No. 18-1240

IN THE

Supreme Court of the United States

PHIL KERPEN, *et al.*,
Petitioners,

v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION BY METROPOLITAN WASHINGTON AIRPORTS AUTHORITY AND THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Virginia and the District of Columbia created the Metropolitan Washington Airports Authority to operate Reagan National Airport and Dulles International Airport under a long-term lease from the United States. MWAA has a multi-jurisdictional, seventeen-member board whose members are appointed by the governors of Virginia and Maryland, the Mayor of the District of Columbia, and the President of the United States. Although the federal Transfer Act specifies minimum conditions that MWAA must meet as a condition of its federal lease, it expressly recognizes that MWAA's powers are only those conferred by Virginia and the District of Columbia pursuant to their interstate compact. 49 U.S.C. § 49106(a)(1). The questions presented are:

1. Whether MWAA exercises delegated federal power triggering separation-of-powers scrutiny.

2. Whether MWAA's governance structure denies States a republican form of government under the Guarantee Clause, and whether that claim is justiciable.

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INTRODUCTION

The premise on which the petition is based is fatally flawed. The Metropolitan Washington Airports Authority (MWAA) is not a federal instrumentality and exercises no "federal" power. Rather, MWAA's power was conferred through joint legislative action by the Virginia General Assembly and the Council for the District of Columbia. As a result, this case is an exceedingly poor vehicle to address federal separation-of-powers principles or the scope of the federal government's ability to delegate its powers.

In addition, the decision by Virginia and the District to create MWAA was valid under the Compact Clause and does not impair the "republican form of government" under the Guarantee Clause. The Guarantee Clause issue is also not justiciable, a point reinforced by this Court's recent decision in *Rucho* and on which there is no split among the circuits.

In fact, there is not "any split at all" on *any* of these questions, let alone a "deep or wide circuit split." Pet. 18. And the petition is a poor vehicle for yet another reason: Virginia is an indispensable party whose refusal to waive its Eleventh Amendment immunity precludes Petitioners from recovering on their claims in federal court.

Certiorari should be denied because the petition will not facilitate resolving *any* of the questions purportedly presented for review.

STATEMENT OF THE CASE

1. Reagan National Airport and Dulles International Airport, both located in northern Virginia, "are the only two major commercial airports owned by the Federal Government." *Metro. Wash. Airports Auth. v.*

Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 256 (1991) ("*CAAN*"). Congress authorized land acquisition for what became Reagan in 1940. *Id.* at 255. When Congress later authorized "a second major airport to serve the Washington area, it again provided for federal ownership and operation," and Dulles "was opened in 1962 under the direct control of the [Federal Aviation Administration]." *Id*. at 256.

As part of the planning for Dulles 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." Pet. 28a. That "stretch of land" was used to build the Dulles Access Highway, "a 13.65–mile highway used exclusively to provide rapid access to and from the Dulles Airport." *Id.* (citation omitted).

In 1984, amid concerns about the unreliability of federal funding for airport improvements, the Secretary of Transportation appointed a commission to develop a plan to create a regional authority that could operate both airports. *CAAN*, 501 U.S. at 257. The commission was chaired by former Virginia Governor Linwood Holton.[1] The Holton Commission recommended that control of the airports be transferred to an entity created by "a congressionally approved compact between Virginia and the District." *CAAN*, 501 U.S. at 257. Congress had given its advance consent for such interstate

[1] Advisory Commission on the Reorganization of the Metropolitan Washington Airports (Dec. 18, 1984), reprinted in *Proposed Transfer of Washington National and Dulles International Airports to a Regional Airports Authority: Hearing Before the Subcomm. on Governmental Efficiency and the District of Columbia of the S. Comm. on Governmental Affairs*, 99th Cong. 371, 374, 376 (1985) [hereinafter 1985 Senate Govt'l Affairs Hearings].

airport compacts in 1959. *See* Act of Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333 (1959); *Cuyler v. Adams*, 449 U.S. 433, 441 (1981) ("Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.").

Virginia and the District of Columbia strongly supported and promptly acted on the Holton Commission's recommendation. In 1985, each adopted parallel legislation to enact the MWAA Compact.[2] The compact established MWAA as "a public body corporate and politic and independent of all other bodies, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislative authorities of both the Commonwealth of Virginia and the District of Columbia."[3]

Virginia and the District each authorized MWAA, among other things, to acquire control of Reagan and Dulles airports from the federal government, "by lease or otherwise."[4] They consented, subject to approval by the Governor of Virginia and the Mayor of the District, to conditions imposed by Congress "that are not inconsistent" with the Compact.[5] They further granted MWAA the power, among other things: to sue and be sued; to contract; to issue bonds secured by airport

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[2] 1985 Va. Acts ch. 598 (codified at Va. Code Ann. §§ 5.1-152 to 5.1-178 (2016)); 1985 D.C. Law 6-67 (codified at D.C. Code §§ 9-901 to 9-926 (LexisNexis 2019)).

[3] Va. Code Ann. § 5.1-153 (2016); D.C. Code § 9-902 (LexisNexis 2019).

[4] Va. Code Ann. § 5.1-154 (2016); D.C. Code § 9-903 (LexisNexis 2019).

[5] *Id*.

revenues; to build airport facilities; and to fix and collect "rates, fees, rentals and other charges."[6] They also granted MWAA the power to condemn property in Virginia "in accordance with" Virginia law governing eminent domain.[7]

The elected leaders of Virginia and the District urged Congress to approve transferring control of the airports to MWAA. In 1985, Governor Chuck Robb expressed Virginia's "very strong support" for the transfer and noted that the Virginia General Assembly had adopted the compact by "an overwhelming vote." [8] D.C. Mayor Marion Barry added that the compact reflected significant regional strides and cooperation among Virginia, Maryland, and the District.[9]

Congress failed to act that year, but Virginia and the District renewed their advocacy in 1986. Virginia's new governor, Gerald Baliles, told Congress that the "destiny of National and Dulles Airports" was a "subject critical to Virginia's future," as the airports comprised "Virginia's most heavily-used gateway."[10]

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[6] Va. Code Ann. §§ 5.1-156(A)(6), (8), (11)–(13) (2016); D.C. Code §§ 9-905(a)(6), (8), (11)–(13) (LexisNexis 2019).

[7] D.C. Code § 9-909(c) (LexisNexis 2019); *see also* Va. Code Ann. § 5.1-160(C) (2016); 49 U.S.C. § 49106(b)(1) (specifying as minimum condition under the Transfer Act that MWAA have "the powers of eminent domain in Virginia that are conferred on it by Virginia").

[8] *Transfer of National and Dulles Airports: Hearings Before the Subcomm. on Aviation of the S. Comm. on Commerce, Sci. and Transp.*, 99th Cong. 80, 83 (1985) [hereinafter 1985 Senate Commerce Hearings].

[9] *Id.* at 114.

[10] *Proposed Transfer of Metropolitan Washington Airports: Hearings Before the Subcomm. on Aviation of the H. Comm. on Pub. Works and Transp.*, 99th Cong. 9–10 (1986).

Baliles argued that the airports should be operated "like every other major airport in the country, . . . by regional authorities that represent the areas they serve."[11] Mayor Barry argued that transferring control of the airports to MWAA would enhance "federalism" by "providing local regional control over essentially local airports."[12] He added that doing so would benefit the District by giving it voting membership in the regional authority.[13]

2. In October 1986, Congress approved the MWAA Compact and authorized the long-term lease of Reagan and Dulles airports in what is commonly called the "Transfer Act."[14] Congress initially created a Board of Review, comprised of Members of Congress, empowered to veto certain decisions by MWAA's Board of Directors. But this Court struck down the Board of Review in *CAAN* as unconstitutional. 501 U.S. at 255.[15]

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[11] *Id*. at 10–11.

[12] *Id*. at 181.

[13] *Id. See also id.* at 171 (statement of Julius Hobson, Jr., Executive Office of the Mayor of the District of Columbia) ("We see it as something that is very important to the District.").

[14] Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, Tit. VI, 100 Stat. 3341-376 (1986) (codified as amended at 49 U.S.C. §§ 49101 to 49112).

[15] Congress attempted to salvage the Board of Review by restructuring it after *CAAN*, but the Board of Review was invalidated again by the D.C. Circuit because Congress "retain[ed] control over the appointments" and "ensure[d] that the Board will be dominated by Members of Congress." *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 99, 101 (D.C. Cir. 1994). After this Court denied certiorari in *Hechinger*, 513 U.S. 1126 (1995), Congress abolished the Board of Review altogether. *See* Pub. L. No. 104-264, § 904(a), 110 Stat. 3276 (1996).

The Transfer Act states that its purpose is to transfer control over the airports "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." 49 U.S.C. § 49102(a). Congress set forth a number of specific findings. Particularly relevant here, Congress found that "the United States Government has a continuing but limited interest in the operation" of the airports, and that that limited federal interest could be satisfied "through a lease mechanism which provides for local control and operation." *Id*. §§ 49101(3), (10).

The Transfer Act provides that MWAA's governance structure must "at least meet the specifications" set forth in the statute, but it makes clear that MWAA's powers are those "conferred upon it jointly" by Virginia and the District of Columbia. *Id*. §§ 49106(a)(1)(A), (B). Among other things, MWAA must be "independent of Virginia and its local governments, the District of Columbia, and the United States Government." *Id*. § 49106(a)(2). It must also be "a political subdivision constituted only to operate and improve the Metropolitan Washington Airports as primary airports serving the Metropolitan Washington area." *Id.* § 49106(a)(3). MWAA may use federally owned land at the airports only for defined "airport purposes." *Id*. § 49104(a)(2). MWAA must make annual lease payments to the United States in the amount of $3 million (in 1987 dollars). *Id.* § 49104(b). And MWAA must meet federal aviation-law requirements that the airports "be as [financially] self-sustaining as possible . . . ." *Id.* § 49104(a)(3) (incorporating requirements of, *inter alia*, 49 U.S.C. § 47107(a)(13)(A)).

The Transfer Act tracks the MWAA Compact in setting forth the number, appointment, and removal of members who serve on MWAA's Board of Directors. *Id*. § 49106(c). That number has increased over time from 11 in 1986,[16] to 17 today—7 appointed by the Governor of Virginia; 4 appointed by the Mayor of the District of Columbia; 3 appointed by the Governor of Maryland; and 3 appointed by the President with the advice and consent of the Senate.[17] All members are removable for cause in accordance with the laws of the appointing jurisdiction. Va. Code Ann. § 5.1-155(E) (2016); D.C. Code § 9-904(e) (LexisNexis 2019). The 3 federal appointees "may be removed by the President for cause." 49 U.S.C. § 49106(c)(6)(C).

The Transfer Act also authorized the transfer to MWAA of the airports' "access highways and other related facilities." *Id.* § 49102(a). The transfer thus included "the Dulles Airport Access Highway and Right-of-way, including the extension between Interstate Routes I-495 and I-66." *Id*. § 49103(4). The federal lease was signed in 1987. *See* 4th Cir. JA 191 (Lease).

3. Petitioners in this case challenge the use of Dulles Toll Road revenues to finance a portion of the cost of constructing Metrorail to Dulles Airport (the "Dulles Metrorail Project"). The history of that project is important to understanding the questions presented.

As the court of appeals explained, "[i]n 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." Pet. 28a. The easement reserved the median strip "for future rail service to

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[16] Pub. L. No. 99-591, 100 Stat. 3341-383 (1986).

[17] Va. Code Ann. § 5.1-155(A) (2016); D.C. Code § 9-904(a) (LexisNexis 2019); 49 U.S.C. § 49106(c)(1).

Dulles Airport." *Id.* "Virginia began operating the tollway in 1984." *Id*. When the federal government leased the airports to MWAA in 1986, the lease was "subject only to Virginia's existing easement for the Toll Road." *Corr v. Metro. Wash. Airports Auth.*, 800 F. Supp. 2d 743, 747–48 (E.D. Va. 2011) (*Corr I*), *aff'd*, 740 F.3d 295 (4th Cir. 2014).

The Dulles Toll Road has been an important dedicated funding source to help defray the cost of extending Metrorail to Dulles Airport. Beginning in 1990, the Virginia General Assembly repeatedly authorized the Commonwealth Transportation Board to issue bonds secured by revenues from the Dulles Toll Road to pay for improvements in the "Dulles Toll Road and Dulles Access Road corridor," including "mass transit." *Id.* at 748. In 2004, the General Assembly codified that authority, defining "[t]ransportation improvements in the Dulles Corridor," including "mass transit," as a bond-eligible "project" under the State Revenue Bond Act. *Id*.

MWAA, of course, shared Virginia's goal of extending Metrorail service to Dulles. The FAA's original "master plan" for the airport "contemplated an eventual extension of metro service from Washington to Dulles." Pet. 5a; 4th Cir. JA 170. MWAA assumed responsibility for that master plan as a condition of the Transfer Act. Pet. 5a; *see* 49 U.S.C. § 49104(a)(6)(A).

In 2006, the Virginia Department of Transportation (VDOT) and MWAA entered into a memorandum of understanding under which MWAA agreed to construct the extension of Metrorail to Dulles in exchange for a permit from Virginia to operate the Toll Road, to set and collect the tolls, and to use toll revenues to help fund the extension project. *Corr I*, 800 F.2d at 749. On December 29, 2006, VDOT and MWAA entered

into a Master Transfer Agreement to effectuate the plan. *Id*. The U.S. Secretary of Transportation certified that MWAA's operation of the Toll Road and its use of toll revenues to pay for the Metrorail project were valid "airport purposes" under the Transfer Act and Lease. *Id*. at 750; 4th Cir. JA 414.

Construction of the Dulles Metrorail Project began in March 2009. *Corr I*, 800 F. Supp. 2d at 750. MWAA completed Phase I of the project in July 2014, extending the "Silver Line" to Tysons Corner and Reston.[18] Construction of Phase II commenced the same year and, once completed, will extend rail service to Dulles Airport and two stops beyond. Phase II is scheduled to open in 2020.

The costs of the Dulles Metrorail Project are shared equitably among the stakeholders. The United States, Virginia, and local governmental entities in Northern Virginia shoulder about half the expense: the United States (15.8%); Virginia (10.1%); Fairfax County (16.1%); Loudoun County (4.8%); and MWAA (4.1%, funded by aviation revenues). 4th Cir. JA 37, 108–09. The remaining costs (approximately 50%) are funded through revenue bonds issued by MWAA and secured by Dulles Toll Road revenues. *Id*.

Under MWAA's agreement with VDOT, if MWAA's ability to set the tolls and to use toll revenues to fund the project is invalidated, MWAA can terminate the agreement and Virginia would "immediately become[] responsible for MWAA's debt." *See Schneider v. Metro. Wash. Airports Auth.*, No. 1:18-cv-402, 2019 WL 1931752, at *2–3 (E.D. Va. Mar. 27, 2019). Debt service on the

[18] Dulles Corridor Metrorail Project, Project Status, http://www.dullesmetro.com/project-status (last visited Jun 26, 2019).

outstanding bonds—all secured by toll revenues on the Dulles Toll Road—exceeds $7 billion. *Id*.

4. This case is the fourth of five unsuccessful lawsuits filed since 2006, mostly by the same lawyers, seeking to block the use of Dulles Toll Road revenues to finance the Dulles Metrorail Project. *See Corr I*, 800 F. Supp. 2d at 749–50 (summarizing litigation history); *Schneider*, 2019 WL 1931752, at *2 ("This is the fifth lawsuit to challenge the legality of the tolls on the Toll Road."). In the first lawsuit, a Virginia circuit court rejected the efforts of motorists to block Virginia from transferring control of the Dulles Toll Road to MWAA. The court ruled that MWAA was an indispensable party and that the case could not proceed without it. *Gray v. Va. Sec'y of Transp*., 77 Va. Cir. 224, 227–33 (2008). The court also ruled "that the tolls were not a tax." *Gray v. Va. Sec'y of Transp.*, CL–07–203 (Richmond Cir. Ct. Oct. 20, 2008); *see Corr I*, 800 F. Supp. 2d at 749. A similar taxation claim was rejected in the second lawsuit. *See Parkridge 6 LLC v. U.S. Dep't of Transp.*, No. 1:09-cv-1312, 2010 WL 1404421 (E.D. Va. Apr. 6, 2010), *aff'd*, 420 F. App'x 265 (4th Cir. 2011).

In the third lawsuit, *Corr I*, the district court rejected an array of constitutional challenges to the project by toll road users. Among other things, the court found that the tolls were valid user fees, not illegal taxes; that MWAA was not a federal instrumentality subject to the separation-of-powers constraints of Articles I and II of the Constitution; and that MWAA did not deprive the States of a "republican form of government" under the Guarantee Clause. 800 F. Supp. 2d at 755–58. The *Corr* plaintiffs appealed to the Federal Circuit, theorizing that that court had appellate jurisdiction because MWAA was a "federal

instrumentality" subject to suit under the Little Tucker Act. *Corr v. Metro. Wash. Airports Auth.*, 702 F.3d 1334, 1336 (Fed. Cir. 2012) (*Corr II*). But the Federal Circuit rejected that theory too, transferring the appeal to the Fourth Circuit. *Id.* at 1337–38.

The Fourth Circuit then affirmed the district court's rulings. *Corr v. Metro. Wash. Airports Auth.*, 740 F.3d 295 (4th Cir. 2014) (*Corr III*), *cert. denied*, 136 S. Ct. 29 (2015). The court of appeals held, in particular, that the tolls were valid user fees that benefitted the users of the Dulles Toll Road by reducing traffic and by providing an alternative way of traversing "the Dulles Corridor." *Id*. at 301. The *Corr* plaintiffs sought review in this Court, raising the same separation-of-powers claims presented in this case, but the Court denied certiorari. 136 S. Ct. 29 (No. 13-1559).

The same counsel then filed this case in the District Court for the District of Columbia, asserting the same claims rejected in *Corr I*, *II*, and *III*. The plaintiffs named as defendants MWAA, the Department of Transportation, and the Secretary of Transportation. Petitioners added a new claim (which they have since abandoned) that the MWAA Compact was not a valid "interstate" compact because the District of Columbia is not a "State." 4th Cir. JA 47. As in *Corr*, the complaint was a putative class action by toll road motorists who sought to invalidate the tolls and to obtain a refund of tolls already paid. 4th Cir. JA 40–41, 77–79.

The district court transferred venue to the Eastern District of Virginia, finding that the focus of the complaint was the "imposition and collection of tolls in Virginia." Mem. Op. at 2, *Kerpen v. Metro. Wash. Airports Auth*., No. 1:16-cv-01401 (D.D.C. Sept. 26, 2016), ECF No. 26. The district judge observed that plaintiffs appeared to have engaged in "forum

shopping prompted by plaintiffs' unsuccessful similar challenges brought in the Fourth Circuit." Pet. 31a n.3 (quoting transferor judge).

Following transfer to the Eastern District of Virginia, the District of Columbia intervened to defend the validity of its compact with Virginia. No. 1:16-cv-1307, ECF Nos. 44, 82. The Commonwealth of Virginia expressly declined to intervene; instead, it filed an amicus brief asserting its Eleventh Amendment immunity and urging dismissal because plaintiffs could not recover on their claims in Virginia's absence. *Id*., ECF Nos. 83, 83-1, 84.

The district court granted the defendants' motions to dismiss all counts and therefore did not reach Virginia's indispensable-party argument. Pet. 31a. Petitioners appealed a handful of the district court's rulings to the Fourth Circuit. Pet. 3a. On appeal, Virginia filed an amicus brief restating its position that Petitioners could not recover because Virginia was an indispensable party that refused to waive its immunity. *See* Virginia Amicus Br. 1–2, ECF No. 66-1.

The Fourth Circuit affirmed. Pet. 1a. The court rejected Petitioners' argument that MWAA violated separation-of-powers principles. It ruled that "MWAA has not been delegated 'legislative power' from the federal government." Pet. 13a. That was so because, under both the MWAA Compact and the Transfer Act, "MWAA exercises only those powers conferred on it by its state creators, not the federal government." *Id*. The court added that, "even if some of MWAA's powers did come from the federal government, whatever policy-making discretion the Authority wields would be amply constrained by Congress' passage of the Transfer Act." *Id*.

The court of appeals also rejected petitioner's claim that the MWAA Compact denies the States a republican form of government under the Guarantee Clause. Pet. 17a. Assuming for argument's sake that the claim was justiciable, the court ruled that Congress did not force the compact on Virginia or the District and that the MWAA Compact did not disturb the republican form of government in any of its member jurisdictions. Pet. 17a–18a. Like the district court, the Fourth Circuit did not address whether Virginia was an indispensable party.

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle for addressing the delegation of federal powers because Congress did not delegate any federal power to MWAA.

The Fourth Circuit found that Congress did not delegate any federal power to MWAA and that, even if it had, the delegation was permissible because Congress provided an "intelligible principle" constraining MWAA's exercise of power through the restrictions in the Transfer Act. Pet. 12a–13a.[19] Petitioners seize on one sentence in which the court of appeals said that "there is nothing *inherently federal* about the operation of commercial airports." Pet. 15a (emphasis added). They turn that point into the centerpiece of their petition, attributing to the Fourth Circuit a

[19] *Accord Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality) ("So we have held, time and again, that a statutory delegation is constitutional as long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'") (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

holding that it did not make: that separation-of-powers scrutiny does not apply when delegated federal power is not "inherently federal." Pet. i. Petitioners repeat that mantra 27 times.

But because Petitioners have ignored the Fourth Circuit's primary holding, their starting premise is entirely wrong. Congress has not delegated *any* federal power to MWAA; MWAA's power derives from the compact between Virginia and the District of Columbia, not from any grant of power by Congress.

A. The federal-instrumentality cases on which Petitioners rely involved entities that, unlike MWAA, were both created and controlled by the federal government.

The cases on which Petitioners rely to show that MWAA exercises delegated federal power all involved actual federal instrumentalities that were created and controlled by the federal government. Because MWAA was not created by the federal government and is not controlled by it, these cases are simply inapposite.

For instance, Amtrak—the National Railroad Passenger Corporation—is considered part of the federal government for constitutional purposes notwithstanding Congress's disclaimer that Amtrak is not part of the federal government for statutory purposes. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 393, 398–400 (1995) (holding that Amtrak is subject to the First Amendment). That is so because "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1232 (2015); *Lebron*, 513 U.S. at 400 (same). "*Lebron* teaches that, for purposes of Amtrak's status as a

federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status." *Am. Railroads*, 135 S. Ct. at 1233.

Likewise, the federal oversight board invalidated in *Free Enterprise Fund*—because its members were too insulated from removal by the President—was created under the Sarbanes-Oxley Act of 2002, and its members were appointed by the Securities and Exchange Commission. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). So just like Amtrak, the Oversight Board was "'part of the [Federal] Government' for constitutional purposes." *Id.* at 486 (quoting *Lebron*, 513 U.S. at 397).

The Federal Elections Commission, whose membership structure was invalidated in *Buckley v. Valeo*, 424 U.S. 1, 109 (1976), was likewise created and controlled by the federal government. The President appointed two of its voting members and Congress appointed the other four, giving Congress improper legislative control over an executive branch agency. *Id.* at 113.

And the Board of Review that had veto power over certain of MWAA's decisions consisted of "nine Members of Congress." *CAAN*, 501 U.S. at 255, 259. The Board of Review thus wielded an unconstitutional congressional veto over MWAA's actions. *Id.* at 276 ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7.").

B. MWAA is not a federal instrumentality because it was created by Virginia and the District of Columbia and is not controlled by the federal government.

Unlike every one of the entities just discussed, MWAA is not a federal instrumentality under *Lebron*'s federal-creation-and-control test. Although MWAA's formation was recommended by an advisory commission appointed by the Secretary of Transportation,[20] MWAA could not have come into existence had it not been created by Virginia and the District of Columbia. Indeed, Petitioners do not dispute the Fourth Circuit's statement that "MWAA was not created by the federal government." Pet. 8a.

Although the Transfer Act sets out certain *minimum* "powers and jurisdiction" that MWAA must have as a condition of the Lease, *see* 49 U.S.C. § 49106(a)(1)(B), the Transfer Act makes clear that such powers and jurisdiction are "conferred upon [MWAA] *jointly by the legislative authority of Virginia and the District of Columbia*," *id*. § 49106(a)(1)(A) (emphasis added). Petitioners are thus wrong to claim—without citation—that at least some of MWAA's powers "come from the federal Transfer Act." Pet. 19. MWAA's powers derive instead from the compact between Virginia and the District. *See* Va. Code Ann. § 5.1-156 (2016); D.C. Code § 9-905 (LexisNexis 2019).

The federal-control element is also lacking because the federal government does not appoint or control a majority of MWAA's governing board. Virginia and the District established a seventeen-member board, giving only three appointments to the President. Virginia, the District, and Maryland appoint the other

[20] 1985 Senate Govt'l Affairs Hearings, *supra* note 1, at 376.

fourteen members.[21] The federal appointees thus hold *fewer* than one out of five seats. Indeed, the entire thrust of Petitioners' complaint in the district court was that the President has *too little* control over MWAA's affairs, not too much. *See* Pet. 47a n.9 (noting that Plaintiffs "generally bemoan MWAA's *unaccountability* to the federal government").[22]

The Fourth Circuit is not alone in holding that MWAA is not a federal instrumentality under the criteria set forth in *Lebron*. The Federal Circuit reached the same conclusion in 2012 in *Corr II*. 702 F.3d at 1337 ("MWAA possesses few, if any, of the hallmarks of a federal instrumentality identified in *Lebron* . . . ."). Yet again, this case was disposed of correctly by the Fourth Circuit based on clear Supreme Court precedent on which there is no split of authority.

C. Federal power was not bestowed on MWAA by Congress's approval of the Compact, by the Lease, or by the federal interest in the successful operation of the airports.

No other ground exists on which to conclude that Congress bestowed federal power on MWAA.

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[21] Va. Code Ann. § 5.1-155(A) (2016); D.C. Code § 9-904(a) (LexisNexis 2019); 49 U.S.C. § 49106(c)(1).

[22] Petitioners below mischaracterized Congress's efforts to conduct oversight of MWAA's actions as proof that MWAA is a federal instrumentality. Appellants' 4th Cir. Br. 39. The Government routinely requires airports receiving federal financial assistance to submit to federal oversight of their activities. *See, e.g.*, 49 U.S.C. §§ 47107(a)(15), (a)(18)-(19), (b)(1), (m), (n). Such supervision does not turn those airports into federal agencies or instrumentalities, and the same is true of MWAA.

The fact that Congress approved the interstate compact between Virginia and the District of Columbia does not transform MWAA's powers into "federal" powers. Petitioners concede that they have "not challenged here" the proposition that interstate-compact entities "'are not federal entities'—even if designed as a 'cooperative relationship with the federal government.'" Pet. 21 (quoting Pet. 10a). They were correct to do so.

To be sure, "congressional consent transforms an interstate compact . . . into a law of the United States." *Cuyler*, 449 U.S. at 438. Accordingly, the interpretation of a federally approved compact presents a federal question, and a federally approved compact will preempt State law under the Supremacy Clause. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 33 (1951) (Reed, J., concurring).

Nonetheless, the federal-law status of an interstate compact does not transform an interstate-compact agency into a *federal* agency. Nor does it confer *federal* power on the interstate-compact agency that must be exercised within the separation-of-powers strictures of Articles I and II. "To hold otherwise would have the effect of treating every congressionally authorized interstate compact entity . . . as a federal agency." *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 533 (2d Cir. 2010); *see Seattle Master Bldrs. Ass'n v. Pac. Nw. Elec. Power & Conserv. Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986) (holding that the members of an interstate-compact agency "are not 'federal' officers within the meaning of the appointments clause").

"Viewed from some sufficiently abstract level of generality, almost any compact between the States will touch on some concern of the national government."

Texas v. New Mexico, 138 S. Ct. 954, 959 (2018). That is "the very reason why the Constitution requires congressional ratification of state compacts." *Id*. But States would have little interest in creating interstate-compact agencies if they had to comply with federal separation-of-powers mandates, such as requiring that a majority of members be appointed by the President. *Seattle Master Bldrs.*, 786 F.2d at 1365 ("No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states."); *Corr I*, 800 F. Supp. 2d at 758 ("It is settled, as established by this country's long history of interstate compacts, that the President of the United States is not required to have authority to appoint or remove all of the members of an interstate compact commission in order to satisfy the Appointments Clause.").

So Petitioners were right to concede that their assertion that MWAA wields "federal power" cannot be premised on Congress's mere approval of the compact; it must be based instead on a decision by Congress to bestow "*additional* power" on MWAA. Pet. 22 (emphasis added). Yet Petitioners point to nothing in the Transfer Act to show that Congress delegated *any* federal power to MWAA, let alone any power beyond what Virginia and the District had already conferred through the compact.

Nor is there anything in the Lease to show that MWAA exercises federal power that triggers separation-of-powers scrutiny. Whenever an entity contracts with the United States, "[i]n a certain loose way it might be called an 'instrumentality' of the United States," but that does not make the contracting party a federal actor for constitutional purposes. *United States v. Twp. of Muskegon*, 355 U.S. 484, 486 (1958)

(holding that a federal lessee is not immune from State taxes). That is why an entity does not become a federal actor merely by leasing federal property, even when the lease advances federal interests, such as by providing public services to visitors at national parks. *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 362 (1939).

The court of appeals explained below why *Muskegon* and *Buckstaff* foreclose Petitioners' claim that the Lease somehow deputized MWAA to act as federal entity. Pet. 9a–10a, 45a. Yet Petitioners fail even to mention those controlling precedents in their petition.

Finally, the claim that MWAA wields federal power cannot be based on the theory that the federal government has an interest in promoting the airports' success. Congress made clear in the Transfer Act that the Government's interest was "limited" and that many other stakeholders shared an interest in the airports:

> [T]he 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.

49 U.S.C. § 49101(3) (emphasis added). Congress identified other stakeholders as including "nearby communities, the traveling public, air carriers, general aviation, airport employees, and other interested groups." *Id.* § 49101(6); *see also* Pet. 10a ("[A]t the very least, the [federal] interest here is one that is shared by the residents of Maryland, the District of Columbia, and Virginia."); *Corr II*, 702 F.3d at 1337 ("[W]hile MWAA does serve limited federal interests, it serves regional and state interests as well.").

Moreover, Congress found that the federal government's "limited" interest could be protected "through a lease mechanism which provides for local control and operation." 49 U.S.C. § 49101(10). After all, the whole point of transferring airport control to an "independent local authority" was to make the airports *more* like "all other major air carrier airports in the United States," which "are operated by public entities at the State, regional, or local level." *Id*. §§ 49101(4), (5). The district court correctly surmised that, "[i]f anything, operating commercial airports like National and Dulles is a distinctly *un*-federal activity." Pet. 46a.

Federal law is clear and federal courts are in accord: interstate-compact approval, federal leases, and limited federal policy interests alone do not confer "federal power" on non-federal entities.

D. MWAA's agreement with Virginia to use toll revenues to finance the Dulles Metrorail Project does not involve any "federal" power.

Finally, Petitioners' suggestion that MWAA exercises "federal" power when it sets the tolls on the Dulles Toll Road cannot be squared with Virginia's longstanding operation of that facility. Virginia built and operated the Dulles Toll Road under a 99-year easement that it obtained in 1983 from the Federal Aviation Administration. *Corr I*, 800 F. Supp. 2d at 746; 4th Cir. JA 256. Beginning in 1990, the Virginia General Assembly specifically authorized Virginia's Commonwealth Transportation Board to issue bonds for the construction of improvements through the "Dulles Corridor," including the extension of rail to Dulles Airport, using surplus revenues generated from tolls on the Dulles Toll Road. *Corr I*, 800 F. Supp. 2d at

748; *Corr III*, 740 F.3d at 298; *Schneider*, 2019 WL 1931752, at *1.

Virginia agreed in 2006 to transfer control over the Dulles Toll Road to MWAA in consideration of MWAA's promise to build the Dulles Metrorail Project in reliance on that same funding mechanism. *Corr I*, 800 F. Supp. 2d at 749. The agreement between Virginia and MWAA requires that toll revenues be used by MWAA only for the Dulles Toll Road "and the design, construction and financing of the Dulles Corridor Metrorail Project." *Id.*; *Schneider*, 2019 WL 1931752, at *1; 4th Cir. JA 332 (Dulles Toll Road Permit & Operating Agreement).

Thus, the project that Petitioners attack here has a purely Virginia history and pedigree. Virginia's use of revenues from the Dulles Toll Road to fund Metrorail's extension to Dulles reflects "a decades-long plan." *Schneider*, 2019 WL 1931752, at *1. And MWAA's authority to charge tolls on the Dulles Toll Road and to use the revenues to fund the Dulles Metrorail Project derives from its permit from Virginia and from its authority under the MWAA Compact. In other words, Petitioners have no legal or factual basis to claim that the setting of tolls on the Dulles Toll Road to finance the Dulles Metrorail Project depends in any way on the exercise of any *federal* power.

* * *

In short, because Petitioners are wrong that MWAA exercises delegated federal power, and because the only two circuits to have examined the question both concluded that MWAA is not an agent or instrumentality of the federal government, certiorari is unwarranted. S. Ct. R. 10; *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (following "our

ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals").

II. The Fourth Circuit correctly held that, even if the Guarantee Clause claim were justiciable, MWAA does not deny the States a republican form of government.

Review is likewise unwarranted of the Fourth Circuit's holding that MWAA's structure does not violate the republican form of government protected by the Guarantee Clause. That question may not be justiciable and, in any event, has not generated any split of authority among courts.

Petitioners face a threshold hurdle that, "[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." *New York v. United States*, 505 U.S. 144, 184 (1992). Prior cases had established "a general rule of nonjusticiability." *Id*. at 184–85. In fact, a majority of this Court recently cited the rule against justiciability of Guarantee Clause questions in support of its holding that political gerrymandering cases are not justiciable. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

Petitioners face the same justiciability barrier here. The federal circuits are in agreement and no circuit to date has found a Guarantee Clause claim justiciable.[23]

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[23] *See, e.g.*, *Phillips v. Snyder*, 836 F.3d 707, 717 (6th Cir. 2016), *cert. denied sub nom. Bellant v. Snyder*, 138 S. Ct. 66 (2017); *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001); *Deer Park Indep. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099 (5th Cir. 1998); *Padavan v. United States*, 82 F.3d 23,

In light of that consensus and *Rucho*, the Guarantee Clause question here does not merit review.

To be sure, the Court posited before *Rucho* "that *perhaps* not all claims under the Guarantee Clause present nonjusticiable political questions." *New York*, 505 U.S. at 185 (emphasis added). Assuming without deciding that question, the Court found that the Guarantee Clause was not offended by financial incentives and disincentives that the federal government imposed to encourage States like New York to address problems surrounding the disposal of nuclear waste. *Id*. The Court reasoned that financial incentives "represent permissible conditional exercises of Congress' authority under the Spending and Commerce Clauses respectively, in forms that have now grown commonplace." *Id*. "Congress offer[ed] the States a legitimate choice rather than issuing an unavoidable command. The States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." *Id*.

New York requires the same conclusion here. Even assuming that Petitioners' Guarantee Clause claim were justiciable, Congress did not coerce Virginia or the District of Columbia to create MWAA through any "unavoidable command." *Id*. Their elected representatives enthusiastically embraced the compact. *Supra* at 4–5. Doing so did not impair their representative democracies. Virginia and the District still "retain the ability to set their legislative agendas," and their "government officials remain accountable to the local electorate." *New York*, 505 U.S. at 185.

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28 (2d Cir. 1996); *Chiles v. United States*, 69 F.3d 1094, 1097 (11th Cir. 1995).

Deciding *whether* to enter into an interstate compact was, of course, a legislative judgment properly committed to the Virginia General Assembly and the D.C. Council. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (rejecting Guarantee Clause challenge to Virginia's decision to establish an unelected board to regulate milk prices).

And even with respect to the tolls challenged by Petitioners in this case, the record shows that Virginia's representative government worked just fine. Virginia's legislature repeatedly voted to authorize using Dulles Toll Road revenues to finance Metrorail to Dulles. *Corr I*, 800 F. Supp. 2d at 748. And while some Virginia legislators tried to block the Commonwealth from transferring control over the Dulles Toll Road to MWAA, a majority of legislators supported that decision. *Id.* at 749 & n.5.

"Even on questions of MWAA's [own] activities, the elected representatives of the people have their say." Pet. 18a. MWAA exercises only those powers conferred on it by the elected leaders of its member jurisdictions. *Id*. The organization is accountable to its seventeen-member Board, whose members are appointed by the Governor of Virginia, the Mayor of the District, the Governor of Maryland, and the President of the United States, and who are removable for cause under the laws of the appointing jurisdiction.[24] MWAA is also accountable to Virginia and the District, which are free to amend the compact through reciprocal action

[24] Va. Code Ann. §§ 5.1-155(A), (E) (2016); D.C. Code §§ 9-904(a), (e) (LexisNexis 2019).

by their respective "legislative authorities."[25] *See Corr I*, 800 F. Supp. 2d at 757 ("MWAA's independence 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.").

MWAA is further accountable to the federal government through provisions of the Lease and the Transfer Act. For instance, MWAA may use federal property "only for airport purposes." 49 U.S.C. § 49104(a)(2)(B). It is true that "airport purposes" is broadly defined. *Id.* § 49104(a)(2)(A). But even at its outer limits—"a business or activity not inconsistent with the needs of aviation"—MWAA is not unaccountable because activities authorized under that provision require prior approval by the Secretary of Transportation. *Id.* § 49104(a)(2)(A)(iv). MWAA is also subject to various federal oversight requirements that are standard for federally supported airports. *See, e.g.*, *id.* §§ 49104(a)(3) & (a)(7), 49106(g).

MWAA's permit from Virginia also holds MWAA accountable to Virginia for the manner in which it operates the Dulles Toll Road. MWAA may expend toll revenues *only* to operate and maintain the Toll Road, to pay costs of the Dulles Metrorail Project, and to fund eligible transportation improvements through the "Dulles Corridor." 4th Cir. JA 333. Any remaining revenues must be returned to Virginia for other "transportation programs and projects that are reasonably related to or benefit the users of the Toll Road." *Id.* The permit thus polices MWAA's obligation to Toll

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[25] Va. Code Ann. § 5.1-153 (2016); D.C. Code § 9-902 (LexisNexis 2019).

Road users and ensures "that the Metrorail expansion and the Dulles Toll Road [remain] parts of a single interdependent transit project." *Corr III*, 740 F.3d at 302.

Finally, it does not threaten a republican form of government that Virginia's compact with the District makes MWAA "independent of Virginia . . . , the District, and the United States." 49 U.S.C. § 49106(a)(2). Independence is not an aberration; it is the hallmark of an interstate-compact agency. "Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any 'one of the United States.'" *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994). Their "political accountability" is intended to be "diffuse" to prevent them from becoming the "instrument of a single State." *Id.* The principal benefit of using the Compact Clause is that "no one State *alone* can control the course of a Compact Clause entity." *Id*. at 47 (emphasis added).

Petitioners' assault on MWAA has no limiting principle. If an interstate-compact agency violates the Guarantee Clause whenever a member State lacks the power to dictate the agency's behavior—as Petitioners apparently contend—then no compact entity would ever survive. In Petitioners' world, the Guarantee Clause would swallow the Compact Clause. That contention is unsupportable and, particularly in the absence of any split of authorities, does not warrant review by this Court.

III. This case is a poor vehicle to reach the questions presented because Virginia is an indispensable party that refuses to waive its immunity.

This case is also a poor vehicle for reaching the questions presented because Virginia is an indispensable party that cannot be joined. Virginia made clear in its amicus brief in the district court, and again in the Fourth Circuit, that it refused to waive its Eleventh Amendment immunity.[26] The district court did not need to decide if Virginia was an indispensable party because it dismissed the complaint for failing to state a claim. Pet. 31a. The court of appeals affirmed that dismissal; it likewise did not reach the indispensable-party question.

It is one thing to dismiss a case on the merits without determining if Virginia's presence is indispensable for Petitioners to recover. It would be quite another to rule in Petitioners' favor without undertaking that analysis.

A party must be joined if feasible under Rule 19(a) when it "claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may . . . as a practical matter impair or impede [its] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864 (2008). Virginia plainly meets that requirement. Indeed, if MWAA's funding mechanism for the Dulles Metrorail Project is invalidated, MWAA is entitled to terminate its agreement with Virginia, which in turn would require Virginia to

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[26] *See* Virginia Amicus Br. 13–16, No. 1:16-cv-01307 (E.D. Va. Jan. 23, 2017), ECF No. 83-1; Virginia Amicus Br. 12–13, No. 17-1735 (4th Cir. Mar. 26, 2018), ECF No. 66-1.

assume MWAA's debt service on Dulles Toll Road bonds, an amount that exceeds $7 billion. *Schneider*, 2019 WL 1931752, at *2–3. Virginia is thus required to be joined if feasible under Rule 19(a), but joinder is not feasible because Virginia has refused to waive its Eleventh Amendment immunity.

Because Virginia cannot be joined, the analysis then shifts to Rule 19(b), which asks whether the case "in equity and good conscience" could proceed without it. But that analysis must be weighted heavily in favor of dismissal because of Virginia's interests as an absent sovereign. As this Court held in *Pimentel*, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." 553 U.S. at 867.

Against that backdrop, "all of the Rule 19(b) factors cut in favor of dismissal." *Schneider*, 2019 WL 1931752, at *4. A judgment invalidating the use of Dulles Toll Road revenues for the Dulles Metrorail Project would plainly "prejudice" Virginia under 19(b)(1). Having to assume $7 billion in bond indebtedness satisfies that requirement. Such "immediate and devastating financial consequences for Virginia would almost certainly directly result if the Court finds in favor of [Petitioners,] as this sum is so significant." *Id.* at *3. The prejudice could not be lessened or avoided under 19(b)(2) by protective provisions in the judgment. A judgment in Virginia's absence would not be "adequate" under 19(b)(3), because Virginia "would not be bound by the judgment in an action where [it was] not [a party]." *Pimentel*, 553 U.S at 871. And Petitioners have an alternative forum to bring their claim under 19(b)(4), because Virginia may be sued in

its *own* courts based on the self-executing constitutional provisions asserted here.[27]

Because this Court could not rule in Petitioners' favor without making Virginia a party, and because Virginia's immunity prevents its compulsory joinder, the Court would not be able to reach the questions presented.

[27] *See CAAN*, 501 U.S. at 273 (describing separation-of-powers protection in the U.S. Constitution "as 'a self-executing safeguard'") (quoting *Buckley*, 424 U.S. at 122); *Schneider*, 2019 WL 1931752, at *4 (holding that suit against Virginia in State court was an "adequate remedy"). Indeed, Petitioners' counsel initially sued Virginia in state court under a similar self-executing constitutional provision, *Gray v. Va. Sec'y of Transp.*, 662 S.E.2d 66, 68 (Va. 2008), but they pleaded themselves out of court by dropping MWAA as a party after the case was remanded to the trial court, *Gray*, 77 Va. Cir. at 224.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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