No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Metropolitan Washington Airports Authority ("MWAA") is an "independent" entity created by interstate compact that exercises delegated authority from Congress over three federally owned assets, each worth billions of dollars: Reagan and Dulles Airports and the Dulles Toll Road. By law and by design, it is not accountable to the federal government or to elected officials in D.C. or Virginia. Petitioners sued, explaining that MWAA's unaccountable delegated authority violates the separation of powers required by Articles I and II and violates the Guarantee Clause. The Fourth Circuit held that separation-of-powers constraints do not apply to a congressional delegation of power that is not "inherently" federal or that is made to an interstate compact entity or other "public body," and that the Guarantee Clause does not apply.

The questions presented are:

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 exercised power is not "inherently" federal or a "core" federal power?

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?

3. Does a statute bestowing government power—however characterized—on an unelected entity and making it "independent" of any elected official or body violate the Guarantee Clause?

PARTIES TO THE PROCEEDING

Petitioners are Phil Kerpen, Austin Ruse, Cathy Ruse, Charlotte Sellier, Joel Sellier, and Michael Gingras, individually and on behalf of all others similarly situated. Respondents are the Metropolitan Washington Airports Authority; Elaine L. Chao, in her official capacity as Secretary of Transportation; and the United States Department of Transportation. The District of Columbia and Karl A. Racine intervened below and are also respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

It is fundamental to the protection of liberty that any entity exercising governmental power be subject to adequate "accountability checkpoints," the absence of which would "dash the whole [constitutional] scheme." *Department of Transportation* v. *Association of American Railroads*, 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring). That is one reason why "no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions." *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1957 (2015) (Roberts, C.J., dissenting).

This case concerns the Metropolitan Washington Airports Authority ("MWAA") and its federally delegated authority to operate, maintain, and improve Reagan and Dulles airports and the associated Dulles Toll Road. Petitioners challenge Congress's ability to delegate to MWAA the authority to perform quintessential governmental functions such as setting policies that allow MWAA to charge exorbitant rates to one group of customers (in this case users of the federally owned Dulles Toll Road) to subsidize an unrelated group of citizens—here, users of the new Metrorail Silver Line.

While other unconstitutional aspects of MWAA's organization have been challenged and struck down, see *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Noise, Inc.*, 501 U.S. 252 (1991) ("*CAAN*") (striking down the Board of Review, a congressional body overseeing MWAA's Board of Directors); *Hechinger* v. *Metro. Wash. Airports Auth.*, 36 F.3d 97, 99, 101 (D.C. Cir. 1994) (same), one core unconstitutional vestige remains: MWAA itself still exercises federal authority without constitutionally

adequate accountability to the federal government. Indeed, by statute, MWAA is "independent" of all other governmental entities—federal or state.

The Fourth Circuit, however, created two novel and erroneous exceptions to this Court's separation-of-powers jurisprudence: It insulated from scrutiny congressional delegations of federal power that are not "inherently" federal—*i.e.*, powers that could find some analogue at other levels of government—and it insulated from scrutiny congressional delegations of federal power to compact or other non-federal "public bodies." The Fourth Circuit also held that Congress does not violate the Guarantee Clause—or other separation-of-powers constraints—when it confers governmental powers on an entity that it simultaneously makes "independent" of any elected body.

Each of the Fourth Circuit's separation-of-powers holdings flouts fundamental separation-of-powers precedents of this Court. And each of these holdings—along with its Guarantee Clause holding—merits this Court's review because, if left untouched, they will encourage Congress to delegate federal power in other settings equally unconstitutional.

OPINIONS BELOW

The Fourth Circuit's decision is printed at 907 F.3d 152 and reprinted at 1a. The district court's opinion granting Respondents' motions to dismiss is printed at 260 F. Supp. 3d 567 and is reprinted at 22a.

JURISDICTION

The Fourth Circuit issued its opinion on October 22, 2018. Chief Justice Roberts granted two extensions, making the petition due on March 21, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Metropolitan Washington Airports Act of 1986, 49 U.S.C. 49101 *et seq.* are reproduced beginning at Pet. 61a.

STATEMENT

A brief review of the facts and procedural history is necessary to understand adequately the need for this Court's review.

A. Factual Background

The facts here center on MWAA, an interstate compact with a history and legal structure that make it—by statutory mandate—"independent" of any other governmental entity despite exercising significant governmental power.

1. This Court has held that, by operating the federal government's D.C.-area airport properties MWAA serves federal purposes that are "vital to the smooth conduct of Government business" and the movement of Members of Congress. *CAAN*, 501 U.S. at 252. Indeed, what this Court called a "strong and continuing interest" in controlling the Reagan and Dulles airports, *CAAN*, 501 U.S. at 266, dissuaded the Government from selling the airports outright.

Instead, in 1984 the U.S. Secretary of Transportation, through an advisory commission, recommended that all airport operations be transferred to "a regional authority with power to raise money by selling tax-exempt bonds" and which would control the airports and finance the desired expansion. *CAAN*, 501 U.S. at 257 (emphasis added). Responding to this recommendation, Virginia and D.C. each passed legislation creating a new interstate compact agency: MWAA. 1985 Va. Acts ch. 598; Va. Code 5.1-152 *et seq.*; 1985 D.C. Law 6-67; D.C. Code 9-901 *et seq*. As required under the Interstate Compact Clause, U.S. Const. Art. I, Sec. 10, Congress consented in advance to this compact. Act of

Aug. 11, 1959, Pub. L. No. 86-154, 73 Stat. 333 (1959); 49 U.S.C. 40124.

But even with congressional consent, MWAA remained an empty shell with no actual authority until Congress delegated to MWAA, through the "Transfer Act," the Federal Aviation Administration's (FAA) operational and regulatory authority—authority that had previously been conferred by Congress itself—to MWAA. Metropolitan Washington Airports Act of 1986, 49 U.S.C. 49101 *et seq*. Through the Transfer Act, Congress leased control of the airports to MWAA subject to certain conditions not relevant here. *Id.;* see also 1987 Va. Acts ch. 665; 1987 D.C. Law 7-18. Both Virginia and DC recognized that the Transfer Act imbued MWAA its governmental authority. See Va. Code 5.1-156(B) ("Pursuant to Section 6007(b) of the [Transfer Act], the Authority is established solely to operate and improve both metropolitan Washington airports."); D.C. Code 9-905(b) (same).

Originally, Congress maintained close control through its Board of Review—but *CAAN* struck this down as unconstitutional. 501 U.S. 252; see also *Hechinger*, 36 F.3d 97. And so, despite Congress's "strong and continuing interests" in the federal property MWAA controls, MWAA no long answers to the federal government, even though it still retains the broad powers delegated to it by Congress.

2. MWAA's "only" purpose is "to operate and improve" Dulles and Reagan Airports. 49 U.S.C. 49106(a)(3); see also Va. Code 5.1-156(A) (MWAA delegated power "[f]or the purpose of acquiring, operating, maintaining, developing, promoting and protecting" Reagan and Dulles); D.C. Code 9-905(a) (same). While MWAA can only exercise these federal

powers for "airport purposes," those purposes are broadly defined to include *any* "business or activity not inconsistent with the needs of aviation." 49 U.S.C. 49104(a)(2)(A)(iv).

Some of MWAA's delegated authority under the Transfer Act includes imposing and collecting fees for the use of public facilities on federal land and assuming, repealing, or modifying as MWAA sees fit airport-related regulations previously promulgated by the FAA. 49 U.S.C. 49104(a)(5)(A), 49106 (b)(1)(E), 49106(e). Endued with that authority, MWAA was tasked by Virginia and D.C. with responsibility to build whatever "commercial and other facilities" MWAA deems "consistent with the purposes of [its enabling legislation]," Va. Code 5.1-156(A)(12), D.C. Code 9-905(a)(12); to exercise police power through MWAA's own police force, 49 U.S.C. 49106(b)(1)(D), 49111(c); Va. Code 5.1-158(A)-(B); and to exercise Virginia's state eminent domain powers. Va. Code 5.1-160(C). By operation of law, MWAA also possesses federal condemnation power. See *Washington Metropolitan Area Transit Auth.* v. *One Parcel of Land in Montgomery Cnty., Md.,* 706 F.2d 1312, 1319 (4th Cir. 1983) (Congress delegates federal condemnation power when it consents to a compact).

MWAA, moreover, is expressly directed to exercise this broad authority "independent of Virginia and its local governments, the District of Columbia, and the United States Government." 49 U.S.C. 49106(a)(2); Va. Code 5.1-156(B); D.C. Code 9-905(b). While this provision may protect the federal, Virginia, and D.C.

treasuries from responsibility for the airports' financial undertakings, it also insulates MWAA from all political accountability.[1]

3. In 1987, Congress executed a lease transferring to MWAA all control over the airports and surrounding areas. These areas include the 14-mile-long corridor of federal land between Interstate 495 West and Dulles Airport, a parcel originally controlled by the FAA but now transferred to MWAA's control. And although Congress had previously given Virginia an easement over part of this federal land—which later became the Dulles Toll Road—MWAA in 2006 assumed control over the Toll Road as well.[2]

As a result, MWAA now has discretion to set fees and tolls for the use of the federally-owned airports and Toll Road and to spend billions of those dollars on massive public facilities of its choosing, including the Dulles Metrorail Project, popularly known as the Silver Line. And MWAA has exercised that discretion to

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[1] MWAA's statutory bar to political accountability is buttressed by an oversight structure diffusing any practical accountability. The 17-member Board of Directors governing MWAA includes seven appointed by the Governor of Virginia, four by the D.C. Mayor, three by the Governor of Maryland, and three by the President. 49 U.S.C. 49106(c); Va. Code 5.1-153; D.C. Code 9-902. Thus, none of the appointing jurisdictions on its own can control a decision or action of the Board.

[2] See MWAA, Proposal to Operate the Dulles Toll Road and Build Rail to Loudoun County 1-2, 9-10 (2006), http://www.mwaa.com/sites/default/files/archive/mwaa.com/file/CorridorProposal.pdf; See Dulles Toll Road Permit and Operating Agreement §§ 3.01, 4.01 (2006), http://metwashairports.com/sites/default/files/archive/mwaa.com/file/dullestollroadpermitandoperatingagreement.pdf.

cross-subsidize the Silver Line with exorbitant fees charged to Toll Road users.

Moreover, under MWAA's governance, the Dulles Metrorail Project's costs have skyrocketed, with MWAA more than trebling tolls at the main toll plaza from $1.00 in 2010 to $3.25 (as of January 1, 2019), and boosting ramp tolls over the same period from $.75 to $1.50. See Compl. ¶¶ 65-66 (figures prior to 2019 hike). MWAA has estimated that it needs $2.82 billion from tolls and another $235 million in airport fees to ultimately complete the Dulles Metrorail Project. *Id.* ¶ 67 (estimates as of complaint filing).

B. Procedural History

Petitioners' Complaint was brought against MWAA as well as the U.S. Secretary of Transportation and the U.S. Department of Transportation. The District of Columbia intervened. The Complaint, among other relief, sought an order declaring MWAA's governance structure unconstitutional and an injunction against MWAA's use of excess toll revenues to subsidize the Dulles Metrorail Project.

On May 30, 2017, the district court dismissed the suit. It held that MWAA is not a "federal instrumentality exercising federal power." Pet. 51a. Moreover, with states controlling all commercial airports except for the two under MWAA control, MWAA's power was not inherently federal, in the court's view, because "operating commercial airports like National and Dulles is a distinctly *un*-federal activity." Pet. 46a. Finding no federal power *or* instrumentality implicated, the court dismissed the case for failure to state a claim because each of Petitioners' separation-of-powers claims rested on the "premise that MWAA exercises federal

power." Pet. 51a. The court also dismissed Petitioners' Guarantee Clause claim.

A panel of the Fourth Circuit affirmed. It found that MWAA is neither a federal nor private entity but instead a "public body which may lawfully exercise governmental power." Pet. 15a. It declared that MWAA's authority was not "inherently federal" as "there is nothing inherently federal about the operation of commercial airports." Pet. 15a-16a. And it further concluded that Congress could delegate governmental power to MWAA because, as an interstate compact entity, MWAA is a "public body" rather than a "private entity." Pet. 14a-15a. Because of this, the court found that MWAA's structure raises no separation-of-powers issues. The panel also rejected Petitioners' claims that MWAA's lack of accountability violated the Guarantee Clause. Pet. 17a-18a.

REASONS FOR GRANTING THE PETITION

Petitioners raised below claims that MWAA is violating the separation-of-powers constraints found in Article I and II, as well as the accountability requirement inherent in the Guarantee Clause. The Fourth Circuit rejected these claims on the theory that (1) only the delegation of "inherently federal" power can trigger separation-of-powers constraints, (2) Congress can delegate governmental power to interstate compact and other "public bodies" that it could not delegate to private entities, and (3) MWAA's structure does not violate the Guarantee Clause even though it is by statute "independent" of any elected government. The Fourth Circuit is gravely wrong on all three points. And its errors are so subversive of accountability in the exercise of governmental power as to demand this Court's review.

I. The Fourth Circuit's holding that governmental power must be "inherently" federal to trigger separation-of-powers constraints is incorrect and merits review.

The Court of Appeals first erred by concluding MWAA would have to be exercising "inherently" federal power to be subject to Articles I and II. This holding merits review because it would allow Congress to delegate its power to private or other non-federal entities independent of the federal government, so long as that power is not "inherently" federal. Review is also warranted because the decision below effectively guts the constraints set forth in *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 485 (2010) ("*Free Enterprise Fund II*"), and because it invites further delegations in circumvention of those constraints.

A. The Fourth Circuit's ruling gives Congress a roadmap for delegating wide swaths of federal power in contravention of this Court's separation-of-powers jurisprudence.

The Fourth Circuit repeatedly held that MWAA's power is not subject to separation-of-power constraints because it is not "inherently federal," Pet. 15a—that is, it "exercises no power assigned elsewhere by the Constitution." Pet. 11a-12a. But Fourth Circuit's logic contravenes the separation-of-powers principles embraced by this Court during the past fifty years.[3]

1. In effect, the Fourth Circuit's new "inherently federal" test operates on the following syllogism: If the activity being regulated is something the states could do on their own (*e.g.*, regulating airports), then Congress may delegate that power to them—or to other entities—without complying with Articles I or II. See Pet. 15a-16a. But that is flatly wrong. Rather, Congress delegates federal power when it conveys significant executive or legislative authority to *any* other person or entity—regardless of whether states could exercise that authority if Congress were not involved. Indeed,

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[3] A previous petition, *Corr* v. *Metropolitan Washington Airports Authority*, No. 13-1559, also raised concerns about MWAA's constitutionality. But when this Court called for the views of the Solicitor General regarding the petition, the Solicitor General noted that "[n]either court [] below" squarely addressed the questions presented there. Br. of the United States at 7, *Corr* v. *Metropolitan Washington Airports Authority*, No. 13-1559. That petition was denied. But as the main text of this petition explains, the Fourth Circuit here squarely addressed the question of whether MWAA is exercising federal power, see Pet. 10a, 15a-16a, making this a clean vehicle to address that and the other questions presented here.

very few of the federal government's powers are inherently or exclusively federal, and those that are likely could not be delegated to non-federal entities at all. Everything else done by the federal government either has an analogue among state or private actors, or involves a concurrent power. But that has never been viewed as precluding separation-of-powers review.

To the contrary, this Court in *Buckley* v. *Valeo*. 424 U.S. 1 (1976), established the standard for determining when a delegation by Congress triggers separation-of-powers scrutiny: The Court held that any appointee who exercises "significant authority pursuant to the laws of the United States" is an "Officer of the United States" subject to the requirements of Article II. *Id.* at 126. Here there can be no doubt that MWAA is exercising "significant authority pursuant to the laws of the United States" – whether or not its authority is "inherently federal" or a "core" federal power. Under *Buckley*, that is enough to trigger separation-of-powers scrutiny.

2. These points are illustrated in two of this Court's recent decisions. For example, in *Free Enterprise Fund* this Court struck down the Public Company Accounting Oversight Board, which Congress had created to regulate the entire accounting industry. 561 U.S. at 484, 485. There, the challenge was to the appointment process employed, where Board members could be removed for good cause only by the SEC—not by the President. *Id.* at 486. The Court ruled this removal method violated Article II *even though* there was no suggestion or finding that regulating the accounting industry is an "inherently federal" function.

Indeed, states can and often do regulate the accounting industry.[4]

Instead, what made the arrangement there unconstitutional was the combination of (a) *some* delegation of power by Congress and (b) the unique removal structure that isolated the Board from the President. *Id.* at 483-484, 492-497. The possibility of states regulating the same industry with similar powers did not eliminate the need for separation-of-powers review. All that was necessary was a statute, as in *Buckley*, conferring "significant authority pursuant to the laws of the United States."

Similarly, in *American Railroads*, neither the parties nor the Court asked whether the operation of Amtrak was "inherently" federal. 135 S. Ct. at 1234. And if that question had been asked, the answer would surely have been "No:" Operating a railroad is not an inherently federal power.

Instead, the Court applied separation-of-powers principles in asking whether the appointment to Amtrak's Board of Directors by someone other than the President violated separation of powers. *Ibid.* That inquiry would have been wholly unnecessary and irrelevant if those principles applied only to "inherent" federal power. Here again, it was enough that the pertinent federal statute conferred "significant authority" on the Board.

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[4] See*, e.g.*, American Institute of CPAs, *State & Territory Requirements*, AICPA.org, https://www.aicpa.org/becomeacpa/licensure.html (outlining individual state requirements for CPA licensure).

To be sure, separation-of-powers decisions often involve powers specifically enumerated in the Constitution. See, *e.g.*, *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932; *INS* v. *Chadha*, 462 U.S. 919, 959 (1983). More often, however, congressional delegation involves general executive or legislative authority to affect some specific subject. And the Fourth Circuit's "inherently federal" test would preclude separation-of-powers review whenever the *subject* of that delegated power is not inherently federal—such as airport operation, railroad operation or accounting oversight.

Accordingly, the Fourth Circuit's approach would gut decisions like *Free Enterprise Fund* and *American Railroads*. That approach would also effectively abrogate a host of this Court's other decisions subjecting to separation-of-powers review congressional delegations of power over many subjects that are not "inherently" federal. *E.g., Touby* v. *United States*, 500 U.S. 160 (1991) (regulating controlled substances); *Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) (setting natural gas rates); *Yakus* v. *United States*, 321 U.S. 414 (1944) (setting commodity prices); *Nat'l Broad.* v. *United States*, 319 U.S. 190 (1943) (regulating broadcast licensing). This stark departure from this Court's precedent clearly merits review.

3. The Fourth Circuit's holding would also abrogate a hallmark of our constitutional structure: ensuring the exercise of all federal power is subject to meaningful federal oversight.

Free Enterprise Fund illustrates this principle as well. There PCAOB's board structure was unconstitutional because it "effectively eliminate[d] any Presidential power to control the PCAOB, notwithstanding that the Board performs numerous regulatory and

law-enforcement functions at the core of the executive power." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("*Free Enterprise Fund I*"). Quoting James Madison, this Court noted that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund II*, 561 U.S. at 492; *accord Free Enterprise Fund I*, 537 F.3d at 691 (Kavanaugh, J.); 1 Annals of Cong. 463 (1789).

Justice Alito also wrote separately in *American Railroads* to affirm this principle: "Our Constitution … prescribes a process for making law, and within that process there are many accountability checkpoints." 135 S. Ct. at 1237. Justice Alito then explained that "[i]t would dash the whole scheme [of Article I] if Congress could give its power away to an entity that is not constrained by those checkpoints." *Ibid.* Accordingly, he warned, "everyone should pay close attention when Congress 'sponsor[s] corporations"—or, by extension, other entities—"that it specifically designate[s] *not* to be agencies or establishments of the United States Government.'" *Id.* (quoting *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 390 (1995)).

Despite this warning, the Fourth Circuit has now approved a law that does precisely that—delegating what had always been a federal governmental operation and powers to an entity that it has "designated not to be [an] agenc[y] or establishment[] of the United States Government." See 49 U.S.C. 49106(a)(2) (MWAA is to be "independent of Virginia and its local governments, the District of Columbia, and the United States Government[.]") (emphasis added). And here,

Congress clearly "sponsor[ed]" MWAA by transforming what was previously a powerless, empty shell into an entity that now manages two federally owned airports, independently sets tolls on federal roads, and accordingly generates a billion dollars in excess revenue, which it then uses to subsidize the Silver Line.

4. If MWAA's and the Fourth Circuit's arguments seem familiar, that is because this Court has already rejected some of them in a similar context. Nearly thirty years ago, this Court—without waiting for a circuit split—granted review in a case concerning a different structure for MWAA. *CAAN*, 501 U.S. at 279. That structure involved a Congress-created Board of Review to oversee the Board of Directors. Like it did below with respect to the present Board of Directors, MWAA argued that the Board of Review does not "exercise[] federal power" and, thus, that MWAA's governance structure does not "raise any separation-of-powers issue." *Id.* at 265.

Justice White's dissent in that case argued further that MWAA is "clearly [a] creature[] of state law," and that "the Board may not have existed but for Congress, but it does not follow that Congress created the Board or even that Congress' role is a 'factor' mandating separation-of-powers scrutiny[.]" 501 U.S. at 278, 281. MWAA and the opinion below make identical arguments, though now about MWAA rather than its (former) Board of Review. Pet. 4a; 13a. Indeed, the decision below calls the laws governing MWAA "organic state laws," as if to emphasize that MWAA was—in Justice White's words—"clearly [a] creature[] of state law[.]"

The majority in *CAAN* rejected all these arguments in a way that applies not just to the Board of Review,

but to MWAA and its Board of Directors. Rejecting the argument that "practical accommodations" should be allowed to create a "workable government," the Court in *CAAN* relied on the fact that "[c]ontrol over National and Dulles was originally in federal hands, and was transferred to MWAA only subject to" specified conditions. *CAAN*, 252 U.S. at 266. The Court also noted that "the Federal Government has a strong and continuing interest in the efficient operation of the airports[.]" *Ibid.* This interest is strong because members of Congress "must shuttle back and forth according to the dictates of busy and often unpredictable schedules." *Id.* at 267.

The *CAAN* Court also held that the scheme there "provide[d] a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role." *Id.* at 254; *accord Free Enterprise Fund II*, 561 U.S., at 500; *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1338 (2016) (Roberts, J., joined by Sotomayor, J., dissenting); *Free Enterprise Fund I*, 537 F.3d at 701 (Kavanaugh, J.) . As explained above, so does the decision here, with respect to both executive and legislative power.

5. Indeed, the D.C. Circuit's *Hechinger* decision conflicts in principle with the Fourth Circuit's analysis and demonstrates the continuing federal role in MWAA. There, the D.C. Circuit analyzed the constitutionality of MWAA's revised Board of Review. The court held that this Board was still an agent of Congress and—under the standard in *CAAN*—was still exercising governmental power, indeed, *federal* power. 36 F.3d at 99-105. Yet the logic of the Fourth Circuit's opinion in this case would have *upheld* the revised Board of Review, as nothing about governing MWAA's

management of airports is—as the Fourth Circuit framed the inquiry—"inherently federal."

The notion that the federal government could bequeath control over its continuing authority in those areas without passing along the constitutional constraints that accompany such authority is astounding and utterly destructive of the constitutional scheme of checks, balances, and accountability.

In short, the Fourth Circuit's ruling squarely conflicts with this Court's separation-of-powers jurisprudence. And, like many previous petitions in this area that have been granted without a deep or wide circuit split—or any split at all[5]—this petition should also be granted.

B. Once the Fourth Circuit's legal errors are corrected, it is clear that MWAA is exercising federal power.

To be sure, this Court in *CAAN* never specifically held that MWAA was exercising federal power, so in that sense *CAAN* is not controlling on that point. But there are a number of other indications that the power conferred on MWAA by Congress is properly considered federal.

First, CAAN itself firmly linked the strong "federal" *interest* in MWAA to the President's appointment of the Board of Review. 501 U.S. at 266-267. Here, by con-

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[5] *E.g.*, *Zivotofsky* v. *Kerry*, 135 S.Ct. 2076 (2015); *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2009); see also *DOT* v. *Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015); *Edmond* v. *United States*, 520 U.S. 651 (1997); *Loving* v. *United States*, 517 U.S. 748 (1996).

trast, the Fourth Circuit *distinguished* the federal interest from the federal government's role in MWAA, noting that "the federal government has an "'interest' in a great many things." Pet. 10a. The tension between *CAAN* and the opinion below is clear: It makes no sense to use an appointment by a federal officer as evidence of federal interest, as *CAAN* does, but not as evidence that the body at issue is exercising federal power.[6]

Second, at least some of MWAA's authority and power come from the federal Transfer Act. And it is implicit in *Buckley* that any authority exercised "pursuant to the laws of the United States" is ipso facto federal in nature.

Third, as a practical matter MWAA could never have had power or authority to regulate the airports—or the toll road—had Congress not provided it. The airports were and are federal assets on federal property controlled only by federal authority. Without this grant, Virginia and D.C.'s interstate compact could have done nothing with the airports or surrounding lands. Instead, it was a federal statute—the Transfer

[6] Any reliance by Respondents on Congress's characterization of the federal interest in MWAA as "limited" is overridden by *CAAN*, as "congressional pronouncements ... are not dispositive of [an entity's] status ... for purposes of separation-of-powers analysis under the Constitution." *Ass'n of Am. R.R.s*, 135 S. Ct. at 1231; see *id.* at 1234 (Alito, J., concurring) (statutory statements that an entity is not federal deserve scrutiny, not deference). It is *CAAN*'s statement of the "vital" federal interest, 501 U.S. at 266, not Congress's disingenuous denial of such an interest, that is controlling in this context.

Act—that imbued MWAA with federal power to operate federal lands. To deny that this power is "federal" in character blinks reality.

Fourth, although MWAA technically obtained its authority over the Dulles Toll Road from Virginia, Virginia itself obtained its authority from the federal government—as a *congressionally granted* use of *federal* land. JA 482-83. And in 2006, Virginia transferred that operation to MWAA. But MWAA's authority over the Toll Road does not magically become "un-federal" simply because the authority granted by Congress first passed through a state intermediary.

To be sure, Congress could simply sell the airports and the Toll Road to MWAA, in which case MWAA's power over the property would no longer be a delegation of federal power. But Congress has repeatedly rejected this approach. And much of the power MWAA currently enjoys must therefore be considered "federal" power, whether or not it is "inherently" federal. Indeed, MWAA is exercising both the federal executive "power of appointing, overseeing, and controlling those who execute the laws"—as evidenced by its complete control of the airport property—as well as the classic legislative power of setting priorities for funding, and rates to achieve the desired funding.

In short, the district court must allow Petitioners' separation-of-powers claim to proceed once this Court reaffirms prior precedent, thereby closing the separation-of-powers loophole created by the Fourth Circuit's new "inherently federal" test. The Court should grant the petition and eliminate that loophole.

II. The Fourth Circuit's holding that Congress can delegate to interstate compacts and other "public entities" powers that could not be delegated to a private entity merits review.

Not only did it create a new "inherently federal" requirement, but the Fourth Circuit also created a broad new area of delegated federal authority not subject to separation-of-powers constraints—those involving interstate compacts or other non-federal "public entities." Pet. 13a. Like the Fourth Circuit's "inherently federal" holding, this holding also merits review.

1. There can be no doubt that the Fourth Circuit's holding creates a delegation twilight zone sheltered from separation-of-powers constraints. First, in a conclusion not challenged here, the panel concluded that, as a matter of law, "[i]nterstate compacts … are not federal entities"—even if designed as a "cooperative relationship with the federal government." Pet. 10a. Second, in a holding that *is* challenged in the second Question Presented, the panel held that MWAA could nevertheless receive a delegation of authority from Congress because, in the panel's view, it is a *governmental* entity rather than a "private entity." Pet. 15a.

In so holding, the Fourth Circuit appropriately recognized that delegating federal authority to private entities is "utterly inconsistent with constitutional prerogatives." Pet. 14a (quoting *A.L.A. Schechter Poultry* v. *United States*, 295 U.S. 495, 537 (1935)). But because, in the panel's view, MWAA is a creature of Virginia, Maryland, and Washington D.C. law, it is "a public [rather than private] body which may lawfully exercise governmental power"—including power delegated by Congress. Pet. 15a.

The panel, however, cited no authority for the proposition that Congress can delegate federal authority—"inherent" or not—to a non-federal "public" or governmental entity like an interstate compact that it could not constitutionally delegate to a private entity. Nor have counsel for petitioners been able to find any such authority.

True, when Congress approves a compact, the terms of the compact become federal law. *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). But the mere approval of a compact does not confer any substantive authority beyond that conferred by the states creating the compact. And the fact that the terms of the compact become federal law doesn't mean that Congress can then delegate additional power to such an entity that it could not delegate to a private entity.

By itself, then, the panel's creation of an unwarranted non-federal "public body exception" to ordinary separation-of-powers and delegation principles richly warrants this Court's review.

2. Not surprisingly, the Fourth Circuit's new "public body" exception to separation-of-powers review also contradicts *CAAN*. Indeed, the Fourth Circuit's logic closely follows Justice White's *dissent* in *CAAN*—logic that the majority there expressly rejected.

Justice White claimed that MWAA's "Board [of Review] offends no constitutional provision or doctrine" because it was a "creature of state law," 501 U.S. 252, 282 (1991), created by the states, not Congress. *Id.* at 278 ("Both [MWAA] and the Board are clearly creatures of state law."). But the majority in *CAAN* squarely rejected this contention that the Board of Re-

view was a pure creature of state law and thus not exercising sufficient federal authority to warrant separation-of-powers scrutiny. The majority concluded instead that the Board of Review, despite purportedly being part of an interstate compact, was "exercis[ing] sufficient federal power as an agent of Congress to mandate separation-of-powers scrutiny." *CAAN*, 501 U.S. at 269; *accord id.* at 255. Subsequently, the D.C. Circuit faithfully followed *CAAN* in *Hechinger* by evaluating whether the revised Board of Review was an agent of Congress or exercising federal power. 36. F.3d at 100-105.

By contrast, under the Fourth Circuit's decision here, a similar board of review, filled with members of Congress, would be shielded from separation-of-powers constraints simply because the board was a part of a "public body," specifically, an "interstate compact, constituted by the states." See Pet. 15a. Under *CAAN*, however, that would clearly be impermissible.[7] See also *Buckley* v. *Valeo*. 424 U.S. 1, 126 (1976) (any appointee who exercises significant authority pursuant to the laws of the United States is an "Officer of the United States" subject to the requirements of Article II).

3. If allowed to stand, the panel's new "public body" exception could also be deployed by Congress to erode

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[7] The *CAAN* and *Hechinger* holdings also signal that petitioners will have a compelling merits argument if certiorari is granted: MWAA was created by the same legislation as the Board of Review in *CAAN*; and Congress delegated authority to MWAA to protect the same acknowledged federal interests that the old Board of Review protected. Moreover, while MWAA today is not staffed by members of Congress, neither *CAAN* nor *Hechinger* said that fact was essential to this Court's delegation analysis.

or even effectively overrule some of this Court's leading separation-of-powers decisions. For example, as long as Congress didn't delegate "inherent" federal power (whatever that means), the Fourth Circuit's decision would allow Congress to authorize interstate compacts and other non-federal "public bodies" to:

- regulate accounting firms using a structure this Court found constitutionally unacceptable in *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010);
- run an interstate train system that the federal government formerly ran with federal input and oversight, but now free from any separation-of-powers constraints. Compare *DOT* v. *Ass'n of Am. R.R.*, 135 S. Ct. 1225 (2015).

Similar arrangements—not imagined by the founding generation or even this Court—could be used to wield enormous federal power in other areas. For example, suppose Congress recognized the desire of Western states to aggressively combat air and water pollution independent of the political constraints of Washington, and on that basis transferred jurisdiction over pollutants in those states from the EPA to an interstate compact. A court following the Fourth Circuit's holding in this case would recognize such a compact as neither federal nor private, and therefore not subject to ordinary separation-of-powers constraints. And of course, given the States' traditional authority over their natural resources, the power delegated by Congress in this example could hardly be considered "inherently" federal. Under the Fourth Circuit's decision, this hypothetical compact could thus wield enormous regulatory power—delegated by Congress—with no accountability to anyone.

But we need not speculate to observe an even more shocking example: Congress's delegation in this case authorizes MWAA to choose to raise a billion dollars in excess revenue through tolls collected entirely for the use of federal land, then use those revenues to fund a public works project benefiting a very different group of citizens—a classic legislative choice.[8] The Court should not allow the Fourth Circuit's ruling to go unexamined when it poses such a serious threat to this Court's separation-of-powers jurisprudence.

[8] On the merits, Petitioners will show that even though it may not be legislative to set *prices* for hot dogs—or even season tickets—that happen to be sold on federal property, it surely is legislative to set *policies* that lead to a billion dollars of revenue being collected on federal land—more than the entire cost of building Nationals Park. See Tim Lenke, *Ballpark's Final Tag: $693 million*, Washington Times (January 7, 2009). The Property Clause not only gives Congress the right to own federal property, but the obligation to control it. See *United States* v. *Jenks*, 22 F.3d 1513, 1517 (10th Cir. 1994) (citing U.S. Const. art. IV, § 3, cl. 2.) ("Congress has the authority and responsibility to manage federal land.").

III. The Guarantee Clause question merits review.

The question concerning the Guarantee Clause likewise merits this Court's review. The fundamental requirement of that Clause is that ultimate accountability for the exercise of state authority must be with the electorate or with elected officials. See *New York* v. *United States* 505 U.S. 144, 185 (1992). Even if MWAA were not exercising federal power, it is mandated and designed to create and pursue its agenda "independently" of any elected body. That requirement on its face violates the Guarantee Clause. U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government….").

To credibly satisfy the Guarantee Clause, state entities cannot be created independent of political processes, and states must "retain the ability to set their legislative agendas [and] state government officials … remain accountable to the local electorate[.]" 505 U.S. at 185. MWAA falls well outside that acceptable realm of accountability.

A. The Transfer Act violates the Guarantee Clause by creating a governmental entity "independent" of all elected officials or governments.

By express congressional command, MWAA's exercise of its power must be "*independent* of Virginia and its local governments, the District of Columbia, and the United States Government." 49 U.S.C. 49106(a)(2) (emphasis added); Va. Code 5.1-156(B)(same); D.C. Code 9-905(b)(same). This statutory mandate of inde-

pendence, which precludes accountability, is supported by a structure that diffuses responsibility and authority for MWAA's actions so that neither of the local electorates in D.C. and Virginia, through their elected legislators and appointed representatives on the MWAA Board, have the ability to control MWAA's actions. 49 U.S.C. 49106(c); Va. Code 5.1-153; D.C. Code 9-902. By mandating MWAA's "independence" and creating a structure that so precludes accountability, Congress did the exact opposite of what the Guarantee Clause requires—ensuring that any state-based authority exercised by MWAA would *not* be exercised in a "Republican," politically accountable manner.

This Court's opinions likewise reflect the understanding that government power is held in check only when "those who wield[] it [are] accountable to political force and the will of the people."[9] It is for this very reason that we have a Guarantee Clause. Conversely, this Court in *New York* explained that the presence of accountability shields states from Guarantee Clause challenges. 505 U.S. at 185. Indeed, "'[p]ower and strict accountability of its use are the essential constituents of good government.'" *Bowsher* v. *Synar,* 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring in the judgment).

By definition, the more independent a government entity is from an elected officer or body the more it be-

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[9] *Freytag* v. *Comm'r,* 501 U.S. 868, 884 (1991); see also, *e.g., Lucia* v. *S.E.C.,* 138 S.Ct. 2044, 2056 (2018) (Thomas, J., concurring); *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674-75 (2015); *Clinton* v. *Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (Executive responsibility is focused in one person to "facilitat[e] accountability.").

comes politically unaccountable. Typically, such independence is achieved indirectly, through the practical operation of the entity's structure, such as tenure protections that subject the entity's leadership only to for-cause removal. But in the MWAA scheme, Congress, Virginia, and D.C. were bold and direct, mandating MWAA's "independence" by statutory fiat. 49 U.S.C. 49106(a)(2); Va. Code 5.1-156(B); D.C. Code 9-905(b).[10] If ever there were a violation of the Guarantee Clause, this is it.

B. The Fourth Circuit's decision ignores the core vice of the MWAA scheme and invites a replication of its assault on the Constitution's structural boundaries.

The decision below erred by ignoring MWAA's statutorily mandated independence and the structural design of its board that further insulates it from political accountability. The Fourth Circuit instead concluded that "MWAA does not disturb the republican form of government of any of its member jurisdictions." Pet. 18a. According to the Fourth Circuit, because these *states* continue to have "Voters [] free to elect their political leaders and political leaders [] free to set their

[10] Moreover, one important aspect of accountability is that "state governments remain responsive to the local electorate's preferences [and] state officials remain accountable to the people." *New York*, 505 U.S. at 168. The structural hobbling of MWAA's accountability serves as a practical mechanism in service to this statutory prohibition of accountability—neither the D.C. Council nor the Virginia General Assembly acting alone can hold MWAA officials accountable or control the Board. Only the unified action of multiple independent bodies can overturn a decision by MWAA—a barrier to accountability and thus to ensuring a Republican form of government.

legislative agendas" MWAA itself does not violate the Guarantee Clause. Pet. 18a. Thus, as long as Virginia and D.C. have elected officials, any power they and the federal government delegate to MWAA—which is "independent" of those bodies—does not violate the Guarantee Clause.

1. To the obvious problem with such reasoning—that MWAA is still exercising government power as a free agent—the Fourth Circuit responds: "MWAA '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.'" Pet. 18a.

But neither the legislative body of Virginia nor of D.C. has the power to modify or abolish the compact. See 49 U.S.C. 49106(a)(1)(A); Va. Code 5.1-153; D.C. Code 9-902. Here, the legislatures of *both* Virginia and D.C. must enact identical responses to any MWAA initiative with which their constituents disagree. And even if they could, they are required by federal law to maintain MWAA's "independence." That means that the members of each legislative body cannot be held accountable for MWAA's performance because their legislatures cannot modify the compact unilaterally, act directly to control MWAA, or withdraw from the compact. See *New York*, 505 U.S. at 185 (states must "retain the ability to set their legislative agendas [and] state government officials … remain accountable to the local electorate[.]")

Moreover, even if MWAA's authority were clearly "circumscribed," as the Fourth Circuit contends, Pet. 18a, that says nothing about whether MWAA is politically *accountable* for its exercise of its lawful authority

within those bounds, as required by the Guarantee Clause. It is not.

2. In any event, the opportunity to modify a legislative grant of authority after the fact has never justified the absence of an effective mechanism to ensure the accountability of an agency for its day-to-day exercise of that power, or as here, an affirmative statutory mandate of "independence" that insulates MWAA's execution of its mission from politically accountability. MWAA's authority may someday be withdrawn, but in the meantime its current authority is beyond the control of any elected official.

Indeed, the vast majority of decisions by an agency that may spark controversy go to *how* an agency is executing its authority, not to *whether* it should enjoy such authority in the first place. For that reason, an issue that will cause legislators to rethink the authority it has delegated to that agency is rare. Thus, the Fourth Circuit's perspective leaves the bulk of MWAA's actions beyond any effective accountability.

3. This case illustrates the sweeping consequences of the Fourth Circuit's holding. MWAA is:

- building massive public works projects benefiting one group of citizens,
- exacting huge sums of money from another group of citizens to pay for those projects, and
- promulgating regulations that have the binding force of law.

MWAA, in short, wields enormous governmental power.

Moreover, while the Fourth Circuit notes that "MWAA's operations are a frequent topic of discussion

in the halls of political power," Pet. 18a, it fails to explain how such discussions translate into constitutionally sufficient political accountability—because they cannot.

In fact, discussions of political leaders concerning MWAA's operations commonly are highly critical, and manifest a frustration borne of impotence to do anything about them.[11] A November 2012 report by the USDOT Inspector General ("IG Report") is a striking example. Indeed, the Report's title makes the essential point: "MWAA's Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability."[12] The Report recognizes that, "[a]s an independent public body subject to few federal and state laws, MWAA must rely on the strength of its policies and processes to ensure credibility in its management of two of the Nation's largest airports and a multibillion-dollar public transit construction project." IG Report at 38. The Report then makes plain the practical consequences of flouting the Constitution's structural safeguards: "MWAA's ambiguous policies and ineffectual controls have put these assets and millions of Federal dollars at significant risk or fraud, waste, and abuse and have

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[11] Indeed, that such discussions are academic exercises at best, and yield no results, amply demonstrates the lack of accountability.

[12] U.S. Dep't of Transp., Office of the Inspector General, Report No. AV-2013-006, *MWAA's Weak Policies and Procedures Have Led to Questionable Procurement Practices, Mismanagement, and a Lack of Overall Accountability,* (Nov. 1, 2012) *available at* https://www.oig.dot.gov/sites/default/files/MWAA%20Final%20Report%2010-31-012_FINAL_signed_508_rev%2012-3-12.pdf.

helped create a culture that prioritizes personal agendas over the best interests of the Authority." *Id.*[13]

MWAA's structure is hardly innocuous, as the billion dollars spent on the Metrorail Silver Line illustrates. And MWAA's statutory preclusion of accountability clearly violates the Constitution's structural boundaries.

Those features by themselves would justify this Court's review of this case. As the Court noted just a short time ago, "policing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'" *NLRB* v. *Noel Canning,* 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) (quoting *Public Citizen* v. *Dep't of Justice,* 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment)). The Court should exercise that "vital function" by granting review here.

C. Applying the familiar and judicially manageable accountability standard here will not require examining broader questions about the Guarantee Clause.

The simply accountability standard urged here, moreover, does not invite the Court into the inherently

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[13] A letter from the Deputy Secretary of Transportation commenting on a draft of the Report similarly points out that the Report uncovers "numerous ethical and fiscal lapses, including the frequent award of contracts without free and open competition, cases of nepotism, and instances where employees accepted favors and gifts in the ordinary course of business. This pattern of conduct is simply unacceptable for a public body entrusted with the management and operation of important Federal assets." IG Report at 48.

political undertaking of evaluating whether specific innovative or non-traditional governmental structures or processes meet the test of a republican form of government—which has been the focus of virtually all previous Guarantee Clause cases. This Court has consistently refused to police political choices made within the broad bounds of the Guarantee Clause where accountability is evident. See, *e.g., Luther* v. *Borden,* 48 U.S. (7 How.) 1, 42 (1849) (which of two governments controlled Rhode Island); *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U.S. 118 (1912) (validity of law adopted via the initiative and referendum); *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U.S. 608 (1937) (validity of State Milk Commission that was directly accountable to Virginia elected officials). Here, however, the statutory "independence" requirement squarely prevents MWAA from being accountable to any elected government at all.

The Court has also noted that some courts have wrongly read these older cases as holding that Guarantee Clause claims are nonjusticiable in principle. See *New York,* 505 U.S. at 184 (observing that the "limited holding [in *Luther*] metamorphosed into the sweeping assertion that violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). Such a sweeping nullification of the "great guaranty" has been consistently rejected by the Court. See *Reynolds* v. *Simms,* 377 U.S. 533, 582 (1964) ("*Some* questions raised under the Guaranty Clause are nonjusticiable.") (emphasis added); *New York,* 505 U.S. at 185 ("[P]erhaps not all claims under the Guarantee Clause present nonjusticiable political questions."); *Arizona State Legislature,* 135 S. Ct. at 2660 n.3 (quoting *New York*).

Because this case presents a Guarantee Clause question subject to a judicially manageable standard—whether MWAA is politically accountable despite its statutorily-mandated independence—it offers an ideal vehicle to illustrate the type of claim that *is* properly justiciable under the Guarantee Clause. Granting and deciding the third Question, then, would confirm that the Guarantee Clause is not surplusage.

Moreover, this case is unlike any previous Guarantee Clause case in that the United States—the assigned guarantor of a republican form of government—is itself complicit in the accountability-destroying scheme at issue. It is a scheme that allows MWAA to exercise enormous government power, with discretion over a massive public works project and the billions of dollars required to pay for it, while expressly placing MWAA beyond the political accountability that the Constitution guarantees. That is yet another reason to grant review.

IV. All three questions are of paramount importance, and this case is an excellent vehicle for resolving them.

The three questions here are exceptionally important and this case is an ideal vehicle for resolving any or all of them.

First, this case is important because MWAA "provide[s] a blueprint" for the "use of similar expedients" to evade accountability. See *CAAN*, 501 U.S. at 277. The whole point of MWAA's unaccountable posture is "to facilitate necessary though unpopular decisions relating to the airports," *Alcorn* v. *Wolfe,* 827 F. Supp. 47, 49 (D.D.C. 1993). That is why Congress declared MWAA "independent" of all other governments.

Such a desire to make unpopular decisions through "independent" entities is not limited to airport projects or to interstate compact entities, much less to recognizably federal instrumentalities. Exacting money from the public for some "innovative," supposedly beneficial enterprise, but without any accountability to that public, is a predictable impulse that can drive the delegation of government power to a potentially vast array of ingenious institutional vehicles.

Federal and state governments are constantly looking for ways to offload the financial and political responsibility for many government functions, and it is important that they do so in a manner consistent with the constitution. Some will be permissible, others will not. This one is not.

This case, moreover, is an ideal and timely vehicle by which the Court can begin to delineate how the Constitution's structural requirements must shape novel initiatives to grant government powers to non-federal

entities, private companies, and independent authorities.[14] Petitioners do not quarrel with the merits of developing the federal government's airports or the extension of the Metrorail system. However, the determination of what is necessary for the public good in a republic is supposed to be made by people accountable to the public. Billion-dollar decisions such as those MWAA makes are *supposed* to have popular support.

At bottom, then, this case is animated by Justice Holmes' famous admonition that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 416 (1922). The decision below flouted that bedrock principle, thus giving this Court a good opportunity to reaffirm it.

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[14] See Eugene Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges,* 37 Harv. J. L. & Pub. Pol'y 931 (2014).

CONCLUSION

The Fourth Circuit's decision creates multiple safe harbors from settled constitutional principles that Congress will be hungry to exploit absent correction by this Court. The petition should be granted.

Respectfully submitted,

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