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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 17-1735

PHIL KERPEN, Individually and on Behalf of All Others Similarly Situated; AUSTIN RUSE, Individually and on Behalf of All Others Similarly Situated; CATHY RUSE, Individually and on Behalf of All Others Similarly Situated; CHARLOTTE SELLIER, Individually and on Behalf of All Others Similarly Situated; JOEL SELLIER, Individually and on Behalf of All Others Similarly Situated; MICHAEL GINGRAS, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs – Appellants,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION,

Defendants – Appellees,

DISTRICT OF COLUMBIA,

Intervenor – Appellee,

KARL ANTHONY RACINE,

Intervenor/Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (1:16-cv-01307-JCC-TCB)

Argued: September 27, 2018

Decided: October 22, 2018

Before WILKINSON, DUNCAN, and KEENAN, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Duncan and Judge Keenan joined.

ARGUED: Gene C. Schaerr, SCHAERR | DUNCAN LLP, Washington, D.C., for Appellants. Stuart Alan Raphael, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellee Metropolitan Washington Airports Authority. Lewis Yelin, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees Elaine Chao and United States Department of Transportation. **ON BRIEF:** Robert J. Cynkar, Patrick M. McSweeney, Christopher I. Kachouroff, MCSWEENEY, CYNKAR & KACHOUROFF PLLC, Woodbridge, Virginia; S. Kyle Duncan, Stephen S. Schwartz, Michael T. Worley, SCHAERR | DUNCAN LLP, Washington, D.C., for Appellants. Philip G. Sunderland, Office of General Counsel, METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, Washington, D.C.; Sona Rewari, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellee Washington Metropolitan Airports Authority. Chad A. Readler, Acting Assistant Attorney General, Mark B. Stern, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Steven G. Bradbury, General Counsel, Paul M. Geier, Assistant General Counsel for Litigation and Enforcement, Joy K. Park, UNITED STATES DEPARTMENT OF TRANSPORTATION, Washington, D.C.; Tracy

McCormick, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Federal Appellees. Mark R. Herring, Attorney General, Stephen A. Cobb, Deputy Attorney General, Toby J. Heytens, Solicitor General, Matthew R. McGuire, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Amicus Curiae.

WILKINSON, Circuit Judge:

Appellants here have raised a variety of constitutional and statutory challenges to Metropolitan Washington Airport Authority's (MWAA) ability to use toll revenues to fund projects enhancing access to Dulles airport. The district court granted defendants' motion to dismiss all of these claims, and we now affirm its judgment.

I.

In 1950, the federal government began to build Dulles Airport. Recognizing that access to the airport was as important as the airport itself, the government also acquired a right of way to begin building an access road, linking Dulles to two of the major highways serving the Washington, D.C. region. In 1962, the airport and the access road were opened under the management of the Federal Aviation Administration.

In 1983, the federal government gave Virginia an easement to build a toll road through the right of way previously acquired for the access road. The federal government determined that the new toll road would help mitigate increasing congestion in the vicinity of

Dulles. The road was opened one year later and was operated by the Commonwealth of Virginia.

By 1984, the federal government was concerned that needed capital improvements at Dulles, and its sister airport National, could not be funded. The solution, devised by a Commission created at the behest of the Secretary of Transportation, was to transfer control of both airports to an authority with the ability to raise money by selling tax- exempt bonds. The next year, Virginia and the District of Columbia passed reciprocal laws to create an interstate compact for the management of Dulles and National. Congress had already consented to the compact in 1959, when it gave advance approval to interstate compacts for the management of airports. Act of Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333 (1959). The result of this compact was the Metropolitan Washington Airport Authority (MWAA).

MWAA was authorized by its organic state laws to acquire National and Dulles from the federal government. Additionally, MWAA was granted powers to operate, maintain, and improve National and Dulles airports, including the power to issue revenue bonds and collect various charges for the use of the airports. Va. Code § 5.1-156; D.C. Code § 9-905(a). MWAA was originally overseen by a Board of Review consisting of Members of Congress. But after two successful challenges the Board was dismantled, leaving the Board of Directors in control. *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Hechinger* v. *Metro. Wash. Airports Auth.*, 36 F.3d 97, 99, 101 (D.C. Cir. 1994). The Board of Directors, as currently constituted, has seven members appointed by the

Governor of Virginia, four appointed by the Mayor of the District of Columbia, three appointed by the Governor of Maryland, and three appointed by the President of the United States. Va. Code § 5.1-155(A); D.C. Code § 9-904(a)(1).

In 1986, Congress passed the Transfer Act, which authorized the Secretary of Transportation to lease Dulles and National to MWAA. Pub. L. No. 99-591, 101 Stat. 3341 (1986), *codified as amended at* 49 U.S.C. §§ 49101-49112. The Act also authorized the transfer of the airports' "access highways and other related facilities," 49 U.S.C. § 49102(a), specifically to include the right of way over which the access road and toll road were built. 49 U.S.C. § 49103 (4). The Transfer Act also specified the terms under which the Secretary could lease National and Dulles to MWAA, requiring that, as a condition of the transfer, MWAA must only use the property for "airport purposes." 49 U.S.C. § 49104(a)(2)(B). "[A]irport purposes" were in turn defined to include "activities necessary or appropriate to serve passengers or cargo in air commerce" and "a business or activity not inconsistent with the needs of aviation that has been approved by the Secretary." 49 U.S.C. § 49104(a)(2)(A)(ii), (iv).

The Transfer Act also required MWAA to "assume responsibility" for the Master Plan developed by the federal government for National and Dulles. 49 U.S.C. § 49104(a)(6)(A). The Plan was concerned with the management of the airports, and included provisions that were designed to ensure that passengers and cargo had access to them, in spite of increasing congestion. One of these provisions contemplated an eventual extension of metro service from Washington to Dulles.

In 2006, metro service to Dulles was becoming a reality. The long-planned Silver Line, which would connect Dulles to Washington, was coming to fruition. In service of this project, Virginia agreed to transfer operation of the toll road to MWAA, and MWAA agreed that it would use revenues from the road to finance construction of the Silver Line, as well as other transportation improvements near Dulles. In 2008, the Secretary of Transportation certified that this arrangement did not violate the terms of the Lease.

Virginia's agreement with MWAA inspired three legal challenges before this one. First was a state law challenge that unsuccessfully tried to have a state court declare MWAA's collection of tolls violated the Virginia Constitution. *Gray* v. *Virginia Secretary of Transportation*, 662 S.E.2d 66, 100, 107 (Va. 2008). A second case advanced substantially the same argument and was dismissed by this court. *Parkridge 6, LLC* v. *U.S. Dept. of Transp.*, 420 F. App'x 265, 267 (4th Cir. 2011). The third case, *Corr* v. *Metropolitan Washington Airports Authority*, raised many of the claims presented here. 800 F. Supp. 2d 743, 751 (E.D. Va. 2011). The district court rejected each one, finding that MWAA's structure did not violate the non-delegation doctrine, the Appointments Clause, or the Guarantee Clause. *Id.* at 756-58. Plaintiffs appealed to the Federal Circuit, but that court held that MWAA is not a federal instrumentality and so jurisdiction was inappropriate. *Corr* v. *Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1338 (Fed. Cir. 2012).

Appellants here (and plaintiffs below) bring a putative class action by users of the toll road and other airport facilities. Their lawsuit presented a

bouquet of statutory and constitutional claims. Important for this appeal are the assertions that MWAA is a federal instrumentality, that MWAA violated Article I, Article II, and the Guarantee Clause of the Constitution, that MWAA violated the Administrative Procedures Act, and that MWAA violated the terms of the Transfer Act and the Lease by using toll revenues to build the Silver Line. The district court dismissed all claims. *Kerpen* v. *Metro. Wash. Airports Auth.*, 260 F.Supp.3d 567, 588 (E.D.Va 2017). Applying *Lebron* v. *National Railroad Passenger Corporation*, 513 U.S. 374 (1995), the court concluded that MWAA was not a federal instrumentality and it did not exercise federal power. *Kerpen*, 260 F.Supp.3d at 580. In the view of the district court, this was fatal to the non-delegation, Appointments Clause, and APA claims. *Id.* at 583-84, 586. The court also dismissed the claims based on the Lease and the Transfer Act, reasoning that metro from Washington to Dulles was a permissible airport-related expenditure. *Id.* at 586. Plaintiffs now appeal this dismissal.

II.

Appellants claim as a threshold matter that MWAA is a federal entity. Applying the standard from *Lebron* v. *National Railroad Passenger Corporation* we conclude that it is not. 513 U.S. 374 (1995)

In *Lebron*, the Supreme Court explained that entities that are both created and controlled by the federal government may be considered federal entities that are subject to the limitations of the Constitution. *Lebron*, 513 U.S. at 397. This first prong of *Lebron* is satisfied by an entity that was

"created by a special statute, explicitly for the furtherance of federal governmental goals." *Id*. The second is satisfied only when an entity's operations are "controlled" by federal government appointees. *Id.* at 396. Mere influence is not sufficient; to satisfy this prong the federal government must be the "policymaker" for the entity, rather than simply an influential stakeholder. *Id.* at 398, 399. Temporary control—as when the federal government steps in as a conservator—is not sufficient. *Id.* at 398; *Meridian Investments* v. *Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 579 (4th Cir. 2017). Only those entities that satisfy both conditions may be considered federal entities. *Lebron*, 513 U.S. at 398. See also *Meridian Investments,* 855 F.3d at 579. ("Under *Lebron*, a private corporation morphs into a federal instrumentality when it is Government-created *and* controlled.") (citation and internal quotation marks omitted).

MWAA does not satisfy either prong. In the first place, MWAA was not created by the federal government. The federal government never passed a "special law" to create it. Rather, Virginia and the District of Columbia, acting on a recommendation from a commission appointed by the Secretary of Transportation, created MWAA when they passed reciprocal laws in 1985. The federal government had pre-approved the agreement in 1959, when it passed a law giving advance consent to regional compacts for the management of airports. The federal Transfer Act does not satisfy *Lebron*'s creation prong for the simple reason that the Act did not create MWAA. It conferred no powers on MWAA; it simply specified the minimum powers MWAA must have in order to lease Dulles and National. 49 U.S.C. § 49106(a)(1)(B).

The text of the Act recognized that these powers originated with Virginia and the District of Columbia. 49 U.S.C. § 49106(a)(1)(A). MWAA is, therefore, a textbook example of an interstate compact. Its history shows plainly that it is not a creature of the federal government.

Lebron's second condition is unsatisfied as well: MWAA is not controlled by the federal government. The Board of Review, which provided for on-going federal control over MWAA, was invalidated in the early 1990's. *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991); *Hechinger* v. *Metro. Wash. Airports Auth.*, 36 F.3d 97, 105 (D.C. Cir. 1994). The federal government appoints just three out of seventeen members of MWAA's Board of Directors. Because these appointees are a distinct minority of the Board, they alone cannot "control" MWAA. Through the process of deliberation and negotiation, these appointees could influence MWAA's operations, but influence is not sufficient. Federal *control* is required to meet *Lebron*'s second prong, and federal control is not present here. The Federal Circuit agreed on this point in *Corr* v. *MWAA* when it wrote that, "[t]he fact that a small minority of the board members are federal appointees is insufficient to establish MWAA as a federal instrumentality." 702 F.3d 1334, 1337 (Fed. Cir. 2012).

None of the facts advanced by appellants are sufficient to convert MWAA into a federal instrumentality. An entity that leases property from the federal government, like MWAA, does not, by virtue of that lease, become a federal entity. See

Buckstaff Bath House Co. v. *McKinley*, 308 U.S. 358, 362 (1939). Nor does an ordinary contractor with the federal government, by virtue of the contract, become a federal entity. See *United States* v. *New Mexico*, 455 U.S. 720, 739-40 (1982). Federal oversight of an entity, like the Secretary of Transportation's oversight of MWAA, does not convert an entity into a federal one. See *Meridian Investments*, 855 F.3d at 575, 579 (holding that Freddie Mac is not a federal entity despite supervision by FHFA). And conditions attached to federal funds, like the conditions on MWAA's federal funding, do not convert the recipient of those funds into a federal entity. See *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 833, 843 (1982) (holding that a recipient of federal funds is not bound by the First Amendment). If we adopted appellants' view on any one of these points, it would auger a wholesale transfer of authority to the federal government from states and local government. We decline to do so.

Finally, appellants argue that MWAA is a federal instrumentality because the federal government has a "strong and continuing interest" in ensuring that members of Congress and other federal employees have access to the nation's capital. Brief for the Appellants at 26 (citing *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Airport Noise*, 501 U.S. 252, 266 (1991)). But of course, the federal government has an "interest" in a great many things. A federal interest does not convert an entity into a federal instrumentality. And, at the very least, the interest here is one that is shared by the residents of Maryland, the District of Columbia, and Virginia.

Interstate compacts—even those that envision a cooperative relationship with the federal government—are not federal entities. In an

increasingly interconnected world, challenges which were once thought to be purely local are in fact regional in character. Single states are often ill-equipped to meet regional challenges like the reduction in marine fisheries, see Atlantic States Marine Fisheries Commission (approved at Act of May 4, 1942, Pub. L. No. 77-539, 56 Stat. 267 (1942)), or the draining of the Great Lakes, see The Great Lakes Compact (approved at Act of Oct. 3, 2008, Pub. L. No. 110- 342, 122 Stat. 3739 (2008)). These challenges demand a regional response, and interstate compacts allow states to act in concert to supply one. Multi-state endeavors such as MWAA are a creative means of meeting regional needs. And though they may entail sharing of responsibilities or cooperation among governments, they remain wholly constitutional.

Appellants' failure to meet the threshold of establishing MWAA as a federal entity is fatal to their claims under the Appointments Clause and the Administrative Procedures Act. Both these provisions apply to federal entities—"Officers of the United States," U.S. Const. Art II. § 2, and "author[ities] of the Government of the United States," 5 U.S.C. § 551(1), respectively. Accordingly, they have little relevance when, as here, the entity in question is not a federal one.

III.

Appellants argue that MWAA's structure violates the non-delegation principle because it has been wrongly delegated "legislative power," "government power," or "federal power." Brief for the Appellants at 13. Because MWAA exercises no power assigned elsewhere by the Constitution, we conclude that it

does not violate that principle. We shall take up each of the challenged delegations in turn.

A.

The principle of non-delegation requires that "core governmental power must be exercised by the Department on which it is conferred and must not be delegated to others in a manner that frustrates the constitutional design." *Pittston* v. *United States*, 368 F.3d 385, 394 (4th Cir. 2004). Legislative power is an example of such a "core" function that may not be delegated to another Department. Article I §1 of the Constitution confers "[a]ll Legislative powers" on Congress. "This text permits no delegation of those powers." *Whitman* v. *Whitman Trucking Assn.*, 531 U.S. 457, 472 (2001). Of course, Congress does not impermissibly delegate power every time "it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors." *Touby* v. *United States*, 500 U.S. 160, 165 (1991). So long as Congress cabins this discretion with an "intelligible principle," no wrongful delegation has taken place. *J.W. Hampton Jr., Co.* v. *United States*, 276 U.S. 394, 409 (1928). In these instances, Congress has not unlawfully delegated any power; it has simply assigned a responsibility to another branch, which may lawfully exercise its inherent discretion to fulfill the assigned responsibility. *Loving* v. *United States*, 517 U.S. 748, 777 (1996) (Scalia, J. concurring in part and concurring in the judgment).

An "intelligible principle" need not be exactingly precise to satisfy the requirements of the non-delegation principle. Quite the opposite: a "broad standard[]" will sufficiently cabin another Department's discretion. *Mistretta* v. *United States*,

488 U.S. 361, 373 (1989). For example, Congress' command that regulation serve the "public interest, convenience, or necessity" has been held to serve as an intelligible principle, *id.* (*citing Nat'l Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-26 (1943)), as has a command to set rates that are "just and reasonable," *id.* at 373-74 (*citing Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944)).

MWAA has not been delegated "legislative power" from the federal government. Under the text of MWAA's reciprocal organic state laws and the Transfer Act, MWAA exercises only those powers conferred on it by its state creators, not the federal government. Va. Code § 5.1-153 and D.C. Code § 9-902 (conferring powers). See also 49 U.S.C. § 49106(a)(1)(A) (recognizing those state powers). And even if some of MWAA's powers did come from the federal government, whatever policymaking discretion the Authority wields would be amply constrained by Congress' passage of the Transfer Act. That Act requires that leased property be used only for "airport purposes," defined by Congress to mean "aviation business or activities," "activities necessary or appropriate to serve passengers or cargo in air commerce," or "nonprofit, public use facilities that are not inconsistent with the needs of aviation." 49 U.S.C. § 49104(a)(2)(A). The strictures of the Transfer Act are sufficiently detailed as to more than satisfy the requirement of an "intelligible principle."

B.

The Constitution also forbids delegation of "core governmental power" to a private entity. Unlike the executive and judicial Departments, the Constitution

recognizes no governmental powers vested in private entities. The Supreme Court of the mid-1930's found it "obvious" that the exercise of legislative power by private entities was "unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress," *A.L.A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 537 (1935), and that such a transfer of power was "legislative delegation in its most obnoxious form." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936). In *Carter Coal*, for example, the power to regulate the mining industry could not constitutionally be delegated to private mining interests because "in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.* Such regulation is "necessarily a government function" that must constitutionally remain with a public body. *Id.*

We need not examine the continuing vitality of these cases because it is clear that certain governmental powers are not "core" powers and may lawfully be delegated to private parties. For example, in *Pittston* v. *United* States, we approvingly cited *United States v. Frame*, a Third Circuit case that upheld the exercise of "ministerial" powers by a private party on behalf of the government. *Pittston*, 368 F.3d at 394-95 (*citing United States* v. *Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989)). We have also recognized that, subject to certain limitations, the government may "delegate its authority [to private entities] to incarcerate, to confine, to discipline, to feed, and to provide medical and other care to inmates who are imprisoned by order of the federal government." *Holly* v. *Scott*, 434 F.3d 287, 297 (4th

Cir. 2006). See also *Rosborough* v. *Management & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (recognizing prison operation as a "fundamentally governmental function" which may nevertheless be "delegated to private entities.").

There has been no unlawful delegation of "government power" to a private entity in this case for the simple reason that MWAA is not a private entity. It is an interstate compact, constituted by the states. Unlike the mining interests in *Carter Coal*, the Constitution recognizes that the states and their compacts have a large role to play in our scheme of federalist governance. See U.S. Const. Art I § 10; *Id.* at Amend. X. Appellants try to analogize MWAA to a private entity on the grounds that it "completely lack[s] accountability[.]" Brief for the Appellants at 51. But the analogy misses the mark. As a creation of the states, MWAA is subject to their dictates in a way that true private entities simply are not. At any time, the elected leaders of Virginia and Washington may amend the compact through reciprocal legislation. Va. Code § 5.1-153; D.C. Code § 9-902. And it is elected officials who appoint MWAA's Board of Directors. Va. Code § 5.1-155(A), (E); D.C. Code § 9-904(a), (e). There may be some level of unaccountability that converts a nominally state entity into a private one, but MWAA's structure is nowhere near it. MWAA is, therefore, a public body which may lawfully exercise governmental power.

C.

Finally, appellants argue that MWAA violates the non-delegation principle by exercising "federal power." But there is nothing inherently federal about the operation of commercial airports. In fact, federal

operation of a commercial airport is the exception, not the rule: National and Dulles are the only major commercial airports that have been federally operated. It was recognition of the incongruity of the federal government operating a commercial airport that led to the formation of MWAA in the first place. As the district court explained, "operating commercial airports like National and Dulles is a distinctly *un*-federal activity." *Kerpen*, 260 F.Supp.3d at 581.

D.

Successful non-delegation challenges are rare. The Supreme Court has "invoked the doctrine of unconstitutional delegation to invalidate a law only" a handful of times in its history. *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting). This is because the limits of delegation "must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton Jr., Co.* v. *United States*, 276 U.S. 394, 406 (1928). Accordingly, "it is small wonder that [courts] have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting).

We will not "second-guess" MWAA's structure because it does not exercise any powers that the Constitution confers elsewhere. Its framework comports with "common sense" and reflects "the inherent necessities of the governmental co-ordination." *J.W. Hampton Jr., Co.*, 276 U.S. at 406. The constitutional design is not frustrated by an

interstate compact's operation of a commercial airport, even when the airport is federal property.

IV.

Appellants next claim that MWAA violates the Guarantee Clause of the U.S. Constitution. Their claim fails because MWAA does not deny any state a republican form of government.

The Guarantee Clause of the U.S. Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const. Art. IV § 4. This clause is litigated only "infrequent[ly]." *New York* v. *United States*, 505 U.S. 144, 184 (1992). For the most part, claims premised on the Guarantee Clause present nonjusticiable "political questions," unfit for resolution within the judicial branch. *Id*. But "not all" claims under the Guarantee Clause are nonjusticiable. *Id.* at 185. The question of whether a claim is justiciable is a "difficult" one. *Id.* Where the merits of the claim itself are easily resolved, the Supreme Court has bypassed the justiciability question entirely. *Id.* We take that path today because, even assuming appellants' Guarantee Clause claim is justiciable, it fails on the merits.

MWAA does not deny the people of Virginia, Washington, Maryland, or any other state or subdivision, a republican form of government. "[T]he distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws." *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891). The Guarantee Clause is not violated when "States … retain the ability to set their legislative agendas" and when "state government

officials remain accountable to the local electorate." *New York*, 505 U.S. at 186.

MWAA does not disturb the republican form of government of any of its member jurisdictions. In Virginia, Maryland, and Washington, the "distinguishing feature" of republican government remains. Voters are free to elect their political leaders and those political leaders are free to set their legislative agendas. Even on questions of MWAA's activities, the elected representatives of the people have their say. MWAA exercises only those powers conferred on it by the elected leaders of its member jurisdictions, 49 U.S.C. § 49106(a)(1)(A); Board members are appointed by executive officials accountable to their electorates and serve for a fixed 6-year term, 49 U.S.C. § 49106(c); and MWAA's operations are a frequent topic of discussion in the halls of political power in Virginia, Maryland, and the District of Columbia, see *e.g.*, "Regional coalition rallies for $50 million investment in Dulles," Washington Business Journal (Feb. 4, 2016); "Heavy hitters talk MWAA mess," Politico (Aug. 14, 2012). As the district court in *Corr* explained, MWAA "does not violate Plaintiffs' right to a republican form of government because [MWAA's] authority is circumscribed by legislation and can be modified or abolished altogether through the elected legislatures that created it." 800 F. Supp. 2d at 757.

V.

Appellants claim that MWAA's use of toll road funds to build metro service to Dulles violates the command that funds only be spent on "capital and operating costs of the Metropolitan Washington Airports." 49 U.S.C. § 49104(a)(3). Because we agree

with the Secretary of Transportation's interpretation of the Lease and Transfer Act, we reject this argument.

MWAA leases Dulles and National from the federal government under terms specified by the Transfer Act. The Act and the Lease allow MWAA to levy certain fees but require that "all revenues generated by the Metropolitan Washington Airports shall be expended for the capital and operating costs of the Metropolitan Washington Airports." 49 U.S.C. § 49104(a)(3). MWAA also has responsibility for the airports' Master Plan, which, since MWAA was created, contemplated the extension of metro service to Dulles. In 2006, MWAA took over the operation of the toll road leading to Dulles so that it could use the revenues from the road to finance construction of a metro line connecting the airport to Washington, D.C. The question presented by this suit is whether the Act and the Lease allow MWAA to spend those funds for that purpose. We conclude they do.

The expenditures in no way violate the Lease terms. The Secretary of Transportation determined as much in 2008 when she certified MWAA's actions as compliant with the Lease. Her certification expressly contemplated improvements both on and off MWAA's property and concluded that these actions "do not conflict with any terms in the lease[.]" J.A. 416. The Secretary's approval in this case is entitled to "great weight." *Consol. Gas Supply Corp.* v. *FERC*, 745 F.2d 281, 291 (4th Cir. 1984). As the D.C. Circuit explained, an agency, when interpreting contracts that it is authorized to approve or disapprove, is "entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders,

its regulations, or its authorizing statute." *Cajun Elec. Power Coop.* v. *FERC*, 924 F.2d 1132, 1135 (D.C. Cir 1991).

It also makes good sense to defer to this determination because it is clear that Congress assigned the Secretary of Transportation a critical role in what, after all, is a transportation matter. The Transfer Act empowers the Secretary in a number of ways: she is responsible for entering into the Lease authorized by the Transfer Act, 49 U.S.C. § 49104(a); she has the power to retake possession of MWAA property that is being improperly used, 49 U.S.C. § 49104(a)(2)(C); and she decides which "business or activity not inconsistent with the needs of aviation" may be considered an "airport purpose" under the terms of the Lease. 49 U.S.C. § 49104(a)(2)(A)(iv). It was pursuant to this critical role that the Secretary of Transportation approved MWAA's use of funds to build metro out to Dulles.

The Secretary's interpretation of the Act and the Lease is plainly a reasonable one, for two reasons. First, the Transfer Act and the Lease command MWAA to "assume responsibility" for the Master Plan for Dulles and National. The version of the Plan in effect at the time of the Act's passage contemplated the extension of metro service to Dulles. Second, the Act and the Lease consent to MWAA's exercise of the power of eminent domain conferred upon it by Virginia. 49 U.S.C. § 49106(b)(1)(D). Congress, therefore, must have imagined that MWAA would make improvements to land that is not owned or controlled by the Authority.

The Secretary's determination conceives practically of an airport as more than just a terminal

and runways. It also encompasses a broader infrastructure and critical adjunct improvements that facilitate access to Dulles. Excessive congestion can effectively strangle airport operations and require citizens to spend an ever longer portion of each day making a flight or returning from one. Efforts to alleviate congestion and expand access to facilities in major metropolitan areas often and understandably meet with challenges from those whose lives and properties may be affected by any given project proposal. But some improvements need to be made lest growth overwhelm the ability of the metropolis to deal with it.

There is no basis in law for finding that the dedicated funding mechanism here was impermissible. To find otherwise would throw longstanding airport expansion arrangements into turmoil. We decline to take that step.

For the foregoing reasons, the judgment of the district court is

AFFIRMED

The United States District Court for the Eastern District of Virginia

Kerpen v. Metro. Washington Airports Auth.

KERPEN, *Plaintiff*, v. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, et al., *Defendants*.

Signed: May 30, 2017

Case No. 1:16-cv1307 (JCC/TCB)

Opinion by: James C. Cacheris

MEMORANDUM OPINION

This matter is before the Court on the Motions for Partial Summary Judgment [Dkt. 46] and for Leave to File Supplemental Authority [Dkt. 127] filed by Plaintiffs Phil Kerpen, Cathy Ruse, Austin Ruse, Charlotte Sellier, Joel Sellier, and Michael Gingras. Also before the Court are the Motions to Dismiss filed by Defendants Metropolitan Washington Airport Authority (WMAA) [Dkts. 90, 91], the District of Columbia [Dkt. 94], Secretary of Transportation Anthony Foxx, and the U.S. Department Of Transportation [Dkts. 85, 86]. Although not a party, the Commonwealth of Virginia has filed a Brief Amicus Curiae in Support of Dismissal [Dkt. 83–1].

Plaintiffs—individuals who "ha[ve] used, and continue[ ] to use" the facilities at Ronald Reagan Washington National Airport and Washington Dulles International Airport, and who pay tolls on the Dulles toll road, Am. Compl. [Dkt. 37] ¶¶ 17–22—filed this putative class action on July 5, 2016. The putative

class includes "all persons or entities in the United States who used the facilities located on or within the premises" at National and Dulles "leased to MWAA ... and from whom MWAA has exacted a fee, charge, toll or other similar payment from November 2008 to present." *Id.* ¶ 78.

Plaintiffs challenge MWAA's authority on a variety of constitutional and statutory grounds. Broadly speaking, Plaintiffs contend that (1) MWAA results from an unlawful interstate compact between Virginia and the District of Columbia (Counts I—II); (2) the federal government has improperly delegated federal power to MWAA (Counts III—V); (3) the tolls charged by MWAA are illegal exactions (Count VI); (4) MWAA has contravened the lease, and the related federal law, under which it maintains properties owned by the federal government (Counts VII—VIII); (5) MWAA and the federal government have both violated the Administrative Procedures Act (APA) (Counts IX—X); and (6) MWAA has violated 42 U.S.C. § 1983 (Count XI). For the following reasons, the Court will grant Defendants' Motions to Dismiss for Failure to State a Claim, deny Plaintiffs' Motions for Partial Summary Judgment and for Leave to File Supplemental Authority, and dismiss Plaintiffs' Complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. Background

Facts drawn from the allegations of and exhibits to Plaintiffs' Amended Complaint [Dkt. 38] are taken as true for purposes of Defendants' Motions, insofar as those Motions are brought pursuant to Federal Rule of Civil Procedure 12(b)(6). See *E.I. du Pont de Nemours & Co.* v. *Kolon Indus., Inc.*, 637 F.3d 435,

440 (4th Cir. 2011). In addition to Plaintiffs' Amended Complaint, the Court considers matters of public record subject to judicial notice, see *Philips* v. *Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009), and cited by Defendants without objection by Plaintiffs.

A. MWAA's Origins

Ronald Reagan Washington National Airport and Washington Dulles International Airport are two of three major airports serving the Washington, D.C., metropolitan area. Am. Compl. [Dkt. 37] ¶ 26. Both are located in Virginia, *id.*, and are "the only two major commercial airports owned by the Federal Government." *Metro. Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 256, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (*CAAN*).

Originally, both National and Dulles were managed by the Federal Aviation Administration (FAA). Am. Compl. [Dkt. 37] ¶ 26. Eventually, however, "the Secretary of Transportation concluded that necessary capital improvements could not be financed for either National or Dulles unless control of the airports was transferred to a regional authority with power to raise money by selling tax-exempt bonds." *CAAN*, 501 U.S. at 257, 111 S.Ct. 2298. In 1984, a commission made up primarily of local, state, and federal representatives from Virginia, Maryland, and the District of Columbia—deemed "the parties principally interested in the operation" of the airports—was tasked with "developing a proposal for transferring" the airports "from federal ownership to a state, local or interstate public entity." 131 Cong.

Rec. S9608, S9609 (Apr. 26, 1986).[1] The commission ultimately determined that "Washington National and Washington Dulles International Airports should be transferred by ... Congress to a single, independent public authority to be created jointly by the Commonwealth of Virginia and the District of Columbia[.]" 131 Cong. Rec. S9608.

In accordance with this plan, Virginia and the District of Columbia enacted reciprocal legislation creating MWAA in 1985. See D.C. Code §§ 9–901, *et seq.*; Va. Code §§ 5.1–152, *et seq*; see also Am. Compl. [Dkt. 37] ¶ 28. MWAA was constituted as an independent public body governed by an 11–member board, later expanded to 17 members with "seven appointed by the Governor of the Commonwealth of Virginia, four appointed by the Mayor of the District of Columbia, three appointed by the Governor of the State of Maryland, and three appointed by the President of the United States." D.C. Code § 9–904; Va. Code § 5.1–155. Virginia and the District individually and jointly conferred "powers and jurisdiction" upon the MWAA, D.C. Code § 9–902; Va.

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[1] The commission included Linwood Holton, Jr., former Governor of Virginia; Franklin E. White, representing Governor of Virginia Charles S. Robb; John W. Warner, U.S. Senator from Virginia; Frank Wolf, U.S. House Representative from Virginia; Martha V. Pennino of the Fairfax County, Virginia Board of Supervisors; Pauline A. Schneider, representing District of Columbia Mayor Marion Barry, Jr., Betty Ann Kane of the District of Columbia Council; Harry R. Hughes, Governor of Maryland; Paul S. Sarbanes, U.S. Senator from Maryland; Steny H. Hoyer, U.S. House Representative from Maryland; and Scott Fosler, Councilman from Montgomery County, Maryland. *See* 131 Cong. Rec. S9609. The commission also included three representatives from airport-related industries and William J. Ronan, previous chairman and board member of the Port Authority of New York and New Jersey.

Code § 5.1–153, as were necessary to manage, fund, and develop National and Dulles. See D.C. Code § 9–905; Va. Code § 5.1–156.

The following year, Congress passed the Metropolitan Washington Airports Act of 1986, codified as 49 U.S.C. §§ 49101, *et seq.* (Transfer Act). This gave the agreement between the District of Columbia and Virginia the status of federal law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, —— U.S. —— –, 133 S.Ct. 2120, 2130 n.8, 186 L.Ed.2d 153 (2013). The Transfer Act recognized the "continuing but limited [federal] interest in the operation of" the airports, as well as the "important and growing" role the airports played in "the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region." 49 U.S.C. § 49101(1), (3). In light of the "perceived limited need for a Federal role in the management of these airports and the growing local interest," the Act sought to achieve "a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the United States." *Id.* § 49101(7).

Congress found that the federal government's interest could be adequately safeguarded "through a lease mechanism which provides for local control and operation" of the two airports. *Id.* § 49101(10). Accordingly, the Act authorized the Secretary of Transportation to lease the two airports, "including access highways and other related facilities," *id.* § 49102, to MWAA as long as MWAA met certain criteria. See *id.* § 49106. The Transfer Act further prescribed minimum terms to be included in the lease. See *id.* § 49104. Among other things, the Transfer Act provided that MWAA would "assume

responsibility for the [FAA]'s Master Plans for the Metropolitan Washington Airports," *id.* § 49104(a)(6)(A), which contemplated an extension of the existing Washington Metrorail system to Dulles. See Federal Defs. Exh. 1 [Dkt. 88–1] at 2, 123–24, 131. "On March 2, 1987, the Secretary of Transportation and MWAA entered into a long-term lease complying with all of the conditions specified in the then recently enacted Transfer Act." *CAAN*, 501 U.S. at 261, 111 S.Ct. 2298.

The Transfer Act also initially provided for a Board of Review composed of nine members of Congress, which was empowered to veto decisions made by MWAA's Board of Directors. See *CAAN*, 501 U.S. at 255, 111 S.Ct. 2298. The Supreme Court held this to be an unconstitutional encroachment by Congress on the sphere of the executive. See *id.* at 277, 111 S.Ct. 2298. Congress attempted to modify and reconstitute the Board of Review, but this second attempt was likewise held to be unconstitutional. See *Hechinger* v. *MWAA*, 36 F.3d 97 (D.C. Cir. 1994). Accordingly, MWAA is now governed solely by its 17–member Board.

The federal government, however, maintains a limited degree of control over the airports through the Secretary of Transportation. The Transfer Act provides that "[i]f the Secretary decides that any part of the real property leased to [MWAA] ... is used for other than airport purposes," the Secretary "shall (i) direct that [MWAA] take appropriate measures to have that part of the property used for airport purposes; and (ii) retake possession of the property if [MWAA] fails to have that part of the property be used for airport purposes within a reasonable period of time, as the Secretary decides." 49 U.S.C.

§ 49104(a)(2)(C). "Airport purposes" is defined broadly, and includes "a business or activity not inconsistent with the needs of aviation that has been approved by the Secretary." *Id.* § 49104(a)(2)(A)(iv).

B. The Dulles Toll Road and Metrorail Project

"To facilitate access to what would become Washington Dulles International Airport ... the federal government acquired a broad corridor of land in Virginia, known as the Dulles Airport Access Highway and Right-of-way[,] ... between the Interstate 495 Beltway at Falls Church, Virginia and Dulles Airport." *Corr* v. *Metro. Washington Airports Auth.*, 800 F.Supp.2d 743, 745–46 (E.D. Va. 2011), *aff'd* 740 F.3d 295 (4th Cir. 2014). This stretch of land was used to construct the Dulles Airport Access Highway—"a 13.65–mile highway" used exclusively "to provide rapid access to and from the Dulles Airport." *Id.* at 746; See also Am. Compl. [Dkt. 37] ¶ 39.

In 1980, Virginia sought and received an easement over a portion of the federally owned Dulles corridor to construct a toll road for non-airport traffic. See *Corr* v. *Metro. Washington Airports Auth.*, 740 F.3d 295, 297 (4th Cir. 2014) (*Corr II*); See also Am. Compl. [Dkt. 37] ¶ 40. The easement required that "[t]he roadway ... be constructed ... so as to preserve the median between the eastbound and westbound lanes of the Dulles Access Highway for future rail service to Dulles Airport." MWAA Mot. Exh. 2 [Dkt. 93–2] ¶ 13. Virginia began operating the tollway in 1984. Am. Compl. [Dkt. 37] ¶ 40.

In the years that followed, "the Virginia General Assembly repeatedly authorized [the Virginia

Commonwealth Transportation Board] to use toll revenue to fund mass transit projects within the Dulles Corridor," including the extension of the Washington Metrorail system to Dulles. *Corr II*, 740 F.3d at 298. As MWAA "shared Virginia's goal of extending the Metrorail system to Dulles Airport" and had assumed the FAA's master plans, which contemplated such a project, "MWAA proposed to take control of the Metrorail expansion project, as well as the Dulles Toll Road which was providing much of the revenue for the expansion." *Id.* at 298. Virginia and MWAA entered into a Master Transfer Agreement in December of 2006. See MWAA Mot. Exh. 5 [Dkt. 93–5]; MWAA Mot. Ex. 6 [Dkt. 95–1]. The agreement required, among other things, that MWAA use revenue from the tollway to fund the Metrorail project. MWAA Mot. Exh. 5 [Dkt. 93–5] § 6.01. Tollway revenues are presently projected to cover roughly half of the project's cost. Am. Compl. [Dkt. 37] ¶ 67. In October of 2008, the Secretary of Transportation certified that this arrangement between MWAA and Virginia serves a valid "airport purpose" within the meaning of the Transfer Act. See Pls. Mot. for Summ. J. Exh. 11 [Dkt. 52–1].

B. *Corr* v. *MWAA*

The toll road agreement between MWAA and Virginia was unsuccessfully challenged in two previous lawsuits brought by Plaintiffs' counsel. See *Gray* v. *Virginia Sec'y of Trans.*, 276 Va. 93, 662 S.E.2d 66 (2008); *Corr II*, 740 F.3d 295. The second of these, *Corr*, was filed in this Court and raised many of the same issues presented here. Accordingly, this Court made a number of rulings bearing upon the present proceedings. It held, for example, that the tolls charged by MWAA for use of the tollway are not

illegal exactions or taxes but rather are permissible "user fee[s]." 800 F.Supp.2d at 755. Similarly, the Court "reject[ed] Plaintiffs' contention that" Congress or the states "impermissibly delegated to an unelected body, MWAA, the authority to tax them." *Id.* at 756. The Court further concluded that "MWAA's independence does not violate Plaintiffs' right to a republican form of government," and found "no merit to Plaintiffs' claim that MWAA's governance structure somehow interferes with the President's authority under Article II to ensure that the laws are faithfully executed or violates the Appointments Clause." *Id.* at 757–58. Each claim rejected above has some analogue in the present action.[2]

After this Court dismissed the *Corr* plaintiffs' complaint, they sought review in the Court of Appeals for the Federal Circuit. That Court held that it did not have jurisdiction to entertain the appeal, as MWAA is not a "federal instrumentality" subject to the Little Tucker Act, 28 U.S.C. § 1346(a)(2). *Corr* v. *Metro. Washington Airports Auth.*, 702 F.3d 1334, 1337 (Fed. Cir. 2012) (*Corr I*). Having found that "MWAA possesses few, if any, of the hallmarks of a federal instrumentality identified" by the Supreme Court, the Federal Circuit transferred the case to the Fourth Circuit. *Id.* at 1337–38.

The *Corr* plaintiffs fared no better there. The primary subject of that appeal was whether Virginia's General Assembly could legally delegate taxing power to MWAA. See *Corr II*, 740 F.3d at 300.

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[2] The Court further found that the *Corr plaintiffs lacked prudential standing, see* 800 F.Supp.2d at 754, but the Fourth Circuit ultimately reversed this portion of the Court's ruling.

The Fourth Circuit found that MWAA had levied no tax, and that the tollway constituted a "fee-for-service" arrangement that did not violate Virginia law. See *id.* at 302. Accordingly, the Fourth Circuit determined that the *Corr* plaintiffs failed to state a claim and affirmed this Court's Order dismissing the case. See *id.* at 302. The Supreme Court subsequently denied certiorari.

D. The Present Proceedings

Plaintiffs originally filed this putative class action in the U.S. District Court for the District of Columbia on July 5, 2016. On September 26, 2016, the U.S. District Court for the District of Columbia transferred the case to this Court. See Mem. Op. and Order [Dkt. 26].[3]

The District of Columbia filed a Notice [Dkt. 44] on December 15, 2016, informing the Court that it would intervene pursuant to Federal Rule of Civil Procedure 5.1(c). Virginia then filed an amicus brief [Dkt. 83–1] on January 23, 2017, stating that it would not waive its sovereign immunity with respect to this suit and would decline to intervene. Accordingly, the Commonwealth argued that the Court should dismiss this case pursuant to Federal Rule of Civil Procedure 19 for failure to join Virginia as a necessary and indispensable party. As the Court finds that the case should be dismissed for other reasons, the Court declines to reach this argument.

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[3] It bears noting that Judge Jackson transferred the case in part because Plaintiffs' decision to file suit in the District of Columbia "appear[ed] to be the result of forum shopping prompted by plaintiffs' unsuccessful similar challenges brought in the Fourth Circuit." *See* Mem. Op. and Order [Dkt. 26] at 9 n.1.

On December 19, 2016, Plaintiffs filed a Motion for Partial Summary Judgment [Dkt. 46], seeking to resolve issues related to Defendants' liability. Defendants each responded with Motions to Dismiss [Dkts. 85, 86, 90, 91, 94]. After the hearing on this matter, Plaintiffs filed a Motion for Leave to File Supplemental Authority [Dkt. 127], further addressing the absence of Virginia and its import under Federal Rule of Civil Procedure 19. Having reviewed the parties' filings and heard the arguments of counsel, this matter is now ripe for decision.

II. Legal Standard

In order to survive a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), a complaint must set forth "a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). When reviewing a motion brought under Rule 12(b)(6), the Court "must accept as true all of the factual allegations contained in the complaint," drawing "all reasonable inferences" in the plaintiff's favor. *E.I. du Pont de Nemours & Co.*, 637 F.3d at 440 (citations omitted). "[T]he court 'need not accept the [plaintiff's] legal conclusions drawn from the facts,' nor need it 'accept as true unwarranted inferences, unreasonable conclusions, or arguments.' " *Wahi* v. *Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 616 n.26 (4th Cir. 2009) (quoting *Kloth* v. *Microsoft Corp.*,

444 F.3d 312, 319 (4th Cir. 2006)) (alterations in original).

Generally, courts may not look beyond the four corners of the complaint in evaluating a Rule 12(b)(6) motion. See *Goldfarb* v. *Mayor & City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015). The Court, however, "may properly take judicial notice of matters of public record." *Philips* v. *Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

III. Analysis

A. MWAA does not violate the Compact Clause.

Count I of Plaintiffs' Complaint alleges that MWAA did not result from a valid interstate compact under the Compact Clause, U.S. Const. art. I, § 10, cl. 3, because the Clause applies only to "states" and the District of Columbia is not a state. Plaintiffs contend that "[b]ecause MWAA is not a valid interstate compact entity and has no authority under the Compact Clause, MWAA has no legitimate constitutional existence as a governmental body." Am. Compl. [Dkt. 37] ¶ 102.

Article I, section 10, clause 3 of the U.S. Constitution provides in relevant part that "[n]o State shall, without the Consent of Congress ... enter into any Agreement or Compact with another State[.]" "By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler* v. *Adams*, 449 U.S. 433, 439–40,

101 S.Ct. 703, 66 L.Ed.2d 641 (1981). Where an agreement between states would tend to " 'increase [the] political power in the states, which may encroach upon or interfere with the just supremacy of the United States,' " congressional approval is required. *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 468, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978) (quoting *Virginia* v. *Tennessee*, 148 U.S. 503, 518, 13 S.Ct. 728, 37 L.Ed. 537 (1893)).

"Congressional consent," however, "is not required for interstate agreements that fall outside the scope of the Compact Clause." *Cuyler*, 449 U.S. at 440, 101 S.Ct. 703. The Clause is "not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *People of State of N.Y.* v. *O'Neill*, 359 U.S. 1, 6, 79 S.Ct. 564, 3 L.Ed.2d 585 (1959).

The Compact Clause serves as a limitation on state power. If, as Plaintiffs contend, the District is not a "state" within the meaning of the Compact Clause, then the Compact Clause limitation does not apply to the District. That would leave the District *more*, not less, free to make agreements with states. The District would not, as Plaintiffs claim, lack some positive "authority" to enter into interstate agreements conferred by the Compact Clause. See Am. Compl. [Dkt. 37] ¶ 102. The only case Plaintiffs cite to support their contrary position, *Alabama* v. *North Carolina*, 560 U.S. 330, 352, 130 S.Ct. 2295, 176 L.Ed.2d 1070 (2010), does not so much as suggest what Plaintiffs claim it holds.

There can be little doubt that Congress delegated to the District the power to enter into agreements with states generally. Congress enjoys "plenary" freedom in the District of Columbia to "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore* v. *United States*, 411 U.S. 389, 397, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973); See also *Atl. Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435, 52 S.Ct. 607, 76 L.Ed. 1204 (1932) (Congress enjoys "all the powers of legislation which may be exercised by a state in dealing with its affairs" in the District). Except as limited by the Compact Clause, state legislatures are generally free to undertake "voluntary and cooperative actions" with other states. *O'Neill*, 359 U.S. at 6, 79 S.Ct. 564. Congress has delegated its legislative power under the District Clause, U.S. Const. art. I, § 8, cl. 17, to the District—including the ability to "contract and be contracted with," D.C. Code § 1–102—and did so "subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States," D.C. Code § 1–203.02, including the Compact Clause.[4] The District may therefore participate in "voluntary and cooperative" interstate endeavors, *O'Neill*, 359 U.S. at 6, 79 S.Ct. 564, in much the same manner as a state.[5]

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[4] Notably, "there is no constitutional barrier to the delegation by Congress to the District of Columbia of [its] full legislative power" within the District. *D.C.* v. *John R. Thompson Co.*, 346 U.S. 100, 109, 73 S.Ct. 1007, 97 L.Ed. 1480 (1953).

[5] The Court notes that the District in fact participates in numerous interstate agreements, including other federally

Plaintiffs' brief arguments to the contrary in their Reply are unsupported and unconvincing. First, Plaintiffs argue that because the Home Rule Act delegated legislative power with respect to "all rightful subjects of legislation *within* the District," D.C. Code § 1–203.02 (emphasis added), the District's authority does not extend to legislation touching on matters *outside* of the District. It is not clear that home rule would be possible in the District of Columbia were the Court to accept this strained reading of the Home Rule Act. See*, e.g.*, D.C. Code Ann. §§ 7–2331, *et seq*. (interstate agreement providing for mutual aid and disaster relief in emergencies); D.C. Code § 9–1117.01 (interstate agreement providing for management of bridges into and out of the District). Moreover, Plaintiffs' interpretation conflicts with the latter half of the cited provision, which states that the District's legislative power is "subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States." D.C. Code § 1–203.02. Much of this part of the Constitution, including the Compact Clause, governs the activities of a state touching on matters beyond its own borders. Plaintiffs' novel interpretation of the Home Rule Act would render this statutory provision mere surplusage, in addition to producing absurd results.

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recognized interstate compacts. *See* Fed. Dfs. Mem. in Supp. of Mot. to Dismiss [Dkt. 88] at 25 n.12. Plaintiffs assert that other interstate compacts including the District are valid because they involve two or more states in addition to the District. Plaintiffs, however, fail to cite any supporting authority and make no attempt to explain their position.

Plaintiffs argue further that "Congress cannot constitutionally delegate to the District the powers of a state as a member of the Union," as this "would violate Art. IV, § 3, which provides the procedures for admitting new States." Pls. Rep. [Dkt. 103] at 27. This is a non sequitur. The question before the Court is not whether Congress could have delegated all powers attendant statehood to the District of Columbia, but whether it has permissibly delegated the power at issue here—to wit, the power to enter into agreements with states. As discussed above, Congress could and did delegate this power to the District. This ability is not uniquely reserved to "member[s] of the Union." Indeed, it is freely exercised by private and governmental actors of all stripes. While Plaintiffs argue that agreements between states are somehow qualitatively different from other agreements, the case upon which they rely for that proposition itself states otherwise. See *Doe* v. *Pennsylvania Bd. of Prob. & Parole*, 513 F.3d 95, 105 (3d Cir. 2008) (finding that an interstate compact is a contract subject to the general principles of contract law).

In light of the above, the Court finds Plaintiffs' Compact Clause claim puzzling. Assuming that the Compact Clause applies to the interstate agreement creating MWAA, Congress gave its express consent through the Transfer Act. The Clause's requirements are thus satisfied. If, on the other hand, Plaintiffs are correct and the Compact Clause does not apply, then Congress' consent was unnecessary and irrelevant for purposes of the Compact Clause. See *Cuyler*, 449 U.S. at 440, 101 S.Ct. 703. Either way, the Compact Clause casts no doubt on the legality of MWAA or its actions.

Plaintiffs respond only that "MWAA purports to be a *compact entity*" and so "must stand or fall as such." Pls. Rep. [Dkt. 103] at 27. Plaintiffs, however, again provide no support for this bald assertion, and the Court fails to see its logic. As discussed above, the Compact Clause does not confer any positive authority on entities constituted as interstate compacts. Nor, for that matter, does it penalize entities that falsely "purport" to be interstate compacts.

If Plaintiffs mean to imply that Congress cast doubt on MWAA's validity by treating it as an interstate compact and passing the Transfer Act, this argument turns the Compact Clause on its head. It treats the Clause as a limitation on *Congress'* power—as backward a reading of that constitutional provision as can be. See *Detroit Int'l Bridge Co.* v. *Gov't of Canada*, 192 F.Supp.3d 54, 71 (D.D.C. 2016). As MWAA aptly points out, the Compact Clause "does not say, nor has it ever been read to mean, that Congress may only consent to compacts between States of the Union." MWAA Rep. [Dkt. 115] at 8. In the absence of such a restriction, Congress was plainly empowered to enact the Transfer Act. See, *e.g.*, U.S. Const. art. I, § 8, cl. 18.

Were it necessary to reach the question, however, the Court would find that the District of Columbia is a "state" within the meaning of the Compact Clause. "Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia* v. *Carter*, 409 U.S. 418, 420, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). The object of the Compact Clause is to

safeguard federal supremacy in matters of federal interest from intrusion by the states. See *Cuyler*, 449 U.S. at 439–40, 101 S.Ct. 703. The federal government has delegated legislative autonomy to the District of Columbia comparable to that of a state. Subject to certain restrictions, the District may use that power to do things with which the federal government disagrees. See*, e.g.*, William Cummings, *Pot Now Legal in D.C. Despite Threats from Congress*, USA Today (Feb. 25, 2015), https://tinyurl.com/ltf96ql. Indeed, the fact that Congress delegated legislative power to the District "subject to all the restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States," D.C. Code § 1–203.02, demonstrates that Congress intended to delegate a degree of autonomy to the District giving rise to Compact Clause concerns. Construing the Compact Clause to exclude the District of Columbia would therefore be contrary the Clause's purpose. But again, this has little bearing on MWAA's legitimacy, as Congress consented to MWAA's creation and so satisfied the Compact Clause's requirements.[6]

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[6] At the hearing on this matter, Plaintiffs argued without support that the District of Columbia is merely the federal government's agent. Courts, however, have generally reached the opposite conclusion. *See, e.g.*, *Sindram* v. *United States*, 67 Fed.Cl. 788, 794 (2005) ("[A]s a matter of law, the District of Columbia is not an agent of the United States Government."); cf. *United States* v. *Jackson*, 163 F.3d 599 (4th Cir. 1998) ("Courts addressing this issue have consistently held that the District of Columbia is not a department or agency of the United States.").

In sum, the Compact Clause does not provide an avenue for Plaintiffs to attack MWAA's legitimacy. Accordingly, Count I of Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted.

Count II of Plaintiffs' Amended Complaint also ostensibly arises under the Compact Clause. The wide-ranging allegations under that heading invoke a variety of doctrines having little to do with the Compact Clause. Ultimately, Plaintiffs posit that "the federal authority delegated to MWAA is improper under the Compact Clause," and MWAA's authority "cannot flow from the Compact Clause, which is MWAA's only claimed source of power to exercise that authority." Am. Compl. [Dkt. 37] ¶ 110. This, again, misreads the Compact Clause as more than a limitation on the ability of states to enter into agreements that might encroach upon federal interests. See *Cuyler*, 449 U.S. at 440, 101 S.Ct. 703. Moreover, as discussed more fully below, MWAA's power is not federal in nature. The Court therefore finds that Count II of Plaintiffs' Amended Complaint likewise fails to state a claim.

B. MWAA does not exercise federal power.

Counts III through V of Plaintiffs' Amended Complaint allege, in various formulations, that the federal government has improperly delegated federal authority to MWAA. As Plaintiffs concede, Counts III, IV, and V of their Amended Complaint rest on "the premise that MWAA exercises federal power." Pl. Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 8] at 8. The Court rejects that premise.

Plaintiffs argue first that the Supreme Court held in *CAAN*, 501 U.S. 252, 111 S.Ct. 2298, that "members of MWAA's Board are federal 'officers' exercising federal power." Pl. Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 8] at 9. That is simply false. *CAAN* did not concern MWAA's Board, but rather its now-defunct Board of Review. The latter was empowered to overturn the decisions of MWAA's Board and was composed of "nine Members of the Congress, eight of whom serve[d] on committees with jurisdiction over transportation issues and none of whom [was] a Member from Maryland, Virginia, or the District of Columbia[.]"*CAAN*, 501 U.S. at 259, 111 S.Ct. 2298. Congress insisted on the Board of Review to alleviate the concern of some members that "by leasing [National and Dulles] to a local authority, [Congress] would be losing control over them" entirely. *Id.* at 268, 111 S.Ct. 2298 (quoting 132 Cong. Rec. 32143 (1986) (statement of Rep. Hammerschmidt)).

The Supreme Court found the Board of Review to be an agent of Congress that either (1) improperly exercised federal executive power or (2) failed to observe the bicameral and presentment procedures necessary to exercise federal legislative power. See *id.* at 274, 111 S.Ct. 2298. The Court did not address whether MWAA itself exercises federal power. The Court did, however, strongly suggest the opposite, concluding that the Board of Review was a mechanism through which "Congress imposed its will on the regional authority created by the District of Columbia and the Commonwealth of Virginia." *Id.* at 276, 111 S.Ct. 2298. The characteristic of the Board of Review the Supreme Court deemed "[m]ost significant" to its analysis—the limitation of

membership to representatives of Congress—is not shared by MWAA's Board. See *id.* at 266–67, 111 S.Ct. 2298.[7]

The only Court to have squarely considered whether MWAA exercises federal power concluded that it does not. As discussed above, the Federal Circuit found in *Corr I* that "MWAA possesses few, if any, of the hallmarks of a federal instrumentality identified" by the Supreme Court. 702 F.3d at 1337–38. That court noted that "though it may partly owe its existence to an act of Congress, MWAA was in large part created by, and exercises the authority of, Virginia and the District of Columbia." *Id.* at 1337. Furthermore, "while MWAA does serve limited federal interests, it serves regional and state interests as well." *Id.* Finally, the court found that MWAA is not subject to meaningful federal control. See *id.* The court thus concluded that the factors identified by the Supreme Court in cases like *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397–98, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995), demonstrate that MWAA is not federal in nature. *Corr I*, 702 F.3d at 1338.

Independently applying the *Lebron* factors, the Court agrees with the Federal Circuit's reasoning. First, MWAA was created by legislation enacted by

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[7] In their Reply, Plaintiffs contend that MWAA's Board "inherited the Board of Review's powers." Pls. Rep. [Dkt. 103] at 4. It is unclear how MWAA's Board could inherit the power to veto its own decisions. Regardless, MWAA's Board certainly did not inherit the seats in Congress held by members of the Board of Review. The Court fails to see how the loss of a federal layer of review over MWAA's actions somehow transformed "the regional authority created by the District of Columbia and the Commonwealth of Virginia" into an agent of Congress like the Board of Review. *CAAN*, 501 U.S. at 276, 111 S.Ct. 2298.

the District of Columbia and Virginia. See D.C. Code §§ 9–901, *et seq.*; Va. Code §§ 5.1–152, *et seq.* Throughout their various filings, Plaintiffs mischaracterize the nature of Congress' contribution, contending that the Transfer Act conferred upon MWAA its various powers. See*, e.g.*, Pls. Rep. [Dkt. 103] at 5. It did not. The Transfer Act instead merely recognized and consented to the powers conferred upon MWAA by Virginia and the District of Columbia. See *Corr I*, 702 F.3d at 1337 ("The Airports Act, however, represents Congressional approval of Virginia's and the District of Columbia's compact-legislation authorizing the establishment of MWAA rather than the creation of the Authority in the first instance."); See also *Seattle Master Builders Ass'n* v. *Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986) ("As 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."). Indeed, the Transfer Act itself expressly recognizes that MWAA exercises powers "conferred upon it jointly by the legislative authority of Virginia and the District of Columbia," not federal authority delegated via the Transfer Act. 49 U.S.C. § 49106(a)(1)(A).

Plaintiffs argue that, notwithstanding that fact, "MWAA's history tells the story of a body shaped, authorized and overseen by Congress at every step." Pls. Rep. [Dkt. 103] at 6. Plaintiffs essentially argue that MWAA was foisted upon Virginia and the District by the federal government. This, however, elides the legislative history underpinning, and congressional findings accompanying, the Transfer Act. For example, MWAA was proposed by a

commission composed primarily of representatives of Virginia, Maryland, and the District, see 131 Cong. Rec. S9608, S9609, and enjoyed strong regional support. See*, e.g*, Commonwealth of Virginia Amicus Curiae Brief in Support of Dismissal [Dkt. 83–1] at 1–4. The Transfer Act itself states that the impetus for MWAA's creation was the "perceived limited need for a Federal role in the management of [National and Dulles] and the growing local interest" in the same. 49 U.S.C. § 49101(7). While the federal government played a role in MWAA's creation, that role was not so dominant as to somehow render MWAA a *de facto* federal entity.

Similarly, Plaintiffs contend that "MWAA was created to pursue Congress's policy goals." Pls. Rep. [Dkt. 103] at 8. There is some truth to that. The policy goal in question, however, was that of relinquishing control of National and Dulles to an entity operating at the "local/State level." 49 U.S.C. § 49101(7). As discussed above, this was a policy goal shared by Virginia and the District of Columbia. It is difficult to see how an entity created in the pursuit of this particular policy would be federal in nature, rather than a "local/State" creation. *Id.* "[T]he fact that federal and state entities act toward a common goal does not convert the state—or interstate—body into a federal one." *New York* v. *Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 533 (2d Cir. 2010).[8]

[8] Plaintiffs also argue that both the federal government and the Commonwealth of Virginia have made isolated statements in other cases indicating that MWAA exercises federal power. Plaintiffs, however, do not contend that Defendants are estopped from arguing otherwise, or that the Court is somehow bound to follow these prior statements. As such, it's not clear that the prior statements have any bearing on the present proceedings.

Plaintiffs argue further that by managing federal property, MWAA "serves a function expressly granted to *Congress* by the Constitution, namely, to make 'Rules and Regulations respecting the Territory or other Property Belonging to the United States[.]' " Pls. Rep. [Dkt. 103] at 7 (quoting U.S. Const. Art. 1, § 3, cl. 2). But as Plaintiffs concede, see *id.* at 8, the mere fact that MWAA leases federal property does not transform it into a federal instrumentality. See *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358, 362, 60 S.Ct. 279, 84 L.Ed. 322 (1939); See also *United States* v. *Muskegon Twp.*, 355 U.S. 484, 486, 78 S.Ct. 483, 2 L.Ed.2d 436 (1958) (holding that operation of federally-owned manufacturing plant did not render a private company a federal instrumentality).

Plaintiffs press the point nonetheless, contending that MWAA is not a typical lessee as it was "created on the Federal Government's terms to exercise the federal Congress's own power over federal property[.]" Pls. Rep. [Dkt. 103] at 8. As discussed above, that is not an accurate description of MWAA. Regardless, Plaintiffs fail to explain how MWAA exercises power reserved to Congress more than any other lessee of federal property. There is nothing inherently "federal" about the operation of National and Dulles. With the exception of National and Dulles, the federal government has never owned or operated major commercial airports. See *CAAN*, 501 U.S. at 256, 111 S.Ct. 2298. Indeed, it seems that part of the impetus for MWAA's creation was a general sense that the federal government has little business running a commercial airport. See 131 Cong. Rec. S9608 (noting that "[b]y 1948, [National] was identified as inappropriate for operation as a

conventional federal agency," and "many attempts were made to reorganize first National, and later both National and Dulles into a government corporation" before the United States ultimately transferred control of the airports to a local authority). Congress itself recognized in the Transfer Act that federal control of a major commercial airport is anomalous, reasoning that transferring control of National and Dulles to the "local/State level" would be more "consistent with the management of major airports elsewhere in the United States." 49 U.S.C. § 49101(7). If anything, operating commercial airports like National and Dulles is a distinctly *un*-federal activity.

Proceeding to the next *Lebron* consideration, MWAA serves predominantly state and local, rather than federal, interests. Although the Supreme Court in *CAAN* observed that Congress has a "strong and continuing interest in the efficient operation of" National and Dulles, 501 U.S. at 266, 111 S.Ct. 2298, Congress found its own interest to be "limited" relative to the "important and growing" role the airports play in "the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region." 49 U.S.C. § 49101(1), (3); cf. *Corr I*, 702 F.3d at 1337 ("[W]hile MWAA does serve limited federal interests, it serves regional and state interests as well."). This conclusion is, frankly, commonsensical; while National and Dulles do undoubtedly serve members of Congress traveling to and from their home districts, the airports far more frequently serve the many residents of the Washington, D.C., metropolitan area. It was recognized when MWAA was first proposed that the state and local

governments of the Washington, D.C., metropolitan area are "the parties principally interested in the operation" of the airports. 131 Cong. Rec. S9609. As stated by then-Governor of Virginia Gerald Baliles in testimony before a congressional subcommittee, National and Dulles are "critical" to Virginia as "Virginia's most heavily-used gateway." Proposed Transfer of Metro. Wash. Airports: Hearings Before the Subcomm. on Aviation of the H. Comm. on Pub. Works and Transp., 99th Cong. 4, 9–10 (1986). The same likely can be said of the District. The very nature of the arrangement struck between the federal government, Virginia, Maryland, and the District of Columbia reflects that the balance of interests tips local, with the federal government's "limited" interest safeguarded only "by a lease mechanism which provides for local control and operation." 49 U.S.C. § 49101(3), (10).

As for the final *Lebron* considerations, 513 U.S. at 397–98, 115 S.Ct. 961, the federal government has little say in MWAA's operations.[9] MWAA was deliberately constituted as a local authority that operates "independent of ... the United States Government." 49 U.S.C. § 49106(a)(2). While the President appoints three members of MWAA's Board, that is only a small minority of the Board's 17 members. See D.C. Code § 9–904; Va. Code § 5.1–155. This is a mundane feature among interstate compacts, *see, e.g.*, *State ex rel. Dyer* v. *Sims*, 341 U.S. 22, 27–28, 71 S.Ct. 557, 95 L.Ed. 713 (1951), and is

[9] The Court notes that Plaintiffs' various arguments with respect to federal control of MWAA are inconsistent with Plaintiffs' other claims, which generally bemoan MWAA's *unaccountability* to the federal government. *See, e.g.*, Am. Compl. [Dkt. 37] ¶¶ 4–5.

not sufficient to demonstrate that MWAA is federally controlled.

The greatest formal authority the United States retains over MWAA is the power to enforce the terms of the airport lease. See 49 U.S.C. § 49104(a)(2)(C). As Plaintiffs concede, however, that is little enough power, see Am. Compl. [Dkt. 37] ¶ 48, and no more than any lessor retains over a lessee. As discussed above, the mere fact that MWAA leases federal property is not enough to transform it into a federal instrumentality. See *Buckstaff Bath House Co.*, 308 U.S. at 362, 60 S.Ct. 279.

Plaintiffs argue further that MWAA is a *de facto* federal entity because it operates under federal control in practice. Plaintiffs, however, provide little evidence of federal control—none of it compelling. Plaintiffs point out that the District and Virginia twice amended their laws concerning MWAA in tandem with Congress. See Pls. Rep. [Dkt. 103] at 5. Such coordination, however, does not demonstrate congressional control—particularly as one of the amendments resulted from court decisions holding the amended portion to be unconstitutional. See *CAAN*, 501 U.S. at 277, 111 S.Ct. 2298; *Hechinger*, 36 F.3d at 105. Relatedly, the Court notes that Congress has twice tried, and failed, to "impose[ ] its will on the regional authority created by the District of Columbia and the Commonwealth of Virginia" through a Board of Review. *CAAN*, 501 U.S. at 276, 111 S.Ct. 2298; See also *Hechinger*, 36 F.3d 97. Those efforts make little sense if Congress in fact controls MWAA in the absence of a Board of Review.

Plaintiffs contend further that the Department of Transportation has recently subjected MWAA's

operations to a degree of "general oversight." See Pls. Rep. [Dkt. 103] at 5–6. But Department of Transportation oversight is simply not the same as meaningful federal control. Indeed, that is, to a degree, *the very premise* of Plaintiffs' lawsuit. Cf. Am. Compl. [Dkt. 37] ¶ 48 ("Neither the Transfer Act nor the Airports Lease creates any mechanism or procedure by which the Secretary is in a position to effectively supervise MWAA, or otherwise to practically enforce the Lease terms.").

This relatively minor federal involvement sets MWAA well apart from entities that courts have deemed to be *de facto* federal instrumentalities. Plaintiffs, for example, compare MWAA to Amtrak. See Pls. Rep. [Dkt. 103] at 5. Whereas the vast majority of MWAA's Board is appointed by state and local authorities, see Va. Code § 5.1–155; D.C. Code § 9–904, nearly all of Amtrak's Board is appointed by the President and confirmed by the Senate. See *Dep't of Transp.* v. *Ass'n of Am. Railroads*, —— U.S. ——, 135 S.Ct. 1225, 1231, 191 L.Ed.2d 153 (2015). Amtrak's Board members must additionally meet qualifications set by federal law, and are paid salaries subject to limits set by Congress. *Id.* While MWAA was constituted by Virginia and the District as a local governmental body, see Va. Code § 5.1–153; D.C. Code § 9–902, Amtrak was constituted as a corporation, with "[t]he Secretary of Transportation hold[ing] all of Amtrak's preferred stock and most of its common stock[.]"*Ass'n of Am. Railroads*, 135 S.Ct. at 1231. Congress is largely uninvolved in MWAA's day-to-day activities. See*, e.g.*, 49 U.S.C. § 49106(a)(2); See also Pls. Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 8] at 15–19 (arguing that MWAA's discretion is not meaningfully constrained

by federal law). Amtrak, on the other hand, is subject to far more thorough requirements set by federal law, ranging from general policies Amtrak must pursue to specific train routes it must maintain. See *Ass'n of Am. Railroads*, 135 S.Ct. at 1232. Finally, unlike MWAA, which receives federal grants on the same basis as any other airport authority, Amtrak is "dependent on federal financial support." *Id.* The contrast is so stark that the Court is surprised Plaintiffs would invite the comparison.

Finally, Plaintiffs argued at the hearing on this matter that MWAA wields federal power because its authority derives in part from the District of Columbia, and the District's authority in turn comes from Congress. The District's authority, however, is generally understood to be local, rather than federal, in nature. See*, e.g.*, *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1396 (D.C. Cir. 1996) (noting that D.C. law is "local" rather than "federal").

At the very least, the District's authority is not "federal" in any sense that would subject MWAA to Plaintiffs' separation of powers challenge. Although Congress delegated legislative power to the District, Congress possesses a "dual authority over the District." *Keller* v. *Potomac Elec. Power Co.*, 261 U.S. 428, 443, 43 S.Ct. 445, 67 L.Ed. 731 (1923). Where the District is concerned, Congress may legislate in its capacity as a national body, or it may legislate using its unitary, "plenary" authority to "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore*, 411 U.S. at 397, 93 S.Ct. 1670. It is this latter power that Congress delegated to the District. This unitary authority is not subject to the Constitution's

separation of powers requirements, whether wielded by Congress, the District, or MWAA. See *Techworld Dev. Corp.* v. *D.C. Pres. League*, 648 F.Supp. 106, 116–17 (D.D.C. 1986), *vacated as moot*, No. 86-5630, 1987 WL 1367570 (D.C. Cir. June 2, 1987).

In light of the above, the Court finds that MWAA is not a federal instrumentality exercising federal power. As Counts III, IV, and V of Plaintiffs' Amended Complaint rest on "the premise that MWAA exercises federal power," Pls. Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 8] at 8, those Counts fail as a matter of law.

C. Tolls charged by MWAA are not illegal exactions, and Plaintiffs fail to state a Section 1983 claim.

Count VI of Plaintiffs' Complaint alleges that tolls charged by MWAA are illegal exactions that violate the Due Process Clause of the Fifth Amendment. The legal basis for this claim is unclear. Indeed, the parties are unable to agree as to the body of law under which the claim arises. The Court notes that Plaintiffs' counsel brought a similar claim in *Corr* that engendered similar confusion. See *Corr II*, 740 F.3d at 299.

Regardless, as in *Corr*, the Court need not resolve the confusion. The Court gleans that—as in *Corr*—Plaintiffs' illegal exaction claim is not freestanding, but rather is "parasitic on" Plaintiffs' other claims. *Corr II*, 740 F.3d at 300. It posits that MWAA collected money from Plaintiffs while operating illegally, and so that collection of money was itself illegal. Plaintiffs' illegal exaction claim can therefore only succeed if the Court rules in Plaintiffs' favor on some other count of Plaintiffs' Amended Complaint.

Plaintiffs conceded as much at oral argument. As the Court finds that the other counts of Plaintiffs' Amended Complaint lack merit, Plaintiffs' illegal exaction claim also fails.

Similarly, Count XI of Plaintiffs' Amended Complaint alleges that MWAA violated 42 U.S.C. § 1983 based on the constitutional claims discussed and rejected above. As Plaintiffs failed to "prove a violation of the underlying constitutional right," Plaintiffs have failed to state a claim under Section 1983. *Daniels* v. *Williams*, 474 U.S. 327, 330, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

D. MWAA has not violated the Transfer Act or the airport lease.

Counts VII and VIII of Plaintiffs' Amended Complaint allege that MWAA has violated the Transfer Act and the lease under which it operates National and Dulles. These claims are effectively identical, as the Transfer Act dictates the pertinent terms of the lease. See 49 U.S.C. § 49104(a).[10]

Plaintiffs contend that MWAA has contravened three provisions of the Transfer Act. First, Plaintiffs argue that MWAA has failed to use the leased premises "only for airport purposes" as required by 49 U.S.C. § 49104. Second, Plaintiffs claim that MWAA has failed to abide by 49 U.S.C. § 49104(a)(3), which

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[10] The Act provides a private cause of action allowing "an aggrieved party" to "compel the Airports Authority and its officers and employees to comply with the terms of the lease." 49 U.S.C. § 49104(c). Courts have interpreted this provision as "limit[ing] the remedies available" for violations of the lease and Transfer Act "to equitable relief necessary to enforce compliance with the Lease." *LTMC/Dragonfly, Inc.* v. *Metro. Washington Airports Auth.*, 699 F.Supp.2d 281, 295 (D.D.C. 2010).

requires that "all revenues generated by the [MWAA] ... be expended for the capital and operating costs of" National and Dulles. Finally, Plaintiffs claim that MWAA has violated 49 U.S.C. § 47107(a)(13)(A), which requires MWAA to set "charges for the use of facilities ... that will make the airport as self-sustaining as possible."

At the hearing on this matter, Plaintiffs expressly abandoned their claim that MWAA's activities have not served "airport purposes" within the meaning of 49 U.S.C. § 49104. As such, the Court will dismiss Plaintiffs' claims insofar as they rest on that provision of the Transfer Act.

Plaintiffs' second argument, that MWAA has failed to spend "all revenues generated" on "the capital and operating costs of" National and Dulles, *id.* § 49104(a)(3), takes issue with MWAA's contributions to the Silver Line Metro project and funds MWAA has put toward improving roads in and around the Dulles Corridor. What constitutes a capital cost is not defined in the airport lease or the Transfer Act.

Both the lease and Transfer Act, however, require MWAA to assume responsibility for the FAA's Master Plans. See 49 U.S.C. § 49104(a)(6)(A). Those Master Plans expressly contemplate the extension of rail service to Dulles. See Federal Defs. Exh. 1 [Dkt. 88–1] at 2, 123–24, 131. Plaintiffs apparently concede that MWAA's contributions to the Silver Line Metro project are in keeping with the Master Plans, and that MWAA's efforts to improve Route 7 and Spring Hill Road are incidental to the Silver Line project. See MWAA Exh. 12 [Dkt. 98–3] at ¶ 1.3.3. Plaintiffs' argument that these are not "capital costs" under the

lease and Transfer Act would therefore have the Court construe the term so narrowly that it would exclude this project *expressly contemplated* by the lease and Transfer Act. MWAA would effectively be advised to pursue, while at the same time forbidden to pursue, these projects. That cannot be a proper construction of the lease and Transfer Act.

Plaintiffs rejoin only that these improvements cannot constitute "capital costs" because they will incidentally benefit a large number of non-airport users. For example, Plaintiffs claim that only a relatively small fraction of the people served by the Silver Line will, on a given day, use the Silver Line to reach Dulles. See Mem. in Supp. of Mot. for Summ. J. [Dkt. 47] at 24. As a matter of logic, it is hard to see why this matters. This incidental benefit to third parties in no way diminishes the improvement to Dulles wrought by rail accessibility. It would be difficult—perhaps impossible—to provide effective rail service to the airport without conferring such a benefit on third parties.

Moreover, Plaintiffs cite no authority for the proposition that a capital expenditure cannot incidentally benefit third parties. Ordinarily, a capital expenditure is simply "[a]n outlay of funds to acquire or improve a fixed asset." CAPITAL EXPENDITURE, Black's Law Dictionary (10th ed. 2014). The fact that the Silver Line will benefit non-airport users does not take it outside this definition. The Court notes that the federal government—the lessor itself—has already certified that the Silver Line project meets the requirements of the lease and Transfer Act, see Pls. Mot. for Summ. J. Exh. 11 [Dkt. 52–1] at 3, including the requirement that "all revenues generated by the [MWAA] ... be expended

for the capital and operating costs of" National and Dulles. See 49 U.S.C. § 49104(a)(3). Plaintiffs provide no compelling reason to second-guess the lessor's construction of its own lease.

Plaintiffs similarly take issue with MWAA's improvements to Route 606 in and around the Dulles Corridor. Route 606 lies partially on land leased to MWAA, and the improvements to it are intended to enhance access to both Dulles and the Dulles Toll Road. See Pls. Exh. 35 [Dkt. 65–1] at 199. At the hearing on this matter, Plaintiffs' counsel conceded that capital expenditures need not pertain to assets resting entirely on property leased to MWAA. It is therefore difficult to see why MWAA's expenditures on Route 606 would not constitute capital costs under the airport lease and Transfer Act. The Court therefore finds that Plaintiffs have failed to demonstrate that MWAA violated 49 U.S.C. § 49104(a)(3) through its various efforts to improve access to Dulles.

Plaintiffs next argue that MWAA has violated 49 U.S.C. § 47107(a)(13)(A) by failing to "make the airport as self-sustaining as possible." Plaintiffs claim that this is so because "the obvious way to do that, if there are excess revenues, is to put those revenues in a trust fund or analogous account so they can be used to meet future expenses of airport facilities[.]" Am. Compl. [Dkt. 37] ¶ 174; See also Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 47] at 25.

Simply characterizing a conclusion as "obvious," however, does not make it so. Nor, for that matter, does it suffice to survive a Rule 12(b)(6) motion. Plaintiffs offer no evidence, analysis, or authority.

Instead, they merely state their conclusion that MWAA could pursue a broad statutory directive more effectively and invite Defendants to prove them wrong. But it falls to Plaintiffs to state a viable claim for relief. See*, e.g.*, *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Plaintiffs fail to put forth sufficient factual matter or analysis to meet that obligation. They instead merely quibble with MWAA's business judgment.

If, as Plaintiffs claim, MWAA could *only* satisfy its obligations under 49 U.S.C. § 47107(a)(13)(A) by putting excess revenue in a trust fund, the lease and Transfer Act would say so. Instead, the lease and Transfer Act entrust MWAA with discretion. Plaintiffs have established they would exercise that discretion differently. That, however, does not demonstrate MWAA has violated 49 U.S.C. § 47107(a)(13)(A), notwithstanding Plaintiffs' apparent confidence that they know best how to run Dulles.[11]

In sum, Plaintiffs have failed to sufficiently allege any violation of the Transfer Act and airport lease. The Court will therefore dismiss Counts VII and VIII of Plaintiffs' Amended Complaint.

E. Plaintiffs fail to state a claim under the APA.

Finally, Plaintiffs allege in Counts IX and X of their Amended Complaint that MWAA, the Department of Transportation, and the Secretary

[11] The Court notes that it is in fact not "obvious" that using excess funds to improve public access to Dulles will make the airport less sustainable than Plaintiffs' vague "trust fund or analogous account."

have all violated the APA. See Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 47] at 25. The Court disagrees.

First, as discussed above, MWAA is not a federal instrumentality. It is therefore not an "authority of the Government of the United States," 5 U.S.C. § 551(1), subject to the APA. See also *Atl. States Marine Fisheries Comm'n*, 609 F.3d at 532–33 (finding that interstate compacts are generally not subject to the APA).

Plaintiffs press the point nonetheless, arguing that the "APA applies to quasi-agencies like interstate compact entities that are imbued with a special federal interest[.]" Mem. in Supp. of Mot. for Partial Summ. J. [Dkt. 47] at 27. The Court concludes that, for the reasons discussed above, Plaintiffs have failed to show that MWAA is imbued with any special federal interest that would justify subjecting MWAA to the APA.

Regardless, neither this Court nor the Fourth Circuit has embraced the "quasi-federal agency" doctrine advanced by Plaintiffs. Indeed, the Fourth Circuit has implicitly rejected it. See *United States* v. *Saunders*, 828 F.3d 198, 205 (4th Cir. 2016) (citing with approval the Second Circuit's rejection of the "quasi-federal agency" doctrine in *New York* v. *Atlantic States Marine Fisheries Commission*, 609 F.3d 524, 527 (2d Cir. 2010)). In the case Plaintiffs cite, *Seal & Co.* v. *Washington Metropolitan Area Transit Authority*, 768 F.Supp. 1150, 1154 (E.D. Va. 1991), this Court explained that "the agency involved—WMATA—is not a federal agency" and so "is not subject to the APA," but noted the reasoning of two other courts finding that "WMATA should be

treated as a federal agency subject to the APA with respect to standing" in certain circumstances. *Id.* at 1155. Judge Ellis did not endorse this conclusion, and the Court finds the limited reasoning of the cases discussed in *Seal & Co.* unpersuasive. Having found that MWAA does not exercise federal power, it would be inappropriate to subject it to a law intended to restrain federal power. See *Atl. States Marine Fisheries Comm'n*, 609 F.3d at 532–33.

It is unclear whether Plaintiffs still maintain their APA claim against the federal defendants. As discussed above, at the hearing on this matter Plaintiffs abandoned their argument that MWAA's activities do not serve valid "airport purposes" within the meaning of 49 U.S.C. § 49104. Plaintiffs' APA claim against the federal defendants rests upon this argument. Having abandoned the argument without qualification at the hearing, the Court is inclined to deem it withdrawn for all purposes.

Regardless, Plaintiffs' APA claim against the federal defendants is both time barred and meritless. First, as the federal defendants note, there is a significant gulf between the claim contemplated in Plaintiffs' Amended Complaint and the claim advanced in Plaintiffs' briefs. Plaintiffs' Amended Complaint specifically challenges "final agency action" under 5 U.S.C. § 706(2)—to wit, the Secretary's 2008 "certif[ication] that MWAA's operation of the Toll Road and its use of toll revenue to fund construction of the Metrorail Project were valid 'airport purposes' within the meaning of the MWAA lease." Am. Compl. [Dkt. 37] ¶¶ 195–98. A claim based on agency action that occurred in 2008, however, is now time-barred by the APA's six-year statute of limitations. See *Jersey Heights*

Neighborhood Ass'n v. *Glendening*, 174 F.3d 180, 186 (4th Cir. 1999).

Perhaps recognizing their error, Plaintiffs' briefs reframe their APA claim as challenging agency action *unlawfully withheld* under 5 U.S.C. § 706(1). As reformulated in Plaintiffs' briefs, the Secretary is committing an ongoing violation of the APA by refusing to recognize that MWAA is using airport property for other than "airport purposes."

"It is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk at Broadlands Homeowner's Ass'n, Inc.* v. *OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013). Here, Plaintiffs attempt through briefing to modify their Amended Complaint to allege the very opposite of what it now says. Plaintiffs' Amended Complaint clearly alleges that the Secretary has already taken "final agency action" on the pertinent issue, Am. Compl. [Dkt. 37] ¶ 196, not that he has refused to take action on it. This is not, as Plaintiffs claim, a mere tweak of their legal theory. Plaintiffs cannot plead one set of facts in their Amended Complaint and expect the Court to rule on another.

While the Court might otherwise grant leave to amend, to do so here would be futile. As discussed above, "airport purposes" is defined broadly in the Transfer Act to include any "business or activity not inconsistent with the needs of aviation[.]" 49 U.S.C. § 49104(a)(2)(A)(iv). Plaintiffs make no serious effort to argue that MWAA's various projects fall outside this expansive definition. Instead, Plaintiffs argue only that the Court should artificially narrow the definition of "airport purposes" to avoid

"constitutional concerns" addressed and rejected above. See Mem. in Supp. of Mot. for Summ. J. [Dkt. 47] at 27–28. The Court declines to rewrite the statute in this manner. Accordingly, Plaintiffs' APA claim against the federal defendants lacks merit whatever its formulation.

IV. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted. Accordingly, the Court will deny Plaintiffs' Motion for Partial Summary Judgment [Dkt. 46], grant Defendants' Motions to Dismiss for Failure to State a Claim [Dkts. 85, 90, 94], deny Defendants' other Motions [Dkts. 86, 91] as moot, and dismiss Plaintiffs' Amended Complaint with prejudice. Because the Court does not reach the question of whether this matter should be dismissed pursuant to Federal Rule of Civil Procedure 19, the Court will deny Plaintiffs' Motion for Leave to File Supplemental Authority [Dkt. 127] as moot.

An appropriate order will issue.

CHAPTER 491—METROPOLITAN WASHINGTON AIRPORTS

§ 49101. Findings

Congress finds that—

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

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

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

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

(5) all other major air carrier airports in the

United States are operated by public entities at the State, regional, or local level;

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

(7) in recognition of a perceived limited need for a Federal role in the management of these airports and the growing local interest, the Secretary of Transportation has recommended a transfer of authority from the Federal to the local/State level that is consistent with the management of major airports elsewhere in the United States;

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

(9) a commission of congressional, State, and local officials and aviation representatives has recommended to the Secretary that transfer of the federally owned airports be as a unit to an independent authority to be created by Virginia and the District of Columbia; and

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

§ 49102. Purpose

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

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

§ 49103. Definitions

In this chapter—

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

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

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

Washington Dulles International Airport.

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

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

§ 49104. Lease of Metropolitan Washington Airports

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

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

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

(i) aviation business or activities;

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

(iii) nonprofit, public use facilities that are

not inconsistent with the needs of aviation; or

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

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

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

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

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

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

(4) In acquiring by contract supplies or services for an amount estimated to be more than $200,000, or awarding concession contracts, the Airports Authority to the maximum extent practicable shall obtain complete and open competition through the use of published competitive procedures. By a vote of 7 members, the Airports Authority may grant exceptions to the requirements of this paragraph.

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

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

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

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

(6)(A) Except as specified in subparagraph (B) of this paragraph, the Airports Authority shall assume all rights, liabilities, and obligations of the Metropolitan Washington Airports on June 7, 1987, including leases, permits, licenses, contracts, agreements, claims, tariffs, accounts receivable, accounts payable, and litigation related to those rights and obligations, regardless whether judgment has been entered, damages awarded, or appeal taken. The Airports Authority must cooperate in allowing representatives of the Attorney General and the Secretary adequate access to employees and records when needed for the performance of duties and powers related to the period before June 7, 1987. The Airports Authority shall assume responsibility for the Federal Aviation Administration's Master Plans for the Metropolitan Washington Airports.

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

(C) The Administration is responsible for reimbursing the Employees' Compensation Fund, as provided in section 8147 of title 5, for compensation paid or payable after June 7, 1987, in accordance with chapter 81 of title 5

for any injury, disability, or death due to events arising before June 7, 1987, whether or not a claim was filed or was final on that date.

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

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

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

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

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

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

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

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

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

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

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

§ 49105. Capital improvements, construction, and rehabilitation

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

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

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

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

§ 49106. Metropolitan Washington Airports Authority

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

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

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

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

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

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

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

(A) to acquire, maintain, improve, operate, protect, and promote the Metropolitan Washington Airports for public purposes;

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

equipment for the airports;

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

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

(E) to levy fees or other charges; and

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

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

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

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

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

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

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

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

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

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

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

(4) A member of the board—

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

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

(C) must reside within the Washington Standard Metropolitan Statistical Area, except that a member of the board appointed by the President must be a registered voter of a State other than Maryland, Virginia, or the District of Columbia.

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

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

same political party.

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

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

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

…

(e) Certain Actions To Be Taken by Regulation.—An action of the Airports Authority changing, or having the effect of changing, the hours of operation of, or the type of aircraft serving, either of the Metropolitan Washington Airports may be taken only by regulation of the Airports Authority.

…

§ 49107. Federal employees at Metropolitan Washington Airports

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

(2) Employee protection arrangements made under this section shall ensure, during the 50-

year lease term, the continuation of all collective bargaining rights enjoyed by transferred employees retained by the Airports Authority.

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

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

§ 49110. Use of Dulles Airport Access Highway

The Metropolitan Washington Airports Authority shall continue in effect and enforce section 4.2(1) and (2) of the Metropolitan Washington Airports Regulations, as in effect on February 1, 1995. The district courts of the United States have jurisdiction

to compel the Airports Authority and its officers and employees to comply with this section. The Attorney General or an aggrieved party may bring an action on behalf of the United States Government.

§ 49111. Relationship to and effect of other laws

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

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

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

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

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

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

(2) The Airports Authority shall consult with—

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

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

§ 49112. Separability and effect of judicial order

(a) Separability.—If any provision of this chapter, or the application of a provision of this chapter to a person or circumstance, is held invalid, the remainder of this chapter and the application of the provision to other persons or circumstances is not affected.

(b) Effect of Judicial Order.—(1) If any provision of the Metropolitan Washington Airports Amendments Act of 1996 (title IX of Public Law 104–264; 110 Stat. 3274) or the amendments made by the Act, or the application of that provision to a person, circumstance, or venue, is held invalid by a judicial

order, the Secretary of Transportation and the Metropolitan Washington Airports Authority shall be subject to section 49108 of this title from the day after the day the order is issued.

(2) Any action of the Airports Authority that was required to be submitted to the Board of Review under section 6007(f)(4) of the Metropolitan Washington Airports Act of 1986 (Public Law 99–500; 100 Stat. 1783–380; Public Law 99–599; 100 Stat. 3341–383) before October 9, 1996, remains in effect and may not be set aside only because of a judicial order invalidating certain functions of the Board.