No. 18-1240

IN THE

Supreme Court of the United States

PHIL KERPEN, ET AL.

PETITIONERS,

V.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL.,

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The 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 question presented by the petition that is addressed by this brief is:

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?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case concerns Cato because constitutional structure secures our liberties. The separation of powers protects against overreaching grants of authority and is critical to our republican system of governance. Further, congressional grants of power should be easily identifiable—and federal power itself must be specifically defined to ensure both congressional accountability and the proper constitutional balance of power.

INTRODUCTION AND SUMMARY OF ARGUMENT

Separation of powers—the division of federal authority among three co-equal branches of government—is a bedrock principle of our constitutional order. Equally important is our conception of enumerated powers: the federal government can only do what the Constitution authorizes, and can't delegate power that it doesn't have. The decision below chips away at both of these core constitutional values.

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[1] Rule 37 statement: All parties were timely notified of and consented to this filing. No counsel for any party authored any of this brief; *amicus* alone funded its preparation and submission.

The lower court incorrectly held that the power to operate airports on federal land is not "inherently federal" and therefore should not be considered federal power for separation of powers purposes. *Kerpen v. Metro. Wash. Airports Auth.*, 907 F.3d 152, 162 (4th Cir. 2018). This "inherently federal" test has no constitutional basis and is out of pace with this Court's jurisprudence regarding federal power.

Congress delegates federal power whenever it gives significant authority to another body, including an interstate compact. As the Court established in *Dep't of Transp. v. Ass'n of Am. R.R.,* when an entity is created and controlled by the government while serving a federal interest, it has been granted federal power and is subject to the separation of powers doctrine. 135 S. Ct. 1225, 1227 (2015). The MWAA's authority satisfies these factors, which is why Congress granted it federal power. But it was improper for Congress to delegate such authority. Congress is charged with making policy decisions that are often complex, time-consuming, and even unpopular. When Congress grants power to another entity so it can avoid responsibility, it undermines the separation of powers.

The lower court also erred in holding that there is a functional difference between federal and "inherently federal" authority. *Kerpen*, 907 F.3d at 162. Federal power is not broken up into these categories. Instead, the Court has long understood, as the Framers did, that federal power is distributed among three and only three branches: legislative, executive, and judicial. Whether a branch may or may not delegate certain powers, the character of its assigned powers is unchanging: they are *all* inherently federal.

Since Congress possesses only "inherently" federal power, the Court must clarify whether Congress has the authority to control airports. If it can control airports, it delegated inherently federal authority to the MWAA—and if it didn't have the authority in the first place, it should not have granted power in this way. Either way, contrary to the decision below, Congress can't delegate power it doesn't have.

The Court thus has an opportunity to resolve uncertainty regarding the definition of federal power. If confusion on this point in the lower courts continues, it will undermine the separation of powers doctrine, and simultaneously reduce the importance of enumerated powers. The Court should clarify that grants of federal power come from Congress—and that federal power is the only kind of power Congress has.

ARGUMENT

I. Congress Delegates Federal Power Whenever It Gives Power to Another Body

1. As the Court explained in *Ass'n of Am. R.R.,* when an entity "is created by the Government, is controlled by the Government, and operates for the Government's benefit," it acts "as a governmental entity for separation of powers purposes." 135 S. Ct. at 1227. Here, the MWAA satisfies this test and thus exercises federal power.

The Fourth Circuit emphasized that states, not Congress, created the MWAA and granted it authority. *Kerpen*, 907 F.3d at 160. Although states did create the MWAA by forming a compact, it was the Metropolitan Washington Airports Act of 1986 (the "Transfer Act") that granted it authority. This law "recommended a transfer of authority from the Federal to the

local/State level that is consistent with the management of major airports elsewhere in the United States." Transfer Act, 49 U.S.C. § 49101. It also stated that "the Federal interest in these airports can be provided through a lease mechanism which provides for local control and operation." *Id.* Contrary to the decision below, the Transfer Act was *expressly* a mechanism for transferring federal authority to the MWAA.

The Transfer Act also controls the extent of the MWAA's authority. Even the Fourth Circuit admitted that "even if some of MWAA's powers did come from the federal government, whatever policymaking discretion the Authority wields would be amply constrained by Congress' passage of the Transfer Act." *Kerpen*, 907 F.3d at 161. If Congress is constraining the MWAA's power, it logically follows that Congress is exercising a degree of control.

Finally, the MWAA serves a government interest. As the Court has previously explained regarding the MWAA, "the Federal Government has a strong and continuing interest in the efficient operation of the airports, which are vital to the smooth conduct of Government business." *Airports Auth. v. Citizens for Noise Abatement,* 501 U.S. 252, 266 (1991). Not only does the federal government have an interest in the MWAA's regulation of airports in Congress's place, but the airports themselves are on federal land. Surely, this use of federal land alone implicates government interests.

2. Congress may not have created the MWAA, but it at least imbued it with federal power. The Transfer Act controls the scope of the MWAA's power, and the MWAA serves a federal purpose. Under this Court's *Association of American Railroads* analysis, the

MWAA employs federal authority and must comply with the separation of powers doctrine.

Separation of powers and non-delegation serve a critical function in our republican system of government: securing a balance of authority. "The non-delegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). Article I states that "[a]ll legislative Powers herein granted shall be vested in a Congress." U.S. Const. art. I, § 1. In conjunction with the vesting clauses that open Articles II and III, the Article I Vesting Clause sets the core design of our constitutional structure. Far from a disposable organizational chart, the Framers laid out separate spheres of authority because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny." Federalist No. 47 (Madison). Recognizing this, they divided both function and responsibility, making each branch answerable to the others, since "[a]mbition must be made to counteract ambition." Federalist No. 51 (Madison). No branch may delegate its assigned sphere to any other. Without that principle, the structure itself would be a nullity. Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002) ("The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense [if there is no limit on delegations].").

Delegation today presents a new challenge, as it increasingly removes congressional accountability. "Delegation undermines separation of powers, not only by expanding the power of executive agencies, but also by unraveling the institutional interests of Congress."

Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U.L. Rev. 1463, 1465 (2015). The result is a Congress whose members are less accountable both to their constituents and to each other. It discharges our representatives from the duty to come together as a deliberative body to legislate on even the most pressing matters. *Id.* Under this framework, Congress need not shoulder the responsibilities for the policies it enacts, instead retaining plausible deniability as another branch confronts the hard questions of governing. *See* Morris P. Fiorina, *Group Concentration and the Delegation of Legislative Authority*, in Regulatory Policy and the Social Sciences 175, 187 (Roger G. Noll, ed., 1985). In place of a clash of ambitions, "[l]awmakers may prefer to collude, rather than compete, with executive agencies over administrative power and so the Madisonian checks and balances will not prevent excessive delegations." Rao, *supra*, at 1466. Recognizing these concerns, the Court has a long-developed doctrine limiting Congress's discretion to delegate its legislative prerogatives. As then-Justice Rehnquist explained:

> First, and most abstractly, [the non-delegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will. Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of

> delegated legislative discretion will be able to test that exercise against ascertainable standards.

Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (cleaned up).

This Court should take this case to clarify that when Congress grants an interstate compact—or any entity—authority over federal land for a federal purpose, that entity is wielding federal power.

II. The "Inherently Federal" Test Makes an Arbitrary Distinction Between Types of Federal Power

The Fourth Circuit here asserted that Congress did not grant the MWAA federal power, while in the same breath defending Congress with the claim that "there is nothing inherently federal about the operation of commercial airports" on federal land. *Kerpen*, 907 F.3d at 162. Instead of simply arguing that the MWAA does not exercise federal power, the lower court avoided that determination by separating "inherent" federal power from federal power generally. *Id.*

The problem with this assertion, of course, is that the distinction between federal and inherently federal power is nonexistent. As Justice Thomas said in his *Association of American Railroads* concurrence, "The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.' Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government." 135 S. Ct. at 1240 (Thomas, J., concurring in judgment). The lower court was mistaken in ranking federal power

according to its degree of "inherently federal" character. Instead, the "types" of federal power are the different kinds the Constitution vested in specific branches—executive, legislative, and judicial. The question should instead be about separation of powers, not whether a certain power is federal "enough" to be classified as such. While the lower court was correct in its assertion that "certain governmental powers are not 'core' powers and may lawfully be delegated to private parties," *Kerpen*, 907 F.3d at 162, it missed the mark. The "core" nature of a power goes to whether Congress can permissibly delegate it, not whether the power is federal. All powers Congress delegates are inherently federal.

As explained in subsection A, *supra*, there are certain legislative powers that are not Congress's to delegate, while others are assigned to other branches. But the character of a power itself does not change from federal to something else based on whether Congress can delegate it or not. A specific power is either federal, or it isn't. Terms like "inherently federal" muddy the waters, so this Court should provide lower courts with the necessary guidance to avoid such pitfalls.

III. The Only Kind of Power Congress Has Is "Inherently" Federal, Because Congress Can't Delegate Power It Doesn't Have

States cannot grant federal power; only Congress can do that. Likewise, federal authority is the only kind of power Congress can delegate; it does not have "non-federal" power to give. As this Court has stated, "Congress cannot grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U. S. 714, 726 (1986). If Congress "lack[s] the power itself, it

cannot delegate that power to an agency." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1224 (2015) (Thomas, J., concurring in judgment).

Further, congressional authority is limited to the enumerated powers vested in it under Article I of the Constitution. There are some things that Congress simply cannot do, as this Court has long held. "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). This truism has surely given rise to uncertainty regarding the extent of power Congress holds, but "the Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 567 (1995) (holding that Congress could not use the Commerce Clause to justify a gun-free school zone law). Enumerating specific, limited powers is thus a feature of our system of checks and balances, not a bug.

* * *

If, under the federal Transfer Act, the MWAA is exercising federal power by operating airports and toll roads on federal land, that power came from Congress. *See* Part I, *supra*. And there is no difference between federal and inherently federal power. *See* Part II, *supra*. Given these premises, either Congress delegated federal power to the MWAA, or Congress lacks the power to manage airports in the first place. If the former, the Court should grant the petition for certiorari and settle the apparent ambiguity regarding types of federal authority. If the latter, then the Court should clarify its Commerce Clause and federal-lands

jurisprudence. Either way, the Court must resolve the uncertainty created by the decision below.

CONCLUSION

The Court should remind lower courts that federal power is the only type that Congress possesses—and that Congress can't delegate what it doesn't have. For the foregoing reasons, and those stated by the petitioners, the Court should grant the petition for certiorari.

Respectfully submitted,

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