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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents do not deny that the Fourth Circuit's decision provides a roadmap for evasion of important constitutional principles, articulated in prior decisions of this Court, that facilitate accountability in the exercise of government power. See Pet.1-2, 11-32. Instead, respondents attempt to dodge the questions presented.

For example, they claim that the first question is based on a misreading of the opinion below. But the Fourth Circuit's holding that MWAA did not exercise sufficient federal power to raise non-delegation concerns was based on the court's express finding that MWAA's powers are not "assigned elsewhere in the Constitution" (Pet.11a), that is, not "inherently federal" (Pet.15a). Respondents themselves pressed this argument, and the court adopted it wholesale. As previous challenges to MWAA demonstrate, review of this and other significant erosions of constitutional principles is warranted regardless of any circuit split because "of the importance of the constitutional question[s]" presented by MWAA's structure. *Metro. Wash. Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 263 (1991) (*"CAAN"*).

Indeed, no party squarely disputes that the questions—as framed in the petition rather than reframed by respondents—are important enough to warrant review. The Fourth Circuit has now approved Congress' delegation of sweeping federal authority to MWAA to regulate, improve and even expand Reagan and Dulles airports and the associated Dulles Toll Road, functions which had previously been executed by an accountable federal agency. MWAA exercises that same authority despite Congress' expressly declaring that MWAA is wholly "independent" of all governmental bodies. This

independence allows MWAA to exercise both legislative and executive powers without regard for the Constitution's structure which separates them. MWAA's design is repugnant to the Constitution, and this Court's review is needed to correct the Fourth Circuit's endorsement of this unconstitutional delegation.

I. This Court's review is needed to determine whether Congress can freely delegate substantial federal power as long as it is not "inherently" federal or specifically "assigned elsewhere by the Constitution."

The petition accurately describes the Fourth Circuit's erroneous conclusion that MWAA "does not violate" the non-delegation doctrine "[*b*]*ecause* MWAA exercises no power assigned elsewhere by the Constitution[,]" Pet.11a-12a (emphasis added)—or, in other words, because MWAA's powers are not "inherently federal," Pet.15a-16a. Regardless of how one describes the holding—as an "inherently-federal rule" or an "assigned-power rule"—the Fourth Circuit clearly erred, and in a way that warrants this Court's review.

A. MWAA exercises federal authority over Dulles, Reagan and related properties that was originally vested in the FAA.

Whether or not deemed "inherent," there can be no denying that MWAA is exercising federal authority. As this Court recognized in *CAAN*, Congress initially delegated authority and control over Dulles and Reagan (and related properties) to the FAA. 501 U.S. at 255-256. That power was federal—as the amicus notes, Congress does "not have 'non-federal' power to give"—and the Constitution expressly grants Congress power

to regulate federal property, such as Dulles and Reagan. Cato 8; U.S. Const. art. IV, §3.

The FAA retained that power after MWAA was created. *CAAN*, 501 U.S. at 258. MWAA argues (at 16) that it gets its powers from Virginia and the District of Columbia, but neither could give MWAA authority over federal property until the Transfer Act delegated it to MWAA. Congress thus acknowledged the need to "transfer . . . authority" from the federal government to MWAA. 49 U.S.C. 49101(7). Accordingly, Congress transferred to MWAA not only the FAA's power to set and levy fees, but also its power (1) to "purchase, lease, transfer, or exchange" any of the federal property it controls; (2) to issue bonds; (3) to promulgate regulations; (4) "to make and maintain agreements with employee organizations"; and (5) to "improve . . . and promote" the airports for any and all "public purposes." 49 U.S.C. 49106(b). Congress even delegated to MWAA sweeping "responsibility for the [FAA's] Master Plans for the Metropolitan Washington Airports." 49 U.S.C. 49104(a)(6)(A).

MWAA argues (at 13) that the authority transferred from the FAA to MWAA was not federal at all. But if that were true, the FAA spent decades regulating federal property without federal authority, an implausible proposition. The act of transferring federal authority does not change the nature of that authority.

The Fourth Circuit's "inherently federal/assigned powers" test makes the same conceptual error. The Transfer Act gave MWAA authority over federal property in which the federal government maintains a "strong and continuing interest." *CAAN*, 501 U.S. at 266. Unless the act of transferring the federal authority *sub silentio* transmuted it into another kind of

power, it remains federal, whether or not it is specifically "assigned elsewhere by the Constitution." And while the FAA *was* accountable to Congress and the President when it exercised that authority, by statute MWAA now exercises that same federal authority "independent of . . . the United States Government[.]" 49 U.S.C. 49106(a)(2). For all the reasons explained in Section I of the petition, the Constitution requires specific forms of accountability in the exercise of federal power, and this Court's review is needed to reverse the Fourth Circuit's refusal to enforce those requirements.

B. Respondents' arguments mischaracterize both the petition and the Fourth Circuit decision.

Rather than dispute these points, the federal respondents (1) focus on an *alternative* issue that petitioners raised below, but not here, and (2) mischaracterize the Fourth Circuit's "inherently federal" holding as merely a rejection of a "premise" advanced by petitioners below (U.S. 15) rather than as an embrace of respondents' own arguments.

1. The federal respondents (at I) raise a red herring by arguing that MWAA is not a "federal entity." That question is not presented, and it does not diminish the importance of the questions presented, which focus on the proper constitutional rules governing delegation of federal authority to *non*-federal entities. Indeed, the parties agree that, although "congressional consent transforms an interstate compact . . . into a law of the United States," it does not automatically create a federal agency. *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981).

Respondents then argue that the petition's reliance on this Court's Appointment Clause cases is "misplaced" because each involved a federal entity. U.S. 8, 11 (citing *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 485-486, 492 (2010); *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (per curiam)); MWAA 16. However, because those cases dealt with federal entities exercising federal powers, and not non-federal entities, their holdings apply with *greater* force to MWAA—which is even further isolated from federal control and constitutional constraints than the agencies this Court has previously found unconstitutional.

2. The federal respondents also mischaracterize the Fourth Circuit's "inherently federal" holding by arguing (at 15) that it was merely a rejection of a premise "that MWAA exercises federal power." U.S. 4 (quoting Pet. 40a). But this ignores their own argument below that MWAA isn't subject to ordinary non-delegation principles, not because its powers—previously exercised by the FAA—were not federal, but because they were not "inherently federal," i.e., "core power[s] vested … in a branch of federal government." See U.S. C.A. Br. 15-20. This is the very argument the Fourth Circuit adopted, nearly verbatim.

MWAA (at 13-14) and the federal respondents (at 8-9) seek to circumvent this holding by arguing that the court never made it, thereby divesting the "inherently federal" and "assigned powers" language of any legal consequence. Yet if this were true, and the "inherently federal" distinction is irrelevant, then the decision below is even more problematic, as it would mean that Congress can delegate *any* type of federal power—"inherently federal" or not—without constitutional constraints. See Cato 7 (distinguishing between

types of federal power is arbitrary). If, instead, respondents are arguing that the regulation of extensive federal property and facilities engaged in interstate transportation in the Nation's capital is not a federal power at all, then their argument is frivolous, and the decision below should be summarily reversed.

The more logical conclusion is that the Fourth Circuit relied upon the "inherently federal/assigned powers" distinction precisely to avoid a more sweeping holding that Congress can delegate *any* federal power without constraint. But the Fourth Circuit's distinction leaves Congress with extensive authority to delegate substantial federal power to non-federal entities without accountability—and in violation of settled constitutional constraints. This Court's review of that flawed holding is needed to avoid creating a roadmap to extensive delegations of federal power with no federal accountability.

II. This Court's review is needed to determine whether Congress can delegate powers to interstate compacts and other public entities which it could not delegate to a private entity.

The Fourth Circuit's error on this point is compounded by its holding that any delegation of federal power to MWAA was appropriate because MWAA is a public body. Pet.15a. Even as an alternative basis for the Fourth Circuit's decision, U.S.15, this question amply warrants this Court's review.

1. The federal respondents (at 16) argue that, because Congress could lease the airports to a private party, it could likewise lease them to MWAA. That proposition is neither relevant nor in dispute: If

MWAA were doing no more than leasing federal property, that would not implicate the constitutional issues raised in the petition.

But, as discussed in Part I, the Transfer Act did not merely give MWAA a leasehold. And, rather than "fixing specific and precise conditions," *United States* v. *Orleans*, 425 U.S. 807, 816 (1976), the Act granted MWAA wide, discretionary authority—authority that, as discussed in Part I, had initially been delegated to the FAA.

Under the FAA's watch, this authority was properly subject to both executive and legislative control. And the Fourth Circuit was wrong to conclude that its transfer to MWAA deprives the federal political branches of their responsibility to maintain that control.

2. Unlike the FAA, moreover, Congress has expressly declared MWAA "independent" of *all* local, state, and federal governments. 49 U.S.C. 49106(a)(2). Respondents' rely (MWAA 13 n.19; U.S. 6-8) on this Court's "intelligible principle" cases to argue that the delegation of power should be sustained. But these cases have never been applied to non-federal public entities, and the Fourth Circuit should not have applied them to MWAA. Indeed, those cases merely set the terms on which Congress may "obtain[] the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989).

Under the Constitution, MWAA is clearly not part of a "coordinate branch" of the federal government. In fact, its statutory independence precludes it from being required to "coordinate" with any government body at all. This should have prevented the Fourth Circuit

from applying the same deference to *this* delegation of authority that is normally reserved for delegations of authority to accountable political branches. No party has provided any authority to suggest that the delegation of authority to non-federal entities can coherently fit into the "intelligible principle" framework.

This Court has acknowledged this point in principle, noting that the delegation of federal authority to *private* entities is "unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress. *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935). By statute, MWAA is independent of any government. But the Fourth Circuit's holding declines to give that independence any constitutional significance. When the Fourth Circuit held that MWAA, as a "public body," "may lawfully exercise governmental power," it ignored the animating concerns of the rule against delegating authority to private entities. Pet.15a. If Congress is free to delegate authority to any and all non-federal "public entities," without concern for constitutional "accountability checkpoints," then the Constitution's structure will no longer serve as a meaningful barrier to the delegation of federal power. *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

This Court's review is needed to address the Fourth Circuit's erroneous holding that Congress can delegate authority to non-federal "public bodies" that it would not otherwise be able to delegate to private entities.

III. This Court's review is needed to determine whether governmental bodies can delegate substantial governmental power to an unelected and independent body without violating the Guarantee Clause.

Contrary to respondents' arguments, the Guarantee Clause question also merits this Court's review. Respondents largely ignore the three statutes that command MWAA's complete independence. 49 U.S.C. 49106(a)(2); Va. Code 5.1-156(B); D.C. Code 9-905(b). While petitioners believe this unprecedented insulation from accountability pushes the generous constitutional envelope of the Guarantee Clause past the breaking point, respondents erroneously pretend there is no envelope to push.

1. MWAA contends that neither this Court nor any circuit court "has found a Guarantee Clause claim justiciable." MWAA 23. But that argument ignores decisions like *Kerr* v. *Hickenlooper,* 744 F.3d 1156, 1176 (10th Cir. 2014), *vacated on other grounds* 135 S. Ct. 2927 (2015); *Largess* v. *Supreme Judicial Court for Mass.,* 373 F.3d 219, 227-229 (1st Cir. 2004); and *United States* v. *Vasquez,* 145 F.3d 74, 83-84 (2d Cir. 1998), all of which held such claims justiciable.

Nor does the standard to be applied here require a nonjusticiable evaluation of Congress' "policy determinations." U.S. 17. Whatever prompted Congress to consent to the compact need not be examined to adjudicate whether MWAA's unaccountable exercise of governmental powers is unconstitutional. If such a question is unreviewable here, then any congressional violation of the Constitution's structural requirements would be

insulated from judicial scrutiny—since presumably all such delegations at least *reflect* congressional policy.

2. Contrary to MWAA's assertion (at 27), its status as an interstate compact agency does not exempt it from the constitutionally required accountability. No other compact is in jeopardy if petitioners prevail because no other compact agency is so independent as to deprive the signatories of sufficient control to assure accountability. For example, the elected officials of each signatory retain effective control over the New York-New Jersey Port Authority because a majority of the twelve commissioners who run it is needed to take action; each state appoints six commissioners; and each state's governor can veto any decision by that state's commissioners. See N.J. State. Ann. 32:1-5, 1-17. Similarly, Arkansas and Mississippi have the right to appoint an equal number of members to the Arkansas-Mississippi Bridge Commission, control their terms, and disapprove any Commission action. Miss. Code. Ann. 65-25-101.[1]

3. Respondents further mischaracterize the Guarantee Clause issue by focusing on the ability of the States to contract, U.S. 19 n.2, or on the role of the MWAA lease, MWAA 26. But there is no denying that MWAA exercises enormous governmental power beyond that of a mere leaseholder—courtesy of the Transfer Act. See Part I; Pet.30. By these same commands, MWAA is not accountable to any elected official. That the States can contract, and the Federal Government can enter leases has no bearing on the

[1] See National Center for Interstate Compacts, Database of Interstate Compacts, http://apps.csg.org/ncic/; W. Voit, Interstate Compacts and Agencies (1998), https://www.csg.org/knowledgecenter/docs/ncic/CompactsAgencies98.pdf.

Guarantee Clause question here. See *New York* v. *United States,* 505 U.S. 144, 185 (1992).

4. Finally, contrary to the federal respondents' assertion (at 17), the Fourth Circuit *did* reject petitioners' claim that MWAA's statutory unaccountability violated the Guarantee Clause. The court did so on the ground that "[MWAA's] authority is circumscribed by legislation and can be modified or abolished altogether through the elected legislatures that created it." Pet.18a. Respondents echo that reasoning (U.S. 18-19; MWAA 26-27), but it does not survive scrutiny. See Pet.28-30.

In short, the Guarantee Clause question richly warrants this Court's review.

IV. MWAA's "necessary party" argument is no barrier to review.

MWAA further contends (at 28-30) that this case is a poor vehicle to answer the questions presented because Virginia is a necessary party (under Fed. R. Civ. P. 19) that refuses to waive its sovereign immunity. But this presents no vehicle problem.

First, MWAA doesn't contend that its "necessary party" argument deprives this Court of Article III or statutory jurisdiction to hear this case. Nor could it. See, *e.g., Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 862 (2008) (absence of necessary party does not "always result in dismissal"); see also Fed. R. Civ. P. 19(a)(1).

Accordingly, this Court need not decide the Rule 19 question, which no court addressed below, to grant the petition. Pet.31a. Were this Court to grant review and reverse the Fourth Circuit, the joinder question could

be raised anew. The petition merely asks whether the significant constitutional questions raised below state a claim sufficient to survive a motion to dismiss.

Second, in any event, MWAA's argument is meritless. While Virginia is immune from suit, MWAA is not. As this Court held in *Hess* v. *Port Auth. Trans-Hudson*, 513 U.S. 30 (1994), interstate compacts such as MWAA:

- lack sovereign immunity,
- "safeguard the national interest," and
- do not threaten a state's "integrity."

Id. at 36-37, 40-41, 43-44.

MWAA's argument ignores *Hess*: A challenge to MWAA, an interstate compact, does not undercut Virginia's "integrity," and Virginia gave MWAA power as a way of safeguarding vital *national* interests, not to further its own.

MWAA's reliance (at 28-29) on *Pimentel*, 553 U.S. at 867, mixes apples and oranges: *Pimentel* was "a suit that involved the Republic's assets," whereas this petition challenges MWAA's use of delegated federal power without concurrent federal oversight of that power's use. *Simon* v. *Republic of Hungary*, 911 F.3d 1172, 1188 (D.C. Cir. 2018). Further, Virginia is not necessary because, even if it does have interests in MWAA's continued vitality, MWAA can adequately represent those interests: It has argued for the constitutionality of its exercise of federal power throughout this case, arguments which Virginia would surely echo if it had been joined. Fed. R. Civ. P. 19(a)(1)(B)(i).

CONCLUSION

Congress delegated enormous federal power to MWAA, a non-federal entity that, by design, is "independent" of all governments and, therefore, of all political accountability. This case presents this Court with a clean vehicle to curtail such delegations of authority to unaccountable entities in violation of the Constitution's text and structure.

The petition should be granted.

Respectfully submitted,

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