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 *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES, JUDICIAL EDUCATION PROJECT, AND RESOLUTE FOREST PRODUCTS INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties, intervenors, and *amici* appearing before the District Court, the Supreme Court, and in this Court are listed in the Appellant's brief.

Amicus curiae Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and organizations of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership interest in it.

Amicus curiae Judicial Education Project is a non-profit organization. It has no parent companies and issues no stock. No publicly held company has a 10 percent or greater ownership interest in it.

Amicus curiae Resolute Forest Products Inc. produces and markets a diverse range of products, including newsprint, specialty papers, market pulp, and wood products, many of which it transports via freight rail. Resolute is a publicly held company. It has no parent company, and no publicly held company has a 10 percent or greater ownership interest in it.

(B) Rulings Under Review

References to the rulings at issue appear in the Appellant's brief.

(C) Related Cases

This case was previously before this Court, *see* 721 F.3d 666 (2014), and the Supreme Court, *see* 135 S. Ct. 1225 (2015). Counsel are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Andrew M. Grossman
Andrew M. Grossman

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, *Amici Curiae* make the following disclosures:

1. The Chamber of Commerce of the United States of America certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

2. Judicial Education Project certifies that it has not issued shares to the public; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

3. Resolute Forest Products Inc. certifies that it is a publicly held company; that it has no parent company, subsidiary, or affiliate that has issued shares to the public; and that no publicly held company has 10 percent or greater ownership interest in it.

/s/ Andrew M. Grossman
Andrew M. Grossman

CERTIFICATE ON NEED FOR A SEPARATE BRIEF

Pursuant to Circuit Rule 29(d), *Amici Curiae* state that, despite filing separate briefs before the Supreme Court of the United States, they have coordinated with other *amici curiae* in support of the Appellant to join in a single brief to the extent practicable here. Counsel for *Amici Curiae* conferred with counsel for *amicus curiae* Professor Alexander Volokh and concluded that their positions are incompatible. Likewise, as stated in its Certificate Regarding Separate Briefing, *amicus curiae* Association of Independent Passenger Rail Operators stands in a unique position apart from other *amici*.

/s/ Andrew M. Grossman
Andrew M. Grossman

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INTEREST OF THE *AMICI*

Amicus curiae 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.

Many American businesses rely upon the nation's railroads to carry their goods to destinations throughout the United States. Significantly, railroad track is a finite resource, with both freight railroads and Amtrak competing for track space, mostly on track owned by the freight railroads. Setting standards that restrict the freight railroads' ability to utilize their limited track capacity 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.

Amicus curiae Judicial Education Project ("JEP") is a non-profit organization dedicated to strengthening liberty and justice in America by defending the Constitution as envisioned by its Framers—creating a federal government of defined and limited power, dedicated to the rule

of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and Internet media. The issues at the heart of this case fall squarely within the realm of constitutional concerns that animate JEP.

Amicus curiae Resolute Forest Products Inc. produces and markets a diverse range of forest products, including newsprint, specialty papers, market pulp, and wood products, with major facilities in the United States, Canada, and South Korea. It relies on freight rail to distribute its products and has an interest in seeing that regulation of rail traffic treats all kinds of rail service fairly, without unduly favoring Amtrak's passenger service at the expense of freight-rail reliability and affordability. Moreover, having encountered similar arrangements in other industries, Resolute is concerned that the statutory scheme 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.[1]

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation

SUMMARY OF ARGUMENT

The Supreme Court's determination that Amtrak is, for present purposes, a government actor does not solve the significant constitutional problems with Amtrak's passenger rail metrics and standards. It merely shifts the focus to other unconstitutional aspects of the statutory scheme.

First, the statutory scheme at issue conflicts with fundamental requirements of constitutional due process by empowering Amtrak, a for-profit corporation, to regulate its competitors so as to advance its own competitive interests. *See* Passenger Rail Investment and Improvement Act of 2008 ("PRIAA"), Pub. L. No. 110-432, Div. B., § 207(a), 122 Stat. 4848, 4907 (codified at 49 U.S.C. § 24101 (note)) ("Section 207"). The most basic of those requirements is that governmental power be exercised to advance the public interest, and not any pecuniary interest, whether personal or institutional. Yet pecuniary interests are the only ones that Amtrak has in its role as regulator when setting the metrics and standards that govern its relationship with the freight railroads on whose tracks it depends and with whom it competes for track space. Amtrak is constitutionally disqualified from regulating its competitors so as to advance its pecuniary interests at their expense, and Section 207 therefore cannot be lawfully executed.

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or submission. The Appellant consents, and the Appellees do not object, to the filing of this brief.

Second, Amtrak's status as a government actor does not solve the private delegation problem with the statute. The same private delegation concerns that animated this Court's original opinion arise with respect to the role played by the arbitrator in setting Amtrak's metrics and standards. This delegation of legislative authority is impermissible in our constitutional system. As this Court properly observed in its prior decision, Congress simply "cannot delegate regulatory authority to a private entity." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) ("*AAR I*"). The delegation of final rulemaking authority to a *private* arbitrator is—no less than previously held by this Court—"legislative delegation in its most obnoxious form." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

Finally, Amtrak's role in setting standards continues to raise significant separation-of-powers concerns in light of the Supreme Court's decision. *Amici* agree with plaintiffs regarding the Appointments Clause problems stemming from the role of Amtrak's president in the standard-setting process. Of even more basic concern is the fact that all but one member of Amtrak's Board are unbound by the oath of office applicable to every officer of the United States. *See* U.S. Const. art. VI, cl. 3. From the founding of the nation, that oath of office, which carries with it a solemn obligation to support the Constitution, has been viewed as a predicate to the exercise of any authority under the Constitution. *See Dep't of Transp. v. Ass'n of Amer. R.Rs.*, 135 S. Ct. 1225, 1234–35

(2015) (Alito, J., concurring) ("*AAR II*"). In neglecting to bind the Amtrak Board by the oath, Congress has improperly vested governmental authority in an organization unresponsive to the constitution and the people.

ARGUMENT

I. Section 207 Violates the Due Process Rights of Amtrak's Competitors for Rail Capacity

A. Due Process Requires That Administrative Proceedings Be Untainted by Institutional or Personal Pecuniary Interest

"At least since the time of Lord Coke, (*Nemo debet esse judex in propria causa*—no one may be a judge in his own case), a fundamental precept of due process has been that an interested party in a dispute cannot also sit as a decision-maker." *Int'l Ass'n of Machinists & Aerospace Workers v. Metro-North Commuter R.R.*, 24 F.3d 369, 371 (2d Cir. 1994). *See also Dr. Bonham's Case*, 8 Co. Rep. 107a, 77 Eng. Rep. 638, 646 (C.P. 1610). Where pecuniary interest is concerned, the law follows human experience in presuming that "'interest would certainly bias [the decisionmaker's] judgment, and, not improbably, corrupt his integrity.'" *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 428 (1995) (quoting The Federalist No. 10, at 59 (James Madison) (J. Cooke ed. 1961). For that reason, "the slightest pecuniary interest"—including competitive interest of a governmental official—is disqualifying. *Tumey v. Ohio*, 273 U.S. 510, 524 (1927).

That "strict principle," derived from and deeply embedded in the common law, *id.* at 525–26, was identified as a fundamental component of constitutional due process in *Tumey*. The defendant in that case was convicted under a law allowing for trial by mayor of various offenses, with any ensuing fines used to supplement the mayor's salary (by all of $12 in that instance) and enrich his village's treasury. *Id.* at 520, 522. The Court held that the Due Process Clause required the mayor's disqualification "both because of his direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village." *Id.* at 535. Due process, the Court explained, "is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532. Instead, it forbids any interest "which would offer a possible temptation to the average man." *Id.* That includes the prospect of any emolument that is more than "de minimis." *Id.* at 531. *See also Connally v. Georgia*, 429 U.S. 245 (1977) (due process violated when justice of the peace received $5 for each search warrant he issued and nothing for warrant applications he denied).

As *Tumey* suggests, a disqualifying pecuniary interest may be either personal or institutional. *Ward v. Village of Monroeville* confirmed as much, finding due process violated by a scheme that directed fines levied in a mayor's court not to the mayor himself but only to his town's general fisc. 409 U.S. 57, 59–60 (1972). Likewise, a pecuniary interest

need not be direct to be disqualifying. *Aetna Life Insurance Co. v. Lavoie*, for example, held that due process required the disqualification of a state supreme court justice who was the plaintiff in a pending case raising similar state-law claims. 475 U.S. 813, 823–24 (1986). It was enough that a favorable decision in the one case "raised the stakes" for the defendant, to the justice's likely pecuniary advantage, in the other. *Id*. at 824.

"This essential aspect of due process applies with equal force to administrative agencies." *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1276 (9th Cir. 1977) (Wallace, J., dissenting) (citing *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). "Indeed, the absence in the administrative process of procedural safeguards normally available in judicial proceedings has been recognized as a reason for even stricter application of the requirement that administrative adjudicators be impartial." *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984) (citing *NLRB v. Phelps*, 136 F.2d 562, 563–64 (5th Cir. 1943)). *See also Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 304–05 (1937). Thus, at a bare minimum, due process requires invalidation of "administrative decisions made by adjudicators with a pecuniary interest in the results of the proceeding." *Jonal Corp. v. District of Columbia*, 533 F.2d 1192, 1197 (D.C. Cir. 1976).

The leading case on point is *Gibson v. Berryhill*, 411 U.S. 564 (1973), which concerned proceedings before the Alabama Board of Op-

tometry, a statutory state body comprised entirely of optometrists in private practice for their own account, to revoke the licenses of optometrists who were employed by a corporate optometry chain—i.e., the board members' chief competitor. Citing *Tumey*, it explained that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579. And because "success in the Board's efforts would possibly redound to the personal benefit of members of the Board," due process required their disqualification. *Id.* at 578–79. *See also Wall v. Am. Optometric Ass'n, Inc.,* 379 F. Supp. 175 (N.D. Ga.), *summarily aff'd sub nom. Wall v. Hardwick*, 419 U.S. 888 (1974) (holding that a similar Georgia board was disqualified from conducting proceedings to enforce its professional conduct rules against the board members' competitors). The Supreme Court has applied the same reasoning in its cases invalidating policymaking authority conferred on private parties. *See infra* n.5.[2]

Finally, *Marshall v. Jerrico, Inc.* confirms that pecuniary interest remains disqualifying even for government actors who do not directly determine the rights and obligations of others. 446 U.S. 238 (1980).

[2] Likewise, the Supreme Court has also recognized that state regulatory bodies made up of interested industry participants present "a real danger" that members will act to pursue their own interests, "rather than the governmental interests of the State," and therefore has held that such bodies are subject to federal antitrust law. *See N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1112 (2015) (quotation marks omitted).

Marshall rejected a due process challenge to the Fair Labor Standards Act's civil penalty provisions, which provide that any sums collected in child-labor cases be used to reimburse the Department of Labor's enforcement expenses, on the ground that this arrangement was unlikely to improperly bias the Department's enforcement personnel, whom it likened to prosecutors. *Id.* at 251–52.

But in so doing, it emphatically denied the contention that the Due Process Clause imposes no limits on government officials like prosecutors who are not subject to the full *Tumey* standard. *Id.* at 249. As public officials, these individuals still must "serve the public interest" and not be "motivated by improper factors." *Id.* Therefore, at a minimum, a court must inquire into whether such an official "stands to profit economically" from his official actions or whether his salary is instead "fixed by law." *Id.* at 250. A court also must inquire whether the official's "judgment will be distorted by the prospect of institutional gain as a result of [his actions]." *Id.* These are, of course, the same two bars on pecuniary interest identified in *Tumey*. *See also Baran v. Port of Beaumont Navigation Dist.*, 57 F.3d 436, 444–45 (5th Cir. 1995) (applying *Marshall* standard to state policymakers); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805–06 (1987) (criticizing arrangement that presented "the *potential* for private interest to influence the discharge of public duty").

In sum, "under a realistic appraisal of psychological tendencies and human weakness," it is well established that pecuniary interest among those exercising governmental power "must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow*, 421 U.S. 47.

B. Amtrak's and Its Officers' Pecuniary Interests Impermissibly Taint Any Section 207 Rulemaking

That Amtrak is a governmental entity for present purposes does not cure the inherent bias of a scheme that empowers a market participant to regulate its competitors for its own financial benefit. Amtrak's and its officials' pecuniary interests in setting the metrics and standards that govern its competitive relationship with the freight railroads are *per se* disqualifying. Section 207 cannot be reconciled with the requirements of constitutional due process.

Amtrak's institutional pecuniary interest is substantial. Amtrak "is not a department, agency, or instrumentality of the United States Government," but a "for-profit corporation." 49 U.S.C. § 24301(a)(2), (3). Its board members, as corporate directors, have a fiduciary duty to the corporation to maximize profits, *AAR I*, 721 F.3d at 676, and therefore not to the public to further the public interest. And its competitors for limited rail space are the freight railroads. The Section 207 "metrics and standards," as well as Amtrak's contracts with the freight railroads—which the statute says must be amended to incorporate the met-

rics and standards "[t]o the extent practicable," PRIAA § 207(c)—largely govern Amtrak's competitive relationship with these competitors.

Given its competitive interests and the power to regulate the freight railroads by setting metrics and standards, Amtrak's institutional incentive is obvious: to exercise this governmental power so as to improve its access to rail space at its competitors' expense. And that is, by all appearances, what it did. The metrics and standards it jointly developed with the Federal Railroad Administration have forced freight railroads, under threat of penalties and fines, to alter their operations to favor Amtrak's traffic, at the expense of their own. *See* Appellant Br. 11–13 (citing record evidence). Amtrak has even demanded monetary payments from one freight railroad that it believes has taken insufficient actions to help Amtrak meet *its own* performance goals as provided in the metrics and standards. JA 377.

None of this is consistent with the requirements of due process. Where *Tumey* and *Ward* held funds deposited in the public fisc to be disqualifying, Section 207 enriches Amtrak with the lifeblood of its service, track space. Where *Gibson* and *Wall* premised disqualification on the presumption that optometry board members might take some business from competitors whose licenses they had revoked, here no presumption is necessary: the metrics and standards effect a transfer of a key competitive asset from Amtrak's competitors to Amtrak. And where *Marshall* required that persons exercising governmental power at a

minimum "serve the public interest," Amtrak and its officers are forbidden by law from so doing and are instead directed to pursue what *Marshall* forbade: "institutional gain," in the forms of improved service and profits.

And then there is the personal pecuniary interest of Amtrak's officers, who stand to augment their salaries in years that Amtrak earns enough to forgo federal assistance, 49 U.S.C. § 24303(b), as well as its managerial employees, who are eligible for bonuses based on Amtrak's financial and customer-service goals. *See* Appellant Br. 34–35. As *Marshall* decried, Amtrak's leadership "stands to profit economically" from any action it takes against the freight railroads to improve its service.

What this Court in its previous decision concluded regarding private delegation is equally true with respect to due process: "No case prefigures the unprecedented regulatory powers delegated to Amtrak." *AAR I*, 721 F.3d at 671. Section 207's novelty is that it fails to heed the precept of disinterest that due process requires and that Congress has augmented in numerous statutes concerning ethics and conflicts of interest in the exercise of governmental power. But Amtrak stands apart from all of that, and from the government's usual pursuit of the public interest, precluding Section 207 from being exercised in a constitutional fashion.

II. Section 207 Violates the Principle Against Delegation of Legislative Power to Private Parties

A. The Private Nondelegation Principle Promotes the Constitutional Assignment and Separation of Powers

Nearly 80 years ago, the Supreme Court declared that the delegation of legislative power to private entities "is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 537 (1935). A year later, the Court held unconstitutional a federal law empowering a private coal board composed of industry participants to set rules governing the conduct of others in the industry. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311–12 (1936). Regulation of this economic activity is "necessarily a governmental function, since, in the very nature of things, one person may not be intrusted with the power to regulate the business of another, and especially of a competitor." *Id.* at 311. This vesting of rulemaking power in a private party is "delegation in its most obnoxious form." *Id.*

The private nondelegation principle stems from the "constitutional prerogatives and duties of Congress." *Schechter*, 295 U.S. at 537. "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Id.* at 529. In imposing a blanket prohibition on legislative delegations to private parties, the nondelegation principle merely reinforces Article I's Vesting Clause

by ensuring that "all" legislative power remains in Congress. U.S. Const. art. I, § 1.

In that critical sense, the private nondelegation principle rests on similar pillars as its better-known "cousin," *AAR I,* 721 F.3d at 670, the nondelegation doctrine, which limits Congress's power to delegate authority to the Executive Branch or other entities within the federal government. *See, e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). Both rules were "developed to prevent Congress from forsaking its duties." *See Loving* v. *United States*, 517 U.S. 748, 758 (1996) (discussing nondelegation doctrine).[3]

These principles exist to ensure that Congress remains accountable to the electorate: "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Id.*, 517 U.S. at 757. "The

[3] In contrast to a delegation within the federal government, delegations of sovereign authority entirely outside government not only abdicate Congress's own legislative responsibility, but also undermine the Executive Branch's authority to execute the law. Article II, like Article I, vests *all* executive authority in the President. *See, e.g.*, *Touby v. United States*, 500 U.S. 160, 168 (1991). The private "nondelegation principle serves both to separate powers as specified in the Constitution and to retain power in the governmental Departments so that delegation does not frustrate the constitutional design." *Pittston Co. v. United States*, 368 F.3d 385, 394 (4th Cir. 2004) (citation omitted).

clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 758.[4] As the "branch of our Government most responsive to the popular will," Congress is directly accountable to the American people for its legislative policy choices. *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring). Private parties, of course, are not.[5]

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[4] *See also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010) ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'") (quoting The Federalist, No. 70, at 476 (Alexander Hamilton) (J. Cooke ed. 1961)). *See also Bowsher* v. *Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring) ("*Power and strict accountability of its use* are the essential constituents of good government.") (quotation marks omitted).

[5] The early Supreme Court private nondelegation cases also emphasize the need to protect regulated parties against improper bias by interested decisionmakers, and thus rest comfortably on due process principles as well. In *Carter Coal Co.*, the Court described the 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. Among the decisions cited was *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. This scheme violated the Due Process Clause because these neighbors were "free to withhold con-

In promoting this accountability to the electorate, the private nondelegation principle also "protect[s] liberty." *AAR II*, 135 S. Ct at 1237 (Alito, J., concurring). "The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty." *Boumediene* v. *Bush*, 553 U.S. 723, 742 (2008). *See also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014) ("the separation of powers can serve to safeguard individual liberty") (citation omitted).[6]

In sum, the constitutional separation of powers served by the nondelegation principle were adopted "not to promote efficiency but to preclude the exercise of arbitrary power.'" *McGautha v. California*, 402

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sent for selfish reasons"—that is, for their own financial benefit. *Id.* at 122. Likewise, *Eubank v. City of Richmond* (also cited in *Carter*) held 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." 226 U.S. 137, 144 (1912).

[6] *See also Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2011) ("The structural principles secured by the separation of powers protect the individual as well."); *Loving*, 517 U.S. at 756 ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); *United States* v. *U.S. Dist. Ct. for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 317 (1972) ("individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government").

U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting) (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)). As Justice Alito so aptly summed up this private nondelegation principle, "[i]t would dash the whole scheme if Congress could give its power away to an entity that is not constrained by [the Constitution's accountability] checkpoints." *AAR II*, 135 S. Ct. at 1237 (Alito, J., concurring). A statute that thwarts this principle of accountability fundamentally threatens individual liberty and cannot stand.

B. The Statute's Arbitration Provision Violates the Private Nondelegation Principle by Vesting Rulemaking Authority in a Private Individual

The Supreme Court's determination that Amtrak is, for present purposes, part of the federal government does not lessen the nondelegation problem with the statutory scheme, since a private arbitrator is ultimately empowered to decide the content of federal regulations. Under the statute's arbitration provision, if the Federal Railroad Administration and Amtrak cannot agree on the metrics and standards, an arbitrator appointed by the Surface Transportation Board is empowered to decide those standards through binding arbitration. *See* PRIAA § 207(d).

If that arbitrator can be a private party, the same improper delegation to a private rulemaker that led this Court to invalidate the statute in its original opinion still haunts the regulatory scheme. And as this Court has already noted, there is no indication in the statute that

the arbitrator must be a *governmental* actor. *AAR I*, 721 F.3d at 673 & n.7. *See also AAR II*, 135 S. Ct. at 1238 (Alito, J., concurring).

Indeed, the Surface Transportation Board generally selects its arbitrators from private, professional arbitration organizations. In cases within its statutory jurisdiction, its arbitration regulations provide that, "[w]hen compiling a list of neutral arbitrators for a particular arbitration proceeding, the Board will conduct searches for arbitration experts by contacting appropriate professional arbitration associations." 49 C.F.R. § 1108.6(c). While these regulations apply, by their terms, to disputes other than those arising under Section 207(d), they demonstrate the Board's *general practice* to draw its arbitrators from outside the ranks of government officials. There is no reason to conclude, based on the language of this statute, that its practice would be any different here. And the government's appeal to constitutional avoidance cannot be a justification to rewrite the statute to limit qualified arbitrators to government officials. *See, e.g.*, *Whitman*, 531 U.S. at 472–73; *Salinas v. United States,* 522 U.S. 52, 59–60 (1997).[7]

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[7] Even if arbitrators could be limited to governmental employees under the statute, that would not solve the problem. Justice Alito was surely correct that a government arbitrator raises significant Appointments Clause issues. *AAR II*, 135 S. Ct. at 1238 (Alito, J., concurring). Where such significant rulemaking power is invested in a government official unaccountable to a higher authority, that official must be appointed by the President with the advice and consent of the Senate. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976). *See also Free Enter. Fund*, 561 U.S. at

The role played by a private arbitrator raises no less serious concerns, then, than those attributed to Amtrak's role in this Court's original opinion. Indeed, the private arbitrator ultimately wields even greater authority than Amtrak under the statutory scheme. Amtrak, after all, has *joint* rulemaking authority with another federal agency. When called upon, however, the arbitrator has *sole* authority to determine the final contents of the metrics and standards. The arbitration results are binding on the parties. PRIAA § 207(d). And as Justice Alito suggests, even where no such arbitration is called for, the mere availability of this ultimate tie-breaking feature of the statute naturally affects the conduct of Amtrak and the Federal Railroad Administration in negotiating the content of the metrics and standards. *See AAR II*, 135 S. Ct. at 1236. The availability of the arbitration tiebreaking mechanism "pollute[s] the rulemaking process" by "stack[ing] the deck in favor of compromise." *AAR I*, 721 F.3d at 674. *See also Metro. Washington Airports*

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510. The temporary nature of the arbitrator's role does not lessen the need to treat the arbitrator as a principal, rather than inferior, officer. Unlike the many circumstances where the temporary and limited nature of an officer's duties have supported an "inferior officer" determination—*see, e.g.*, *United States v. Germaine*, 99 U.S. 508 (1878) (civil surgeons making pension health determinations not officers); *Morrison v. Olson*, 487 U.S. 654 (1988) (independent counsel an inferior officer)—rulemaking affects a broad class of individuals and has lasting effect. Here, the metrics and standards apply generally across the railroad industry and not to one, isolated dispute.

Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264–65 (1991) (premising standing on the presumption that a government actor whose actions are subject to veto is necessarily influenced by that threat, even when the veto has not been exercised); *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (similar); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 512, n.12 (2010) ("We cannot assume...that the Chairman would have made the same appointments acting alone.").

This central rulemaking role sets this statutory scheme apart from many that have been upheld under the private nondelegation principle.[8] The arbitrator is, in no way, subordinate to a properly appointed executive branch official. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (upholding role of private producers who "function[ed] subordinately to the Commission" in recommending minimum prices to federal body). Nor is the arbitrator's role simply "ministerial" or "advisory" in nature. *See Pittston Co.* v. *United States*, 368 F.3d 385, 398 (4th Cir. 2004). Finally, even assuming that *Currin v. Wallace*, 306 U.S. 1, 15 (1939), remains good law in the wake of *INS v.*

[8] *Amici* do not take issue with 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.

Chadha, 462 U.S. 919 (1983),[9] and that it has anything to say about delegations of executive power, this is not the case where a government agency *makes* the law and merely asks for the assent of the governed.

In each of those circumstances, it is a federal agency or actor that ultimately decides what the law is. *See Currin*, 306 U.S. at 15. Here, by contrast, Congress has delegated to a single individual the authority to decide metrics and standards that govern an entire industry. This delegation to a non-governmental individual—likely plucked from the rosters of a private dispute resolution organization—leaves the ultimate decision on the content of the law to an individual wholly unaccountable to the people.[10] The arbitrator's decision will govern the relationships

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[9] *See AAR II*, 135 S. Ct. at 1254 (Thomas, J., concurring).

[10] Unlike a delegation to a government actor, delegations to private parties are not saved by Congress's articulation of an "intelligible principle" to guide the decision. *See AAR I*, 721 F.3d at 671. The Supreme Court allows executive agencies to fill in the gaps in regulation where Congress has articulated an intelligible principle to guide the agency's regulatory choices. This is based on the Court's recognition that a "'certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.'" *Whitman*, 531 U.S. at 475 (quoting *Mistretta v. United States,* 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)). Delegations outside of government, however, are accompanied by none of the constitutional checks that accompany delegations within government. Non-government actors are not subject to the constitutional appointments process; they do not take a constitutional oath; and they are not subject to impeachment. Thus, "[w]hen it comes to private entities, ...there is not even a fig leaf of constitutional justification." *AAR II*, 135 S. Ct. at 1237 (Alito, J., concurring). *See also, e.g.,* Harold J. Krent, The Private

between and among Amtrak and freight railroads (and their customers), who compete on an everyday basis for rights to use the limited available trackage. But both Congress and the Executive can simply shrug their collective shoulders and cry "not our fault" when the standards result in real and costly burdens on regulated entities.

By "abdicat[ing] or...transfer[ing] to others the essential legislative functions with which it is thus vested [by the Constitution]," *see Schechter*, 295 U.S. at 529, Congress has failed in its core legislative role. Because it contemplates the delegation of legislative authority to a private individual, the statute must be invalidated.

III. As Currently Constituted, Amtrak's Board Cannot Exercise Governmental Power

Congress has created a constitutional conundrum in its delegation of rulemaking authority to Amtrak. It has vested Amtrak with enough governmental authority and subjected it to enough governmental control that Amtrak is, at least for constitutional purposes, a federal actor. *See AAR II*, 135 S. Ct. at 1232–33. At the same time, it has explicitly disclaimed that Amtrak is a department, agency, or instrumentality of the federal government. 49 U.S.C. § 24301(a)(3). Congress's denial of

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Performing the Public: Delimiting Delegations to Private Parties, 65 U. Miami L. Rev. 507, 523 (2011) ("The checks of the Appointments and Impeachment Clauses cannot easily be reconciled with delegations to private parties.").

this constitutional reality has led to certain anomalies that doom Amtrak's adoption of the metrics and standards at issue here.

Principal among them is that (with the exception of the Secretary of Transportation) Amtrak's board members do not take the constitutional oath of office. *See AAR II*, 135 S. Ct. at 1235 (Alito, J., concurring). The Constitution's Oaths Clause requires that all Senators, Representatives, state legislators, and "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." U.S. Const. art. VI, cl. 3.

The Oaths Clause ensures that those exercising significant governmental authority—at *all* levels of state and federal government—do so with the solemnity described by George Washington: "[I]f it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunctions thereof, I may (besides incurring constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony." Washington's Second Inaugural Address, *available at* http://www.inaugural.senate.gov/swearing-in/address/address-by-george-washington-1793. Washington was obviously addressing the *Presidential* oath of office, but the Framers intended the same moral obligation to attach to Article VI's oath. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("How immoral is it to impose [an oath on judg-

es] if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?"). *See also* Joseph Story, Commentaries on the Constitution of the United States, § 164 (1st ed. 1833) (oath of office "conscientiously b[inds]" all federal officials "to abstain from all acts...inconsistent with" the Constitution). As Justice Alito observed, the Oath Clause confirms an important point: that "[t]hose who exercise the power of Government are set apart from ordinary citizens." *AAR II*, 135 S. Ct. at 1235.

There is little question, as a result of the Supreme Court's ruling, that Amtrak board members are executive officers and should be subject to this oath requirement. In setting standards that govern the conduct of other regulated railroads, board members exercise significant authority pursuant to the laws of the United States. *See supra* n.7 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). And by requiring at least eight members of the Amtrak board to be appointed by the President with the advice and consent of the Senate, *see* 49 U.S.C. § 24302(a), Congress subjected those board members to the formal requirements of the Appointments Clause, which governs the appointment of executive "officers." *See* U.S. Const. art. II, §2, cl. 2.[11]

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[11] The role of Amtrak's president also raises significant Appointments Clause concerns. Amtrak's president is appointed by the other board members. 49 U.S.C. § 24303(a). But the president is a member of the board and has the ability to vote as a co-equal on issues before the board. *Id.* § 24302(a)(1)(B). This joint rulemaking power suggests that

These board members are not, however, subject to the solemn obligation of the oath of office. That oath is not merely ceremonial, but is a predicate to the exercise of governmental authority. *See AAR II*, 135 S. Ct. at 1235 (Alito, J., concurring). That conclusion is borne out by more than two centuries of practice. Again, President Washington, in his second inaugural address, noted that "[p]revious to the execution of any official act of the President the Constitution requires an oath of office." Washington's Second Inaugural Address, *supra*. Similarly, at the start of President James Monroe's second term of office, then-Secretary of State John Quincy Adams asked the Supreme Court for advice regarding whether the oath of office could be delayed when inauguration day fell on a Sunday. In an advisory letter on behalf of the Supreme Court,[12] Chief Justice Marshall suggested that, while the timing of the oath was

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Amtrak's president should also be considered a principal officer for Appointments Clause purposes. By vesting such significant joint authority in a board member not appointed by the President of the United States, Congress undermines the voter accountability protected by the Appointments Clause. *See AAR II*, 135 S. Ct. at 1239 (Alito, J., concurring). *See also Edmond v. United States*, 520 U.S. 651, 660 (1997) ("Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one").

[12] The text of this letter was reprinted by the *New York Times* in 1916, when a similar issue arose at the start of President Wilson's second term. *See* Wilson To Take The Oath Sunday, *New York Times* (Nov. 15, 1916), *available at* http://query.nytimes.com/gst/abstract.html?res=9C00E3D7143BE633A25756C1A9679D946796D6CF, appended at App. 1.

at the discretion of the President, "executive power could not be exercised" but is "suspended" during the interim period.[13] Following that precedent, the State Department later advised President Wilson to take the oath of office for his second term on a Sunday (when his prior term ended) in order to avoid any "slight interval when the executive power is suspended." *See* "Wilson to Take The Oath Sunday," *supra* n.12. *See also* Peabody, *supra* n.13 at 19–20.

While the Presidential Oath Clause, U.S. Const. art. II, § 1, cl. 7, contains language requiring an oath before the President may "enter on the Execution of his Office," Article VI's Oath Clause mandatory language ("shall be bound") has similarly been read to require the constitutional oath as a predicate to the exercise of governmental authority by officers subject to its terms. The Attorney General long ago opined that an elected Representative may not exercise legislative power until after taking the oath. A "Representative in Congress, in my opinion, does not become a member of the House until he takes the oath of office as such Representative." 14 U.S. Op. Att'y Gen. 406, 408 (June 6, 1874). Indeed, a Representative-elect is "not regarded as in the office prior to that time

[13] A federal statute at the time provided that the President's term of office ended on midnight on March 3rd, leaving a twelve-hour period (prior to the traditional swearing-in ceremony at noon the following day) where Presidential power was dormant. *See* Bruce Peabody, Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution, 104 Nw. U. L. Rev. Colloquy 12, 19–20 (June 14, 2009).

for any purpose." *Id.* *See also* 15 U.S. Op. Att'y Gen. 280, 281 (May 19, 1877) (Representative-elect does not "become a member until he accepts the duties of the office and takes the appropriate oath").

The same conclusion should apply to Amtrak's board members. They neither receive a Commission from the President as is required of "all the Officers of the United States," U.S. Const. art. II, § 3, nor are they bound by the oath of office. Lacking the solemnity of an obligation to support the Constitution in the performance of their duties, Amtrak's board members also lack the authority to exercise any powers vested by the Constitution in executive officers.

CONCLUSION

Amtrak inhabits a constitutional no-man's land, existing as a government entity while claiming exemption from the Constitution's many checks on the exercise of arbitrary power. Empowering Amtrak to regulate its competitors, or alternatively vesting that power in a private citizen, Section 207 chafes against the structure of constitutional government. It should not be allowed to stand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because it contains 6,703 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook typeface.

Dated: July 6, 2015

/s/ Andrew M. Grossman
Andrew M. Grossman

Appendix

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WILSON TO TAKE THE OATH SUNDAY

First Swearing Into Office on March 4 Will Be Repeated the Following Day.

RULING BY JOHN MARSHALL

Chief Justice in 1821 Wrote That Executive Power Was Suspended for a Time.

Special to The New York Times.

WASHINGTON, Nov. 14.—After an examination of its records in a search for precedents, the State Department holds "that in its view there is no interval between the term of one President and the beginning of his successor, although there may be a slight interval when the executive power is suspended." The department also holds that the fact that President Wilson's first term will expire on a Sunday will not leave a hiatus in the office of President until noon of Monday, March 5, 1917, when Mr. Wilson will formally take the oath of office for a second term.

In order to obviate the raising of any question as to what person is exercising the functions of Chief Executive on Sunday, March 4, 1917, Secretary Lansing will advise President Wilson to take the oath for a second term on that day. The oath will be readministered to Mr. Wilson on Monday, March 5.

The ruling of the State Department disposes of the theory that the Secretary of State—in this case, Mr. Lansing—will become Acting President or President ad interim for the period between midnight, of Saturday, March 3, 1917, and noon of Monday, March 5, when Mr. Wilson will be formally inaugurated for a second term. Search of the archives of the State Department brought to light sufficient evidence to lay the ghost of an historical tradition that Vice President Daniel D. Tompkins of New York served as President for the twenty-four hours of Sunday, March 4, 1821, between the first and second terms of President Monroe.

The position of the State Department is based mainly on a letter found in the archives, written by Chief Justice John Marshall to John Quincy Adams, Secretary of State, dated Feb. 20, 1821. Monroe had been elected President for the term beginning March 4, 1817, and re-elected for the term beginning March 4, 1821. The Marshall letter shows that Adams, in conversation with the Chief Justice, had spoken of the fact that March 4, 1821, would fall on a Sunday and he was concerned to know whether it would be proper or permissible for President Monroe to take the oath of office for the second term on that day and if his failure to be inaugurated then would leave a hiatus in the office of President for the twenty-four hours.

The letter is in the handwriting of the Chief Justice and was copied at the State Department today for THE NEW YORK TIMES correspondent out of a musty volume of records bound in sheepskin. In its application to the case of Woodrow Wilson, one of the interesting features is that while Mr. Wilson will still be President on Sunday, March, 1917, after his first term expires, he will not be constitutionally empowered to perform any executive function until he has taken the oath of office for a second term on Monday, March 5.

The letter of Chief Justice Marshall reads as follows:

"From Washington, Feb. 20, 1821.

"Sir:

"I have conversed with my brethren on the subject you suggested when I had the pleasure of seeing you, and will take the liberty to communicate the result.

"As the Constitution only provides that the President shall take the oath it prescribes 'before he enters on the execution of his office,' and as the law is silent on the subject, the time seems to be in some measure at the discretion of that high officer. There is an obvious propriety in taking the oath as soon as it can conveniently be taken, and thereby shortening the interval in which the executive power is suspended. But some interval is inevitable. The time of the actual President will expire, and that of the President-elect commence, at 12 in the night of the 3d of March. It has been usual to take the oath at midday on the 4th. Thus, there has been uniformly and voluntarily an interval of twelve hours during which the executive power could not be exercised. This interval may be unavoidably prolonged. Circumstances may prevent the declaration of the person who is chosen until it shall be too late to communicate the intelligence of his election until after the 4th of March. This occurred at the first election.

"Undoubtedly, on any pressing emergency the President might take the oath in the first hour of the 4th of March; but it has never been thought necessary so to do, and he has always named such hour as he deemed most convenient. If any circumstance should render it unfit to take the oath on the 4th of March, and the public business would sustain no injury by its being deferred till the 5th, no impropriety is perceived in deferring it till the 5th. Whether the fact that the 4th of March comes this year on Sunday be such a circumstance may, perhaps, depend very much on public opinion and feeling. Of this, from our retired habits, there are few, perhaps, less capable of forming a correct opinion than ourselves. Might we hazard a conjecture, it would rather be in favor of postponing the oath till Monday, unless some official duty should require its being taken on Sunday. But others who mix more in society than we do can give conjectures on this subject much more to be confided in than ours.

"With very great respect, I have the honor to be, your obedient servant,

"J. MARSHALL."

The New York Times
Published: November 15, 1916

CERTIFICATE OF SERVICE

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

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