ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5204

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ASSOCIATION OF AMERICAN RAILROADS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION;
ANTHONY FOXX, SECRETARY OF TRANSPORTATION;
FEDERAL RAILROAD ADMINISTRATION;
SARAH FEINBERG, ADMINISTRATOR, FEDERAL
RAILROAD ADMINISTRATION,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

**BRIEF OF *AMICUS CURIAE* PROFESSOR ALEXANDER VOLOKH
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *amici*. All parties and *amici* in this case and before the Supreme Court are listed in the Opening Brief for Appellant.

B. Rulings under review. References to the ruling at issue appear in the Opening Brief for Appellant.

C. Related cases. *Amicus curiae* adopts the statement of related cases presented in the Opening Brief for Appellant.

/s/ Christopher J. Paolella
Christopher J. Paolella

CERTIFICATE REGARDING SEPARATE BRIEFING

In accordance with Circuit Rule 29(c), counsel for *amicus curiae* Alexander Volokh certifies that a separate *amicus* brief for Professor Volokh is necessary because his position regarding the proper constitutional test for private delegations is in conflict with the positions adopted by the other *amici*. These inconsistent positions make joinder in a single brief impractical. Counsel for Professor Volokh conferred with counsel for *amici* Judicial Education Project, Resolute Forest Products Inc., and the Chamber of Commerce of the United States regarding joint filing prior to submitting this brief. *Amicus* Association of Independent Passenger Rail Operators filed a certificate expressing its intention to file a separate brief with its notice of intent to file an *amicus* brief. Professor Volokh filed an *amicus* brief in the Supreme Court in this case.

/s/ Christopher J. Paolella
Christopher J. Paolella

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INTEREST OF THE *AMICUS CURIAE*

Alexander Volokh is an associate professor at Emory University School of Law. He teaches, writes, and blogs about constitutional law, administrative law, and legal issues related to privatization, and has an interest in the sound development of these fields. He has discussed this case in a recent article, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931 (2014), and his analysis of the Supreme Court opinion in this case is forthcoming in the *Cato Supreme Court Review*.[1]

SUMMARY OF THE ARGUMENT

This brief addresses important issues of constitutional law raised in this case that were not addressed or resolved in the recent decision by the Supreme Court that remanded the case to this Court.

1. Congress's delegation of authority to Amtrak to develop metrics and standards violates the Due Process Clause. Amtrak is required by statute to act as a profit-making entity, and it is a

[1] All parties have consented to the filing of this brief. No counsel for a party authored this *amicus* brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund its preparation or submission to the Court.

longstanding due process doctrine that self-interested parties, whether public or private, may not wield regulatory power. Although this doctrine has an exception—where a disinterested party must approve the self-interested party's exercise of authority before it has any effect—the extent of Amtrak's authority under this statutory scheme is so great that Amtrak does not fall within it. If a disinterested party, such as the Federal Railroad Administration, were determined to block Amtrak's self-interested regulatory proposals, it would not necessarily be able to do so.

2. The appointment of a private arbitrator does *not* violate any per se rule against delegations of authority to private parties. The Supreme Court has repeatedly upheld such delegations based on the same doctrine that applies to delegations to public parties. *Carter* v. *Carter Coal Co.*, 298 U.S. 328 (1936), is not to the contrary, as it was decided under the Due Process Clause, not under the non-delegation doctrine. D.C. Circuit precedent does not foreclose the interpretation of *Carter Coal* as being a due process case, not a non-delegation case. Nor does dictum in *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935), support a per se rule against delegations to private parties. Thus, even if this Court decides that the arbitrator appointed under the statute may be private, this Court should not strike down the statutory provision under a per se rule against private delegation.

ARGUMENT

I. Allowing a Self-Interested Party to Regulate Its Own Industry Violates Due Process.

In light of the Supreme Court's holding that Amtrak is public, this Court should rule in favor of the Association of American Railroads on a due process theory, focusing on the fundamental unfairness of letting Amtrak, a self-interested entity, participate in the regulation of the railroad industry. The due process argument relies on Amtrak's being *both* a state actor (consistent with *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995), and the Supreme Court's opinion in this case) *and* self-interested (because of the statutory mandate that it act as a profit-maximizing entity, 49 U.S.C. § 24301(a)).

A. Amtrak Is a Self-Interested Regulatory Party.

Congress has delegated authority to Amtrak to "jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations." Passenger Rail Investment and Improvement Act of 2008 [hereinafter PRIIA], Pub. L. No. 110-432, § 207(a) (codified at 49 U.S.C. § 24101 note). This is a regulatory power for two obvious reasons. First, private rail carriers are required to incorporate the standards into their agreements with Amtrak whenever "practicable," PRIIA § 207(c); *see also Dep't of Transp.* v. *Ass'n of Am. R.R.* [hereinafter *AAR*], 135 S. Ct. 1225, 1235–36 (2015) (Alito, J., concurring). Second, as this Court has recognized, the standards "lend definite regulatory force to an otherwise broad statutory mandate." *Ass'n of Am. R.R.* v. *United States Dep't of Transp.* [hereinafter *AAR*], 721 F.3d 666, 672 (D.C. Cir. 2013).

This regulatory power is self-interested because Amtrak is instructed to act as a for-profit entity. 49 U.S.C. § 24301(a). Amtrak thus has a financial stake in the metrics and standards it proposes. Indeed, Amtrak has a statutory duty (as well as a fiduciary duty to its shareholders) to do whatever is legal and maximizes profits, even if this involves undermining private railroads. *See* Appellant's Opening Br. at 32–36; *cf. eBay Domestic Holdings, Inc.* v. *Newmark*, 16 A.3d 1, 34–35 (Del. 2010) (holding, under Delaware corporate law, that openly pursuing non-stockholder-wealth-maximizing strategies violates fiduciary duty).

B. The Rule Against Granting Coercive Power to Self-Interested Parties Is a Longstanding Due Process Doctrine.

Granting regulatory power to parties, public or private, with a self-interested stake in how that power is exercised has long been considered a due process violation. In a series of cases extending from the early 20th century into modern times, the Supreme Court has consistently so held.

In *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), the Supreme Court considered a challenge to disciplinary hearings held by the Alabama Board of Optometry. The Board, which was entirely composed of *self-employed* private optometrists, initiated proceedings to revoke the licenses of *corporate-employed* optometrists on the grounds that working for a corporation rather than being self-employed constituted the "unlawful practice of optometry." The Supreme Court held that such hearings violated due process because the Board, being composed of corporate-employed optometrists' competitors, was impermissibly biased. "[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579.

Gibson is one of a long line of cases, stretching at least as far back as *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), holding that the exercise of power by self-interested parties violates due process. In *Eubank*, the Supreme Court struck down a city ordinance giving private property owners the unconstrained authority to establish a building line beyond which future construction would be illegal. *Id.* at 143. The Supreme Court held that the ordinance violated due process. The ordinance was "an unreasonable exercise of the police power" because it failed to provide standards by which the private landowners were to exercise their regulatory authority, allowing them to establish the building line "solely for their own interest, or even capriciously." *Id.* at 143–44. (If anything, this case presents the due process violation in starker form, since here, Amtrak not only *may* pursue its self-interest, but indeed is *statutorily required* to do so.)

Similarly, in *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), the Court struck down an ordinance allowing two-thirds of neighboring owners to waive a statutory prohibition against the construction of "philanthropic home[s] for children or old people." The Court reiterated that it violated due process to give coercive power over property owners (the would-be philanthropic home builders) to a (one-third) minority of their neighbors—power that could be exercised "for selfish reasons or arbitrarily," "uncontrolled by any standard or rule prescribed by legislative action," and without a "provision for review." *Id.* at 122.

In light of *Eubank* and *Roberge*, it is clear that *Carter* v. *Carter Coal Co.*, 296 U.S. 238 (1936), which struck down a statutory scheme granting a supermajority of industry participants a regulatory power to set wages and hours industry-wide, is a due process case. Its language about a "majority . . . regulat[ing] the affairs of an unwilling minority," and the distinction between "disinterested" regulators and "private persons whose interests may be and often are adverse to the interests of others in the same business," *id.* at 311, are clearly in the same vein as the statements quoted above from *Eubank* and *Roberge*. And indeed, both of these cases are cited in *Carter Coal*. *Id.* (Part II.B, *infra*, explains why *Carter Coal* should *not* be read as a non-delegation case; but what is clear is that *Carter Coal* is *at least* a due process case.)

This doctrine—that self-interested parties cannot be given coercive power—applies with equal force whether the self-interested parties are public or private. This makes sense, since all that is required for due process protections to apply is that the defendant be a "state actor." Thus, the Supreme Court's holding that Amtrak is governmental does not change the due process analysis.

In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the violator was a village mayor who also sat as a judge; he was impermissibly biased because his costs were only reimbursed by the defendant in case of a conviction. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), also involved a mayor who sat as a judge; his bias arose because the traffic fines he assessed as judge contributed a substantial portion of the village finances that he would be able to use as mayor. And in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), the Supreme Court held that an Alabama Supreme Court justice's participation in a case violated due process, even though he sat on a nine-justice panel, when he himself was a party to a similar pending lawsuit. *Id.* at 822–25. The

Court recognized that "under the Due Process Clause no judge can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *Id.* at 822 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotation marks omitted).

In *Tumey*, *Ward*, and *Lavoie*, the parties were government officials with bad incentives; in *Eubank*, *Roberge*, and *Carter Coal*, they were private parties serving their self-interest—though of course their exercise of a regulatory power made them "state actors" for that purpose. Whether the self-interested party is private or public, the due process cases treat the two situations identically. Wielding coercive power when one has a self-interested stake in how that power is exercised quite straightforwardly violates the Due Process Clause.

The due process cases cover very diverse situations, from the disciplinary authority over industry participants in *Gibson*, to the quasi-zoning power in *Eubank* and *Roberge*, to the judicial power in *Tumey*, *Ward*, and *Lavoie*, to the grant of private authority to seize property.

The modern property seizure cases begin with *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), where the Supreme Court invalidated a state statute "ordering state agents to seize a person's possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond." *Id.* at 69–70. The statutes, the Court wrote, "abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another." *Id.* at 93. Other cases following *Fuentes* are to the same effect. *See, e.g.*, *N. Ga. Finishing* v. *Di-Chem, Inc.*, 419 U.S. 601, 606–07 (1975) (finding a due process violation where the "writ of garnishment [was] issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer" and was based on "conclusory allegations"); *Sniadach* v. *Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969) (finding a due process violation where "notice and an opportunity to be heard [were] not given before the *in rem* seizure of the wages" and where "the clerk of the court issue[d] the summons at the request of the creditor's lawyer").

In all these diverse cases, the doctrine is the same: Giving self-interested parties (public or private) coercive power of any kind violates the Due Process Clause.

C. This Case Does Not Fall Within the Due Process Exception for Effective Government Oversight.

An exception to this doctrine does exist—but it does not apply in this case. Where self-interested power can be exercised only with the approval of a disinterested official, the Supreme Court has held that due process is not violated. This explains the line of cases involving garnishment and prejudgment attachment procedures. As discussed above, due process was violated in *Fuentes*, *North Georgia Finishing*, and *Sniadach*, because private parties could initiate a seizure of another's property without any government oversight. However, in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 605–06 (1974), the Court found that due process was satisfied because a writ of sequestration would not issue "on the conclusory allegation of ownership or possessory rights," but only if a judge was convinced of particular facts.

This distinction—between cases where private parties are given *mandatory* control over coercive processes and cases where they are merely given the power to petition the government to (in its *discretion*) coerce private parties—is key to more recent cases as well, where grants of power to self-interested parties were upheld. For instance, in

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), incumbent auto dealers could protest a car manufacturer's decision to open a new dealership nearby. But these incumbent auto dealers could not prevent the opening of a new dealership: their only power was to force the (disinterested) New Motor Vehicle Board to consider the case. *Id.* at 108–09. Similarly, in *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984), tenants could ask a state agency to condemn the property on which they lived, as part of a land redistribution program. But they could not force a condemnation: they could only force the state agency to determine whether the condemnation served the statute's public purposes. *Id.* at 243 n.6; *see also* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 944–50 (2014).

Federal Railroad Administration (FRA) and Surface Transportation Board (STB) oversight do not suffice to bring Amtrak's coercive power within this exception. Amtrak's power is much greater than the ability to merely petition disinterested parties to exercise coercive power.

It is true that no fines are levied unless the STB brings an enforcement action, PRIIA § 213(a) (codified at 49 U.S.C. § 24308(f)). But some coercion occurs long before an STB enforcement action: The railroads are already subject to an immediate requirement to incorporate the metrics and standards in their agreements with Amtrak "to the extent practicable." PRIIA § 207(c). Moreover, when the STB eventually brings an enforcement action, it will be to penalize railroads' actions that resulted in a violation of the metrics and standards that Amtrak has in part created (and which the STB has no ability to alter).

Thus, to bring Amtrak within the due process exception for oversight by a disinterested party, one will have to locate such oversight much earlier: perhaps at the time when Amtrak and the FRA are negotiating over the content of the metrics and standards. The FRA does has a veto power over any metrics and standards that Amtrak may propose, but this veto power is insufficient to prevent Amtrak from acting in its naked self-interest. Amtrak is no mere petitioner to the FRA. The statute itself treats Amtrak and the FRA as partners: the two are to "jointly . . . develop" the metrics and standards. PRIIA § 207(a). As this Court has recognized, "Amtrak enjoys authority equal to the FRA." *AAR*, 721 F.3d at 671. Amtrak's coercive power allows it to exercise "an effective veto over regulations developed by the FRA." *Id.* And if the FRA is too aggressive in checking Amtrak's self-interest, such that the two parties do not reach consensus, the arbitration provision kicks in, PRIIA § 207(d)—at which point the FRA will not be certain that its (more public-interested) alternative will prevail.

Nor can the arbitrator be considered a check on Amtrak's self-interested behavior. The statute does not specify how the arbitrator is to decide on the content of the metrics and standards, or even whether the arbitrator is to be public or private. *See AAR*, 135 S. Ct. at 1236–38 (Alito, J., concurring). There is no requirement or guarantee that the arbitrator will systematically oppose Amtrak's naked self-interest or act in the public interest himself.

This Court should therefore invalidate § 207 based on the Due Process Clause.

II. The Arbitration Provision Does Not Violate Any Private Non-Delegation Doctrine.

While the Supreme Court disapproved this Court's holding that Amtrak is private for purposes of the non-delegation doctrine, it expressed no opinion on this Court's other holding—that delegations of regulatory power to *private* parties are per se unconstitutional, even when there is an "intelligible principle" that would be sufficient to save the delegation if it were to a public party. This Court could again strike down § 207 using this theory, because of the delegation of authority, in case Amtrak and the FRA disagree, to an arbitrator who might be private. *See* PRIIA § 207(d); *AAR*, 135 S. Ct. at 1237–38 (Alito, J., concurring); Appellant's Opening Br. at 43–47.

However, this Court should not rely on this theory. No Supreme Court precedent supports a special non-delegation doctrine that applies when Congress delegates to private entities. On the contrary, the Supreme Court has repeatedly upheld delegations to private parties using the same doctrine that applies to delegations to public parties.

Carter Coal is not to the contrary, as it was decided under the Due Process Clause, not under the non-delegation doctrine; nor does

D.C. Circuit precedent hold otherwise. Nor does dictum in *Schechter Poultry* disapproving of broad private delegations support a special per se rule when the delegate is private.

A. The Supreme Court Has Upheld, Rather Than Invalidated, Delegations of Authority to Private Parties.

The Supreme Court has never invalidated a delegation to private parties under the non-delegation doctrine. On the contrary, it has upheld such delegations against non-delegation challenges at least four times. On two occasions, the Court has simply upheld the delegation. *See United States* v. *Rock Royal Coop.*, 307 U.S. 533 (1939); *Butte City Water Co.* v. *Baker*, 196 U.S. 119 (1905). On two other occasions, the Court went even further, and upheld the delegation by explicitly analogizing it to a similar case where the delegation was to the President or an executive official. *See Currin* v. *Wallace*, 306 U.S. 1 (1939); *St. Louis, Iron Mountain, & S. Ry. Co.* v. *Taylor*, 210 U.S. 281 (1908). These cases establish that there is no per se rule against delegations to private parties, and that the rule for such delegations is the same as the rule for delegations to public parties.

Currin concerned a challenge to the Tobacco Inspection Act of 1935. The Act authorized the Secretary of Agriculture to (1) establish uniform standards for tobacco and (2) designate tobacco markets where no tobacco could be sold unless it was inspected and certified according to those standards. However, the Secretary was forbidden from designating a market unless two-thirds of the growers in that market voted in favor of the designation in a referendum. *Currin*, 307 U.S. at 15. Industry members thus held an "on-off" power to determine whether predetermined regulations would go into effect.

Foundational Supreme Court precedent makes it clear that an "on-off" power to determine the applicability of legal norms is not a trivial power, and its delegation (if not adequately circumscribed) can become a delegation of legislative authority and thus violate the non-delegation doctrine. Indeed, the Supreme Court has at least once struck down a delegation of an "on-off" power to the President on precisely such grounds, holding that the President lacked meaningful statutory guidance as to how to exercise the power. *See Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 430 (1935). In other cases, the Supreme Court has upheld the delegation of such an "on-off" power, but it was clear that the validity of the delegation had to be analyzed under the non-delegation doctrine. *See Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 386 (1813); *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 694 (1892).

The *Currin* Court upheld the delegation to the industry members. The Court held that the delegation was comparable to the delegation *to the President* of the power to determine the difference in production costs between countries and set tariffs that equalized those costs—a delegation that had been upheld in *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394 (1928); s*ee Currin*, 306 U.S. at 16. Therefore, the delegation of power to industry did "not involve any delegation of legislative authority." *Id.*

Nowhere did the *Currin* Court note that it made a difference that the industry members deciding whether the regulations would take effect were private citizens. On the contrary, in citing *J.W. Hampton*, it explicitly treated federal executive officials and private citizens as equivalent in terms of whether Congress could delegate an "on-off" power to them:

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation.

Currin, 306 U.S. at 16 (quoting *J.W. Hampton*, 276 U.S. at 407).

The Supreme Court's earlier analysis in *St. Louis Railway* had followed exactly the same pattern. A statute authorized a private group, the American Railway Association, to "designate to the Interstate Commerce Commission the standard height of drawbars for freight cars." 210 U.S. at 286. The ICC was then directed to promulgate that height as law. *Id.* This was challenged as "an unconstitutional delegation of legislative power to the railway association and to the [ICC]." *Id.* at 287. The Supreme Court rejected this argument in a single paragraph by referring to *Buttfield* v. *Stranahan*, 192 U.S. 470 (1904)—a case about delegation of tea-inspecting authority to an executive official, the Secretary of the Treasury. Here, too, it was clear that the Supreme Court did not consider the private nature of the delegate to be at all relevant. Twenty-seven years later, the Supreme Court explicitly referred to this case as one of several where delegations to private parties were unproblematic. *Schechter Poultry*, 295 U.S. at 537 & n.15.

Another case cited in *Schechter Poultry*, 295 U.S. at 537 & n.14, as an example of an unproblematic delegation to private parties was *Butte City Water*. In that case, the Supreme Court upheld the power of Congress, as part of its power to make regulations for public lands, to delegate rulemaking authority to miners in local mining districts. 196 U.S. at 125–26.

Finally, a few months after *Currin*, the Supreme Court upheld another delegation to private parties in *Rock Royal*. *Rock Royal* concerned a challenge to the Agricultural Marketing Agreement Act of 1937, a statute aimed at assisting in the marketing of agricultural commodities. 307 U.S. at 542–43. The Act authorized the Secretary of Agriculture to make orders restoring parity prices for farmers of specific farm products. *Id.* at 574–75. Orders could become effective in two ways: (1) consent of the handlers; or (2) two-thirds support from the producers (if the Secretary of Agriculture, with the President's approval, determined that the handlers' failure to consent obstructed the policy of the act). *Id.* at 547. The Supreme Court held that a delegation to private parties of the "on-off" power to put an order into effect did not violate the non-delegation doctrine. *See id.* at 577–78. Absent from the analysis is any mention of the private nature of the delegates.

The fact that the Supreme Court has upheld delegations to private parties against non-delegation challenges *at least four times*, and has explicitly cited some of those cases as examples of unproblematic delegations to private parties, demonstrates that there is no per se rule against such delegations. More than that: The fact that it has twice—in *Currin* and *St. Louis Railway*—upheld the private delegations by explicitly analogizing them to delegations to the President or an executive official, without expressing any reservations based on the private nature of the delegates, demonstrates that the non-delegation doctrine does not distinguish between public and private parties.

B. *Carter Coal* Should Be Treated as a Due Process Case, Not as a Non-Delegation Case.

Carter Coal is not to the contrary. This Court's previous opinion in this case relied on *Carter Coal* to strike down § 207 under the non-delegation doctrine. *See AAR*, 621 F.3d at 670–71. But *Carter Coal* struck down a private delegation based not on the non-delegation doctrine, but on the Due Process Clause. Nor does D.C. Circuit precedent bind this Court to a non-delegation reading of *Carter Coal*. Interpreting *Carter Coal* as a due process case is consistent with both Supreme Court and D.C. Circuit precedent. It also makes more doctrinal sense to interpret *Carter Coal* as a due process case, because its reasoning focused primarily on the unfairness of being regulated by one's competitors. The Due Process Clause is a more natural home for such issues because it is concerned with unfairness. The non-delegation doctrine, by contrast, is concerned with how much power Congress has given up, not with who is the recipient of such power. Getting the doctrinal basis right is also important because it affects whether the rule governs state delegations and whether damages are available.

1. *Carter Coal* Is Most Properly Seen as a Due Process Case.

It is true that *Carter Coal* disapproved of a private delegation. But this does not mean that its holding was based on the non-delegation doctrine of Article I.

In *Carter Coal*, the Supreme Court struck down a delegation of power to some industry members to impose regulations on other industry members. The Court found the statutory scheme to be "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." *Carter Coal*, 298 U.S. at 311.

However, the mere recitation of the word "delegation" does not mean that the non-delegation doctrine is involved. It is not difficult to find examples throughout constitutional law of problems posed by "delegation," where the source of the problem is clearly not the non-delegation doctrine.

For instance, the government may not "delegat[e] a governmental power to religious institutions," *see Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982), but that is because doing so would violate the Establishment Clause. (Indeed, the delegation in *Larkin*—by the Massachusetts legislature—could not possibly have violated the non-delegation doctrine, which applies only to Congress.)

Justice Kennedy has discussed the "[d]ifficult and fundamental questions" regarding "delegation of Executive power" to private attorneys general to enforce environmental laws—but he was referring to potential Article II constraints on such "delegation[s]," not the non-delegation doctrine. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring).

The Supreme Court, in *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921), held that Congress could not "delegate legislative power" to courts and juries to decide what conduct would be criminal, but that was because doing so violated "the Fifth and Sixth Amendments." *Id.* at 92. The Supreme Court has recently cited *L. Cohen Grocery* as part of the caselaw arising under the "void-for-vagueness" doctrine (which of course applies to state laws as well). *See Johnson* v. *United States*, No. 13-7120 (U.S. June 26, 2015), slip op. at 6–7, 11–12.

As a final example, consider *Roberge*—discussed in Part I.A *supra*—where the Court held that a state's "delegation of power to owners of adjoining land" to determine whether a "philanthropic home for children or old people" could be built violated the Due Process Clause. *Roberge*, 278 U.S. at 120.

As discussed in Part I.A *supra*, *Carter Coal* is one of the progeny of due process cases like *Eubank* and *Roberge*. It specifically states that due process is implicated: "[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is . . . clearly arbitrary, and . . . clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment . . . ." *Carter Coal*, 298 U.S. at 311. The opinion not only explicitly invokes "due process" and "the Fifth Amendment" but also mentions "interference with personal liberty and private property," which are two of the three interests protected by the Fifth Amendment. *Cf. Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 572 (1972). Most importantly, *Carter Coal* raises very similar issues to *Eubank* and *Roberge*: In *Eubank* and *Roberge*, self-interested property owners had been granted a zoning-like power to prevent construction by their neighbors, while in *Carter Coal*, self-interested industry participants had been granted a regulatory power to set wages and hours industry-wide.

It is true that the relevant discussion in *Carter Coal* cites the non-delegation case *Schechter Poultry* as well as *Eubank* and *Roberge*.

However, this citation is not highly probative. First, the mere citation of a non-delegation case does not amount to a holding that the non-delegation doctrine is implicated. And second, the whole discussion in *Schechter Poultry* that expresses skepticism of delegations to private parties is pure dictum—and dictum that does not even categorically disapprove of such delegations.

The *Schechter Poultry* Court asked, rhetorically: "[W]ould it 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?" 295 U.S. at 537. And it answered, rhetorically: "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.*

But the Court never found a delegation to private parties in *Schechter Poultry*—nor could it have, since the codes of fair competition at issue in that case could not go into effect without being promulgated by the President. The Supreme Court found the delegation invalid because the statute insufficiently constrained *the President*. Thus, no part of the holding of *Schechter Poultry* concerns delegations to private parties.

Even if *Schechter Poultry*'s discussion were binding, it would not establish that delegations to private parties are subject to a different rule than delegations to public parties. Of course Congress may not "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"—but, as *Schechter Poultry* itself holds, Congress is equally forbidden from delegating comparable authority to the President. *Schechter Poultry* acknowledged that delegation of authority to private parties could be acceptable, 295 U.S. at 537 & nn.14–15 (citing *St. Louis Railway* and *Butte City Water*), but distinguished this particular delegation as being excessive and crossing the line into a delegation of "legislative authority." Thus, *Carter Coal* could not have incorporated any holding—or even dictum—of *Schechter Poultry* relevant to any supposedly disfavored status of private delegations under the non-delegation doctrine.

It is therefore not surprising that the Supreme Court has repeatedly recognized that *Carter Coal* is a due process case, not a non-delegation doctrine case. *See Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . . .") (citing *Panama Refining* and *Schechter Poultry*, but *not* citing *Carter Coal*); *Mistretta* v. *United States*, 488 U.S. 361, 373 (1989) (likewise listing *Panama Refining* and *Schechter Poultry* as the only two cases to have struck down statutes under the non-delegation doctrine, and omitting *Carter Coal*). Then-Judge Scalia, as part of a three-judge district court per curiam opinion, has also written that, although *Carter Coal* "discussed" the "delegation doctrine," its holding "appears to rest primarily upon" the Due Process Clause. *See Synar* v. *United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (per curiam), *aff'd sub nom. Bowsher* v. *Synar*, 478 U.S. 714 (1986); *cf.* Appellant's Opening Br. at 24 (quoting the Supreme Court transcript, in which Justice Scalia opined that "the case law in this area relies on the due process clause more than on the distinction simply between public and private entities").

2. D.C. Circuit Precedent Is Not Inconsistent with Reading *Carter Coal* as a Due Process Case.

In its previous opinion, this Court stated that it was bound by circuit precedent to consider *Carter Coal* a non-delegation case. *AAR*, 721 F.3d at 671 n.3 (citing *Nat'l Ass'n of Regulatory Util. Comm'rs* v. *FCC* [hereinafter *NARUC*], 737 F.2d 1095, 1143 (D.C. Cir. 1984)). This is mistaken, for three reasons.

First, the entire discussion of *Carter Coal* in *NARUC* is dictum, and indeed, it is ambiguous as to whether *Carter Coal* applied the non-delegation doctrine or due process.

The discussion in *NARUC* about private delegation is dictum because the *NARUC* Court did not find any private delegation at all. The *NARUC* Court wrote: "Since the FCC has here retained its final authority over these possible surcharges, which cannot go into effect unless and until the Commission approves them . . . , it is premature to accuse the agency of an unlawful delegation." *Id.* at 1144.

While the *NARUC* Court did mention *Carter Coal*, it did not *explicitly* characterize *Carter Coal* as either a due process or a non-delegation case. It simply stated:

> Had the Commission so acted and had the Congress so intended it to act, that would amount to a "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."

Id. at 1143–44 (quoting *Carter Coal*, 298 U.S. at 311).

It is true that a nearby footnote in *NARUC* explicitly mentions the non-delegation doctrine, *id.* at 1143 n.41, so perhaps one might say that *NARUC implicitly* characterizes *Carter Coal* as a non-delegation case, though this would be an implication in a footnote in a discussion that is itself dictum.

Second, even that footnote in *NARUC* discusses a very particular situation: a *double delegation*, first from Congress to the FCC, and then from the FCC to private exchange carriers. (By contrast, here there is only a *single* level of delegation: even though the STB is the agency that appoints the arbitrator, the arbitrator's power has been conferred directly by Congress.)

The *NARUC* Court stated that the harm of delegations is "doubled in degree in the context of a transfer of authority from Congress to an agency and then from an agency to private individuals." *Id.* at 1143 n.41. This discussion is ambiguous: One cannot tell whether the *NARUC* Court is stating that the delegation is more suspect because it involves a private individual, or that the delegation is more suspect because there are two levels of delegation (as opposed to the one level in this case).

Third, the discussion in *NARUC* is ambiguous as to whether there exists a per se rule against delegation to private parties. The discussion in the footnote stops short of endorsing a per se rule: It merely notes that "[t]he vitality of challenges to" delegations from an agency to private individuals is "unquestionable." *Id.* at 1143 n.41. But to say that the vitality of a delegation challenge is unquestionable does not mean that such a challenge will always win, or that there is a per se rule against such delegations.

Thus, to the extent the *NARUC* Court considered *Carter Coal* a non-delegation case, it was incorrect; and in any event, because the *NARUC* Court's consideration of *Carter Coal* was dictum (as well as being ambiguous), this Court is not bound by it here.

3. Treating *Carter Coal* as a Due Process Case Makes More Doctrinal Sense.

Whether the doctrine of *Carter Coal* is treated as a matter of non-delegation or due process makes a significant difference, for three reasons.

First, and most importantly, the due process interpretation makes more sense here because of the internal logic of the doctrines themselves. The non-delegation doctrine—true to its roots in Article I's Vesting Clause—ensures that legislative authority stays with Congress. The focus is properly on how much power Congress has given up, not on whom it has given that power to. Due process, though, is about fairness. If private delegations are unfair because of the exercise of coercive power by self-interested parties, the proper doctrinal home for this problem is the Due Process Clause.

Second—and related to the previous point—it would be problematic to treat *Carter Coal*-like situations as posing problems under the non-delegation doctrine, which (since it derives from the Vesting Clause of Article I) applies only to delegations by Congress. The opening words of this Court's original opinion—in which this Court invited the reader to "[i]magine a [*Carter Coal*-like] scenario in which Congress has given to General Motors the power to coauthor . . . regulations that will govern all automobile manufacturers," *AAR*, 721 F.3d at 668—sounded in fairness and would not have been any less powerful if "Congress" were replaced with "a state legislature." The Due Process Clause properly applies to both the federal government and state governments through the Fifth and Fourteenth Amendments. This distinction does not affect this particular case—where the delegation is federal—but it will be significant in future cases that rely on the precedent created here.

Some judges and commentators have suggested treating delegation to private parties as a hybrid non-delegation and due process problem. *See, e.g.*, *McGautha v. California*, 402 U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 151, 153 (2000).

However, it is not clear what is gained by such a solution. Judges examining state private-delegation statutes, where the non-delegation doctrine cannot apply, will have to determine whether and how a due-process-only state analysis proceeds differently from the combined federal analysis. If the analyses of state and federal delegations to private parties are identical, then the non-delegation doctrine will have contributed nothing to the analysis. If so, it is better to proceed directly under due process, so that the precedent created will not be arbitrarily limited to federal delegations.

Third, the characterization of *Carter Coal* as a due process or non-delegation case affects whether damages are available for parties injured by the private delegation. Due process cases can be litigated under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which allows for damages against federal actors responsible for the due process violation. *See also Davis* v. *Passman*, 442 U.S. 228 (1979) (extending *Bivens* to due process violations). However, *Bivens* has not been extended to violations of the non-delegation doctrine, and—especially given the restrictive trend of *Bivens* cases after 1980—is unlikely to be. *See generally* Alexander Volokh, *The Modest Effect of* Minneci *v.* Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287 (2013).

For all these reasons, it is helpful to be clear on the precise doctrinal basis of *Carter Coal*, and it is helpful to have that doctrinal basis be the Due Process Clause and not the non-delegation doctrine.

Statutes can violate due process without violating the non-delegation doctrine: for instance, if a statute spelled out in minute detail how officials should deprive beneficiaries of welfare payments without hearings. Conversely, statutes can violate the non-delegation doctrine without violating due process: for instance, if an agency were granted boundless discretion but used its power to adopt narrowing regulations that provided generous hearings with many procedural protections. *Cf. Whitman*, 531 U.S. at 472–73. The two doctrines apply differently, cover different sets of actors, have different remedies, and serve different goals. They should therefore be kept analytically separate.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of appellant based on the Due Process Clause, but *not* based on a private non-delegation doctrine.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume restrictions of Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 29 because it contains 6,769 words, as determined by the word-count function of Microsoft Word 2013, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

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