No. 13-1080

In the Supreme Court of the United States

DEPARTMENT OF TRANSPORTATION, ET AL.,
Petitioners,

V.

ASSOCIATION OF AMERICAN RAILROADS,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF TRUSTEES AND ALUMNI, THE JOHN WILLIAM POPE CENTER FOR HIGHER EDUCATION POLICY, AND JUDICIAL EDUCATION PROJECT IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici curiae[1] are non-profit organizations with an interest in the continued vitality of the private nondelegation principle at issue in this case. Specifically, *amici* are concerned about unchecked legislative authority in the hands of unaccountable private parties. *Amici*'s interest in this issue is not merely theoretical, but stems from experience with the federal system of higher education funding. There, wholly private accreditation agencies wield substantial authority to determine and apply standards by which educational institutions and their students qualify for federal funding. Yet this private rulemaking and adjudication is virtually free from independent federal oversight. Further, these private accreditation decisions are largely made by administrators and faculty who work for competing institutions in the education industry and whose institutions benefit from the federal dollars effectively controlled by their accreditation agencies.

The very structure of the system creates the potential for biased and unaccountable decisionmaking.

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[1] The parties have consented in writing to the filing of this brief and copies of their letters of consent are on file with the Clerk's office. Counsel for *amici* authored this brief in its entirety. No party to this case or its counsel authored any part of this brief or contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amici*, their members, and their counsel, contributed money that was intended to fund the preparation or submission of this brief.

As discussed below, the delegation of the control of federal educational benefits to private organizations composed largely of education industry stakeholders creates substantial constitutional problems akin to those posed by the delegation of authority to Amtrak in this case.

Amici curiae believe that the private nondelegation principle applied below provides a critical safeguard against the unsupervised exercise of governmental authority. This private nondelegation principle—properly grounded in the Constitution's separation of powers and due process guarantees—is an important bulwark against delegations of excessive authority to private parties. It ensures that the elected branches of the federal government remain constitutionally accountable for decisions made under federal law and that decisions under federal law are not made by stakeholders in the outcome.

Amicus curiae the American Council of Trustees and Alumni ("ACTA") is an independent, non-profit organization committed to academic freedom, excellence, and accountability at America's colleges and universities. ACTA works with alumni, donors, trustees, and education leaders across the United States to support liberal arts education, uphold high academic standards, safeguard the free exchange of ideas on campus, and ensure that the next generation receives an intellectually rich, high-quality college education at an affordable price. ACTA has a long history of advocacy for accreditation reform in light of the failure of the higher education accreditation system to accomplish its intended purpose of ensuring academic quality.

Amicus curiae the John William Pope Center for Higher Education Policy ("Pope Center") is a 501(c)(3) non-profit institute dedicated to improving higher education. The Pope Center believes that higher education in the United States has strayed from its chief goals of scholarly inquiry and responsible teaching. To address these concerns, the Pope Center conducts studies in areas such as governance, curriculum, financing, access, accountability, faculty research, and administrative policies. It explores ways to increase the accountability of trustees, administrators, faculty, and students. And it engages in the broader dialogue about how to improve higher education around the nation.

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers—creating a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and Internet media. The private nondelegation principle at issue in this case falls squarely within the realm of constitutional concerns that animate JEP.

SUMMARY OF ARGUMENT

The private nondelegation principle, which prohibits the delegation of legislative power to private, non-governmental actors, remains a vital aspect of our constitutional order. Properly described by the court of appeals as a "lesser-known cousin of the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch," Pet. App. 7a, this private nondelegation principle serves a pair of constitutional values.[2] First, like the nondelegation doctrine, it reinforces the Constitution's assignment and separation of powers by ensuring that legislative and executive powers are exercised by persons or agencies constitutionally accountable to the electorate. Second, it furthers the guarantee of due process of law by ensuring that governmental authority is vested only in unbiased and disinterested decisionmakers acting for the public good.

These underlying tenets are tested whenever private actors are endowed with federal rulemaking authority. The private decisionmaker delegated federal authority is wholly unaccountable to the electorate for its exercise. At the same time, the political branches are able to disclaim responsibility for the substantive policies that result from the delegation.

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[2] For sake of clarity, *amici* use the phrase "private nondelegation principle" to refer to the question of Congress's power to delegate authority to private parties. This is distinguished from the question of Congress's power to delegate authority within the federal government, which this Court has generally called the "nondelegation doctrine."

These problems are amplified when the ultimate decisionmaker is a private party acting not for the public good, but for its own interests.

The proper role of a private party in legislative rulemaking is circumscribed by Article I's vesting clause, which vests "all legislative Powers herein granted" in Congress. U.S. Const. art. I, § 1. A private party therefore may not, in any circumstance, *make* the law. As this Court famously declared in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), "[t]his is legislative delegation in its most obnoxious form."

Of course, this Court has recognized that Congress retains sufficient flexibility to account for the myriad economic, social and regulatory challenges it faces as a national legislature. With respect to intragovernmental delegations, this Court seeks to protect Congress's Article I authority by requiring an intelligible principle to guide the governmental official and to ensure that it is Congress, and not the Executive Branch (or other governmental entity), that decides what the law is. But legislative delegations to private entities raise an additional constitutional concern by encroaching not only on Congress's legislative authority but also on the Executive Branch's constitutional duties to apply and enforce the law. Moreover, delegations to private parties lack the same constitutional safeguards as delegations to Executive Branch officials, who are bound by the constitutional oath and are subject to removal and impeachment. As a result, the "intelligible principle" rule is insufficient to preserve the constitutional design and protect individual liberties.

Nevertheless, this Court has made clear that Congress can invite the assistance of private parties in certain aspects of federal rulemaking, provided that Congress, with perhaps the input of the Executive Branch, is always responsible for the fundamental design and content of the law. This Court has recognized two circumstances where a private party's involvement in the rulemaking process does not run afoul of the rule against private delegation.

First, Congress may enlist private parties to act in a subordinate role in regulating under federal law. A private organization may thus act in an advisory capacity to an Executive Branch official in proposing a federal regulation, provided that the ultimate decision regarding the final rule is vested in the governmental actor. *See Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940). In these circumstances, the ultimate responsibility for the *content* of federal law remains with Congress and the Executive Branch (acting pursuant to congressional direction).

Second, Congress may condition the effectiveness of a federal regulation on the consent of a class of regulated parties, as by an industry referendum. *See, e.g.*, *Currin* v. *Wallace*, 306 U.S. 1 (1939) and *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939). Provided that it acts with sufficient clarity, in those circumstances it is again Congress that establishes the contours of federal law. The regulated industry merely satisfies a condition established by Congress on the effectiveness of its legislative policy. It might be said that Congress's conditioning of the effectiveness of federal law on a plebiscite of a regulated industry *reinforces* the democratic accountabil-

ity inherent in the constitutional structure by adding yet another layer of democratic processes to its law-making.

The court of appeals here correctly determined that Congress's delegation to Amtrak did not fall within these safe harbors. Far from playing a subordinate role, Amtrak is a co-equal partner with the federal agency. It "jointly" (with the Federal Railroad Administration) crafts the law that regulates the conduct of other private parties. *See* Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4916.

The statutory scheme is also unlike the permissible referendum process. It subjects governmental regulation to the approval of a single regulated party and gives that private party an equal hand in crafting its content. While the Department of Transportation has *some* shared responsibility for the guidelines, even that can be divested if Amtrak calls for arbitration. In that circumstance, the statute permits the relevant metrics and standards to be set by a private arbitrator unfettered from governmental control. Ultimately, then, the statutory scheme lacks the earmarks of secretarial control necessary to confine the delegation of authority.

The statutory scheme equally fails the guarantee of due process. Amtrak is a stakeholder in the rail transportation industry, which competes with freight railroads for the limited availability of tracks. Yet Amtrak sets standards that affect the conduct of those freight railroads. These same concerns for guarding against possible bias animated *Carter Coal* and numerous due process cases that followed.

This case demonstrates the continuing utility of the private nondelegation principle in reinforcing the constitutional structure, promoting constitutional accountability, and protecting individual liberties. There are good reasons for this Court to reaffirm the limitations on Congress's power to assign legislative responsibility to private parties. Indeed, while Congress has generally observed the safeguards against private lawmaking, *amici curiae*'s experience with an unrelated statutory scheme—the Higher Education Act—illustrates the need for continued vigilance.

Under the Higher Education Act, Congress has granted to private accreditation agencies broad unreviewable authority to establish accreditation standards by which educational institutions' eligibility for federal funding is determined. By both setting and applying the standards by which universities and other educational institutions qualify for federal funding, accreditors effectively decide whether those educational institutions live or die. But as with the instant case, the accreditation scheme lacks sufficient oversight and control, resulting in unchecked and increasingly arbitrary accreditation standards and decisions. While this case obviously examines a different scheme, *amici*'s experience with the accreditation system further demonstrates that a vibrant check on private delegations is warranted in modern jurisprudence.

ARGUMENT

I. THE PRIVATE NONDELEGATION PRINCIPLE PROMOTES THE CONSTITUTIONAL ASSIGNMENT AND SEPARATION OF POWERS AND PROTECTS AGAINST BIASED DECISIONMAKING

Nearly 80 years ago this Court declared that the delegation of legislative power to private entities "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Co.* v. *United States*, 295 U.S. 495, 537 (1935).[3] A year later, the Court held unconstitutional a federal law empowering a private coal board composed of industry participants to set rules governing the conduct of others in the industry. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311-

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[3] In *Schechter*, the Court ultimately invalidated the delegation at issue because Congress established no guidelines for the President's approval of codes of conduct that were drafted by private industry. *See* 295 U.S. at 537-42. Prior to tackling the issue of whether Congress had properly delegated authority to an Executive Branch official, the Court had no trouble concluding that a straight delegation to an industry association (in the absence of a presidential approval role) would have been unconstitutional, reasoning that it cannot "be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries." *Id.* at 537. Nor "[c]ould trade or industrial associations or groups be constituted legislative bodies for that purpose" simply "because such associations or groups are familiar with the problems of their enterprises." *Id.*

12 (1936). This vesting of rulemaking power in an interested private party is "delegation in its most obnoxious form." *Id.* at 311. Regulation of this economic activity is "necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.*

While this Court has not since invalidated a statute under *Carter Coal*, the private nondelegation principle is not simply a remnant of a by-gone constitutional era. *See Mistretta* v. *United States*, 488 U.S. 361, 374 n.7 (1989) (distinguishing *Schechter* on grounds that statute authorizing U.S. Sentencing Commission to create sentencing guidelines does not "delegate regulatory power to private individuals"). It is instead grounded in enduring constitutional precepts. First, it protects and promotes the constitutional assignment and separation of powers and the attendant political accountability to the people. Second, it reinforces due process protections against potential bias and self-interest in the determination and application of federal law. In both respects, the private nondelegation principle safeguards individual liberties.

A. The Private Nondelegation Principle Ensures Political Accountability to the Electorate

1. Like the Nondelegation Doctrine, the Private Nondelegation Principle Reinforces the Constitutional Structure

Carter Coal cited the Fifth Amendment's due process clause in support of its ruling, *see* 298 U.S. at 311, but also relied on *Schechter*'s rule against delegations of legislative power to a private entity. That decision grounded its concerns about delegation to private parties in the "constitutional prerogatives and duties of Congress." *Schechter*, 295 U.S. at 537. From its origins, then, the private nondelegation principle was firmly grounded in the Constitution's assignment and separation of powers. *See id.* at 529 ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.").[4]

In this critical respect, the private nondelegation principle is like its better-known "cousin," Pet. App.

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[4] Indeed, modern commentary understands—just as both lower courts did here, *see Ass'n of American Railroads* v. *Department of Transportation*, 865 F. Supp. 2d 22, 33 (D.D.C. 2012), *judgment rev'd*, 721 F.3d 666 (D.C. Cir. 2013); *see also* Pet. App. 7a—the private nondelegation principle to stem, in large part, from the constitutional separation of powers. *See, e.g.*, Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. Miami L. Rev. 507, 510 (2011).

7a, the nondelegation doctrine, which limits Congress's power to delegate authority to the Executive Branch or other entities within the federal government. *See, e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Both doctrines rest on the Constitution's carefully delineated structure, which vests the two coordinate political branches with the authority to determine the contents and execution of the law. But by prohibiting the delegation of governmental power outside the federal government, the private nondelegation principle goes a step further than the better-known nondelegation principle. It protects not only congressional prerogatives, but executive prerogatives as well.

The intra-governmental nondelegation doctrine "developed to prevent Congress from forsaking its duties." *Loving* v. *United States*, 517 U.S. 748, 758 (1996). In particular, Article I, § 1, declares that "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1. Thus, the "fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, and may not be conveyed to another branch or entity." *Loving*, 517 U.S. at 758 (citation omitted).[5]

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[5] *See also Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."); *Whitman*, 531 U.S. at 472 ("[T]he constitutional question is whether the statute has delegated legislative power

(Continued …)

The Constitution vests Congress with this sole responsibility for lawmaking because it is the branch most accountable to the electorate: "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving*, 517 U.S. at 757. "The clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 758.[6] As the "branch of our Government most responsive to the popular will," Congress is directly accountable to the American people for its legislative policy choices. *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

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to the agency . . . [The Constitution's] text permits no delegation of those powers.").

[6] *See also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'") (quoting *The Federalist*, No. 70, at 476 (Alexander Hamilton)); *see also Bowsher* v. *Synar*, 478 U.S. 714, 738 n.1 (1986) ("If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished . . . . *Power and strict accountability of its use* are the essential constituents of good government.") (omission in original) (internal quotation marks and citation omitted).

The private nondelegation principle is equally grounded in this concern for congressional abdication of legislative authority. In this sense, both doctrines are "rooted in the principle of separation of powers that underlies our tripartite system of Government." *See Mistretta*, 488 U.S. at 371.[7] They rest on the fundamental premise that *any* transfer of *core legislative functions* outside of Congress is prohibited by the Constitution. "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 405-06 (1928).

Where Congress seeks to delegate authority entirely outside of government, the concern becomes not simply Congress's abdication of its own legislative responsibility, but also its undermining the Executive Branch's authority to execute the law. Article II, like Article I, vests *all* of the executive authority in the President. *See, e.g., Touby* v. *United States*, 500 U.S. 160, 168 (1991). Congress under-

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[7] *See also Loving*, 517 U.S. at 758 ("[T]he delegation doctrine[ ] has developed to prevent Congress from forsaking its duties."); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399, 1416-17 (2000) ("The nondelegation doctrine promotes separation of powers by forcing Congress to make the hard choices rather than allowing it to delegate such responsibility to the executive branch.").

mines the Executive Branch's authority to administer the law when it delegates rulemaking authority entirely outside of government. As one lower court explained, then, the private "nondelegation principle serves both to separate powers as specified in the Constitution . . . and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co.* v. *United States*, 368 F.3d 385, 394 (4th Cir. 2004).

The accountability promoted by the separation of powers in general, and the private nondelegation principle in particular, protects individual liberty. "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty." *Boumediene* v. *Bush*, 553 U.S. 723, 742 (2008); *see also Nat'l Labor Relations Bd.* v. *Canning,* 134 S. Ct. 2550, 2559-60 (2014) ("the separation of powers can serve to safeguard individual liberty") (citation omitted).[8] A statute that thwarts this principle of accountability cannot stand.

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[8] *See also Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011) ("[T]he dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well."); *Loving*, 517 U.S. at 756 ("Even before the birth of this country, separation of powers was known to be a defense against tyranny"); *United States* v. *U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317-18 (1972) (noting "our basic constitutional doctrine that individual freedoms will best be

(Continued …)

2. Private Delegations Are Not Saved by Congress's Articulation of an Intelligible Principle

For similar reasons, purely private delegations are not saved from invalidity by Congress's articulation of an "intelligible principle" to guide a non-governmental actor's decisionmaking. *See Whitman*, 531 U.S. at 472 ("[W]hen Congress confers decisionmaking authority upon agencies[,] Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'") (last alteration in original) (citation omitted).

The "intelligible principle" rule, which affords broad deference to congressional delegations of authority within the federal government, is grounded in the "inherent necessities of the governmental coordination" in our constitutional system. *See J.W. Hampton*, 276 U.S. at 406. In purely intragovernmental delegations, Congress establishes the broad contours of legislative policy by articulating an intelligible principle. This permits the Executive Branch, as Chief Justice Marshall famously noted, to "fill up the details." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (affirming the power of Congress to permit the judiciary to establish rules of judicial practice); *see also Yakus* v. *United States*, 321 U.S. 414, 424-25 (1944) (the Constitution "does not

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preserved through a separation of powers and division of functions among the different branches and levels of Government").

require that Congress find for itself every fact upon which it desires to base legislative action" nor deny Congress the power to "direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command").

Allowing a co-equal branch to define the specifics of a regulation to be applied in certain factual circumstances flows naturally from the "'certain degree of discretion, and thus of lawmaking, [that] inheres in most executive or judicial action.'" *Whitman*, 531 U.S. at 475 (quoting *Mistretta,* 488 U.S. at 417 (Scalia, J., dissenting)); *see also Touby*, 500 U.S. at 165. "Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving*, 517 U.S. at 773; *see also Mistretta*, 488 U.S. at 372 (separation of powers "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches").

That same degree of flexibility does not attach to delegations to private parties outside the federal government. *See* Pet. App. 8a ("Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority."). Where the delegation is to a person outside the government, the accountability safeguards inherent in intra-governmental delegations do not accompany the del-

egation.[9] A purely private party is not, like an Executive Branch official, subject to impeachment by Congress. *See* Krent, *supra* note 4, at 523 ("The checks of the Appointments and Impeachment Clauses cannot easily be reconciled with delegations to private parties."). Nor are any such non-governmental actors required to take the oath to support the Constitution, which binds every state and federal legislator as well as all executive and judicial officers. U.S. Const. art. VI, cl. 3; Krent, *supra* note 4, at 523. Without these and related structural controls, an intelligible principle does not constrain private actors in the same way it does governmental actors. Thus, an intelligible principle is not sufficient to safeguard democratic accountability with respect to those private delegations.

At bottom, whether or not accompanied by an intelligible principle, delegations to private parties raise the danger cited by Justice Scalia in his *Mistretta* dissent. The lack of accountability permits Congress and the Executive Branch to insulate themselves from difficult and volatile political issues:

> I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various

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[9] Article I permits Congress to authorize private action in just one place—in recognizing Congress's power to issue Letters of Marque and Reprisal. *See* U.S. Const. art. I, § 8, cl. 11. But such decrees "more closely resemble[] an authorization for a private cause of action rather than a delegation of decisional authority." Krent, *supra* note 4, at 524.

> portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, "no win" political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. *This is an undemocratic precedent that was set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government*.

Mistretta, 488 U.S. 422 (Scalia, J., dissenting) (emphasis added). The private nondelegation principle permits a government that "benefits from expertise without being ruled by experts." *Free Enterprise*, 130 S. Ct. at 3156 (emphasis added). It does so by preserving the ultimate decisional authority in *governmental* actors because "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Id.*

B. The Private Nondelegation Principle Protects against Biased Decisionmaking by Self-Interested Parties

Procedural due process limitations on biased decisionmaking also underlie the private nondelegation principle. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. Pa. L. Rev. 1513, 1553 (1991). As one commentator explains, although the rule "arose out of a perceived need to preserve the separation of governmental powers, the concerns

that the doctrine is intended to address are, at bottom, procedural due-process concerns." *Id.* These "procedural requirements and separated powers are simply different limitations on the exercise of government power, sharing a common goal: to restrict arbitrary government action that is likely to harm the rights of individuals." *Id*. at 1556.

This Court's due process decisions have long been concerned with protecting governmental decisions from the unfair effect of an interested or biased decisionmaker. Thus, the Court has frequently struck down adjudications by persons or groups with a potential stake in the outcome of a particular controversy. *See, e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973). "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (citation omitted). The Court has been sensitive, in particular, to the "potential for private interest to influence the discharge of public duty." *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (reversing contempt convictions secured by private parties and noting the concomitant dangers of self-interested prosecution by a private party).

Carter Coal merely applied this essential due process protection in the realm of government regulation. *Carter Coal* reasoned that "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311. A private lawmaker's interests "may be and

often are adverse to the interests of others in the same business." *Id.*[10] Thus, one cannot assume that a private actor will approach a public duty with the same "presumptively disinterested" view as a government actor. *See id.* To the contrary, there is a significant danger that the private party will serve its own interests and not the public good. *See, e.g.*, *Young*, 481 U.S. at 806.

Carter Coal thus concluded that "a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal Co.*, 298 U.S. at 311. The decision guards the well-accepted principle that "[g]overnmental decisions can only be considered fair or impartial if undertaken by officials who are not self-interested." Krent, *supra* note 4, at 527.

C. Private Parties May Play Only Limited Roles in Federal Rulemaking

Cognizant of the dangers of unchecked legislative authority in the hands of private parties, this Court's decisions have long prohibited Congress from "abidicat[ing], or . . . transfer[ing] to others, the es-

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[10] A decisionmaker need not exhibit actual bias to trigger due process concerns; rather, the question is whether there is a *potential* for bias. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) ("The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'").

sential legislative functions with which it is vested by the Constitution." *Currin v. Wallace*, 306 U.S. 1, 15 (1939). But because the Constitution also recognizes that "legislation must often be adapted to conditions involving details with which it is impracticable for the legislature to deal directly," *id.*, the Court has acknowledged a limited role for private parties to assist in spelling out the contours of federal regulation. The operative cases fall into one of two categories. In either circumstance, the Constitution assures that it is Congress, and not private parties, that "make the law." *Id.*

The first category of permissible private involvement is where private parties are enlisted by Congress in a function subordinate to the ultimate governmental decisionmaker. In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), this Court held that the role private coal producers played in recommending minimum prices to a federal coal commission, which ultimately established those minimum prices, did not constitute an unlawful delegation to private individuals. The private parties merely "operate[d] as an aid to the Commission but [were] subject to its pervasive surveillance and authority." 310 U.S. at 388. They thus "function[ed] subordinately to the Commission." *Id.* at 399. The governmental body, "not the [private producers], determine[d] the prices." *Id.*; *see also id.* at 388 (noting that the proposed prices could be "approved, disapproved, or modified by the Commission"). The federal commission had "authority and surveillance over the activities of these [private] authorities. *Since lawmaking is not entrusted to the industry*, this stat-

utory scheme is *unquestionably valid*." *Id.* at 399 (emphasis added).

Following the Supreme Court's ruling in *Adkins*, the lower courts have generally affirmed statutory schemes in which a private body "functions subordinately" to a federal agency in federal rulemaking. Provided that Congress subjects the private role in the rulemaking scheme to federal agency oversight, lower courts generally uphold statutes in which private parties play an advisory or ministerial function in a federal rulemaking scheme.

In *Pittston*, for instance, the Fourth Circuit upheld a statute that established a fund providing benefits to retired coal miners. *See* 368 F.3d 385. The statute granted the federal government sole authority to define the nature of the fund and who must contribute; to specify the amounts that must be paid; and to identify beneficiaries. Private parties were merely authorized to collect premiums and pay the beneficiaries. *See id*. The court concluded that the statute gave the private parties "*ministerial* and *advisory tasks* in a manner and to an extent that does not violate" the Constitution's private nondelegation principle. *Id*. at 398 (emphasis added).[11]

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[11] *See also, e.g.*, *Todd & Co.* v. *SEC*, 557 F.2d 1008, 1014 (3d Cir. 1977) ("The independent review function entrusted to the S.E.C." over self-regulatory markets "is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism."); *Ass'n of Am. Physicians & Surgeons* v. *Weinberger*, 395 F. Supp. 125, 129-30 (N.D. Ill.) (three-judge panel) (approving the use of private parties to review whether

(Continued …)

Second, this Court has also upheld statutory schemes in which Congress conditions the effectiveness of a federal regulation on a referendum of the affected industry. In those circumstances, private individuals or organizations are permitted to have a say in whether a government-authored regulation will be put into effect in a particular region or industry, but only after the content of the regulation is already defined by constitutional officers.

Most notably, in *Currin*, this Court upheld a legislative scheme that required the Secretary of Agriculture to submit certain tobacco industry regulations to a referendum of growers in the geographic areas to be governed by the regulations. The Court reasoned that because the *Secretary* determined the regulations' content and the growers decided whether to accept them, "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market." 306 U.S. at 15. In these circumstances, "it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id.* at

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Medicaid and Medicare services are medically necessary where the Secretary of Health, Education and Welfare retained the power to review such determinations), *aff'd,* 423 U.S. 975 (1975); *see also Noblecraft Indus., Inc.* v. *Sec'y of Labor*, 614 F.2d 199, 203 (9th Cir. 1980) (upholding OSHA's reliance on a private body to distill a "national consensus standard" for use in the sawmill and plywood industries because "OSHA in practice did not surrender to ANSI all its standard-making function;" rather, it "selected among the ANSI standards with apparent discrimination").

16. The "required favorable vote" is merely "one of these conditions." *Id.* To say that the private parties are "'exercising legislative power'" in these circumstances "'is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution.'" *Id.* (quoting *J.W. Hampton*, 276 U.S. at 407).

Likewise, in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), this Court upheld a statutory scheme where an Executive-authored order setting minimum milk prices could not be issued absent approval by two-thirds of the milk producers in a given market. 307 U.S. at 577-78. But, as in *Currin*, Congress directed that the *Secretary* prepare the order, and provided that the order not go into effect unless approved by the private producers.

In both cases, Congress authorized the executive agency to issue a rule, but then subjected the rule's implementation to an affirmative vote of affected parties. The people thus know whom to blame for the content of the regulation. And an affected subset of the people votes "yea" or "nay" as to whether the government-proposed rule will even apply to them, adding an *additional* layer of democratic accountability to the process. But with or without that additional layer of protection, the ultimate decision on the terms and conditions of federal policy is made by Congress.

II. THE DELEGATION TO AMTRAK VIOLATES THE PRIVATE NONDELEGATION PRINCIPLE

Applying these principles, the court of appeals correctly concluded that the delegation here to

Amtrak cannot pass constitutional muster.[12] The delegation lacks the political accountability and due process controls essential to protecting against arbitrary abuses of governmental authority by private entities.

The court found several aspects of the regulatory scheme constitutionally unsound: that Amtrak could craft regulations directly impacting third parties; that Amtrak, a private party, acted as a check on the federal agency's regulatory authority; and, most disturbing to the court, that Amtrak enjoyed "authority equal to the [agency]"—"[s]hould the [agency] prefer an alternative to Amtrak's proposed metrics and standards, § 207 leaves it impotent to choose its version without Amtrak's permission." Pet. App. 10a. It is not surprising that the court of appeals found no authority "embracing the position that a private entity may *jointly* exercise regulatory power on equal footing with an administrative agency." *Id.* at 14a (emphasis added).

The Government contends that the private nondelegation principle is satisfied here because "governmental entities had sufficient control over the development and adoption of the metrics and standards in the first instance." Pet'rs' Br. 19. But Amtrak's

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[12] *Amici* assume the correctness of the court of appeals' determination that Amtrak is a private, non-governmental entity for purposes of the application of the private nondelegation principle. *Amici* also adopt and incorporate Respondent's explanation of the mechanics of the statutory scheme and the effect of the metrics and standards on regulated freight railroads.

role goes well beyond the "subordinate," advisory function upheld in the *Adkins* line of cases. *Adkins*, 310 U.S. at 399. This statutory scheme is instead exceptional in granting Amtrak the authority to "jointly . . . develop" performance standards and metrics with a federal agency. Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, § 207(a), 122 Stat. 4916. Unlike the commission's role in *Adkins*, the Transportation Department cannot, by itself, draft a single metric or standard in the first instance and cannot modify any Amtrak-crafted metric or standard without the approval of Amtrak or some private arbitrator. Far from subordinate, Amtrak is at least co-equal with the executive agency.

The Government argues that Amtrak's "joint" statutory role is akin to the industry referenda upheld in cases like *Currin*. Pet'rs' Br. 22-23. As the court of appeals correctly reasoned, especially as it relates to due process protections against biased decisionmaking, there is a significant difference between the approval of a supermajority of an affected industry and a single industry actor setting standards that affect regulated competitors. *See* Pet. App. 10a n.4. As Amtrak effectively competes with freight railroads for the limited availability of tracks, the potential for self-interest affecting the metrics and standards is real.

The Government's argument also overlooks an important difference between this statutory scheme and those upheld in the *Currin* line of cases. In *Currin* and *Rock Royal*, the government actor—whether Congress itself or an executive agency acting at the

direction of Congress—controls the *content* of the regulation at issue. The industry referendum merely satisfies a condition that Congress has already established. *Currin* described the objectionable feature of *Carter Coal* as private industry participation in determining not merely the applicability of a regulation to certain facts, but also the *content* of that regulation, reasoning that it was constitutionally problematic that "a group of producers *may make the law and force it* upon a minority." 306 U.S. at 15-16 (emphasis added).

So, too, here. The statutory scheme at issue combines two features that, by themselves, may not be objectionable, but when combined, doom the constitutionality of the scheme. *See* Pet. App. 12a-13a (citing *Free Enterprise Fund*, 130 S. Ct. at 3146-47). Amtrak not only has a seat at the table in crafting the metrics and standards, but can also prevent any regulatory provision that it finds objectionable from taking effect simply by disagreeing with the government agency. This elevates Amtrak to a joint regulator with the Executive Branch. While the Department of Transportation may be able to prevent Amtrak from taking action on its own, the joint power-sharing arrangement sufficiently deprives the federal government of the ultimate control of the regulatory scheme so as to render the entire arrangement suspect.

The constitutional flaws of this power-sharing arrangement are exacerbated by the statute's arbitration provision, which, as Respondent correctly notes, permits wholly private arbitrators to determine applicable metrics and standards when Amtrak and the

Department are at odds. *See* Passenger Rail Investment and Improvement Act of 2008, § 207(d), Pub. L. No. 110-432, 122 Stat. 4917. When invoked, this provision permits Amtrak to circumvent government officials entirely in the development of metrics and standards. The Government seeks to overcome this flaw by simply denying that the statute permits private parties to serve as arbitrators. But just as the Executive Branch cannot "cure an unconstitutionally standardless delegation of power by declining to exercise some of that power," *Whitman*, 531 U.S. at 473, the Government here cannot save an otherwise improper delegation of authority to a private arbitrator by rewriting the statute to avoid that delegation. *See, e.g., Salinas* v. *United States*, 522 U.S. 52, 59-60 (1997) (constitutional avoidance canon is "not a license for the judiciary to rewrite language enacted by the legislature") (internal quotation marks and citation omitted).

At bottom, Amtrak's role in the development of metrics and standards governing competing railroads deprives the public of the accountability that is a central feature of the separation of powers. The statute endows Amtrak with a dual role—wielding both power of the pen and an effective veto over a government agency's regulatory approach. But the majority of Amtrak's governing board do not answer to the electorate the same way that a governmental actor would. Because they are not "executive" officers of the United States, for instance, they are not restrained by the oath of office that "conscientiously [binds]" all federal officials "to abstain from all acts inconsistent" with the Constitution. Joseph Story, *Commentaries on the Constitution of the United*

States, § 374 (1st ed. 1833); *cf. Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2667 (2013) (intervenors defending state statute "owe nothing of the sort [i.e., special duties] to the people" in the absence of oath of office). At the same time, the statute permits the Department of Transportation to plead "not our fault" when presented with a complaint by an affected freight railroad or a member of the public about the resulting metrics and standards.

The Constitution requires, in all circumstances, that the political branches of the federal government remain accountable to the people for laws enacted. Because it fails to promote that accountability and because it vests in a private industry actor significant regulatory authority to regulate its competitors, the statute here must fail constitutional scrutiny under the private nondelegation principle.

III. THE PRIVATE NONDELEGATION PRINCIPLE FINDS ONGOING APPLICATION IN CIRCUMSTANCES BEYOND THIS CASE

This case illustrates the need for continued judicial vigilance against the delegation of legislative authority to private parties. Such unconstitutional delegations of Congress's lawmaking power to private parties have, fortunately, been rare. But from time to time, Congress runs afoul of constitutional accountability principles in delegating unsupervised rulemaking authority to private parties. A vibrant private nondelegation principle serves as a check on such excesses by ensuring that laws are made by unbiased officials who are politically accountable to the people.

Amici's interest in the private nondelegation principle stems from what they believe to be another constitutionally problematic delegation of lawmaking authority to private entities. Specifically, *amici* submit that the Higher Education Act ("HEA"), improperly delegates unchecked legislative authority to private education accreditation agencies. *See* 20 U.S.C. § 1099b (2012). While the current dispute does not require the Court to pass on this separate statutory scheme, *amici* raise the issue to illustrate the need to continue to guard against private legislative delegations.

Historically, private accreditation agencies were purely voluntary organizations dedicated to assuring quality in the delivery of higher education services by their members through peer review. That purely voluntary role changed with the enactment of legislation culminating in the Higher Education Act of 1965, which enlisted these private organizations to play a central role in both determining and applying the standards by which higher educational institutions are eligible for federal funding.[13]

Under the HEA, private accreditation agencies now serve as gatekeepers to an educational institution's eligibility for federal financial aid. No institu-

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[13] *See generally* Hank Brown, *Protecting Students and Taxpayers: The Federal Government's Failed Regulatory Approach and Steps for Reform*, American Enterprise Institute, 2 (Sept. 2013), http://www.aei.org/files/2013/09/27/-protecting-students-and-taxpayers_164758132385.pdf.

tion can participate in federal student assistance, loan, or work-study programs without current accreditation by an accrediting agency. *See* 20 U.S.C. § 1099b(j). Given the significant role that federal funding plays in higher education, loss of accreditation is tantamount to a death sentence for an educational institution.

Accrediting agencies are given broad leeway under the HEA to establish and apply accreditation standards with minimal oversight by the Secretary of Education. By statute, the Secretary of Education's role is limited to accrediting the accreditors—that is, certifying an accreditation agency "to be a reliable authority as to the quality of education or training offered for the purposes" of the HEA's financial aid provisions. 20 U.S.C. § 1099b(a).

An accreditation agency must establish and maintain minimum accreditation standards that assess the institution based on ten statutory criteria, such as success with respect to student achievement, curricula and facilities, among others. 20 U.S.C. § 1099b(a)(5). With respect to the content of those standards, the Secretary's authority is severely circumscribed. The statute explicitly prohibits the Secretary from "establish[ing] any criteria that specifies, defines, or prescribes the standards that accrediting agencies or associations shall use to assess any institution's success with respect to student achievement." *Id.* § 1099b(g). Nor shall the Secretary "promulgate any regulation with respect to the standards of an accreditation agency or association described in subsection (a)(5)." *Id.* § 1099b(o). The Secretary has the authority to determine only

whether the minimum standards promulgated and applied by the accrediting agency itself are of sufficient quality to achieve the stated objectives of the coursework offered by the school. *Id.* § 1099b(a)(4), (5).

Critically, as long as it addresses the minimum criteria established by Congress, an accreditation agency can maintain and apply *any other standard* that it chooses, free from any oversight or review by the Secretary. *See* 20 U.S.C. § 1099b(g) ("Nothing in this chapter shall be construed to prohibit or limit any accrediting agency or association from adopting additional standards not provided for in this section."). Those extra-statutory accreditation standards are then used by the accreditation agency to approve or to deny an educational institution's accreditation. *See id.* The Secretary may not revoke an accreditation agency's certification based on the adoption of any such extra-statutory accreditation standard. *See id.* § 1099b(n)(3).

In addition, the statute does not authorize the Secretary to review an accreditation agency's *application* of its standards to an individual educational institution. *See* 20 U.S.C. §1099b(a)(6)(C); *see also* 34 C.F.R. § 600.41(e)(2) (2013). An accreditor's adverse determination *requires* the Secretary to terminate an institution's eligibility for federal funding, 20 U.S.C. § 1099b(j), and the Secretary is powerless to review or change the accreditation decision.

The HEA thus contravenes the private nondelegation principle in several respects. First, it bestows *substantial regulatory authority* on the private accreditation agencies, which have control over the ex-

penditure of billions of taxpayer dollars. It does not limit the subject matters on which the accreditation agency can establish accreditation standards, instead setting only statutory minimum criteria and leaving the accreditation agency unfettered discretion to develop more far-reaching standards to apply to educational institutions.

Second, in adopting and applying those standards for determining eligibility for federal funding, the private accreditation agencies are in no way subordinate to the Secretary. Rather than having the Secretary develop substantive standards, and granting ministerial authority to the private entity to implement those standards, *see* discussion, *supra* Section I.C, the statute does just the opposite. It vests vast unreviewable regulatory authority with a private entity and leaves to the Secretary the ministerial task of cutting off funding where the accreditation agency has determined to deny or withdraw accreditation.

Finally, it vests significant regulatory authority in the very stakeholders in the educational system. Private accreditation agencies are usually made up of administrators and faculty from the various member institutions. While the statute seeks to eliminate this bias by prohibiting any particular conflicts of interests, 20 U.S.C. § 1099b(a)(6), the very nature of the system ensures those conflicts, since faculty and administrators who help develop and apply the accreditation standards also work at institutions that benefit from their application. *See* Brown, *supra* note 13, at 2-3.

The HEA effectively grants no-strings-attached regulatory powers to a private entity made up of in-

terested stakeholders without retaining any significant federal control over that entity. The result has been an increasingly dysfunctional accreditation system. Accreditation agencies wield enormous authority over the distribution of billions of dollars in federal funding, yet are largely insulated from accountability to the public.[14] Rather than focus on educational outcomes—the purported objective of accreditation—modern accreditors often look to micromanage the affairs of the institutions they oversee.[15] And the HEA's limitations on federal oversight allow the

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[14] *See* Jay Schalin, *Time to Decouple Accreditation from Federal Funding*, the John William Pope Center (Nov. 21, 2013), http://www.popecenter.org/commentaries/article.html?id=2934#.U71ExVXD_5o.

[15] *See* Brown, *supra* note 13, at 5-6; *see also Keeping College Within Reach: Discussing Program Quality through Accreditation: Hearing Before the Subcomm. on Higher Educ. and the Workforce, Comm. on Educ. and the Workforce*, 113th Cong. (June 13, 2013) (Testimony of Anne D. Neal), *available at* http://www.goacta.org/images/download/NealTestimony6-13-13.pdf; *see also* Hank Brown, *The Rise of the Accreditor as Big Man on Campus*, Wall St. J. Jan. 14, 2013, *available at* http://goo.gl/j2SXPy (accreditors "focus[] on process and resources rather than on educational excellence"); Shirley M. Tilghman, *The Uses and Misuses of Accreditation, Address to the Reinvention Center Conference*, Princeton University (Nov. 9, 2012), *available at* http://www.princeton.edu/president/tilghman/speeches/20121109/ (accreditation "agencies have adopted a stance that too often places them in an adversarial posture vis-à-vis their member colleges and universities, inserting their own judgments into decisions of how best to achieve the enormously diverse academic missions of their membership").

Secretary of Education, when confronted with complaints about accreditation standards and their application, to fall back on the Department's powerlessness over accreditors under federal law.

Amicus curiae ACTA's recent experience with this system demonstrates the real-world implications of private accreditors' lack of accountability. In 2012, the Southern Association of Colleges and Schools Commission on Colleges placed the University of Virginia on "warning" status—a first step toward loss of accreditation—after a failed effort by the University's governing board to remove the school's president. The accreditor did so not because of any concern for educational outcomes stemming from the University's personnel decision, but because it disapproved of the process by which the decision was made. The accreditor found that the University was out of compliance with the accreditor's standards relating to the independence of the University's Board of Visitors. It did so notwithstanding that the composition of the board is entirely a function of state law—with each member appointed by the Governor and confirmed by the state legislature. *See* Va. Code Ann. § 23-70 (Supp. 2014). The accreditor further found that the University lacked what the accreditor considered to be sufficiently clear standards regarding the role of the faculty in governance.[16]

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[16] Jan. 15, 2013 Letter from Belle S. Wheelan to Teresa A. Sullivan, 1-3, *available at* http://www.virginia.edu/sacs/2013/sanctionletter.pdf; *see also* Brown, *supra* note 13, at 5-6.

In response to the accreditor's formal warning, *amicus curiae* ACTA filed a complaint with the Department of Education.[17] ACTA argued that the accreditor acted without authority in reprimanding the University of Virginia for what amounted to a disagreement with the manner in which the University board chose to administer the school's business. It complained in particular about the accreditation agency's application of its "institutional governance" standards, which had little to do with assessing the University's academic performance.

The Department responded by letter from an Assistant Secretary of Education, who noted that the "Department is expressly barred from dictating agency accrediting standards."[18] The Assistant Secretary concluded that the accreditor's institutional governance standards were beyond the Department's reach and that "the *Department does not have authority* to find an agency out of compliance with re-

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[17] Dec. 31, 2012 Letter from Anne D. Neal, American Council of Trustees and Alumni, to U.S. Department of Education Secretary Arne Duncan and Kay Gilcher, Director of the Accreditation Division at the U.S. Department of Education, *available at* http://www.goacta.org/images/download/12-31-12_Letter_to_DOE.pdf.

[18] Feb. 11, 2013 Letter from David A. Bergeron, Acting Assistant Secretary for Postsecondary Education, U.S. Department of Education, to Anne D. Neal, American Council of Trustees and Alumni, 1, *available at* http://s3.documentcloud.org/documents/612957/doe-response-to-acta-complaint.pdf.

spect to accreditation standards not required by [the HEA]."[19]

The Department's response is a textbook example of how private legislative delegations undermine constitutional accountability. The substantive decisions affecting rights under federal law are farmed out to private actors, leaving affected citizens no recourse to the political process. At the same time, the governmental actors to whom those citizens turn for redress of their grievances are able to wash their hands entirely of the matter. To borrow from *Free Enterprise Fund*, the buck stops nowhere. 130 S. Ct. at 3164.[20]

This case presents an important opportunity for this Court to reinforce the constitutional accountability that animates the separation of powers. Like the educational institutions and their students affected under federal law by private accreditation decisions,

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[19] *Id.* at 3 (emphasis added).

[20] *Amici* do not endorse vesting greater authority in the federal education officials as the proper solution to the HEA's private delegation problem. Other possible legislative approaches—such as breaking the link between accreditation and federal funding, requiring audited disclosure of key financial and productivity metrics, and demanding greater transparency of universities and schools that receive federal funding—would address the constitutional concerns, while offering greater flexibility in the educational marketplace. *See* American Council of Trustees and Alumni, *Why Accreditation Doesn't Work and What Policymakers Can Do About It* (June 2007), *available at* http://www.goacta.org/images/download/why_accreditation_doesnt_work.pdf.

Respondent is impacted by a system that delegates substantial legislative authority to a private actor unfettered from the constitutional checks and balances that control Congress and the Executive Branch. *Amici curiae* respectfully submit that the private nondelegation principle is the key to preserving responsiveness to the electorate in this case and others.

CONCLUSION

Amici curiae respectfully urge the Court to reaffirm the continuing vitality of the private nondelegation principle and to affirm the judgment of the court of appeals.

Respectfully submitted,

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