No. 13-1559

IN THE

Supreme Court of the United States

JOHN B. CORR, *et al*.,
Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the governing bodies of interstate compact entities like the Metropolitan Washington Airports Authority (MWAA), created by states under the Compact Clause, are required to be appointed and controlled by the President under Article II of the Constitution.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, MWAA, an interstate compact entity formed by reciprocal legislation of the Commonwealth of Virginia and the District of Columbia, and approved by Congress, does not have a parent corporation, it has issued no stock, and, therefore, it has no stock held by any publicly held company.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

I. INTRODUCTION

As the district court explained: "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 the members of an interstate compact commission in order to satisfy the Appointments Clause." Pet. App. 55. Nevertheless, Petitioners ask this Court to declare MWAA—and by extension numerous other interstate compact entities created by states under the Compact Clause[1]—unconstitutional because the President does not control the membership of its Board of Directors. This Court should refuse Petitioners' extraordinary request.

Petitioners concede that there is no split of authority Pet. 26. Indeed, no court has *ever* held that an interstate compact entity like MWAA violates the Appointments Clause[2] because all or a majority of its governing body is not appointed or otherwise controlled by the President. Not surprisingly, Petitioners fail to acknowledge, let alone distinguish, the well-reasoned cases cited by the district court rejecting such challenges. As the Ninth Circuit explained, the argument Petitioners advance here "would outlaw virtually all compacts. . . ." *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power &*

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[1] U.S. Const. art. I, § 10, cl. 3. Petitioners acknowledge that MWAA was "established by the Commonwealth of Virginia and the District of Columbia in an interstate compact, to which the United States Congress gave its consent in 1986." Br. Opp. App. 7a, ¶ 15.

[2] U.S. Const. art. II, § 2, cl. 2.

Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

Petitioners' reliance on *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (*CAAN*), 501 U.S. 252 (1991), is misplaced. In *CAAN*, this Court expressed no concern over the composition of MWAA's Board of Directors. Rather, it held only that a separate and novel "Board of Review," comprised of members of Congress, with the power to veto decisions of MWAA's Board of Directors, ran afoul of the separation of powers doctrine. The separation of powers problem arose from the *Board of Review's* exercise of powers *on behalf of Congress*, acting as its agent. *Id*. at 276-77.

The Board of Review's abolition in 1997 eliminated the unconstitutional means by which Congress had tried to control MWAA's Board of Directors. The Board of Review's power could not, and did not, "devolve" onto MWAA's Board of Directors, as Petitioners assert. Pet. 7. The Board of Review's elimination removed Congress' unconstitutional oversight of MWAA, allowing its Board of Directors to function like the governing bodies of virtually all interstate compact entities. Until the present litigation, no one had ever asserted that Article II of the Constitution, or the separation of powers doctrine, requires the President to have the power to appoint and remove all or a majority of MWAA's Board of Directors.

Even if the Court were inclined to consider breaking new constitutional ground at the intersection of Compact Clause and Article II jurisprudence, this case would be a poor vehicle to do it. Petitioners failed to preserve their Article II-based arguments in the Fourth Circuit by belatedly asserting them for the first

time in a "supplemental reply brief," after omitting them from their opening brief. Additionally, because of Petitioners' erratic presentation of their Article II challenge, it received no substantive analysis in the Federal Circuit or the Fourth Circuit. This is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Practical considerations further warrant denial of the petition. The nearly $6 billion Metrorail to Dulles Airport project is over halfway complete, and rail service on the first 11.6 miles of the new "Silver Line" has been in operation since July 2014. When Petitioners filed suit in April 2011, the project had already been under construction for two years, and MWAA had issued over $1.3 billion in bonds backed by revenues from the tolls that Petitioners assail. Today, over $1.9 billion in bonds have been issued. Petitioners' action was the third unsuccessful legal challenge to MWAA's tolls since 2007. Three failed lawsuits and nearly eight years of litigation is enough.

II. STATEMENT OF THE CASE

A. Historical background

In 1987, National (now Reagan National) and Dulles International airports were the "only two major commercial airports owned by the Federal Government." *CAAN*, 501 U.S. at 256. At the time, necessary capital improvements were out of reach "unless control of the airports was transferred to a regional authority with power to raise money by selling tax-exempt bonds." *Id*. at 257. This was not solely a federal problem, but also a local one, as the airports were, and still are, an "an important and growing part of the commerce, transportation, and economic patterns of Virginia, the District of

Columbia, and the surrounding region." 49 U.S.C. § 49101(1) (2012).

To solve this problem, Virginia and the District of Columbia adopted legislation in 1985 to form MWAA as the contemplated regional authority, using the Compact Clause. Pet. App. 4, 31-32. The Compact Clause serves to address "interests that 'may be badly served or not served at all by the ordinary channels of National or State political action.'" *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (citation omitted).

Congress approved MWAA's compact in the Metropolitan Washington Airports Act of 1986[3] (the Transfer Act). Pet. App. 4. In the Transfer Act, Congress acknowledged the "growing local interest" in the airports, the federal government's "continuing but limited interest in the operation" of them, and "a perceived limited need for a Federal Role" in their management. *Id.* § 6002(7) (now 49 U.S.C. § 49101(7) (2012)). Congress also found that the limited federal interest could be satisfied "through a lease mechanism which provides for local control and operation." *Id.* § 6002(10) (now 49 U.S.C. § 49101(10) (2012)).

In March of 1987, the U.S. Secretary of Transportation, authorized by the Transfer Act, leased the two airports to MWAA. Pet App. 4; *CAAN*, 501 U.S. at 261. This put them under "local control, management, operation, and development," like all other major air carrier airports. 49 U.S.C. §§ 49101(5), 49102(a) (2012).

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[3] Pub. L. No. 99-591, Title VI, 100 Stat. 3341-376 (1986) (codified as amended at 49 U.S.C. §§ 49101-49112 (2012)).

MWAA's interstate compact reflects the local nature of its operations and authority. Among other things: MWAA's rules and regulations are enforceable under Virginia law in the Virginia courts;[4] MWAA possesses Virginia's power of eminent domain;[5] and the courts of Virginia have original jurisdiction in actions brought by or against MWAA.[6] Indeed, the compact expressly provides that MWAA shall be "*independent of . . . the federal government*."[7]

Under its initial compact, MWAA was governed by an 11-member Board of Directors, with five members appointed by the Governor of Virginia, three by the Mayor of the District of Columbia, two by the Governor of Maryland, and one by the President with the advice and consent of the Senate. *CAAN*, 501 U.S. at 257. In the original Transfer Act, however, Congress sought to retain control over MWAA through a novel "'Board of Review' composed of nine Members of Congress and vested with veto power over decisions made by MWAA's Board of Directors." *Id*. at 255.

B. The *CAAN* litigation and elimination of the Congressional Board of Review

In 1988, a citizens group and two individuals who resided under National Airport's flight path filed a lawsuit seeking a "declaration that the Board of

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[4] Va. Code Ann. § 5.1-157(F), (H) (2010 Repl. Vol.); D.C. Code § 9-906(f), (h) (2013 Repl. Vol.).

[5] Va. Code Ann. § 5.1-160(C) (2010 Repl. Vol.); D.C. Code § 9-909(c) (2013 Repl. Vol.).

[6] Va. Code Ann. § 5.1-173(A) (2010 Repl. Vol.); D.C. Code § 9-922(a) (2013 Repl. Vol.).

[7] Va. Code Ann. § 5.1-156(B) (2010 Repl. Vol.); D.C. Code § 9-905(b) (2013 Repl. Vol.) (emphasis added); *see also* 49 U.S.C. § 49106(a)(2) (2012).

Review's power to veto actions of MWAA's Board of Directors is unconstitutional." *Id*. at 262. After the district court dismissed the action on summary judgment, the D.C. Circuit reversed. *Citizens for the Abatement of Airport Noise, Inc. v. Metro. Wash. Airports Auth*., 917 F.2d 48, 57 (D.C. Cir. 1990). The court struck down the Board of Review on separation of powers grounds, holding that it served as an agent of Congress and exercised executive powers on Congress' behalf that the Constitution did not grant to the legislative branch. *Id*. at 57-58.

In *CAAN*, this Court agreed that the Board of Review was subject to separation of powers scrutiny because it was an "agent of Congress" that "exercises sufficient federal power" on its behalf. 501 U.S. at 269. Thus, it was the *Board of Review*'s status and actions *as Congress' agent* that triggered separation of powers scrutiny. Indeed, this Court found it "[m]ost significant" that "*membership on the Board of Review is limited to federal officials, specifically members of congressional committees charged with authority over air transportation*." *Id*. at 266-67 (emphasis added).

The Court invalidated the Board of Review because it exercised powers, as Congress' agent, that were beyond the constitutional prerogative of the legislative branch. *Id*. at 276-77. If the Board of Review's power was deemed "executive, the Constitution does not permit an agent of Congress to exercise it." *Id*. at 276. If its power was "legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." *Id*.

By striking down the Board of Review, this Court eliminated the unconstitutional means by which

Congress had exercised control over MWAA. This allowed MWAA's Board of Directors to function without Congressional control. The Court, however, expressed no constitutional concern over the Board of Directors or its actions, though it recognized that the Board had only one presidential appointee. *Id*. at 268.

After *CAAN*, Congress tried to preserve the Board of Review in a modified form. *See Hechinger v. Metro. Wash. Airports Auth*., 36 F.3d 97 (D.C. Cir. 1994). But the district court and the D.C. Circuit found that the modified Board of Review suffered from the same infirmities as its predecessor. *Id*. at 100, 105. It remained dominated by Congress, and continued to be "a congressional agent . . . that . . . exercises power in violation of the doctrine of the separation of powers." *Id*. at 105.

Despite invalidating the modified Board of Review, the D.C. Circuit again expressed no constitutional qualms over the composition or independent actions of MWAA's Board of Directors. To the contrary, the court objected to Congress' use of the Board of Review to "interfere impermissibly with the [MWAA Board of] Directors' performance of their independent responsibilities." *Id*. at 104. This Court declined certiorari. 513 U.S. 1126 (1995).

In 1996, Congress called upon Virginia and the District to abolish the Board of Review. *See* Pub. L. No. 104-264, §§ 903, 904, 110 Stat. 3213, 3275-76 (1996). Virginia and the District did so the following year. 1997 Va. Acts ch. 661; 1997 D.C. Law 12-8. After subsequent amendments to MWAA's compact, its Board of Directors now consists of 17 members: seven appointed by the Governor of Virginia, four by the Mayor of the District of Columbia, and three each by

the Governor of Maryland and the President, with each non-federal member removable for cause under the laws of the jurisdiction from which he or she was appointed. Va. Code Ann. §§ 5.1-155(A), (E) (2010 Repl. Vol. & 2014 Supp.); D.C. Code §§ 9-904(a),(e) (2013 Repl. Vol. & 2014 Supp.); 49 U.S.C. §§ 49106(c)(1), (6)(C) (2012).

C. MWAA's Metrorail to Dulles Airport project

Beginning in 2006, consistent with Dulles Airport's original master plan and MWAA's interstate compact, MWAA entered into a series of agreements with Virginia to facilitate the construction of Metrorail to Dulles Airport. Pet. App. 6. The agreements authorized MWAA to construct the Metrorail project and operate the Dulles Toll Road (DTR) that Virginia had built and operated within the right-of-way of the Dulles Airport access highway. *Id*. The agreements allowed MWAA to set the DTR tolls and required that all revenue be used exclusively for the Metrorail project, the DTR, or other transportation improvements within the Dulles Corridor area. *Id*.

For nearly eight years, these agreements and the DTR tolls have "been subject to repeated legal challenges," all unsuccessful. *Id*. Petitioners' lawsuit, filed in April 2011, was the third such challenge. *Id*. at 7. By then, construction on the initial phase of the 23-mile Metrorail project had been underway for two years,[8] and MWAA had issued more than $1.3 billion in bonds backed by DTR toll revenue to finance the first phase of the project. Br. Opp. App. 12a, ¶¶ 115-16; JA at 256, 349, 351, *Corr v. MWAA*, No. 13-1076 (4th Cir. Feb. 27 2013) (ECF No. 22). The project's

[8] *See* Joint Appendix (JA) at 349, *Corr v. MWAA*, No. 13-1076 (4th Cir. Feb. 27, 2013) (ECF No. 22).

second phase is also financed in substantial part through revenue bonds backed by DTR revenue. Br. Opp. App. 13a-14a, ¶¶ 118, 120, 123. Additionally, roughly half of the nearly $6 billion total project cost is being furnished by grants from local, state and federal government sources. *See* Dulles Corridor Metrorail Project, *Frequently Asked Questions*, *available at* http://www.dullesmetro.com/info/faqs.cfm.html#3 (last visited Nov. 17, 2014).

MWAA completed the first phase of the project in July 2014, and service on the new Silver Line to and from five new stations has been available since then.[9]

D. The proceedings below

Petitioners filed their Complaint on April 14, 2011. Though they now ask this Court to declare that MWAA's governance structure violates Article II of the Constitution, the Complaint did not request that relief. Br. Opp. App. 27a. And neither of Petitioners' two federal constitutional causes of action were framed as alleged violations of Article II or the separation of powers doctrine. *Id*. at 17a-19a, ¶¶ 135-40; 24a-27a, ¶¶ 169-79.

Petitioners first raised their Article II challenge in opposition to MWAA's motion to dismiss in the district court. *See* Pls.' Br. in Opp. to Def.'s Mot. to Dismiss at 19-21, No. 1:11-cv-389, *Corr v. MWAA* (E.D. Va. May 16, 2011) (ECF No. 17). Though not raised in the Complaint, the district court addressed the Article II

[9] *See* Metro News Release, *Metro launches Silver Line, largest expansion of region's rail system in more than two decades*, available at http://www.wmata.com/about_metro/news/PressReleaseDetail.cfm?ReleaseID=5749 (last visited Nov. 17, 2014).

attack anyway and found it infirm as a matter of law. Pet. App. 55. As the court explained, "[i]t 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." *Id*. (citing *Seattle Master Builders Ass'n*, 786 F.2d at 1365; *Columbia Gorge United Protecting People & Property v. Yeutter*, CV No. 88-1319-PA, 1990 WL 357613, at *12 (D. Or. May 23, 1990), *aff'd*, 960 F.2d 110 (9th Cir. 1992), *cert. denied*, 506 U.S. 863 (1992)).[10]

Instead of appealing to the Fourth Circuit,[11] where there was "no dispute" that appellate jurisdiction existed, Petitioners turned to the Federal Circuit (Pet. App. 25), asserting that it had jurisdiction "based on their Little Tucker Act claims." *Id*. at 22. The Little Tucker Act authorizes jurisdiction in the district courts and the Court of Claims over certain claims "against the United States, not exceeding $10,000 in amount." 28 U.S.C. § 1346(a)(2) (2012). The Federal Circuit had jurisdiction to hear Petitioners' appeal only if the district court's jurisdiction was based, in whole or in part, on the Little Tucker Act. 28 U.S.C. § 1295(a)(2) (2012).

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[10] The district court also held that none of Petitioners' various other federal and state constitutional theories stated a valid claim, and dismissed the Complaint with prejudice. Pet. App. 48-62.

[11] Less than four months earlier, the Fourth Circuit had affirmed the dismissal of the second lawsuit challenging the DTR tolls. *See Parkridge 6, LLC v. United States Dept. of Transp.*, 420 F. App'x 265, 268 (4th Cir. 2011).

MWAA argued that the Federal Circuit lacked jurisdiction under the Little Tucker Act on multiple grounds. Br. of Appellee, *Corr v. MWAA*, No. 2011-1501, 2012 WL 1713010, at *1, 12-29 (Fed. Cir. Apr. 23, 2012). In a published decision, the Federal Circuit agreed that it lacked jurisdiction, but relied on only one of the grounds MWAA had argued—that MWAA is not a federal instrumentality for the purposes of Little Tucker Act jurisdiction. Pet. App. 25. Lacking appellate jurisdiction, the Federal Circuit transferred Petitioners' appeal to the Fourth Circuit. *Id*.

In the Fourth Circuit, Petitioners elected not to raise any Article II-based challenge in their opening brief. Pet. 12. Indeed, replying to MWAA's response to their Docketing Statement, Petitioners stated that "[w]e do not contend that MWAA is constitutionally invalid." Appellants' Reply to Appellee's Resp. to Docketing Statement, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794579, at *2 (4th Cir. Jan. 28, 2013). This failure to assert such a challenge led Virginia's Attorney General to decline to intervene on behalf of the Commonwealth. *See* Notice of the Commonwealth of Virginia, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794580, at *1-2 (4th Cir. Mar. 25, 2013).

Several months later, however, Petitioners reversed course, filing a "Supplemental Reply Brief" attacking MWAA's constitutionality on the very same Article II theory that they previously stated they were not advancing. Pet. 13-14. MWAA objected to this belated constitutional attack on multiple grounds, including the well-settled rule that an appellant's failure to raise an argument in its opening brief "'triggers abandonment of that claim on appeal.'" Appellee's Objection to Supp. Reply Br. of Appellants, *Corr v. MWAA*, No. 13-1076,

2013 WL 9794583, at *1-2 (4th Cir. Aug. 5, 2013) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 241 n.6 (4th Cir. 1999)). MWAA also objected on the ground that Petitioners' earlier conduct had caused Virginia's Attorney General not to intervene and defend against the constitutional attack. *Id*. at *3.[12]

The Fourth Circuit construed MWAA's objection as a motion to strike Petitioners' new arguments and deferred consideration of it "pending review of the appeal on the merits." Order, *Corr v. MWAA*, No. 13-1076, 2013 WL 9794581 (4th Cir. Aug. 8, 2013). The Fourth Circuit's published decision on the merits affirmed the district court's dismissal of the Complaint in its entirety, but did not explicitly address MWAA's motion to strike or Petitioners' Article II challenge. Pet. App. 15-16.

III. REASONS FOR DENYING THE PETITION

There is no circuit split on the constitutional question presented. Rather, it has long been settled that Article II of the Constitution does not require the governing body of an interstate compact entity to be controlled by the President. Additionally, Petitioners abandoned their Article II challenge in the Fourth Circuit. That, along with other procedural irregularities and no appellate examination of the constitutional question presented, make this case a poor vehicle to resolve that question.

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[12] MWAA also noted that Petitioners' opening brief had asserted that the "Federal Circuit's ruling is the 'law of the case'," another reason why Petitioners' belated constitutional attack was improper. 2013 WL 9794583, at *1, 3.

A. MWAA, as an interstate compact entity, is not required to have its Board of Directors controlled by the President

The district court correctly rejected Petitioners' argument that, under Article II, the President must have the power to appoint and remove all or a majority of MWWA's Board of Directors. Pet. App. 55-56. The court based that ruling on well-reasoned authority recognizing that interstate compact entities—which routinely address state *and* federal interests—are not forbidden by Article II from having a membership that reflects their hybrid state/federal constitutional status under the Compact Clause. Petitioners have not cited, much less distinguished, these authorities.

In the first case, *Seattle Master Builders (SMB)*, the Ninth Circuit rejected an argument similar to Petitioners' here that an interstate compact entity (the Pacific Northwest Electric Power and Conservation Planning Council) "violates the appointments clause . . . because [it] exercises significant authority over the federal government but has not been appointed by the President." 786 F.2d at 1362-63.[13] The court held that the Council was a "compact agency and that its members are not 'federal officers' within the meaning of the appointments clause." *Id*. at 1363.

The Ninth Circuit observed that "[n]o court has yet held that the *appointments clause* prohibits the creation of an interstate planning council with

[13] The Council had authority over a federal agency, the Bonneville Power Administration (BPA), including the power to "request certain action of BPA," and to "review BPA actions." 786 F.2d at 1362. Only the participating three states, and not the President, appointed the Council's members. *Id*.

members appointed by the states." *Id*. at 1365 (italics in original). To hold otherwise would "outlaw virtually all compacts because all or most of them impact federal activities and all or most of them have members appointed by the participating states." *Id*.

Rejecting the argument that the Council's ability to "directly affect a federal agency" was "unusual" and "militates in favor of considering the Council to be a federal rather than a compact agency," the Ninth Circuit explained that it is "*not unusual for the federal government to be involved in or to be directly affected by compact-created agencies*." *Id*. at 1363-64 (emphasis added). The Court cited numerous examples,[14] and observed that "[t]he federal government has even participated as a member of interstate compact agencies." *Id*. (citing Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961)).

In *Yeutter*, the other decision cited by the district court below, the court rejected an argument that the Columbia River Gorge Commission, created by an interstate compact between Washington and Oregon, "is a federal agency and the President of the United States should appoint the members of the Commission" under Article II. 1990 WL 357613, at *32. The Ninth Circuit affirmed (960 F.2d 110 (9th Cir. 1992)), and this Court denied certiorari. 506 U.S. 863 (1992).

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[14] 786 F.2d at 1364 (citing Washington Metropolitan Area Transit Regulation Compact, Pub. L. No. 86-794, 74 Stat. 1031 (1960); Interstate Commission on the Potomac River Basin, Pub. L. No. 91-407, 54 Stat. 748 (1940); Ohio River Valley Water Sanitation Compact, Pub. L. No. 76-739, 54 Stat. 752 (1940); and the Upper Colorado River Basin Compact, Pub. L. No. 81-37,63 Stat. 31 (1949)).

Petitioners claim that no other interstate compact entity besides MWAA manages federal property. Pet. 23-24. Yet, the Commission in *Yeutter* is an example to the contrary. The relevant compact legislation provided that "all land use within the Columbia River Gorge Scenic Area, *whether private, federal or local*, will be consistent with the management plan developed by the Commission." 960 F.2d at 112 (emphasis added). Indeed, "some seventeen percent of the land in the affected area is federally owned," and Congress had declared the entire area that the Commission regulated to be "of critical national significance." *Id*. at 113. Following *SMB*, the *Yeutter* court held that the Commission's impact on federal interests did not require its members to be controlled by the President under the Appointments Clause. 1990 WL 357613, at *32.

As these cases illustrate, there is nothing "unprecedented" (Pet. 24) about an interstate compact entity—including one that impacts federal interests—being governed by a mix of federal and state appointees. Petitioners have not identified any interstate compact entity where the President appoints all or even a majority of the governing body. In fact, there are many compact entities for which the President appoints a minority of the membership,[15] appoints

[15] Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145 (1949); Ohio River Valley Water Sanitation Compact, Pub. L. No. 76-739, 54 Stat. 752 (1940); Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961); Interstate Commission on the Potomac River Basin, Pub. L. No. 91-407, 84 Stat. 856 (1970); Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970).

only a non-voting member,[16] or does not appoint anyone.[17]

Perhaps recognizing as much, Petitioners concede that "the President is not required to have the power to control a run-of-the mill interstate compact entity." Pet. 23. Yet they do not explain what a "run-of-the-mill" compact entity is, or offer any principle limiting their argument from invaliding not just MWAA, but also countless other compact entities.

Instead, Petitioners proceed from the premise that "[t]he whole point of an interstate compact is to address a matter of concern *to the states* that are parties to the compact" and *not* "*matters of federal concern*." Pet. 24 (emphases added). But that premise is fundamentally incorrect. As this Court has noted, "state/federal shared power is the essential attribute" of an interstate compact entity. *Hess*, 513 U.S. at 42 n.11. That is why the Compact Clause requires congressional consent for interstate compacts "that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

While this Court has repeatedly recognized that interstate compact entities address an amalgam of federal and state interests, it has never suggested, let alone declared, that they must be subject to the President's control. In *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22 (1951), for example, eight states

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[16] Alabama-Coosa-Tallapoosa River Basin Compact, Pub. L. No. 105-105, 111 Stat. 2233 (1997).

[17] Port of New York Authority, Pub. Res. No. 67-17, 42 Stat. 174 (1921); Bi-State Development Agency, Pub. L. No. 81-743, 64 Stat. 568 (1950); Delaware River and Bay Authority, Pub. L. No. 87-678, 76 Stat. 560 (1962).

entered into a compact creating the Ohio River Valley Water Sanitation Commission. The compact authorized the Commission to control pollution in interstate waters—action that the Court recognized could be "an appropriate subject for national legislation." *Id*. at 26. The President appointed only three of the Commission's 27 members, the remainder of whom were appointed by the participating states. *Id*. at 24, 28.

Instead of condemning that governance structure, this Court endorsed it as an example of the cooperative federalism that the Compact Clause was intended to achieve:

> A compact is more than a supple device for dealing with interests confined within a region. That *it is also a means of safeguarding the national interest* is well illustrated in the Compact now under review. Not only was congressional consent required, as for all compacts; *direct participation by the Federal Government was provided in the President's appointment of three members of the Compact Commission*.[18]

The hybrid state/federal nature of interstate compact entities also refutes Petitioners' objections that MWAA lacks political accountability because of the allegedly "splintered nature of the appointments to comprise MWAA's Board of Directors." Pet. 21-22. Precisely "[b]ecause Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States,' . . . their political accountability is diffuse." *Hess*, 513 U.S. at 42 (citation omitted).

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[18] 341 U.S. at 27-28 (emphasis added).

In short, MWAA is not, as Petitioners would have it, a federal agency in disguise. It is a standard interstate compact entity, formed with Congress' consent under the Compact Clause. Like virtually every interstate compact entity, MWAA serves state and regional interests, together with certain limited federal ones. Neither Article II nor the separation of powers doctrine prohibits the membership of MWAA's Board of Directors from reflecting those shared interests, or requires the Board to be controlled by the President.

B. Petitioners' reliance on *CAAN* and *Free Enterprise Fund* is misplaced

Petitioners do not acknowledge any of the cases discussed above addressing the question they present—namely, whether the Board of Directors of an interstate compact entity must be controlled by the President. Nor do the cases they rely on speak to that question.

CAAN held only that the now-defunct Board of Review, acting as Congress' agent, was unconstitutional. Nothing in the decision suggests that MWAA's Board of Directors suffered from any similar infirmity. *See* Section II.B., *supra* pp. 6-7. Petitioners assert, without authority, that the abolition of the Board of Review caused the powers it exercised as Congress' agent to "devolve[] entirely" upon MWAA's Board of Directors. Pet. 7. This is incorrect. Once the Board of Review was abolished, all of its power to control MWAA on behalf of Congress was necessarily extinguished.

Petitioners seize on this Court's observation in *CAAN* that, as of 1991, the federal government had a "strong and continuing interest in the efficient operation of the airports." Pet. 2, 11. But the Court's separation of powers concerns were not driven by this

federal interest. Rather, the "[m]ost significant" factor was Congress' creation of the Board of Review, comprised of "federal officials, specifically members of congressional committees charged with authority over air transportation," who acted as Congress' agent. 501 U.S. at 266-67. MWAA and its Board of Directors bear no similarity to the Board of Review. Congress has no membership on, and does not control, MWAA's Board of Directors. *See* Section II.B., *supra* pp. 7-8. *CAAN* is simply inapposite here.

Petitioners' other principal authority, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010), is likewise unavailing. MWAA is wholly unlike the Public Company Accounting Oversight Board scrutinized in that case. The Oversight Board was not established by states under the Compact Clause. Rather, it was created by an Act of Congress, and empowered to promulgate nationwide accounting regulations, violations of which were federal crimes, punishable by up to 20 years' imprisonment or $25 million in fines. *Id*. at 3148. Indeed, all parties to the case agreed that the Oversight Board was "part of the Government" and "that its members are 'Officers of the United States' who 'exercis[e] significant authority pursuant to the laws of the United States.'" *Id*. at 3142, 3148 (internal quotation marks and citation omitted). MWAA has none of those attributes.

C. The United States' *amicus curiae* arguments below did not "confirm" that MWAA is subject to Article II

There is no merit to Petitioners' contention that the United States—appearing in the Fourth Circuit solely as an *amicus curiae*—somehow "confirmed" that MWAA is subject to Article II. Pet. 18-20. Petitioners

cite no authority holding that an *amicus*' argument can be asserted as an admission against a party, and MWAA is aware of none.

In any event, the United States' arguments did not characterize MWAA as a federal instrumentality subject to Article II. For instance, Petitioners rely heavily on the United States' assertion that the Secretary of Transportation has "oversight" of MWAA under the long-term airports lease. Pet. 13. But such oversight is no different from that of any landlord over the tenant of its property. This Court, in fact, has held that leasing federal property from the United States does not transform the tenant into a federal instrumentality, even where there is "control reserved by the Government for protection of a governmental program and the public interest." *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363 (1939) (holding that tenant's long-term lease of federal property does not render it a federal instrumentality for the purposes of a payroll tax exemption).

Nor did the United States portray MWAA as a federal instrumentality subject to Article II by arguing that state laws inconsistent with MWAA's compact are preempted, as Petitioners theorize. Pet. 13, 18-19. Congress' approval of an interstate compact does indeed elevate the compact to federal law that preempts inconsistent state laws. *E.g.*, *Dyer*, 341 U.S. at 34. But no court has ever held that such approval converts the compact entity into a federal instrumentality subject to the President's sole control. If that were the case, it "would have the effect of treating every congressionally authorized interstate compact entity, regardless of the body's structure and function, [as] a federal 'agency' . . . ." *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 533

(2d Cir. 2010) (holding that a compact entity, the Atlantic States Marine Fisheries Commission, is not a federal agency subject to the Administrative Procedure Act).[19]

And counsel for the United States did not concede at oral argument that MWAA is subject to Article II, as Petitioners claim. Pet. 14, 19-20. Rather, he principally argued that Petitioners had waived their Article II challenge by not raising it at the outset. Br. Opp. App. 29a-30a. Only *in the alternative*, "[i]f the Court thinks that the [Article II] issue is properly before it," did counsel for the United States suggest that the lease would give the Secretary of Transportation adequate control to satisfy any Article II concerns the court might have. *Id*. at 30a. But the Article II challenge was not properly before the court (*see* Section III.E, *infra* pp. 27-28), and MWAA is not subject to the President's control under Article II. *See* Section III.A, *supra* pp. 13-18.[20]

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[19] Also, no infirmity arose from Virginia and the District amending their compact legislation after Congress had passed the Transfer Act and certain subsequent amendments, as Petitioners' *Amici* suggest. Br. of *Amici* 11-12. In *Cuyler v. Adams,* this Court recognized that "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." 449 U.S. at 441 (citations omitted).

[20] Petitioners' *Amici* fare no better in arguing that Congress retains control of MWAA. Br. of *Amici* 11-17. Congress did not create MWAA, as Petitioners conceded in their Complaint (Br. Opp. App. 7a, ¶ 15), and by eliminating the Board of Review, Congress relinquished its control over MWAA's operations. *See* Section III.B, *supra* p.18.

D. Petitioners' attack on the Federal Circuit's ruling is legally wrong and also unavailing because the court lacked jurisdiction for multiple reasons

The posture of Petitioners' constitutional challenge is problematic, largely due to its erratic presentation and admittedly "tortured path" through the appellate courts. Br. Opp. App. 31a. Petitioners seek a writ of certiorari to the Fourth Circuit and ask this Court to vacate the Fourth Circuit's ruling "with instructions to transfer this appeal to the Federal Circuit for vacatur and remand." Pet. 25. Yet instead of assailing the Fourth Circuit's holding, Petitioners challenge only the Federal Circuit's reasoning that MWAA is not a federal instrumentality for the purposes of establishing appellate jurisdiction under the Little Tucker Act. Pet. i-ii, 15-27.

Petitioners' attack on the Federal Circuit's federal instrumentality analysis—the basis for the court's ruling that it lacked jurisdiction under the Little Tucker Act—is legally incorrect. It is also unavailing because the Federal Circuit lacked appellate jurisdiction for additional reasons. That means the relief that Petitioners seek here—a transfer to the Federal Circuit (Pet. 25)—is unavailable. It also means that the Federal Circuit's ultimate *decision*—that it lacked jurisdiction—is substantively correct and cannot be reversed, even if this Court were to disagree with the Federal Circuit's reasoning. *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.").

1. The Federal Circuit correctly ruled that MWAA is not a federal instrumentality and, therefore, lacked appellate jurisdiction

As Petitioners acknowledge, under 28 U.S.C. §1295(a)(2), the Federal Circuit could have exercised appellate jurisdiction in this case only if the district court had jurisdiction under the Little Tucker Act. Pet. 10. Because the Little Tucker Act authorizes jurisdiction only for certain claims "'against the United States,'" the Federal Circuit properly recognized that it could exercise appellate jurisdiction only if MWAA were a federal instrumentality tantamount to the United States itself. Pet. App. 22 (quoting 28 U.S.C. § 1346(a)(2)).

In holding that it lacked jurisdiction, the Federal Circuit correctly determined that MWAA is not a federal instrumentality, but, instead, an interstate compact entity that was "created by, and exercises the authority of, Virginia and the District of Columbia." Pet. App. 23. The court's conclusion is well supported by the terms of MWAA's interstate compact (*see* Section II.A, *supra* p. 5), and the ample precedent holding that interstate compact entities like MWAA are not federal instrumentalities. *See* Section III.A, *supra* pp. 13-18. The Federal Circuit's conclusion is not "directly at odds" with *CAAN*, as Petitioners assert. Pet. 27. *CAAN*, which concerned only the former Board of Review, and not MWAA or its Board of Directors, is inapposite for the reasons previously explained. *See* Section III.B, *supra* pp. 18-19.

Petitioners object to the Federal Circuit's reliance upon the four-part test in *Lebron v. National Railroad Passenger Corporation*, 514 U.S. 374 (1995) to determine whether MWAA is a federal instrumentality.

Pet. 15. They argue that *Lebron* is the "wrong test," but never explain what they claim to be the correct test. *Id*. In fact, Petitioners themselves relied upon *Lebron* in the Federal Circuit to argue that MWAA should be deemed a federal instrumentality.[21]

Petitioners' argument falls flat in any case, as *Lebron* confirms that the Federal Circuit's ruling was correct. In *Lebron*, this Court explained that, when Congress declares that an entity is not a federal instrumentality, it is "assuredly dispositive" for the purposes of federal statutes and other "matters that are within Congress's control." 513 U.S. at 392. The Little Tucker Act, 28 U.S.C. § 1346(a)(2), is a jurisdictional statute enacted by Congress and therefore is subject to its control. Thus, Congress' characterization of MWAA as "independent of . . . the United States Government" (49 U.S.C. § 49106(a)(2)) is an "assuredly dispositive" statement that MWAA is not a federal instrumentality for purposes of the Little Tucker Act. Indeed, the "Tucker Act is not available" where Congress has "explicitly disclaimed" that an entity is a federal instrumentality. *Slattery v. United States*, 635 F.3d 1298, 1307 n.3 (Fed. Cir. 2011).

Moreover, courts have consistently refused to treat MWAA as a federal instrumentality that is subject to

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[21] *See* Opp. of Pltfs-Appellants to Mot. to Dismiss for Lack of Appellate Jurisdiction, *Corr, et al. v. MWAA*, No. 2011-1501, 2011 WL 12521042, at *7-10 (Fed. Cir. Aug. 4, 2011); Opening Br. of Appellants, *Corr v. MWAA*, No. 2011-1501, 2012 WL 992892, at *35 (Fed. Cir. Mar. 5, 2012); Reply Br. of Appellants, *Corr v. MWAA*, No. 2011-1501, 2012 WL 1864611, at *8-9, 16, 29 (Fed. Cir. May 7, 2012).

other federal statutes applicable to the United States and its agencies.[22]

Accordingly, the Federal Circuit correctly ruled that MWAA is not a federal instrumentality necessary to establish jurisdiction in that court under the Little Tucker Act and 28 U.S.C. § 1295(a)(2).

2. The Federal Circuit also lacked jurisdiction because the constitutional provisions on which Petitioners rely are not "money-mandating"

The Little Tucker Act, like the other two versions[23] of the Tucker Act, authorizes federal jurisdiction of a claim against the United States only where a separate federal statutory or constitutional provision "creates the right to money damages." *Fisher*, 402 F.3d at 1172 ("In the parlance of Tucker Act cases, that source must be 'money-mandating.'"). "[T]he absence of a money-mandating source [is] fatal to the court's jurisdiction under the Tucker Act." *Id*. at 1173.[24]

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[22] *United States ex. rel. Blumenthal-Kahn Electric LP v. Am. Home Assurance Co.*, 219 F. Supp. 2d 710, 714 (E.D. Va. 2002) (holding that MWAA is not subject to the Miller Act because "MWAA is not a creature or part of the federal government, but is instead a political subdivision created by state statutes, that is independent of the federal government . . . ."); *San Jose Constr. Grp., Inc. v. Metro. Wash. Airports Auth.*, 415 F. Supp. 2d 643, 645-46 (E.D. Va. 2006) (finding no federal question jurisdiction in suit against MWAA because "MWAA is not a federal entity.").

[23] "There are the (Big) Tucker Act, 28 U.S.C. § 1491; the Little Tucker Act, 28 U.S.C. § 1346(a)(2); and the Indian Tucker Act, 28 U.S.C. § 1505." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005).

[24] This Court has acknowledged that the money-mandating requirement applies to suits under the Little Tucker Act. *United*

Here, the Federal Circuit lacked jurisdiction because the constitutional basis for Petitioners' claims—the separation of powers doctrine and the Due Process Clause—are not money-mandating within the meaning of the Little Tucker Act. *LeBlanc v. United States*, 50 F.3d 1025, 1029 (Fed. Cir. 1995). Holding that no Tucker Act jurisdiction existed over those same constitutional claims, the Federal Circuit, in *LeBlanc*, explained that "rights under the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the doctrine of separation of powers . . . [are not] a sufficient basis for jurisdiction because they do not mandate payment of money by the government." *Id*. at 1028 (italics omitted).[25]

Thus, the Federal Circuit lacked jurisdiction in this case under the Little Tucker Act for reasons other than that MWAA is not a federal instrumentality. This not only renders unavailable the relief Petitioners have requested—to go back to the Federal

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States v. Bormes, 133 S. Ct. 12, 20 (2012) (holding that Little Tucker Act jurisdiction was lacking on other grounds).

[25] The Federal Circuit also lacked Little Tucker Act jurisdiction because Petitioners never named or joined the United States as a defendant. Tucker Act jurisdiction is "confined to the rendition of money judgments in suits brought for that relief against the United States." *United States v. Sherwood*, 312 U.S. 584, 588 (1941). The United States is an indispensable party in suits under the Tucker Act. *E.g., Rothgeb v. Statts*, 56 F.R.D. 559, 562 (S.D. Ohio 1972); *see also Amber Res. Co. v. United States*, 73 Fed. Cl. 738, 751 (2006), *aff'd*, 538 F.3d 1358 (Fed. Cir. 2008). Thus, in Tucker Act suits based on the conduct of an alleged federal instrumentality, the United States is still named as the defendant. *E.g., Chas H. Tompkins Co. v. United States*, 230 Ct. Cl. 754 (1982); *Butz Eng'g Corp. v. United States*, 499 F.2d 619 (Ct. Cl. 1974).

Circuit (Pet. 25)—but it also means that the Federal Circuit's decision to refuse jurisdiction was legally correct and may not be reversed even if this Court were to disagree with its reasoning on the federal instrumentality issue. *Helvering*, 302 U.S. at 245.

E. Petitioners abandoned their Article II challenge, and this case is otherwise a poor vehicle to resolve the constitutional question presented

Petitioners abandoned their Article II challenge in the Fourth Circuit by omitting it from their opening brief. *Edwards*, 178 F.3d at 241 n.6. Their attempt to raise that challenge months later could not resuscitate it. *Id*. Petitioners seek to avoid this consequence by pointing to a footnote in their opening brief in the Fourth Circuit in which they claimed to have omitted the Article II challenge because, according to Petitioners, it "could not have been revisited by the Fourth Circuit," as the Federal Circuit's ruling was "law of the case." Pet. 12. Petitioners subsequently repudiated that position, however, when they asked the Fourth Circuit to entertain the Article II challenge in their "Supplemental Reply Brief" (*id*. at 14), and again at oral argument. Br. Opp. App. 31a-32a.[26]

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[26] Petitioners characterize the Federal Circuit's decision as a "sweeping conclusion intertwining the jurisdictional and merits issues" of their Article II arguments which "could not have been revisited by the Fourth Circuit." Pet. 11-12. But this position irreconcilably conflicts with their assertion of those very same "merits" arguments in the Fourth Circuit. In any event, by ruling that it lacked jurisdiction, the Federal Circuit lost the power to decide the merits of the case. *See, e.g.*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (holding that the

The Fourth Circuit's decision (Pet. App. 1-15) did not explicitly address Petitioners' Article II challenge, or MWAA's motion to strike it. But the court also did not forgive Petitioners' abandonment of the challenge. Nor did the court hold, *sub silentio*, that the Federal Circuit's decision to refuse jurisdiction and transfer was law of the case on any aspect of the merits of Petitioners' Article II attack, as they imply. Pet. 14. If anything, the Fourth Circuit's affirmance of the district court's dismissal without comment on the Article II challenge is consistent with the court's treatment of it as abandoned.

Neither this Court nor MWAA, however, should have to infer what the actual disposition of Petitioners' Article II challenge may have been, when any ambiguity is the result of their erratic presentation of the constitutional claim. Petitioners could have averted the confusion they caused by asking the Fourth Circuit to clarify its ruling, but they did not. Instead, they proceeded to this Court and ask it to be the first appellate court to review their Article II challenge. That is improper, as this is a "court of review, not of first view." *Cutter*, 544 U.S. at 718 n.7.

Moreover, no matter how the two appellate decisions below are read, neither contains a particularized analysis of Petitioners' Article II attack and its conflict with settled Compact Clause precedent. Only the district court's decision specifically addressed and analyzed those issues (Pet. App. 55-56)—albeit in a paragraph—thus effectively requiring this Court to be a court of "first view." "Prudence . . . dictates awaiting a case in which the

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Federal Circuit erred by "reach[ing] the merits anyway" after concluding that it lacked jurisdiction).

issue was fully litigated below, so that we will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). This case fits directly within that principle.

The procedural irregularities below, lack of appellate analysis of the constitutional issue at hand, as well as lingering questions about Petitioners' standing,[27] make this case a poor vehicle to resolve the question presented.

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[27] MWAA maintains that Petitioners lack standing for the reasons held by the district court. Pet. App. 43-48. The action was brought on behalf of potentially millions of motorists who pay tolls. Br. Opp. App. 16a, ¶¶ 128-29. The district court held that Petitioners lacked prudential standing, as their objections to the toll charges constituted "'generalized grievances'" that are "'more appropriately addressed in the representative branches.'" Pet. App. 46 (citation omitted.). This Court recently explained that its "reluctance to entertain generalized grievances" implicates Article III standing concerns, and not merely prudential ones. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014). Although the Fourth Circuit ruled that Petitioners had standing (Pet. App. 10), this Court, nonetheless, has "an independent obligation to examine" standing and other aspects of Article III jurisdiction in every case. *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31 (1990).

CONCLUSION

Petitioners concede there is no split of authority and fail to identify any other compelling reason for granting certiorari. Moreover, this case is a poor vehicle for the Court to address their novel constitutional theory. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CIVIL ACTION NO. 1:11-cv-389 (AJT/TRJ)

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

Plaintiffs,

vs.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,

Defendant.

CLASS ACTION COMPLAINT

Plaintiffs John B. Corr and John W. Grigsby, individually and on behalf of all others similarly situated, allege as follows.

NATURE OF THE CASE

"In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."
McCulloch v. Maryland, 17 U.S. 316, 427 (1819)

1. "No 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 Virginia Constitutions.

2. This case challenges exactions of money from motorists, through the tolls they pay for the use of the Dulles Toll Road, that violate this fundamental principle, and so are unconstitutional under the Federal and Virginia Constitutions.

3. These illegal exactions began with the 2005 increase in tolls imposed by the Commonwealth Transportation Board. That toll increase was deliberately set at levels far in excess of amounts needed to pay for the operation and maintenance expenses of the Dulles Toll Road plus reasonable payments for the debt incurred to construct or improve the Dulles Toll Road. This surplus revenue exacted from motorists who used the Dulles Toll Road was explicitly designed, and in fact has been used, to pay for the construction of the Metrorail to Dulles Airport. By creating surplus revenue from the tolls for the Dulles Toll Road in this way, the Commonwealth Transportation Board began the practice of converting what is supposed to be a legitimate user fee into a tax. Because it is an unelected government agency, under the Virginia Constitution the Commonwealth Transportation Board did not have, does not now have, and can never be given the power to impose a tax. Thus the exaction of surplus revenue from motorists as a result of the 2005 toll increase was illegal.

4. The illegal exactions were continued, and ultimately increased, by the Metropolitan Washington Airports Authority ("MWAA") when it took operating and financial control of the Dulles Toll Road in late 2008 pursuant to a contract between MWAA and the Virginia Department of Transportation ("VDOT"). MWAA was created by the Commonwealth of Virginia and the District of Columbia in an interstate compact to manage the Reagan National and Dulles

International Airports. The United States consented to that compact in the Metropolitan Washington Airports Act of 1986 (the "Airports Act"). MWAA is run by an unelected Board of Directors and is purportedly independent of the governments of Virginia, the District of Columbia, the United States, and any other governmental body. The Board of Directors and officers of MWAA are neither officers nor inferior officers of the United States, of the Commonwealth of Virginia, of the District of Columbia, or of any other state or local government.

5. When it took control of the Dulles Toll Road, MWAA also took control of all the money that had been illegally exacted under the 2005 toll increase, continued to exact tolls at that excessive level, and, beginning with the 2010 toll increase, set tolls at ever higher levels, again all for the purpose of generating revenue to pay for the construction of the Metrorail to Dulles Airport.

6. These exactions by MWAA through the tolls for the Dulles Toll Road are illegal for several, in part overlapping, reasons.

(a) Under the Virginia Constitution, the setting of rates or fees for a public service or facility is a legislative power that can be delegated to an officer or entity within state or local government only by the express authorization of the Virginia General Assembly. The Virginia General Assembly has never enacted legislation that delegates to MWAA the power to set the tolls for the Dulles Toll Road. Moreover, the Virginia General Assembly could not delegate a toll-setting power to MWAA because MWAA is an entity completely outside of the governments of the Commonwealth or its counties,

municipalities, or other entities of local government. Having no authority to set and impose tolls, any exaction of money through the tolls for the Dulles Toll Road set and imposed by MWAA is illegal.

(b) As was the case for the Commonwealth Transportation Board's 2005 toll increase, under the Virginia Constitution, MWAA in addition cannot be given the power to tax because it is an unelected "public" entity. Indeed, under the terms of the statutes that created it, MWAA is purportedly a novel governmental creature outside all other forms of government recognized in our constitutional regime. Having no authority to impose a tax, any exaction of money through the tolls for the Dulles Toll Road set and imposed by MWAA that exceeds amounts needed to pay for the operation and maintenance expenses of the Dulles Toll Road plus reasonable payments for the debt incurred to construct or improve the Dulles Toll Road is illegal.

(c) Whether it is considered a power to set a user fee or to impose a tax, the unlimited discretion given to MWAA to set these tolls constitutes a standardless, unconstitutional delegation of legislative power to MWAA. As a result, any exaction of money through the tolls for the Dulles Toll Road set and imposed by MWAA is illegal.

(d) No federal legislation authorizes MWAA to set tolls for the Dulles Toll Road or to impose a tax on the users of the Dulles Toll Road. Nor could any federal legislation do so. The United States Constitution does not allow Congress to compel a state to violate that state's Constitution, concerning a matter not otherwise governed by the United

States Constitution, under the Compact Clause or any other provision of the United States Constitution. The United States Constitution does not allow Congress to delegate any legislative power to any person who is not an officer or inferior officer of the United States. Thus, the federal legislation approving the compact between the Commonwealth of Virginia and the District of Columbia that created MWAA over 20 years before MWAA assumed control of the Dulles Toll Road did not, and could not, authorize MWAA to set tolls or impose taxes for the use of the Dulles Toll Road. Having no authority to set and impose tolls, any exaction of money through the tolls for the Dulles Toll Road set and imposed by MWAA is illegal.

7. This case is not the first example of the violation of fundamental constitutional principles by MWAA. The Airports Act originally conditioned the consent of the United States to the compact establishing MWAA on MWAA creating a Board of Review, composed of members of Congress, which had the power to veto major actions of MWAA. MWAA did create that Board, which was subsequently held to violate separation of powers principles by unconstitutionally vesting executive functions in an agent of Congress. *See Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

8. This action seeks 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 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.

JURISDICTION AND VENUE

9. This action arises under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

10. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States. Alternatively, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1346(a)(2) because, insofar as the MWAA may be held to have a federal character, to be a federal instrumentality, or to be acting pursuant to a command in federal law, each member of the proposed Plaintiff Class is making a claim founded on the Constitution and an Act of Congress and is seeking restitution of an amount not exceeding $10,000.

11. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1343(a) because this action is brought to secure restitution of a portion of the tolls paid by the proposed Plaintiff Class for the use of the Dulles Toll Road and to secure equitable or other relief under an Act of Congress providing for the protection of civil rights, specifically 42 U.S.C. § 1983.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the events giving rise to the claims of the proposed Plaintiff Class occurred in this District; the Dulles Toll Road is located in this District; and the Defendant is located and transacts business in this District.

THE PARTIES

THE PLAINTIFFS

13. Plaintiff John B. Corr is a resident of Great Falls, Virginia. For approximately the last 15 years, he has used, and continues to use, the Dulles Toll Road from time to time for a variety of purposes. He pays the toll in cash. He has been a victim of the illegal exactions that are the subject of this complaint since they began in 2005.

14. Plaintiff John W. Grigsby is a resident of Hillsboro, Virginia. For approximately the last 17 years he has used, and continues to use, the Dulles Toll Road almost every day to go to work and for other purposes. He pays the toll via transponder. He has been a victim of the illegal exactions that are the subject of this complaint since they began in 2005.

THE DEFENDANT

15. Defendant MWAA is "public body corporate and politic" established by the Commonwealth of Virginia and the District of Columbia in an interstate compact, to which the United States Congress gave its consent in 1986. Va. Code § 5.1-152 *et seq*.; D.C. Code § 9-901 *et seq*. *See* 49 U.S.C. § 49101 *et seq*.

16. MWAA was created 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).

17. MWAA has only the powers and jurisdiction enumerated in the acts of the Commonwealth of

Virginia and the District of Columbia which memorialize their interstate compact, "and such other additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia." Va. Code § 5.1-153; D.C. Code § 9-902.

18. While MWAA was given the power "[t]o fix, revise, charge, and collect rates, fees, rentals and other charges ***for the use of the airports***," Va. Code §5.1-156(A)(8) (emphasis added), it has not been given any power to set tolls for a Dulles Toll Road.

19. Nevertheless, in the Airports Act Congress provided that such powers and jurisdiction must "at a minimum" meet certain requirements, including giving MWAA the authority to "issue bonds from time to time in its discretion for public purposes," to secure those bonds by MWAA's general revenues or from the revenue of "designated projects whether or not any part of the projects are financed from the proceeds of the bonds," and to "levy fees or other charges." 49 U.S.C. §49106 (b)(1)(B), (E) & (2)(B).

20. MWAA is authorized to sue and be sued in its own name. Va. Code § 5.1-156(A)(11); D.C. Code § 9-905(a)(11).

21. MWAA was not structured to enable it to enjoy the special constitutional immunity of the Commonwealth of Virginia or the District of Columbia. To the contrary, MWAA is "independent of all other bodies." Va. Code §§ 5.1-153, 5.1-156(B); D.C. Code §§ 9-902, 9-905(b). *See also* 49 U.S.C. § 49106(a)(2) (MWAA is "independent of Virginia and its local governments, the District of Columbia, and the United States Government.").

22. MWAA is financially independent of the Commonwealth of Virginia and the District of Columbia. Bonds issued by MWAA are not considered a debt of the Commonwealth of Virginia or of the District of Columbia, or of any of their political subdivisions. 49 U.S.C. § 49106(b)(2)(A). Neither the Commonwealth of Virginia nor the District of Columbia is responsible to pay judgments against MWAA or is in any other way responsible for the liabilities of MWAA.

23. MWAA is governed by a 13-member Board of Directors. Five members are appointed by the Governor of Virginia. Three members are appointed by the Mayor of the District of Columbia. Two members are appointed by the Governor of Maryland. Three members are appointed by the President of the United States. Va. Code § 5.1-155(A); D.C. Code § 9-904(a). *See also* 49 U.S.C. § 49106(c)(1). No member of the MWAA Board of Directors may hold any elective or public office. Va. Code § 5.1-155(B); D.C. Code § 9-904(b). *See also* 49 U.S.C. § 49106(c)(4)(A). Members are appointed for a six-year term and may be removed or suspended only for cause. Va. Code § 5.1-155(C), (E); D.C. Code § 9-904(c), (e). *See also* 49 U.S.C. § 49106(c)(3), (6)(C). No member of the MWAA Board of Directors or any other officer or manager of MWAA is an officer or inferior officer of the United States, of the Commonwealth of Virginia, of the District of Columbia, or of any other state or local government.

GENERAL ALLEGATIONS

CONSTITUTIONAL RESTRICTIONS ON THE FEDERAL GOVERNMENT

24. While the power of taxing the people and their property is essential to the very existence of government, taxation is a deprivation of property. As Chief Justice Marshall famously observed, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). As such, the power to impose taxes is a necessary, but dangerous, power of government.

25. The republican structure of government is the primary security against the abuse of the power to tax. "[T]he influence of the constituents over their representative," *McCulloch v. Maryland*, 17 U.S. at 428, is the essential check on that abuse.

26. Thus the United States Constitution guarantees "to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

27. Thus the United States Constitution guarantees that the citizens of each state "shall be entitled to all Privileges and Immunities of Citizens in the several States," and prohibits the abridgment of the privileges or immunities of citizens of the United States. U.S. CONST. art. IV, § 2; amend. XIV, § 1. Among these privileges and immunities is the privilege to vote for or against legislators who enact laws that impose taxes, and the immunity from any taxation not enacted by their elected representatives.

28. The United States Constitution gives the legislative power to enact taxes to Congress. Congress may not delegate any of its legislative power, including

the taxing power, to a person who is not an officer or inferior officer of the United States.

29. Congress has no constitutional power to delegate legislative power, including the taxing power, to the President, to any administrative agency, or to any officer or inferior officer of the United States, unless the exercise of that delegated power is constrained by specific policies and definite standards set by Congress.

30. A user fee is not a device for raising revenue to defray general or future expenses of government for the public welfare. Rather, a bona fide user fee is paid by a person receiving a present, particularized benefit, and the amount of the fee is a fair approximation of the cost of the benefit provided.

31. The Compact Clause of the United States Constitution does not authorize Congress, by consenting to an interstate compact among States, to delegate any of its legislative power, including the taxing power, to a person who is not an officer or inferior officer of the United States.

32. The Compact Clause of the United States Constitution does not authorize Congress to place a condition on its consent to an interstate compact that requires a state to delegate the legislative power to set rates or fees for a public service or facility, or to impose taxes, in violation of that state's Constitution.

33. Money that the government has required to be paid to itself or to others contrary to law is an illegal exaction that constitutes a deprivation of property without due process of law.

* * *

(Paragraphs 34-114 omitted)

Tolls Are Raised In 2010, 2011, and 2012, With The Prospect of More To Come, In Order To Raise Revenue For The Metrorail Project.

115. On the same day that it assumed control over the Dulles Toll Road, MWAA's Dulles Corridor Enterprise Fund issued bond anticipation notes for $150 million to provide short-term financing for the Metrorail Project.

116. On August 5, 2009, the Dulles Corridor Enterprise Fund issued four series of Dulles Toll Road Revenue Bonds totaling a debt of $972.3 million, including:

a) $198 million in Series 2009A current interest bonds to "[f]inance Dulles Toll Road and Corridor Improvements and retire Series 2008 [bond anticipation notes];"

b) $207 million in 2009B Series capital appreciation bonds to "[f]inance a portions of the Dulles Metrorail Project;"

c) $158 million in 2009C Series convertible capital appreciation bonds to "[f]inance Dulles Toll Road and Corridor Capital Improvements and a portion of the Dulles Metrorail Projects;" and

d) $400 million in 2009D "current interest bonds —issue subsidy—Build America Bonds" to "[f]inance a portion of the Dulles Metrorail Projects."

117. On November 4, 2009, MWAA approved a set of toll rate increases for the Dulles Toll Road to take effect in each of the following three years. On January 1, 2010, tolls were increased at the main toll plaza and at the ramps by 25 cents, putting the toll at the main toll plaza at $1.00 and 75 cents at the ramps. On

January 1, 2011, another 25-cent increase of the toll at the main toll plaza would take effect, and on January 1, 2012 yet another 25-cent increase of the toll at the main toll plaza would take effect.

118. MWAA primarily justified these toll increases as necessary to fund the Metrorail Project. Specifically, MWAA explained that it was going to "issue approximately $2.7 billion of debt over the next seven years. This debt will be secured by toll road revenues." MWAA went on, "Gross toll revenue collected on the CTR will need to increase from approximately $65 million in 2008 to $87 million in 2010 and $220 million by 2020 to cover potential debt service costs."

119. MWAA planned to spend 47.1 percent of the total $87 million in toll revenue it expected in 2010 on Metrorail Construction Financing, 51.2 percent of the total $97 million in toll revenue it expected in 2011 on Metrorail Construction Financing, and 61.5 percent of the total $107 million in toll revenue it expected in 2012 on Metrorail Construction Financing.

120. In its "Frequently Asked Questions about the Toll Setting Process," MWAA acknowledged that the 2009 toll increases were part of a plan to use Dulles Toll Road tolls not simply to pay for the Dulles Toll Road, but to generate revenue for the Metrorail Project and other improvements not part of the Dulles Toll Road:

> Increases to the Dulles Toll Road (DTR) tolls are part of a long-established plan to help fund construction of the Dulles Corridor Metrorail Project (Project). 48% of the funds come from Fairfax and Loudoun Counties, the Commonwealth of Virginia, the federal government and

> the Metropolitan Washington Airports Authority. 52% of the funds come from the bonds which the Metropolitan Washington Airports Authority will sell and which are backed by the tolls. In addition to funding the Metrorail Project, the toll increase will also pay for improvements to the DTR and elsewhere within the Dulles Corridor.

121. Indeed, as MWAA understands it, the whole purpose of the Permit was to give MWAA the authority "to operate the Dulles Toll Road and collect toll revenues to fund construction of the Dulles Corridor Metrorail Project."

122. In 2009, the Dulles Corridor Enterprise Fund received total operating revenues of $64.9 million, all from the operation of the Dulles Toll Road (comprised of toll revenues and fines for toll violations). For the same period, the Dulles Corridor Enterprise Fund incurred $30 million in operating expenses from the operation of the Dulles Toll Road *and* the costs of the Metrorail Project. The debt service paid by the Dulles Corridor Enterprise Fund that year for the Series 2009 bonds—debt mostly incurred for the Metrorail Project —was $14.5 million.

123. On November 18, 2010, MWAA released a "Financial Update" in which it now estimated that the "allocation" of Dulles Toll Road revenues to Phase I of the Metrorail Project would be $1.3 billion and to Phase II would be $1.6 billion, assuming that the cost of Phase II would be a total of $2.5 billion. If Phase II ultimately includes a "two-mile tunnel with underground station at Dulles International Airport," the total cost for Phase II jumps to $3.8 billion, with the estimated allocation of Dulles Toll Road revenues rising to approximately $2.6 billion, that is, 57.2 percent of the total cost. The next largest contributor

to Phase II under that scenario is estimated to be Fairfax County, with 16.1 percent of the total cost.

124. In the Financial Update, MWAA serves notice that, notwithstanding the successive toll increases in 2010, 2011, and 2012, "[t]oll increases beyond 2012 will be analyzed upon actual financial performance and potential receipt of any additional grants."

125. Through September 2010, revenues from the Dulles Toll Road totaled $66.3 million, that is, $17.3 million, or 35.4 percent, higher than the amount for the same period in 2009. Operating income for the Dulles Corridor Enterprise Fund through September 2010 was $48.6 million. Total debt service for that period was $21 million.

126. MWAA's Amended Budget for 2010 for the Dulles Corridor Enterprise Fund (as of November 2010) anticipates total revenues from the Dulles Toll Road for the year to reach $87.4 million, with net operating income of $63.2 million. Total debt service for the year is estimated as $46.4 million.

127. MWAA's Budget and publicly announced plans subordinate the interests of the Dulles Toll Road and the motorists who rely on it to the financial needs of the Metrorail Project. People who may never use the new Metrorail line are paying for that project under the guise of a toll for a public facility they are using. Even worse, there is a serious possibility that toll revenues will decline as drivers choose other, less convenient or efficient routes in the face of rising tolls. If so, the resources available to maintain the Dulles Toll Road will be in jeopardy as the costs of the Metrorail Project escalate unabated. And MWAA's only public response to the possibility of declining toll

revenues has been to suggest that further toll hikes might be necessary.

CLASS ACTION ALLEGATIONS

128. Plaintiffs bring this case as a class action, under Federal Rule of Civil Procedure 23, on behalf of themselves and on behalf of a class of all persons and entities who paid tolls for the use of the Dulles Toll Road from May 2005 to the present, and from whom the amount illegally exacted in those tolls does not exceed $10,000. Excluded from this proposed Plaintiff Class are MWAA and its officers, directors, employees, agents, and legal representatives.

129. The proposed Plaintiff Class is so numerous that joinder of all members is impracticable. There were over 110 million toll transactions on the Dulles Toll Road in 2009. The proposed Plaintiff Class is composed of two subclasses:

a) The Transponder Subclass includes all persons and entities from whom tolls for the use of the Dulles Toll Road were electronically collected through a transponder, or similar device, mounted in their vehicles as part of the "E-ZPass," "Smart Tag," or equivalent systems. There are more than 733,000 active E-ZPass active transponders issued by VDOT alone. Approximately 70 percent of the tolls collected on the Dulles Toll Road are paid via transponder. The identity of each member of the Transponder Subclass can be readily ascertained from the personal data maintained by MWAA, VDOT and the other governmental agencies in other states who issued transponders to each individual who electronically paid tolls on the Dulles Toll Road. Those

computerized records include the individual's name, social security or driver's license number, and address.

b) The Cash Subclass includes all persons and entities who paid tolls for the use of the Dulles Toll Road in cash. While records are not maintained that identify the members of the Cash Subclass, records of each toll transaction are maintained and the license plates of cars are photographed at toll booths. Accordingly, publication and other forms of notice can serve to bring this action to the attention of members of the Cash Subclass, and MWAA's records can confirm any claims made by them.

* * *

(Paragraphs 130-134 omitted)

CAUSES OF ACTION

COUNT ONE

Illegal Exaction Under Color of Federal Law (U.S. Const. amend. V and XIV, § 1)

135. The allegations in the foregoing paragraphs of this Complaint are incorporated here by reference.

136. The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are violated when money is illegally exacted or retained by governmental entities.

137. Any power to set tolls for the Dulles Toll Road is a legislative power. In addition, any power to set tolls for the Dulles Toll Road that 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 Toll Road is a specific type of legislative power, the power to tax. Under the United States Constitution, this power cannot be delegated to MWAA because the Board of Directors and officers of MWAA are neither officers nor inferior officers of the United States, nor are they subject to any control or direction by officers or inferior officers of the United States. To the extent that any provision of the Airports Act, or of any other federal law, purports to delegate such power to MWAA, that provision is unconstitutional and was void *ab initio*.

138. To the extent that any provision of the Airports Act, or of any other federal law, purports to delegate to MWAA the absolute, exclusive discretion to set tolls for the Dulles Toll Road that 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 Toll Road, under the United States Constitution that provision is an unconstitutional delegation of legislative power and was void *ab initio*.

139. MWAA's exercise of any power to set tolls or to tax under the color of any provision of the Airports Act, or of any other federal law, by its continuing exaction and retention of tolls on the Dulles Toll Road is an illegal exaction under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

140. Pursuant to 28 U.S.C. §§ 1331 and 1346(a)(2), 49 U.S.C. §49101 *et seq*., and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, MWAA is liable to the Plaintiffs and the proposed Plaintiff Class for

restitution of the tolls they paid that constituted illegal exactions, plus interest, and for the attorneys' fees and expenses incurred to bring and prosecute this action.

COUNT TWO

Illegal Exaction Under Color of State Law (42 U.S.C. §1983)

141. The allegations in the foregoing paragraphs of this Complaint are incorporated here by reference.

142. MWAA is a "person" within the meaning of 42 U.S.C. §1983.

143. The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution are violated when money is illegally exacted or retained by governmental entities.

144. The Compact Clause of the United States Constitution does not empower a state, with the consent of Congress, to enter into a compact violating the Federal or State Constitutions.

145. Under the Constitution of Virginia, a tax may be imposed only by a majority of the elected representatives of a legislative body. That legislative body may not delegate its taxing power to a non-elected body.

146. Thus citizens have the right or privilege only to be taxed by representatives whom they elect and can vote out of office. Citizens are otherwise immune from taxation.

147. Under the Constitution of Virginia, the power to set rates or fees for public services or facilities is a legislative power that can be delegated only by an express act of the Virginia General Assembly. Such

delegations of legislative power to an administrative agency are valid only if they establish specific policies and fix definite standards to guide the agency in the exercise of that power. Generally, legislative power may only be delegated to an officer or entity within the government of the Commonwealth, of a county, or of a municipality or other local governmental entity. One specific type of legislative power, the power to tax, may not be delegated to any unelected officer or entity.

148. Under the Constitution of Virginia, while the General Assembly may authorize the creation of a debt for a specific revenue-producing capital project and secure that debt by a pledge of revenues form that project, those revenues may not be used to pay for a different capital project.

149. In raising the tolls for the Dulles Toll Road in 2005, the Commonwealth Transportation Board purported to be acting pursuant to authority delegated to it by the General Assembly giving it the sole discretion to set tolls for the Dulles Toll Road.

150. The Commonwealth Transportation Board expressly set the amount for the new tolls in 2005 to generate revenue exceeding 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 Toll Road in order to provide revenue to pay for the costs and financing of the Metrorail Project.

151. The amount of the "tolls" set in 2005 that exceeded 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 Toll Road constituted a tax.

152. The Commonwealth Transportation Board did not have, and cannot have, any power to impose a tax.

153. The Commonwealth Transportation Board did not have, and cannot have, any power to pledge the amount of the "tolls" set in 2005 that exceeded 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 Toll Road, for debt incurred to construct the Metrorail Project.

154. The Commonwealth Transportation Board did not have, and cannot have, any legislative power to set tolls for the Dulles Toll Road to produce surplus revenue at levels chosen by it in its absolute discretion unconstrained by specific policies and definite standards set by the General Assembly.

155. The money collected under the 2005 toll rate schedule that exceeded 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 Toll Road was illegally exacted from the Plaintiffs and the proposed Plaintiff Class.

156. The money illegally exacted from the Plaintiffs and the proposed Plaintiff Class under the 2005 toll rate schedule has been illegally retained by MWAA.

157. In its "Frequently Asked Questions about the Toll Setting Process," MWAA claims that its authority to set tolls for the Dulles Toll Road was given to it by "statutes enacted by the Commonwealth of Virginia and the District of Columbia" and by "the Permit and

Operating Agreement between the Commonwealth and [MWAA]."

158. The Virginia General Assembly has no power to delegate to the Commonwealth Transportation Board any authority to set tolls for the Dulles Toll Road at levels chosen by the Commonwealth Transportation Board in its absolute discretion unconstrained by specific policies and definite standards set by the General Assembly. Any purported delegation of such authority was void *ab initio*.

159. The Virginia General Assembly has no power to delegate to VDOT any authority to set tolls for the Dulles Toll Road at levels chosen by VDOT in its absolute discretion unconstrained by specific policies and definite standards set by the General Assembly. In addition, the Virginia General Assembly has no power to delegate to VDOT any authority to impose a tax. Any purported delegation of such authority was void *ab initio*.

160. VDOT did not have, does not have, and cannot have, any power to delegate to MWAA, through a contract or any other instrument, any authority to set tolls for the Dulles Toll Road at levels unconstrained by specific policies and definite standards set by the General Assembly or to impose a tax through those tolls. Any purported delegation of such authority was void *ab initio*.

161. The Permit entered into by VDOT and MWAA did not, and could not, delegate to MWAA any authority to set tolls for the Dulles Toll Road at levels chosen by MWAA in its absolute discretion unconstrained by specific policies and definite standards set by the General Assembly or to impose a tax through those tolls. Any provision of the Permit

that purported to delegate to MWAA such authority was void *ab initio*.

162. By Resolution No. 07-24, MWAA adopted and promulgated in its Regulations, which have the force and effect of law, the 2005 toll rate schedule established by the Commonwealth Transportation Board.

163. The money collected under the 2005 toll rate schedule that exceeded 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 Toll Road was illegally exacted from the Plaintiffs and the proposed Plaintiff Class, and has been illegally retained by MWAA.

164. The toll rate increases adopted by MWAA on November 4, 2009 for 2010, 2011, and 2012, also promulgated in MWAA's Regulations, were expressly set to generate revenue exceeding 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 Toll Road in order to provide revenue to pay for the costs and financing of the Metrorail Project.

165. The toll rate increases adopted by MWAA for 2010, 2011, and 2012 were an exercise of a purported authority to set tolls for the Dulles Toll Road, and to impose taxes through those tolls, that MWAA does not have. Accordingly, the money collected under the 2010 toll rate schedule was illegally exacted from the Plaintiffs and the proposed Plaintiff Class, and has been illegally retained, by MWAA.

166. For the same reasons, the money being collected under the 2011 toll rate schedule is being illegally exacted from the Plaintiffs and the proposed Plaintiff Class, and is being illegally retained, by MWAA. Likewise, the money to be collected under the 2012 toll rate schedule will be illegally exacted from the Plaintiffs and the proposed Plaintiff Class by MWAA.

167. For these reasons, the money paid by the Plaintiffs and the proposed Plaintiff Class for tolls on the Dulles Toll Road and retained by MWAA under the color of state law that exceeds the amounts that would have been collected under the toll structure in effect before the 2005 toll increase constitute illegal exactions in continuing violation of rights, privileges, and immunities guaranteed by the United States and Virginia Constitutions.

168. Pursuant to 42 U.S.C. §§ 1983 and 1988, MWAA is liable to the Plaintiffs and the proposed Plaintiff Class for restitution of the tolls they paid that constituted illegal exactions, plus interest, and for the attorneys' fees and expenses incurred to bring and prosecute this action.

COUNT THREE

Illegal Exaction By MWAA As An Independent Public Body Corporate and Politic (U.S. Const. amend. V and XIV, § 1, art. IV, §§2 and 4; Va. Const. art. I, § 14)

169. The allegations in the foregoing paragraphs of this Complaint are incorporated here by reference.

170. The United States Constitution vests the federal legislative power in Congress. Congress may not delegate any of its legislative power to a person

who is not an officer or inferior officer of the United States.

171. Among the privileges and immunities of citizens guaranteed by the United States Constitution is the privilege to vote for or against legislators who enact laws that impose taxes, and the immunity from taxation not enacted by their elected representatives.

172. The Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly. VA. CONST. art. IV, § 1.

173. The Constitution of Virginia provides that "no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof." VA. CONST. art. 1, § 14.

174. MWAA's Board of Directors is composed of persons who are not chosen for those positions by the vote of citizens. They are not elected representatives of any constituency.

175. The discretion of the MWAA Board of Directors over tolls on the Dulles Toll Road is absolute. No legally binding principles or guidance have been set down by any legislature to channel or constrain that discretion of MWAA.

176. MWAA is officially designated by the legislation that established it, and by the legislation by which Congress gave its consent to the compact between the Commonwealth of Virginia and the District of Columbia, as "a public body corporate and private" that is "independent of all other bodies." MWAA is independent of the Commonwealth of Virginia and its local governments; it is independent of the District of Columbia; and it is independent of

the Federal Government. Thus MWAA is not a part of the Federal Government or any state or local government. No member of the MWAA Board of Directors or officer of MWAA is an officer or inferior officer of the United States, of the Commonwealth of Virginia, of the District of Columbia, or of any other state or local government.

177. By setting tolls on the Dulles Toll Road MWAA exercised a legislative power. Moreover, by setting those tolls so that they generated revenue that 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 Toll Road, MWAA exercised a specific type of legislative power, the power to impose taxes. In doing so, MWAA acted as a separate governmental entity that is a part of neither the Federal Government nor any state government and that is not a body elected by and representing the constituency from whom this money was exacted. MWAA is a creature placed completely outside the edifice of our constitutional regime of limited government. MWAA is accountable to no one.

178. This exercise of a general rate-setting legislative power and of the legislative power to impose taxes constitutes a continuing violation of the constitutional rights of the Plaintiffs and of the proposed Plaintiff Class to a republican form of government and to be governed only by a state or local government or by the Federal Government. Furthermore, it is a continuing violation of the privileges and immunities of the Plaintiffs and of the proposed Plaintiff Class, and of their right to the due process of law, to be taxed only by the enactments of

legislatives bodies elected by them. The continuing exaction and retention of tolls by MWAA is illegal.

179. As a result, MWAA is liable to the Plaintiffs and the proposed Plaintiff Class for restitution of the tolls they paid that constituted these illegal exactions, plus interest, and for the attorneys' fees and expenses incurred to bring and prosecute this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. That the Court certify this case as a class action;

2. That the Court enjoin the Defendant from setting tolls for the Dulles Toll Road at levels different from the toll structure in place before the 2005 toll increase;

3. That the Court order the Defendant to pay back to the Plaintiffs and the proposed Plaintiff Class the amount of money illegally exacted from them, plus interest; and

4. That the Court grant such other and further relief as the law and evidence may justify and as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all issues so triable.

Dated: April 14, 2011

Respectfully submitted,

JOHN B. CORR, and
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APPENDIX B

Partial transcript of oral argument in *Corr, et al. v. Metropolitan Washington Airports Authority*, 740 F.3d 295 (4th Cir. 2014) (from recording available at: http://coop.ca4.uscourts.gov/OAarchive/mp3/13-1076-20131211.mp3)

Jeffrey Clair: (at 34:29)	. . . .Your Honor in the brief time I have, I did want to address briefly the Article 2 argument that motorists have raised here. They are making assertions that granting certain powers to this interstate compact agency violates the Article 2 requirement that it is the president who must take care that the laws are faithfully executed. Our principal contention here is that this is an argument that has been waived. There's no discussion of this in the opening brief and consequently no discussion of the issue in the Amicus Brief the United States filed here. I think the Motorists' contention will be well this is an issue that came up somehow as a consequence of the brief the government has filed here. That simply is not the case if you look towards the end of the District Court opinion – uh – District Court expressly addressed Article 2 contentions. Now the Court didn't say a lot about them because I think, correctly, the District Court thought these arguments were insubstantial.

	But the District Court opinion itself indicates that these were matters that were raised below. They have not been raised here and therefore are not properly before the Court. If I could have one moment to address the merits, Your Honor.
Judge:	Thirty Seconds.
Jeffrey Clair:	OK 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 of the lease. All those things 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 2 argument.
The Court:	Thank you Mr. Clair.
Jeffrey Clair:	Thank you.
The Court:	Mr. Cynkar.

Robert J. Cynkar:	First, we didn't waive the argument, if you will recall we have followed a tortured path to get to this Court. Initially we believe that MWAA was a Federal instrumentality. We went to the Federal Circuit and we raised all the constitutional, the Article 2 arguments there. That court ruled that it was not an instrumentality and so we came back to this court. And it is only through the preemption arguments of the Appellee and my colleague from the Justice department actually even makes it more muscular one. It's not just, as I read his brief it is not just the compact, but it is the Federal statute by itself that has a preemptive power here. If you add that to the fact that this is an entity that is managing Federal property, it's, it's an absolutely unique interstate compact. There's never been an entity like this ever. It's whole purpose is to manage Federal properties to solve a Federal problem. The lease explicitly give it the powers of the Secretary of Transportation and it has a whole range of Federal restrictions on it. I contend that the Government's brief here is in effect a motion to reconsider the Federal Circuit's ruling that this is not a Federal instrumentality. And

	once you do that, once you go down the preemption line, he's right. It doesn't matter whether this is a fee or a tax because the President only has the power to appoint three of the seventeen board members and under the Free Enterprise Fund case, that's a violation of his responsibilities to take care that the laws be faithfully executed. Because this is a Federal instrumentality taking money using Federal power. Now, we have tried to be a little bit more conservative in approaching this case. But if you go down that route, we've got to win, no matter whether this is a fee or a tax. But it also illustrates that there was a bit of a dichotomy in my colleague for the appellee's argument. He focused on Virginia law. But a compact approved by Congress is Federal law and it's Federal precedence that you used to construe the words which is why I focused on Federal cases. And there is no word involving taxation there. Just purely on the textual basis of a compact. And so, *Meeks*, itself, is, focuses on Virginia law. But frankly, it's just distinguishable on the fact because once again, as I was saying in my opening, the Court did this in-depth analysis of the history of that project and that project was 70 years that facility was being given to people

	was vehicular connections between Portsmouth and Norfolk. And so it's tunnels and bridges and that had always been considered as one facility and that was the Court's construction there. That's why it was a User Fee. It didn't abandon or overturn any of these principles distinguishing User Fees or the fact that the General Assembly can't delegate taxing power. Now one important illustration here besides the fact that you have this entity that is independent of every form of Government that we know. I mean just think about that.
The Court:	Was this entity a creation of Congress? Is that the only way it can happen under the Compact law?
Robert J. Cynkar:	Uh, no. It was a creation of Virginia and the District of Columbia and it was approved by, by Congress.
The Court:	Well, Congress has to approve it, doesn't it?
Robert J. Cynkar:	Uh,
The Court:	Through statute
Robert J. Cynkar:	Yes. Um, but also the, both the Federal statute and the Compact itself says that MWAA only has the powers given to it by the legislative authority of Virginia and the District

	of Columbia and the power to impose tolls to pay for Metro only comes to MWAA from its deal with VDOT through the permit and it doesn't come from the legislation. Remember, the Compact legislation was passed way before Dulles toll road and the Metro was even being considered. So the text of the Compact itself doesn't provide for this taxing power and it doesn't provide for the power to exact money to pay for Metro more explicitly. That only comes from arguably this contract, this deal with VDOT which under the terms of the Compact itself, that's not the legislative authority of Virginia. It can't be given that power. So, I would urge the court that, really, the sort of most conservative resolution of this case is to rule that this is an illegal tax. We have stated a cause of action and we go back and litigate it. Finally, and I'm sorry to be speaking so quickly but I'm trying to get in a couple of different things. The other thing is, there is no record here that this is going to relieve congestion. That is simply not true. The only pages, that the in the record that address the question of what is happening here are the ones I discussed with the Court. JA238.

The Court:	You don't think it's self-evident that if you add a rail line along a highway that with the same destination
Robert J. Cynkar:	Actually
The Court:	Will relieve congestion
Robert J. Cynkar:	Actually it isn't, Your Honor. And in the policy debate over this, there's a lot of back and forthing and guess-timation of whether it will relieve congestion and, in fact, many people think it's going to be the added tolls that will relieve congestion because people won't use the toll road. It's not going to be the Metro. But even if that were the case, that is one of those indirect benefits. Just like in the *United Shoe* case, that, OK. It's a benefit. There's a benefit to the whole transportation network in Northern Virginia. And that's a good thing. But it should be paid for by taxes, not by toll road users. And my time has expired.
The Court:	Okay
Robert J. Cynkar:	Thank you, Your Honors.
Judge:	Thank you. We're going to have a brief counsel and then go on to our last case.