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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

This case concerns such an issue: whether the Constitution permits Congress to delegate legislative power to a private party. Transferring legislative rulemaking authority to a private party to set the rules of the game tempts the creation of self-serving action to tilt the competitive playing field. That danger ensues equally when the entity wielding effective rulemaking power is a government-chartered corporation, endowed with considerable advantages, and created to sell goods or services in the commercial sphere. The statutory provisions at issue here implicate all of these concerns in a vital segment of the economy—freight rail service.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Letters of consent from Petitioners and Respondent have been submitted to the Clerk.

Many American businesses rely upon the nation's rail shippers to carry their goods to destinations throughout the United States. Significantly, railroad track is a finite resource, with both freight- and passenger-rail service competing for track space. Setting standards for rail traffic thus has the potential to impact the ability of the Chamber's members to obtain reliable and low-cost transport for their goods. The Chamber and its members, therefore, have a substantial interest in the resolution of this case.

SUMMARY OF ARGUMENT

The Chamber does not take issue with—and, indeed, avails itself of—many of the mechanisms Congress has created to allow private persons to participate in the rulemaking process. Private parties may, for example, comment on proposed rules. Federal agencies may also turn to private parties for expert consultation. And they may even draft proposed rules, subject to the Government's approval or modification. In all of these cases, however, the Government retains the final say as to the rule's contents.

But the Constitution establishes important restraints on the power of Congress to delegate rulemaking power to private parties. As the D.C. Circuit correctly reasoned, eliminating the Government's exclusive ability to impose final rules or to disapprove or modify privately developed rules transgresses these limits. A grant of rulemaking power to private parties invites one-sided standards and anticompetitive abuses by parties that seek to use their rulemaking authority to gain advantage in the marketplace. These considerations are no different when the private entity is a government-chartered corporation that has been created to act as an independent "for-profit" company in a commercial setting.

Section 207 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), however, gives Amtrak—an entity charged with selling commercial services "for-profit"—a rulemaking role *equal* to that of the Federal Railroad Administration (FRA). The final word about what the standards say effectively belongs to both of them, working in collaboration (with any dispute to be resolved by a third-party arbitrator), *not* the Government alone. That this scheme shares some characteristics with provisions upheld in the past—allowing private parties to determine whether government-written rules become effective or to propose rules subject to government approval or change, for example—provides no support for fusing those schemes together and assigning a private party *both* the ability to co-author *and* the ability to prevent the implementation of the Government's preferred rule.

Section 207's delegation of rulemaking power to Amtrak also threatens to harm the Chamber's members by reducing the availability of reliable freight rail service. Given its "for-profit" mission, Amtrak has every incentive to assert its rulemaking authority in favor of passenger service, to the detriment of freight service. Because the Chamber's members collectively rely on freight-rail services to ship vast quantities of goods in an environmentally friendly manner, Amtrak's incentive and ability to act on that incentive risks imposing significant costs and inefficiencies.

The D.C. Circuit's decision invalidating Section 207 as an unconstitutional delegation of rulemaking authority to a private entity properly ensures that Amtrak cannot wield regulatory power over freight shipments and, ultimately, the consumers that purchase them. This Court should affirm.

ARGUMENT

I. THE GOVERNMENT'S POWER TO DELEGATE EFFECTIVE RULEMAKING AUTHORITY TO PRIVATE PARTIES, ESPECIALLY FEDERALLY CHARTERED ONES, IS SHARPLY LIMITED.

There are many different lawful avenues for private involvement in governmental rulemaking. But Congress may not transfer the ultimate control over a rule's contents to a private party. Doing so would constitute an impermissible delegation—abdication—of the Government's sovereign rulemaking authority. This well-established constitutional prohibition protects against the private imposition of self-interested standards and extends equally to government-created corporations operating as private parties in the marketplace.

A. There Are Many Ways For Private Stakeholders Lawfully And Meaningfully To Participate In The Rulemaking Process.

1. Private interests often play a key part in formulating legal rules. For starters, a statute may "contemplate[] that … standards will be set and revised through notice-and-comment rulemaking." *Chem. Mfrs. Ass'n* v. *Natural Res. Def. Council, Inc.*, 470 U.S. 116, 153 (1985) (Marshall, J., dissenting); see also *United States* v. *Mead Corp.*, 533 U.S. 218, 229–31 (2001). In general, an agency must notify the public of the proposed rule, after which the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c). The Cham-

ber and its members frequently participate in this sort of rulemaking.

In other instances, private parties have even more say over the implementation of Government-formulated rules. Congress has granted members of industry power to vote for or against the execution of proposed standards, for example. See, *e.g.*, 7 U.S.C. § 608c(7)–(9) (Secretary of Agriculture may enter orders governing agricultural commodities in certain situations after determining that the order is approved by at least two-thirds of producers). Elsewhere, the application of rules or the grant of rights has been conditioned on whether a regulated party holds a particular third-party accreditation or certification. See, *e.g.*, 42 U.S.C. § 263a (accreditation from "a private nonprofit organization" can count toward required certification for laboratories handling human body materials); 21 U.S.C. §§ 381(q), 384d(c)(2)(B)(i) (certification for imports from "accredited third-party auditors"); see also *Cospito* v. *Heckler*, 742 F.2d 72, 88–89 (3d Cir. 1984) (hospital accreditations). There, the third-party criterion is at most a condition on whether or not the Government's rule applies.

In addition, Congress has authorized self-regulatory bodies to propose the rules or standards themselves, but ultimately subject to the Government's final approval. In the securities context, for instance, self-regulatory organizations may file proposed rules with the Securities and Exchange Commission, after which the Commission can decide (with input from the public) whether or not to implement the proposal. See 15 U.S.C. § 78s(b)–(c). But "the industry and the government [do not] fulfill the same function in the regulatory framework or … enjoy the same order of authority or deserve the same degree of

deference, whether by firms, courts or the Congress." S. Rep. No. 94-75, at 23 (1975). Instead, "[t]he self-regulatory organizations exercise authority subject to SEC oversight [and] have no authority to regulate independently of the SEC's control." *Id.*

More generally, "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government … are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. app. 2 § 2(a). Again, however, the governing statute, the Federal Advisory Committee Act, specifies that the committees "should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved." *Id.* § 2(b)(6); see also *id.* § 9(b).

In a similar vein, Congress occasionally authorizes the adoption of privately developed standards as binding rules. But Congress ordinarily requires an executive department or agency to make the final call as to whether a privately set standard should be incorporated into federal law. For example, the Consumer Product Safety Commission "shall rely upon voluntary consumer product safety standards … whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. § 2056(b); see also *id.* § 2058(a)(5), (b). Further, only the standards actually approved by the agency are incorporated into federal law, and "[f]uture amendments or revisions of the publication are not included." 1 C.F.R. § 51.1(f). This ensures that

the Government knows and controls what standards are being incorporated.

2. This Court has upheld these sorts of schemes against constitutional challenges. In a series of decisions from the New Deal era, in particular, the Court held that it is constitutional either to allow private parties to oppose the implementation of a government-written standard or to invite private parties to propose standards subject to government approval or modification.

In *Currin* v. *Wallace*, 306 U.S. 1 (1939), for example, the Supreme Court addressed "delegation" concerning tobacco standards. The rules were instituted by the Secretary of Agriculture but their operation could be withheld in a given market "'unless two-thirds of the growers … favor it.'" *Id.* at 15. As the Government explained, this was not a case in which "the vote of the majority was effective to impose the regulation, uncontrolled by the legislature or by any executive officers." Br. for the U.S., 1938 WL 63974, at *74 (1938). Rather, "the legislation has imposed a regulation and provided merely that it shall not be effective if those primarily affected disapprove its application." *Id.* at *75. This Court agreed that the statute "d[id] not involve any delegation of legislative authority" for that reason. *Currin*, 306 U.S. at 15–16.

United States v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), was similar. There, the Secretary could enter orders governing milk sales, but whether or not the order became effective in certain circumstances depended on the Secretary's determination that two-thirds of the producers approved. *Id.* at 547–48, 577–78. The Government once more argued that "Congress has exercised its legislative authority by imposing a regulation and prescribing the conditions upon which it shall apply," Br. for the U.S., 1939 WL

48478, at *116–19 (Apr. 17, 1939), and this Court, applying its holding in *Currin*, upheld the constitutionality of the statute, 307 U.S. at 577–78.

Sunshine Anthracite Coal Co. v. *Adkins*, 310 U.S. 381 (1940), dealt with the reverse of the schemes in *Currin* and *Rock Royal*. There, private parties were permitted to propose coal prices pursuant to statutory standards, but the proposals could be "approved, disapproved, or modified" by the relevant government agency. *Id.* at 388. Because that meant that the Government "determine[d] the prices … [a]nd … ha[d] authority and surveillance over" private parties, industry members "function[ed] subordinately" to the Government, and Congress had not "delegated its legislative authority to the[m]." *Id.* at 399.

B. Granting Private Parties The Power To Effectively Wield Rulemaking Authority Is Impermissible And Anticompetitive.

1. Although this Court has approved several different approaches to private involvement in governmental rulemaking, all of the permutations described above have one critical factor in common: the Government retains ultimate authority over the rules' contents, either by crafting them in the first place or by deciding whether and what to adopt. Take that away, and a private party could wind up with the practical ability to both start (by writing) and finish (by approving or disapproving) the rulemaking process. Because private actors cannot constitutionally be empowered to wield the sovereign's rulemaking authority over an industry, that is a step too far.

This principle was spelled out in *Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936). The Bituminous Coal Conservation Act of 1935 was Congress's initial effort to stabilize the coal industry, but it "delegate[d] the

power to fix maximum hours of labor [and] minimum wages" to a subsection of that industry. *Id.* at 310. This was "legislative delegation in its most obnoxious form" because it was "to private persons" and "not even … an official or an official body." *Id.* at 311; see also *Currin*, 306 U.S. at 15 (Congress cannot "attempt[] to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution."). Applying these principles, the courts of appeal have recognized that while the Government may "employ private entities for *ministerial* or *advisory* roles," Congress may not "give these entities governmental power over others." *Pittston Co.* v. *United States*, 368 F.3d 385, 395 (4th Cir. 2004); see also, *e.g.*, *United States* v. *Frame*, 885 F.2d 1119, 1129 (3d Cir. 1989) (same); *Sierra Club* v. *Sigler*, 695 F.2d 957, 963 n.3 (5th Cir. 1983) ("an agency may not delegate its public duties to private entities").

2. While delegating legislative power to private parties can be condemned as subverting the political process, *Misretta* v. *United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting); see also *Yakus* v. *United States*, 321 U.S. 414, 424 (1944), it can also subvert competition. Quite obviously, allowing one set of private parties to adopt regulatory standards, backed by the force of law, that govern other private parties creates a risk that the standards developed will benefit the former to the detriment of the latter. See, *e.g.*, Louis L. Jaffe, *Law Making By Private Groups*, 51 Harv. L. Rev. 201, 202 (1937) (discussing such "demand[s] by the more explicit elements in a group that the group as a corporate body be given power to coerce under the sanction of law dissentient members of the group"). There is a reason why an umpire, and not the opposing team, calls balls and strikes.

Indeed, this Court has emphasized the problems that private-party delegation poses to competition. In *Carter*, the Court expressly recognized the anticompetitive risks. It explained that private party delegation can leave the "dissentient minority [subjected] to the will of the stated majority," but that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311. Even where approving delegation in *Currin*, the Court emphasized that it was *not* "a case where a group of producers may make the law and force it upon a minority." 306 U.S. at 15; see also Br. for the U.S., 1938 WL 63974, at *75 ("In this case the growers cannot impose their will on anyone.").

C. Delegation Of Rulemaking Power To Government-Created Corporations That Are Injected Into The Commercial Sphere Likewise Warrants Scrutiny.

These principles are no less powerful when the regulating private entity is a government-formed corporation that has been injected into the commercial sphere. There is a "long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386 (1995). In the 1960s, Congress started forming "corporations that it specifically designated *not* to be agencies or establishments of the United States Government, and declined to subject to [statutory] control mechanisms." *Id.* at 390. In that way, the Government could "act unhindered by the restraints of bureaucracy and politics." *Id.* at 391; see also Kevin Kosar, Cong. Research Serv., Report No. RL30365, *Federal Government Corporations: An Overview* (2011).

Having chosen this corporate form in order to shed certain governmental burdens, Congress also intends

for these firms to "enter[] the private sector, but [to] do[] so with Government-conferred advantages." *Lebron*, 513 U.S. at 390. Such benefits can give government corporations a boost unavailable to private parties that do not get their start in an act of Congress.

But these advantages should not include vesting such entities with sovereign legislative powers to make rules to govern other private actors. Like the other private parties in the marketplace, these government-created corporations frequently engage in the "commercial sale of goods and services," *id*. at 388, and may even compete with private entities for customers or resources. Absent a level of control that does not exist here, there is no reason why a "for-profit" government corporation should be granted legislative power that other private parties cannot wield. Indeed, this Court has even recognized that there is a risk of self-dealing when the Government *qua* Government engages in commercial transactions while also acting as the regulator over such transactions. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 897–98 (1996) (plurality opinion).

In short, when Congress creates corporations with the purpose of having those corporations enter the private sector and engage in commercial activities without the level of control that exists for federal agencies, they should be treated like private parties for the purpose of determining whether they have been delegated sovereign rulemaking power in violation of the non-delegation doctrine.

II. SECTION 207 IS AN IMPERMISSIBLE DELEGATION OF RULEMAKING POWER THAT HAS PRACTICAL IMPLICATIONS FOR THE CHAMBER'S MEMBERS.

Section 207 delegates too much rulemaking power to Amtrak, and does so in a way that raises significant concerns for the nation's businesses that depend on freight-rail services.

A. Section 207 Impermissibly Delegates Effective Rulemaking Power To Amtrak.

Section 207(a) directs Amtrak and the FRA to "jointly … develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations," "in consultation with the Surface Transportation Board, rail carriers over whose rail lines Amtrak trains operate, States, Amtrak employees, nonprofit employee organizations representing Amtrak employees, and groups representing Amtrak passengers, as appropriate." 49 U.S.C. § 24101 (PIIRA § 207(a)). In the event no agreement is reached, either Amtrak or the FRA (or any other party involved in the standards' development) may petition the Surface Transportation Board (STB) to appoint an arbitrator to resolve the matter through binding arbitration. *Id.* (PIIRA § 207(d)). Amtrak and rail carriers must incorporate the relevant standards into contracts "[t]o the extent practicable." *Id.* (PIIRA § 207(c)). And the STB is empowered to investigate violations of these standards and award damages against host railroads that fail to provide Amtrak with sufficient access to their rail lines. *Id.* § 24308(f) (PIIRA § 213(a)).

This constitutes too broad a delegation of lawmaking authority. As Respondent Association of Ameri-

can Railroads (AAR) explains, the command to "jointly" develop standards leaves Amtrak and the FRA as equals, which means that the Government does not retain exclusive control over the contents of the standards. AAR Br. 18–19. It is, moreover, no answer to say that this Court has previously upheld schemes in which private parties could either disapprove or propose standards, Br. for U.S. 19–26, because allowing Amtrak to do both at the same time means forfeiting the features that ensured Government control over the rule's contents—*i.e.*, writing the rules (in *Currin* and *Rock Royal*) or being able to modify or nullify them (in *Sunshine Anthracite*). AAR Br. 19–23. The Government does not get the last word under section 207(a).

Nor does the arbitration provision in section 207(d) save this scheme. Nothing in the statute says who the STB-appointed arbitrator must be (Government or not), or that the arbitrator must put a thumb on the scale in favor of the Government's interests over Amtrak's. AAR Br. 26–30. Not only that, but the provision also "pollute[s] the rulemaking process over and above the other defects besetting the statute" because it "stack[s] the deck in favor of compromise." Pet. App. 15a. Even if the FRA prefers a different position, the risk that the arbitrator could side with Amtrak incentivizes the FRA to reach a compromise, rather than simply imposing the position that it, as the government agency, thinks is best.

Section 207 thus implicates one of the core concerns discussed above that undergirds the non-delegation doctrine: it provides a mechanism for Amtrak to advantage its business interests over other commercial parties by giving Amtrak the ability to shape key regulatory standards. See AAR Br. 5–10, 18–19, 23–24. Congress has given Amtrak direct control over

binding regulatory standards, and the Government exercises no control over Amtrak's "'day-to-day operations.'" *Id.* at 14, 40–41.

Because of its status as a "for-profit" commercial enterprise, 49 U.S.C. § 24301(a)(2), Amtrak has strong incentives to use its rulemaking authority to advantage its operations. Amtrak "compete[s] with the freight railroads … for use of their scarce track," Pet. App. 19a, and, accordingly, Amtrak has good reason to insist upon standards that require that its trains be given greater rail access than freight trains. Indeed, according to AAR, Amtrak already used its rulemaking authority to obtain standards that favor its passenger traffic at the expense of freight traffic. AAR Br. 8–10.

B. Upholding Section 207 Risks Serious Repercussions For Freight Shippers And The Economy.

Track space is a scarce resource. And, as noted, Amtrak competes with freight railroads for access to that track. How this balance is struck has broad consequences to the Chamber's members and the nation's economy.

Freight railroads ship an enormous and increasing amount of goods. There were over 2 billion tons of shipments in 2012, and the Department of Transportation estimates that the figure will climb to nearly 2.8 billion tons by 2040. U.S. Dep't of Transp., Bureau of Transp. Statistics, *Freight Facts and Figures 2013*, at 3 tbl.2-1 (Jan. 2014). Measured in dollars, $551 billion worth of goods are shipped by freight rail today, and that number is projected to grow to almost $900 billion within 30 years. *Id.* at 4 tbl.2-2. The Chamber's members routinely use rail for shipping

their goods and are amongst the nation's largest freight rail shippers.

This level of commercial activity has far-reaching significance for the national economy. It should come as no surprise that, for example, "America's freight railroads sustain 1.2 million jobs, including 180,000 high-paying jobs in the freight rail industry itself." *Perspectives from Users of the Nation's Freight System*: *Hearing Before the Panel on 21st-Century Freight Transp. of the H. Comm. on Transp. And Infrastructure*, 113th Cong. 68 (2013) (statement of Edward R. Hamberger, President and CEO, Ass'n of Am. R.R.). Railroads help move roughly one-third of all U.S. exports. *Id.* at 72. And by providing efficient transportation services, freight rail is an essential part of our nation's (and the world's) economy, has ultimately lowering costs for consumers worldwide. See, *e.g.*, Ass'n of Am. R.R., *The Economic Impact of America's Freight Railroads* (May 2014).

The consequence of delegating rulemaking authority to Amtrak, however, is that neither the FRA nor the STB ultimately has final say as to important rail regulatory standards that can slow down the shipment of goods by rail, or make shipments more expensive, or both. Amtrak's ability to tilt those standards in its favor threatens to harm not only the Chamber's members, but consumers as well. Enforcing non-delegation principles, by contrast, would ensure that freight rail service will be subjected to evenhanded rules that will serve to benefit the country as a whole, not just the interests of a single commercial entity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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