No. 19-735

In The
Supreme Court of the United States

WILLIAM TONG, in his Official Capacity as Attorney General for the State of Connecticut,

Petitioner,

v.

TWEED-NEW HAVEN AIRPORT AUTHORITY, CITY OF NEW HAVEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM TONG
Attorney General
State of Connecticut
CLARE E. KINDALL*
Solicitor General
ANDREW S. GRAHAM
Assistant Attorney General

165 Capitol Avenue
5th Floor
Hartford, CT 06106
(860) 808-5261
clare.kindall@ct.gov
**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTRODUCTION

Respondents concede that a circuit split exists on the issue of whether a political subdivision can sue its creator state under the Supremacy Clause. The Ninth Circuit has answered that question no, while the Fifth and Tenth Circuits have answered that question in the affirmative. *See* Brief in Opposition ("BIO") 11-12. Additional circuit holdings cited by Respondents (BIO 12-13) have agreed in full or in part with the holding of the Ninth Circuit, which further highlights the nationwide conflict and the need for this Court's review.

As the Petition explained, the Second Circuit decision on political subdivision "standing"—and those of the Fifth and Tenth Circuits—contravene this Court's precedent. Petition ("Pet.") 22-28. This Court has expressly held that political subdivisions are "creature[s] of the state exercising and holding powers and privileges subject to the sovereign will" and therefore may not maintain suits under the Constitution against their States. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). In *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933), this Court held that a political subdivision "has no privileges or immunities under the Federal Constitution, which it may invoke in opposition to the will of its creator." *See also Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009). Respondents' principal response is to insist that political subdivisions have Article III standing under cases such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). BIO 9-10, 16-18. That misses the point. The Court used the term

"standing" to effectuate a federalism rule, not a rule about whether political subdivisions were injured in fact or whether their injuries could be remedied by a lawsuit. Respondents never explain why that longstanding federalism rule does not apply with full force to claims under the Supremacy Clause.

The damage to federalism wrought by the Second Circuit's decision is significant. Enlisting political subdivisions to enforce federal law against their own States "turn[s] the State against itself." Pet. 21 (*quoting Alden v. Maine*, 527 U.S. 706, 749 (1999)). As Judge Kozinski explained—in a concurring opinion discussed at length in the Petition (at 19-20) but not mentioned in the BIO—allowing political subdivisions to sue their States under federal laws is equivalent to a federal law empowering specific state officers to sue their governors or States. Such a federal intrusion into state governance goes far beyond what our Framers would have approved. *See Printz v. United States,* 521 U.S. 898, 928 (1997). The Second Circuit decision here runs counter to the federalism principles announced in *Alden* and *Printz*. Moreover, Connecticut never consented to be sued by its political subdivision, rendering inapposite this Court's decision in *Va. Office for Prot. & Advocacy v. Stewart ("VOPA")*, 563 U.S. 247 (2011).

Certiorari is also warranted on the issue of Federal Aviation Act ("FAAct") preemption. Under the Second Circuit's ruling, the quintessentially local question whether an airport remains a small, regional airport or a major airport is now a federal decision to

be decided by a federal agency. *See* Pet. 28-31. Respondents embrace that conclusion, insisting that there is "a direct relationship between runway length and safety"—regardless of whether the small airport had been experiencing any specific safety problems. BIO 27. Whether Congress intended this massive transfer of power from state governments to federal bureaucrats is an important question meriting prompt resolution.

I. CERTIORARI IS WARRANTED ON THE ISSUE OF POLITICAL SUBDIVISION STANDING.

A. THE CIRCUITS ARE IN CONFLICT OVER POLITICAL SUBDIVISION STANDING.

1. As Respondents recognize, the Second Circuit's holding that political subdivisions can sue their parent States under the Supremacy Clause, like similar holdings from the Fifth and Tenth Circuits, directly conflicts with the Ninth Circuit's holding that they cannot. BIO 9-16. *Compare Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979), and *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 629 (10th Cir. 1998), *with City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir. 1980). Describing the Ninth Circuit as an "outlier," Respondents rely upon decisions from the Third, Fourth, Sixth, and Eleventh Circuits. BIO 9, 11-13. To the contrary, those circuit court decisions establish how closely divided and uncertain the circuits are on this issue.

In *Amato v. Wilentz,* 952 F.2d 742 (3d Cir. 1991), the Third Circuit rejected a county's attempt to sue the Chief Justice of the New Jersey Supreme Court. *Id*. at 754-55. The Third Circuit concluded that there is a "general reluctance of federal courts to meddle in disputes between state governmental units." *Id*. at 754-55, *citing Williams*, 289 U.S. at 40; *South Lake Tahoe*, 625 F.2d at 233; *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir. 1973). Rather than "reject[ing] Petitioner's proposed *per se* bar of standing for political subdivisions" (BIO 12), the Third Circuit holding in *Amato* supports a *per se* bar.

So does the Fourth Circuit in *City of Charleston v. Pub. Serv. Comm. of W. Va.*, 57 F.3d 385 (4th Cir. 1995). Addressing whether a city could sue its parent state for impairing a contract between the city and a third party, the court acknowledged Supreme Court precedent that "a municipality has no standing to bring *any* suit based on the Contract Clause (or any other part of the Constitution) against the state that created it." *Id*. at 389 (*citing Williams*, 289 U.S. at 40). The Fourth Circuit concluded that whether the city had standing was "unclear," and ultimately decided not to resolve the issue since the city's claim failed on the merits. *Id*. at 390.

The Sixth Circuit pointed both ways in *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986). On the one hand, it held

a political subdivision cannot challenge an ordinance of another subdivision on due process and equal protection grounds. *Id*. at 505 (citations omitted). On the other hand, in dicta it stated that "there may be occasions" where political subdivisions are not prevented from challenging the constitutionality of state legislation. *Id*. (citations omitted). Similarly, the Eleventh Circuit denied standing to a state university suing its State under the Fourteenth Amendment, but noted that, like the Fifth Circuit, it could not endorse a *per se* rule in its circuit. *United States v. Alabama*, 591 F.2d 1450, 1454-55 (11th Cir. 1986). Rather than undermining the circuit split, the Sixth and Eleventh Circuits confirm that the reach of the political subdivision standing doctrine is uncertain. Only this Court can bring clarity and resolution to the issue.

2. Respondents concede that this case would warrant review by this Court if the Ninth Circuit "definitively resolves, or declines to resolve, its analysis contrary to other circuits." BIO 15. But no further action from the Ninth Circuit is necessary based on its jurisprudence to date.

The Ninth Circuit has faithfully adhered to its broad *per se* ruling in *South Lake Tahoe*, reaffirming it as recently as 2019. *See Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d at 1362 (9th Cir. 1998); *Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999); *City of San Juan Capistrano v. California Utilities Commission*, 937 F.3d 1278, 1281 (9th Cir. 2019). To date the Ninth Circuit has not held a hearing *en banc* to determine

whether a political subdivision may sue its parent state under the Supremacy Clause. Forty years of Ninth Circuit jurisprudence establishes that the circuit has definitively spoken on the issue of political subdivision standing.

B. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. The Second Circuit decision recognizing political subdivisions' standing to sue their creator states under the Supremacy Clause contravenes precedent from this Court. Pet. 22-28. The principle that a political subdivision is a "creature of the state exercising and holding powers and privileges subject to the sovereign will," and that "the state may withhold, grant or withdraw powers and privileges as it sees fit" is well established. *Trenton,* 262 U.S. at 187. This Court also has long-recognized the principle that a political subdivision "has no privileges or immunities under the Federal Constitution, which it may invoke in opposition to the will of its creator." *Williams*, 289 U.S. at 40; *Ysursa*, 555 U.S. at 363. Those principles fully apply to suits brought under the Supremacy Clause.

Respondents insist that those cases hold only that "political subdivisions had no substantive rights under the Contracts Clause and Fourteenth Amendment." BIO 19. But that misses this Court's repeated focus on subdivisions' lack of power to bring suit "*in opposition*

to the will of its creator." *Williams*, 289 U.S. at 40; *Ysursa*, 555 U.S. at 363; *Trenton*, 262 U.S. at 187. These cases centered on political subdivisions' subservience to their States and their lacking any authority not granted by their creators—including the right to sue them. The *Trenton/Williams/Ysursa* line of decisions seeks to protect that fundamental ordering of state internal operation from federal interference. Respondents fail to explain how States need that protection any less in Supremacy Clause cases than in Contracts Clause and Fourteenth Amendment cases.

Respondents fare no better when they contend that political subdivisions can meet the three-part test for Article III standing set forth in *Lujan*. BIO 16-17. Once again, they misconceive the nature of the *Trenton/Williams/Ysursa* line of cases. Those decisions are not about modern Article III standing and its inquiries into (among other things) injury-in-fact and whether a favorable court decision would redress the injury. They are about the federalism concerns detailed above. That is why *Ysursa*, in discussing *Williams* and *Trenton*, does not contain an Article III analysis and why, conversely, the *Trenton/Williams/Ysursa* line of cases are not considered in the Article III standing cases cited by Respondents.

Moreover, the individual members of Congress denied Article III standing in *Raines v. Byrd*, 521 U.S. 811 (1997) are not analogous to political subdivisions seeking to sue their parent states under a constitutional provision. Nor is the plaintiff state legislature in *Arizona State Legislature v. Arizona*

Independent Redistricting Commission, 135 S.Ct. 2652 (2015), which did not sue its creator. In *Virginia House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945 (2019), the Court held merely that, "[j]ust as individual members lack standing to assert institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole." *Id*. at 1953-54 (footnote and internal citation omitted). None of these cases are instructive as to whether a political subdivision such as an airport authority has standing to sue its creator state for a federal constitutional violation. More generally, none of these cases addressed *Williams* and *Trenton* and the doctrine of political subdivision standing. "This Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *United States v. Los Angeles Tucker Truck Lines, Inc.*, 344 U.S. 33, 38, (1952). *See* Pet. 27-28.[1]

C. THE SECOND CIRCUIT'S RULING ON POLITICAL SUBDIVISION STANDING UNDERMINES STATE SOVEREIGNTY.

By permitting a political subdivision to sue its creator State under the Supremacy Clause, the Second Circuit has interfered with the State's internal governmental structure, has granted local political

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[1] *Tucker Truck* applies equally to Respondents' discussion of *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) and *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004). BIO 21-22; *see* Pet. 27-28.

units powers and duties not provided by state law, and has forced the State to defend itself against itself without its consent. *See* Pet. 18-21. Respondents seek to brush aside these federalism concerns by asserting that the Second Circuit's decision was compelled by this Court's decision in *VOPA*, 563 U.S. 247 (2011). *See* BIO 23-25. To the contrary, *VOPA* is inapposite because Connecticut never consented to be sued.

In *VOPA*, this Court allowed suit by one state agency to proceed against another under the *Ex Parte Young* exception to the Eleventh Amendment, applying two conditions that "rarely coincide" but existed in that case: the plaintiff state agency had (1) a federal right against the State, and (2) the state-law authority to sue other state officials to enforce that right. *VOPA*, 563 U.S. at 260-61. As the Court explained, the reason the two conditions "rarely coincide" is that the second condition "cannot exist without the consent of the State that created the agency and defined its powers." *Id*. at 260-61. The State of Virginia's grant of power authorizing a state agency to sue state officials in *VOPA* was essential to the Court's holding allowing the action to proceed. *Id*. at 258, 260-61. Consequently, the *VOPA* holding "forces the State to defend itself *against itself* in federal court." *VOPA*, 563 U.S. at 271 (Roberts, J., dissenting) (italics in original).

By contrast, Respondents are attempting to expand *VOPA* by forcing a State to defend itself against itself in the absence of State consent to suit by a political subdivision. Pet. 27. Thus, this case presents an affront to the State's dignity that was not condoned in *VOPA*.

See id. at 258, 260-61. Further, Virginia's grant of authority to its state agency in *VOPA* is consistent with this Court's holding in *Trenton*, which recognized that a State may "withhold, grant or withdraw powers and privileges as it sees fit" from a political subdivision. *Trenton,* 262 U.S. at 187. *VOPA* therefore does not offend principles of federalism at the heart of the *Trenton/Williams/Ysursa* line of cases that forbid political subdivisions from suing their creator States against their will.

The Second Circuit's decision likewise runs counter to the federalism principles underlying *Printz*, where the Court objected to state officers being "dragooned into administering federal law" by requiring local law enforcement officers to conduct background checks under a federal firearms statute. *Id*., 521 U.S. at 928-29. As Judge Kozinski explained, empowering political subdivisions to sue their creator States raises similar concerns. *Burbank*, 136 F.3d at 1365 (Kozinski, J., concurring). He asked whether Congress "could conscript state instrumentalities to aid in the destruction of the state's laws," and concluded that "such a scenario could create a conflict in the responsibilities designated to state officials." *Id*. Respondents ignore Judge Kozinski's concerns, noting only that they have not been *compelled* to administer a federal law by the federal government. BIO 23-24. But that does not eliminate the interference with States' internal operations.

The federal government has deputized Tweed, a state political subdivision, with the power to enforce federal law against the State, thereby "turn[ing] the

State against itself and . . . against its will." *Alden*, 527 U.S. at 749. Whether Congress has endowed political subdivisions "with powers and duties that conflict with their responsibilities under state law" is a question that merits this Court's consideration. *See Burbank*, 136 F.3d at 1365 (Kozinski, J., concurring).

II. THE PREEMPTION ISSUE WARRANTS THIS COURT'S REVIEW.

1. The Second Circuit's preemption ruling interprets the FAAct to deprive States of any ability to determine the size and scope of their airports and places that authority squarely in the hands of the federal government. That marks a sea change in how airports are regulated and, standing alone, merits this Court's review, especially where the premise of the Second Circuit's preemption holding—that the Airport runway has a "direct impact on air safety"—an be applied to any small or regional airport in the nation. App. 16a.

As the Petition explained, under the Second Circuit's reasoning any airport in the country with a runway that could not accommodate certain types of planes, or planes with certain quantities of people and baggage, would be deemed unsafe and subject to expansion if the FAA so decreed. Pet. 28-30. Respondents do not dispute that the Second Circuit decision means just that or that its logic would apply to most small and regional airports. They contend, however, that FAAct *preemption* will only arise if state

law prohibits FAA-desired expansion. BIO 28. Under that reasoning, state laws are not preempted so long as the State abides by federal regulators' views on the size of airports. Respondents fail to explain how full control of airport size is not now in the hands of federal regulators.

Nothing in the FAAct mandates that result. Just because a runway can accommodate additional planes if it were lengthened does not make it unsafe at its current length. Otherwise, every small airport is unsafe within the meaning of the FAAct. If Tweed was unsafe at its current runway length, the FAA would have brought an enforcement action. As both parties have stipulated, the FAA has not. App. 32a-33a. The FAA also has not mandated a runway extension at the Airport, nor has it required Airport expansion per Tweed's Master Plan. *See* Pet. 29-30.

Whether to expand airports is a major local decision that implicates a variety of considerations. Respondents miss the point when they claim that the Second Circuit's position will not prevent the States from enacting "environmental laws to protect 'wetlands and watercourses.' " BIO 28. Rather, the decision prevents the State from considering environmental impact among many other factors affecting State citizens and the State fisc if the federal government alone determines future expansion of a State airport. Pet. 30-31. States should not be deprived of that authority, certainly without a clearer statement from Congress.

2. Finally, Respondents resort to alternative arguments they made to the Second Circuit that the court did not reach. BIO 29-31. Those arguments offer no basis for denying certiorari. Certiorari is warranted because of what the Second Circuit held on FAAct preemption, not because of what it might have said about the Airline Deregulation Act or the Airport and Airway Improvement Act preemption. This Court routinely reviews questions reached by lower courts and then remands to allow the lower courts to address alternative arguments not addressed below. *See, e.g., Skinner v. Switzer*, 562 U.S. 521, 537 (2011).

CONCLUSION

For the foregoing reasons, the Court should grant the writ of certiorari.

Respectfully submitted,

WILLIAM TONG
Attorney General
State of Connecticut
CLARE KINDALL*
Solicitor General
ANDREW S. GRAHAM
Assistant Attorney General

165 Capitol Avenue
5th Floor
Hartford, CT 06106
(860) 808-5261
clare.kindall@ct.gov
**Counsel of Record*

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