No. 18-1240

In the Supreme Court of the United States

PHIL KERPEN, ET AL., PETITIONERS

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Metropolitan Washington Airports Authority (MWAA) is a federal instrumentality for purposes of the separation of powers—in particular, the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2.

2. Whether the statute authorizing the federal government to transfer operating authority over two federally owned commercial airports in the Washington, D.C., region to MWAA, pursuant to a long-term lease, violates the non-delegation doctrine.

3. Whether the statute authorizing that transfer violates the Guarantee Clause, U.S. Const. Art. IV, § 4.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Kerpen v. *Metropolitan Wash. Airports Auth.*, No. 16-cv-1307 (May 30, 2017)

United States Court of Appeals (4th Cir.):

Kerpen v. *Metropolitan Wash. Airports Auth.*, No. 17-1735 (Oct. 22, 2018)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 18-1240

PHIL KERPEN, ET AL., PETITIONERS

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 907 F.3d 152. The opinion of the district court (Pet. App. 22a-60a) is reported at 260 F. Supp. 3d 567.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 2018 (Pet. App. 1a). On January 14, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 20, 2019. On February 12, 2019, the Chief Justice further extended the time to and including March 21, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1940, Congress authorized the construction of what is now known as Reagan National Airport. *Metropolitan Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 255 (1991) (*CAAN*). Ten years later, Congress provided for the acquisition of land for Dulles International Airport and a right-of-way in a broad corridor leading to Dulles, for an access highway linking the new airport "to two of the major highways serving the Washington, D.C. region." Pet. App. 3a. "The access highway runs the length of the right-of-way, with no exits and no tolls, exclusively to service traffic to and from the airport." *Corr* v. *Metropolitan Wash. Airports Auth.*, 740 F.3d 295, 297 (4th Cir. 2014) (*Corr II*), cert. denied, 136 S. Ct. 29 (2015). At the time, "[t]he government reserved a strip of land in the median of the access highway for a possible future public transportation project." *Ibid.*

Until 1987, the federal government owned and operated both airports and their related facilities. *CAAN*, 501 U.S. at 255. But it had become clear by then that the Washington airports' anomalous status as "the only two major commercial airports owned by the Federal Government," *id.* at 256, was preventing them from being developed and operated with the same degree of support from local and regional governments that was available to other transportation hubs located near state boundaries, such as the three major airports operated in and around New York City by the Port Authority of New York and New Jersey. See 131 Cong. Rec. 9608 (1985). In 1984, an advisory commission recommended that a "regional authority" to operate the Washington airports be "created by a congressionally

approved compact between Virginia and the District [of Columbia]." *CAAN*, 501 U.S. at 257.

In 1985, Virginia and the District enacted compact legislation, creating the Metropolitan Washington Airports Authority (MWAA) as "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction * * * conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia." Va. Code Ann. § 5.1-153 (2016); see D.C. Code § 9-902 (LexisNexis 2012); Pet. App. 4a. In 1986, Congress authorized the transfer of both of the Washington-area airports and their related facilities, including the Dulles access corridor, to MWAA pursuant to a long-term lease, which went into effect in 1987. Metropolitan Washington Airports Act of 1986 (Transfer Act), Pub. L. No. 99-500, Tit. VI, 100 Stat. 1783-373; see C.A. App. 191-255 (lease agreement and amendments).

MWAA's lease with the federal government was encumbered by an easement that the federal government had granted to Virginia in 1980 to construct and operate a toll road, commonly known as the Dulles Toll Road, which serves non-airport traffic within the Dulles access corridor. *Corr II*, 740 F.3d at 297; see C.A. App. 202, 256-266 (lease warranty of title and easement). The easement required Virginia to construct the road "so as to preserve the median * * * for future rail service to Dulles Airport." C.A. App. 261.

In the ensuing years, Virginia used toll revenues from the Dulles Toll Road to fund mass transit projects within the Dulles access corridor, including projects to extend the Washington Metrorail system to Dulles airport. *Corr II*, 740 F.3d at 298. In 2006, Virginia and MWAA agreed that Virginia would transfer to MWAA

control over the Dulles Toll Road and that MWAA would use revenues from tolls to finance construction of portions of the planned Metrorail extension. Pet. App. 6a.

2. In 2016, petitioners brought this action against the Secretary of Transportation, the Department of Transportation, and MWAA, on behalf of a putative class of fee-paying users of the Dulles Toll Road and airport facilities allegedly aggrieved by MWAA's use of toll-road revenues and other fees for the Metrorail expansion. Pet. App. 6a, 31a; see Am. Compl. ¶¶ 1, 78. Petitioners alleged, as relevant here, that Congress had delegated "significant federal authority" to MWAA in violation of the separation of powers, Am. Compl. ¶ 115; that MWAA exercises federal executive power and its governing structure violates Article II of the Constitution, *id.* ¶¶ 124-125; and that MWAA exercises federal legislative power in violation of the non-delegation doctrine, *id.* ¶¶ 134-137. Petitioners contended that, because of these purported constitutional defects, MWAA could not lawfully require them to pay tolls and other fees "to subsidize * * * public facilities." *Id.* ¶ 104.

The District of Columbia intervened as a defendant. Pet. App. 31a. Virginia filed an amicus brief informing the district court that it would not waive its sovereign immunity from suit and arguing that the suit should be dismissed for failure to join Virginia as a necessary party. *Ibid.*

3. The district court dismissed petitioners' amended complaint for failure to state a claim. Pet. App. 22a-60a. The court understood petitioners' separation-of-powers challenges to share the common premise "that MWAA exercises federal power." *Id.* at 40a (citation omitted). The court "reject[ed] that premise." *Ibid.* It concluded,

on the basis of this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), that MWAA is "not a federal instrumentality exercising federal power." Pet. App. 51a. The court noted that "[t]here is nothing inherently 'federal' about the operation of National and Dulles" and that the federal government "has never owned or operated" any other commercial airports. *Id.* at 45a. The court also noted that "part of the impetus for MWAA's creation was a general sense that the federal government has little business running a commercial airport," *ibid.*, and that Congress had specifically found that transferring control over the airports to regional authorities "would be more 'consistent with the management of major airports elsewhere in the United States," *id.* at 46a (quoting 49 U.S.C. 49101(7)). Thus, in the court's view, "operating commercial airports like National and Dulles is a distinctly *un*-federal activity." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-21a. It first agreed with the district court, "as a threshold matter," that MWAA is not a "federal entity" under the standards set forth in *Lebron*. *Id.* at 7a. It explained that MWAA "was not created by the federal government," but rather by an interstate compact between Virginia and the District of Columbia. *Id.* at 8a. The court of appeals also determined that "MWAA is not controlled by the federal government." *Id.* at 9a. After changes made in response to this Court's decision in *CAAN*, *supra*, and *Hechinger* v. *Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 513 U.S. 1126 (1995), MWAA is now governed by a 17-member Board of Directors, only three of whom are appointed by the President. Pet. App. 9a; see *id.* at 4a-5a (explaining that the remaining 14 directors

are appointed by the Governors of Virginia and Maryland and the Mayor of the District of Columbia). The court of appeals acknowledged that the three federal directors "could influence MWAA's operations," but it found that "federal control is not present here," given their distinct minority status. *Id.* at 9a. The court also reasoned that MWAA's lease to operate Reagan and Dulles airports did not transform MWAA into a "federal entity," just as "an ordinary contractor with the federal government" does not, "by virtue of the contract, become a federal entity." *Id.* at 9a-10a. Having determined that MWAA is not part of the federal government, the court concluded that its structure need not comply with the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. Pet. App. 11a.

The court of appeals then proceeded to address whether the authorities exercised by MWAA might nonetheless violate any constitutional limits on the delegation of federal legislative or executive power. Pet. App. 11a-17a. The court recognized that Article I of the Constitution vests "[a]ll legislative Powers" of the United States in Congress, U.S. Const. Art. I, § 1, and that "[t]his text permits no delegation of those powers," Pet. App. 12a (quoting *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). It determined, however, that "[u]nder 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." *Id.* at 13a. The court also determined that, "even if some of MWAA's powers did come from the federal government," no delegation problem would arise. *Ibid.* The non-delegation doctrine, the court explained, is satisfied as long as Congress provides "an 'intelligible principle'" to cabin the

discretion of the officials Congress authorizes to act, and the Transfer Act's provisions specifying how the facilities leased by MWAA may be used "are sufficiently detailed as to more than satisfy" that requirement. *Id.* at 12a-13a.

The court of appeals also considered whether MWAA's powers represent an impermissible "delegation of 'core governmental power' to a private entity," Pet. App. 13a, in light of this Court's decisions in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). The court of appeals concluded that the concerns animating those decisions are not applicable here "for the simple reason that MWAA is not a private entity," but rather a "public body which may lawfully exercise governmental power." Pet. App. 15a. The court further observed that, because Virginia and the District of Columbia "may amend the [interstate] compact" that created the MWAA, and because MWAA is governed by a Board of Directors whose members are appointed by elected officials, MWAA is politically accountable "in a way that true private entities simply are not." *Ibid.* Like the district court, the court of appeals also rejected petitioners' contention that there is something "inherently federal about the operation of commercial airports," such that the MWAA is necessarily "exercising 'federal power.'" *Ibid.*

Finally, the court of appeals rejected petitioners' alternative argument that, even if MWAA is not a federal entity, it exercises "*governmental* power" (Pet. C.A. Br. 42) in violation of the Guarantee Clause, U.S. Const. Art. IV, § 4. See Pet. App. 17a-18a. The Guarantee Clause 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. The court concluded that "MWAA does not deny the people of Virginia, Washington, Maryland, or any other state or subdivision, a republican form of government." Pet. App. 17a. Assuming that such a claim is justiciable, the court explained that the "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." *Ibid.* (quoting *In re Duncan*, 139 U.S. 449, 461 (1891)). The court held that the Transfer Act does not limit that right: "Voters are free to elect their political leaders and those political leaders are free to set their legislative agendas." *Id.* at 18a. The court further explained that, even with respect to its own activities, MWAA remains accountable to elected officials, because MWAA's "authority is circumscribed by legislation and can be modified or abolished altogether through the elected legislatures that created it." *Ibid.* (citation omitted).

ARGUMENT

The court of appeals correctly determined that the statutory scheme enabling MWAA, an entity created by an interstate compact, to operate the two federally owned commercial airports in the Washington, D.C., region does not violate the separation of powers and does not deprive the people of Virginia and Maryland of a republican form of government. Pet. App. 7a-18a. That determination does not conflict with any decision of this Court or another court of appeals and does not otherwise warrant this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners principally contend (Pet. 10-11) that the court of appeals "erred by concluding [that] MWAA would have to be exercising 'inherently' federal power

to be subject to Articles I and II," and that this "new 'inherently federal' test" is inconsistent with this Court's precedent. See Pet. 11-18. That contention, however, rests on a misreading of the decision below. The court of appeals did not adopt the "test" petitioners attribute to it, and they identify no sound basis for further review of the court's actual holding.

a. The court of appeals held that the structural constraints on the appointment of "Officers of the United States" under Article II of the Constitution, U.S. Const. Art. II, § 2, Cl. 2, do not apply to the selection of the members of MWAA's Board of Directors because MWAA is not a "federal entity." Pet. App. 11a; see pp. 5-6, *supra*. That holding was based on this Court's decision in *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), which held that the National Railroad Passenger Corporation (Amtrak) was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," *id.* at 394. The Court explained in *Lebron* that Amtrak was "established and organized under federal law for the very purpose of pursuing federal governmental objectives," and that a majority of its directors "are appointed directly by the President of the United States," putting it firmly "under the direction and control of federal governmental appointees." *Id.* at 397-398.

"Applying the standard from *Lebron*" to the circumstances of this case, the court of appeals concluded that MWAA, unlike Amtrak, is not "a federal entity" as far as the Constitution is concerned. Pet. App. 7a. The court observed that MWAA was not "created by the federal government," nor is it "controlled by the federal government." *Id.* at 8a-9a. The court also reasoned that

MWAA's lease of federal property and the federal government's oversight of its activities do not "convert" MWAA into a federal entity. *Id.* at 10a. Finally, the court explained that the interests that MWAA serves are not distinctly federal, but rather are "shared by the residents of Maryland, the District of Columbia, and Virginia." *Ibid.*

That decision is correct and does not conflict with any decision of this Court. To the contrary, the reasoning of the decision below closely tracks *Lebron*. It also comports with this Court's decision in *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225 (2015), which looked to many of the same factors in evaluating whether Amtrak is "a governmental entity for purposes of separation of powers analysis under the Constitution," *id.* at 1231; see *id.* at 1231-1233. The decision below is also consistent with this Court's precedent indicating that a lease or contract between the federal government and a private party does not thereby make the private party a government entity. See *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358, 362-363 (1939) (explaining that a private corporation's "lease from the Secretary of the Interior did not convert it into [a federal] instrumentality" exempt from state taxes).[1]

---

[1] See also *United States* v. *Orleans*, 425 U.S. 807, 816 (1976) ("[B]y contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies—into federal governmental acts."); *United States* v. *Township of Muskegon*, 355 U.S. 484, 486 (1958) (holding that the operation of a federally owned manufacturing plant did not transform a private company into a federal instrumentality).

The decision below also does not conflict with the decision of any other court of appeals. Indeed, the Fourth Circuit's decision here is premised on substantially the same considerations that led the Federal Circuit to conclude that MWAA is not "a federal instrumentality" for certain statutory purposes. *Corr* v. *Metropolitan Wash. Airports Auth.*, 702 F.3d 1334, 1336 (2012) (citation omitted). More broadly, no court of appeals has ever held that the Appointments Clause applies to an entity, like MWAA, created by an interstate compact. See *Seattle Master Builders Ass'n* v. *Pacific Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986) (noting that "virtually all compacts * * * or most of them impact federal activities," and that no court has held that the Appointments Clause applies to them), cert. denied, 479 U.S. 1059 (1987).

b. In any event, petitioners do not ask this Court to review the court of appeals' determination that MWAA is not part of the federal government for separation-of-powers purposes. The court of appeals found that determination to be "fatal to [petitioners'] claims under the Appointments Clause," Pet. App. 11a, and petitioners identify no defect in that reasoning—indeed, they do not address it at all.

Petitioners' reliance (Pet. 12-14) on decisions addressing the appointment and removal of officers of the United States is thus misplaced. Those decisions concerned entities that were, for constitutional purposes, part of the federal government. See *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 485-486, 492 (2010) (invalidating the removal limitations on directors of the Public Company Accounting Oversight Board, "a Government-created, Government-appointed

entity with expansive powers to govern an entire industry," which all parties agreed "is 'part of the Government' for constitutional purposes") (quoting *Lebron*, 513 U.S. at 397); *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (per curiam) (applying the Appointments Clause to the selection of members of the Federal Election Commission); cf. *Association of Am. R.Rs.*, 135 S. Ct. at 1239-1240 (Alito, J., concurring) (expressing Appointments Clause concerns that "all flow from the fact that" Amtrak "must be regarded as a federal actor for constitutional purposes"). The court of appeals here determined "as a threshold matter" that MWAA is not a federal entity, Pet. App. 7a, and petitioners do not challenge that holding.

There is also no merit to petitioners' suggestion (Pet. 16, 18-19, 22-23) that the decision below is inconsistent with this Court's decision in *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (*CAAN*). In that case, the Court held that a since-repealed arrangement for MWAA's governing structure—under which nine Members of Congress on a "Board of Review" could veto many significant decisions of MWAA's Board of Directors—violated the separation of powers. *Id.* at 269; see *id.* at 276. In determining that the Board of Review should be subject to "separation-of-powers scrutiny," *id.* at 269, the Court explained that the "[m]ost significant" consideration was that "membership on the Board of Review [was] limited to federal officials," *id.* at 266-267. MWAA's current governing structure is materially different. Its Board of Directors is now composed of 14 members appointed by the executives of Virginia, the District of Columbia, and Maryland, and three appointed by the President, Pet. App.

4a-5a, and its decisions are not subject to federal control—as petitioners recognize, see Pet. 5 ("MWAA no long[er] answers to the federal government."). Moreover, the Court in *CAAN* strongly implied that MWAA itself, when considered apart from the Board of Review, was *not* a federal entity, but rather a "regional authority created by the District of Columbia and the Commonwealth of Virginia." 501 U.S. at 276.

c. The court of appeals also correctly determined that Congress did not violate any Article I principles of non-delegation when Congress authorized the transfer of operating authority over the Dulles and Reagan airports and the Dulles access corridor to MWAA pursuant to a long-term lease. Pet. App. 11a-17a. The court concluded that Congress has not delegated authority to MWAA at all, because "MWAA exercises only those powers conferred on it by its state creators, not the federal government," and, alternatively, that Congress provided "intelligible principle[s]" to guide MWAA's exercise of "whatever policymaking discretion [MWAA] wields" under federal law. *Id.* at 13a.

Petitioners argue (Pet. 19) that the Transfer Act delegated "at least some" federal power to MWAA. As the court of appeals explained, however, MWAA owes its existence and authority to the laws of Virginia and the District of Columbia. Va. Code Ann. § 5.1-153 (2016); D.C. Code § 9-902 (LexisNexis 2012); see Pet. App. 13a. Notably, it was Virginia—not Congress—that required MWAA to use Dulles Toll Road revenues to fund the Metrorail expansion, as a condition of Virginia's transfer of its easement to MWAA. Pet. App. 6a. In the Transfer Act, Congress specified the powers and structure the regional authority would need to have in order

to receive a lease from the federal government to operate Dulles and Reagan airports, but Congress itself delegated no authority to MWAA. See *id.* at 8a; see also 49 U.S.C. 49106. And petitioners do not, at all events, challenge the court of appeals' alternative holding that the Transfer Act provides "intelligible principle[s]" if the statute delegates any federal authority to MWAA. Pet. App. 13a.

The court of appeals' conclusion that the Transfer Act does not violate the non-delegation doctrine did not rest on any novel test about whether the challenged delegation involved an "'inherently' federal or a 'core' federal power." Pet. i. To be sure, the court observed that "[l]egislative power is an example of * * * a 'core' function that may not be delegated." Pet. App. 12a; see *id.* at 13a ("The Constitution * * * forbids delegation of 'core governmental power' to a private entity."). But that observation followed from this Court's precedent. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (observing that the Constitution's vesting of all "'legislative Powers'" in Congress "permits no delegation of those powers") (citation omitted); *Pittston Co.* v. *United States*, 368 F.3d 385, 394 (4th Cir. 2004) (citing *Whitman* for the proposition that, "[*i*]*n other words*, 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") (emphasis added), cert. denied, 544 U.S. 904 (2005). That observation also was not the basis for the court of appeals' decision, which turned instead on the absence of any congressional delegation at all.

The court of appeals also stated, in rejecting petitioners' argument that "MWAA violates the non-delegation principle," that "there is nothing inherently federal

about the operation of commercial airports," and that "federal operation of a commercial airport is the exception, not the rule." Pet. App. 15a-16a. Petitioners repeatedly and selectively quote that portion of the decision, which contains the court's only reference to "inherently federal" activities. See Pet. i, 2, 8, 9, 10, 11, 12, 13, 14, 18, 20, 21, 24. Read in context, however, the court's reference to "inherently federal" activities was merely a response to petitioners' own arguments, not a new operative separation-of-powers test. Petitioners had argued that the powers exercised by MWAA and its officers are "inherently federal" and therefore may only be exercised by duly appointed officers of the United States, Pet. C.A. Br. 20, and the court disagreed with petitioners' premise. And it did so (Pet. App. 15a-16a) only after already concluding on other grounds that petitioners' Appointments Clause and non-delegation challenges fail (*id.* at 7a-15a).

2. In their second question presented (Pet. i, 21-25), petitioners seek review of the court of appeals' holding that the Transfer Act did not impermissibly delegate federal authority to a private party because MWAA is a public, interstate-compact entity. That alternative basis for the decision below does not merit the Court's review because it is subsumed by the court of appeals' more general holding that Congress did not delegate any federal authority to MWAA. The court was also plainly correct to conclude that the concerns animating this Court's decisions in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936), and *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), are not present here. See Pet. App. 14a-15a (explaining that *Carter Coal* involved the delegation of "the power to regulate

the mining industry" to "private mining interests," empowering some firms to regulate their competitors, whereas MWAA is "a creation of the states" and is "subject to their dictates").

The second question presented as framed in the petition is also based on an unsound premise. Petitioners ask the Court (Pet. i) to address whether Congress may "delegate to interstate compacts and other instrumentalities of state or local governments" authority that Congress "could not constitutionally * * * delegate[] to private entities." But nothing in the decision below supports petitioners' apparent belief that Congress could not authorize the government to lease Dulles and Reagan airports (or any other federally owned commercial property) to a private party. And petitioners identify no reason to doubt that, if Congress can authorize the federal government to lease Dulles and Reagan airports to a private party, it can also authorize such a lease to an entity created by an interstate compact.

3. Finally, petitioners argue (Pet. 26-34) that the court of appeals erred in holding that the federal government did not violate the Guarantee Clause by leasing Dulles and Reagan airport to MWAA. Petitioners' arguments under the Guarantee Clause are insubstantial and do not warrant this Court's review.

As an initial matter, this Court approaches Guarantee Clause claims "with some trepidation, because the Guarantee Clause has been an infrequent basis for litigation throughout our history." *New York* v. *United States*, 505 U.S. 144, 184 (1992). And "[i]n most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine." *Ibid.* (citing cases). Petitioners contend (Pet. 34) that

there is no barrier to review here because a "judicially manageable standard" governs the question "whether MWAA is politically accountable despite its statutorily-mandated independence." That is not a question the court of appeals addressed, however, and petitioners identify no reason for this Court to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Moreover, a claim may be nonjusticiable if the Court's decision would require "an initial policy determination of a kind clearly for nonjudicial discretion." *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (citation omitted); see also *Rucho* v. *Common Cause*, 139 S. Ct. 2489, 2494, 2499-2501 (2019). The focus of petitioners' complaint is on MWAA's use of Dulles Toll Road revenues to fund the Metrorail expansion—an undertaking the Commonwealth of Virginia required when it transferred its easement to MWAA. Pet. App. 6a. More generally, petitioners challenge the federal government's discretionary decision to lease federally owned commercial airports to a regional interstate-compact entity. It is unlikely that this Court could resolve petitioners' Guarantee Clause claim without questioning the policy determinations Congress made. See, *e.g.*, 49 U.S.C. 49101(1) and (5) (finding that transferring airport operations to MWAA is desirable, in part, because the two airports are "an important and growing part of the commerce, transportation, and economic patterns of Virginia, the District of Columbia, and the surrounding region," and "all other major air carrier airports in the United States are operated by public entities at the State, regional, or local level").

In any event, petitioners' claim is plainly meritless. The Guarantee Clause 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 Court has explained that "the 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." *In re Duncan*, 139 U.S. 449, 461 (1891). As the court of appeals correctly concluded, MWAA's operation of the Dulles Toll Road "does not deny the people of Virginia, Washington, Maryland, or any other state or subdivision, a republican form of government." Pet. App. 17a. The interstate compact does not limit electoral rights, circumscribe legislative choices, or in any way alter the government of any State.

Petitioners observe that "MWAA's exercise of its powers must be '*independent* of Virginia and its local governments, the District of Columbia, and the United States Government.'" Pet. 26 (quoting 49 U.S.C. 49106(a)(2)). That independence, petitioners argue (Pet. 27), "precludes accountability," "diffuses responsibility," and strips Virginia's legislators (and those of the District) of "the ability to control MWAA's actions." Even if that description were accurate, petitioners offer no basis for their assumption that the Guarantee Clause is implicated by a State's grant of some degree of independence to an interstate-compact entity charged with addressing a discrete problem of a regional character. Interstate compacts, after all, are expressly authorized by the Constitution if consented to by Congress, see U.S. Const. Art. I, § 10, Cl. 3, as the compact here was, see Act of Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333. And such compacts sometimes create interstate entities to carry out their functions—such as the Port Authority of New York and New Jersey, see *Hess* v. *Port Auth.*

Trans-Hudson Corp., 513 U.S. 30, 35-36 (1994), which operates several airports, see p. 2, *supra*.[2]

Petitioners' description of MWAA's independence is, in any event, inaccurate. MWAA has independent authority "in the performance and exercise of the airport-related duties and powers" given to it by Virginia and the District. Va. Code Ann. § 5.1-156(B) (2016); D.C. Code § 9-905(b) (LexisNexis 2012). But MWAA exercises only those powers conferred by the Virginia and District legislatures. See Va. Code Ann. § 5.1-153 (2016); D.C. Code § 9-902 (LexisNexis 2012); cf. 49 U.S.C. 49106(a)(1)(A). And the majority of MWAA's Board is appointed by the executives of those two jurisdictions. Pet. App. 4a-5a; Va. Code Ann. § 5.1-155(A) (2016); D.C. Code § 9-904(a) (LexisNexis 2012); cf. 49 U.S.C. 49106(c). Thus, while MWAA need not seek approval before acting pursuant to its authorities, MWAA remains accountable to the representatives of the people of Virginia and the District.

---

[2] Petitioners similarly do not explain (Pet. 29) why the Guarantee Clause should be understood to limit a State's authority to enter into an interstate compact that requires joint action with the other compacting parties to alter the terms of the compact. Interstate compacts are typically "construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 628 (2013). A contract requiring mutual consent to alter its terms is hardly unusual.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
LEWIS S. YELIN
Attorneys

JULY 2019