purchased with their proceeds benefit every citizen in the community, whether she has asked for the benefit or not. Id. at 185.

Turning to the first inquiry, it is clear that the toll is voluntarily paid. Nobody is forced to drive on the Dulles Toll Road. Like most toll roads, the Dulles Toll Road merely provides motorists with a faster alternate route to reach their destinations in exchange for a fee. A motorist who objects to the toll may take another route.

The answer to the second question is no less clear. The funds raised for the Metrorail expansion project directly benefit only travelers who use the Dulles Corridor, not the community as a whole. Receipt of the benefit is therefore voluntary in that it only accrues to those who have chosen to travel in the corridor. While this group is not limited only to Dulles Toll Road

drivers, this prong of the Elizabeth River Crossings test does not ask whether those who pay the toll are the only ones who benefit. It asks only whether receipt of the benefit is voluntary. There can be little doubt that use of the Dulles transit corridor--whether by using the airport, driving on the access road, or driving on the Dulles Toll Road--is voluntary.

3.

Finally, "the tolls are collected solely to fund the Project." Id. at 183. The Metrorail expansion is part of the same project as the Dulles Toll Road. As we have already noted, the toll road and the Metrorail expansion run through the same narrow transit corridor, serve many of the same areas, and will benefit many of the same commuters. The Virginia General Assembly explicitly found as much when it designated "transportation improvements in the Dulles Corridor," including "the Dulles Toll Road, the Dulles Access Road, . . . [and] mass transit" as components of a single project for the purpose of revenue-bond financing. 2004 Va. Acts ch. 807, J.A. 224.

The Virginia Supreme Court in Elizabeth River Crossings was faced with arguments similar to those before us now: there, as here, appellants argued that, regardless of how the state characterized them, the various particular arteries were not sufficiently intertwined to be considered parts of a single project. But the Virginia Supreme Court showed no appetite for such an inquiry. It took for granted the state's choice to treat the individual tunnels and bridges as components of a common project. It instead inquired into whether the toll revenue would flow outside of the project, so

defined, to benefit citizens at large. See Elizabeth River Crossings, 749 S.E.2d at 185.

Following that approach, we accept Virginia's and the MWAA's assessment that the Metrorail expansion and the Dulles Toll Road are parts of a single interdependent transit project--though we observe once more that this notion hardly strains credulity. Because they are parts of the same project, tolls charged on the Dulles Toll Road are not transformed into taxes merely by being used to fund the Metrorail expansion.

The record does not indicate that the surplus tolls are diverted outside those confines or are treated, in any sense, as general revenue. Indeed, the very basis for appellant's complaint is that the increased tolls are earmarked specifically to fund the Metrorail expansion as provided under § 4.01(e) of the operating agreement between Virginia and MWAA. Therefore, we conclude that the tolls collected are used solely to fund the project.

III.

Under the Elizabeth River Crossings framework, therefore, the tolls charged for passage on the Dulles Toll Road are user fees, not taxes, under Virginia law. Their collection by the MWAA thus does not run afoul of the Virginia Constitution and, accordingly, does not violate the due process rights of motorists. The district court's order dismissing the complaint is therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-1076
(1:11-cv-00389-AJT-TRJ)

[Filed January 21, 2014]

JOHN B. CORR, on behalf of themselves and all others similarly situated; JOHN W. GRIGSBY, on behalf of themselves and all others similarly situated,

Plaintiffs – Appellants,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant – Appellee.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA; UNITED STATES OF AMERICA,

Amici Supporting Appellee.

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2011-1501

[Filed December 14, 2012]

JOHN B. CORR AND JOHN W. GRIGSBY,
Plaintiffs-Appellants,
v.
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia in No. 11-CV-0389, Judge Anthony J. Trenga.

ROBERT J. CYNKAR, Cuneo, Gilbert & LaDuca, LLP, of Alexandria, Virginia, argued for the plaintiffs-appellants. With him on the brief were PATRICK M. MCSWEENEY, of Powhatan, Virginia, CHRISTOPHER I. KACHOUROFF, Dominion Law Center, P.C., of Woodbridge, Virginia, and RICHARD B. ROSENTHAL, Law Offices of Richard B. Hosenthal, of Miami, Florida.

STUART A. RAPHAEL, Hunton & Williams, LLP, of McLean, Virginia, argued for defendant-appellee.

Before NEWMAN, DYK, and PROST, *Circuit Judges.*

PROST, *Circuit Judge.*

ORDER

Petitioners John B. Corr and John W. Grisby filed this class action against the Metropolitan Washington Airports Authority ("MWAA") on behalf of themselves and all drivers who have used the Omer L. Hirst-Adelard L. Brault Expressway, also known as the Dulles Toll Road ("Toll Road") in Virginia since 2005. They claim that the tolls are a tax and constitute an illegal exaction in violation of the Due Process Clause of the Fifth and Fourteenth Amendments because they are assessed by MWAA, an unelected body. Petitioners also assert that the composition of MWAA violates separation of powers by intruding on the President's authority under Article II of the Constitution. Finally, Petitioners allege a violation of the Virginia Constitution's prohibition on the establishment of a government "separate from, or independent of, the government of Virginia," set forth in Article I, § 14. Because we conclude that this court lacks jurisdiction, we transfer this case to the United States Court of Appeals for the Fourth Circuit.

I

Opening in 1962, The Dulles Airport Access Highway ("Access Road") which connects Dulles Airport to Interstate 495 and Interstate 66 was built on a portion of a federally purchased Right-of-way for the exclusive purpose of providing access to and from the Dulles Airport. At the request of the Virginia Department of Highways and Transportation ("VDOT"), in 1983, the federal government granted Virginia a 99-year easement within the Right-of-way to

construct, operate and maintain the Toll Road for the use of non-airport traffic. On October 1, 1984, the Toll Road opened and became a "project" within the jurisdiction of the Commonwealth Transportation Board ("CTB"). Va. Code § 33.1-268(2)(n). Beginning in 1989, Virginia enacted a series of statutes to facilitate the maintenance and expansion of the Toll Road and mass transit in the Right-of-way. In 2005, CTB raised tolls on the Toll Road, expressly reserving the entire toll increase to fund Virginia's share of the cost of extending Metrorail to Dulles.

In 1985, Virginia and the District of Columbia passed compact-legislation authorizing the establishment of the MWAA. A year later, Congress passed the Metropolitan Washington Airports Act of 1986, 49 U.S.C. § 49101 et seq. ("Airports Act"), approving the compact-legislation. MWAA is governed by a Board of Directors consisting of thirteen members: five members appointed by the Governor of Virginia, three members appointed by the Mayor of the District of Columbia, two members appointed by the Governor of Maryland, and three members appointed by the President of the United States with the advice and consent of the Senate. 49 U.S.C. § 49106(c). According to the Airports Act, MWAA is independent of the United States Government and authorized to "operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area." *Id.* § 49104(a)(1),(2).

Beginning in December 2005, MWAA proposed that it operate the Dulles Toll Road and oversee the construction of the Metrorail project, including

assuming responsibility for toll rate setting for the Dulles Toll Road and for Virginia's remaining share of financing for both Phase I and II of the Dulles Metrorail extension. On December 29, 2006, VDOT and MWAA executed a Master Transfer Agreement and Dulles Toll Road Permit and Operating Agreement. Under the Permit, MWAA was authorized to operate the Toll Road and collect toll revenues in consideration for its obligation to fund and cause to be constructed the Dulles Corridor Metrorail Project and other transportation improvements in the Dulles Corridor. On November 1, 2008, control of the Toll Road transferred from VDOT to MWAA.

Petitioners filed their complaint in the United States District Court of the Eastern District of Virginia on April 14, 2011. On May 5, 2011, MWAA filed a motion to dismiss on the grounds that Petitioners lack both Article III and prudential standing and that Petitioners' Complaint fails to state a claim. On July 7, 2011, the district court granted MWAA's motion and dismissed the Complaint with prejudice holding that the Petitioners' claims were barred by the prudential standing doctrine. The court alternatively held that Petitioners failed to state a claim under the Due Process Clause, that the tolls do not constitute a tax, and that even if the Virginia Constitution was violated, such claims are preempted by the Supremacy Clause. This appeal followed. On July 25, 2011, MWAA filed a motion claiming that this court lacked appellate jurisdiction and requesting that the appeal be either dismissed or transferred to the United States Court of Appeals for the Fourth Circuit. On December 9, 2011, this court denied the motion and invited the parties to reiterate their arguments in their merits briefs.

II

As a threshold matter, we must determine whether this court has jurisdiction to hear the Petitioners' appeal. In the Complaint, Petitioners allege federal question jurisdiction under 28 U.S.C. § 1331, as well as jurisdiction under the so-called Little Tucker Act, 28 U.S.C. § 1346(a)(2). On appeal, Petitioners argue that jurisdiction properly lies with this court based on their Little Tucker Act claims. In their motion to transfer and merits brief, MWAA argues that there is no Little Tucker Act jurisdiction and the case should either be dismissed or transferred to the United States Court of Appeals for the Fourth Circuit.

District courts have jurisdiction under the Little Tucker Act to hear claims "against the United States, not exceeding $10,000" and this court has jurisdiction to hear the appeals of claims brought pursuant to the Little Tucker Act. 28 U.S.C. § 1346(a)(2); 28 U.S.C. § 1295(a)(2). Little Tucker Act jurisdiction "may be invoked whenever 'a federal instrumentality acts within its statutory authority to carry out [the government's] purposes' as long as no other specific statutory provision bars jurisdiction." *Auction Co. of Am. v. FDIC,* 132 F.3d 746, 749 (D.C. Cir. 1997), *decision clarified on denial of reh'g,* 141 F.3d 1198 (D.C. Cir. 1998) (quoting *Butz Eng'g Corp. v. United States,* 204 Ct. Cl. 561, 499 F.2d 619, 622 (Ct. Cl.1974)). Petitioners allege that MWAA is a federal instrumentality for purposes of their constitutional claims and, therefore, jurisdiction in this court is proper under the Little Tucker Act.

We must therefore determine whether MWAA is a federal instrumentality. "[T]here is no simple test for

ascertaining whether an institution is so closely related to governmental activity as to become a [federal] instrumentality." *Dep't of Emp't v. United States,* 385 U.S. 355, 358-59 (1966). Nonetheless, "the Supreme Court has looked to several factors, including: whether the entity was created by the government; whether it was established to pursue governmental objectives; whether government officials handle and control its operations; and whether the officers of the entity are appointed by the government." *Augustine v. Dep't of Veterans Affairs,* 429 F.3d 1334, 1339 n.3 (Fed. Cir. 2005) (citing *Lebron v. Nat'l R.R. Passenger Corp.,* 513 U.S. 374, 397-98 (1995)).

The first factor–whether the entity was created by the federal government–does not support the conclusion that MWAA is a federal instrumentality. It is true that MWAA was created by Congress through passage of the Airports Act. The Airports Act, however, 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. Moreover, the Airports Act states that MWAA "shall be a public body corporate and politic with the powers and jurisdiction conferred upon it jointly by the legislative authority of Virginia and the District of Columbia or by either of them and concurred in by the legislative authority of the other jurisdiction." 49 U.S.C. § 49106(a). Thus, though it may partly owe its existence to an act of Congress, MWAA was in large part created by, and exercises the authority of, Virginia and the District of Columbia.

Petitioners fare little better under the second factor. Petitioners allege that MWAA was created to serve federal interests such as managing and raising funds for federally owned airports. These facts must be balanced against the fact that the Airports Act indicates that the federal government had "a continuing but limited interest" in the operation of Reagan National Airport and Dulles International Airport. *Id.* § 49101(3). That "limited" federal interest is satisfied "through a lease mechanism which provides for local control and operation." *Id.* § 49101(10). Moreover, Congress found that many groups had an interest in the airports, including: "nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the United States Government and State governments." *Id.* § 49101(6). Thus, while MWAA does serve limited federal interests, it serves regional and state interests as well.

Turning to the final two factors, it becomes clear that MWAA cannot be considered a federal instrumentality for the purpose of Petitioners' claims. Petitioners do not allege any facts that would allow this court to determine that federal officials handle and control MWAA's operations. To the contrary, the gravamen of Petitioners' constitutional claims is that MWAA is an unelected entity independent of elected authorities exercising governmental power. Furthermore, the President appoints only three of MWAA's thirteen board members. The fact that a small minority of the board members are federal appointees is insufficient to establish MWAA as a federal instrumentality. *See Chas. H. Tompkins Co. v. United States,* 230 Ct. Cl. 754, 756 (1982) (finding, inter alia,

three federal appointees out of thirty-five board members was insufficient to establish federal control and, in turn, federal instrumentality status); *cf. Lebron,* 513 U.S. at 399 (holding that where the government, inter alia, "retains for itself permanent authority to appoint a majority of the directors of [a] corporation, the corporation is part of the Government for purposes of the First Amendment").

As MWAA possesses few, if any, of the hallmarks of a federal instrumentality identified in *Lebron,* we conclude that MWAA is not a federal instrumentality for the purpose of Petitioners' claims. Since MWAA is not a federal instrumentality and has not been alleged to act on behalf of the government in any other capacity, this court does not have jurisdiction over Petitioners' Little Tucker Act claims. *See Slattery v. United States,* 635 F.3d 1298, 1301 (Fed. Cir. 2011) (en bane) ("The [Tucker Act's] jurisdictional criterion is . . . whether the government entity was acting on behalf of the government"). Therefore, this court lacks jurisdiction to hear Petitioners' non-Little Tucker Act claims.

III

In their Complaint, Petitioners allege federal question jurisdiction under 28 U.S.C. § 1331 and there is no dispute that this appeal could have been filed in the United States Court of Appeals for the Fourth Circuit. Thus, this court will transfer the appeal to the court in which it could have been brought, pursuant to 28 U.S.C. § 1631 (when an appeal is filed in a court which thereafter determines that it lacks jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court

in which the action or appeal could have been brought at the time it was filed or noticed").

Accordingly,

IT IS ORDERED THAT:

The motion to transfer the appeal, pursuant to 28 U.S.C. § 1631, is granted. The appeal is transferred to the United States Court of Appeals for the Fourth Circuit.

FOR THE COURT

December 12, 2012
Date

/s/ Sharon Prost
Sharon Prost
Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 1:11-cv-389 (AJT/TRJ)

[Filed July 7, 2011]

JOHN B. CORR, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION

As alleged in the Complaint, Plaintiffs John B. Corr and John W. Grisby (collectively "Plaintiffs") are residents of Virginia who, for the past 15 years or more, have used and continue to use the Orner L. Hirst-Adelard L. Brault Expressway, also known as the Dulles Toll Road (the "Toll Road"). Concerned by the continuing increase in tolls assessed for the use of the Toll Road, the cost of the Metrorail extension to Dulles Airport financed through the increase in tolls, and what the Plaintiffs perceive as a lack of authority and

accountability on the part of an unelected entity that establishes those tolls, the Plaintiffs filed this class action against the Metropolitan Washington Airports Authority ("MWAA") on behalf of themselves and all drivers who have used the Toll Road in Virginia since 2005. At the heart of Plaintiffs' claim is the contention that they have been, and are continuing to be, subjected to tolls for their use of the Toll Road they consider excessive. In that regard, and as discussed in more detail below, Plaintiffs claim that because the amount of these tolls were set, not to cover costs associated with maintaining and operating the Toll Road itself, but in order to generate funds necessary to cover the costs associated with the construction of a Metrorail line extending to Dulles International Airport ("Dulles Airport"), such tolls constitute a "tax," and because this "tax" has been assessed by MWAA, an unelected body, it constitutes an "illegal exaction" in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and the guarantee of a "Republican Form of Government" under Article IV, § 4 of the United States Constitution, as well as a violation of the Virginia Constitution's prohibition on the establishment of a government "separate from, or independent of, the government of Virginia," set forth in Article I, § 14. Based on these claims, the Plaintiffs seek "to halt MWAA' s continuing illegal exaction of money from the users of the Dulles Toll Road and to secure for them the return of all money illegally exacted through the tolls for the Dulles Toll Road – that is, the amount of money that exceeds the amount that would have been collected from 2005 through the final judgment for this action had the toll structure before the 2005 toll increase remained in force – plus interest." Compl. at 8.

On May 5, 2011, MWAA filed a Motion to Dismiss for Failure to State a Claim, Doc. No. 6, on the grounds that Plaintiffs do not have standing to bring this suit and that Plaintiffs' Complaint fails to state a claim.[1] On May 26, 2011, the Court held a hearing on the motion after which the Court took the motion under advisement. For the reasons stated below, the Court will grant MW AA's motion and dismiss the Complaint with prejudice.

I. FACTUAL BACKGROUND

On September 7, 1950, Congress enacted legislation authorizing construction of a major public airport, in addition to Ronald Reagan Washington National Airport ("Reagan Airport"), in the vicinity of the District of Columbia.[2] 81 Cong. Ch. 905, Sept. 7, 1950, 64 Stat. 770. To facilitate access to what would become

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[1] MWAA also moved to dismiss on the grounds that all or a portion of the Plaintiffs' claims are barred by the applicable statute of limitations or the doctrine of laches. Because of the Court's rulings on MWAA's other grounds for dismissal, the Court does not reach the merits of these issues.

[2] This section is taken from the factual allegations of the Complaint, documents filed in support of the motion to dismiss as well as documents from the public record. *See Philips v. Pitt County Mem'l Hosp.,* 572 F.3d 176, 180 (4th Cir. 2009) (stating that the district court can consider documents attached to the motion to dismiss, "so long as they are integral to the complaint and authentic" and the district court may "properly take judicial notice of matters of public record.") For the purposes of ruling on a motion to dismiss, the Court must accept as true factual allegations, but need not accept legal conclusions drawn from the facts nor accept as true unwarranted inferences, unreasonable conclusions or arguments. *Id.*

Washington Dulles International Airport ("Dulles Airport"), the federal government acquired a broad corridor of land in Virginia, known as the Dulles Airport Access Highway and Right-of-way ("Right-of-way"), between the Interstate 495 Beltway at Falls Church, Virginia and Dulles Airport. The Dulles Airport Access Highway (the "Access Road") which connects Dulles Airport to Interstate 495 (the "Beltway") and Interstate 66 was built on a portion of the federally purchased Right-of-way as part of the overall project. In 1962, Dulles Airport and the Access Road opened under the direct control of the Federal Aviation Administration ("FAA"), an agency that is a part of the Department of Transportation. Compl. ¶ 48. The Access Road is a 13.65-mile highway whose exclusive purpose is to provide rapid access to and from the Dulles Airport. Because of that purpose, there are no general-access exists from the west-bound lanes or the east-bound lanes. No toll or other user fee is imposed on motorists using the Access Road; but any use of the Access Road by motorists other than for purpose of going to or from Dulles Airport for airport business is punishable by civil penalties. Compl. ¶¶ 49-50.

As development increased in the surrounding Virginia counties, the Access Road came under increased pressure to become an avenue for commuters and other motorists. Compl. ¶ 51. In 1980, in order to address the problem without interfering with the Access Road's purpose of serving as an exclusive artery to Dulles Airport, the Virginia Department of Highways and Transportation ("VDOT") requested the FAA allow Virginia to construct a new toll road within the Right-of-way for the use of non-airport traffic to

and from Washington, D.C. and within Fairfax County. Compl. ¶ 52. In 1983, the federal government granted Virginia a 99-year easement within the Right-of-way to construct, operate and maintain a limited access highway to be called the Dulles Toll Road and which is officially known today as the Omer L. Hirst-Adelard L. Brault Expressway (the "Toll Road"). *See* Doc. No. 9-1 (Deed of Easement).

On October 1, 1984, the Toll Road opened over a distance of 16.15 miles between the Beltway and Route 28. Compl. ¶ 54. The Toll Road became a "project" within the jurisdiction of the Commonwealth Transportation Board ("CTB"), which is empowered under Virginia legislation to "[f]ix and collect tolls and other charges for the use of such projects or to refinance the cost of such projects." Va. Code. §§ 33.1-268(2)(n) and 269(5); Compl. ¶ 55. Pursuant to its legislative authority, the CTB set the tolls for the Toll Road at 50 cents at the main toll plaza, 25 cents at the exit ramps, and 35 cents at the ramps to Sully Road and the Greenway, which, as discussed below, remained at that level until 2005. Compl. ¶ 78.

In 1984, the United States Secretary of Transportation appointed an advisory commission to develop a plan for the creation of a regional authority to manage both Dulles Airport and Reagan Airport. *Metropolitan Washington Airports Authority v. Citizens of Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 257 (1991). The Commission recommended that the proposed authority be created by a congressionally approved interstate compact between Virginia and the District. *Id.* In 1985, Virginia and the District passed compact-legislation authorizing the establishment of

the recommended regional authority, MWAA. *Id.; see also* 1985 Va. Acts ch. 598; 1985 D.C. Law 6-67.[3]

A year later, in 1986, Congress passed the Metropolitan Washington Airports Act of 1986, 49 U.S.C. § 49101 *et seq.* ("Airports Act"), which approved the compact-legislation passed by Virginia and the District. As approved under the Airports Act, MWAA "shall be a public corporate and politic with the powers and jurisdiction conferred upon it jointly by the legislative authority of Virginia and the District of Columbia or by either of them and concurred in by the legislative authority of the other jurisdiction." *Id.* § 49106(a). MWAA is to be governed by a 13-member Board of Directors, each appointed for a six-year term; five members appointed by the Governor of Virginia, three members appointed by the Mayor of the District, two members appointed by the Governor of Maryland, and three members appointed by the President of the United States with the advice and consent of the Senate. 49 U.S.C. § 49106(c).

The Airports Act authorized MWAA to "operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area," *id.* § 49104(a)(1), and is independent of Virginia and its local governments, the District of Columbia,

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[3] As stated in that legislation enacted by Virginia and the District, the Compact was "for the purpose of acquiring, operating, maintaining, developing, promoting and protecting Ronald Reagan Washington National Airport and Washington Dulles International Airport together as primary airports for public purposes serving the metropolitan Washington area." Va. Code.§ 5.1-156(A); D.C. Code§ 9-905(a).

and the United States Government. 49 U.S.C. § 49106(a)(2); Va. Code. § 5.1-156(8); D.C. Code § 9-905(b). Congress also directed that MWAA "shall assume all rights, liabilities, and obligations of the Metropolitan Washington Airports on June 7, 1987, including leases, permits, licenses, contracts, agreements, claims. . . " 49 U.S.C. § 49104(a)(6)(A). Congress also directed that MWAA's authority over Dulles Airport "includes the Dulles Airport Access Highway and Right-of-way, including the extension between Interstate Routes I-495 and I-66." 49 U.S.C. § 49103(4). Additionally, MWAA was also to assume responsibility of the FAA's Master Plans for the Metropolitan Washington Airports. *Id.* Those Master Plans reserved the median strip in the Access Road for a future mass transit line. *Id;* Doc. No. 9-16, Ex. 11 at 4.

The Airports Act also authorized MWAA "to acquire, maintain, improve, protect, and promote the Metropolitan Washington Airports for public purposes," "to levy fees or other charges," "to acquire real and personal property by purchase, lease, transfer, or exchange." 49 U.S.C. § 49106(b). MWAA also has the authority "to issue bonds from time to time in its discretion for public purposes, including paying any part of the cost of airport improvements, construction, and rehabilitation and the acquisition of real and personal property, including operating equipment for the airports," and that such bonds "are not a debt of Virginia, the District of Columbia, or a political subdivision of Virginia or the District of Columbia; and may be secured by the Airports Authority's revenues generally, or exclusively from the income and revenues of certain designated projects whether or not any part

of the projects are financed from the proceeds of the bonds." 49 U.S.C. § 49106(2). To implement the Compact, the Airports Act also authorized the United States Secretary of Transportation to lease to MWAA, pursuant to a long-term lease, both airports and the Right-of-way, subject only to Virginia's existing easement for the Toll Road ("Federal Lease). 49 U.S.C. §§ 49102, § 49104 and 49103(4); *see* Doc. No. 9-26, Ex. 21 (Federal Lease).

Beginning in 1989, the Virginia General Assembly passed a series of statutes, enacted into law, to facilitate the maintenance and expansion of the Toll Road and mass transit in the Right-of-way. First, in 1989, the Virginia General assembly passed the Commonwealth of Virginia Transportation Facilities Bond Act of 1989 (the "Bond Act of 1989"), under which the issuance of bonds were authorized to pay for widening and extension of the Dulles Toll Road. 1989 Va. Acts 960, § 2; Compl. ¶ 59. The Bond Act of 1989 did not explicitly mention mass transit as a permissible purpose for the issuance of bonds, so in 1990, the General Assembly amended § 13 of the Bond Act of 1989 to specifically permit the CTB to "provide for additional improvements to the Dulles Toll Road *and Dulles Access Road corridor* including, but not limited, to *mass transit* . . ." 1990 Va. Acts. ch. 251, § 13, Doc. No. 9-10, Ex. 5 (emphasis added). The 1990 amendments also added § 14 that specifically authorized "the rates fees, and charges" to be used,

among other purposes, for the funding of mass transit in the Dulles corridor.[4]

Then, in 1995, the Virginia General Assembly approved another bond for the Toll Road, again authorizing the CTB to use surplus Toll Road revenues to fund various improvements in the Dulles Corridor, including mass transit. 1995 Va. Acts ch. 560, §§ 2, 14, Doc. No. 9-27, Ex. 22. Pursuant to that authority, in 2001, the CTB passed a resolution that, beginning in 2003, 85% of the surplus revenues from the Toll Road would be set-aside for "mass transportation initiatives in the Dulles Corridor." *See* H.J. Res. 200 (Va. 2002), Doc. No. 9-12, Ex. 7. In 2002, the General Assembly passed House Joint Resolution No. 200 approving the CTB resolution. *Id*.

In 2004, the Virginia General Assembly amended the State Revenue Bond Act specifically to define "Transportation improvements in the Dulles Corridor" as a bond-eligible project. 2004 Va. Acts ch. 807, § 1 (amending Va. Code Ann. § 33.1-268(2)(n)). This

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[4] Section 14 provides:

> Notwithstanding any other provisions of this act, the rates, fees, and charges established and collected pursuant to § 9 of this act shall not be used for any purpose other than for the payment of debt service on all outstanding notes and bonds, operations and maintenance costs of the facility, the purpose enumerated in Chapter 615 of the 1989 Acts of Assembly, for the funding of mass transit, and for the funding of additional improvements, as described in § 13 of this act, to the Dulles Toll Road/Dulles Access Road corridor over that portion of that corridor extending from Route 7 at Tyson's Corner in Fairfax County to Route 28 at Sulley Road in Loudoun County. *Id*

legislation gave the CTB express authority under the State Revenue Bond Act to issue its own revenue bonds to fund construction of Metrorail to Dulles using revenues from the Toll Road. *See* Va. Code. Ann. § 33.1-269(2) (Supp. 2010). In 2005, CTB raised tolls on the Toll Road to 75 cents at the main gate and 50 cents at the exit ramps, expressly reserving the entire toll increase to fund Virginia's share of the cost of extending Metrorail to Dulles. Compl. ¶¶ 83-84.

Beginning in December 2005, MWAA proposed that it operate the Dulles Toll Road and oversee the construction of the Metro rail project, including assuming responsibility for "toll rate setting" for the Dulles Toll Road and "for the Commonwealth's remaining share of financing for both Phase I and II of the Dulles Metrorail extension." Compl. ¶¶ 87, 90. On March 24, 2006, the Virginia Secretary of Transportation executed a Memorandum of Understanding ("MOU") between VDOT, on behalf of the Commonwealth of Virginia, and MWAA concerning the Dulles Corridor Metrorail Project and the Dulles Toll Road. *Gray v. Virginia Sec'y of Trans.,* 276 Va. 93, 99 (2008). The MOU explains that the Dulles Toll Road was "constructed upon property owned by the federal government and leased to [the MWAA], pursuant to several deeds of easement to the Commonwealth of Virginia for the construction of the Dulles Toll Road." *Id.* The MOU provided that the Commonwealth, acting through VDOT and the CTB, "will transfer possession and control over the Dulles Toll Road right-of-way and all improvements thereto to the [MWAA]," that MWAA will assume all operational, maintenance, toll-setting, toll-collection, debt, and financial responsibility for the Dulles Toll Road, and that MWAA will construct

certain phases of the Metrorail Project. *Id.* The MOU also provides that "[revenues collected from the Dulles Toll Road shall be used for any and all costs related to the operation, maintenance and debt service of the Dulles Toll Road, and the design, construction and financing of the Dulles Corridor Metrorail Project." *Id*

On December 29, 2006, after unsuccessful legislative efforts to prevent Virginia's transfer of the Toll Road to MWAA,[5] VDOT and MWAA entered into a Master Transfer Agreement and Dulles Toll Road Permit and Operating Agreement (the "Transfer Agreement" and the "Permit"). *See* Doc. No. 9-2,9-3, Ex. 2, 3 (Master Transfer Agreement and Permit); Compl. ¶ 99. Under the Permit, MWAA was authorized "to operate the Toll Road and collect Toll Revenues in consideration for the Airports Authority's obligation to fund and cause to be constructed the Dulles Corridor Metrorail Project and other transportation improvements in the Dulles Corridor." Compl. ¶ 99. Specifically, MWAA would: (i) operate the Toll Road and determine the tolls to be charged, after public notice and hearing; (ii) construct the Metrorail Project in the Dulles Corridor; and (iii) use Toll Road revenues solely and exclusively for transportation improvements within the Dulles Corridor. Compl. ¶¶ 99-102, Doc. No. 9-3, Ex. 3 (Permit) at §§ 4.01, 6.01, 7.01.

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[5] Legislation to prohibit VDOT from transferring control of the Toll Road to MWAA was repeatedly introduced in the Virginia General Assembly. *See* H.B. 5010 (Va. 2006) failed (9/28/2006) Doc. No. 9, Ex. 9; H.B. 5068 (Va. 2006) (failed 9/29/2006), Doc. No. 9-15, Ex. 10; and again in 2007, H.B. 1650 (Va. 2007) (Appropriations Bill, Items 427 #2h and 445 #1h), Doc. No. 9-17, Ex. 12.

Litigation over the transfer of the Toll Road to MWAA quickly followed. In January 2007, suit was filed against officials of Virginia and MWAA in the Circuit Court of the City of Richmond to invalidate the Master Transfer Agreement and Permit. Plaintiffs in that case, two Toll Road users, argued that the imposition of tolls to fund Metrorail was an illegal tax under the Virginia Constitution. *Gray et al., v. Virginia Secretary of Transportation, et al.,* 276 Va. 93, 99-100 (2008). The trial court initially dismissed the case based on sovereign immunity; but the Virginia Supreme Court held that sovereign immunity did not bar suit against the Commonwealth of Virginia and remanded the case to the Circuit Court, which on October 22, 2008, granted summary judgment in favor of the defendants, ruling, among other things, that the tolls were not a tax. *Gray v. Va. Sec'y of Transp.,* CL-07-203 (Richmond Cir. Ct. Oct. 20, 2008), Doc. No. 9-19, Ex. 14.[6] With the *Gray* suit resolved, on October 29, 2008, the U.S. Secretary of Transportation certified that MWAA's operation of the Toll Road was a valid "Airport Purpose" under the Federal Lease and that MWAA could properly use Toll Road revenues to pay for the Metro rail project. Doc. No. 9-22, Ex. 17 ¶¶ 10, 12.

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[6] The Circuit Court also ruled initially that MWAA was also immune from suit under the doctrine of sovereign immunity. That ruling was not appealed and on remand the case proceeded only against the Virginia officials. *See Gray,* 276 Va. at 100 n.3, 107.

On November 1, 2008, VDOT transferred control of the Toll Road to MWAA. Compl. ¶ 114. Construction on Phase I began in March 2009, and is continuing.

In August 2009, another lawsuit was filed challenging plans, then already underway, to expand Metrorail access. *See Parkridge 6, LLC et al. v. United States Dep't of Trans.,* 2010 WL 1404421 (E.D. Va. Apr. 6, 2010), *aff'd,* 2011 WL 971530 (4th Cir. Va. Mar. 21, 2011). Plaintiffs in *Parkridge,* a Virginia-based LLC which owned property adjoining the proposed development route of the Metro rail and a Virginia-based civic advocacy group established to monitor the development of the Metrorail construction, alleged, *inter alia,* that MWAA' s collection of tolls violates the Virginia Constitution because such collection constitutes taxation by unelected officials. *Id,* at *2. This Court granted the defendants' motion to dismiss, ruling that plaintiffs lacked both Article III and prudential standing and that the federal legislation that approved the interstate compact that created MWAA preempted any claim under the Virginia Constitution. *Id.,* at *4, *6. The Fourth Circuit affirmed on the grounds that plaintiffs lacked prudential standing. *Parkridge,* 2011 WL 971530, at *2.

The construction of the Metrorail continues and as of March 2011, Phase 1 was approximately 33% was complete. *See* Doc. Nos. 9-18, 9-24, Ex 13 & 19.

II. STANDARD OF REVIEW

In order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must set forth "a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,*

129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). In that regard, the Court must construe the complaint in the light most favorable to the plaintiffs, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Lab., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1993). However, "[c]onclusory allegations regarding the legal effect of the facts alleged" need not be accepted. *Labram v. Havel,* 43 F.3d 918, 921 (4th Cir. 1995). For that reason, a claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 129 S. Ct. at 1949; *Twombly*, 555 U.S. at 556. "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal,* 129 S. Ct. at 1949 (2009); *Twombly,* 550 U.S. at *555.* A complaint is also insufficient if it relies upon "naked assertions devoid of further factual enhancement." *Iqbal,* 129 S. Ct. at 1949 (internal citations omitted). The central purpose of the complaint is to provide the defendant "fair notice of what the plaintiffs claim is and the grounds upon which it rests," and the plaintiffs legal allegations must be supported by some factual basis sufficient to allow the defendant to prepare a fair response. *Twombly,* 550 U.S. at 555.

III. ANALYSIS

MWAA seeks dismissal of the complaint on the grounds that (1) Plaintiffs lack standing to raise the alleged claims; and (2) the complaint fails to state a claim upon which relief can be granted.

A. THE COMPLANT

Briefly summarized, the complaint alleges that the tolls paid for the use of the Metrorail construction are "illegal exactions," which are unconstitutional because they are a tax assessment in violation of the principle of"no taxation without representation." Compl ¶¶ 1-4. These "exactions" are claimed to be illegal because:

1. Neither the Virginia General Assembly nor Congress has ever enacted legislation that delegates to MWAA the power to set tolls for the Dulles Toll Road.

2. Neither the Virginia General Assembly nor Congress has the power to delegate to MWAA the authority to set tolls for the Dulles Toll Road because MWAA is an entity completely outside of the Commonwealth and is not composed of federal "officers" or "inferior officers." Rather, it is an unelected, independent and "novel government creature outside of all other forms of government." Compl ¶ 6(a)-(d).

3. Any delegation to MWAA to set such tolls is unlawful because it confers "unlimited discretion" and therefore "constitutes a standardless, unconstitutional delegation of legislative power to MWAA." Compl. ¶¶ 6(c), 138.

4. Regardless of whether the tolls are characterized as "user fees" or "taxes," the tolls set for the Dulles Toll Road exceed "the amount needed to pay a fair approximation of the operating and maintenance expenses of the Dulles Toll Road plus reasonable payments for the debt incurred

to construct or improve the Dulles Road" and therefore exceed any lawful delegation to MWAA.

5. The delegation of authority to set tolls violates the Virginia Constitution; and federal legislation approving the interstate compact cannot preempt limitations on the General Assembly imposed under the Virginia Constitution. The constitutional requirement that Congress must consent to any interstate compact, such as that entered into by Virginia with respect to MWAA, does not authorize Congress "to compel a state to violate that state's constitution, concerning a matter not otherwise governed by the United States Constitution." Compl. ¶ 6(d).

Based on these claims, the Complaint alleges that the tolls established to fund the Metrorail extension are (1) "illegal exactions" in violation of the Fifth and Fourteenth Amendments to the United States Constitution (Count One); (2) deprive the Plaintiffs of "a republican form of government" and "to be governed only by state or local government or by the Federal Government" (Count Three); and (3) violate the Plaintiffs' "privileges and immunities" and "their right to the due process of law, to be taxed only by the enactments of legislatives [sic] bodies elected by them" (Count Three).[7]

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[7] Count II of the Complaint also alleged a violation of 42 U.S.C. 1983, which the Plaintiffs withdrew at the hearing held on May 26, 2011.

B. STANDING

Under Article III, § 2 of the Constitution, federal courts have jurisdiction over a dispute only if it is a case or controversy. For this reason, Plaintiffs must establish that they have standing to sue. *Raines v. Byrd,* 521 U.S. 811, 818 (1997). To establish Article III standing, Plaintiffs must show that: (1) they have suffered an injury in fact that is both concrete and particularized, and actual or imminent; (2) there is a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant; and (3) it must likely be redressed by a favorable decision of the Court. *Ariz. Christian Sch. Tuition Org. v. Winn,* 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). The Court concludes that Plaintiffs have Article III standing to raise the issues alleged in the Complaint.

To meet the first requirement of showing an injury in fact, Plaintiffs' complaint must establish that Plaintiffs have a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to the Plaintiffs. *See Lujan,* 504 U.S. at 560- 561, and n. 1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way"). In this case, Plaintiffs have alleged an injury in fact, the paying of an unconstitutional toll assessed by a constitutionally infirm entity, MWAA, that is both concrete and particularized, as well as actual, and ongoing.

Plaintiffs' claim to standing is premised on a footing that is distinct from those cases in which a taxpayer lacked standing to challenge the legality of legislation

that only indirectly affects them. *See, e.g., Arizona Christian School Tuition Org. v. Winn,* 131 S.Ct. 1436 (2011) (holding that a taxpayer did not have standing to challenge the constitutionality of certain tax credits given to other taxpayers); *Doremus v. Board of Ed. of Hawthorne,* 342 U.S. 429 (1952) (finding plaintiff-taxpayer lacked standing to challenge state law that required public school teachers to read Bible verses to their students because the plaintiff lacked "any direct and particular financial interest" in the suit). Nor is standing precluded, as MWAA contends, based on the holding in *Frothingham v. Mellon,* 262 U.S. 447, 486 (1923) and *Williams v. Riley,* 280 U.S. 78, 80 (1929). In *Frothingham,* a taxpayer-plaintiff argued that she had standing to challenge certain federal expenditures because the allegedly unconstitutional expenditure of government funds would affect her personal tax liability. *Id.* at 486. There, however, unlike here, the taxpayer was only indirectly affected; and "[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect to every other appropriations act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.* at 488. Likewise in *Williams* v. *Riley,* 280 U.S. 78, 80 (1929), California imposed a tax on gasoline distributors, and although plaintiffs-drivers' fuel costs were arguably enhanced by the tax, the drivers were not taxed directly.

Here, Plaintiffs challenge the constitutionality of the tolls they have actually paid directly and will continue to pay for the use of the Toll Road, and while this alleged injury is shared by a large number of other

members of the public, the injury is nevertheless "actual," "concrete," and "particularized." Likewise, Plaintiffs have alleged an injury that has a causal connection to the challenged conduct; indeed, it is the direct result of the challenged conduct. Finally, there is no doubt that the Court can redress the alleged injury by fashioning an appropriate remedy were it to find that Plaintiffs are entitled to relief. For these reasons, the Court concludes that Plaintiffs have Article III standing to raise the issues they have alleged in the Complaint.[8]

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[8] The court recognizes that some courts, when faced with comparable challenges to tolls have found no Article III standing, principally on the grounds that the plaintiff's "injury" is indistinguishable from that experienced by millions of other persons who have or will pay the challenged tolls. *See Soling* v. *New York,* 804 F. Supp. 532 (S.D.N.Y. 1992) (finding that motorists lack specific individualized injury and thus standing to challenge a toll charged by the New York State Thruway Authority and Triborough Bridge & Tunnel Authority). While that circumstance exists in this case (indeed, plaintiffs rely on this commonality of injury to seek class certification for hundreds of thousands, if not millions, of toll payers from 2005 to the present), this aspect alone does not deprive an otherwise qualifying individual of standing. It cannot be the case that an individual plaintiff who, when alone in his injury, has standing to seek redress based on allegedly unconstitutional conduct, loses that standing if the effects of that conduct are too far reaching. Moreover, the courts in these cases, while finding no Article III standing, were clearly more focused on the central concerns embodied in the doctrine of prudential standing. *See id.* at 534-35 ("the Framers did not intend the courts be dragged into disputes over public policy . . . [which] would tend to place the judiciary in the inappropriate role of exercising generalized supervision over the legislative and executive branches").

Even where Article III standing exists, courts recognize that certain issues are so inextricably bound up with the political and legislative judgments of the other branches of government that courts should not intrude as a matter of "prudence." For this reason, Courts have refused to intervene in "generalized grievances" arising out of those legislative judgments, which are regarded as "more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 12 (2000). This self-imposed limitation on the exercise of federal jurisdiction derives from the "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984)(quoting *Vander Jagt v. O'neill,* 699 F.2d 116, 1178-79 (1983) (Bork, J., concurring)).

The presence of Article III standing notwithstanding, the Court concludes that Plaintiffs lack standing under the doctrine of prudential standing under the facts of this case. There is no doubt that the issues presented by the Plaintiffs have long been the subject of legislative judgments, made by elected representatives, over complex issues of public policy concerning regional transportation needs occasioned by the development of the Dulles Airport and the related Right-of-way. As in *Soling,* the challenged legislative choices that have been made "are more or less ordinary grist for the mill of democratic political controversy." *Soling,* 804 F. Supp. 532 at 535. For this reason, the Court concludes that Plaintiffs' constitutional challenges fall squarely within the prudential standing doctrine, under which courts refrain from exercising jurisdiction over a "'generalized grievance' shared in

substantially equal measure by all or a large class of citizens." *Warth v. Seldin,* 422 U.S. 490, 499 (1975).

This Court's analysis is guided, if not dictated, by the Fourth Circuit's opinion in *Parkridge 6, LLC v. United States Dep't of Transp.,* 2011 WL 971530 (4th Cir. Mar. 21, 2011). In *Parkridge,* plaintiffs alleged, as here, that MWAA's collection of tolls violated the Virginia Constitution because such collection constitutes taxation by unelected officials. *Parkridge 6 LLC v. United States Dep't of Transp.,* 2010 WL 1404421, at *2 (E. D. Va. Apr. 6, 2010). The district court dismissed the case on the grounds, *inter alia,* that plaintiffs lacked Article III and prudential standing. *Id* at *4-5. The Fourth Circuit affirmed the dismissal on prudential standing grounds finding that "[w]hether or not the taxes and tolls associated with the Project [pertaining to the expansion of Metrorail access] are unnecessary . . . is not a particularized legal injury but a policy question of broad applicability," and found that these claims are "more appropriately addressed in the representative branches." *Parkridge,* 2011 WL 971530, at *5 (citing *Elk Grove,* 542 U.S. at 12).

If *Parkridge* does not necessarily foreclose Plaintiffs' case, it cannot be materially distinguished. As in *Parkridge,* Plaintiffs' alleged injuries are shared in substantially equal measure by a large class of undifferentiated persons who use the Toll Road. The alleged injury is the result of a long political process involving multiple jurisdictions, the legislatures of which voted to create MWAA and vest in it broad authority with a Board of Directors appointed by the executive officers of various affected jurisdictions, specifically the mayor of the District, the President of

the United States, and the governors of Virginia and Maryland. As in *Parkridge,* the Plaintiffs challenge what is most centrally a policy question that is best left to other branches of government to address. For these reasons, the Court concludes that there is a lack of prudential standing.

C. MERITS

Given the legal issues involved in this case, the ongoing nature of the project challenged and the long history of litigation concerning these issues in this and other courts, the Courts will consider, in the alternative, the merits of Plaintiffs' claims, their lack of standing notwithstanding

1. Plaintiffs' Due Process Challenge (Count One)

Plaintiffs first allege in connection with their Due Process challenge that MWAA is not authorized under federal legislation or Virginia legislation to set the price of the tolls. The position, however, flies in the face of a long series of legislative acts that clearly authorizes MWAA to set tolls. Under the terms of the Compact, MWAA has broad authority to "fix, revise, charge, and collect rates, fees, rentals and other charges for the use of the airports." Va. Code. § 5.1-156(A)(8); 49 U.S.C. § 49106(b)(1)(E) (MWAA "shall be authorized ... to levy fees or other charges"). As mentioned previously, MWAA's authority over Dulles Airport includes authority over the entire Right-of-way on which the Toll Road was built. 49 U.S.C. § 49103(4); Va. Code § 5.1-152. As this Court has already concluded in *Parkridge*, MWAA is authorized under the

Compact to levy tolls on the Toll Road. 2010 WL 1404421 at *6.

Plaintiffs also contend that the legislation delegating authority to MWAA is improper; and that in any event, MWAA may not assess tolls that exceed the costs related to the Toll Road for the purpose of funding an extension of the Metrorail system within the Right-of-way. Inextricably bound up with their Due Process challenge is their claim that the tolls constitute not a legitimate user fee but rather a tax that is within the exclusive province of an elected legislative body and the authority to impose such a tax may not be delegated to MWAA. Thus, Plaintiffs argue that to the extent that the Airports Act or any other federal law purports to delegate such power to MWAA it is unconstitutional because it violates the Plaintiffs' right of due process. For the reasons stated below, the Court finds that MWAA's conduct does not violate the Plaintiffs' right of due process.

As an initial matter, the Court cannot conclude, as Plaintiffs contend, that the challenged tolls in this case constitute a "tax," as opposed to a user fee. Plaintiffs' decision to use the Toll Road is optional, not compulsory; the toll collected is not used for unrelated general purposes, but rather for transportation improvements within the same Right-of-way; the United States Secretary of Transportation certified that MWAA's operation of the Toll Road was a valid "Airport Purpose" and that MWAA could properly use Toll Road revenue to pay for the Metorail project under the Federal Lease. *See* Doc. No. 9-22, Ex. 17, ¶¶ 10, 12. Furthermore, as at least one Virginia state court has already ruled that MWAA's imposition of the toll is not

a tax under Virginia law. *See Gray v. Virginia Sec'y of Transp.* CL-07-203 (Richmond Cir. Ct. Oct. 20, 2008), Doc. No. 9-19, Ex. 14. Nevertheless, the crux of Plaintiffs' complaint is not so much that they are forced to pay a tax, but they are forced to a pay a tax imposed by an unauthorized, unelected body, relying on the principle of "no taxation without representation."[9]

There is no doubt that historically, protests against "taxation without representation" motivated the founding generation and certain values expressed in the United States Constitution. Without disagreeing with the broad sentiments expressed in Plaintiffs' position, the Court must also acknowledge that such a principle, as such, was not adopted in the federal Constitution and has not been enforced as such. Rather, Article I, § 8 confers on Congress the broad power "to lay and collect Taxes, Duties, Imposts and Excises;" and as the United States Supreme Court explained early in our history, this power is "general, without limitation ... extend[ing] to all places over which the government extends." *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317, 318-19 (1820). Similarly, in *Heald v. District of Columbia*, the Supreme Court rejected the claim that a congressional tax on intangible personal property of persons residing or doing business in the District was unconstitutional

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[9] More specifically, the Complaint states that "'[n]o taxation without representation' is not simply some slogan redolent of a past age of patriots and heroes. Rather, it is an ever-vital principle at the heart of representative government and the liberty such government is established to preserve. It embodies an animating proposition of accountability to citizens for any governmental exaction of money from them that has profoundly shaped the United States and the Virginia Constitutions." Compl. ¶ 1.

because it subjects the residents of the District to taxation without representation. 259 U.S. 114, 124 (1922). The Court concluded "[t]here is no constitutional provision which limits the power of Congress that taxes can be imposed only upon those who have political representation." *Id*; *see also Adams v. Clinton*, 90 F. Supp. 2d 35, 54-55 (D.D.C. 2000) (concluding that *Loughborough* and *Heald* are binding precedent). Lower courts have likewise refused to recognize a federal constitutional right against "taxation without representation" with respect to a variety of issues. *See Breakefield v. District of Columbia*, 442 F.2d 1227, 1228 (D.C. Cir. 1970), *cert. denied* 401 U.S. 909 (1971) (where the D.C. Circuit considered and rejected a challenge to Congress's imposition of an income tax upon District residents.); *Doe v. Maximus*, 2010 WL 4789963, at *5 (M.D. Tenn. Nov. 15, 2010) ("There is no legal basis for 'Plaintiff's taxation without representation' claim"); *Campbell v. Hilton Head No. 1 Public Serv. Dist.*, 580 S.E.2d 137, 140 (S.C. 2003) ("while the American Revolution may have been spurred on by the rallying cry 'no taxation without representation,' the federal Constitution that was subsequently drafted contained no express provision guaranteeing that as a right").

For similar reasons, the Court must also reject Plaintiffs' contention that the legislative bodies that represent them impermissibly delegated to an unelected body, MWAA, the authority to tax them. In that regard, it is settled that legislative authority may be delegated so long as the delegation is limited by "an intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 472 (2001)

(internal quotations omitted). When that principle is applied to the facts of this case, the Court must conclude that the legislative delegation to MWAA was lawful because Congress clearly set intelligible boundaries on MWAA's exercise of its power to set tolls. Those boundaries include the obligation to set "charges for the use of facilities ... that will make the airport as self-sustaining as possible ...." 49 U.S.C. § 47107(a)(13)(A). MWAA's authority to use "all revenues" is limited to the "capital and operating costs" of the airports, which include the Right-of-way. *Id.* § 49104(a)(3). MWAA is, therefore, vested with a precisely defined mission, and the Airports Act confers an intelligible principle by which MWAA must discharge its duties. Setting tolls that allow MWAA to raise revenue for the construction of the Metrorail, a capital project, is well within the articulated scope of authority delegated to MWAA and the language of that delegation is comparable in detail and limited scope to other approved articulations of delegated authority. *See*, *e.g.*, *Whitman*, 531 U.S. at 472-75 (approving the EPA's authority to set ambient air quality standards at a level that would protect the public health); *Yakus v. United States*, 321 U.S. 414, 420 (1944) (approving the wartime conferral of agency power to fix prices of commodities at a level that will be generally fair and equitable and will effectuate the purposes of the Act); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943) (approving the Federal Communications Commission's power to regulate airwaves in the "public interest" as an intelligible principle); *see also Whitman*, 531 U.S. at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)) ("we have 'almost never felt qualified to second-guess Congress regarding the

permissible degree of policy judgment that can be left to those executing or applying the law.'")[10]

Nor is there any merit to Plaintiffs' contention that MWAA's exercise of toll setting authority is unlawful because it does not issue from the delegation of authority from elected representatives, but is "contractually" effected by the Permit that transferred authority over the Toll Road to MWAA. *See* Doc. No. 17 at 10, 19 (Opposition Brief). This position ignores the federal ownership of the land on which the Toll Road was built and the federal and state legislation that confers on MWAA, independent of the Permit, the authority to set rates and raise revenue for the purposes of the airports, which includes the Right-of-way. To the extent the Permit references a transfer of authority to set rates for the Toll Road, it does no more than reference MWAA's pre-existing legislative authority with respect to land and facilities committed to its administration.

For the above reasons, the Court concludes that the tolls set by MWAA with respect to the Toll Road are not unconstitutional or otherwise illegal and therefore are not "illegal exactions" that violate the Due Process Clause or the Privileges and Immunities Clause of the United States Constitution.

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[10] Plaintiffs have not cited any cases in which the delegation doctrine was applied to invalidate an interstate compact like MWAA, and seemingly rely on *Whitman*, despite the Supreme Court's determination in that case that Congress did not violate the delegation doctrine when it authorized EPA to promulgate standards under the Clean Air Act to protect the public health. *Id.* at 472.

2. Plaintiff's Claim to a Republican Form of Government (Count III)

Plaintiffs allege that because an unelected body, MWAA, imposes what they regard as a tax, they have been denied the constitutional guarantee of a republican form of government under Article IV, § 4.[11]

As Plaintiffs concede, "[i]n most of the cases in which the Court has been asked to apply the [Guarantee] Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *New York v. United States*, 505 U.S. 144, 184 (1992). In that connection, courts have predictably refused to grant relief under the Guarantee Clause under circumstances similar to that presented in this case.[12]

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[11] The Guarantee Clause, U.S. Const. art. IV, § 4, provides as follows: "The United States shall guarantee to every State in this Union a Republican Form of Government."

[12] *See*, *e.g.*, *Soling v. New York*, 804 F. Supp. 532 (S.D.N.Y. 1992), where the district court rejected a drivers challenge of an authority's power to set tolls. As in this case, the Plaintiffs in *Soling* claimed that the rate setting entities acted as independent governments that impose tolls which amount to taxes without consent of the governed, and that the tolls are used in ways not decided upon by elected representatives, contrary to the constitutional guarantee of a republican form of government. 804 F. Supp. at 533. Although the court dismissed on standing grounds, the court opined that "the use of corporate entities created by statutes passed by elected officials to fulfill governmental objectives ... has a long tradition and has never been held to violate any constitutional provision." *Id.* at 537. The court reasoned that "[e]ntities created by statute rather than by constitutional provision, at the federal as well as state or local

The protections afforded by the Guarantee Clause are addressed through the jurisprudence that has developed concerning the delegation of legislative authority. As discussed above, the delegation to MWAA was a lawful and constitutional exercise of authority by the Commonwealth of Virginia, acting pursuant to legislation passed by its elected legislature and signed by its elected governor, as well as the elected Congress of the United States and the elected President of the United States. MWAA's independence does not violate Plaintiffs' right to a republican form of government because its authority is circumscribed by legislation and can be modified or abolished altogether through the elected legislatures that created it.

Likewise, there is no merit to Plaintiffs' claim that MWAA's governance structure somehow interferes with the President's authority under Article II to ensure that the laws are faithfully executed or violates the Appointments Clause, Article II, § 2. As described above, MWAA is governed by a thirteen member Board of Directors, three of whom are appointed by the President; five members who are appointed by the Governor of Virginia, three members appointed by the Mayor of the District, and two members appointed by the Governor of Maryland. 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. *See Seattle Master Bldrs.*, 786 F.2d 1359, 1365 (holding that

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levels, can be modified or abolished by statute" leaving the republican form of government intact. *Id.*

Appointments Clause does not apply to state members of an interstate entity); *Columbia Gorge United-Protecting People & Prop. v. Yeutter,* 1990 WL 357613, at *12 (D. Or. May 23, 1990) (same), *aff'd*, 960 F.2d 110 (9th Cir. 1992).

Because MWAA has acted pursuant to a constitutional delegation of authority, the Court concludes that the Plaintiffs have not been denied the right to be governed by a republican form of government. For the same reasons, the Court rejects Plaintiffs' claim that its denial of a republican form of government constitutes a denial of due process.

3. Plaintiff's Claims Under the Virginia Constitution (Count III)

Finally, Plaintiffs challenge the constitutionality of the tolls based on limitations set forth in the Virginia Constitution and the continuing vitality of these constitutional limitations, applicable to MWAA, following Congress' consent to the Compact. Specifically, Plaintiffs' Complaint alleges that MWAA's conduct violates Article I, § 14 of the Virginia Constitution, which provides that "no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." Compl. ¶¶ 169-179. Plaintiffs' also allege a violation of Article IV, § 1 of the Constitution of Virginia, which vests the legislative power of the Commonwealth in the General Assembly. Compl. ¶¶ 172, 177. Plaintiffs contend, as they do under the federal Constitution, that MWAA is exercising the legislative power of taxation by setting tolls at levels that exceed the amount necessary to pay for operating

and maintenance expenses of the Toll Road. Compl. ¶ 177.

Before considering the merits of their constitutional claims under the Virginia Constitution, the Court must first consider whether under the Supremacy Clause of the federal Constitution, Congress's approval of the interstate compact creating MWAA, and the passage of related federal legislation, preempts any Virginia constitutional provisions that the Plaintiffs rely on. The Court concludes that it does.

The Compact Clause, Art. I, § 10, cl. 3, of the United States Constitution, provides that "[n]o State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State." It has long been settled that "once a compact between States has been approved, 'it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested.'" *New Jersey v. New York*, 523 U.S. 767, 810 (1998) (citing *Rhode Island v. Massachusetts*, 12 Pet. 657,727, 9 L. Ed. 1233 (1838)). *See also New Jersey*, 523 U.S. at 811 (citing *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)); ("[C]ongressional consent 'transforms an interstate compact within [the Compact] Clause into a law of the United States.) *Bush v. Muncy*, 659 F.2d 402 (4th Cir. 1981) (adoption transforms a compact into federal law at which time its interpretation and construction presented federal, not state questions); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33 (1951) (Reed, J., concurring) ("The interpretation of the meaning of the compact controls over a state's application of its own law through the Supremacy Clause and not some implied federal power to construe state law."). MWAA's

Compact is, therefore, the law of the United States, which under the Supremacy Clause preempts any Virginia constitutional provisions. Thus, MWAA's authority is to be determined under the Compact. As discussed above, federal legislation, which incorporated the legislative grants embodied in the state legislation creating MWAA, clearly authorized MWAA to set the challenged tolls. *See* 49 U.S.C. § 49106(b)(1)(E) (MWAA "shall be authorized ... to levy fees or other charges").

For these reasons, whatever may be the limitations placed on the Virginia General Assembly under the Virginia Constitution with respect to delegating decision making within Virginia to state agencies, any such limitations cannot undo the interstate Compact that was authorized by the General Assembly once there has been congressional consent and approval, as there was here. To the extent that the Virginia Constitution or a Virginia statute is inconsistent with the Compact, they are preempted by the Compact and related federal legislation under the Supremacy Clause. *See Sims*, 341 U.S. at 34 ("West Virginia adjudges her execution of the compact is invalid as a delegation of state power... Since the Constitution provided the compact for adjusting interstate relations, compacts may be enforced despite otherwise valid state restrictions on state action."); *Parkridge*, 2010 WL 1404421, at *6 (concluding that "MWAA is therefore authorized to levy tolls on the roadway, and any Virginia law or provision of the Virginia Constitution that conflicts with that authority is preempted under

the Supremacy Clause of the United States Constitution").[13]

Implicitly recognizing the constitutional roadblock to their position imposed by the Supremacy Clause, the Plaintiffs attempt an end-run by arguing that under the Tenth Amendment federal law may not, under the circumstances of this case, preempt the Virginia Constitution.[14] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." Plaintiffs argue that under the Tenth Amendment, Congress did not have the power through its exercise of authority under the Compact clause to "force" Virginia to pass legislation in violation of Virginia's constitutional proscription against taxation-without-representation. But certain powers have been delegated to the United States through the Compact Clause, and once a compact becomes federal law, as it did in this case with respect to MWAA, "it lay[s] beyond the judicial power of any party state to declare the Agreement not binding upon the state, even on state

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[13] Based on *Gray*, discussed above, and other Virginia cases, the Court would conclude, in any event, that there is no violation of Virginia's constitutional prohibition on taxation without representation. *See Sims*, 341 U.S. at 28 (concluding that federal courts have authority to review alleged state constitutional violations involving interstate compacts).

[14] The Complaint does not expressly allege a claim based on the Tenth Amendment. Nevertheless, the Plaintiffs raised this issue in their opposition to MWAA's Motion to Dismiss and the Court will address the merits of this claim in order to eliminate the need to consider a request to amend the Complaint.

constitutional grounds, and its provisions, interpreted as federal law, must prevail over any existing or subsequently created provisions of state law in direct conflict." *Bush v. Muncy*, 659 F.2d 402, 410 (4th Cir. 1981). The Tenth Amendment provides the Plaintiffs no basis for relief in this case.

IV. CONCLUSION

For the above reasons, the Court concludes that Plaintiffs do not have prudential standing to bring their claims, and in any event, their complaint fails to state a claim upon which relief can be granted. The Court will dismiss the Complaint with prejudice.

The Court will enter an appropriate Order.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
July 7, 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 1:11-cv-389 (AJT/TRJ)

[Filed July 7, 2011]

JOHN B. CORR, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,	)
	)
Defendant.	)

ORDER

Upon consideration of Defendant Metropolitan Washington Airports Authority's Motion to Dismiss for Failure to State a Claim (Doc. No. 6), the memoranda and exhibits in support thereof and in opposition thereto, and the argument of counsel at the hearing held on May 26, 2011, the Court finds for the reasons set forth in the accompanying Memorandum Opinion that the prudential standing doctrine warrants dismissal of the case, and alternatively, Plaintiffs fail to state a claim upon which relief can be granted. Accordingly, it is hereby:

ORDERED that Defendant Metropolitan Washington Airports Authority's Motion to Dismiss for Failure to State a Claim be, and the same hereby is, GRANTED, and it is further

ORDERED that Plaintiffs' Complaint (Doc. No. 1) be, and the same hereby is, DISMISSED with prejudice.

This Order is Final.

The Clerk is directed to forward copies of this order to all counsel of record.

/s/ Anthony J. Trenga
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
July 7, 2011

APPENDIX D

STATUTORY PROVISIONS INVOLVED

49 U.S.C. § 49101

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49101. Findings

Congress finds that--

(1) the 2 federally owned airports in the metropolitan area of the District of Columbia constitute an important and growing part of the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region;

(2) Baltimore/Washington International Airport, owned and operated by Maryland, is an air transportation facility that provides service to the greater Metropolitan Washington region together with the 2 federally owned airports, and timely Federal-aid grants to Baltimore/Washington International Airport will provide additional capacity to meet the growing air traffic needs and to compete with other airports on a fair basis;

(3) the United States Government has a continuing but limited interest in the operation of the 2 federally owned airports, which serve the travel and cargo needs of the entire Metropolitan Washington region as well as

the District of Columbia as the national seat of government;

(4) operation of the Metropolitan Washington Airports by an independent local authority will facilitate timely improvements at both airports to meet the growing demand of interstate air transportation occasioned by the Airline Deregulation Act of 1978 (Public Law 95-504; 92 Stat. 1705);

(5) all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level;

(6) any change in status of the 2 airports must take into account the interest of nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups, as well as the interests of the United States Government and State governments involved;

(7) in 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 has 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;

(8) an operating authority with representation from local jurisdictions, similar to authorities at all major airports in the United States, will improve communications with local officials and concerned residents regarding noise at the Metropolitan Washington Airports;

(9) a commission of congressional, State, and local officials and aviation representatives has recommended 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; and

(10) the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation.

49 U.S.C. § 49102

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49102. Purpose

(a) General.--The purpose of this chapter is to authorize the transfer of operating responsibility under long-term lease of the 2 Metropolitan Washington Airport properties as a unit, including access highways and other related facilities, to a properly constituted independent airport authority created by Virginia and the District of Columbia, in order to achieve local control, management, operation, and development of these important transportation assets.

(b) Inclusion of Baltimore/Washington International Airport not precluded.--This chapter does not prohibit the Airports Authority and Maryland from making an agreement to make Baltimore/Washington International Airport part of a regional airports authority, subject to terms agreed to by the Airports Authority, the Secretary of Transportation, Virginia, the District of Columbia, and Maryland.

49 U.S.C. § 49103

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49103. Definitions

In this chapter--

(1) "Airports Authority" means the Metropolitan Washington Airports Authority, a public authority created by Virginia and the District of Columbia consistent with the requirements of section 49106 of this title.

(2) "employee" means any permanent Federal Aviation Administration personnel employed by the Metropolitan Washington Airports on June 7, 1987.

(3) "Metropolitan Washington Airports" means Ronald Reagan Washington National Airport and Washington Dulles International Airport.

(4) "Washington Dulles International Airport" means the airport constructed under the Act of September 7, 1950 (ch. 905, 64 Stat. 770), and includes the Dulles Airport Access Highway and Right-of-way, including the extension between Interstate Routes I-495 and I-66.

(5) "Ronald Reagan Washington National Airport" means the airport described in the Act of June 29, 1940 (ch. 444, 54 Stat. 686).

49 U.S.C. § 49104

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49104. Lease of Metropolitan Washington Airports

(a) General.--The lease between the Secretary of Transportation and the Metropolitan Washington Airports Authority under section 6005(a) of the Metropolitan Washington Airports Act of 1986 (Public Law 99-500; 100 Stat. 1783-375; Public Law 99-591; 100 Stat. 3341-378), for the Metropolitan Washington Airports must provide during its 50-year term at least the following:

(1) The Airports Authority shall operate, maintain, protect, promote, and develop the Metropolitan Washington Airports as a unit and as primary airports serving the Metropolitan Washington area.

(2)(A) In this paragraph, "airport purposes" means a use of property interests (except a sale) for--

(i) aviation business or activities;

(ii) activities necessary or appropriate to serve passengers or cargo in air commerce;

(iii) nonprofit, public use facilities that are not inconsistent with the needs of aviation; or

(iv) a business or activity not inconsistent with the needs of aviation that has been approved by the Secretary.

(B) During the period of the lease, the real property constituting the Metropolitan Washington Airports shall be used only for airport purposes.

(C) If the Secretary decides that any part of the real property leased to the Airports Authority under this chapter is used for other than airport purposes, the Secretary shall--

(i) direct that the Airports Authority take appropriate measures to have that part of the property be used for airport purposes; and

(ii) retake possession of the property if the Airports Authority fails to have that part of the property be used for airport purposes within a reasonable period of time, as the Secretary decides.

(3) The Airports Authority is subject to section 47107(a)-(c) and (e) of this title and to the assurances and conditions required of grant recipients under the Airport and Airway Improvement Act of 1982 (Public Law 97-248; 96 Stat. 671) as in effect on June 7, 1987. Notwithstanding section 47107(b) of this title, all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of the Metropolitan Washington Airports.

(4) In acquiring by contract supplies or services for an amount estimated to be more than $200,000, or awarding concession contracts, the Airports Authority to the maximum extent practicable shall

obtain complete and open competition through the use of published competitive procedures. By a vote of 7 members, the Airports Authority may grant exceptions to the requirements of this paragraph.

(5)(A) Except as provided in subparagraph (B) of this paragraph, all regulations of the Metropolitan Washington Airports (14 CFR part 159) become regulations of the Airports Authority as of June 7, 1987, and remain in effect until modified or revoked by the Airports Authority under procedures of the Airports Authority.

(B) Sections 159.59(a) and 159.191 of title 14, Code of Federal Regulations, do not become regulations of the Airports Authority.

(C) The Airports Authority may not increase or decrease the number of instrument flight rule takeoffs and landings authorized by the High Density Rule (14 CFR 93.121 et seq.) at Ronald Reagan Washington National Airport on October 18, 1986, and may not impose a limitation on the number of passengers taking off or landing at Ronald Reagan Washington National Airport.

(D) Subparagraph (C) does not apply to any increase in the number of instrument flight rule takeoffs and landings necessary to implement exemptions granted by the Secretary under section 41718.

(6)(A) Except as specified in subparagraph (B) of this paragraph, the Airports Authority shall assume all rights, liabilities, and obligations of the Metropolitan Washington Airports on June 7, 1987, including leases, permits, licenses, contracts,

agreements, claims, tariffs, accounts receivable, accounts payable, and litigation related to those rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. The Airports Authority must cooperate in allowing representatives of the Attorney General and the Secretary adequate access to employees and records when needed for the performance of duties and powers related to the period before June 7, 1987. The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports.

(B) The procedure for disputes resolution contained in any contract entered into on behalf of the United States Government before June 7, 1987, continues to govern the performance of the contract unless otherwise agreed to by the parties to the contract. Claims for monetary damages founded in tort, by or against the Government as the owner and operator of the Metropolitan Washington Airports, arising before June 7, 1987, shall be adjudicated as if the lease had not been entered into.

(C) The Administration is responsible for reimbursing the Employees' Compensation Fund, as provided in section 8147 of title 5, for compensation paid or payable after June 7, 1987, in accordance with chapter 81 of title 5 for any injury, disability, or death due to events arising before June 7, 1987, whether or not a claim was filed or was final on that date.

(D) The Airports Authority shall continue all collective bargaining rights enjoyed by employees of the Metropolitan Washington Airports before June 7, 1987.

(7) The Comptroller General may conduct periodic audits of the activities and transactions of the Airports Authority in accordance with generally accepted management principles, and under regulations the Comptroller General may prescribe. An audit shall be conducted where the Comptroller General considers it appropriate. All records and property of the Airports Authority shall remain in possession and custody of the Airports Authority.

(8) The Airports Authority shall develop a code of ethics and financial disclosure to ensure the integrity of all decisions made by its board of directors and employees. The code shall include standards by which members of the board will decide, for purposes of section 49106(d) of this title, what constitutes a substantial financial interest and the circumstances under which an exception to the conflict of interest prohibition may be granted.

(9) A landing fee imposed for operating an aircraft or revenues derived from parking automobiles--

(A) at Washington Dulles International Airport may not be used for maintenance or operating expenses (excluding debt service, depreciation, and amortization) at Ronald Reagan Washington National Airport; and

(B) at Ronald Reagan Washington National Airport may not be used for maintenance or operating expenses (excluding debt service,

depreciation, and amortization) at Washington Dulles International Airport.

(10) The Airports Authority shall compute the fees and charges for landing general aviation aircraft at the Metropolitan Washington Airports on the same basis as the landing fees for air carrier aircraft, except that the Airports Authority may require a minimum landing fee that is not more than the landing fee for aircraft weighing 12,500 pounds.

(11) The Secretary shall include other terms applicable to the parties to the lease that are consistent with, and carry out, this chapter.

(b) Payments.--Under the lease, the Airports Authority must pay to the general fund of the Treasury annually an amount, computed using the GNP Price Deflator, equal to $3,000,000 in 1987 dollars. The Secretary and the Airports Authority may renegotiate the level of lease payments attributable to inflation costs every 10 years.

(c) Enforcement of lease provisions.--The district courts of the United States have jurisdiction to compel the Airports Authority and its officers and employees to comply with the terms of the lease. The Attorney General or an aggrieved party may bring an action on behalf of the Government.

(d) Extension of lease.--The Secretary and the Airports Authority may at any time negotiate an extension of the lease.

49 U.S.C. § 49105

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49105. Capital improvements, construction, and rehabilitation

(a) Sense of Congress.--It is the sense of Congress that the Metropolitan Washington Airports Authority--

(1) should pursue the improvement, construction, and rehabilitation of the facilities at Washington Dulles International Airport and Ronald Reagan Washington National Airport simultaneously; and

(2) to the extent practicable, should cause the improvement, construction, and rehabilitation proposed by the Secretary of Transportation to be completed at Washington Dulles International Airport and Ronald Reagan Washington National Airport within 5 years after March 30, 1988.

(b) Secretary's assistance.--The Secretary shall assist the 3 airports serving the District of Columbia metropolitan area in planning for operational and capital improvements at those airports and shall accelerate consideration of applications for United States Government financial assistance by whichever of the 3 airports is most in need of increasing airside capacity.

49 U.S.C. § 49106

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49106. Metropolitan Washington Airports Authority

(a) Status.--The Metropolitan Washington Airports Authority shall be--

(1) a public body corporate and politic with the powers and jurisdiction--

(A) conferred upon it jointly by the legislative authority of Virginia and the District of Columbia or by either of them and concurred in by the legislative authority of the other jurisdiction; and

(B) that at least meet the specifications of this section and section 49108 of this title;

(2) independent of Virginia and its local governments, the District of Columbia, and the United States Government; and

(3) a political subdivision constituted only to operate and improve the Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area.

(b) General authority.--(1) The Airports Authority shall be authorized--

(A) to acquire, maintain, improve, operate, protect, and promote the Metropolitan

Washington Airports for public purposes;

(B) to issue bonds from time to time in its discretion for public purposes, including paying any part of the cost of airport improvements, construction, and rehabilitation and the acquisition of real and personal property, including operating equipment for the airports;

(C) to acquire real and personal property by purchase, lease, transfer, or exchange;

(D) to exercise the powers of eminent domain in Virginia that are conferred on it by Virginia;

(E) to levy fees or other charges; and

(F) to make and maintain agreements with employee organizations to the extent that the Federal Aviation Administration was authorized to do so on October 18, 1986.

(2) Bonds issued under paragraph (1)(B) of this subsection--

(A) are not a debt of Virginia, the District of Columbia, or a political subdivision of Virginia or the District of Columbia; and

(B) may be secured by the Airports Authority's revenues generally, or exclusively from the income and revenues of certain designated projects whether or not any part of the projects are financed from the proceeds of the bonds.

(c) Board of Directors.--(1) The Airports Authority shall be governed by a board of directors composed of the following 17 members:

(A) 7 members appointed by the Governor of Virginia;

(B) 4 members appointed by the Mayor of the District of Columbia;

(C) 3 members appointed by the Governor of Maryland; and

(D) 3 members appointed by the President with the advice and consent of the Senate.

(2) The chairman of the board shall be appointed from among the members by majority vote of the members and shall serve until replaced by majority vote of the members.

(3) Members of the board shall be appointed to the board for 6 years, except that of the members first appointed by the President after October 9, 1996, one shall be appointed for 4 years. Any member of the board shall be eligible for reappointment for 1 additional term. A member shall not serve after the expiration of the member's term(s).

(4) A member of the board--

(A) may not hold elective or appointive political office;

(B) serves without compensation except for reasonable expenses incident to board functions; and

(C) must reside within the Washington Standard Metropolitan Statistical Area, except that a member of the board appointed by the President

must be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.

(5) A vacancy in the board shall be filled in the manner in which the original appointment was made. A member appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of that term.

(6)(A) Not more than 2 of the members of the board appointed by the President may be of the same political party.

(B) In carrying out their duties on the board, members appointed by the President shall ensure that adequate consideration is given to the national interest.

(C) A member appointed by the President may be removed by the President for cause. A member appointed by the Mayor of the District of Columbia, the Governor of Maryland or the Governor of Virginia may be removed or suspended from office only for cause and in accordance with the laws of jurisdiction from which the member is appointed.

(7) Ten votes are required to approve bond issues and the annual budget.

(d) Conflicts of interest.--Members of the board and their immediate families may not be employed by or otherwise hold a substantial financial interest in any enterprise that has or is seeking a contract or agreement with the Airports Authority or is an

aeronautical, aviation services, or airport services enterprise that otherwise has interests that can be directly affected by the Airports Authority. The official appointing a member may make an exception if the financial interest is completely disclosed when the member is appointed and the member does not participate in board decisions that directly affect the interest.

(e) Certain actions to be taken by regulation.--An action of the Airports Authority changing, or having the effect of changing, the hours of operation of, or the type of aircraft serving, either of the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority.

(f) Administrative.--To assist the Secretary in carrying out this chapter, the Secretary may hire 2 staff individuals to be paid by the Airports Authority. The Airports Authority shall provide clerical and support staff that the Secretary may require.

(g) Review of contracting procedures.--The Comptroller General shall review contracts of the Airports Authority to decide whether the contracts were awarded by procedures that follow sound Government contracting principles and comply with section 49104(a)(4) of this title. The Comptroller General shall submit periodic reports of the conclusions reached as a result of the review to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

49 U.S.C. § 49107

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49107. Federal employees at Metropolitan Washington Airports

(a) Labor agreements.--(1) The Metropolitan Washington Airports Authority shall adopt all labor agreements that were in effect on June 7, 1987. Unless the parties otherwise agree, the agreements must be renegotiated before June 7, 1992.

(2) Employee protection arrangements made under this section shall ensure, during the 50-year lease term, the continuation of all collective bargaining rights enjoyed by transferred employees retained by the Airports Authority.

(b) Civil service retirement.--Any Federal employee who transferred to the Airports Authority and who on June 6, 1987, was subject to subchapter III of chapter 83 or chapter 84 of title 5, is subject to subchapter III of chapter 83 or chapter 84 for so long as continually employed by the Airports Authority without a break in service. For purposes of subchapter III of chapter 83 and chapter 84, employment by the Airports Authority without a break in continuity of service is deemed to be employment by the United States Government. The Airports Authority is the employing agency for purposes of subchapter III of chapter 83 and chapter 84 and shall contribute to the Civil Service Retirement and Disability Fund amounts required by subchapter III of chapter 83 and chapter 84.

(c) Access to records.--The Airports Authority shall allow representatives of the Secretary of Transportation adequate access to employees and employee records of the Airports Authority when needed to carry out a duty or power related to the period before June 7, 1987. The Secretary shall provide the Airports Authority access to employee records of transferring employees for appropriate purposes.

49 U.S.C. § 49110

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49110. Use of Dulles Airport Access Highway

The Metropolitan Washington Airports Authority shall continue in effect and enforce section 4.2(1) and (2) of the Metropolitan Washington Airports Regulations, as in effect on February 1, 1995. The district courts of the United States have jurisdiction to compel the Airports Authority and its officers and employees to comply with this section. The Attorney General or an aggrieved party may bring an action on behalf of the United States Government.

49 U.S.C. § 49111

Title 49. Transportation
Subtitle VII. Aviation Programs
Part D. Public Airports
Chapter 491. Metropolitan Washington Airports
§ 49111. Relationship to and effect of other laws

(a) Same powers and restrictions under other laws.--To ensure that the Metropolitan Washington Airports Authority has the same proprietary powers and is subject to the same restrictions under United States law as any other airport except as otherwise provided in this chapter, during the period that the lease authorized by section 6005 of the Metropolitan Washington Airports Act of 1986 (Public Law 99-500; 100 Stat. 1783-375; Public Law 99-591; 100 Stat. 3341-378) is in effect--

(1) the Metropolitan Washington Airports are deemed to be public airports for purposes of chapter 471 of this title; and

(2) the Act of June 29, 1940 (ch. 444, 54 Stat. 686), the First Supplemental Civil Functions Appropriations Act, 1941 (ch. 780, 54 Stat. 1030), and the Act of September 7, 1950 (ch. 905, 64 Stat. 770), do not apply to the operation of the Metropolitan Washington Airports, and the Secretary of Transportation is relieved of all responsibility under those Acts.

(b) Inapplicability of certain laws.--The Metropolitan Washington Airports and the Airports Authority are not subject to the requirements of any law solely by reason of the retention by the United States Government of the fee simple title to those airports.

(c) Police power.--Virginia shall have concurrent police power authority over the Metropolitan Washington Airports, and the courts of Virginia may exercise jurisdiction over Ronald Reagan Washington National Airport.

(d) Planning.--(1) The authority of the National Capital Planning Commission under section 8722 of title 40 does not apply to the Airports Authority.

(2) The Airports Authority shall consult with--

(A) the Commission and the Advisory Council on Historic Preservation before undertaking any major alterations to the exterior of the main terminal at Washington Dulles International Airport; and

(B) the Commission before undertaking development that would alter the skyline of Ronald Reagan Washington National Airport when viewed from the opposing shoreline of the Potomac River or from the George Washington Parkway.

APPENDIX E

Partial Transcript of Oral Argument before the United States Court of Appeals for the Fourth Circuit in *Corr v. Washington Metropolitan Airport Authority*, No. 13-1076, December 11, 2013, available at http://coop.ca4.uscourts.gov/OAarchive/mp3/13-1076-20131211.mp3

Mr. Clair (counsel for the United States as amicus curiae)	If I could have one moment to address the merits, Your Honor.
The Court	30 seconds.
Mr. Clair	Okay, Your Honor. If the court thinks that the issue is properly before it, we note that the federal government retains important controls over the Airport Authority. Airport property is leased to the Authority, it must be used for airport purposes. If the Secretary of Transportation concludes that airport purposes are not being furthered, it has the authority to demand compliance and the final analysis to terminate the lease, to bring actions to enforce compliance to the lease. All those things that are in the statute, as well as the

	lease provisions at page 321 of the Appendix. All those things combined give the federal government ample control, ultimate control for purposes of the Article II argument.
The Court	Thank you Mr. Clair.
Mr. Clair	Thank you.