No. 13-1559

In the Supreme Court of the United States

JOHN B. CORR, ET AL., PETITIONERS

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Metropolitan Washington Airports Authority (MWAA) was created by legislative acts of Virginia and the District of Columbia to which Congress consented. MWAA leases from the United States two airports and associated facilities, including an access corridor with highways and space for mass transit.

The question presented is whether MWAA should be considered a federal entity whose composition must satisfy federal separation-of-powers principles.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. In 1940, Congress authorized the construction of what is now known as Reagan National Airport. *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 255 (1991) (*CAAN*). Ten years later, it provided for the acquisition of land for Dulles International Airport and a broad corridor leading to Dulles, which would contain an access highway with a median strip reserved for a future mass-transit line. Pet. App. 3, 29-30, 33. Until 1987, the federal government owned and operated both airports and their related facilities. *CAAN*, 501 U.S. at

255. But it had long since become clear that the Washington airports' anomalous status as "the only two major commercial airports owned by the federal government" (*id.* at 256) was preventing them from being developed and operated with the support of local and regional governments (and regard for local and regional concerns) that was available to other transportation hubs situated near state boundaries, such as the three major airports operated in and around New York City by the Port Authority of New York and New Jersey. See 131 Cong. Rec. 9608 (1985). In 1984, an advisory commission recommended that a "regional authority" that would operate the Washington airports be "created by a congressionally approved compact between Virginia and the District [of Columbia]." *CAAN*, 501 U.S. at 257.

In 1985, Virginia and the District enacted compact legislation, creating the Metropolitan Washington Airports Authority (MWAA). Pet. App. 31-32. In the Metropolitan Washington Airports Authority Act of 1986, 49 U.S.C. 49101 *et seq.* (known as the "Transfer Act"), Congress authorized the transfer of both airports and their related facilities (including the Dulles access corridor) to MWAA pursuant to a long-term lease, which went into effect in 1987. 49 U.S.C. 49102(a); *CAAN*, 501 U.S. at 261. MWAA is "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction * * * conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia."[1] As currently constituted, MWAA's Board of Directors has 17 members, 7 of whom are appointed by

[1] Va. Code Ann. § 5.1-153 (2010); see D.C. Code § 9-902 (LexisNexis 2001); 49 U.S.C. 49106(a)(1)(A).

the Governor of Virginia, 4 by the Mayor of the District, 3 by the Governor of Maryland, and 3 by the President with the advice and consent of the Senate.[2]

b. This case pertains to MWAA's operation of the Dulles access corridor. MWAA's original lease from the federal government was encumbered by an easement that Virginia had obtained from the federal government to construct and operate the Dulles Toll Road, which provides for non-airport traffic within the corridor. Pet. App. 3-5, 30-31, 34. Virginia continued to operate the toll road until 2006. *Id.* at 36. In the meantime, the Virginia General Assembly repeatedly authorized using toll-road revenues to fund improvements within the corridor, including mass transit. *Id.* at 34-36.

In 2006, Virginia and MWAA agreed that Virginia would transfer to MWAA control over the Dulles Toll Road and that MWAA would construct portions of the planned extension of Metrorail, the local mass-transit system, through the Dulles corridor. Pet. App. 6, 36-37. In 2008, the Secretary of Transportation certified that MWAA's operation of the toll road was a valid "[a]irport [p]urpose" within the meaning of MWAA's lease and that MWAA could use toll-road revenues to pay its share of Metrorail construction costs. *Id.* at 38; see 49 U.S.C. 49104(a)(2)(A).

2. Petitioners are two Virginia residents who use the Dulles Toll Road. Pet. App. 27-28. In this putative class action, filed in 2011 in the Eastern District of Virginia, they challenge MWAA's collection of tolls for use in funding the extension of Metrorail in the Dulles corridor. *Ibid.* Their complaint alleges causes of action

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[2] Va. Code § 5.1-155(A) (Supp. 2014); D.C. Code § 9-904(a) (LexisNexis 2014); 49 U.S.C. 49106(c)(1).

under the Fifth and Fourteenth Amendment Due Process Clauses, 42 U.S.C. 1983, the Article IV Privileges and Immunities Clause, the Republican Guarantee Clause, and provisions of the Virginia Constitution governing the exercise of legislative and tax powers. Br. in Opp. App. 17a-27a.

3. The district court granted respondent's motion to dismiss. Pet. App. 27-60. The court held that petitioners have Article III standing but lack prudential standing because their grievance is shared by a large class of citizens. *Id.* at 43-47. In the alternative, it held that each of petitioners' various federal and state constitutional claims fails on the merits. *Id.* at 48-60. In the course of discussing the Republican Guarantee Clause, the court rejected petitioners' contention "that MWAA's governance structure somehow interferes with the President's authority under Article II to ensure that the laws are faithfully executed or violates the Appointments Clause." *Id.* at 55. Although the court recognized that the President may appoint (and remove) only a small minority of MWAA's Board of Directors, it concluded that, under "the country's long history of interstate compacts," it is "settled * * * 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." *Id.* at 55-56 (citing *Seattle Master Builders Ass'n* v. *Pacific Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987), and *Columbia Gorge United–Protecting People & Prop.* v. *Yeutter,* No. 88-1319, 1990 WL 357613, at *12 (D. Or. May 23, 1990), aff'd, 960 F.2d 110 (9th Cir.), cert. denied, 506 U.S. 863 (1992)).

4. Petitioners appealed to the Federal Circuit, contending that their claims against MWAA are claims "against the United States, not exceeding $10,000," which would fall within that court's appellate jurisdiction under the Little Tucker Act, 28 U.S.C. 1346(a)(2). See Pet. App. 22; 28 U.S.C. 1295(a)(2).

The Federal Circuit held that it lacked appellate jurisdiction because MWAA is not "a federal instrumentality for purposes of [petitioners'] constitutional claims." Pet. App. 25. The court discussed (*id.* at 23-25) factors it drew from *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that Amtrak "is an agency or instrumentality of the United States for purposes of individual rights guaranteed against the Government by the Constitution," *id.* at 394. The court determined that, although MWAA "may partly owe its existence to an act of Congress, [it] was in large part created by, and exercises the authority of, Virginia and the District of Columbia." Pet. App. 23. Moreover, the court found that, although the federal government has "'a continuing but limited interest'" in the operation of the Washington airports, they also serve important "regional and state interests." *Id.* at 24 (quoting 49 U.S.C. 49101(3)). Finally, the court concluded that the presence on MWAA's Board of Directors of only a "small minority" of federal appointees further confirms that it is not an instrumentality of the federal government. *Id.* at 24-25.

Having concluded that it lacked jurisdiction, the Federal Circuit transferred petitioners' appeal to the Fourth Circuit, which could entertain the appeal on the basis of federal-question jurisdiction. Pet. App. 25-26.

5. In the Fourth Circuit, petitioners challenged the district court's dismissal on prudential-standing

grounds and contended on the merits that MWAA's toll increases were taxes prohibited by the Virginia Constitution. Pet. C.A.4 Br. 3-4, 21-49. Petitioners did not present a separation-of-powers argument; instead, they asserted in a footnote that the Federal Circuit's jurisdictional holding had made it "law of the case" that MWAA is not a "federal instrumentality." *Id.* at 2 n.1.

After the parties' briefing was completed, the United States filed an amicus brief, arguing that MWAA's operation of the toll road and use of toll-road revenues to construct a mass-transit line to Dulles Airport constitute an "[a]irport [p]urpose" permitted under the Transfer Act and under the lease. United States C.A.4 Amicus Br. 1-2, 10-11 & n.2. In response to petitioners' contention that MWAA toll increases violated Virginia constitutional law, the United States observed that MWAA was created by an interstate compact approved by Congress, which is "a law of the United States" that preempts any contrary state law. *Id.* at 12-14 (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998), in turn quoting *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981)).

Petitioners filed a supplemental reply brief, contending that the United States' amicus brief had revived their separation-of-powers challenge by purportedly indicating that "MWAA is indeed a federal instrumentality" because its operations comply with the terms of its lease and the Transfer Act. Pet. C.A.4 Supp. Reply Br. 4. Respondent contended in part that petitioners had waived any separation-of-powers challenge by failing to include it in their opening brief, Resp. C.A.4 Objection to Supp. Reply Br. 2—a position with which counsel for the United States agreed at oral argument, see Br. in Opp. App. 29a-30a.

In its opinion, the Fourth Circuit did not address a separation-of-powers question (or the preemption argument that the United States had made). Pet. App. 1-15. After holding that petitioners had standing, *id.* at 9-10, the court concluded that the tolls "are user fees, not taxes, under Virginia law," which can be "used to fund the Metrorail expansion," and MWAA therefore does not violate due process by exercising any tax power in violation of the Virginia Constitution, *id.* at 15.

DISCUSSION

Petitioners contend that the Metropolitan Washington Airports Authority is, for separation-of-powers purposes, a federal entity that exercises executive power pursuant to federal statutes (Pet. 15-20) and that the President therefore lacks adequate control over MWAA's Board of Directors, the great majority of whom are appointed by the Governors of Virginia and Maryland and the Mayor of the District of Columbia (Pet. 20-25). Neither court of appeals below squarely addressed that constitutional question, which alone provides sufficient reason to deny further review. Even so, the district court correctly rejected petitioners' fundamental premise and held that MWAA is not a federal entity. Notwithstanding petitioners' repeated assertions (Pet. ii, 18-20, 22, 24), the United States has not stated otherwise, and it maintains that MWAA's structure presents no separation-of-powers concerns. There is no disagreement in the courts of appeals concerning whether public bodies created by compacts are federal entities for separation-of-powers purposes—a question that has rarely arisen even in that generalized form. And the concededly *sui generis* nature of the compact at issue here underscores that the case presents no issues of significance for this Court's review.

A. Petitioners' Separation-Of-Powers Objections To The Composition Of MWAA's Board Of Directors Lack Merit

Although petitioners formally present two questions in this Court (Pet. ii, 15-20, 20-25), the current dispute pertains to only the threshold question: whether MWAA should be considered a federal governmental entity for separation-of-powers purposes. As the district court concluded, it should not. Pet. App. 55-56.[3]

Petitioners do not contend that the compact that created MWAA is invalid because its parties were Virginia and the District of Columbia (rather than two States). See Br. in Opp. App. 7a (Compl. ¶ 15) (describing MWAA as having been "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"). Nor do petitioners contend that MWAA was imbued with *federal* power by virtue of the District of Columbia's key role in its creation. This case therefore comes to the Court on the assumption—which we believe is correct, see United States C.A.4 Amicus Br. 13 n.3—that the compact is materially similar to compacts between two or more States to which Congress has consented under the Compact Clause (U.S. Const. Art. I, § 10, Cl. 3). Cf. *Metropolitan Wash. Airports Auth.* v. *Citizens for the*

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[3] If MWAA were found to be a federal governmental entity, its current structure would prevent it from performing functions that must be subject to the President's control. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-510 (2010) (severing good-cause-removal restriction for board members of federal regulatory entity); *Buckley* v. *Valeo*, 424 U.S. 1, 137-143 (1976) (per curiam) (invalidating, on Appointments Clause grounds, FEC's ability to perform some of its statutory functions).

Abatement of Aircraft Noise, Inc., 501 U.S. 252, 266 (1991) (*CAAN*) (describing MWAA as being "created by state enactments").[4]

Petitioners nevertheless contend (Pet. 23-24) that MWAA materially differs from entities created by "run-of-the[-]mill" compacts and should be considered a federal governmental entity for purposes of separation-of-powers analysis. That conclusion lacks merit.

1. Petitioners principally contend (Pet. 16-18; Cert. Reply Br. 2-3) that MWAA exercises federal power because this Court's decision in *CAAN* held that the now-repealed Board of Review—which empowered nine Members of Congress to veto many significant decisions of MWAA's Board of Directors—exercised federal power. 501 U.S. at 269. But MWAA's current composition is entirely different from that of the former Board of Review, which comprised only Members of Congress. Indeed, *CAAN* explained that the "[m]ost significant" consideration in its analysis was that "membership on the Board of Review [was] limited to federal officials." *Id.* at 266-267. That is not true of MWAA's current Board of Directors. Moreover, the Court strongly implied that MWAA itself, when considered apart from the Board of Review, was *not* federal.

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[4] The Court has recognized that the District of Columbia's own laws are "equivalent to those enacted by state and local governments." *Key* v. *Doyle*, 434 U.S. 59, 68 n.13 (1977). The Compact Clause, which is phrased only as a *limitation* on agreements between States, does not preclude the development of other cooperative arrangements between and among the federal government, States, territories, and the District. The District has entered into many compacts with two or more States. See Nat'l Ctr. for Interstate Compacts, Council of State Governments, *D.C. Compacts*, http://apps.csg.org/ncic/State.aspx?id=51 (last visited May 22, 2015) (nonexhaustive list of 16 compacts).

Thus, it quoted legislative history to the effect that Congress sought to avoid "losing control over" the Washington airports "to a local authority." *Id.* at 268 (quoting 132 Cong. Rec. 32,143 (1986) (statement of Rep. Hammerschmidt)). And the Court concluded that Congress had impermissibly "imposed its will on *the regional authority* created by the District of Columbia and the Commonwealth of Virginia." *Id.* at 276 (emphasis added). Although it knew that the President could appoint only a small minority of MWAA's Board of Directors, *id.* at 257, the Court never indicated that MWAA, as opposed to the Board of Review, posed its own separation-of-powers problems.

Petitioners suggest (Pet. 11, 17, 22) that it is a *non sequitur* to rest MWAA's non-federal status on the fact that the President appoints only a small minority (3 of 17) of its current Board of Directors. But the President's power to appoint, directly, eight of the nine members of Amtrak's Board of Directors was a substantial factor in the Court's recent determination that Amtrak is sufficiently subject to "federal control and supervision" that it is a governmental entity for separation-of-powers purposes. *Department of Transp.* v. *Association of Am. R.R.*, 135 S. Ct. 1225, 1231, 1233 (2015) (*AAR*). The obverse situation is plainly relevant when evaluating MWAA's status. Nor does the presence of *some* presidential appointees on MWAA's Board create a toehold requiring the other members to be similarly appointed. Direct (but minority) federal representation on compact entities is well established. See, *e.g.*, *West Va. ex rel. Dyer* v. *Sims*, 341 U.S. 22, 24, 27-28 (1951) (noting presidential appointment of 3 of 27 members of Ohio River Valley Water Sanitation Commission); Br. in Opp. 15-16 (identifying other compacts).

2. Similarly, the presence of a compact approved by Congress does not establish a sufficiently overriding federal interest to make MWAA a federal entity. As respondent explains (Br. in Opp. 16-17), all such interstate compacts reflect not only a regional interest but also "the national interest." *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (quoting *West Va. ex rel. Dyer*, 341 U.S. at 27). That is why congressional consent gives a compact the status of federal law that preempts any conflicting state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2130 n.8 (2013). Yet no court has found that such considerations are sufficient to transmute a public body created by a compact—even one with some direct federal representation—into a federal entity or otherwise render it subject to federal separation-of-powers limitations.

3. Petitioners further assert (Pet. 23-24, 27; Cert. Reply Br. 1) that MWAA's power must be federal in nature because it is able to manage federal facilities in service of federal interests. While the Washington airports and associated facilities are important to the federal government, Congress has expressly recognized that the federal government's "continuing but limited interest in the operation" of the airports, 49 U.S.C. 49101(3), can be satisfied "through a lease mechanism which provides for local control and operation," 49 U.S.C. 49101(10), by an "authority with representation from local jurisdictions" that makes MWAA "similar to authorities at all [other] major airports in the United States," 49 U.S.C. 49101(8). Moreover, the federal government's ability to set the terms on which it leases its property, and to supervise the property's management through the mechanism of the lease, does not transform the lessee into a federal agency that

must be under direct presidential control. Cf. *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358, 362-363 (1939) (explaining that private corporation's "lease from the Secretary of the Interior did not convert it into [a federal] instrumentality" exempt from state taxes).

4. Finally, petitioners note (Cert. Reply Br. 1, 6-7) that Congress initiated changes to the compact here (including in response to decisions invalidating the former Board of Review) and has recently given the Department of Transportation's Inspector General "authority to audit and investigate" MWAA.[5] In petitioners' view, Congress could not initiate compact amendments or subject MWAA to federal investigation unless MWAA were exercising federal power. But "compacts are construed as contracts" and may be amended by the contracting parties' unanimous agreement. *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130; see *id.* at 2133 & n.12 (citing two "Amended" compacts). It is well established that Congress's consent to a compact may come either before or after the compact parties have acted, see *Cuyler* v. *Adams*, 449 U.S. 433, 441 (1981), and there is no reason that option should vanish when the question involves an amendment rather than a new agreement.[6]

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[5] Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 600.

[6] The D.C. Circuit's hesitation in *Tobin* v. *United States*, 306 F.2d 270, 273, cert. denied, 371 U.S. 902 (1962), concerned whether Congress's consent to a compact can reserve a right to make *unilateral* amendments or alterations. Here, Virginia and the District agreed to all amendments, as petitioners' amici acknowledge. See Am. Highway Users Alliance Amicus Br. 12 & nn.11-12, 14.

Nor is it unusual for a federal inspector general to investigate a state, local, or even private entity that has a contractual relationship with the federal government. Thus, the Department of Justice's Inspector General recently audited a private corporation's operation and management of a halfway house under a contract with the Bureau of Prisons.[7] And the Department of Transportation's Inspector General has—in response to specific congressional requests—previously investigated such matters as whether the Commonwealth of Massachusetts appropriately conducted safety reviews and remediation work in the Boston Central Artery/Tunnel Project[8] and whether the City of Los Angeles improperly diverted airport revenues to its general fund.[9] Congress's assumption that MWAA may be subjected to similar oversight reflects only that MWAA holds a long-term lease to operate federally owned facilities, not that it is any more a part of the federal government than are the Massachusetts Department of Transportation and the Los Angeles Department of Airports.

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[7] *Audit Division GR-70-15-005: Audit of the Federal Bureau of Prisons Residential Reentry Center in Brooklyn, New York Contract No. DJB200055* (Mar. 2015), https://oig.justice.gov/reports/2015/g7015005.pdf.

[8] *Report No. MH-2007-039: Audit of the Independence of Central Artery/Tunnel Project Inspection Contractors* 2 (Mar. 27, 2007), https://www.oig.dot.gov/sites/default/files/MH2007039Final.pdf; National Transportation Safety Board Reauthorization Act of 2006, Pub. L. No. 109-443, § 11(a), 120 Stat. 3302.

[9] *Report No. R9-FA-7-005: Management Advisory Memorandum on City of Los Angeles' Department of Airports Revenue Retention* 1-2 (Mar. 7. 1997), https://www.oig.dot.gov/sites/default/files/r9fa7005.pdf.

B. The United States Did Not Take The Legal Positions That Petitioners Attribute To It

Petitioners repeatedly assert (Pet. ii, 14, 19-20) that the United States has "implicitly" conceded that MWAA wields federal power and must satisfy separation-of-powers scrutiny. But the United States has not taken the position that MWAA—as opposed to its now-abolished Board of Review—is constitutionally infirm.

1. Petitioners assert (Pet. 19) that the United States' amicus brief in the Fourth Circuit in this case "confirmed that MWAA exercises *federal* power for purposes of petitioners' separation-of-powers claim." The basis for that assertion is opaque. Petitioners identify (*ibid.*) statements that MWAA's toll increases to fund the Metrorail expansion were consistent with what MWAA is authorized to do under the lease and the Transfer Act, and that, under well-settled principles applicable to *all* congressionally approved compacts, the terms of the compact here would preempt any contrary state law. See *Tarrant Reg'l Water Dist.*, 133 S. Ct. at 2130 & n.8. But neither of those propositions suggests that MWAA is executing federal statutory law rather than the powers conferred on it by Virginia, the District, and the terms of its lease.[10]

2. Petitioners also cite (Pet. 19-20) a statement made by counsel for the United States at oral argu-

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[10] Cf. 49 U.S.C. 49106(a)(1)(A) (stating that MWAA is a "public body" with "the powers and jurisdiction" "conferred on it jointly by the legislative authority of Virginia and the District of Columbia"); *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 399-400 (1979) (holding that, for purposes of 42 U.S.C. 1983, the acts of a regional entity created by an interstate compact that Congress must approve are still actions taken under color of state law).

ment in the Fourth Circuit in this case. After calling petitioners' separation-of-powers argument "insubstantial" and noting that it had been waived in the court of appeals, counsel briefly addressed the argument's lack of merit. Br. in Opp. App. 29a-30a. Counsel noted that "[a]irport property is leased to [MWAA]" and "must be used for airport purposes." *Id.* at 30a. The Secretary of Transportation thus retains authority to "demand compliance" with the lease, "terminate the lease," or "bring actions to enforce compliance of the lease," and that such authority "give[s] the federal government ample control, ultimate control for purposes of the Article [II] argument." *Id.* at 30a. Counsel did not state that MWAA has authority to execute federal law. Counsel was discussing the control that MWAA, as a tenant and operator, has over federal property. Indeed, that was the concern that petitioners' counsel immediately invoked in rebuttal: that MWAA "is managing Federal property." *Id.* at 31a. Thus, to the extent that MWAA has the power to manage federal property in its capacity as a lessee, the government has retained "important controls" as the lessor, which ensure that it has not abdicated or delegated execution of federal law. *Id.* at 30a.

3. Finally, petitioners invoke (Cert. Reply Br. 3) the United States' brief in *Hechinger* v. *Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 513 U.S. 1126 (1995), which addressed post-*CAAN* modifications to the Board of Review. *Id.* at 98-99. In its *Hechinger* brief, the United States contended that those changes were insufficient to cure the constitutional problem, in large part because Congress had effectively retained *de facto* control over the restructured Board of Review (as

shown by the fact that eight of its members were current or former Members of Congress). Br. for Intervenor United States, *Hechinger*, *supra*, 1994 WL 16776877, at *12-*14 (No. 94-7036) (U.S. *Hechinger* Br.). The D.C. Circuit agreed, holding that the restructured Board of Review "remains a congressional agent" and "exercises power in violation of the doctrine of the separation of powers." 36 F.3d at 105.

Petitioners highlight (Cert. Reply Br. 3) a sentence in the United States' *Hechinger* brief stating that "the powers and authority of the Board of Review (as well as [MWAA]) were, and still are, dictated by Congress." U.S. *Hechinger* Br. *12. In context, that parenthetical reference to Congress's ability to dictate the powers of MWAA appears to have been to the Board of Review's revised powers to make recommendations to Congress, which were still "equal to a veto over [MWAA's] proposed action[s]." *Id.* at *3; see *id.* at *9. To the extent that it could instead be read as referring to MWAA's powers in its own right, it simply recognized that the powers and authorities conferred by Virginia and the District of Columbia had complied with the conditions of Congress's authorization of MWAA's lease. But that likewise would not suggest that MWAA itself was a federal entity. Although the United States' brief repeatedly described the *Board of Review* as exercising "federal power" or "federal authority" (*id.* at *3, *7, *10, *14, *15, *23, *26, *27), it never said the same thing about MWAA. If petitioners' reading were correct, then the method for appointing the Board of Directors would have been a clearer violation of the Appointments Clause than that for the restructured Board of Review. And others evidently did not draw petitioners' inference from the brief, because the pro-

spect of subjecting MWAA's own actions to such constitutional challenge failed to precipitate any comment in MWAA's reply brief or in the D.C. Circuit's decision.

C. There Is No Circuit Conflict Concerning The Federal-Entity Status Of Public Bodies Established By Compacts

There is no disagreement in the courts of appeals concerning the federal-entity status of MWAA in particular or even of other public bodies established by interstate compacts.

1. As an initial matter, the decisions below could not contribute to any circuit conflict on separation-of-powers issues because neither court of appeals squarely addressed the federal-entity status of MWAA for those purposes.

a. The Federal Circuit held that it lacked jurisdiction under the Little Tucker Act because a claim against MWAA should not be considered one "against the United States" under 28 U.S.C. 1346(a)(2). See Pet. App. 22. The court considered factors it drew from this Court's First Amendment decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and its jurisdictional holding was based on its determination that "MWAA is not a federal instrumentality for the purposes of [p]etitioners' claims." Pet. App. 23-25. But even if that analysis could be read to suggest an answer to the separation-of-powers question, the court did not actually decide the merits of petitioners' constitutional argument. Nor could it have. After answering the statutory question governing its jurisdiction, "the only function remaining to the court [was] announcing" that it lacked jurisdiction, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

(citation omitted), and transferring the appeal to the Fourth Circuit. Pet. App. 25-26.

The analysis of MWAA's federal-entity status for statutory purposes is, in fact, markedly different from the constitutional analysis.[11] Thus, petitioners themselves concede (Cert. Reply Br. 10) that, if this Court were to grant review, it could "hold[] that the Transfer Act violates Article II" and then remand for further proceedings without even "address[ing] the Federal Circuit's jurisdictional determination." In other words, they admit that the question presented is distinct from the jurisdictional issue before the Federal Circuit.

b. Nor did the Fourth Circuit decide the separation-of-powers question. Petitioners do not suggest otherwise, though they do contend (Pet. 14; Cert. Reply Br. 12) that the Fourth Circuit was prevented from reaching the question by the law-of-the-case doctrine. That conclusion is highly doubtful, given the differences between the statutory and constitutional analyses of MWAA's status. See, *e.g.*, *Cobell* v. *Salazar*, 679 F.3d 909, 917 (D.C. Cir.) (finding no law of the case where "the court's holding arose in a different context at an

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[11] As respondent notes (Br. in Opp. 24), analyzing whether a claim against MWAA is one against the United States for Little Tucker Act purposes is straightforward, because Congress has expressly stated that MWAA is "independent of * * * the United States Government." 49 U.S.C. 49106(a)(2); see *AAR*, 135 S. Ct. at 1231 (noting that "Congressional pronouncements" are "instructive as to matters within Congress' authority to address"); *Free Enter. Fund*, 561 U.S. at 485-486 (treating Public Company Accounting Oversight Board as part of the federal government "for constitutional purposes" even though its "members are not Government officials for statutory purposes"); *Lebron*, 513 U.S. at 392 (distinguishing between statutory and constitutional analyses of Amtrak's federal-entity status).

earlier stage of the litigation and the statements with regard to its holding spoke to a different issue"), cert. denied, 133 S. Ct. 543 (2012); *Bouchet* v. *National Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984) (Scalia, J.) ("only when an issue not expressly addressed must have been decided by 'necessary implication' will the [law-of-the-case] doctrine be applied"). The Fourth Circuit's silence about the question could easily be attributed to a determination that petitioners waived the constitutional challenge in that court, as respondent and the United States had urged. See p. 6, *supra*. And, unless petitioners prevail in their effort to use the law-of-the-case doctrine as a justification, that waiver should prevent them from raising the separation-of-powers contention anew in this Court.

c. Accordingly, the only court below to address the separation-of-powers question petitioners now raise was the district court, which disposed of it in a single paragraph. Pet. App. 55-56. The absence of a court of appeals decision is sufficient reason to deny certiorari. See Sup. Ct. R. 10(a). As the Court often observes, it does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries special force in the context of constitutional questions that have gone unaddressed in the court of appeals. See, *e.g.*, *ibid.*; *AAR*, 135 S. Ct. at 1234; *Bond* v. *United States*, 131 S. Ct. 2360, 2367 (2011); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

2. Even if a decision on the merits of the current question presented could be attributed to the Federal Circuit or the Fourth Circuit, there would still be no conflict in the courts of appeals concerning whether a

public body established by a compact is a federal entity for separation-of-power purposes. The only court of appeals to have considered such a question rejected the proposition that the Appointments Clause required members of an interstate-compact council to be appointed by the President rather than the governors of four participating States. See *Seattle Master Builders Ass'n* v. *Pacific Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1364-1366 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987). The Ninth Circuit explained that, "[a]s with any compact, congressional consent did not result in the creation but only authorized the creation of the compact organization and the appointment of its officials." *Id.* at 1365. The appointments were therefore derived from state power, and council members performed their "duties under a compact, rather than 'federal law.'" *Ibid.*

Petitioners do not contend that *Seattle Master Builders* was wrong on its terms or that it conflicts with the decisions below. Instead, they seek (Cert. Reply Br. 6 & n.7) to distinguish it on the ground that MWAA—unlike "any historical example," including the council in *Seattle Master Builders*—has, in their view, been "invest[ed]" with "federal powers" by Congress. As explained above, however, MWAA does not exercise federal powers; it exercises authority conferred on it by Virginia and the District of Columbia and operates the airport facilities (including the Dulles corridor) as a lessee of the United States.[12]

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[12] In opposing certiorari in *Seattle Master Builders*, the United States acknowledged that some of the powers exercised by the council there presented "novel and difficult constitutional questions." U.S. Br. in Opp. at 15, *Seattle Master Builders*, *supra* (No. 86-629). The United States' concerns, however, were rooted in "a

D. The Question Presented Does Not Otherwise Warrant This Court's Review

Notwithstanding the absence of any disagreement in the courts of appeals concerning the federal status of compact entities, petitioners contend (Pet. 27-28) that the Court should grant review to prevent Congress from rushing to foist "variations of the MWAA model" on "our body politic." But that threat rings hollow.

Petitioners themselves characterize MWAA as "truly an unprecedented outlier." Pet. 24; see Cert. Reply Br. 6 ("there has never been an interstate compact entity like MWAA"). The circumstances leading to MWAA's creation are unlikely to recur, since they involved the only commercial airports in the country that are owned by the federal government. See p. 2, *supra*. If petitioners' fears were well founded, Congress would presumably have found occasion to adopt a similar solution at some point during the nearly three decades after MWAA was formed and after the Ninth Circuit concluded in *Seattle Master Builders* that the members of an interstate-compact entity need not be appointed in conformity with Article II.

In any event, the likelihood that Congress will read the decisions below as "a prescription" for "circumvent[ing] * * * separation-of-powers requirements" (Pet. 26) is especially fanciful given the failure of either court of appeals even to address the separation-of-powers question. Furthermore, the case would not

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number of attributes" that "distinguish[ed] the Northwest Power Act from the typical interstate compact," including the council's ability to "veto the actions of a federal agency, [the Bonneville Power Administration]," and the ability of the Secretary of Energy to appoint the council's members if the States failed to do so. *Id.* at 14-15. Here, MWAA does not share those attributes.

inspire Congress to believe it could vest in a compact entity regulatory powers that would be beyond what States could grant, as petitioners do not challenge the Fourth Circuit's well-reasoned conclusion that MWAA's decision to increase tolls was entirely consistent with the "fundraising powers the General Assembly could have delegated to the MWAA under Virginia law." Pet. App. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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