No. 18A726

In the Supreme Court of the United States

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

v.

Metropolitan Washington Airports Authority, et al.

APPLICATION FOR AN ADDITIONAL EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

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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February 8, 2019

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,[1] 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).[2] The United States Court of Appeals for the Fourth Circuit affirmed its judgment on October 22, 2018. The Chief Justice previously granted an extension of time to February 20, 2019. Counsel requests an additional extension to March 21, 2019—60 days after the original 90-day period that ended January 20, 2019. This Court will have jurisdiction under 28 U.S.C. 1254.

1. As the previous application explained, 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

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[1] Applicants appear individually and on behalf of all those similarly situated.

[2] 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.

airports—previously administered by the federal government—was transferred to MWAA.

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 derives entirely from the federal government. 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 to a limited extent through MWAA.

The panel also held that an interstate compact, without being held fully accountable to the federal government, can 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 adequate 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 an additional extension. In this Court alone, counsel has had to prepare three significant filings since the last extension was granted:

- First, Counsel had previously filed a petition in *Patterson* v. *Walgreen Co.*, No. 18-349. Between the filing of the response in that case and the filing of the reply, four justices signaled an interest in examining the definition of "undue hardship" in Title VII's religious accommodation, which has not been addressed since *TWA* v. *Hardison*, 432 U.S. 63 (1977), a decision that both the *Patterson* petition and the four Justices suggest should be revisited. See *Kennedy* v. *Bremerton School District*, No. 18-12 (Alito, J., concurring). Counsel devoted significant time to drafting a reply that would aid this Court in considering whether *Patterson* is a good vehicle both for examining the issue flagged in *Kennedy* and for resolving two circuit splits.

- Second, following a denial of rehearing en banc and subsequent stay application in *June Medical Services* v. *Gee*, No. 18A774 this Court requested a response to the stay application, which counsel timely filed last week. This unexpected matter occupied counsel's time for a significant portion of last week.

- Finally, counsel represents the petitioner in *Utah Republican Party* v. *Cox*, No. 18-450. The respondents there filed their oppositions earlier than counsel anticipated. Counsel is investing significant time preparing an appropriate reply in this Court before circulation next week.

Because of these and other obligations, counsel needs additional time to adequately prepare the petition. This extension—from February 20, 2019 to March 21, 2019—will ensure that the important questions the petition will present are adequately explained and supported. The extension will also increase the likelihood that the petition will be able to address any implications for this case of this Court's forthcoming decision in *Gundy*.

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 February 8, 2019, to:

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