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**In the Supreme Court of the United States**

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*Phil Kerpen, on behalf of all those similarly situated, et al., Applicants*

v.

*Metropolitan Washington Airports Authority, et al.*

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**APPLICATION FOR EXTENSION OF TIME TO  
FILE A PETITION FOR WRIT OF CERTIORARI**

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**Directed to the Honorable John G. Roberts,  
Chief Justice of the Supreme Court of the United States  
and Circuit Justice for the  
United States Court of Appeals for the Fourth Circuit**

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January 10, 2019

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**To the Honorable John G. Roberts, Circuit Justice for the United States Court of Appeals for the Fourth Circuit:**

Applicants Phil Kerpen, Austin Ruse, Cathy Ruse, Charlotte Sellier, Joel Sellier, and Michael Gingras,<sup>1</sup> respectfully request a thirty-day extension of the deadline for filing their petition for a writ of certiorari. The United States District Court for the Eastern District of Virginia granted a motion to dismiss filed by the Metropolitan Washington Airports Authority (MWAA).<sup>2</sup> The United States Court of Appeals for the Fourth Circuit affirmed its judgment on October 22, 2018. As January 20 is a Sunday, the petition for certiorari is presently due on January 21, 2019. Applicants seek a thirty-day extension to February 20, 2019. This Court will have jurisdiction under 28 U.S.C. 1254.

1. This case concerns the constitutionality of a congressional delegation of power to MWAA, and of its use of that power. Congress granted MWAA the authority to manage two federally owned commercial airports, Dulles and Reagan, together with a toll road on federal land that is statutorily defined as part of Dulles Airport. MWAA was created by the Virginia Commonwealth and the District of Columbia and is styled as the product of an interstate compact. In 1986, the management of the airports—previously administered by the federal government—was transferred to MWAA.

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<sup>1</sup> Applicants appear individually and on behalf of all those similarly situated.

<sup>2</sup> MWAA was supported in the courts below by the Department of Transportation, Elaine Chao in her official capacity as the Department Secretary, the District of Columbia, and the District's Attorney General, Karl Racine. These parties are also Respondents here.

Congress authorized the Secretary of Transportation to give MWAA a lease of property for the two airports as well as highways that access and connect the airports to each other and to Washington, D.C. Pub. L. No. 99-591, 101 Stat. 3341 (1986), *codified as amended at* 49 U.S.C. 49101-49112.

In 2006, Virginia transferred operation of the Dulles Toll Road, which also sits on federal land, to MWAA. MWAA in return agreed to use revenues from the road to pay for transportation improvements near Dulles airport.

This class action was brought by users of the toll road and other airport facilities to challenge, under the federal Constitution, MWAA's collection of tolls on federal land. Both courts below rejected Applicants' claims on the theory that, although MWAA exercises governmental power (by delegation from Virginia and the District), it is not really exercising *federal* power. They reached this conclusion even though all the assets at issue sit on federal land, MWAA exercises its power over those assets pursuant to federal statute, and MWAA has complete control over those assets which, as this Court has put it, serve the Federal Government's "strong and continuing interest in the efficient operation of the airports[.]" *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 266 (1991).

2. In their petition, Applicants intend to present at least two important issues of federal law:

1. Is power exercised by a government agency over federal property, pursuant to federal statute, properly considered “federal power” for purposes of Articles I and II of the Constitution, even where the power at issue is not inherently or “necessarily” federal?
2. Can Congress delegate to interstate compacts and other instrumentalities of state or local governments powers that could not constitutionally be delegated to private entities?

The Fourth Circuit answered the first question “no.” According to the Circuit’s opinion, MWAA, despite exercising complete control over two federally-owned airports on behalf of the federal government—and pursuant to a lease issued by the federal government—is not exercising federal power at all. App. 12. Indeed, the panel insisted that “MWAA exercises only those powers conferred on it by its state creators, not the federal government.” App. 12. But MWAA’s “state creators”—Virginia and D.C.—never had authority over Reagan or Dulles airports, and Virginia’s authority over the Dulles Toll Road comes from Virginia’s use of federal land. Virginia and D.C. cannot confer on MWAA powers they never had. And Virginia cannot deprive the powers it received from the federal government of their federal character simply by transferring them to another governmental agency.

To sidestep this conclusion, the panel argued that running an airport is not *necessarily* a function of the Federal Government. App. 15 (“But there is nothing inherently federal about the operation of commercial airports.”). But this test would allow Congress—or the Executive Branch—to delegate any non-

central function to private entities, entities immune from the requirements of Article I and II of the Constitution. And Congress could continue to regulate these private entities through federal law, as it does MWAA.

The panel also held that an interstate compact can, without being held accountable to the federal government, wield power that has been previously exercised by the federal government for years, even if a *private* entity could not do so: “There has been no unlawful delegation of ‘government power’ to a private entity in this case for the simple reason that MWAA is not a private entity. It is an interstate compact, constituted by the states.” App. 14.

This holding substantially expands Congress’ ability to insulate the exercise of federal power from Executive Branch oversight. Indeed, it gives Congress a roadmap for sidestepping this Court’s decision in *Free Enterprise Fund*. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), which held that Congress cannot create “two levels of protection from removal for those who nonetheless exercise significant executive power.” *Id.* at 514. Under the Fourth Circuit’s decision, Congress could, with the help of two sympathetic states, bury a great deal of federal power in an interstate compact that would be effectively immune from oversight by the Executive—including the ability to remove the agency’s officers.

Delegation issues like the ones the Fourth Circuit addressed below are frequently considered by this Court. See, e.g., *Gundy v. United States*, No. 17-6086 (decision pending).

3. To adequately present these issues for the Court's consideration, undersigned counsel needs a thirty-day extension. Besides attending his daughter's wedding and three related receptions around the country, counsel of record was very busy over the holiday season, filing briefs in multiple cases:

- On December 26, counsel submitted a merits stage amicus brief on behalf of religious denominations and other religious institutions in *American Legion v. American Humanist Association*, No. 17-1717. That brief clarifies that the Establishment Clause, as originally understood, extends to some governmental activities that are not coercive.
- On December 20, counsel filed an amicus brief supporting review in *Doe v. Boyertown Area School District*, No. 18-658, highlighting the watered-down nature of the Third Circuit's strict scrutiny analysis in the opinion below in that case.

Counsel, moreover, has other pressing obligations this month. Counsel just began a new semester teaching two courses at Brigham Young University's law school, where he serves as an adjunct professor. And on January 14, counsel anticipates receiving a brief in opposition in *Patterson v. Walgreen Co.*, No. 18-349. Counsel, who represents the petitioner in that case, will need to prepare a reply brief by January 30, which will occupy much of counsel's available time for the remainder of the month.

Because of these and other obligations both in January and at the end of December, counsel needs an additional thirty days to adequately prepare the petition. This extension—from January 21, 2018 to February 20, 2018—will ensure that the important questions the petition will present are adequately explained and supported. The Court will still be able to grant (or deny) certiorari this term, preventing any prejudice to Respondents from delay.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

As a member of the Supreme Court bar, I caused a copy of this document to be sent by e-mail and U.S. Mail on January 10, 2019, to:

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