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

REPLY TO BRIEF IN OPPOSITION

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The Metropolitan Washington Airports Authority ("MWAA") advances an extreme view of an interstate compact entity as a vessel into which Congress can pour federal powers unencumbered by the Constitution. To secure this Constitution-free zone, MWAA urges this Court to pay no constitutional attention to this ostensible "interstate compact" entity (i) managing what the Deputy Secretary of Transportation characterized as "vitally important federal assets,"[1] and (ii) wielding significant federal power pursuant to the Transfer Act,[2] despite being deemed by Congress in the same law to be "independent" of the Executive Branch, 49 U.S.C. § 49106(a)(2). Moreover, *Congress* has twice unilaterally restructured this "interstate compact" entity's Board of Directors,[3] and in 2014 unilaterally subjected this same entity to the investigatory authority of the Transportation Department's Inspector General.[4] Congress could do this *only* if MWAA exercises federal power.

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

a. MWAA hinges its opposition on the proposition that it is immune from separation-of-powers scrutiny because it is an "interstate compact entity." Opp. 13-18. In the interstate compact context, as others, the

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[1] *See* Brief of Amici Curiae American Highway Users Alliance et al. ("Am. Br.") 4 n.3.

[2] Metropolitan Washington Airports Act of 1986 ("Transfer Act"), codified at 49 U.S.C. §§ 49101, *et seq.*

[3] Am. Br. 12.

[4] *Id.*

"Constitution look[s] to the essence and substance of things, and not to mere form." *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 470 (1978) (internal quotation marks and citation omitted). Similarly, in the separation-of-powers context, this Court looks "beyond form to the substance of what Congress has done." *CFTC v. Schor*, 478 U.S. 833, 854 (1986) (internal quotation marks and citation omitted).

Accordingly, this Court in *MWAA v. Citizens for the Abatement of Aircraft Noise, Inc.* ("*CAAN*"), held that MWAA's interstate compact form did not "immunize from separation-of-powers review" MWAA's Board of Review. 501 U.S. 252, 266 (1991). Instead, the relevant question was whether the Board of Review exercised "sufficient federal power as an agent of Congress to mandate separation of powers scrutiny." *Id.* at 269. Here too, the relevant question is whether MWAA's Board of Directors "exercises sufficient federal power" to mandate separation-of-powers scrutiny.

b. MWAA argues that *CAAN*'s separation-of-powers analysis is inapplicable because Congress's abolition of the Board of Review extinguished Congress's power to control MWAA. Opp. 18. MWAA contends that the Board of Review's powers did not devolve on the MWAA Board of Directors, which is not the "agent of Congress." *Id.*

In the Transfer Act, Congress delegated to MWAA the power to "acquire, maintain, improve, operate, protect, and promote" the only two federally-owned airports and related facilities. 49 U.S.C. § 49106(b)(1)(A). The Transfer Act provided that

MWAA was to be "governed" by its Board of Directors. *Id.* § 49106(c).

The Transfer Act further made certain key management actions of the Board of Directors "subject to review" and disapproval by the Board of Review. *See CAAN*, 501 U.S. at 259-60 & n.5. Congress's subsequent elimination of the Board of Review simply eliminated its oversight, but did nothing to change the federal authority given to MWAA by the Transfer Act, now wielded at the unfettered discretion of the Board of Directors.

c. MWAA does *not* dispute that its Board of Directors, liberated from the veto power of the Board of Review, (i) "exercis[es] significant authority," and (ii) does so "pursuant to the laws of the United States." *See Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976).

Taking these points in reverse order, MWAA's authority is delegated by the Transfer Act. As the Justice Department explained in the second round of litigation after *CAAN*: "[T]he powers and authority of the Board of Review (*as well as the Airports Authority*) were, and still are, dictated by Congress." Brief for the Intervenor United States, *Hechinger v. MWAA*, 36 F.3d 97 (D.C. Cir. 1994) (No. 94-7036), 1994 WL 16776877, at *11 ("U.S. *Hechinger* Br.") (emphasis added).

Here, both the United States and MWAA have confirmed that the Transfer Act itself authorizes MWAA to fund the Metrorail extension to Dulles Airport by tolls exacted from Toll Road drivers. *See* Pet. 18-19; C.A.4 Appellee's Br. 54 n.26 (endorsing the district court's conclusion that the Transfer Act confers on MWAA "'the authority to set rates and raise revenue for the purposes of the airports'")

(quoting Pet. App. 53); C.A.4 J.A. 429 (transcript of MWAA's counsel, arguing that "MWAA is exercising federal authority as Judge Brinkema found in her ruling in the *Parkridge* case").

MWAA's Transfer Act authority to fund the "largest and one of the most complex transportation projects in the United States"[5] is manifestly "significant" for Article II purposes. *Cf. Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) (stating that officials who perform "important functions" and "exercise significant discretion" exercise "significant authority" for Appointments Clause purposes).

d. Because MWAA exercises significant authority delegated by the Transfer Act, its exercise of executive authority insulated from any presidential oversight violates Article II. *See* Pet. 20-25. This is so even though, unlike the now-stricken Board of Review, MWAA is not an agent of Congress, as such. The explanation of the United States in *Hechinger* of the restructured Board of Review's constitutional defect applies with equal force here:

> Since the Board of Review wields federal authority, its exercise of executive power violates the Appointments Clause. *This is true regardless of whether or not the Board acts an agent of Congress.*

U.S. *Hechinger* Br. *23 (emphasis added).

e. Rather than directly rebut petitioners' contention that MWAA exercises "significant authority pursuant to the laws of the United States," Pet. 18, MWAA dodges by recasting our claim as simply a

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[5] *See* Am. Br. 4 & n.2.

concern over an entity that merely "impacts federal interests," Opp. 15. Under that reformulation, MWAA then argues that our position has no limiting principle and would invalidate "countless other compact entities." *Id.* at 16.

Not true. MWAA made the identical argument to salvage the restructured Board of Review in *Hechinger*. The United States explained why MWAA's argument failed then, and must also fail now:

> [T]he Supreme Court has instructed that simply because Congress approves an interstate compact does *not* mean that officials of that compact are then exercising federal law. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398-400 (1979).

U.S. *Hechinger* Br. **26-27.

Here, Congress approved MWAA in 1959, years in advance of the compact's 1986 creation.[6] Rather than *approve* the compact, the Transfer Act transferred federal authority and property to MWAA, subject to Virginia and the District thereafter conforming MWAA to the dictates of the Transfer Act—which they promptly did. It is the Transfer Act—not Congress's advance approval of the MWAA compact—that invests MWAA with "significant authority pursuant to the laws of the United States." *See Buckley*, 424 U.S. at 125-26.

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[6] Act of Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333 (1959) (codified as amended at 49 U.S.C. § 40124). Petitioners withdraw their prior statement that the Transfer Act "approved" MWAA. *See* Pet. 3.

To our knowledge, there has never been an interstate compact entity like MWAA—one that Congress has invested with *significant* authority under federal law. MWAA certainly does not point to any historical example.[7]

MWAA is an outlier in a second striking respect. As our *amici* noted without any response by MWAA, *Congress* unilaterally restructured the composition of MWAA's Board of Directors twice, first in 1996 and then in 2011. *See* Am. Br. 12. In response, Virginia and the District dutifully modified their enabling legislation to conform MWAA to Congress's dictates. *Id.*

We are unaware of Congress dictating changes to the terms of *any* other previously-approved interstate compact—an assertion of authority by Congress that is constitutionally problematic *if* MWAA is a bona fide compact entity. *See, e.g.*, *Tobin v. United States*, 306 F.2d 270, 273 (D.C. Cir. 1962) (expressing doubt over Congress's power to dictate changes to a previously-approved compact).

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[7] Neither *Seattle Master Builders Ass'n (SMB) v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986), nor *Columbia River Gorge United-Protecting People & Property v. Yeutter*, 960 F.2d 110 (9th Cir. 1992), cited by MWAA, come close. In *SMB*, Congress merely approved the compact establishing a regional council, without either establishing the council or investing it with federal powers. Thus, the council members did "not serve pursuant to federal law." *SMB*, 786 F.2d at 1365. *Columbia River Gorge* is even farther afield. The compact established in that case required that its management plan for private and federal property be "approved by the Secretary of Agriculture"—an official accountable to the President—thus obviating any separation-of-powers concerns. *See* 960 F.2d at 112.

In 2014, Congress further underscored MWAA's outlier status when—in response to scandals at MWAA, *see* Am. Br. 9-10—it unilaterally subjected MWAA to the investigatory authority of the Transportation Department's Inspector General.[8] *See* Am. Br. 12-13. Under our constitutional structure, "this is not the way Congress would treat an interstate compact entity exercising state authority." *Id.* at 13.

MWAA's exercise of unchecked and unaccountable federal power is without parallel. Indeed, it is MWAA that offers this Court no principle limiting its claimed constitutional immunity. Under MWAA's theory, Congress could transfer the full authority of the Transportation Department to MWAA without running afoul of Article II. This Court's review is imperative.

II. MWAA's Tucker Act Arguments Are Both Wrong and Beside the Point.

MWAA asserts that there are "multiple reasons" why the Federal Circuit lacked Tucker Act jurisdiction, and that the Federal Circuit's jurisdictional determination therefore was correct and may not be reversed even if this Court were to disagree with the Federal Circuit's reasoning on the separation-of-powers issue. Opp. 22-27. These arguments are both wrong and beside the point.

a. MWAA contends that the Transfer Act's characterization that MWAA is "independent of . . . the United States Government (49 U.S.C. § 49106(a)(2))"

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[8] *See* Consolidated Appropriations Act of 2014, Div. L, Title I, Pub. L. No. 113-76, 128 Stat. 600 ("[T]he [Transportation Department's] Inspector General shall have the authority to audit and investigate [MWAA] . . . .").

disclaims Tucker Act jurisdiction over this case. Opp. 24. Congress can disclaim Tucker Act jurisdiction, but it must do so "unambiguously." *See Presault v. ICC*, 494 U.S. 1, 12 (1990). This is a high bar, not satisfied here, particularly in view of the Transfer Act's failure to even mention the Tucker Act. *See, e.g.*, *California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) (provision immunizing the United States from liability was insufficient to withdraw Tucker Act jurisdiction because "the Tucker Act . . . is not mentioned in the statute"); *Cardiosom, LLC v. United States,* 656 F.3d 1322, 1324 (Fed. Cir. 2011) (provision denying "an independent cause of action or right to administrative or judicial review" was not sufficiently unambiguous to withdraw Tucker Act jurisdiction).

The bar is even higher if the purported disclaimer itself violates the separation of powers. That is, if the Transfer Act provision purportedly disclaiming Tucker Act jurisdiction itself is deemed to be unconstitutional because it divests the Executive Branch of control over MWAA, that provision hardly can nevertheless be construed as an effective and constitutional disclaimer of Tucker Act jurisdiction. At bottom, MWAA's claim of immunity from Tucker Act jurisdiction invites this Court to follow the same circular path of the Federal Circuit, *i.e.*, to conclude that Tucker Act jurisdiction is absent *because of* the very attribute that makes the Transfer Act unconstitutional.

b. MWAA's argument that Tucker Act jurisdiction is lacking because petitioners' claim is not grounded on a "money-mandating" statute, Opp. 25-27, ignores a distinct category of Tucker Act monetary claims: where the plaintiff has paid money to

the Government and seeks return of all or a part of that sum. *See, e.g.*, *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004). Petitioners assert this type of claim, commonly referred to as an illegal exaction claim, which need not be based on a "money-mandating" statute. *See ECCO Plains, LLC v. United States*, 728 F.3d 1190, 1201-02 (10th Cir. 2013).

Petitioners' illegal exaction claim is grounded on the Due Process Clause. *See Casa de Cambio Comdiv SA v. United States*, 291 F.3d 1356, 1363 (Fed. Cir. 2002). MWAA argues that a due process claim cannot be brought under the Tucker Act. Opp. 26. That argument is misplaced; "there is no jurisdiction under the Tucker Act over a Due Process claim *unless it constitutes an illegal exaction*." *Casa de Cambio*, 291 F.3d at 1363 (emphasis added).[9]

c. Finally, even if Tucker Act jurisdiction is absent, that does not prevent petitioners from obtaining relief if this Court holds that the Transfer Act violates Article II. Petitioners also invoked federal question jurisdiction, Pet. 9, and the question presented encompasses restitutionary and injunctive relief. Pet. i. If this Court holds that the Transfer Act is unconstitutional, on remand the district court

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[9] There is no jurisdictional rule, as MWAA claims, Opp. 26 n.25, that the "United States" must be a named defendant in a Tucker Act case, and none of the cases cited by MWAA stand for that proposition. In many Tucker Act cases, the sole named defendant is a federal instrumentality, agency, or officer, and not the United States. *See, e.g.*, *Grant County Black Sands Irrigation Dist. v. U.S. Bureau of Reclamation*, 579 F.3d 1345 (Fed. Cir. 2009); *Jan's Helicopter Serv., Inc. v. FAA,* 525 F.3d 1299 (Fed. Cir. 2008).

could—*if* Tucker Act jurisdiction is absent—award petitioners full relief under its federal question jurisdiction. *See Bowen v. Massachusetts*, 487 U.S. 879, 893-95, 901 (1988); *Katz v. Cisneros*, 16 F.3d 1204, 1208-09 (Fed. Cir. 1994).

Thus, MWAA's assertion that the purported absence of Tucker Act jurisdiction makes petitioners' separation-of-powers claim "unavailing," Opp. 22, is beside the point in view of the indisputable existence of federal question jurisdiction. Indeed, if this Court reverses the Federal Circuit and holds that the Transfer Act violates Article II, it need not necessarily address the Federal Circuit's jurisdictional determination. This Court could remand for further proceedings in the district court on petitioners' requested relief, including the Tucker Act claim for monetary relief, in light of the Court's decision on the separation-of-powers issue.

III. This Case Is a Sound Vehicle.

MWAA asserts that this case is a "poor vehicle" to address petitioners' separation-of-powers claim because petitioners supposedly "abandoned" that argument. Opp. 27. According to MWAA, thanks to petitioners' "erratic presentation," *id.* at 28, the Fourth Circuit did not address the issue, and the Federal Circuit did not give it a sufficiently "particularized analysis" cast in terms of MWAA's preferred argument. *Id.* MWAA's characterization reflects neither the procedural path of this case nor the law governing that path.

Petitioners pled their separation-of-powers claim at the outset, *see* Compl. ¶¶137, 139-40, and the district court decided it, Pet. App. 55-56. Because district court jurisdiction was based in part on the Little

Tucker Act, 28 U.S.C. § 1346(a)(2), petitioners appealed to the Federal Circuit as required by 28 U.S.C. § 1295(a)(2).

After full briefing and argument on the separation-of-powers issue, the Federal Circuit accepted MWAA's argument that, as an interstate compact entity, MWAA is not subject to separation-of-powers scrutiny: "[W]e conclude that MWAA is not a federal instrumentality *for the purpose of Petitioners' claims*." Pet. App. 25 (emphasis added). That *merits* determination on the separation-of-powers issue in turn destroyed Tucker Act jurisdiction: "Since MWAA is not a federal instrumentality, . . . this Court does not have jurisdiction over Petitioners' Little Tucker Act claims." *Id.*

The Federal Circuit's ruling on petitioners' separation-of-powers claim was the law of the case. Under that doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). In the Fourth Circuit, MWAA expressly agreed, arguing (i) that petitioners' separation-of-powers challenge "*was decided by the Federal Circuit* after full briefing," and (ii) that the Federal Circuit's decision "should continue to govern the same issues in subsequent stages in the same case." C.A.4 Appellee's Objection to Supplemental Reply Brief of Appellants in Resp. to Amicus Curiae Br. of United States **1-2 n.1, 3 (emphasis added). Indeed, this Court in *Christianson* cautioned: "the policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordi-

nate court threaten to send litigants into a vicious circle of litigation." 486 U.S. at 816.

The Federal Circuit's interlocutory decision on petitioners' separation-of-powers claim was therefore law of the case in the Fourth Circuit. That decision is now open to this Court's adjudication, as this Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *See Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001); S. SHAPIRO ET AL., SUPREME COURT PRACTICE § 2.3, at 84 (10th ed. 2013) ("Supreme Court review of a final judgment opens up the entire case . . . .").

Because the law of the case doctrine "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues," *Christianson*, 486 U.S. at 816 (citation omitted), petitioners were not required to rebrief their separation-of-powers claim to preserve it for this Court's review. Petitioners advised the Fourth Circuit that, while they were not rebriefing the separation-of-powers issue because the Federal Circuit's decision was law of the case, they were *not* "abandon[ing] [it] for possible Supreme Court review in the future." C.A.4 Appellants' Br. *2 n.2 (4th Cir. 2013). The issue is therefore preserved for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

December 2, 2014 Respectfully submitted,

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