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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 FOR RESOLUTE FOREST PRODUCTS INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which grants Amtrak the power to co-author regulations governing competitor railroads, is an unlawful delegation of governmental authority to a private actor.

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INTEREST OF THE *AMICUS CURIAE*[1]

Resolute Forest Products Inc. produces and markets a diverse range of products, including newsprint, specialty papers, market pulp, and wood products, with major facilities in the United States, Canada, and South Korea. Based on its experience marketing products in nearly 90 countries, Resolute is concerned that the delegation of rulemaking authority at issue in this case will serve as a model for, and vindicate, similar programs empowering private entities to regulate their competitors, to the detriment of the constitutional separation of powers, democratic accountability, and ultimately the rights of the governed. Having encountered similar arrangements and witnessed their faults and iniquities, Resolute agrees with this Court's observation in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), that empowering a private entity to regulate the affairs of its unwilling competitors "is legislative delegation in its most obnoxious form" that inevitably leads to violation of the most basic guarantees of due process.

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[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

Only twice before has the Court been confronted with an attempt to delegate federal policymaking authority to a private entity, and both times the Court has rejected it, with incredulity. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). It did so for good reason: "one person may not be intrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter*, 298 U.S. at 311. Delegation of such power to private parties is antithetical to the vesting of governmental power in the branches of government and incompatible with the constitutional imperative of democratic accountability. Inevitably, such schemes to escape the confines of the vesting of the powers of government in the branches of government sacrifice the very rights that our system of government was designed to guarantee. Accordingly, as the Court has recognized, the nondelegation principle applies with special force to attempts to confer policymaking power on private entities.

Section 207 exemplifies all of the evils of delegation of policymaking authority to private actors. It authorizes Amtrak, a government-chartered for-profit corporation with private shareholders, to set the standards by which its own performance is

measured, allowing it to shift the blame for its failures to freight railroads, its competitors for the limited slots available on rail lines. Not only has Amtrak taken full advantage of this opportunity to pass the buck, but so has Congress, by foisting responsibility for Amtrak's poor performance, as well as some of the costs of remedying it, on third parties. This is the antithesis of the kind of public accountability that the constitutional separation of powers, as well as the vesting of governmental power in the branches of government, was designed to ensure. In this respect, Section 207 is entirely typical of attempts by Congress to delegate governmental power to private actors.

Equally typical is Amtrak's naked pursuit of self-interest in crafting metrics and standards that seriously disadvantage its competitors, as well as the concomitant violation of its competitors' due-process rights. Amtrak's bias in favor of its own interests is equal to that of any other economic actor, and that bias is plainly reflected in its policymaking here, including the one-sided standards it set and its attempt to rig future proceedings by limiting evidence of "permissible delays" that are not held against its competitors. This exercise confirms what the Court has previously suggested: that delegation of policy-making authority to private actors is one of the "situations…in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

The Court should reaffirm that delegation of governmental policymaking authority to private actors is repugnant to the Constitution and affirm the decision of the court below.

ARGUMENT

I. Strict Limits on Delegation to Private Actors Are Essential To Protect Individual Liberty Through Democratic Accountability

A. Delegation to Private Actors Undermines Democratic Accountability

"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 v. United States*, 517 U.S. 748, 757 (1996). In particular, "[t]he clear assignment of power to a branch…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.

That kind of democratic accountability is frustrated, however, when private parties are charged with making those decisions. "[T]he basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government." *Tx. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 469 (Tx. 1997). Private entities, of course, are not elected by

the people or subject to appointment or control by an elected official. When a private actor exercises governmental authority in ways that are contrary to the public interest, the public can do no more than complain to lawmakers and other officials, who in turn can deflect the criticism back to the private actor. Yet the private actor is not accountable to the public through elections or otherwise. This is a recipe for unresponsive government.

Even more perniciously, the possibility of private delegation also warps the incentives of government officials. Legislators and executive officials, being sensitive to public opinion, may prefer to hand off controversial matters of policy to less-sensitive private actors. For example, a decision of whether or not to impose new pollution-control requirements is likely to prompt disapproval from whichever side loses—environmentalists and their supporters, on the one hand, and industry and its allies, on the other. But a politician or regulator can avoid such difficult decisions entirely by delegating them to private actors who aren't directly susceptible to such pressure.

Delegation similarly reduces the cost to elected officials of making unpopular choices. For example, by placing the pollution-control decision in the hands of environmentalists, a politician can effectively determine the outcome—more controls, at greater expense—without having to bear full responsibility for deciding. In this way, private delegation "calls into question the future operation of the political pro-

cess....” George W. Liebmann, Delegation to Private Parties in American Constitutional Law, 50 Ind. L.J. 650, 659 (1975).

Delegations that attempt to circumvent or circumscribe the role of the Executive pose special problems. The Framers “vest[ed] Executive authority in one person rather than several...in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability.” *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment). But “[t]hat unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him,” by delegating certain of his authorities and responsibilities to third parties. *Printz v. United States*, 521 U.S. 898, 923 (1997). Moreover, within the Executive Branch, accountability flows from the President by virtue of his power to remove executive officers. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010). But as with the double restriction on removal that the Court struck down in *Free Enterprise Fund*, the vesting of executive duties in private actors “grant[s]...executive power without the Executive’s oversight” and thereby “subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.” *Id*. at 3155. This vesting of executive duties in private parties is “incompatible with the Constitution’s separation of powers.” *Id*.

These concerns are not hypothetical, having actually arisen in other contexts where Congress sought to pass the buck (sometimes literally) to third parties. For example, Congress has authorized citizen suits to challenge implementation delays under several environmental-protection statutes, including the Clean Air Act and Clean Water Act. 42 U.S.C. § 7604; 33 U.S.C. § 1365. And yet it is Congress that complains the loudest about regulatory burdens and collusion when environmental groups take advantage of these provisions to enforce the statutory deadlines for agency action set by Congress. *See, e.g.*, Hearing before the Subcom. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary regarding the Sunshine for Regulatory Decrees and Settlements Act of 2012, Feb. 3, 2012 (hearing on the "abuse" of consent decrees to hold agencies to statutory deadlines). Indeed, Members of this Court have recognized that outsourcing the setting of regulatory and enforcement priorities to private parties raises "[d]ifficult and fundamental questions" regarding delegation of the powers vested in the political branches. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). *See also id.* at 209, 211 (Scalia, J., dissenting).

Relatedly, the Court in *Printz*, 521 U.S. at 920–35, rejected congressional "commandeering" of state officials to carry out federal policy on the basis that it would wreck the structure of accountability at all levels. "By forcing state governments to absorb the

financial burden of implementing a federal regulatory program, Members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Id*. at 930. State officials carrying out federal diktats, meanwhile, would take the blame for errors in policy and enforcement that are beyond their own control. *Id*. at 920, 930. And the vital check of an elected federal Executive to set enforcement priorities, the President, would be circumvented entirely. *Id*. at 922.

These defects, the Court found, were present even where state officers were enlisted to carry out only "discrete, ministerial tasks specified by Congress." *Id*. at 929.[2] In other words, even a tightly circumscribed delegation of federal authority to parties outside of the three branches of federal government—a delegation that might satisfy the "intelligible principle" standard that separates proper congressional

[2] *See also New York v. United States*, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (Roberts, C.J.) ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."); *id*. at 2660 (Scalia, Thomas, Kennedy, Alito, JJ., dissenting); *Alden v. Maine*, 527 U.S. 706, 751 (1999); *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring).

conferral of executive power from unconstitutional delegation of legislative authority[3]—is still incompatible with the vesting of federal authority in the branches of the federal government, as opposed to third parties. *Id*. at 927–28. *Cf. New York*, 505 U.S. at 156–57 (explaining that the Tenth Amendment reflects limitations on the power of Congress). This limitation makes sense as a matter of political economy: politicians will contrive unusual arrangements such as conferring federal authority on third parties precisely where they will maximize political benefits, while minimizing political costs. *New York*, 505 U.S. at 182–83 (recognizing "the possibility that powerful incentives might lead [federal] officials to view departures from the federal structure to be in their personal interests"). Accordingly, even small deviations from the constitutional architecture are likely to carry major costs in terms of political accountability.

As between the political branches, the nondelegation principle "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." *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring) (citing *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissent-

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[3] *See Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 472 (2001).

ing in part); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in result)). And as between the federal government and the states, the prohibition on coercive delegation of federal responsibilities to state actors, like other aspects of federalism, "serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). But as between the federal government and private parties, the nondelegation principle serves not only to promote and clarify public accountability, but to ensure that it exists at all.

B. Delegation to Private Actors Facilitates Self-Dealing

It is no coincidence that every time the Court has considered an allegedly improper delegation of rulemaking authority to private actors, the law at issue raised serious concerns about self-dealing, whatever the merits of the delegation claim. The private parties most eager to exercise governmental power (or, barring that, to advise the government) are those seeking to gain an advantage on their competitors.

This trend begins with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 522 (1935), which invalidated provisions of the National Industrial Recovery Act authorizing the President to approve comprehensive "codes of fair competition" devised by trade or industrial associations or groups. Four Jewish butchers—the Schechter brothers—were prosecuted for and convicted of violating the Live Poultry Code's "straight selling" requirement, which mandated that resellers purchase live chick-

ens only by the coop or half-coop, without selecting particular chickens. *Id*. at 527–28. This requirement was clearly a benefit to larger poultry operations—like those that devised the Code—but it was a costly inconvenience to their smaller competitors, particularly those catering to Jewish customers buying chickens individually in accordance with kosher practices. *See* Steven Horwitz, That's Not Kosher: How Four Jewish Butchers Brought Down the First New Deal, The Freeman, May 30, 2012.[4]

Although *Schechter Poultry* typically is cited for the Court's invalidation of the NIRA program as a standardless delegation to the Executive, the government also argued that Congress had properly and reasonably delegated policymaking authority to those "persons most vitally concerned and most familiar with its problems"—market participants. *Id*. at 537.[5] The Court rejected this argument out of hand, recognizing the cynicism underlying claims that businesses would look out for their competitors and the public good:

> But would it be seriously contended that Congress could delegate its legislative authority to

[4] Available at http://www.fee.org/the_freeman/detail/thats-not-kosher-how-four-jewish-butchers-brought-down-the-first-new-deal.

[5] *See* Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN To Route Around the APA and the Constitution, 50 Duke L.J. 17, 147 (2000) (describing how *Schechter Poultry* "involved both public and private delegation issues").

> 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? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises?...The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. at 537.

Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936), saw similarly untoward motives underlying a scheme authorizing larger coal producers, organized into district boards, to regulate their smaller competitors' labor practices:

> This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business…. [Regulating the production of coal] 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. And a statute which attempts to confer such

> power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

Id.[6] *Cf. New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 127 (1978) (Stevens, J., dissenting) (criticizing a "California statute [that] gives private parties, serving their own private advantage, the unfettered ability to invoke the power of the State to restrain the liberty and impair the contractual arrangements of their new competitors.").

Even in cases where the Court has rejected private-delegation claims, the dynamic was the same. To begin with, *Currin v. Wallace*, 306 U.S. 1, 6 (1939), upheld the Tobacco Inspection Act, which allowed the Secretary of Agriculture to apply a statutory regulatory scheme to regional tobacco markets where at least two thirds of growers voted in favor of it. The scheme was challenged by warehousemen and auctioneers, who recognized that uniform standards for classification of tobacco would cost them money, while reducing demand for their ser-

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[6] The district boards were, in theory, open to any coal producer, their membership being "determined by the majority vote of the district tonnage during the calendar year 1934 represented at a meeting of the producers." Bituminous Coal Conservation Act of 1935, Pub. L. 74-402, § 4(a), 49 Stat. 991, 994. As a practical matter, however, majority-tonnage voting ensured that they were controlled by larger producers. That the parties challenging the private delegation could potentially have benefited from it, had they attempted to join the district board, was irrelevant to the Court's analysis.

vices. *Id*. at 7–8. Although the Court upheld the vote trigger, reasoning that it was merely a "restriction upon [Congress's] own regulation" and not a delegation of substantive policymaking authority, *id*. at 15–16, it recognized that the Act effectively shifted costs from growers to middlemen—which may explain why 96 percent of growers in the region at issue voted in favor of regulation. *Id*. at 7–9.

Similarly, *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 546–48 (1939), upheld on identical grounds a scheme that allowed the Secretary of Agriculture to issue "milk orders" comprehensively regulating the handling and marketing of milk where such regulation was approved by two thirds of producers in a referendum. The milk order at issue imposed price floors on handlers, while exempting producer-run cooperative handlers. *Id*. at 560–61. The competitive effect was sufficiently devastating on non-cooperative handlers that Justice Roberts, writing in dissent, would have held the order constituted a taking without due process of law in violation of the Fifth Amendment. *Id*. at 583. *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 388, 399 (1940) (upholding provision authorizing coal producers organized into regional boards to "propose minimum prices").[7]

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[7] *Cf. Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) (challenge to referendum-triggered agricultural promotion program by producer disfavoring generic promotion that benefited its competitors); *United States v. United Foods, Inc.*,

In sum, it is bad enough that the exercise of discretion by government actors can be rife with conflicts of interest, from the subtle, *e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886–87 (2009), to the blatant, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 298 (2004) (Scalia, J.) (noting "the traditional criterion of incumbency protection" in gerrymandering); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 306–307 (2003) (Kennedy, J., dissenting in part) (characterizing campaign-finance restriction as an "incumbency protection plan"). But there is no conflict, only naked self-interest, when private actors are authorized to exercise governmental power.

C. Delegation to Private Actors Violates the Constitution's Guarantee of Due Process

Due to the self-interest that necessarily controls private actors' exercise of delegated governmental power, schemes that confer such power on private actors inevitably raise serious due-process concerns. After all, "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10, p. 59 (J. Cooke ed. 1961) (J. Madison).

Justice Brennan observed that the nondelegation principle has "roots both in the constitutional requirement of separation of powers…and in the Due

533 U.S. 405 (2001) (same); *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005) (same).

Process Clause of the Fifth Amendment." *McGautha v. California*, 402 U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting). *See also* Louis Jaffe, Lawmaking by Private Groups, 51 Harv. L. Rev. 201, 248 (1937) (regarding delegation as an issue "of reasonableness within the due process clause"). Of course, "[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.'" 402 U.S. at 272 n.21 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). *See also I.N.S. v. Chadha*, 462 U.S. 919, 963 n.4 (1983) (Powell, J., concurring). The Court made that link explicit in *Carter Coal*, describing the beggar-thy-competitor scheme at issue there as "so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question." 298 U.S. at 311 (citing, *inter alia*, *Schechter Poultry*, 295 U.S. at 537).[8]

The most apt of those decisions is *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118 (1928), which concerned a zoning ordinance conditioning construction of a "philanthropic home for children or for old people" on the written consent of two thirds of its neighbors. These neighbors, the Court explained, "are not bound by any official duty, but are free to withhold consent for self-

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[8] *See also Carter Coal*, 298 U.S. at 318 (opinion of Hughes, C.J.).

ish reasons or arbitrarily and may subject the trustee to their will or caprice." *Id.* at 122. And, for that reason, "[t]he delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment." *Id. See also Eubank v. Richmond*, 226 U.S. 137 (1912) (holding that an ordinance permitting two thirds of owners of property abutting a street to establish "building lines" beyond which construction was illegal violated due process because "the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously").

Likewise, *Gibson v. Berryhill*, 411 U.S. 564, 578 (1973), invalidated the authority of a State Board of Optometry, comprised entirely of optometrists in private practice for their own account, to revoke the licenses of all optometrists in the State who were employed by business corporations—i.e., the Board members' competitors. The Court agreed with the district court's finding that "success in the Board's efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that in the opinion of the District Court the Board was constitutionally disqualified" from passing judgment on its competitors. *Id.* It concluded that "those with substantial pecuniary interest in legal [or administrative] proceedings should not adjudicate these disputes." *Id.* at 579.

Roberge and *Berryhill* demonstrate that the exercise of discretionary governmental authority by private actors is simply incompatible with due-process

requirements. In other words, such delegations are among the "situations [that] have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Because private actors will inevitably act in their self-interest, typically financial, such delegations are, for due-process purposes, indistinguishable from cases "in which the adjudicator has a pecuniary interest in the outcome" and is therefore barred from presiding. *Id*. In that respect, private delegations are no different from run-of-the-mill cases invalidating convictions entered by judges whose compensation or official finances depended on levying fines. *E.g.*, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

In sum, private delegation of discretionary governmental power "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47.

D. Delegation to Private Actors Violates the Constitutional Separation of Powers

At base, the problem with private delegation is that it seeks to circumvent the constitutional separation of powers, which in turn frustrates achievement of the Constitution's most basic purpose: to safeguard liberty. "The Framers recognized that, in the

long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). "[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo*, 424 U. S. 1, 129 (1976). The Framers' solution, of course, was to separate and divide the powers of the government and thereby to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

But when discretionary authority is delegated to a private actor, rather than the Executive, Congress is able to aggrandize itself at the expense of the Executive. The intrusion on executive power inherent in private delegation is far more extreme than that rejected in *Free Enterprise Fund*, which held that insulation of inferior officers from Presidential control through double for-cause removal provisions "stripped [him] of the power our precedents have preserved, and his ability to execute the laws...." 130 S. Ct. at 3154. By contrast, the President has absolutely no authority to remove a private party whom Congress has designated to wield governmental power. The *Free Enterprise Fund* Court regarded with disbelief the government's "unwilling[ness] to concede that even *five* layers between the President and the Board would be too many," despite that the "officers of such an agency—safely encased within a

Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name." *Id*. But that is the very result when private actors wield governmental power. *See also Bowsher*, 478 U.S. at 727–28 (rejecting scheme that conferred authority to require budget cuts on official who was not removable by the President).

Indeed, that is another reason why the "intelligible principle" standard that separates proper congressional conferral of executive power from unconstitutional delegation of legislative authority does not apply to delegations of executive power (including policymaking to fill in the details of a statutory scheme) to private actors. *See Whitman*, 531 U.S. at 472. Such arrangements inevitably are "contrary to Article II's vesting of the executive power in the President," *Free Enterprise Fund*, 130 S. Ct. at 3154, and violate the constitutional requirement that "all Officers of the United States are to be appointed in accordance with the [Appointments] Clause," *Buckley*, 424 U.S. at 132. Therefore, as *Carter Coal* suggests, private delegations of such authority are *per se* unconstitutional. 298 U.S. at 311.[9] *See also* Thomas

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[9] *Accord Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (explaining that "[a]ny delegation of regulatory authority" to private actors violates the nondelegation principle); *Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (recognizing this Court's "antipathy to the delegation of policy-making responsibility to private organizations"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C.

Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L.R. 2097, 2168 (2004) ("If all federal government activity is confined to three branches, then Congress cannot delegate governmental authority (i.e., the authority to act with the force of law) to a fourth branch.").

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). And it is not at all difficult to see that liberty is placed at risk when Congress seeks to place the authority to make public policy in private hands.

II. Section 207 Is an Unlawful Delegation

The evils of delegation of policymaking authority to private actors are fully manifest in Section 207 of the Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, Div. B, § 207, 122 Stat. 4848, 4916–17 (2008) (PRIIA).

A. Section 207 directs the Federal Railroad Administration and Amtrak to "jointly…develop new or improve existing metrics and minimum standards

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Cir. 1984) (stating that delegation of executive authority to a private actor is a *per se* violation of the nondelegation principle); *Sierra Club v. Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("[A]n agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest.") (citation omitted).

for measuring the performance and service quality of intercity passenger train operations, including cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services." 49 U.S.C. § 24101 note. Although government chartered, Amtrak "is not a department, agency, or instrumentality of the United States Government," but a private, "for-profit corporation," 49 U.S.C. § 24301(a)(2), (3), with nearly 10 million shares of common stock owned by private investors, National Railroad Passenger Corp. and Subs., Consolidated Financial Statements 24 (FY 2012).[10] Amtrak is, for the reasons stated in the Respondent's brief (at 33–43), a private actor for purposes of nondelegation analysis.[11]

Relying on the authority of Section 207, Amtrak and FRA issued final metrics and standards in May 2010. 75 Fed. Reg. 26839 (May 12, 2010). The rule sets standards for Amtrak's "on-time performance," which in turn may trigger obligations among freight railroads—which own most tracks and are Amtrak's competitors for use of track—to take additional

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[10] Available at http://www.amtrak.com/ccurl/137/692/Audited-Consolidated-Financial-Statements-2012.pdf.

[11] The government's contention to the contrary (at 45), relying on an opinion of the Office of Legal Counsel, is undercut by that opinion's assumption that Amtrak "do[es] not engage in regulation through…rulemaking," the very thing that it did in this instance. Holdover and Removal of Members of Amtrak's Reform Board, 27 Op. O.L.C. 163, 167 (2003).

measures to improve Amtrak performance at the expense of their own. *See Ass'n of Am. R.R.s v. U.S. Dep't of Trans.*, 721 F.3d 666, 669–70 (D.C. Cir. 2013). The rule also addresses "permissible delays," which are not held against the freight railroads, by providing that fault will be determined by reference only to Amtrak's Conductor Delay Reports, J.A. 138 & n.23, even though conductors are likely to lack information about the cause of any particular delay.

B. This self-serving arrangement is exactly what one would expect in terms of accountability when a private actor writes the rules to measure its own performance: passing the buck. As shown in the Respondent's brief (at 8–10), the metrics and standards have proven unworkable and unachievable. They appear to serve primarily to shift blame and ultimately costs for Amtrak's abysmal service onto Amtrak's competitors for the limited slots available on rail lines. *See also* Christopher Ingraham, The sorry state of Amtrak's on-time performance, mapped, Wonkblog, July 10, 2014[12] ("Amtrak is a heavily-subsidized rail service with Russian quality at Swiss prices. It is the shame of the developed world.").

But it's not just Amtrak that is evading accountability. The metrics and standards were developed

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[12] Available at http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/10/the-sorry-state-of-amtraks-on-time-performance-mapped/.

jointly with the FRA, which is Amtrak's funding agency and regulator, at the behest of Congress, which created Amtrak in 1970 and continues to subsidize it. Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (1970); Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Div. L, Tit. I, 128 Stat. 5, 591–92 (2014). Understandably, Congress and the FRA would prefer to shift blame for Amtrak's lackluster performance to freight railroads, for which they are not directly responsible. And quite understandably, Congress might prefer to leave the details of this blame- and cost-shifting scheme to Amtrak and the FRA, rather than set them itself and attract the ire of the freight railroads and their customers. The result, in effect, is an implicit subsidy to Amtrak, but one that Congress does not have to justify, take heat for, or even fund—the money ultimately comes out of someone else's pocket. This lack of accountability is what results when the constitutional separation of powers is circumvented through private delegation.

C. The self-dealing involved in this scheme is plain on its face. Amtrak's policymaking largely absolves the carrier of responsibility for its own performance, while pinning the blame on its competitors for rail slots. Those competitors, in turn, are required to alter their operations to Amtrak's benefit. They also face the risk of sanctions based on failure to satisfy the metrics set by Amtrak, as well as the expectation that they will alter their operating agreements with Amtrak to incorporate those metrics. 49 U.S.C.

§ 24308(f); PRIIA § 207(c). Fundamentally, this is little different from the laws at issue in *Schechter Poultry* and *Carter Coal*: all of these cases concern schemes that authorize market participants to regulate the operations of their competitors for their own financial advantage. *See supra* § I.B. In that respect, Section 207, no less than the statutes in those other cases, "undertakes an intolerable and unconstitutional interference with personal liberty and private property." *Carter Coal*, 298 U.S. at 311.

D. Not only is the risk to due process plain on the face of Section 207, but Amtrak's actions in carrying it out demonstrate actual bias of the sort that "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. at 47. Section 207 authorizes Amtrak to set the standards by which its relationship with its competitors will be measured and judged. It did so, contriving metrics and standards that seriously disadvantage its competitors. Like the Optometry Board in *Gibson*, Amtrak's efforts redound to its own personal benefit. Not only that, but it rigged future proceedings by limiting the evidence proving "permissible delays" to only that which is seen by and known to Amtrak conductors, without further investigation or consideration. J.A. 138 & n.23. It is hardly consistent with the maxim that "no man is allowed to be a judge in his own cause" that a private actor can legally restrict the evidence that his competitors may rely upon in their disputes with it.

E. The government's arguments as to why the delegation principle does not apply in this instance, assuming that Amtrak is considered a private entity for these purposes, are unconvincing.

First, this is not an instance where Congress has merely conditioned the effectiveness of a regulatory scheme on a private actor's approval. *See* Pet. Br. at 20. Instead, consistent with Section 207, "the FRA and Amtrak jointly drafted performance metrics and standards for intercity passenger rail service…." J.A. 113. Subsequently, "[t]he FRA and Amtrak…considered the comments of the respondents," responded to those comments, and revised their proposed standards into a final rule, which they promulgated. 75 Fed. Reg. 26839 (May 12, 2010).

It may or may not have been "entirely reasonable," as the government argues (at 22), for Congress "to provide a distinct role for Amtrak," but that is irrelevant. After all, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Chadha*, 462 U.S. at 944. Indeed, the government's reasonableness argument is the same one that the Court rejected out of hand in *Schechter Poultry*. *See* 295 U.S. at 537 ("The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that

industry—by the persons most vitally concerned and most familiar with its problems.'").

Amtrak does not wield a "veto" of the kind upheld in *Currin* and *Rock Royal*. *See* Pet. Br. 21–23. It is not the case, as the government contends, that in *Rock Royal* "some private actors were able to decide what prices would apply (even to their competitors)." Pet. Br. at 24. Instead, as the Court's opinion describes, the milk order at issue was promulgated *by the Secretary of Agriculture* following public hearings and was subject to a referendum. 307 U.S. at 548. Indeed, the Court rejected a challenge that the governing statute authorized an unlawful delegation to milk producers on the ground that the producers' only power was to participate in the referendum. *Id*. at 577–78 (citing *Currin*, 306 U.S. at 15). By contrast, Amtrak is empowered by Section 207 to participate directly and significantly in the formulation of metrics and standards and, in fact, did so.

Second, Section 207 does not merely authorize Amtrak to play an advisory role in the formulation of performance metrics and standards, like in *Adkins*. *See* Pet. Br. at 25. Instead, its statutory mandate, as described above, is to develop them "jointly" with the FRA. It is not at all absolving that Amtrak and FRA were directed to "act 'in consultation with' various stakeholders other than Amtrak." Pet Br. at 25 (quoting Section 207). To the contrary, this shows that Congress knew how to specify when it intended a private actor to play an advisory role and that it

did not intend for Amtrak's role to be merely advisory.

Third, Section 207 is not rescued by its provision for appointment of an arbitrator in the instance that Amtrak and FRA are unable to reach agreement. *See* Pet. Br. at 27–29. In fact, this provision confirms Amtrak's power in the rulemaking process. If Amtrak were participating in only an advisory capacity, the FRA could simply address or reject its comments, according to the FRA's reasoned view of things, and then promulgate a final rule. Instead, the statute recognizes that Amtrak's power is equal to the FRA's in the process of setting metrics and standards and that, in the event the two clash, a third party may assist in resolving their differences.

Even if the arbitrator appointed were a government arbitrator—although the statute does not so provide—Amtrak would remain a party to the case, again on equal footing with FRA. When parties enter into arbitration, they do not suddenly cease to be invested in the underlying dispute, powerless to sway the proceedings. Instead, they become litigants, directly participating in the give-and-take of their case. The government's assumption to the contrary (at 27) is without support in law or common sense.

It would be one thing if, in the event Amtrak and the FRA were at loggerheads, the FRA was authorized to disregard Amtrak's views and proceed on its own, without any practical consequence for so doing—that would be closer to the approach approved in *Adkins*. But it is another thing entirely when the

FRA faces the choice between working with Amtrak to jointly develop metrics and standards or battling it out with the company in arbitration, with some third party making the final call. If sanctioned by the Court, this kind of convoluted scheme could facilitate private delegation in every instance, subject only to the theoretical limitation of government officials' willingness to roll the dice and see what comes of arbitration—something that could be expected to happen little or never. This power to coerce governmental officials in the exercise of their discretion is far removed from the kind of advisory role approved in *Adkins*, while carrying all the baggage of an outright private delegation. *See* Mark Seidenfeld, Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation, 41 Wm. & Mary L. Rev. 411, 457 & n.199 (2000) (explaining that such schemes "raise the specter of privately enacted law"). In practical effect, it is one.

CONCLUSION

Section 207 violates the nondelegation principle. The decision of the court below should be affirmed.

Respectfully submitted,

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